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DEAR READERS!

We are in August of 2016. In the Oriental Calendar, this is the year of the Fire Monkey that has been and will be filled with tumultuous events, both unforeseen and sometimes sad. On 3 August, my wife Larisa Alekseevna passed away and on 5 August died my teacher — academician Alexander Ivanovich Tatarkin. Let them rest in peace! Blessed memory and love of relatives and friends to them!

August has been abnormally hot in some of the Russian regions. For example, 4 August holds the record for the heat wave in the Sverdlovskaya oblast and Yekaterinburg in particular, as the temperature was +34.8° C. That was the hottest day this summer.

The Russian economy and politics also keep high temperatures. Many indicators show that the social and economic situation in Russia during the crisis is stably difficult as other countries provided better control over inflation, diversification of the national economy, growth of productivity, generous social programs, and political stability. For example, the Chinese economic policy in the grip of a crisis has been oriented to meet the needs of the domestic market, thus resulting in less dependence on external factors that finally predetermined its economic growth and development.

The economic situation in Russia is actually worsening after the USA and European countries have imposed various sanctions, including financial ones.

It was also hot for Russia during the Olympic Games in Rio de Janeiro, especially against the backdrop of the doping scandal. According to the IOC decision, many leading Russian athletes were not allowed to take part in the Rio Olympics.

Political heat in Russia will take place on 18 September during the single day of voting and the mixed system elections to the RF State Duma. According to the results of the weekly e-survey of 9 August, five parties will join the Duma: the United Russia Party with 44.4%, the Russian Communist Party with 18.9%, the Just Russia Party with 10.9%, and the Russian Liberal Democratic Party with 10.4%. Let us wait and see!

This September marks the 40th anniversary of the Institute of Law and Business of the Ural State Law University (the former Faculty of Legal Service in the National Economy System).

Dear readers! Take care of yourselves and your relatives. Love your neighbours as yourselves. It is very important not to lose yourself in this raging world.

We are open to cooperation and ready to publish articles, information and advertisement in our “Russian Law: Theory and Practice” journal.

Editor-in-Chief, Doctor of Law, Professor V.S. Belykh

THE PROTECTION OF RIGHTS IN RUSSIA'S REGIONS — THE ROLE OF THE CONSTITUTIONAL AND CHARTER COURTS

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Abstract: The article is devoted to the issues of human rights protection and regulation in Russia, looking at regional aspects through the prism of Constitutional Courts of republics and Charter Courts of some other subjects of the Russian Federation. This article is one of the series on legal research on constitutional justice in Russia and shows only some aspects of the matter.
Keywords: regional constitutional justice, human rights protection, Constitutions (Charters) of Russian republics/regions.

Since March 2014 the Russian Federation regards itself as consisting of 85 subjects of the Federation, that is: 22 republics[1], 9 territories (krais)[2], 46 regions (oblasts)[3], 3 cities of federal status[4], 1 autonomous region (avtonomnaya oblast)[5], and 4 autonomous national areas[6]. These are listed in Article 65 of the Constitution of the Russian Federation of 1993.

Each of these subjects of the Federation has a constitutive document. For the 22 republics, this is a constitution, and for the other subjects, this is a charter (ustav). Article 5 of the Fed-

[1] Adygeia (Adygeia), Altai, Bashkortostan, Buriatiia, Dagestan, Ingushetia, Kabardino-Balkariia, Kalmykiia, Karachaevo-Cherkesskaia, Karelia, Komi, Crimea, Marii El, Mordoviia, Sakha (Yakutiia), Northern Osetia — Alaniia, Tatarstan (Tatarstan), Tyva, Udmurt, Khakasiia, Chechnia, Chuvashia.

[2] Altai, Zabaikal, Kamchat, Krasnodar, Krasnoiar, Perm, Maritime (Primorskii), Stavropol, Khabarov

[3] Amur oblast, Arkhangelsk oblast, Astrakhan oblast, Belgorod oblast, Bryansk oblast, Vladimir oblast, Volgograd oblast, Vologda oblast, Voronezh oblast, Ivanovo oblast, Irkutsk oblast, Kaliningrad oblast, Kaluga oblast, Kemerovo oblast, Kirov oblast, Kostroma oblast, Kurgan oblast, Kursk oblast, Leningrad oblast, Lipetsk oblast, Magadan oblast, Moscow oblast, Murmansk oblast, Nizhnii Novgorod oblast, Novgorod oblast, Novosibirsk oblast, Omsk oblast, Orenburg oblast, Oryol oblast, Penza oblast, Pskov oblast, Rostov oblast, Ryazan oblast, Samara oblast, Saratov oblast, Sakhalin oblast, Sverdlovsk oblast, Smolensk oblast, Tambov oblast, Tver oblast, Tomsk oblast, Tula oblast, Tyumen oblast, Ulyanovsk oblast, Chelyabinsk oblast, Yaroslavl oblast.

[4] Moscow, St. Petersburg, Sevastopol.

[5] The Jewish Autonomous Region.

[6] Nentsy, Khanty-Mansiisk-Iurga, Chukotsk, Yamalo-Nenets.

eral Constitution specifies in relation to the subjects of the Federation that they shall be "equal subjects of the Russian Federation", and, paragraph 2 of Article 5 says that "a republic (state) shall have its own constitution and legislation. A territory, region, city of federal significance, autonomous region, or autonomous national area shall have its own charter and legislation". Paragraph 1 of Article 66 specifies that "The status of a republic shall be determined by the Constitution of the Russian Federation and the Constitution of the republic", whereas paragraph 2 specifies that "The status of a territory, region, city of federal significance, autonomous region, or autonomous national area shall be determined by the Constitution of the Russian Federation and by the Charter of the territory, region, city of federal significance, autonomous region, or autonomous national area adopted by the legislative (or representative) agency of the respective subject of the Russian Federation".

Thus, it is apparent that each republic within the Russian Federation may adopt its constitution in whatever way it wishes, whereas the other subjects of the Federation, which each have a charter, must adopt that charter through their legislative body. However, whichever way the constitution/charter is adopted, it should be consistent with the Federal Constitution, as paragraph 1 of Article 15 says that "The Constitution of the Russian Federation shall have the highest legal force, direct effect, and be applied throughout the entire territory of the Russian Federation. Laws and other legal acts applicable in the Russian Federation must not be contrary to the Constitution of the Russian Federation". Although in the 1990s there were instances of incompatibility between, for example, some republican constitutions and the Federal Constitution, since the early years of this century these differences have been eliminated.

Chapter 2 of the Federal Constitution sets out the "Rights and Freedoms of Man and Citizen" in detail, and also Article 17 asserts that:

"1. The rights and freedoms of man and citizen according to generally recognised principles and norms of international law and in accordance with the present constitution shall be recognised and guaranteed in the Russian Federation.

2. The basic rights and freedoms of man shall be inalienable and should belong to each from birth.

3. The effectuation of the rights and freedoms of man and citizen must not violate the rights and freedoms of other persons".

Also, importantly, Article 18 specifies that "The rights and freedoms of man and citizen shall be of direct effect. They shall determine the sense, content, and application of laws and the activity of legislative and executive power and local self-government and shall be insured by justice".

However, the means by which that "justice" is insured, unfortunately, varies in different subjects of the Russian Federation, as we will see below.

All the 85 subjects of the Russian Federation have their own constitutive document — a constitution or charter, as appropriate[7]. These vary quite surprisingly in structure and form. All have a number of individual articles (*stat'i*) although some organise these in different sections (*razdels)* subdivided into chapters (*glavy*), and some just have chapters. The overall number of articles also varies; to take just a few examples, the Constitution of the Altai Republic has 170, whilst the Republic of Kalmykiia only has 48; the Charter of the Kamchat

[7] Almost all of these are available at: http: constitution.garant.ru/region/ .

Territory says everything in 46 articles whereas Krasnoiar has 170; within the regions, Astrakhan has only 47 articles in its 9 chapters. Tomsk has 59 chapters in its 12 sections (129 articles overall), whereas Omsk has only 8 chapters (with 74 articles).

Two important points should be noted in relation to the protection of rights in the subjects of the Russian Federation. All the constitutions and charters, in one way or another, give support to rights. Many specifically refer to the rights in the Federal Constitution, although some also have a list of particular substantive rights. For example, a few of the constitutive documents give specific mention of the protection of "small peoples", that is, indigenous groups. Thus, in the Constitution ("Steppe Code") of the Republic of Kalmykiia, Article 14 establishes that the Republic "fully promotes the preservation of ethnic identity and uniqueness, traditions of Kalmyk, Russian and other peoples of the republic, especially respect for elders, respect for women, love and care for children"[8]. Unsurprisingly, the charters of the four Autonomous National Areas (Nentsy, Khanty-Mansiisk–Iurga, Chukotsk, Yamalo-Nenets) also guarantee the rights of their "small peoples", as does the Constitution of Yakutiia. (This is as well as the guarantees which are given in the federal laws, such as that of 30 April 1999 "On the Guarantees of Rights of Indigenous Small Peoples of the Russian Federation"[9], of 20 July 2000 "On the General Principles of Organization of Communities of Indigenous Small Peoples of the North, Siberia and Far East of the Russian Federation"[10] and of 7 May 2001 "On the Territories of the Tradition of Wildlife Management of Indigenous Small Peoples of the North, Siberia and Far East of the Russian Federation"[11]).

Most constitutions or charters entitle the section on rights as "Rights and Freedoms of Man and Citizen" (as in the Federal Constitution) but occasionally in some republican constitutions (for example, of Buriatia, Ingushetia, Komi, Tatarstan, Khakasiia) there is also reference in the title to duties, as in the 1978 Constitution of the RSFSR.

However, here we come to the main topic of this article: only a minority of the subjects of the Federation have established the possibility of judicial defence of the rights enumerated in the constitution or charter of that subject of the Federation. In other words, the number of the Federation subjects which have established a republican Constitutional or regional Charter Court is very limited. At the time of writing in summer 2016, of the 85 subjects of the Federation, only 17 have a functioning Court. 14 of the 22 republics have a Constitutional Court (Adygeia; Bashkortostan; Buriatia; Daghestan; Ingushetia; Kabardino-Balkaria; Karelia; Komi; Marii El; Sakha (Yakutiia); North Osetia-Alania; Tatarstan; Tyva; and Chechniia). Only 2 of the 46 regions have a Charter Court (Kaliningrad and Sverdlovsk). Only 1 of the 3 cities of federal significance has a Charter Court (St.Petersburg). This means that, based on the population as set out in the 2010 census, only 20 per cent of citizens of the Russian Federation are served by a Constitutional or Charter Court in their place of residence[12]. This has

[8] Respublika Kalmykiia vsemerno sodei'stvuet sokhraneniu samobytnosti i etnicheskoi' nepovtorimosti, traditsii kalmytskogo, russkogo i drugikh narodov respubliki, osobenno pochitanie starshykh, uvazhenie k zhenschine, lubov' i zabota o detiakh [Republic of fully contributes to the preservation of ethnic identity and originality, tradition, Kalmyk, Russian and other peoples of the republic, especially respect for elders, respect for women, love and care of children].

[9] No. 82 — FZ.

[10] No. 104 — FZ.

[11] No. 49 — FZ.

[12] Overall population in the Russian Federation given as 142,856,536. Number of residents in places which have a constitutional or charter court is 29,062,323, i.e. 20.34% of the total population.

slightly improved since an earlier calculation published in 2008 based on the 2002 census of the Russian Federation. Then 17.87 per cent of the population lived in areas served by a Constitutional or Charter Court[13]. Nevertheless, it could be regarded as a serious breach of the principle of equality under the law, and equal opportunities for the realization of rights and freedoms as required under Article 19 of the Constitution of the Russian Federation, that four-fifths of the population of the subjects of the Federation are denied the opportunity to enforce their own constitution or charter.

How has this situation come about? The 1996 Federal Constitutional Law on the Judicial System Article 27 paragraph 1 states, "The Constitutional (or Charter) Court of a subject of the Russian Federation *may* [*mozhet*] be created by a subject of the Russian Federation ... [emphasis added]". Where such a court does exist, the same legislation puts the duty of financing the court on the budget of the respective subject of the Federation. (Some courts, for example, in Tatarstan, Dagestan, and Sakha (Yakutiia) predate that legislation, but the budget impact is the same)[14].

The reasons why a particular subject of the Federation has not chosen to establish a Constitutional or Charter Court may vary. In a work published in 1999, V.A.Kriazhkov[15] summarised a number of reasons for "inertia" in setting up a Constitutional or Charter Court. These included: (a) intellectual and psychological: that the novelty of the institution inhibits its establishment; (b) political: that there needs to be the necessary political culture and will in the particular locality to allow this new factor into the balance of power; (c) legal: that the federal legislation only indicates the contours of constitutional justice in subjects of the federation, leaving the details of the competences of the court and the status of judges as open issues; (d) relating to personnel: suitable judges would be necessary with specialist higher legal qualifications, including expertise in state and constitutional law, and these are frequently lacking; and finally (e) financial: in order to establish such courts they must not be considered an unnecessary drain on the regional budget.

In recent years, it could be argued that the first four of these reasons are less likely to be as important as they were in the last century when Kriazhkov's book was published. It is no longer novel to have a Constitutional Court, at least, at the federal level. The activities and importance of such a Court are extremely well recognised throughout Russia. It is also now likely that sufficient specialists will have studied state and constitutional law to supply the necessary ranks of judges. There are clear examples of successful courts, which could be emulated in other subjects of the Federation. For example, the courts in Tatarstan, Kaliningrad, and Sverdlovsk have been quite active and successful. For example, in 2015 the Tatarstan Constitutional Court issued 18 rulings (opredelenii) — although not all were final and significant — and 5 determinations (postanovlenii); the Sverdlovsk Regional Charter Court issued 5 determinations (postanovlenii) and 2 rulings (opredelenii). So far, already in 2016,

[13] J. Henderson. Regional'noe konstitutsionnoe pravosudie v Rossiiskoii Federatsii [Regional Constitutional Justice in the Russian Federation]// Yevropei'skoe publichnoe pravo [European Public Law]. 2008, vol. 14, issue 1, pp. 21 — 33. At that stage there were 15 working courts.

[14] A. Trochev. Men'she demokratii, bol'she sudov: golovolomka sudebnogo peresmotra v Rossii [Less Democracy, More Courts: a Puzzle of Judicial Review in Russia]// Zakon i obshchestvennyi' obzor [Law & Society Review]. 2004, 38(3), pp. 513 — 548.

[15] Konstitutsionnoe pravosudie v subektakh Rossiiskoii Federatsii (pravovye osnovy i praktika) [Constitutional Justice in the Subjects of the Russian Federation (Legal Basics and Practice)]// Formula Prava [Formula Prava]. Moscow, 1999, pp. 30 — 31. As cited in Henderson, above note 10.

the Tatarstan Court has issued 4 determinations (postanovlenii) and 16 rulings (opredelenii). We also note that the courts have paid attention to international legal instruments (as recommended in Article 17 of the Federal Constitution, cited above) as well as their own constitution or charter.

However, and particularly in recent years, when there have been serious economic stresses, the cost of a court could be regarded as an impediment. This view, certainly, completely ignores the benefit to the society in general of support for individual rights and enhancement of the rule of law. Having a Constitutional or Charter Court is an unimpeachable symbol of constitutionality and the rule of law. Also, a close study of the activities of such courts by Dr Belykh evidences their important role in the protection of rights of people living in the localities; in particular, it is mainly the social and economic rights which are supported, and these are the rights which very strongly affect citizens' actual everyday existence. The positive role of the most active courts has a value which is impossible to assess in monetary terms.

Nevertheless, the potential impact of financial pressure is brought home by the situation which arose in regard to the Constitutional Court in the Republic of Buriatia. On 14 November 2013, the Republic of Buriatia adopted a budgetary law which had the effect of suspending the activity of the Republican Constitutional Court from the beginning of 2015 to the end of 2017 because no provision was made for the cost of the court (apart from existing judicial pensions)[16]. This law was appealed to the Federal Constitutional Court by a group of State Duma deputies. They asserted that the statute deprived citizens of their right to appeal to the Republican Constitutional Court and also breached the principle of separation of powers. On 3 March 2015, the Federal Constitutional Court issued a ruling (opredelenie)[17]. The Federal Constitutional Court noted that the Federal Constitutional Law on the Judicial System of the Russian Federation gave the subjects of the Russian Federation an absolutely free choice as to whether or not to create a Constitutional or Charter Court (as noted above). However, once established, such a court could not be suspended in this way merely through the provisions of a budgetary law. The legislative agency of the subject the Federation would need to use the appropriate legal procedure to pass legislation to abolish the court, if that were desired. A budgetary law could not contain provisions which were not related to state revenues and expenditure, and could not thus alter existing rights and obligations and especially could not be used to change the legal status and functioning of a Constitutional or Charter Court. Such an action would be "an unacceptable interference with the legislative power in the function of the institutions of justice, violating the position on the separation of powers established by the Russian Constitution, autonomy of the agencies of judicial power, independence of judg-

[16] "O priostanovlenii deistvia i priznanii utrativshimi silu otdel'nykh zakonodatel'nykh aktov Respubliki Buriatia" No. 92-V ["On the Suspension of Operation and Loss of Force of Certain Legislative Acts of the Republic of Buriatia" No. 92-V].

[17] Opredelenie Konstitutsionnogo Suda Rossiiskoii Federatsii "Po zaprosu gruppy deputatov Gosudarstvennoi' Dumy o proverke konstitutsionnosti punkta 2 chasti 1 stat'i 1 Zakona Respubliki Buriatia "O priostanovlenii dei'stvia i priznanii utrativshimi silu otdel'nykh zakonodatel'nykh aktov Respubliki Buriatia" No. 421-O [Ruling of the Constitutional Court of the Russian Federation ["On Request of a Group of State Duma Deputies to Examine the Constitutionality of p. 2 of Part 1 of Article 1 of the Act of the Republic of Buriatia "On the Suspension of Operation and Loss of Force of Certain Legislative Acts of the Republic of Buriatia" No. 421-O]. Dated March 03, 2015. V sviazi s priniatiem Respublikoi' Buriatiia Zakona "O respublikanskom budzhete na 2015 god i na planovyi' period 2016 i 2017 godov [In Connection with the Adoption by the Republic of Buriatia of the Act "On the Republican Budget for 2015 and for the 2016 — 2017 planning period"]. The text is available in Consultant Plus legal information system.

es and of court funding, which is necessary to ensure the independent administration of justice (Articles 10, 120, and 124)"[18]. Nevertheless, despite this clear ruling by the Federal Constitutional Court that the suspension of the Constitutional Court of the Republic of Buriatia was unconstitutional, the Court in Buriatia has not yet been reinstated.

In relation to two other courts, activity has been stopped as result of actions, or inaction, of the regional executive. A Court was established in the Chelyabinsk region by a law of 27 October 2011. It began working in the following year. However, in early 2014 the then new acting governor Boris Dubrovskii abolished it. His justification was that the court had arrived at a different conclusion to the Federal Constitutional Court in relation to a particular piece of legislation, the law of the Chelyabinsk region "On Transport Tax" of 28 November 2002[19].

The issue under discussion was the reduction of tax paid by certain groups of people, such as the elderly or families with three or more children under the age of 18. The Chelyabinsk Charter Court had ruled on 12 February 2013 that the law "On Transport Tax" unjustifiably restricted the right of certain people to social support. In contrast, the Constitutional Court of the Russian Federation concluded on 2 December 2013 that the regulation in the Chelyabinsk law of tax privileges did not contradict the Constitution of the Russian Federation[20]. The acting governor suggested that this disparity of view indicated that the Chelyabinsk Charter Court judges had insufficient legal expertise. This, of course, ignored the fact that the Chelyabinsk law "On Transport Tax" was being subject to control by two different documents by each of the two courts, respectively — the Chelyabinsk Charter and the Constitution of the Russian Federation. It is perfectly possible for different considerations and interpretation to allow a different decision to exist in relation to 2 different constitutive documents. Nevertheless, the Court was abolished and has not yet been reinstated.

In the Irkutsk region, the Charter Court should have started its work on 1 January 2015 on the basis of a law passed the previous year, but by mid-2016 it was still not functioning as the new governor Sergei Levchenko had refused to nominate judges. Very unusually, this failure by the governor to act has been appealed to court[21].

It is extremely tempting to suggest that, ironically, such resistance to the existence of a Charter Court by the head of the regional executive strongly emphasises the importance of such a court and the significant role which it would play in supporting the rule of law, separation of powers, and the rights of the individual, particularly against executive encroachment.

In relation to equality in protection of rights, the authors of this piece believe that it would be beneficial if all the subjects of the Russian Federation had an appropriate court to protect constitutional and charter rights. And the authors are not alone in that view. In recent legal literature there has been discussion about the fairness of the requirement for each subject of

[18] Oznachalo by nedopustimoe vmeshatel'stvo zakonodatel'noi' vlasti v funktsionirovanie institutov pravosudiia, narushayushchee ustanovlennye Konstitutsiei' Rossiiskoii Federatsii polozheniia o razdelenii vlastei', o samostoiatel'nosti organov sudebnoi' vlasti, nezavisimosti sudei' i o finansirovanii sudov, kotoroe dolzhno obespechivat' nezavisimoe osushchestvlenie pravosudia (stat'i 10, 120 i 124) [Would mean an unacceptable government interference in the functioning of the institutions of justice, violates the established by the Constitution provisions on the separation of powers, independence of the judiciary, the independence of judges and funding of courts, which should ensure the independent administration of justice (Article 10, 120 and 124)].

[19] No. 114 — ZO.

[20] No. 26 — R.

[21] The Charter Court went through different instances. Available at: https://ircity.ru/articles/10210/# ; http://www.irk.ru/news/20160114/claim/ .

the Federation to create a regional body of constitutional justice[22]. In particular, A.M.Tsaliev has stressed that those regions which have not created Constitutional (Charter) Courts have actually deprived themselves of a powerful means of improving their political and legal spheres and are significantly behind in the development of democracy on the standards achieved at the federal level and in those subjects of the Russian Federation, where constitutional justice is carried out[23].

It is not currently clear whether reform to bring a Constitutional or Charter Court as appropriate to each subject of the Federation should be achieved by an amendment to the Federal Constitutional Law on the Judicial System to replace "may" with "must", or whether there is some other, better, mechanism to persuade regional legislatures and executives of the importance, both practically and symbolically, of the constitutional control exercised by specialist courts in each subject of the Federation. Either way, the availability of judicial protection of the republican constitutions and regional charters could be an important factor in the actual realization of the statement made in the opening article of the Federal Constitution that "Russia — the Russian Federation is a democratic federated rule-of-law State with a republican form of government"[24].

[22] M.S. Salikov. Regional'nye konstitutsionnye (ustavnye) sudy: mesto v sudebnoi' sisteme Rossii [Regional Constitutional (Charter) Courts: their Place in the Judicial System of Russia]// Rossiiskoe pravo: obrazovanie, praktika, nauka [Russian Law: Education, Practice and Science]. 2013, No. 2 — 3, pp. 18 — 22.

[23] A.M. Tsaliev. Konstitutsionnye (ustavnye) sudy sub'ektov Rossiiskoii Federatsii: ot suschego k dolzhnomu [Constitutional (Charter) Courts in the Rassian Federation subjects: from actual to appropriate]/ /Rossiiskoe pravo: obrazovanie, praktika, nauka [Russian Law: Education, Practice and Science], 2013, No. 2 — 3, p. 25.

[24] Rossia — Rossiiskaia Federatsiia est' demokraticheskoe federativnoe pravovoe gosudarstvo s respublikanskoi' formoi' pravleniia [Russia — Russia is a democratic federal law state with a republican form of government].

FINAL SUMMARY OF THE DISCUSSION ON THE RESULTS OF THE MEETING OF THE COORDINATION COMMITTEE OF THE BRICS LAW INSTITUTE (9 — 10 JUNE 2016)

I. Introduction

1. We, the participants of the Coordination Committee Session of the BRICS Law Institute and the Expert Group on Legal Support to Inter-State Partnership and Integration on Economics, Finance, Taxation and Customs, met in Yekaterinburg (Russian Federation) on 9-10 June 2016 in order to analyse the impact of the coordination of national sovereignties in international relations and outline possible paths for promoting the Rule of Law concept in the framework of forming an inclusive global legal order that prevents shocks connected with sporadic political crises and enhances the proactive role of BRICS as a bridge between developing and developed countries (including the OECD member states);

2. Based on the scientific analysis carried out over the past few years by the participants of the Coordination Committee Session of the BRICS Law Institute and the Expert Group, we have come to identify that action in the following areas can provide an important contribution towards the achievement of a global legal order and the goals outlined earlier in this document:

a) establishing an effective global system for the settlement of cross-border economic disputes along the format of the BRICS countries forum;

b) promoting an inclusive global framework that preserves the effectiveness of national sovereignty and legal policy without external interferences in respect of genuine economic practices, including when States decide to foster economic development through special economic zones;

c) promoting joint action of BRICS in order to enhance the effectiveness of global justice and achieve solutions that broaden the legitimacy of international solutions, including that provided within the framework of the BEPS project, and adapt them to both the needs of developed and developing countries, respecting the rights of the latter ones to pursue their right to economic development;

d) and establishing a Permanent Forum for Discussion on Economics, Finance, Taxation and Customs among Experts under the aegis of the Coordination Committee of the BRICS Law Institute and the BRICS Legal Forum.

II. Proposals

1. The Importance of Supplementing WTO Law with Alternative Mechanisms for the Support of Sustainable Economic Development and Settlement of Economic Disputes in the Modern World: the recent developments show that the global instruments of WTO Law do not appear to be particularly effective in the field of Finance, Taxation and Customs.

In particular, unilateral measures, such as economic sanctions or compensation for lower taxation, produce negative effects on the legal framework established under the WTO agreement.

In the absence of effective mechanisms to settle cross-border economic disputes, the format of BRICS could be used as an international forum for settling cross-border economic disputes of different character, which supplement the mechanisms already available under WTO law.

Moreover, the modern global economic system suffers from a crisis of trust. Global regulators of economic activity have a dubious or disputed status in international law. Such unclear status renders their regulatory mechanisms ineffective and which fail to take into consideration the sovereign interest of developing countries.

While acknowledging the global impact of the recent recommendations and decisions offered by the OECD and G20, it can be noticed that, in the situations of distinct contradiction of the interests of more developed and less developed countries, the outputs rarely favour or fully take into account the economic interests of the latter.

Consequently, there are clear and significant reasons to institutionalize the format of BRICS as an international organization and a counter balance to the OECD to more effectively consider the interests of more developed and less developed countries towards building the new architecture of the global economic and legal order.

2. Special Economic Zones in BRICS: under the conditions of implementing the Base Erosion and Profit Shifting Action Plan (BEPS Action Plan), special economic zones are becoming the focus of attention especially in regard to the assessment of the tax regime which they provide for their residents.

On the one hand, the risk is recognised that they (special economic zones) may be used in harmful tax competition of jurisdictions and may be used for tax evasion / avoidance in cross-border situations in contradiction to the growing participation or commitment of jurisdictions to automatic exchange of tax information.

On the other hand, properly constituted and monitored special economic zones can be effective mechanisms for intervention in the economy and for economic development through the offering of justified tax incentives.

The countries of BRICS reflect in their economic systems both the features of developed and developing countries, already for this reason there are grounds to believe that they are a proper international forum for finding appropriate balance between the regulation of the activities in special economic zones and the implementation of the BEPS Action Plan as recommended and approved by the G20 and OECD.

3. The Practice of Regulating Taxation of Cross-Border Investments in BRICS: the analysis shows that in regard to many aspects the countries of BRICS have comparable economic advantages or, on the contrary, problems; with respect to many activities and economic sectors the BRICS countries are net exporters of capital and technologies and for others net importers of capital and technologies.

Being positioned between more developed and less developed economies adds legitimacy to the BRICS call for an agenda for the development of an international legal system to derive a coordinated approach and necessary legal regulation for the global economy.

However, the current analysis of the legal policy regulating international investment and tax relations in each of the BRICS countries (as reflected in their bilateral treaties for tax and investment and also, for tax matters) in the commentaries to the OECD and UN Model Con-

ventions shows serious differences. These stated positions are not always realised by the BRICS and equally do not represent their common interest. Acting in joint forum may result in a common position which will better balance the needs of the developed countries against those of the developing countries. The abovementioned statement can be supported by some particular examples given below in Table No.1.

The abovementioned discrepancies may also produce difficulties when defining a uniform position of the BRICS states on the issues of developing a multilateral instrument to implement Actions 14 and 15 of the BEPS Plan as approved by the OECD and G20. Demonstrating unity in the development of a coordinated position would be important to ensure that the approaches of the OECD non-member states are implemented at the stage of establishing the global system of regulation of direct taxation rather than repeating the historical trend dismissing many countries of the world from the development of the rules of world trade (for example, as it happened in the development of the GATT rules and later those of WTO).

4. On the Creation of a Permanent Format of Expert Discussions: on the basis of the discussions held, the participants of the Coordination Committee of the BRICS Law Institute and the Expert Group have come to conclusions on the effectiveness of the format chosen and on the importance of holding expert discussions on the annual basis.

The founders and other participants of the BRICS Legal Forum are encouraged (starting with the 3rd forum which will be held in India) to coordinate the topics and directions of the research conducted and also to hold in 2017 a joint meeting of the Coordination Committee of the BRICS Law Institute and of the BRICS Legal Forum in Russia, in Yekaterinburg, where the format of BRICS was implemented for the first time in 2009.

It is also proposed to inform the interested state authorities, public and business associations about this forum of expert work which is of an open character and invites all interested parties in the organization of a competent dialogue to facilitate the discussions between state authorities, experts, practitioners and civil society activists.

Table No.1

Article of the OECD / UN Model	Brazil	India	China	Russia	South Africa
4		Partnerships are in the subjective scope of the treaty		Partnerships are in the subjective scope of the treaty	
4 (2)		Mutual Agreement Procedure			
5	Natural resources exploration			Natural resources exploration	
5 (6)		Collection of insurance premiums constitutes PE		Collection of insurance premiums constitute PE	
7 / 14	Independent personal services		Independent personal services	Independent personal services	

Article of the OECD / UN Model	Brazil	India	China	Russia	South Africa
9 (2)	The right not to include reverse adjustments			The right not to include reverse adjustments	
12 (1)	Taxation of royalty at source		Taxation of royalty at source	Taxation of royalty at source	Taxation of royalty at source
12 (2)	Usage of equipment	Usage of equipment	Usage of equipment	Usage of equipment	
21	Tax at source	Tax at source	Tax at source	Tax at source	Tax at source
23	Tax sparing		Tax sparing		
25 (2)	To exclude joint commission		To exclude joint commission		

THE BRICS AND THE BEPS PROJECT: AN OVERVIEW FROM A BRAZILIAN PERSPECTIVE

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Abstract: Even though the BRICS countries share a number of similarities in terms of their position in the international economy, there is still no significant dialogue among these States with respect to tax treaty policy. There are, however, several reasons to believe that these countries could benefit from such a debate. In the context of the BEPS Project discussions, these reasons become even clearer, being relevant to point out three features of the Project that make the interaction of the BRICS countries essential.
Keywords: BRICS countries, BEPS Action Plan, Brazilian Tax Law, International Tax Law

I. Introduction

Even though the BRICS countries share a number of similarities in terms of their position in the international economy, there is still no significant dialogue among these States with respect to tax treaty policy. There are, however, several reasons to believe that these countries could benefit from such a debate. In the context of the BEPS Project discussions, these reasons become even clearer, being relevant to point out three features of the Project that make the interaction of the BRICS countries essential.

The *first of them* is the excessive focus of the BEPS Project on the demands of the OECD countries, which has led to Actions that are not necessarily pressing for developing countries and for the BRICS countries in particular: country-by-country reporting is a clear example of this. *Secondly*, the Project assumes a certain common ground in domestic legislation which does not necessarily exist: the uniformity with regard to transfer pricing legislation (fundamental for Actions 8, 9 and 10) and CFC legislation (important for Action 3) is not an actual fact, and the existence of consolidated general anti-abuse legislation (relevant for Actions 6 and 12) is far from the reality in many countries, for instance, in Brazil. *Finally*, the Project takes the allocation of taxing rights as a premise, while most countries are struggling in their bilateral negotiations to bring the boundaries of tax jurisdiction closer to what they perceive as fair.

The present article is aimed at providing an overview of the Brazilian measures with regard to the BEPS Project and seeking the common perspectives that Brazil may share with other BRICS countries.

In its *first part*, the article addresses some aspects of the Brazilian legislation which are relevant for the BEPS Project Actions. Even though Brazilian legislation is still silent with respect to a General Anti-Avoidance Rule (GAAR), Brazil has enacted important Special Anti-Avoidance Rules (SAARs). Besides, Brazilian transfer pricing policy presents significant deviations from the OECD Guidelines. These deviations, if adequately interpreted, may offer a suitable solution to current feasibility problems of the application of transfer pricing legislation as addressed in the OECD Guidelines[1].

It is also important to describe why the Brazilian regime of taxation of controlled foreign companies cannot be considered as a SAAR. Furthermore, it is important to present Brazilian measures with regard to deductibility of interests, contrasting them with the measures of BEPS Action 4. Finally, we address the treaties in which Brazil has recently included specific anti-abuse provisions.

In the *second part*, common evolutionary aspects of the treaty policies of the BRICS countries are presented, followed by considerations on the need for cooperation between the BRICS for more comprehensive reforms with regard to the digital economy.

II. Brazilian legislation and the BEPS Project

1. *Action 12 and Brazilian Tentative Legislation on Voluntary Disclosure*

Brazil does not have a GAAR in force[2]. However, allegedly inspired by Action 12 of the OECD G20 BEPS Project, on 21 July 2015, the Brazilian President, without any previous discussion with the civil society, enacted MP[3] 685, which was to create the obligation for taxpayers to disclose aggressive tax planning. As described, there is no legal certainty with respect to what would be an "aggressive tax planning" and the proposal has brought nothing with respect to such clarification.

According to Article 7 of MP 685/2015, taxpayers would be obliged to report to Brazilian tax authorities, until the 30th of September of each year, of the transactions carried out in the previous year, if they included elimination, reduction or deferral of taxes. This statement would have to be filed when: (a) the performed transactions would not have relevant reasons other than tax ones; (b) the adopted form would not be usual for the intended transaction, or when the contract contains clauses that result in effects different from a typical contract; or (c) the specific transactions performed by the taxpayer would be those included in a list to be enacted by the Federal Revenue Secretariat ("RFB").

In case the RFB would not recognize the transactions carried out by the taxpayer as legitimate, the taxpayer would be notified to pay (or be requested to pay in installments) the taxes due with interests within 30 days. The penalty would only be applied in case the taxpayer presents the declaration after the RFB starts a tax inspection.

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1 This argument has been further developed in L.E. Schoueri's Arm's Length: Beyond the Guidelines of the OECD, 69 Bulletin for International Taxation December 12, 2015, pp. 690 — 716.

2 See, on the issue, L.E. Schoueri, M.C. Barbosa. Braziliia [Brazil]. Moscow. Lang et. al (ed.), GAARs — A Key Element of Tax Systems in the Post-BEPS Tax World? (Linde, Wien, 2016), pp. 109 — 146.

3 A provisional measure is a feature of the 1988 Constitution by means of which the President is authorized to unilaterally enact measures invested with "force of law" in cases of "relevance and urgency". Once it has been enacted by the Executive Branch, a MP is sent to the Congress, which may convert it into a law in a maximum period of 120 days. If it is not approved within this deadline, the provisional measure loses its enforceability ex tunc, being up to the Congress to "regulate, by means of a legislative decree, the juridical relations deriving from it".

On the other hand, according to Article 12 of this MP, the lack of declaration or the incomplete or incorrect declaration would characterize an omission intended to hide a tax evasion or tax fraud, and the RFB would charge taxes due with penalty (150%) and interest.

Although the Brazilian Government has argued that the disclosure of tax planning strategies would be following BEPS recommendations, a closer look shows that MP 685/2015 ignored many of the OECD propositions.

As stated by the Public Discussion Draft of the BEPS Action 12 (Mandatory Disclosure Rules): "[t]he information that a taxpayer is required to provide under a mandatory disclosure regime is generally no greater than the information that the tax administration could require under an investigation or audit into a tax return"[4].

Therefore, rules related to mandatory disclosure should be precisely articulated and clearly understood in order to be easier to comply with[5]. Besides, sanctions to encourage disclosure and to penalize those who do not comply with their obligations have to be clear[6]. Consequently, this Draft highlights the importance of being explicit in domestic law about the consequences of reporting a scheme or transaction under a disclosure regime[7].

When analyzing the expressions prescribed in MP 685/2015, one shall conclude that the mandatory disclosure set forth in this law is not clear. In the Brazilian domestic law, there is no definition of "relevant reasons other than tax reasons". Moreover, this law is inaccurate when refers to the "adopted form" or to the "typical contract". Also, there is no relevance in analyzing whether the adopted form is (or not) usual because, unlike, e.g., the German legislation, the Brazilian domestic law does not take this aspect as a requisite as to deem an operation as abusive. Brazil simply has no tradition in applying such concepts, and there is no reason to believe that they should be used as hallmarks for mandatory disclosure.

Furthermore, one may note that such information could never be found in an audit or investigation, as suggested by the OECD. In other words, the Tax Authority does not obtain from the taxpayer the information that "there was a transaction without relevant reasons other than tax reasons". The Tax Authority can only reach this conclusion on its own. Thus, MP 685/2015 would compel the taxpayer to recognize a fact against herself/himself without actually being able to predict the legal consequences of it. As a consequence, given that the lack of declaration could entail the presumption of tax fraud, MP 685/2015 could be deemed to entail self-incrimination concerns.

The problems arising from such legislation become even clearer when one considers the lack of adequate anti-avoidance legislation in Brazil. By enacting MP 685/2015, the Brazilian Executive intended to take for granted the existence of an applicable general anti-avoidance rule in Brazil, even though its regulation has never been approved in Congress, as addressed in Section I.

In other words, the basic premise of a "mandatory disclosure rule" is clearness with respect to what shall be disclosed by the taxpayer. However, as described, in the current Brazilian tax legislation, there is no clear definition with regard to how should tax avoidance be

[4] OECD, Action Plan 12: Mandatory Disclosure Rules, Public Discussion Draft, BEPS, OECD, published on May 11, 2015, p. 47.

[5] See OECD, Action Plan 12: Mandatory Disclosure Rules, op.cit., p. 47.

[6] See OECD, Action Plan 12: Mandatory Disclosure Rules, op.cit., p. 47.

[7] See OECD, Action Plan 12: Mandatory Disclosure Rules, op.cit., p. 50.

combated by the tax administration. For this reason, the fact that the Brazilian Congress has rejected these provisions of the Provisional Measure is not surprising.

During the debates in Congress, the Government has stepped back in its proposal. The self-incrimination concerns have been eliminated and the declaration became "optional" in most cases. The taxpayer would mandatorily disclose solely the operations to be listed by the RFB[8]. However, even this proposal has been rejected by the Deputies.

This fact makes clear that there is a need to further discuss the issue of tax avoidance in Brazil. The Brazilian tradition in tax law presents a strong rejection to open clauses which grant wide interpretation attributions to tax authorities. Whilst the Executive Branch has managed to "kidnap" the jurisdiction to tax planning cases in the last decade, a more sincere evaluation of the current scenario evidences that the alleged evolution in the Brazilian approach to tax avoidance is actually unsustainable. If the Government agrees with the doctrine applied, the Legislative surely does not and the Judiciary is still to be heard on this issue.

Such a conclusion leads to critiques not only to the Brazilian tax administration, but to the BEPS Project itself. Action 12 takes for granted that all G20 countries have effective (and similar) means of combating tax avoidance in force, which is not an actual fact. Brazil still struggles in terms of legislation and institutional capacity in this regard.

Besides the critiques with respect to the actual involvement of non-OECD countries in the Project, one may also take the Brazilian experience of an example of how harmful it is to take solely the tax administration perspective during debates. In Brazil, if one asks tax officials whether there are sufficient mechanisms to combat tax avoidance, the answer will surely be "yes, and they work very well". However, a closer look shows that taxpayers in Brazil are actually submitted to a high degree of uncertainty, due to the lack of legal basis for the assessments of tax authorities. Since the final decision ends up being handed down by the tax authorities themselves, they are able to seek in substance over form, business purpose and/or abuse of law doctrines, the arguments that better fit their needs, even though Congress has clearly rejected both Provisional Measures which tried to introduce such criteria in the Brazilian Legal System.

In the meantime, Brazil remains with no further developments with regard to enhancing the relationship between tax administration and tax authorities. In Brazil, there is a form of tax ruling ("*Solução de Consulta*"), whereby the taxpayer is allowed to submit a query before the RFB, with regard to the interpretation of tax legislation and classification of services and intangibles. In 2013, the regulations were improved. The outcome of a *Solução de Consulta* is now binding for the tax administration, not only when applying the rules to the taxpayer who requested the tax ruling (as in the former regulations), but also to any and every taxpayer in the same conditions of the consulting person. Another important development on the tax rulings is that the reasoning of the solution met by the tax administration shall be disclosed. This shows that Rulings are not intended to benefit only the taxpayer concerned; they are rather a clarification of tax authorities' understanding in cases they are asked for.

2.BEPS Actions 8, 9 and 10 and the Brazilian Fixed Margins

As for Law 9,430/1996, Brazilian transfer pricing rules are applicable to imports and exports of products, services and rights, in controlled transactions. The rules are also mandatory to intercompany loans and to any and every import and export uncontrolled transaction

[8] See Bill No. 22 referring to MP 685/2015.

between a Brazilian resident (either an individual or a legal entity), and residents in low tax jurisdictions, or in jurisdictions whose domestic legislation provides for the secrecy of corporate ownership. These jurisdictions are listed by the Brazilian tax authorities[9], along with privileged tax regimes, to which TP rules are also mandatorily applicable[10].

Therefore, the anti-avoidance intent of Brazilian transfer pricing legislation is clear: it does aim not only at controlled transactions, whose price may not follow market price, but also at uncontrolled transactions carried out between a Brazilian resident and a resident in a listed jurisdiction.

The transactions described must be evaluated on the annually basis, under any of the methods available in the Brazilian legislation. Even though there is no "best method rule", the same method must be applied consistently to the same product or transaction in the same fiscal year. It is possible, however, to apply different methods to transactions involving distinct products or services, or to transactions involving the same product or service, but occurring in different fiscal years.

The methods concerning the import of goods, services or rights are: i) the Comparable Independent Price Method ("PIC"); ii) the Resale Price Less Profit Method ("PRL"); iii) the Production Cost Plus Profit Method ("CPL"); and iv) the Quotation Price on Imports Method ("PCI"). For exports, the methods applicable are: i) the Export Sales Price Method ("PVEx"); ii) the Resale Price Method ("RPM")[11]; iii) the Purchase or Production Cost-Plus Tax and Profit Method ("CAP"); and iv) the Quotation Price on Exports Method ("PCEX").

The main deviation from the international standards lies in the adoption of predetermined profit margins under the equivalents of the resale and cost plus methods. The so-called "fixed margins" should not be confused with Formulary Apportionment ("FA"). The

[9] See IN 1,037, June 4, 2010. The listed jurisdictions are: Andorra; Anguilla; Antigua and Barbuda; Netherlands Antilles; Aruba; Ascension Island; the Commonwealth of the Bahamas; Bahrain; Barbados; Belize; Bermuda; Brunei; Campione D' Italia; Channel Islands (Alderney, Guernsey, Jersey e Sark); Cayman Islands; Cyprus; Singapore; Cook Islands; Republic of Costa Rica; Djibouti; the Commonwealth of Dominica; United Arab Emirates; Gibraltar; Grenada; Hong Kong; Kiribati; Labuan; Lebanon; Liberia; Liechtenstein; Macau; Madeira Island; Maldives; Isle of Man; Marshall Islands; Mauritius Island; Monaco; Montserrat Island; Nauru; Niue Island; Norfolk Island; Panama; Pitcairn Islands; French Polynesia; Qeshm Island; American Samoa; Western Samoa; San Marino; Saint Helena Island; Saint Lucia; Federation of Saint Kitts and Nevis; Saint-Pierre and Miquelon Islands; Saint Vincent and the Grenadines; Seychelles; Solomon Islands; St. Kitts and Nevis; Swaziland; Sultanate of Oman; Tonga; Tristan da Cunha; Turks and Caicos Islands; Vanuatu; United States Virgin Islands; British Virgin Islands.

[10] IN 1,037/2010 also includes the following as privileged tax regimes: Uruguai's regime regarding legal entities incorporated in the form of "Financial Companies Investment (Safis)" until December 31, 2010; Denmark's regime applicable to legal entities incorporated as a holding company; Netherlands' regime applicable to legal entities incorporated as a holding company; Iceland's regime applicable to legal entities incorporated as International Trading Company (ITC); United States of America's regime applicable to legal entities incorporated as a Limited Liability Company (LLC), whose membership is made up of non-residents which are not subject to federal income tax; Spanish's regime applicable to legal entities incorporated in the form of "Entidad de Tenencia de Valores Extranjeros (E.T.V.Es.)"; Maltese's regime applicable to legal entities incorporated as International Trading Company (ITC) and International Holding Company (IHC); Switzerland's regimes applicable to legal entities incorporated as a holding company, domiciliary company, auxiliary company, mixed company and administrative company whose tax treatment results in incidence of Corporate Income Tax ("IRPJ") in order combined, less than 20% (twenty percent), according to the federal, cantonal and municipal legislation as well as the arrangements applicable to other legal forms of incorporation of legal entities, by rulings issued by tax authorities, resulting in incidence of IRPJ, in combination, less than 20% (twenty percent), according to the federal, cantonal and municipal legislation.

[11] Distinctly from the OECD Guidelines, in the Brazilian RPM, the fixed margins, described below, are used, instead of resorting to comparables.

Brazilian Approach does not pursue a division of the global profit of the MNEs among the entities. Neither does it take into consideration the amount of profits to be paid to the other entities of the group. The Brazilian legislation only takes into consideration the profits of the Brazilian entity. Therefore, it is clearly not a FA-based method, since neither does it take into account the global profit of the MNE, nor does it disregard the intra-group transactions. The fixed margins approach is essentially a transactional approach.

As for the fixed margins approach, countries may establish "different profit margins per economic sector, line of business or, even more specifically according to the kind of goods or services dealt with, to calculate the parameter price"[12], on the application of the relevant ALS-base methods. The profit margins must be determined on the basis of market researches. These pricing researches could be both carried out by the tax administration, or purchased from third parties, being important that it is previously submitted to discussion with the economic groups to which they will be applied.

If the legislation establishes numerous and very specific margins, the chances that the applicable margins correspond to a consensus concerning reality increase. The Brazilian Chapter in the UN Practical Manual highlights that in some cases the existence of many different margins may not be necessary, depending on the diversity of goods and services exported and imported by the country[13]. Determining how numerous and how specific the fixed margins are is deemed to be a policy decision, which may vary according to the characteristics of the State's economy[14].

The legislation may establish fixed margins by economic sector (distinguishing, e.g. extraction or production of raw materials, manufacturing and services) or more specifically with reference to the relevant activities of the MNE. As suggested by the UN Practical Model, "the country could use a margin for the chemical industry as a whole, or different margins for different types of products of the chemical industry (agrochemical, petrochemical, explosives, cosmetics etc.)"[15].

The Brazilian Chapter in the UN Practical Model deems possible to establish "range of profit margins". It is important to note that the current Brazilian legislation does not include such a mechanism. In some cases, it would be necessary to determine a maximum and a minimum profit margin which would statistically correspond to the available relevant data of uncontrolled transactions. This range would represent "an acceptable divergence margin"[16]. In this case, the legislation should establish ranges instead of margins. In case the pricing researches find out that some companies have a 25% margin and others a 38% margin, the

[12] United Nations, Practical Manual on Transfer Pricing for Developing Countries (hereinafter the "UN Practical Manual"), UN Committee of Experts on International Cooperation in Tax Matters. New York, 2013, p. 372, para 10.2.9.1.

[13] UN Practical Manual, p. 372, para 10.2.9.1.

[14] Accordingly, "[e]ach country should determine, according to its specific circumstances, the amounts involved and types of goods and services, how specific the margins should be and whether more margins are merited. Besides, a country may combine different levels of margin specifications if it seems appropriate; it may set forth some general margins for a line of business in addition to more specific margins for some goods.". UN Practical Manual, p. 373, para 10.2.9.4.

[15] The Brazilian Chapter highlights that "[t]he differentiation per industry into types of products is adopted by Brazil, where, for the Resale Price Method for imports, the margin for chemicals sector in general is 30%, while the margin for pharmaceutical chemicals and pharmaceuticals is 40%". UN Practical Manual, p. 373, para 10.2.9.3.

[16] UN Practical Manual, p. 373, para 10.2.9.5.

range would be advisable instead of fixed margins, in a sense that margins within 25% and 38% would be acceptable. If the range becomes too wide, it may be the case for further specification concerning the products or activities[17].

The advantages of the fixed margins are immediate[18]: i) they may avoid the need for specific comparables; ii) they can be applied both by tax administrations and the companies without the need for technical knowledge on specific transfer pricing issues, which is a scarce human resource both for companies and tax administrations in developing countries; iii) they grant legal certainty to the taxpayer, since this is an *ex ante* objective alternative, not relying on further subjective analysis; iv) they reduce costs for both tax administrations and taxpayers, since they diminish the need to empirically determine gross margins in a comparability analysis; v) they privilege competition among enterprises in the state, submitting them to the same tax burden.

However, if not correctly considered, the approach may be incompatible with the Arm's Length Standard. Despite important for tax policy considerations, the "Comments for Countries Considering the Adoption of Fixed Margins" in the UN Practical Manual ignores the need for rebuttable presumptions.

The Brazilian Chapter was written by the Brazilian tax administration and, as a consequence, it does nothing more than expressing the Revenue Service interpretation of the Brazilian legislation. Hence, it considers as a "weakness" of the method the "unavoidable" outcome "that some Brazilian enterprises will be taxed at (higher or lower) profit margins not compatible with their profitability", which would be due to the fact that "the fixed margin method applies regardless of the cost structures of taxpayers"[19]. The Brazilian tax administration also regards that "[t]he approach may lead to double taxation in case there is no access to competent authorities to negotiate relief of double taxation"[20].

Therefore, the Brazilian Chapter ignores that the ALS may be inferred from the Brazilian tax legislation[21] and is also included in every single tax treaty signed by Brazil[22]. If the tax authorities' interpretation is adopted, then the allegedly "unavoidable" outcome of the methods applied clearly violates provisions of the Brazilian tax system. This interpretation is responsible for the worldwide rejection of Brazilian transfer pricing legislation, given that,

[17] UN Practical Manual, p. 374, para 10.2.9.7.

[18] UN Practical Manual, p. 370, para 10.2.7.1.

[19] UN Practical Manual, p. 371, para 10.2.7.2.

[20] UN Practical Manual, p. 371, para 10.2.7.2.

[21] L.E. Schoueri, Preços de Transferência no Direito Tributário Brasileiro (Transfer Pricing in Brazilian Tax Law). 3rd ed., São Paulo, Dialética, 2013, at 60; R.L. Torres, O Princípio Arm's Length, os Preços de Transferência e a Teoria da Interpretação do Direito Tributário" (The Arm's Length Principle, Transfer Pricing and Theory of Interpretation of Tax Law), 48 Revista Dialética de Direito Tributário. 1999.

[22] Brazil currently has DTCs with the following countries (date of signature noted). Japan, January 24, 1967; France, September 10, 1971; Belgium, June 23, 1972, amended November 20, 2002; Denmark, August 27, 1974; Spain, November 14, 1974; Sweden, April 25, 1975; Austria, May 24,1975; Italy, October 3, 1978; Luxembourg, November 8, 1978; Argentina, May 17, 1980; Norway, August 21, 1980; Ecuador, May 26, 1983; the Philippines, September 29, 1983; Canada, June 4, 1984; Hungary, June 20, 1986; Czechoslovakia (now the Czech Republic and Slovakia), August 26, 1986; India, April 26, 1988; Korea (Rep.), March 7, 1989; the Netherlands, March 8, 1990; China, August 5, 1991; Finland, April 2, 1996; Portugal, May 16, 2000; Chile, April 3, 2001; Ukraine, January 16, 2002; Israel, December 12, 2002; Mexico, September 25, 2003; South Africa, November 8, 2003; Venezuela, February 14, 2005; Peru, February 17, 2006; Trinidad and Tobago, July 23, 2008; Turkey, December 16, 2010.

put in the terms contended by the tax administration, the Brazilian Approach is clearly in breach of the international agreements signed by Brazil.

The only reasonable interpretation of the fixed profit margins is that the margins set forth by the legislation are rebuttable. The taxpayer must be entitled to bring arguments to convince that an ALS margin in the transaction described would probably be distinct from the margin reached by the tax administration, or would not fall within the range of margins provided. A distinct interpretation would imply a violation of both domestic legislation and tax treaties providing for the ALS. Unfortunately, the Brazilian tax administration still does not share this perspective, and the Brazilian transfer pricing legislation has been deemed compatible with Brazilian tax treaties, with no further need to consider the fixed margins as rebuttable presumptions[23].

When one reads the text of Law 9,430/1996, as amended in 2012, it is clear that margins may be revised. However, this has not been a practice in Brazil. It is difficult to determine the reason why taxpayers have not challenged the determined margins. It is true that the previous legislation required an enormous documentation for any application for revision of margins, which made any such request virtually infeasible. However, this legislation is not in force anymore, what could offer taxpayers and tax administration the opportunity of discussing industry-specific margins. The circumstance that this has not occurred so far may be considered the major weakness in Brazilian practice. This shows that the Brazilian present practice may not be considered as a final solution, but rather a methodology under construction.

Another failure of the fixed margins, presently existing in the Brazilian practice, is that there is scarce evidence concerning the methodology employed to reach said margins. Such opacity implies a clear lack of legitimacy of the presumption itself, since no one can convincingly argue that the margins are reasonable, or not. A further development of the method seems, therefore, necessary for the methodology, as well as the data collected and employed, to be transparent, thus allowing a control of the presumption.

Under such conditions, the Brazilian transfer pricing legislation can certainly be compatible with the ALS and could be seen as an important tool to circumvent the feasibility issues present in the current OECD Guidelines. The Brazilian present practice is not a final solution: it should be considered as an alternative under construction, which demands further corrections.

III. BEPS Action 4 and Limits on the deduction of interests in the Brazilian Legislation

BEPS Action 4 includes rules which limit the level of interest expense or debt in an entity with reference to a fixed ratio. Examples of these rules include debt to equity ratios, interest to EBITDA ratios and interest to assets ratios.

As for Law 12,249/2010, interests paid or credited by a Brazilian source to an individual or a legal person resident abroad are deductible only to the extent that they are an expense deemed necessary for the economic activity of the Brazilian company (Art.24). To comply

[23] See, e.g., CARF, Judgment No. 108-09.763 passed on 11.13.2008; Judgment No. 1401-000.801 passed on December 06, 2012. Not surprisingly, the tax treaty concluded with Germany (June 27, 1975) was denounced by the German authorities on April 7, 2005 due to disagreements that include also transfer pricing issues.

with such a requirement, there is a debt to equity fixed ratio that limits the deduction of interests.

In case of controlled cross-border transactions, interest expenses are only deductible if the debt value does not exceed twice the value of the Brazilian company's equity (Art.24, II). If a foreign company holds shares in a Brazilian company, the debt value cannot exceed twice the value of participation of the foreign company in the Brazilian company's equity (Art.24, I). If the foreign individual or legal entity is located in a tax heaven or is under a privileged tax regime, the debt value cannot exceed 30% of the equity of the Brazilian company (Art.25).

In any case, there is also a constructive ownership rule, whereby in case the Brazilian company pays interests to more than one individual or legal entity abroad, the limitation applies in taking the sum of the debt values into account (Art.24, III).

It is reasonable to conclude that since 2010 Brazil adopts rules that can be deemed even more restrictive than the ones suggested by the BEPS Project, considering the express discrimination of tax heavens and privileged tax regimes, not mentioned in Action 4.

IV.BEPS Action 3 and the "Brazilian CFC rules": no-deferral universal taxation regime is not a SAAR

"Brazilian CFC rules" are not properly CFC rules, as commonly seen in the international experience. Most importantly, "Brazilian CFC rules" are certainly not SAARs. Unlike the profile of the CFC regime found elsewhere, the Brazilian rules are broad and applicable to any and every Brazilian controlled foreign company. Hence, Brazilian rules concerning the taxation of foreign profits have been under serious questioning since their enactment, back in 1995.

Accordingly, profits derived by a foreign controlled company shall be deemed available to the Brazilian parent company on an annual term. No relevant distinction is made with respect to the jurisdiction where the subsidiary is located ("the designated jurisdiction approach"), nor any reference to the nature of the income derived by the company ("the tainted income approach"). If a Brazilian company develops heavy industry activities in Germany through a subsidiary, the profits of such a subsidiary shall be taxed in Brazil on the annual basis, as if they were distributed to the Brazilian parent company, even if they are not.

Hence and despite the reasoning adopted by the Explanatory Memorandum of Law 9,249/95, nothing in the profile of the former Brazilian legislation leads to the conclusion that it has been specifically drafted to counter abusive behavior.

The only aspect that has always been clear with respect to them was the Government's intention to tax profits derived by Brazilian CFCs irrespective of the need of actual distribution. Questioning the constitutionality of the rule was the natural reaction expected from taxpayers. Unexpected, however, was that the decision of the Supreme Court would take twelve years to be completed, with a mostly inconclusive outcome[24].

Under the Brazilian judicial review, the majority principle must be observed in order to consider a rule constitutional or unconstitutional: six out of eleven Justices must consider the rule constitutional or unconstitutional[25]. In the CFC rules judgment, one of the Justices had been previously involved in the case as General-Attorney and could not vote. Four Justices considered that the regime was unconstitutional, and four considered that it was compatible

[24] Supreme Court, Direct Action of Unconstitutionality No. 2588 passed on October 04, 2013.
[25] Law 9.868 of November 10, 1998, article 23.

with the constitution. Another Justice considered that the Article was unconstitutional only with respect to associate companies[26].

The last remaining opinion was finally issued in 2013. Justice Barbosa understood, on the one hand, that "the obsolescence of tax legislation" could not "be evoked as to protect [the practice of] tax evasion", but admitted, on the other hand, that "as it has been written, the Brazilian rule deems, indistinctively, that every controlled or associated foreign company has avoidance or evasion purposes".

After a brief description of the international experience on CFC rules, Justice Barbosa decided that the application of the Brazilian regime should be limited to the taxation of associate or controlled foreign companies that are situated in low tax jurisdictions or countries that lack transparent corporate regulations, "usually known as tax havens"[27]. He also considered that, "in case of companies not situated in tax havens, the tax authorities must contend and prove the tax evasion". **Thus**, as for his understanding, even in the case of companies not located in tax havens, Brazilian CFC rules would only be applicable in exceptional situations.

Summarizing Justice Barbosa's view, in cases involving companies incorporated in tax havens, this newly conceived SAAR would be applicable. If the company is not in a low tax jurisdiction, tax authorities would have to prove the case of tax evasion in order to apply the CFC rules.

Due to the diversity of opinions, the outcome of the decision is mostly inconclusive. As for the Supreme Court's "average opinion" system, the majority decided that: (i) the taxation of controlled companies located in tax havens is constitutional; and (ii) the taxation of associated companies not located in tax havens is unconstitutional. The decision is silent with respect to controlled companies not located in tax haven and associated companies incorporated in tax havens.

Where the position of the Supreme Court with respect to the taxation of foreign profits remains unclear, the reform proposed by the Government still lacks proportionality and harms competitiveness of Brazilian investors. Provisional Measure 627 of 11 November 2013 amended the legislation in view of the unconstitutionality of its application to associate companies not located in tax havens, though still generally maintaining the taxation of CFC profits regardless of distribution to the country and also comprising within its scope companies indirectly held (second- and further tiers). The Provisional Measure was later converted into Law 12,973/14, excluding the part applicable to individuals.

As a conclusion, while European countries aim to sharpen their respective CFC rules, as to target solely the wholly artificial arrangements, and the US discusses restrictions to the taxation of their CFCs due to competitiveness concerns, the Brazilian legislation goes against

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[26] Associate companies are regarded as those in which the investor holds "significant influence", characterized when the investor holds or exercises the power to take part in financial or operational policy making of the investee, without controlling it. The "significant influence", though, is presumed when the investor holds 20% or more of the voting stocks of the investee, without controlling it. It should also be mentioned that, according to the Civil Code, an associate company may also be characterized once the investor holds 10% of participation.

[27] Under Article 24 of Law 9.430 of December 27, 1996, tax havens are deemed as the jurisdictions which (i) tax their resident's income at a rate lower than 20% or (ii) impose secrecy regarding the shareholding of legal entities or the identification of the beneficial owner of income attributed to non-residents. Taking into account the general criteria above, the tax authorities enacted Normative Ruling 1.037 of June 04, 2010 — the Brazilian "blacklist".

the grain, punishing legitimate investments abroad without setting a clear and definitive distinction between actual economic activity and abusive behavior.

The reaction of the Executive Branch to the Supreme Court decision shows that there is no intention of the Brazilian Government to adopt legislation similar to those observed in the US or in the European Union.

Under the current no-deferral universal taxation regime, there is no need to actual CFC rules, since the situation of abuse envisaged by such rules is not present. According to the BEPS Action Plan, "[o]ne of the sources of BEPS concerns is the possibility of creating affiliated non-resident taxpayers and routing income of a resident enterprise through the non-resident affiliate". Law 12,973 does not allow such a situation. If Action 3 aims to strengthen CFC rules, the Brazilian legislation is surely a case where there is no space for "strengthening".

Any form of standardization proposed by the BEPS Project would demand that Brazil "weakens" its current regime, and not the contrary. There is no evidence as to conclude that the Brazilian Government is willing to do so. In any case, it must be clear that the Brazilian rules are not an anti-abuse regime, but rather a general regime, applicable to any and every Brazilian company carrying out activities through subsidiaries abroad.

V. Action 6 and Brazilian SAARs in tax treaties

Brazil has also recently inserted SAARs in tax treaties that may be deemed to be a part of its treaty negotiation policy. It is not clear, however, whether the initiative to include such provisions came from Brazilian negotiators, since one does not find a uniform reading in recent treaties.

For decades, the OECD has sustained that states willing to apply their domestic anti-avoidance legislation to situations within the scope of a tax treaty should negotiate specific provisions in order to do so. As from 2003, however, the organization has changed its position, suggesting that the application of anti-avoidance domestic provisions to situations governed by a tax treaty would not be troublesome, even in cases where the domestic legislation of a contracting party does not provide for the abuse of treaties[28].

Traditionally, Brazilian treaty negotiators were not likely to consider the inclusion of specific anti-abuse provisions when signing a tax treaty. Since 2002, however, tax treaties signed by Brazil provide for limitations on the treaty benefits and for situations in which domestic legislation is considered applicable.

In a couple of treaties, such clauses are much less comprehensive than LOB and PPP clauses found elsewhere, namely within the US treaty framework, and are solely intended to forbid third-country residents to obtain treaty benefits. The treaties concluded with South Africa (2003) and Peru (2006) provide, in general terms, that the treaty benefits shall not be granted to a resident of a contracting state the majority of shares of which is directly or indirectly held by a person who is not a resident in that contracting state, unless the entity concerned develops therein a "substantial business activity" other than holding investments.

[28] On the debates regarding the 2003 Revisions to the OECD Commentaries, see A.Martín Jiménez, The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?, 58 Bulletin for International Taxation (2004); B.J.Arnold, Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model, 58 Bulletin for International Taxation (2004).

In the treaties concluded with Mexico (2003), Israel (2002) and Turkey (2010), much broader clauses were adopted. The treaty with Mexico includes a specific provision that the contracting states may use the mutual agreement procedure in order to deny treaty benefits if it is their opinion that granting those benefits would constitute "a treaty abuse according to its purpose". In the treaty with Israel, such denial does not require the mutual agreement, and "a notice of the application" of the provision to the authorities of the other contracting state is considered sufficient. As for the treaty with Turkey, neither the mutual procedure, nor the referred notice, is necessary to deny the treaty benefits in a situation of abuse.

Apart from the clauses described above, the treaties with Mexico and Turkey also set forth that the provisions of the treaty do not prevent the contracting states from applying their domestic thin capitalization and CFC rules, or "any similar legislation". The treaty with Peru does not mention thin capitalization rules, but includes the broader "any similar legislation" expression. The treaty with Israel includes a provision that solely makes reference to the thin capitalization rules without mentioning other situations.

It is the author's opinion that such references are necessary to make domestic legislation applicable to situations governed by a tax treaty. In case of absence of such clauses, the application of domestic provisions would constitute a treaty override, which is not acceptable under the Brazilian Constitution.

With regard to the PPT or the LOB proposals currently present in Action 6 of the BEPS Project, the author does not consider them desirable in their proposed form, since they entail too much discretion to tax authorities in the application of tax conventions. Moreover, since several Brazilian treaties entail tax advantages, including matching credit provisions, it is not clear that PPT would correspond to the Brazilian treaty policy. Finally, there are some concerns on the legal effect of including Action 6 in a multilateral instrument (Action 15), due to its compatibility with the object and purpose of treaties signed with traditional Brazilian investors. Notwithstanding that, from a Brazilian tax authority perspective, there is no reason to believe that such clauses would be rejected in a negotiation, even though there could be resistance in Congress upon the ratification of the treaty.

III. Common Backgrounds among the BRICS Countries and Issues of Cooperation

After addressing the main aspects of Brazilian legislation which are relevant for the BEPS Project, the present topic approaches similarities with respect to evolutionary aspects of the BRICS treaty policies. Further, it is argued that there is space and need for cooperation between the countries in the context of the digital economy.

1. Common developments of the BRICS countries in tax treaties

China and India have managed to develop two of the largest treaty networks in the international community, having concluded treaties with developed countries, emerging economies and developing countries. Russia[29] and South Africa[30] are also approaching a hundred of tax treaties signed each. The exception in the BRICS countries with regard to the extension of

[29] See, on the Russian treaty policy, D.V. Vinnitskiy. Rossiia v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [Russia in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner, P. Pistone. Chapter 5. IBFD 2015, online Books IBFD.

[30] See, on the South-African treaty policy, P.J. Hattingh. Yuzhnaia Afrika v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [South Africa in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner, P. Pistone. Chapter 8, IBFD 2015, online Books IBFD.

its treaty network is Brazil, which currently holds a relatively small number of 32 tax treaties in force.

While negotiating treaties with the OECD countries during the 1980s[31], China took the position of a capital-importing country, thus bargaining for source-based taxation and tax sparing provisions, which ensured that "the Chinese tax incentives benefit the investors as opposed to the treasury of the residence country"[32]. The same approach was followed by India, which included a tax sparing provision "in virtually all Indian treaties concluded until the 1990s"[33] and South Africa, which would request for tax sparing clauses in its negotiations. Likewise, Brazil has kept a very strong position, demanding not only tax sparing clauses, but also important deviations with respect to the taxation of technical services at source. The exception in this respect is Russia, which, despite negotiating source taxation for certain items of income, includes tax sparing clauses only in a few tax treaties and "their influence on the current regime of cross-border taxation with Russia has been insignificant so far"[34].

The last two decades have brought new trends to the BRICS treaty policies. In the Chinese treaty policy, since 2000, there was a trend towards more anti-abuse and exchange of information provisions and most of the treaties signed with OECD countries during the 1980s were renegotiated[35]. In the renegotiated treaty signed with Germany in 2014, for instance, there is a provision on exchange of information in line with the 2010 OECD-MC, while in the 1985 treaty there were no provisions similar to 26(4) and 26(5) of the 2010 OECD-MC. Another difference in the renegotiated treaty is that the tax sparing granted by Germany for interest and royalty payments has been abolished.

The same trend is observed in India, where treaties are being renegotiated in order to include anti-abuse provisions, "correct aberrations" and provide for exchange of information[36]. Likewise, tax sparing provisions are not as usual as before, not being included in renegotiations[37], and some of the tax sparing provisions of the earlier treaties have already expired, as in the treaty with Germany (1996), which provided for a time limit of 12 years[38].

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[31] Tax treaties were signed with the United States (1984), France (1984), the United Kingdom (1984), Belgium (1985), Germany (1985), Malaysia (1985), Norway (1986), Denmark (1986), Canada (1986), Finland (1986), Sweden (1986), New Zealand (1986), Thailand (1986), Italy (1986), Singapore (1986), the Netherlands (1987), the Czech Republic (1987), Poland (1988) and Australia (1988).

[32] J. Li, The Great Fiscal Wall of China — Tax Treaties and Their Role in Defining and Defending China's Tax Base, 66 Bull. Intl. Taxn. 9 (2012), p. 453.

[33] See D.P. Sengupta. Indiia v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [India in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner and P. Pistone. Chapter 6, IBFD 2015, online Books IBFD, sec.6.3.4.

[34] D.V. Vinnitskiy. E. Pustovalov. Rossiia, tendentsii i igroki v nalogovoi' politike [Russia, in Trends and Players in Tax Policy]. Moscow, Lang et al. eds., Chapter 16, IBFD 2016, online Books IBFD, Sec.16.7.3.

[35] See, e.g., United Kingdom (renegotiated in 2011), Belgium (renegotiated in 2009), Germany (renegotiated in 2014), Canada (renegotiated in 2012), Finland (renegotiated in 2010), Singapore (renegotiated in 2007), Czech Republic (renegotiated in 2009).

[36] See D.P. Sengupta. Indiia v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [India in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner and P. Pistone. Chapter 6, IBFD 2015, online Books IBFD, sec.6.2.1.1.

[37] In the treaties with Finland, Hungary Japan, Malta, Nepal, Norway, Romania, Sri Lanka, Switzerland, Syria and Tanzania no tax sparing provision has been included. One exception is the treaty with Malaysia, which contains a tax sparing provision.

[38] The tax sparing provision has also expired in the treaties with Korea (1986), the Netherlands (1989), Spain (1995), Sweden (1997) and Portugal (2000).

Since 2005, South Africa has also abandoned the policy to request tax sparing in treaty negotiations, by deleting its reservation on Article 23 of the OECD-MC, due to "perceived abusive arrangements, although no such cases have been tested before the South African courts"[39]. Reportedly, this approach was also motivated by the need to refuse requests of including tax sparing provisions by smaller African and Asian countries[40].

Unlike India and China, Brazil has not engaged in renegotiations of its tax treaties. However, there has been an increasing trend towards anti-abuse provisions in tax treaties, and in recent treaties, no tax sparing provisions have been negotiated. There is no clear justification for this approach to tax sparing, being possible to attribute this position to the perception that the contracting States in recent treaties are not traditional capital exporters in their relations with Brazil. As for the other BRICS, Brazil might be strategically refraining from negotiating tax sparing provisions not because those clauses are perceived as leading to abusive behavior, but rather due to the countries' role in the international economy. If tax sparing clauses are aimed at ensuring that benefits granted by the source state are not converted in tax revenues for the State of residence, when negotiating with smaller economies, the other contracting party would be the one expected to ask for a tax sparing provision. However, there is no public information as to whether Brazil has ever refused to grant a tax sparing in its negotiations. On the contrary, the treaty with Spain, which includes a reciprocal tax sparing clause for interests and royalties, denotes that the country would be willing to include such clauses even in its relations with the OECD countries.

On the other hand, the issue of exchange of information has been dealt with more substantially outside of double tax conventions. Apart from several TIEAs signed in June 2015, the Brazilian Congress approved the Intergovernmental Agreement (IGA) for the implementation of the FATCA. The IGA approved is based on Model 1A, whereby the financial institutions exchange information with their own Governments, which further carry out the exchange of information with the other contracting State. Brazil has also signed and approved the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

2. The challenges of the digital economy

The digital economy has significantly changed several aspects of economic transactions and structuring of value chains, which are relevant for taxation. As a consequence, it is obvious that problems arising from the digital economy cannot (and should not) be solved by means of interpretation of the old rules, as the OECD has for long tried to do, but require a new form of allocation of taxing rights[41]. The need for physical presence to attract jurisdiction is a tremendous anachronism on which developed countries conveniently rely. Therefore, scholars have recently provided relevant contributions to "justify the exercise of the taxing

[39] P.J. Hattingh. Yuzhnaia Afrika v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [South Africa in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner, P. Pistone. Chapter 8, IBFD 2015, online Books IBFD, sec.8.3.4.

[40] P.J.Hattingh. Yuzhnaia Afrika v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [South Africa in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner, P. Pistone. Chapter 8, IBFD 2015, online Books IBFD, sec.8.3.4.

[41] See R.A. Galendi Jr. and G.S. Galdino, Desafios da Economia Digital: do problema hermenêutico ao desequilíbrio na alocação de jurisdição, In: M.L. Gomes and L.E. Schoueri (coord.), A tributação internacional na Era Pós-BEPS: soluções globais e peculiaridades de países em desenvolvimento, vol. 3 (Lumen Juris, Rio de Janeiro, 2016).

jurisdiction by the market country" in respect of income arising from the digital economy[42]. In the same sense, China and India have engaged more intensively in adopting the concept of permanent establishment to the digital economy[43].

The Final Report of Action 1 is the clearest signal that the BEPS Project should not be taken as final for the purpose of debating the allocation of taxing rights in the digital economy. OECD's trend towards understating the relevance of the digital economy is repeated in Action 1, which considers that "broader direct tax challenges currently raised by the digital economy are expected to be mitigated once the BEPS measures are implemented".

Action 1 considered some responses to the challenges of the digital economy: i) the creation of a new nexus to cover situations in which there is significant digital presence in the source State; ii) the enactment of withholding taxes in digital economy transactions; iii) the charging of an equalization levy, which would be levied in cases of significant digital presence. Such proposals would surely affect the allocation of taxing rights. However, even though they were examined in the context of Action 1, the Final Report has not recommended any of them, because "measures developed in the BEPS Project will have a substantial impact on the BEPS issues previously identified in the digital economy". As concluded by the Final Report, "certain BEPS measures will mitigate some aspects of the broader tax challenges", and "consumption taxes will be levied effectively in the market country"[44].

Essentially, while concrete proposals on direct taxation in the digital economy were expected, the Report changed the subject, recommending countries "to apply the principles of the International VAT/GST Guidelines for the collection of VAT on cross-border B2C supplies of services and intangibles and consider the introduction of the collection mechanisms included therein". In summary, the only proposal actually recommended by the BEPS Project is not a measure on direct taxation[45]. With respect to the other three proposals, which would in fact influence the allocation of jurisdiction, the Final Report considers that countries could "introduce any of the options in their domestic laws as additional safeguards against BEPS, provided they respect existing treaty obligations, or in their bilateral tax treaties"[46].

The BEPS Project could have been an opportunity to acknowledge the importance of the demand for the creation of value. However, the Project has chosen to consider only the supply side, and refused measures aimed at implementing a more comprehensive notion of the creation of value. The Project has also shown that the anti-avoidance rhetoric was developed as an effective means to avoid relevant debates on allocation of jurisdiction. The most extreme

42 P. Hongler, P. Pistone. Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy. IBFD White Papers, Amsterdam, IBFD, 2015, p. 18.

43 See P.J. Hattingh. Yuzhnaia Afrika v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [South Africa in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner, P. Pistone. Chapter 8, IBFD 2015, online Books IBFD, sec.8.3.2.

44 OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 — 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 148. Available at: http://dx.doi.org/10.1787/9789264241046-en , accessed on July 22, 2016.

45 For the South-African developments on the digital economy, see P.J. Hattingh. Yuzhnaia Afrika v BRIKS i vozniknovenie mezhdunarodnoi' nalogovoi' koordinatsii [South Africa in BRICS and the Emergence of International Tax Coordination]// Edited by Y. Brauner, P. Pistone. Chapter 8, IBFD 2015, online Books IBFD, sec.8.3.2.

46 OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 — 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 148. Available at: http://dx.doi.org/10.1787/9789264241046-en , accessed on July 22, 2016.

example is that one of the most relevant actions of a Project dealing with “profit shifting” ended up presenting a solution based on indirect taxation.

Scholars have shown that there are feasible alternatives to substantially change the allocation of taxing rights as a response to fundamental changes brought by the digital economy[47]. These changes encompass recognizing factors that “arise in the market country and that can influence the performance of business and value creation arising in such context”[48]. In fact, as argued by Brauner, “source has never been about moral or economic correctness, but rather about legitimacy and practicality”[49]. Making such changes happen demands cooperation among the countries that could benefit from such proposals, which include not only the BRICS countries, but also the developing world as a whole.

IV. Conclusions

From the Brazilian perspective, it is clear that, while aimed at tax administrations, the BEPS Project has failed to bring more incisive statements on the protection of taxpayers' rights. Even though there are recommendations to strengthen anti-abuse legislation, the Action has served to justify excessively harsh measures, which bring more harm than good. Excessively discretionary measures are not compatible with the reality of the developing world, and the need to objectively control the acts of the tax administration is central even for emerging economies such as Brazil.

The main challenge for the BRICS countries is to adhere to standards of combating abusive behavior and simultaneously keep an independent policy in their relations with capital exporting countries. Combating abusive behavior should never be confused with allocating taxing rights. Signing treaties with smaller economies implies a completely different scenario, where the BRICS countries face the very same pleads they made during the 1970s and 1980s. The question is whether the BRICS countries will adopt the negotiation positions of a developed country or whether they will be able to meet the developing world halfway.

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[47] See Y. Brauner, A. Baez. Withholding Taxes in the Service of BEPS Action 1: Address the Tax Challenges of the Digital Economy. Amsterdam, IBFD White Papers, IBFD, 2015.

[48] P. Hongler, P. Pistone. Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy. Amsterdam, IBFD White Papers, IBFD, 2015, p. 19.

[49] Y.Brauner, What the BEPS, 16 Florida Tax Review 2 (2014), p. 68.

SUMMARY OF THE REPORT AT THE PLENARY MEETING OF THE EUROPEAN-ASIAN LAW CONGRESS (10TH SESSION, 9 — 10 JUNE 2016)

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Last year I spoke about the influence of the BRICS on the BEPS Project. This Project was completed and endorsed by G20 in November 2015. The new challenge for global tax law is now its effective, fair and homogeneous implementation around the world. Some States question its legitimacy, others refuse its technical content, and others are actively involved in the implementation process. Developing countries timidly express the first view. The US for most aspects belongs to the second category. The EU and Russia are good examples of the third category.

The focus of my selected remarks for this plenary session is on how the European Union intends to implement the BEPS Project and the role that the BRICS countries can play once more in this scenario. The detailed analysis is a matter to discuss in the tax expert group session.

In January 2016, the EU Commission proposed a package for implementing the BEPS Project in the European Union through supranational law of the European Union.

The key content of the package is an EU Directive, which includes six measures. I would like to mention three of them.

First, it introduces a common statutory general anti-avoidance clause throughout the European Union.

Second, it introduces a common CFC legislation. Such a measure allows the EU Member State of residence of parent companies to tax income of their foreign subsidiaries established in low-tax jurisdictions.

Third, it introduces a switchover clause. Such a measure allows the EU Member State of residence to change the method for relieving double taxation from exemption to credit in respect of income sourced in low-tax jurisdictions or preferential tax treatment.

Through the second and third measures, the EU Member State of residence can unilaterally compensate lower taxation in the country of source, regardless of whether such lower taxation is connected with situations of tax avoidance or aggressive tax planning.

Such measures apply to relations with non-EU countries, but not to those between two EU Member States.

Let us imagine an EU resident company, which invests in a special economic zone in Vladivostok, Montevideo, Lodz or Vigo. **On the one hand**, the EU State of residence of the investor may wash out (compensate) tax incentives granted by the former two zones in respect of genuine business activities; **on the other hand,** no compensation will instead apply to investment in the latter two ones. This may encourage investors to invest their capital within the European Union.

For such reasons, I consider these two measures as the latest expression of legal protectionism made in the European Union. As such, they are in my view potentially incompatible with WTO law.

The research groups on the BRICS countries and special economic zones are currently working on technical arguments that can contribute to implement the positive sides of the BEPS Project, which are to coordinate international taxation and allow taxation in the country of value creation.

As technical experts, I think we should stand united to promote international tax justice and work for the BRICS law institute to give the BRICS leaders food for thought and contribute to fairness in global taxation.

If you are curious to learn more about this, join our tax expert group session, or wait for the output in the final summary.

HISTORY OF TAXATION OF INCOMES DERIVED FROM IMMOVABLE PROPERTY IN CROSS-BORDER SITUATIONS[1]

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1. Introduction

Article 6 of the OECD Model deals with the incomes from immovable property derived by a resident of a contracting state from this property situated in the other contracting state.

According to Article 6(1) of the OECD Model (as well as the UN Model), income derived by a resident of one contracting state from immovable property situated in the other contracting state may be taxed in the latter state. The respective rule is known as the situs principle which secures attribution of the primary taxing right to the situs state[2]. Depending on the method for the avoidance of double taxation (see: Article 23 of the OECD Model / UN Model), the state of residence has either to exempt the respective income or grant a credit for the tax paid in the situs state.

Since the amendments of the OECD Model and Commentary in 1977, the allocation rule of Article 6 has been restricted to bilateral scenarios and is currently inapplicable to those situations where an immovable property is located in a third or in the residence state[3]. The same approach is reflected in the UN Model and Commentary[4].

The subject matter of Article 6 of the OECD Model has a complex relationship with the subject matter of Articles 5 and 7 (and Article 14 in the UN Model), 13, 21 and 22[5]. In particular, the definition of immovable property in Article 6 is also adopted by Articles 13(1) and 22(1).

In the practical sense, the question of the relationship between Articles 6 and 7 is one of the most relevant. In particular, one could suppose that the absolute priority of the situs principle (reflected in Article 6), in case of broad interpretation, may lead to unrestricted

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[1] This Article was prepared in the framework of a wider project in cooperation with the IBFD (2014 — 2016).

[2] See: E. Reimer. Dokhody ot nedvizhimogo imushchestva [Income from Immovable Property]. Article 6 OECD Model Convention, in M. Lang, P. Pistone, J. Schuch, Claus Staringer (eds), Source versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives. 2008, p.1.

[3] Para. 1 of the Commentary to Article 6 of the OECD Model.

[4] Para. 1 of the Commentary to Article 6 of the UN Model.

[5] See, in particular, R. Papotti and N. Saccardo. Interaction of Articles 6, 7 and 21 of the 2000 OECD Model Convention// Byulleten' Mezhdunarodnoi' nalogovoi' dokumentatsii [Bulletin of International Fiscal Documentation]. 2002, p. 516; B. Arnold. At Sixes and Sevens: The Relationship between the Taxation of Business Profits and Income from Immovable Property under Tax Treaties// Byulleten' Mezhdunarodnoi' nalogovoi' dokumentatsii// Bulletin of International Fiscal Documentation, 2006, p. 5.

application of Article 6 in place of other tax treaty provisions[6]. However, the current wording of Article 6 of the OECD/ UN Model is more aimed at securing the taxing right of the situs state than intends to wholly separate income from immovable property from the rules of Article 7 and other provisions of the OECD / UN Model. As we can see further, such an approach may also be confirmed by the analysis of history of the development of the Model conventions.

2. Policy of Article 6 of the OECD / UN Model

Everyone seems to agree that income from immovable property in a state is taxable there. As E.Reimer argues, the assignment of primary taxation to the state of situs is as old as wealth, income and inheritance tax treaties themselves. More than any other distributive principles in tax treaty law, it has always been taken for granted that the state of situs has the "best right" to control the land and to tax both itself and all incomes derived therefrom[7]. The same approach may be seen in the very "early" international tax law literature[8].

In particular, K.Neumeyer in 1914 mentioned the situs principle in cross-border taxation as the oldest one and made a reference to the book of the XII century of Bologna by Professor Jacobus who examined this issue in regard to taxation of immovable property in Bologna and Ferrara owned by foreigners[9].

Taking into account that principles of cross-border taxation (as well as provisions of the OECD Model) have a long history and many of them were elaborated at the time when research and technology were considerably less developed comparing to nowadays, one could suppose that the situs principle[10] may imply, first of all, a physical presence in the territory of a contracting state[11]. At the same time, during the recent years, it is possible to identify an evident development in the concept of the situs principle in Articles 5 and 8. In particular, some authors argue that in the context of the permanent establishment rule the territorial link has weakened over time[12]. This trend is closely connected with the development of telecommunication activities, Internet and space technologies and E-commerce (see: Action Plan on Base Erosion and Profit Shifting, 2013).

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6 B. Arnold. At Sixes and Sevens: The Relationship between the Taxation of Business Profits and Income from Immovable Property under Tax Treaties// Byulleten' Mezhdunarodnoi' nalogovoi' dokumentatsii// Bulletin of International Fiscal Documentation. 2006, p. 5.

7 E. Reimer. Income from Immovable Property (Article 6 OECD Model Convention), in M. Lang, P. Pistone, J. Schuch, Claus Staringer (eds), Source versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives, Taxmann Publications, 2010, p. 3.

8 A. Garelli. Il Diritto Internazionale Tributario, Torino — Roux Frassati e Co, 1899; Torres Campos M. Elementos de derecho internacional privado, Madrid, Librería de Fernando Fe, I Vol. (La tercera edición), 1906, pp. 89 — 100; G. Lippert. Das Internationale Finanzrecht. Eine systematische Darstellung der internationalen Finanzrechtsnormen, Triest — Wien — Leipzig, M. Verlag. Quidde, 1912; G. Salvioli. Le doppie imposte in diritto internazionale, Napoli, Stab. Tip. Luigi Pierro & Figlio (via Roma, 402) 1914; E. Isay. Internationales Finanzrecht. Stuttgart — Berlin, W. Verlag. Kohlhammer, 1934, etc.

9 K. Neumeyer. Internationales Finanzrecht, Zeitschrift für Internationales Recht, XXIV Band, München und Leipzig, 1914, pp. 186 — 187.

10 In taxation of income derived from immovable property.

11 Historically, the situs principle was considered as manifestation of the principle of territoriality in international taxation of immovable property and incomes derived from this property. See, e.g., Torres M. Campos. Elementos de derecho internacional privado, Madrid, Librería de Fernando Fe, I vol. (La tercera edición), 1906, pp. 89 — 100.

12 Schaffner. How fixed is a permanent establishment? 2013, p. 20.

Indeed, the hallmark of a global economy is greater mobility of economic transactions and economic agents[13]. Traditionally, the economists disentangled the idea of situs (or residence) from the idea of origin. Origin (source) is the specific place where income is produced[14]. However, under contemporary conditions, at a fundamental level, one can always argue that it makes little sense to attempt to fine-tune a definition of PE, rooted in concepts of physical presence, for a universe of transactions in which physical presence is often irrelevant[15]. This led to the development of the worldwide discussion of the concept of "virtual-PE". In particular, many scholars argue that it is possible that a server would satisfy the general rule of Article 5(1) of the OECD Model and, thus, constitute a PE. However, the location of the server is easy to manipulate. There is nothing to prevent it from being located in a low tax jurisdiction or a tax haven and not in the source country[16].

The above-mentioned difficulties with the transformation of the traditional concept of PE in the conditions of modern technologies let us suppose that the traditional concept of "immovable property" (originated from property and civil law) may also be an object of development in international tax law.

Notwithstanding the said above, it seems that in case of Article 6 the territorial link between income and respective property was and remains highly important. Consequently, Article 6 of the OECD/ UN Model remains the most unchanged and stable part of the Models and bilateral tax treaties.

3. History. Article 6 of the OECD / UN Model

Compared to other distributive rules, Article 6 of the OECD Model has been subject to relatively few changes and amendments over the decades[17]. However, the existing League of Nations and OEEC/OECD materials let us identify several stages in the development of the rules for taxation of incomes derived from immovable (real) property.

3.1 League of Nations and Draft Conventions, 1927 — 1935

In April 1927, a report was presented by the Committee of Technical Experts on double taxation and tax evasion[18]. This report consisted of four draft conventions with commentaries, in particular, one of them was the Draft Convention for the Prevention of Double Taxation. That Draft Convention contained an allocation rule for income from immovable property in Article 2 ("Impersonal taxes"):

Article 2(1): The income from immovable property, i.e. which corresponds to the actual or presumed rental value of such property, as well as any other income from such property

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13 See: Kobrin. Territoriality and Governance of Cyberspace, Journal of International Business Studies, 2001, vol. 32, No. 4, pp. 687 — 704; Tanzi, Globalization, Tax Competition and the Future of Tax Systems, International Monetary Fund, Working Paper (Washington DC), etc.

14 See in detail: Mukherji, Governing the taxation of digitized trade, Technical Report Working Paper No. 2002/05, ASARC, RSPAS, ANU, 2002.

15 Shubhajit Basu, Global Perspectives on E-Commerce Taxation Law, 2007, Ashgate, p. 126.

16 Shubhajit Basu, Op. cit. p. 126.

17 See some additional explanation of this fact: Reimer Ekkehart, Income from the Immovable Property (Article 6 OECD Model Convention), Source versus Residence, Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer (eds.), Taxmann, p. 3.

18 League of Nations. Doklad "Ob izbezhanii dvoi'nogo nalogooblozheniia i ukloneniia ot uplaty nalogov" [Report "Double Taxation and Tax Evasion"]. C.216.M.85. 1927. II.

which is not covered by Article 5, shall be taxable in the State in which the property in question is situated.

Article 2(2): This rule shall apply to income from mortgage or other similar obligations.

The situs principle and taxation of income from immovable property situated in the third state.

Article 2 of the 1927 Draft Convention adopted (as well as 6 of modern model conventions) the situs principle. However, Article 2 did not limit the scope of its application to cases where the taxpayer is a resident of a contracting state and immovable property is situated in the other contracting state[19]. Thus, Article 2 of 1927 Draft Convention could be applied to the situations where the income was derived from the immovable property situated in the third state.

Permanent Establishment Principle vs. Situs Principle

Another important point was that Article 2 of the 1927 Draft Convention gave the taxing right to the state in which the immovable property is situated only if the income was not derived from industrial, commercial or agricultural undertaking through a permanent establishment. In the latter case, Article 5 of the 1927 Draft Convention gave the taxing right to the state in which the permanent establishment is situated. Thus, Article 2 was completely subsidiary to Article 5[20]. In the modern conventions, we see that the situs principle (Article 6) takes precedence over the permanent establishment principle (Articles 5 and 7) and the situs state has the right to tax such income, even if income is earned by way of using immovable property in the exercise of a business[21].

General scope of Article 2 of 1927 and 1928[22] Draft Conventions

The general scope of Article 2 of the above-mentioned Draft Conventions was not quite certain, as there was no definition (at the international level) of the term "immovable property". However, this approach was based on the idea of the border (in the logical and economic sense) between income from immovable property and business income, which was "derived from industrial, commercial or agricultural undertakings". The first one may correspond to the actual or presumed rental value.

It is also important (in order to compare with the current situation) to underline that the scope of the "income from immovable property" rule covered the income from mortgage,

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[19] This limitation of Article 6 of the OECD Model Convention first appeared in the 1997 OECD Model Convention and remained in the subsequent models. See in detail: Jessica Yu-Hui Hsu, "Article 6 Income from Immovable Property" in Tomas Ecker & Gernot Ressler, eds, History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties, Vienna, Linde, 2011, p .295.

[20] Jessica Yu-Hui Hsu, "Article 6 Income from Immovable Property" in Tomas Ecker & Gernot Ressler, eds, History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties, Vienna, Linde, 2011, p. 296.

[21] Michael Lang, Introduction to the Law of Double Taxation Convention, Vienna, Linde, 2010, p. 86.

[22] In October 1928, two additional texts of draft conventions for the prevention of double taxation were elaborated and included in the respective report presented by the General Meeting of Government Experts. The principle of taxation of income from immovable property reflected in these two additional texts follows the approach of the 1927 Draft Convention. See: League of Nations, Report "Double Taxation and Tax Evasion", C.216.M.85. 1927. II; League of Nations, Report presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion", "Text of Draft Conventions No.1a, 1b, 1c", 1928, C.562.M.178. 1928. II.

royalties from mines, quarries or natural resources, gains derived from the alienation of immovable property, and capital represented by immovable property[23].

This stage of the development of the respective distributive rule precedes the current diversification of tax treatment of different incomes connected with immovable property (see: Article 6, on the one hand, and Articles 11 (interest), 12 (royalties), 13 (capital gains), 21 (other income) and 22 (capital), on the other hand, in the modern 2014 OECD Model Convention).

Further development and the activity of the LN Fiscal Committee in 1929-1935

In 1928, based on the suggestion of the Committee of Technical Experts, the LN Fiscal Committee was set up as a part of the League's organization; this committee also discussed the Draft Convention for avoidance of double taxation during some of its sessions, in particular, in 1929, 1930, 1930, 1931, 1933 and 1935. Thus, in 1931, a draft of Plurilateral convention for the prevention of double taxation of certain categories of income was presented and included in the respective report of the session of the Committee[24]. In general, the convention reproduced the approach to taxation of income from immovable property reflected in the 1927 and 1928 Draft Conventions. However, the most interesting changes were proposed in 1933 and 1935; in accordance with them, the Article on immovable property should provide for that "business income shall not include …income from immovable property… {and} income from mortgage, from public funds, bonds (including mortgage bonds)…"[25]. This made the distributive rule on income from immovable property closer to the current approach of the OECD/UN Model. However, the drafts of 1933 and 1935 did not much influence the subsequent models discussed in 1943 and 1946.

3.2 Mexico 1943 draft and London 1946 draft Conventions

Article 2 of the Mexico 1943 draft and London 1946 draft Conventions provided for that "income from real property shall be taxable only in the State in which the property is situated". Thus, the principle of situs prevailed and the residence state did not receive any taxable right in respect of this category of income.

Besides, some specific categories of income from immovable (real) property were regulated by Articles 3 ("income from mortgages"), 10 ("royalties from immovable property or in respect of the operation of a mine, a quarry, or other natural resource") and 12 (gains derived from the sale) of Mexico and London draft Conventions. These articles, as Article 2, were fully based on the principle of exclusive taxing right of the situs state. In these circumstances, such a classification of incomes from immovable property had quite a limited legal meaning.

Another interesting point was connected with the issue of interaction of business income and income from immovable property. As it was indicated in the Commentary on Article 2 of the Mexico and London drafts, Article 2 does not apply to the cases where income is

[23] Jessica Yu-Hui Hsu, "Article 6 Income from Immovable Property" in Tomas Ecker & Gernot Ressler, eds, History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties, Vienna, Linde, 2011, p. 296.

[24] League of Nations, Report to the Council on the Work of the Third Session of the Committee, 1931, C.415.M.171. 1931. II.A, Appendix I, p. 10.

[25] See: League of Nations, Report to the Council on the Work of the Fourth Session of the Committee, 1933, C.399.M.204. 1933. II.A, Annex. Draft Convention and League of Nations, Report to the Council on the Work of the Fifth Session of the Committee, 1935, C.252.M.124. 1935.II.A, Annex. I.

derived from exploration of lands, buildings, and sub-soil as a part of a business, including mining, forestry and agriculture but Article 4 ("business income") should apply under such circumstances[26]. So, in the above-mentioned approach, we see the replication of the principle reflected in the 1927 Draft convention and, consequently, the proposal of the 1935 Draft convention was not supported.

3.3 Organization for European Economic Cooperation, 1948 — 1963

In 1948, the Organisation for European Economic Cooperation (OEEC) was founded, and since the 1950s this institute, as it is well known, started to play a significant role in the future development of model tax conventions. In 1955, a committee of experts on taxation was created in the framework of the OEEC[27]. The first results of the work of the committee appeared in 1957[28], the respective report was mostly based on the London 1946 draft convention; however, it presented some changes in cross-border tax treaty policy. In particular, some elements of a general definition of the term "immovable property" was included in the draft convention (the draft also used the reference to domestic law of the situs state).

Besides, from the terminological point of view, experts differentiated between (1) "income derived from the direct use" of immovable property, (2) income from letting, (3) "alienation of immovable property", but provided for the same tax treatment.

Another principle change was connected with the attempt of the implementation of the modern approach in accordance with which the situs principle prevailed on business income (taxation of immovable property rule should apply to immovable property of commercial, industrial or handicraft enterprises, etc.).

These changes were mostly approved in 1958 and 1959 with some technical amendments, in particular, it was explicitly mentioned that the ships and aircraft should not be regarded as immovable property for tax treaty purposes[29]. Finally, the rule on taxation on income from immovable property was scheduled in 1961 as Article 6.

On 30 September 1961, the OEEC was reorganized into the Organisation for Economic Cooperation and Development (OECD) which completed the elaboration of the respective convention on 1 July 1963. The only important change for Article 6 at this period was connected with decisive separation between taxation of income derived from the immovable property, on the one hand, and derived from the alienation of the immovable property, on the other hand.

3.4. OECD after 1963

Since 1963 Article 6 of the OECD Model has not had too many changes and remained one of the most stable Articles of the OECD Model. It is interesting that at the first stage of existence of the convention, the OECD Member States mostly discussed the issues of correlation of Article 6 and Article 7 ("business profits" and "agricultural or forestry

[26] League of Nations, Report on the Work of the Tenth Session of the Committee, 1946, C.37.M.37. 1946. II. A.

[27] OEEC, Note of the Council of creation of a committee of experts on taxation, July 11, 1955, C (55) 180.

[28] OECC, Report on taxation of income from immovable property, Working party No. 9 of the Fiscal Committee, October 28, 1957, FC/WP9 (57) 1.

[29] OEEC, Second report on taxation of income from immovable property, Working party No. 9 of the Fiscal Committee, May 03, 1958, TFD/FC/36; OEEC, Final draft of the Article proposed by Working Party No 9, September 25, 1958, TFD/FC/44 (1st revision); OEEC, Final text of Articles 5 to 15, June 11, 1959, TDF/FC/69.

enterprise"), Article 6 and Article 13 ("capital gains")[30]. However, in the textual sense, the most important change was connected only with the interpretation of the residence criteria in Article 6. As it is well known, Article 6(1) of the 1963 OECD Convention did not contain the reference to the residence state and de facto provided for the possibility of the worldwide taxation of the situs state for incomes derived from immovable property. However, the revised text of the 1977 OECD Model ascertained that the property in question must be located in the state which is not the taxpayer's state of residence. Thus, income derived by a resident of the contracting state from this state or a third state should fall under Article 21, but not 6 of the Model[31].

[30] Jessica Yu-Hui Hsu, "Article 6 Income from Immovable Property" in Tomas Ecker & Gernot Ressler, eds, History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties, Vienna, Linde, 2011, pp. 303 — 304.

[31] OECD, Second Report of Working Group No. 15, September 12, 1975, CFA/WP1 (75) 5.

THE LOGIC AND ISSUES OF INTERNATIONAL REGIONAL TAX INTEGRATION

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Abstract: The article is devoted to the issues of international regional tax integration. The international economic integration has two mainstreams: global and regional economic integration. The global tax integration is concerned only with double taxation matters there while the regional tax integration aims at procuring four fundamental freedoms of the common market and goes far beyond the elimination of double taxation. The legal solution for both global and regional international tax integration cannot be founded on the base of traditional conflict of laws method (sometimes called a collision technique). Only the substantive law instruments meet the needs of both types of tax integration. The experience of international regional tax integration shows the examples of integration (or community) tax law system formation, which include both supranational and national sources of law. The tax harmonization is usually started with indirect taxes and indirect taxes harmonization reaches the highest level. The tax harmonization covers tax administration issues. The direct taxes are usually harmonized later and only with reference to selected issues. Taxes are part of sovereignty which is vested in a particular state therefore supranational entities do not have their own tax systems.
Keywords: tax harmonization, international economic integration, the European Union, European tax law, community tax law, international tax law, tax administration, indirect taxes, VAT, excise duties, taxes on income and capital.

International economic integration including the tax integration is one of the hot topics in the contemporary academic world.

Generally speaking, international economic integration has two mainstreams: global and regional economic integration.

Taxes can constitute tariff and sometimes non-tariff barriers for free trade. Therefore global economic integration includes global tax integration, but only on a few issues. The international global tax integration is mostly concerned with the problem of multiple or double taxation in order to develop free trade around the world.

The idea of free trade is considered the most progressive since the beginning of the XX century. The idea of free trade implies the abolishment of tariff and non-tariff barriers for the trade between the countries. By the beginning of the XXI century the idea of free trade was

recognised around the world, however, the barriers for trade even in goods and services are again becoming the virtual practice of the states. According to the data of the Global Trade Alert, in 2009, there were 257 barriers registered and far less measures of liberalisation were identified. After the crisis of 2008, the state practices around the world became rather protectionist than liberal.

Notwithstanding all the back steps, the international global economic integration is in process and the beginning of the XXI century does not look like the beginning of the XX century in terms of global trade. With the recognition of the idea of free trade, the tax burden in international trade in goods and services is considerably alleviated. The most successful steps in this field were undertaken in the framework of the General Agreement on Trade and Tariffs of 1947 which became part of the legal system of the World Trade Organisation. The burden of income and capital taxes was alleviated by the net of multilateral and bilateral tax treaties based on the models of international organisations: the OECD Model Tax Convention on Income and on Capital and the UN Model Convention.

The legal solution for the transboundary tax burden alleviation cannot be founded on the traditional conflict of laws method (sometimes called a collision technique). The tax law of any particular state is a classical example of public law. Therefore, the courts and state authorities of one state never apply tax law of other states. International global tax integration can use only substantive law instruments, like treaties and conventions. At the same time we do not have enough basis for "international tax law", because all international documents in international global tax integration refer to tax systems of particular states. International documents do not impose taxes and cannot directly change tax regulation. They can only address to the sovereign will of the states to follow their international obligations. Politically, states are reluctant to agree on fiscal matters. One of the reasons is that benefits of global tax integration are deferred far beyond any political mandate. The drawback of the protectionist approach shows that global tax integration has limited and modest results.

In the regional economic integration, taxation plays a far more active and important role. Taxation plays an important role in economic integration of states. The international regional integration of states is the contemporary way of creating interstate unions. Interstate unions, in a wide sense, include communities, commonwealths, confederations and many other forms. Interstate unions are created by formally or virtually independent and sovereign states which give some of their powers to supranational authorities.

Interstate unions have a long history and even ancient forms of interstate unions like unias, empires, protectorates, etc. could not become feasible without tax harmonization. Even now we can recognize the traces of former tax integration.

There are quite a few examples of international regional economic integration in the contemporary world and tax integration is always their inherent part. The contemporary examples include the Andian Community[1], the South-African Economic Community[2], and the European Union[3]. The issues of tax integration are becoming more important for Russia due to its membership in the Eurasian Economic Union (EEC).

The regional economic integration usually means that the states set closer economic and political relations due to the common interests, common problems or vicinity. There should

[1] Available at: http://www.comunidadandina.org .
[2] Available at: www.sadc.int .
[3] Available at: http://europa.eu/ .

be some true and naturally existing circumstances driving the economic integration and sometimes making the economic integration inevitable. Therefore, the tax integration depends not only on political willingness, but on virtual conditions. In case of regional economic integration, states are usually willing to include tax integration in their agenda and follow their obligations. International regional tax integration has some obvious incentive pushing it in motion.

As with international global tax integration, regional tax integration is achieved on the basis of the documents on substantive law (not the conflict of laws mechanisms). Substantive law documents include unified documents, treaties, recommendations, model laws, etc. The regulation of the tax integration can usually be found in internal legislation of the states, interstate documents and the documents of supranational institutions. The interrelation and hierarchy of these documents is complicated and ambiguous. In the tax law literature, the whole system of those regulations is called integration tax law or community tax law[4].

Usually, the contemporary regional economic integration goes through several stages. The simplest form of integration is the zone of preferential trade. The next stage is the customs union. The third integration stage is the common economic area (common market). The common market usually warranties not only the freedom of goods movements but also freedom of services, capitals and labour movement. Once the common finance and monetary policy becomes feasible, the development of regional economic integration can get to the stage of the economic union and envisage the prospective of common currency. The economic union is considered to be the base for further political union with unified internal and foreign policy. Further economic integration may lead to the foundation of a confederation or even federation.

The tax integration comes to the scene on the stage of customs union. Above other issues in the agenda of tax integration are the taxes related to transboundary transactions — indirect taxes in the usual tax law terminology. The taxation of income and capital — direct taxes — usually become an issue later and can never be totally harmonized.

The European Union (EU) including the previous steps of integration (European Communities) gives us a good example of tax integration development. We should remind here that the European Union was initially based on three communities: the European Coal and Steel Community (ECSC) (the founding treaty expired in 2002), the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom). The communities were incorporated in the European Union and constituted "the first pillar". The other two pillars are: the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters.

Originally, the integration tax legislation was within the European Economic Community. The legal system of the contemporary European Union absorbed the integration tax law of the EEC. Some of the documents of the EEC are still in force, although new documents were adopted on the bulk of issues.

The integration tax law of the European Union, apart from the harmonization of taxes, was amplified with tax administration issues, including mutual assistance of tax authorities. The sources of integration law of the EU include: the founding treaties of the communities and the European Union, regulations, directives, decisions of supranational authorities and

[4] See: G. Tolstopyatenko. Evropei'skoe nalogovoe pravo: sravnitel'no-pravovoe issledovanie [The European Tax Law: Comparative Legal Study]. Norma Publishing House, Moscow, 2001.

the rulings of the European Court of Justice (ECJ). In fact, all the sources are involved in the integration of tax systems. The integration tax law includes the national tax legislation in a complicated interaction with the supranational documents. From the practical point of view, in order to get an idea of VAT taxation of certain supplies, first of all, one should address the legal system (including legislation, rulings and other sources) of the member state where the supply takes place (for example, the Value Added Tax Act of the UK) and then the directives and other sources of the EU, including the decisions of the ECJ. As we have already noted, some of the directives originally issued within the EEC are in force and still a part of the EU legislation.

Originally, the EEC integration tax legislation had one of the instruments for procurement of fundamental freedoms of the common market: freedom of goods movement; freedom of services movement; freedom of labor movement and freedom of capitals movement.

This orientation to the procurement of four freedoms remained in the EU context. As on the previous stages of integration, currently the priority is given to the freedoms of goods and services movement, therefore the most harmonized taxes are the indirect taxes.

The indirect taxes (turnover taxes, sales taxes, VAT and excises) were the first to be harmonized. The unified taxable base, principles, etc. were defined very early, while harmonization of direct taxation still does not go beyond some selected issues.

The first documents on the harmonization of turnover taxation included: Council Directive 67/227/EEC of April 1967 on the harmonization of legislation of the Member States concerning turnover taxes (the First Directive), Council Directive 77/388/EEC of May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (the Sixth Directive), Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover tax — Arrangements for the refund of value added tax to taxable persons not established in Community territory (the Thirteenth Directive).

In 2006, the new directive on VAT was adopted: Council Directive 2006/112/EC on the common system of value added tax.

The harmonization of excises was related to the removal of customs control within the EEC and the EU. Firstly, the integration tax legislation defined the excise goods, taxable base, minimum rates and calculation methods. Further harmonization was structured with reference to particular excise goods categories.

The excises on tobacco, for example, were harmonized with the following documents: Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes; Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes; Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

In respect of taxation of alcohol there were the following documents: Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages.

The excise taxation of mineral oils was also harmonized in 1992 by Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils and by Council Directive 92/82/EEC of 19 October 1992 on the approximation

of the rates of excise duties on mineral oils. In 2003, Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity was adopted.

In 2008, the harmonization of excises reached the systematization stage and new Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty was adopted repealing Directive 92/12/EEC.

The direct taxes are not so harmonized in the EU as indirect taxes. Only selected issues are covered by a limited number of directives. The main directives on direct taxation are: Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Council Directive 2003/49/EC of 3 June 2003 on the common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments. The names of these directives show how restricted the scope of this integration legislation is. It should be added, however, that some of the harmonization problems in the direct taxation are sorted out on the basis of the general principle of non-discrimination which arises from the founding documents of the EU and is widely applied by the ECJ, but it does not amount to the unified tax base, calculation methods and rates.

Nowadays, there is an initiative on the common consolidated corporate tax base which is discussed in the EU. However, no serious steps are being undertaken, so the main question is if the harmonization of the tax base is still feasible. In general, the scarce number of issues already harmonized for direct taxation is closely related to freedoms of capital and labour movement. It might be the case that full harmonization of direct taxation is not required for the procurement of four fundamental freedoms and therefore not supported by the Member States.

As we have mentioned, the EU brought new forms of cooperation (the second and third pillars) which included further cooperation of fiscal authorities of the member states in the field of tax administration. We can mention here the following documents:

Council Regulation (EU) No.904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;

Council Regulation (EU) No.2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties and Council Directive 2004/106;

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation;

Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures;

and the Arbitration Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (the Convention itself and the protocols). The Convention re-entered into force in 2004.

The logic of tax harmonization was elaborated from the experience of international regional economic integration and we could see it by the example of the EU. The indirect taxation is the first area to be harmonized as the states are mostly interested in facilitating freedoms of movement of goods and services. The cooperation of fiscal authorities and other

tax administration issues are addressed on the first stages in relation to indirect taxation, but the consistent basis for tax administration is considered, once the deep political integration process is in place. The harmonization of direct taxation is usually an issue of less interest for member states which is postponed for later stages of integration.

This logic of tax harmonization can already be identified and is likely to be followed within the development of international regional economic integration within the Eurasian Economic Union (which is in force since 1 January 2015).

The tax integration as a part of international regional economic integration can achieve a far advanced level. However, harmonization of taxes will never amount to a supranational tax system, for example, a tax system of the European Union. Tax is a part of sovereignty which is still vested in a particular state.

MONOPOLISM IN THE ECONOMY AND NATIONAL SECURITY ISSUES OF RUSSIA

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Abstract: The article considers factors of contemporary competition in the external markets between the main centers of economic production. The monopolism of the manufacturers has a significant impact on the present state of the Russian competitive environment. However, over recent years there has been a certain breakthrough in the sphere of competition and restriction of business entities' monopoly position. The author identifies the increasing unfair competition in various market segments as an internal threat to the Russian national security.
Keywords: monopolism, unfair competition, national security, the state of security, threats to security, modernization of economy.

1. During growing geopolitical, trade and economic rivalries in the international markets, unprecedented competition between the four main centers of current economy production — the USA, Western Europe, China and Japan — has become tougher and stronger. In this competition, for example, the growth of exports largely depends on the external competitiveness of the supplied products. However, due to the changing international environment when the industrial development of most countries has led to relative equality of prices for homogeneous products and services, the first place is held by **non-price factors** of competition such as the quality, time limits, and after sales service and support.

The monopolism of the manufacturers has had a notable impact on the state of the competitive environment in Russia. National (state) property gave rise to the monopolism in our country. Being of a giant size at that time, it manifested itself at all directions and levels. John Ross, the Economic Advisor to a group of the Labor party members of the British Parliament, noted that

"the Russian economy in the industrial sphere is closer to a perfect monopoly structure than any economy in the West. Furthermore, the hopes of the Russian government that either privatization or international competition can offset the effects of this monopoly structure are illusory"[1].

Indeed, total privatization of the business entities did not and could not considerably restrict the monopolistic activity in commodity markets and other markets of the country. On the contrary, it has largely contributed to wasting national (state) property and has led to property redistribution. Rapid growth of privatization has seriously affected the enterprises belonging to various branches of the national economy, especially the defense industry.

[1] J. Ross. Po zakonam rynka protsvetaet Kitai' i razvalivaetsa Rossiia [Market Forces Make China Flourish and Russia Collapse]// Rossiiskaia gazeta [Russian Newspaper]. February 6, 1993.

There is a certain breakthrough in the sphere of competition and restriction of business entities' monopoly position. The most competitive (in the internal market) branches and enterprises are considered to be those that are oriented at the consumer market. These are light, food, furniture, printing, and other branches of industry. There is a gradual progress in the development of the competition experienced by enterprises of metallurgical and machine building complexes. At the same time, it has not been possible to make the investment and innovative breakthrough in the real sector of the economy and to change the structure of the national economy in favor of high-tech branches.

Particular attention should be paid to the fact that, according to the survey, *negative consequences of Russia's accession to the WTO in the short term* may affect the enterprises of food, pharmaceutical, and textile industries. Possible decline in the production volume in these sectors may be 0.5 — 2%[2]. But the largest fall is expected in *the machine building sector* — up to 12% drop of the production — and also in the food, light, and construction materials industries where the drop will be up to 7%. Negative consequences will affect aircraft building and car industry, agriculture, and agrifood sector. For example, due to Russia's commitments, the country will have to reduce tariffs on imported line aircrafts within 7 years. It will pose a serious threat to large-scale aircraft manufacturing projects being implemented by our state. That is hardly helping the development of the Russian aircraft companies.

2. On the one hand, **major** integrated structures should become the most important links in the Russian economy. In addition to state defense industry enterprises, holdings are able to lift the national economy out of stagnation to the level of the progressing development. On the other hand, *small and medium entrepreneurship (business)* is an important and necessary element of the market economy. In the industrialized countries of Europe small and medium business plays a key role in the stable growth of the national economy and welfare of the citizens. "The Asian economic miracle" owes much to small entrepreneurship. Nearly all countries of South-East Asia (excluding North Korea) are providing assistance on the unprecedented scale to small entrepreneurship. Their indicators showing the dynamics of entrepreneurship development and the economic growth are three times higher than in European countries[3]. These figures are impressive!

As noted by the Anti-crisis plan, one of the key RF Government directions in the nearest future will be its assistance to the development of small and medium business through financial reductions and administrative expenditures. And we sincerely hope that it will do so!

3. *The Russian national economic security* is the condition when basic national economic interests are protected from internal and external threats. Being a security for a person, state, and economy, national and economic security is defined through the system of qualitative and quantitative indicators.

Therefore, in brief, national economic security is the **condition** when basic economic interests are protected from internal and external threats[4]. Here, it is also important to point out that such notions as "conditions", "factors', and "correlation" characterize the economic

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[2] Available at: http://www.vestifinance.ru/articles/5504 .

[3] See: V.A. Semeusov. Maloe predprinimatel'stvo v Rossii: Uchebnik [Small Entrepreneurship in Russia: Textbook]. Irkutsk, 2001, pp. 11 — 12.

[4] See: S.I. Tsyganov, A.Ya. Manina. Inostrannye investitsii v Rossii: problemy natsionalnoi' ekonomicheskoi' bezopasnosti [Foreign Investments in Russia: Problems of National Economic Security]. Monogragh. Publishing House of the Ural State Law Academy, Yekaterinburg, 2000, p. 16. Defining the economic security, the named authors underline that the basic economic interest should be based on meeting national needs.

security from different standpoints. Thus, *a condition* is an environment in which the economic security is provided. There are economic, geopolitical, ecological, legal and other conditions. *A factor* is the reason and the driving force of the economic security. *A correlation* of economic interests is their mutual ratio and their arrangement with respect to one another.

4. Monopoly is the *economic and legal phenomenon*[5]*. It (phenomenon) is economic in its content and legal in its form. In this qualitative state the monopoly is characterized:* **first,** by the dominant position of a business entity in a certain market segment; **second,** by special (exclusive) rights of a business entity to exercise activities of a certain kind within one commodity market.

Increasing unfair competition in various market segments can be attributed to one of the internal threats to the Russian security. Monopoly in the market economy, in its turn, suppresses competition, reduces the interest of companies in developing competitive advantages, because the motivation — the competitor — disappears[6]. Monopolization hampers the restructuring as there is no motivation to work, stockpiling, expansion, renovation, and technical reconstruction of production. These will lead to physical and moral obsolescence of assets and their decumulation. Monopoly hampers scientific and technological progress, leads to stagnation in all spheres of social life, and to defenselessness of the consumer[7]. Here are some examples from the life of monopoly companies.

National production facilities are physically and morally worn out. Specialists believe that more than 70% of the production facilities have been in service for more than 10 years. The most rapidly deteriorating is the material and technical basis of aircraft, rocket and space, electronic industries, and communication means. The basic production assets in fuel and energy industry are worn by 80% when the most part of the resources (assets) derived from export stay in this industry[8].

The Russian Federal State Statistics Service (*Rosstat*) estimates that the degree of assets wear in manufacturing industry was at the beginning of: 2004 — 47.9%, 2005 — 47.7%, 2006 — 47.4%, 2007 — 46.8%; in mining industry at the beginning of the corresponding years — 55.4%, 53.2%, 53.0%, 53.3%[9]. We see a high degree of the assets wear even at the official level.

The scientists predict that 500 billion US dollars are needed to restore and renew physically and morally worn production assets of the national industrial enterprises[10]. 10-11% from the said sum should be added to ensure reproducing the active part of the worn assets[11].

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5 O.A. Grigoryeva. Pravovoe regulirovanie estesstvennykh monopolii [Legal Regulation of Natural Monopolies]// Dissertatsiia na soiskanie stepeni kandidata yuridicheskikh nauk [Dissertation for the degree of Candidate of Law]. Yekaterinburg, 2003, pp. 25 — 31.

6 Ekonomicheskaia bezopasnost' Rossii: Obschii kurs: Uchebnik [Russian Economic Security: a General Course: Textbook]// Edited by V.K. Senchagov. Moscow, 2005, pp. 208 — 209.

7 Available at: http://otherreferats.allbest.ru/economy/00147819_0.html .

8 See: Kommersant [Merchant]. December 20, 2001, p. 7.

9 Available at: http://www.gks.ru .

10 The Innovative and Investment Development Centre of the Institute of Economics at the Russian Academy of Sciences made a forecast: 1200 — 1500 billion US dollars are needed to improve and restore the production assets of all the sectors in the real sector of the Russian economy by the end of the decade; and 2500 — 3000 billion US dollars are needed by the end of 2025 for the development of the high-tech innovative economy (see: Proekt energeticheskoi' strategii Rossii [Project of Russia's Energy Strategy]. Moscow, 2001). Russia does not have such astronomical resources.

11 M.S. Ilyin, A.G. Tikhonov. Finansovo-promyshlennaia integratsia i korporativnye struktury: mirovoi' opyt i realii Rossii [Financial and Production Integration and Corporate Structures: World Experience and Russian Realities]. Moscow, 2002, p. 67.

We can hardly expect massive foreign investments in the Russian economy. Foreign investments (regarding the accurate picture of their inflow) cannot be crucial means to develop the factors of production.

Thus, we need *massive investments* for stable growth and enhancement of export potential. "International experience shows that there is an alternative in definite limits, if a country imports a lot, then the growth of the investments falls. Investments go where the goods cannot"[12]. In 2008, the country's economy received foreign investments in the amount of 103.8 billion US dollars representing a drop of 14.2% compared to 2007. In the first quarter of 2008, the economy received foreign investments in the amount of 17.3 billion US dollars (representing a drop of 29.9% compared to the corresponding period of the previous year), in the second quarter — 29.3 billion US dollars (an 18% drop), in the third quarter — 29.2 billion US dollars (a 6.1% rise), in the fourth quarter — 28 billion US dollars (a 15.2% drop)[13]. The major investing countries in 2008 were Cyprus, the United Kingdom (Great Britain), the Netherlands, Germany, Luxemburg, France, and the British Virgin Islands. These countries accounted for 77% of total cumulative foreign investment and for 79.4 % of total cumulative direct foreign investment. Moreover, the proportion of the fixed investment is 15.3% (according to other estimations — 21%). The largest proportion (51.6%) of the cumulated foreign capital is represented by other return investments.

5. Russia is considered to be in the grip of the imperial model of state-building. In other words: "Modernization in the name of the Empire"[14]. In this regard, it is very important to raise a number of questions. **First,** Why does the imperial way of development lead Russia to a catastrophe and China to flourishing? What is the mystery with China's success? **Second,** Why cannot the achievements of the revolutionary modernization in the People's Republic of China be used in Russia? The reasons for that are as ever different.

One reason is the following: "It is not possible to borrow the positive factors of authoritarian modernizations without taking others as a severe burden"[15]. Then, A.V.Rubtsov notes that Russia "must not scope on Chinese and other analogs. The history gives this resource only once and the USSR did not fully use it at its time"[16]. We agree with the main thesis which states that it is not possible to repeat (if one tries hard, it could be done) the authoritarian modernization with all its attributes and consequences.

Nevertheless, some circumstances should be taken into account. First of all, there is a well-known mingling of different models of modernization, their manifestations, and related (overlapping) notions. In fact, revolutionary modernization, as in the Battle of Borodino, is identified with the authoritarian (totalitarian) regime, which is a type of the state political regime. For example, a change in the political regime (even if the form of government stays the same) usually leads to sharp changes in the internal and external government policy. The main reason for this is that the political regime is connected not only with the form of gov-

[12] Ekonomicheskaia bezopasnost' Rossii: Obschii kurs: Uchebnik [Russian Economic Security: a General Course: Textbook]// Edited by V.K. Senchagov. Moscow, 2005, p. 199.

[13] Available at: http://www.gks.ru .

[14] S.N. Gavrov. Modernizatsiia Rossii: postimperskii transit [Modernization of Russia: Post-Empire Transit]. Monograph. Preface by L.S. Perepyolkin. Moscow, 2010.

[15] See: A.V. Rurtsov. Privedenie k sovremennosti [Bringing to Contemporaneity]. Available at: http://www.ng.ru/ideas/2010-04-14/5 _modernize.html .

[16] Ibid.

ernment organization but with its content[17]. **Thus,** formally (externally) one or another modernization may be named as both "liberal" and "corporatist" etc., but in fact, from the point of the content it may have either an imperial or revolutionary character, and so on. We do not endorse the view that the Chinese experience in the modernization sphere is not suitable for Russia and even poses a threat. Modernization is a multidimensional notion. We should welcome any positive experience in the sphere of economy modernization but not label it. Some analysts believe that China is possibly ahead of Germany in GDP and holds the third place. Russia planned to double the GDP and China — to quadruple. This is a competition between two power-countries!

Russian researchers formulated a principle question in the comparative characteristic of Russia and China. S.N.Gavrov writes: "They (*Russian political elite* — V.Belykh) have to answer the key-question whether Russia is a part of Europe, a potential part of the West or an independent center of power such as the EU, the USA, and China. Our future depends on the answer to this question"[18]. S.N.Gavrov himself answers it. So, following the *first variant (way) of the strategic development*, Russia is both a part of Europe and a potential part of the West in analogy with Germany that joined the Euro-Atlantic association only after the end of the Second World War. In this case, the EU and the NATO expansion to the East and South, including Ukraine and Georgia, presents no danger and is advisable. "Then this is a movement together with Russia — for them to NATO and the EU earlier, and for us — later. Small Georgia and big Russia may obviously have different forms of integration in these international structures".

The second variant of development is that Russia is an independent center of power, independent East-Christian civilization that embodied itself earlier in the Russian and Soviet empires and that will have to embody in the new one. This answer means that NATO is a political and military competitor whose movement to the Russian borders poses a serious threat — a threat to imperial restoration[19].

In short, the choice should be made by Russia, by the political elite, and by the people (to a lesser degree). S.N.Gavrov thinks that the analysis of current socio-political processes in our country allows the conclusion that the actions of the contemporary Russian power show the *tendency for the great power imperial revanche*. The said tendency is accompanied by the climate of fear and conspiracy perception of the world. Today, the quantity of facts proving and illustrating this hypothesis is growing exponentially. These trends have been mostly observed since the autumn of 2003 — the beginning of 2004.

Findings: **1**. Contemporary Russia takes an intermediate place being in an inertial position between authoritarianism and free competition, between the leading and catching-up modernization, between the West and the East. Our country is again at the crossroads. It has to make a decisive choice. There is a topical question: What should be done? We do not share the view of those scholars who think it is impossible and even harmful for Russia to use the experience of countries that apply these or those "alien" (at first glance) models (types) of

[17] See: Teoriia gosudarstva i prava: Uchebnik [Theory of State and Law: Textbook]. 3rd edition, updated and revised. Moscow, 2004, p. 102.

[18] See: S.N. Gavrov. Modernizatsia Rossii: postimperskii transit [Modernization of Russia: Post-Empire Transit]. Monograph. Preface by L.S. Perepyolkin. Moscow, 2010.

[19] See: S.N. Gavrov. Modernizatsia Rossii: postimperskii transit [Modernization of Russia: Post-Empire Transit]. Monograph. Preface by L.S. Perepyolkin. Moscow, 2010.

modernization. Any positive experience in the sphere of economy and technology modernization must be only welcomed. **2**. The idea of modernization is clear in general and not objectionable. But its spheres, aims and principles must be clearly defined. The economy of Russia, its political system and other segments of society and the state require modernization. So, we need *a holistic concept for modernizing the Russian economy* for a long-term period effected by a system of legal and non-legal means. In particular, we suggest that all Russian national projects should have a form of federal laws and be taken up by the state and society. **3**. Presidential Decree No.478 of 29 April 2012 approved the Charter of a budgetary institution "Russian Institute of Strategic Studies" (RISS). The main task of RISS is to provide information support to the Administration of the President of the Russian Federation, the Federation Council, the State Duma and the Security Council as well as to Government offices, ministries and departments. RISS provides expert appraisals and recommendations and prepares analytical materials for those bodies[20]. We think that RISS activities should focus on major projects like modernization of the economy, political system, and national security. There is no center for legal studies within the RISS structure and there are no expert lawyers. In any case, RISS needs reforming with due regard to the experience of strategic studies institutes (centers) in the countries of the near and far abroad. **4**. The concept of the Russian economy modernization should mainly focus on the development (with the elements of strong state support and protectionism) of core branches of the national economy system such as machine-building, metallurgical industry, fuel and energy complex, chemical and forest complex, and light industry. These very spheres of economy should be invested in. The economy needs diversification! **5**. Now Russian rental income is the key problem. According to the academician D.S.Lvov, annual net national economy profit of the country is 60-80 billion US dollars that is two times higher than the volume of current budgetary resources[21]. So, if retained income is 60-80 billion US dollars, then the rent is 45-60 billion US dollars. Thus, the most part of the Russian rental income is privatized (e.g. in shadow business, offshore zones, criminal structures). But, as the economist notes, the rental income is not the result of entrepreneurial activity and commercial risks. It is a gift of God to Russia. So, the rental income must belong to everyone. **6**. RF Government Resolution No.191 of 9 March 1994 (edited 4 September 1995) "On the State Program of Economy Demonopolization and the Development of the Competition in RF Markets (Main Aspects and Priority Measures)" (including "Regulation on Inter-agency Commission on Competition Policy") requires significant improvement. We need a more modern program of economy demonopolization. **7**. We should develop the criteria and indicators for evaluating the monopolization of the economy in general and the monopoly position of individual business entities.

[20] Available at: http://www.riss.ru/ .

[21] Upravlenie sotsial'no-ekonomicheskim razvitiem Rossii: kontseptsii, tseli, mekhanizmy [Management of Russian Socio-Economic Development: Concepts, Aims, Mechanisms]. Heads of the research group D.S. Lvov, A.G. Porshnev. Moscow, 2002, pp. 13 — 14.

A SET OF ACTIONS ON ECONOMIC CONCENTRATION

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1. Chapter 7 of the Protection of Competition Act (PCA) focuses on different aspects of the state control over economic concentration. However, legal techniques applied by the legislator make a false attribution that transactions enlisted in this chapter are treated as economic concentration transactions[1].

In fact, comparing p.21 of Article 4 of the PCA and Chapter 7 of the PCA it becomes evident that transactions the control of which is regulated by Chapter 7 of the PCA are just a part of the total amount of economic concentration transactions, because under p.21 of Article 4 of the PCA economic concentration implies any actions, including transactions amounting to acts of market power, because their outcome influences the state of competition, and not only in the negative way.

Elaborating Chapter 7 of the PCA, the legislator intended to establish a legal institution of the state control over certain types of transactions which have significant influence on competition. In other words, whereas p.21 of Article 4 of the PCA stipulates the characteristics of economic concentration as a legal notion, Chapter 7 of the PCA provides for legal foundations, types and procedures of the state control over certain types of economic concentration transactions, which, in the view of the legislator, ask for a special legal regime of the state control over transactions.

2. Article 26.1 of the PCA establishes the basis for the state control over economic concentration enabling to determine the jurisdiction of the anti-monopoly body over certain types of transactions or actions undertaken by different subjects of law. This system is based on several criteria: 1) the subject matter of the transaction or action; 2) the subjects of the transaction or action; 3) a special economic position of economic entities-parties to the transaction or action; 4) special time limits of the state control over economic concentration (a non-obligatory criterion).

The subject matter of the transaction (action), which determines the jurisdiction of the anti-monopoly body, are property rights (or legally related to them rights) as well as corporate and contractual rights of the subjects of the market. Property rights may include assets of Russian financial organizations and productive funds of Russian commercial and non-commercial organizations situated in the territory of the Russian Federation. The subject matter of the transaction under the state control may also be intangible assets of Russian

[1] S.A. Puzyrevsky. Antimonopolnyi' kontrol' ekonomicheskoi' kontsentratsii [Antimonopoly Control over Economic Concentration]. 2013. The text is available in Consultant Plus legal information system.

commercial and non-commercial organizations, including the protectable IP results and means of individualization, enlisted in Article 1225 of the RF Civil Code, as well as the IP objects such as property and moral rights, for example, the resale right, the right to access and others (Article 1225 of the RF Civil Code). The state control over economic concentration is also to be exercised over transactions concerning corporate rights, the subject matter of which are voting shares and shares of stock in economic entities, including Russian non-commercial organizations (Art.27-29 of the PCA). Contractual obligations of the subjects of the market which make one or several subjects control other subjects of the relevant market are under special antimonopoly control. As a rule, such contractual obligations arise from contracts between the subjects of the market which are state-controlled by Article 35 of the PCA.

The subjects of transactions under the state control over economic concentration are mostly Russian residents in the form of commercial, non-commercial and financial organizations. However, the Protection of Competition Act applies the principle of exterritoriality in respect to subjects of economic concentration, according to which the Russian antimonopoly legislation is to be applied to agreements, including agreements entered into by Russian and (or) foreign entities or organizations beyond the territory of the Russian Federation, as well as to actions undertaken by them, if such agreements or actions affect competition in the territory of the Russian Federation. It should be noted that Part 1 of Article 26.1 of the PCA states that the subjects of economic concentration transactions are organizations, i.e. economic entities (including financial organizations) and non-commercial organizations which are residents of the Russian Federation, while the state control in respect to non-residents of the RF is exercised not only over organizations but other foreign entities delivering goods to the territory of the Russian Federation. We think that nowadays, in conditions of high concentration of the Russian private capital, both sole proprietors and physical entities can easily meet the economic criteria applied to economic concentration transactions, such as the size of the entity's assets. *For this reason*, the criteria applied to economic concentration transactions made by organizations should be expanded to include physical entities which are residents of the RF if all other criteria of transactions correspond to the total requirements of the state control over economic concentration established by Chapter 7 of the PCA.

It should be noted, however, that "a group of persons" as a legal institution in the Russian antimonopoly law under Article 31 of the PCA includes physical persons who partially fall under the state control, not under preliminary but subsequent control. However, anti-competition consequences of transactions, which correspond to the requirements of transactions under preliminary control over economic concentration made by physical persons, are not less evident than those of similar transactions made by legal entities. **Therefore**, it is another reason to include physical persons who are residents of the Russian Federation in the list of subjects of those transactions which are under preliminary control over economic concentration.

A *third important criterion* of economic concentration transactions is the economic (market) position of their subjects. Economic conditions of jurisdiction over economic concentration in accordance with Articles 27-29 of the PCA are dependent on different economic parameters: the volume of the sold goods in the relevant market within certain time limits; the balance sheet of the organization; total cost of assets of the financial organization; and net sales of the organization within certain time limits of analyzing the state of competition.

The mentioned criteria (the subject matter of the transaction, subjects of the transaction and their economic position) are the main ones and of cumulative character. Practically speaking, it means that the state control over economic concentration is to be exercised only in such transactions which correspond to the above mentioned criteria simultaneously.

A *fourth criterion* of the state control stands apart from the others: it concerns not substantive but procedural matters — the character of the state control, and namely a type of control in the form of preliminary and subsequent (notifying) control. It should be mentioned that the procedural character of the state control does not affect legal consequences in case of its violation. Pursuant to Part 2 and Part 4 of Article 34 of the PCA, transactions corresponding to the criteria of preliminary state control over economic concentration made without any prior permission of the antimonopoly body (Art. 28-29 of the PCA) as well as transactions requiring subsequent notification of the antimonopoly body (Art.31 of the PCA) made with a violation of the notification procedure may be found by the court invalid if such transactions or any actions have led or might have led to the limitation of competition, including as a result of dominance or increased dominance.

The main criterion to establish preliminary, but not subsequent, control over economic concentration is the subject matter of the transaction. Preliminary control is to be exercised over corporate transactions concerning the establishment and re-organization of business entities, transactions with assets of financial organizations, with production means and intangible assets of commercial and non-commercial organizations, with voting shares and stocks of shares in commercial and non-commercial organizations as well as over transactions aimed at the redistribution of corporate control on the basis of the contract. The exception out of the general rule is transactions made within a group of entities (Part 1 of Article 31 of the PCA). All other transactions affecting the state of competition must be controlled by the state with notification, in other words, by means of subsequent control. This peculiarity of corporate transactions is connected with a special consequence of violating the preliminary state control over economic concentration: instead of being found invalid, corporate transactions to establish a commercial organization, including as a result of a merger or takeover (Art.27 of the PCA), made with a violation of the advance approval procedure of the antimonopoly body, have an absolutely different legal consequence — in case of limited competition, including situations of dominance or increased dominance of economic entities, the newly established commercial organizations, upon the claim by the antimonopoly body, are either liquidated or reorganized in the form of division or spin-off by the court decision, if their establishment has led or may lead to the limitation of competition, including situations of dominance or increased dominance.

Practical significance of this rule is quite evident: instead of eliminating legal consequences of establishing corporate control as a result of economic concentration transactions by finding them invalid, a more efficient means of restoring healthy competition or stabilizing market concentration in case of establishing or reorganizing legal entities is to liquidate the potentially dangerous dominating subjects. It can be accounted for by the fact that the process of finding a transaction invalid is much easier than the process of forced liquidation of a legal entity. In the latter case, it is necessary to undertake appropriate actions to liquidate a legal entity in accordance with the current corporate legislation and to formally register the liquidation or reorganization of such a legal entity. Besides, p.3 of Art.167 of the RF Civil Code which partially enables to restore a voidable transaction shall not be applied in case of

a significant deviation of market concentration or in case of a dominating subject of oligopoly, which during its market activity within a rather short period of time can significantly affect the state of competition in the relevant market and lead to rather evident anti-competition consequences, particularly in respect to third parties (for example, to make them refuse from entering into contracts and establishing barriers to the access to the market by competing economic entities).

3. In accordance with the Hall-Taidman index, the level of market concentration in the relevant market directly depends on the ranking of the company which is determined by either the total amount of assets or the total profit of participants of economic concentration transactions. Depending on the specific market (economic) position of the economic entity or financial organization, under the current Russian legislation there are three types of enterprises by the degree of capitalization:

1) enterprises with a high degree of capitalization (>10 bln.roubles) such as credit organizations with total assets more than 29 bln.roubles[2] [3], commercial and (or) non-commercial organizations with total assets more than 10 bln.roubles;

2) enterprises with an average degree of capitalization (>1 bln.roubles, but <10 bln. roubles), among which there are commercial and non-commercial organizations the total profit of which as participants of economic concentration transactions is more than 7 bln. roubles, and also some financial organizations such as microfinancial organizations and leasing organizations[4], the assets of which exceed 3 bln.roubles, as well as organizers of trade the assets of which exceed 1 bln.roubles;

3) enterprises with a low degree of capitalization (<1 bln.roubles) which are exclusively financial organizations listed in Ruling No.1072[5].

The current antimonopoly and banking legislation as well as bylaws of the RF Government do not say that procedural peculiarities of the state control over economic concentration are connected with a degree of capitalization of the transaction participants. What is

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[2] Postanovlenie Pravitel'stva RF "Ob ustanovlenii razmera aktivov finansovykh organizatsii' po nadzoru v tsentral'nom banke Rossiiskoii Federatsii s tsel'yu antimonopol'nogo kontrolia No. 1072" [RF Government Ruling "On Establishing the Size of Assets of Financial Organizations under the Supervision of Central Bank of the Russian Federation with the Purpose of Antimonopoly Control" No. 1072]. October 18, 2014. Sobranie zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. October 27, 2014, No. 43, art. 5907.

[3] V sootvetstvii s Postanovleniem Pravitel'stva RF "Ob ustanovlenii razmera aktivov finansovykh organizatsii' po nadzoru v tsentral'nom banke Rossiiskoii Federatsii s tsel'yu antimonopol'nogo kontrolia No. 1072" [RF Government Ruling "On Establishing the Size of Assets of Financial Organizations under the Supervision of Central Bank of the Russian Federation with the Purpose of Antimonopoly Control" No. 1072]. October 18, 2014. Sobranie zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. October 27, 2014, No. 43, art. 5907 (further Ruling No. 1072).

[4] Postanovlenie Pravitel'stva RF "Ob ustanovlenii razmera aktivov lizingovykh organizatsii' s tsel'yu antimonopol'nogo kontrolia" No. 334 [RF Government Ruling "On Establishing the Size of Assets of Leasing Organizations with the Purpose of Antimonopoly Control" No. 334]. May 30, 2007. Sobranie zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. June 04, 2007, No. 23, art. 2799 (further Ruling No. 334).

[5] Postanovlenie Pravitel'stva RF "Ob ustanovlenii razmera aktivov finansovykh organizatsii' po nadzoru v tsentral'nom banke Rossiiskoii Federatsii s tsel'yu antimonopol'nogo kontrolia No.b1072" [RF Government Ruling "On Establishing the Size of Assets of Financial Organizations under the Supervision of Central Bank of the Russian Federation with the Purpose of Antimonopoly Control" No.b1072]. October 18, 2014. Sobranie zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. October 27, 2014, No. 43, art. 5907.

important for the state control is the fact that the company has reached such a degree of capitalization that is provided for by the law. What is important is the company ranking which size depends on the activity of economic entities which are participants of economic concentration transactions. Such a differentiation is connected with a potential danger for the state of competition of different market players. Paradoxically, financial organizations under prudential regulation of the Bank of Russia (credit organizations, microfinancial organizations) and financial organizations the activity of which must be licensed (leasing organizations and trading organizers) are much less dangerous for competition than those financial organizations which are "freely floating", because the number of the latter has significantly increased and their activity is much less controlled by the state, therefore they follow a more risky policy in the market; as a result, the state control must be established on a lower level. Conversely, major market players, such as credit organizations and major commercial enterprises, follow a less risky policy in the market; besides, their activity is under strict control not only of competent state institutions (for example, by the Bank of Russia over credit organizations) but in many cases under the control of self-regulating organizations, especially in those types of entrepreneurial activity where self-regulation is obligatory (for example, in the sphere of major construction, in different types of industrial enterprises, etc.)

An important criterion for establishing a level of state control over economic concentration is the size of total assets of participants of economic concentration transactions. This criterion enables to determine control (both corporate and exclusively contract one) which appears as a result of corporate transactions or transactions of control redistribution and monitor the appearance of an economic entity which is potentially dangerous because it may limit the competition in the market.

Article 29 of the PCA, which provides for grounds of the state control over economic concentration concerning financial organizations, takes the ranking of the resulting subject of economic concentration transactions as the most important criterion, i.e. the size of assets of the financial organization in which as a result of such a transaction there is a change in control. Such redistribution of control itself does not change the ranking of an individual financial organization; however, it can change the composition and the total size of the assets of a group of entities that such a financial organization can become part of as a result of redistribution of corporate control. In this case, the state control over redistribution of corporate participation in financial organizations provided for by Article 29 of the PCA must be exercised not so much as to control the changed competitive (dominating) position of a certain financial organization in the market (because it practically remains unchanged), but to control the position of a group of entities that such an organization can become part of as a result of economic concentration transactions.

Article 28 of the PCA, in respect of redistribution of control in commercial organizations, sets forth that the highest level of the total assets of the resulting subject of economic concentration and the group of entities it belongs to is 250 bln.roubles. Another criterion for transactions resulting in redistribution of corporate control in respect of commercial organizations is the registration of one of the participants of such a transaction in the register of dominating subjects. It automatically means a potential threat to the competition of the resulting subject of economic concentration which is a member of a group of the dominating subject.

4. The legal regulation of economic concentration control to a great extent depends on the activity of participants of the economic concentration transaction. Therefore, the legislator has established different legal regimes of the state control over commercial and financial organizations within corporate economic concentration by the reorganization of legal entities.

First of all, it concerns different criteria of the state jurisdiction over economic concentration transactions for commercial and financial organizations. The criteria of the state control over commercial organizations are their tangible assets (including their production means), the cost of their intangible assets as well as the total profit received by the enterprise over a certain period of time, whereas there is only one criterion for financial organizations: the total cost of their assets.

Secondly, we can underline that criteria of jurisdiction over transactions with participation of financial organizations dominate over criteria concerning the control over transactions by commercial organizations. When a commercial organization joins a financial organization, or vice versa, the grounds for the state control over such transactions are the criteria for financial organizations (but not for commercial ones), i.e. the cost of assets of financial organizations. For commercial organizations, the criterion of jurisdiction over affiliation transactions is the size of total assets of the uniting enterprises or their total profit (p.2 Part 1 of Art.27 of the PCA), but for the transaction of affiliating a financial organization with a commercial organization to fall under the criteria of the state control over economic concentration it is enough to determine the cost of assets of the financial organization without considering and analyzing the size of tangible assets and the profit of the commercial organization which the financial organization is affiliated with or which joins the financial organization (p.6-7 of Part 1 of Article 27 of the PCA).

It seems that the dominance of criteria for economic concentration transactions with the participation of financial organizations over similar criteria established for commercial organizations does not depend on the size of assets of financial organizations and is determined by several reasons: 1) the universality of financial assets which can be quickly diversified and reoriented; 2) a bigger significance of financial organizations for the civilian turnover, which makes it necessary to legally regulate their activity by means of special legal regimes; 3) a bigger lability (variability) of financial organizations with their more commercial-risk-prone character that generally makes the market more unstable and, in particular, affects the competition.

5. If transactions concerning the establishment and reorganization of legal entities apply criteria connected with the size of assets of commercial enterprises or financial organizations, the transactions involving shares (stocks), property and rights in respect of commercial (Art.28 of the PCA) and financial organizations (Art.29 of the PCA) apply one more criterion — a degree of control which is determined by the specific volume of the acquired shares, property and rights.

We see a certain similarity of criteria applied to commercial and financial organizations. First of all, it concerns the subject matter of the economic concentration transaction — shares (stocks), property and rights of commercial and financial organizations. Secondly, the criteria of legal consequences of such transactions by both commercial and financial organizations are similar from the viewpoint of changing a degree of control over a certain volume of shares (stocks) before and after the commission of the transaction.

However, this is all similarity in economic concentration transactions over shares (stocks), property and rights of commercial and financial organizations. Differences in the legal regimes of transactions by commercial and financial organizations are more important. Firstly, while for financial organizations there is a differential size of the cost of assets depending on the type of activity by such organizations, for commercial enterprises there are universal criteria for the total cost of assets of the transaction participants (more than 10 bln.roubles) and their total profit (more than 7 bln.roubles) (Part 1 of Article 28 of the PCA). Secondly, for financial organizations, but not for commercial enterprises, it is sufficient to estimate financial assets of the financial organization which is a participant of the transaction (Part 1 of Article 29 of the PCA), regardless of the fact whether the resulting subject of the economic concentration transaction is a commercial enterprise or a financial organization. Thirdly, for commercial enterprises, unlike for financial organizations, it is important to know the total amount of assets not only of the participants of the transaction but of the resulting subject of the economic concentration, i.e. of that legal entity whose shares (stocks), property and rights in respect thereof are the subject matter of the economic concentration transaction (more than 250 bln.roubles) (Part 1 of Article 28 of the PCA). It determines the ranking of the commercial enterprise, which is significant for competition, because in this case such an enterprise is considered as an economic entity which potentially has features of a dominating entity.

Critically important is the criterion of legal consequences in transactions over acquisition of shares (stocks) of commercial and financial organizations, which determines the degree of corporate control gained by the purchaser of shares or stocks of a legal entity as a result of the transaction. This criterion depends on three features: 1) a business form of the resulting subject of economic concentration (a joint-stock company or a limited liability company) which is of primary importance due to the legal peculiarities of economic concentration transactions, the subject matter of which are either voting shares or stocks which are specifically regulated by special federal acts[6]; 2) a degree of control of a transaction participant over the resulting subject of economic transaction before the transaction, which is indirectly determined by percentage or shares in possession, usage, or disposal of shares or stocks respectively; 3) a degree of control of a transaction participant over the resulting subject of economic concentration as a result of the transaction, which is indirectly determined by percentage or shares in possession, usage, or disposal of shares or stocks respectively. The conditions of jurisdiction over a transaction connected with the size of assets of the transaction participants are just basic conditions for preliminary state control over economic concentration, but they do not determine a degree of control: the principle of its determination is equal for both commercial and financial organizations.

To determine a degree of corporate control, the legislator has established an indirect quantitative criterion which is equal to the volume of shares or stocks of the economic concentration object before and after the transaction to acquire or alienate shares or stocks.

Consequently, there are three levels of corporate control which are important for the transaction jurisdiction assessment:

1) a low degree of corporate control: the participant of the economic concentration transaction before the transaction itself did not dispose of voting shares of a joint-stock company

[6] Collection of Legislations of the RF on joint-stock companies and limited liability companies.

which played the role of a resulting subject of economic concentration, or it disposed of not more than 25% of voting shares of such a joint-stock company (a 1/3 share in the limited liability company), but as a result of the transaction it acquired the right to dispose of more than 25% of voting shares of such a joint-stock company (a 1/3 share in the limited liability company);

2) a medium degree of control: before the transaction itself, the transaction participant disposed of not more than 25% (not less than a 1/3 share in the limited liability company), but not more than 50% of voting shares of such a joint-stock company (a 1/2 share in the limited liability company), but as a result of the transaction it acquired the right to dispose of more than 50% of such shares (more than a 1/2 share in the limited liability company);

3) a high degree of control: before the transaction itself, the transaction participant disposed of not less than 50% (more than a 1/2 share in the limited liability company), but not more than 75% of voting shares of such a joint-stock company (not more than a 2/3 share in the limited liability company), but as a result of the transaction it acquired the right to dispose of more than 75% of such shares (more than a 2/3 share in the limited liability company).

Owing to such a system of control over transactions with shares or stocks of economic concentration objects, preliminary state control is exercised over almost all transactions with shares or stocks of commercial and financial organizations which meet the criteria for the size of assets and proceeds, established by Part 1 of Article 28 of the PCA and Part 1 of Article 29 of the PCA. It should be noted that a degree of corporate control (whether low, medium, or high) is quite relative, because, for example, the transaction participant may at one time acquire more than 75% of shares of the economic concentration object and, consequently, gain a high degree of corporate control in respect of such a legal entity.

Such a system of control over transactions enables to simultaneously solve several tasks important for *ad hoc* antimonopoly legislation.

Firstly, in case of commercial enterprises which are the resulting subjects of economic concentration and which are potentially monopolistic, this system enables to control not only a degree of corporate control at this enterprise, but simultaneously control the group of entities of this enterprise. Depending on the participant of the transaction, it may be critically important because such a participant may simultaneously be a participant of a group of other enterprises which are directly competing with the organization which is the resulting subject of economic concentration.

Secondly, such a system of preliminary control enables to monitor the dynamics in the ranking of enterprises and the degree of indirect influence by the owners of shares or stocks.

Thirdly, this factor becomes even more significant taking into account the fact that such transactions can considerably change the structure of the market by changing the composition of such groups the participants of which are the participants of transactions (for example, those acquiring the mentioned shares or stocks). Controlling the quantitative criteria of objects in transactions with shares or stocks, we can indirectly control the qualitative state of economic concentration which is determined by redistribution of real market power as a result of such transactions.

THE CATEGORY OF CIVIL LEGAL COMMUNITIES IN RUSSIAN LAW: CONCEPT, FEATURES AND TYPES

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Abstract: The article analyzes the Russian law and the provisions of Resolution No.25 of the Plenum of the Supreme Court of the Russian Federation "On Judicial Application of some Provisions of Section I, Part I of the Civil Code of the Russian Federation" concerning civil legal communities. It deals with the first official interpretation of the term "civil legal community", adds more types of such communities to the list presented in Article 181.1 of the Civil Code, and provides their classification. The author underlines that the issue of civil legal communities in Russia can be explored on the basis of similar structures in European legal systems, namely, legal communities, which have received doctrinal rationale. Nevertheless, legal communities representing a broader legal structure are not identical to civil legal communities. In this article the author defines civil legal communities and describes their characteristics.
Keywords: civil legal community, legal community, decisions of meetings, civil legal community of part owners.

The growing complexity of inter-entity relations in the civil circulation clearly illustrates an increasing number of different entities, such as founders, creditors (in case of bankruptcy), co-owners, heirs, spouses, co-authors. Responding to economic needs, the legislature puts such participants into a separate group, called a legal community. On the one hand, this group is not conferred with legal personality; on the other hand, it is differentiated from individual subjects of civil law. As a result, in 2013, Article 181.1 of the Civil Code of the Russian Federation introduced the concept of civil legal community, a new idea for civil law in Russia.

The current Russian civil jurisprudence tends to consider such communities from the perspective of plurality, which is generally a broader concept; still, there is no doubt that civil legal communities are a type of civil legal pluralities.

On 23 June 2015, the Plenum of the Supreme Court of the Russian Federation adopted Resolution No.25 "On Judicial Application of some Provisions of Section I, Part I of the Civil Code of the Russian Federation"[1]. This Resolution of the Supreme Court incorporates a number of provisions, including those concerning civil legal communities. It is of great importance, because this is the first official document which interprets the concept of a civil legal

[1] Rossiiskaia Gazeta [Russian Newspaper]. 2015, No. 140.

community. In comparison, the aforementioned Article 181.1 of the Civil Code of the Russian Federation does not give a definition of the term "a civil legal community" and does not enumerate any features of these communities; it only includes an open-ended list of civil legal communities, containing legal entities, creditors in case of bankruptcy, co-owners.

The analysis of the provisions of the Resolution shows the following:

Section 103 of the Plenum Resolution defines a civil legal community as a group of people lodged with powers to make decisions which are associated with civil law consequences mandatory for all individuals entitled to participate in the meeting as well as for other persons if it is prescribed by law or implied by the substance of regulations. Obviously, this definition is based on Chapter 9.1 "Decisions of Meetings" of the Civil Code of the Russian Federation, and it focuses on a decision of a meeting as a juridical fact rather than on a civil legal community as such. The information concerning civil legal communities is so insufficient that the only conclusion which can possibly be made is that this community is a group of individuals which has a body to express its will and to make decisions; in other words, this group possesses organizational integrity.

Section 118 of the Resolution divides all communities into those which are legal entities and those which are not. In particular, if a civil legal community is a legal entity, it is a defendant in case of nullifying a decision. According to the Supreme Court, the first type of civil legal communities includes assemblies of the following: participants and other bodies of commercial organizations, associations (unions) of commercial organizations, noncommercial organizations incorporating business corporations and (or) sole proprietors, and noncommercial organizations which, according to federal law, are self-regulating entities incorporating entrepreneurs. The second type includes decisions made during meetings of creditors and meetings of creditors' committees in case of bankruptcy, decisions of part owners, including decisions of property owners in multifamily residential buildings or in nonresidential buildings, decisions of co-owners of plots of agricultural land.

It is apparent that such a classification cannot be considered terminologically reliable as it is more accurate to differentiate between civil legal communities which are legal entities and civil legal communities which are regulated by another type of common law (not by corporate law). One cannot equate a legal entity with its founders and participants because it contradicts such a characteristic of a legal entity as autonomy in civil law transactions, a characteristic of detachment, primarily, detachment of a legal entity from its founders.

The Resolution adds more items to the list of civil legal communities presented in the Civil Code of the Russian Federation. As it is known, the Civil Code enumerates only three types of communities. However, it does not mention cases of forming civil legal communities on the basis of joint ownership. For example, in accordance with the Federal Act "On Gardening Noncommercial Associations of Citizens"[2], gardening noncommercial associations also have general meetings of participants, and the property in such communities is jointly owned.

Lack of a legal definition of the term "a civil legal community" and an open-ended list of such communities have aroused doubts about what communities can be considered civil legal communities. For example, D.M.Kharitonov observes, "A tenant and members of his

[2] Federal'nyi' zakon "O sadovodcheskikh, ogorodnicheskikh i dachnykh nekommercheskikh ob'edineniiakh grazhdan No. 66-FZ" [Federal Act "On Gardening Non-commercial Associations of Citizens No. 66-FZ"]. April 15, 1998 (ed. January 31, 2016). Sobranie zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 1998, No. 16, p. 1801.

family form a specific civil legal community (a family as such). Loss of the family connection between the tenant and the members of his family puts an end to their civil legal community, which, however, does not deprive the family members of their right to use the residential property"[3]. Yet, it is apparently wrong in essence to regard the tenant's family as a civil legal community. This viewpoint is substantiated by the thorough analysis of Chapter 9.1 of the Civil Code of the Russian Federation and by the proposition of the Supreme Court which differentiates civil legal communities from other types of legal plurality by emphasizing that civil legal communities have a decision-making body, which unequivocally excludes, for example, spouses as well as a tenant's family.

Secondly, a tenant and members of his family are united into a legal community on the basis of a common property right, and if a legal fact does not terminate it, the community continues to exist despite the family disruption.

Besides, it is not clear how to name those unions which are not civil legal communities. One can come across such terms as "collective bodies", "quasipeople" or "quasisubjects"[4]. It might be a good idea to turn to the experience of western countries where such unions are called legal communities.

Studies on theories and types of legal communities done in western countries will contribute to the development of a domestic doctrine. The concept of a legal community is not defined in the German Civil Code or in the Swiss Civil Code, even though it is used in these legal acts. In the commentary to the Swiss Civil Code, A.Meier-Hayoz defines a legal community as "an unincorporated association of persons, the members of which are holders of equal rights and obligations"[5]. Practically, the most typical and simplest case of a legal community is a community of co-owners of a property item.

The aforementioned idea was theoretically underpinned, first of all, in theories viewing a legal community as a single subject[6].

This group of theories includes the theory of membership which says that a joint unified right can be exercised only by means of creating a community[7]. A community is an independent bearer of rights; thus, it possesses legal capacity[8]. Members of a legal community can have only rights which are detached from this community[9]. Therefore, participation of owners in a community is regarded as the right of membership.

Elaborating on the main idea of the theory of membership, A.Saengler points out, "In a community of part owners as well as in a community of co-owners there is no division

[3] D.M. Kharitonov. Pravovoe polozhenie nanimatelia i chlenov ego semi po dogovory sotsial'nogo naiima [Legal Status of a Tenant and Members of his Family under the Social Housing Tenancy Agreement]// Rossiiskii' sledovatel' [Russian Investigator]. 2014, No. 10, p. 48.

[4] A.A. Kulakov. O mnozhestvennykh sub'ektakh v grazhdanskom prave [On Plural Subjects in Civil Law]// Piatii' Permskii' Kongress uchonykh yuristov [Fifth Permskiy Congress of Legal Scholars]. Perm, October 24 — 25, 2014// Selected materials G.V. Abshilava, V.V. Akinfieva, A.B. Afanasiev, et al; ed. by V.G. Golubtsov, O.A. Kuznetsova. Moscow, Statut Publishing House, 2015, p. 400.

[5] A. Meier-Hayoz. Schweizerisches Privatrecht. Basel, Genf, München: Helbing Lichtenhahn, 1996, p. 31.

[6] B. Schneider. Das schweizerische Miteigentumsrecht. — Bern: Stämpfli. 1973, p. 209.

[7] F. Fabricius. Relativität der Rechtsfähigkeit, p. 139; G. Buchda. Geschichte und Kritik der deutschen Gesamthandlehre. p. 294.

[8] F. Fabricius. Relativität der Rechtsfähigkeit. p. 139.

[9] E. Dossmann. Das Recht des Miteigentümers. Halle a. S. Kaemmerer, 1908, p. 111; N. Hilger. Miteigentum der Vorbehaltslieferanten gleichartiger Ware. Göttingen: Schwartz, 1983, p. 61.

of rights. A community is a subject of the common right. The right of a co-owner is not equal to the common right; in other words, a co-owner is not the same as an owner"[10].

In German-speaking countries, there are two theories concerning legal entities: the dualistic theory and the monistic theory. According to the dominant dualistic theory, a community of co-owners is a legal entity of the second order. According to the monistic theory, a legal entity is any community where participants are somehow connected and where their relations within this group are legally regulated. These considerations make it possible to view a community of co-owners as a legal entity, which can be observed, for instance, in Austria, where a community of owners of common property in multifamily residential buildings is a legal entity.

This idea serves as a basis for the theory of collective unity of co-owners. The theory is mostly applied for explaining the concept of joint ownership. The theory of collective unity assumes the existence of both legal entities and legal communities. A legal community is almost the same as a legal entity, but the legal nexus among its participants is less explicit. R.Kunz, A.Egger, C.Wieland and G.Buchda were against such dualism. They believe that the difference between a legal entity and a legal community is very theoretical. R.Kunz states, "The idea of unity cannot be analyzed by means of a rising scale. In terms of the content and quality of this theory, it is not clear what exactly can be seen in joint ownership — plurality or unity of powers"[11].

R.Kunz stresses that one can either talk about plurality of competences, in which case it cannot be a community, or about single competence which means a legal entity[12].

As far as the issue of competences is concerned, there are significant differences between a legal entity and a legal community. The concept of a legal entity implies individual competence whereas the concept of a legal community is characterized by plurality of competences.

It is traditionally believed that a community of co-owners is closer to a legal entity in terms of unity of participants than a community of part owners since externally such communities are seen by third party observers as a single legal entity. Rights and obligations which are acquired on behalf of the community through law or transactions are rights and obligations of the community as a subject of law[13].

A new theory interpreting a community of co-owners as a group has been developed by W.Flume[14]. This scholar regards all groups as subjects of law. In his opinion, it is a misconception to believe that a community involves a common right to property. The main idea of a community is participation of its members in joint activities. Unity in this case equals to a legal entity. If a community is not understood as unity of activities, it is not clear how it can be possible to have common property; if there is unity of activities, consequently, it is already a legal entity.

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[10] A. Saengler. Gemeinschaft und Rechtsteilung. Giessen, 1913, p. 117.

[11] A. Egger. Kommentar zum Schweizerischen Zivilgesetzbuch /Unveränd. Nachdr. der 2. umgearb. Aufl. 1930 Vorbemerkungen zu Art. 52 ff. ZGB No. 9. Zürich: Schultheß, 1978, p. 346. WielandC. Handelsrecht I. Nachdr., Basel, Helbing [u.a.], 1934. Frankfurt/Main, 1987, p. 425.

[12] Kunz R. Über die Rechtsnatur der Gemeinschaft zur gesamten Hand: Versuch einer dogmatischen Konstruktion. Bern, 1963, p. 74; Buchda G. Geschichte und Kritik der deutschen Gesamthandlehre. Nachdr. der Ausg. Marburg 1936. Frankfurt a.M.: Keip, 1970, p. 258.

[13] Wilhelm J. Sachenrecht. 4., völlig, neu, bearbeitete Auflage. — Berlin : De Gruyter, p. 92.

[14] Flume W. Allgemeiner Teil des Bürgerlichen Rechts, Band I, 1. Teil, Die Personengeselschaft, Berlin 1977, p. 52.

Regarding a community of co-owners as a group is based on perceiving this group as an integral whole. Its activities within legal boundaries are autonomous actions performed by a single separate subject of law which exists as a community of partners. W.J.Sachenrecht states, "This legal reality takes place as a matter of practice; not by operation of law, but in real life a community is vested with autonomy as a juridical entity"[15].

According to Flume's theory, the difference between a legal entity and a joint community does not concern legal incapacity; under Paragraph 124 of the Labor Code, public commercial partnerships, which are communities of co-owners, have legal capacity. The difference between a legal entity and all types of communities of co-owners is that common property is a juridical community, and common activities of members are these members' own actions, not actions of another subject of law, a legal entity. This distinctive feature of a legal entity is illustrated by the term "a group". A group includes a number of people, and they form a certain unity which exists only when they act together. As stated in Flume's theory, a legal entity is different from joint communities because it is "a bearer of rights and obligations on the basis of its own legal standing, and not as a group of united members".

On the one hand, an action on behalf of a community takes place on behalf of this community as a juridical entity. On the other hand, it also takes place on behalf of this community as a group of partners as any community is unity of its partners' activities. Partners are liable for obligations of the community whereas the community is the group's shared unit of action.

As far as civil legal communities are concerned, it should be noted that by implication of Russian legislature this type encompasses not all legal communities but only those which possess a number of features making them, to a great extent, similar to a legal entity. The features of such a community are as follows: it has a common purpose and organizational integrity; its members are held liable for the community's obligations; a member of the community possesses a common right, the specific character of which determines mechanisms of decision-making aimed at exercising this right.

The research has resulted in the following conclusions:

First, the concept of a civil legal community, which is a new notion for the Russian civil law, should be considered from the perspective of theories on legal entities and legal communities because by implication of law civil legal communities are closer to legal entities than other types of legal communities.

Second, a legal community is a union of individuals on the basis of a common right such as the right of obligation, proprietary right, corporate right or intellectual property right. These individuals enjoy equal rights exercised within the community but for the sake of their own goals which cannot be achieved outside the community. For example, without interacting with other co-owners it is impossible to set an optimal mode for using a shared thing.

Third, the features of civil legal communities are a common purpose and organizational integrity. Moreover, members of these communities are liable for the community's obligations, and each member enjoys a common right, whose specific character determines the process of decision-making aimed at exercising this right.

Fourth, a civil legal community can be defined as a goal-oriented union without legal capacity whose members possess a common right (proprietary, obligations, corporate) to

[15] J. Wilhelm. p. 95.

some property. The participation in this union does not terminate the members' own powers but serves as a prerequisite for the most efficient exercise of each participant's rights if one takes into consideration its collective nature.

Fifth, singling out the category of civil legal communities leaves other existing legal communities beyond the scope of legal regulation. These are legal communities where relations among participants are corporate in nature and need legal control, for example, communities of part owners, which could fall under the provisions of Chapter 9.1 of the Civil Code of the Russian Federation. Applying these provisions to part owners would solve many problems arising in practice and making relations of shared ownership cost-inefficient. Generally speaking, the inclusion of civil legal communities into the current legislation does not resolve any fundamental issues; it only states the fact that such communities are involved in making decisions, not transacting deals, which was already obvious from the provisions of special legislation.

"HARD" AND "SOFT" REGULATION IN CORPORATE LAW

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Abstract: The article is focused on various levels of regulating legal relationships in corporate law. Those range from legislative provisions—either mandatory or default—to corporate by-laws and shareholders agreements. The paper comes to the conclusion that the legislators should set forth default rules applying to any corporate form except public companies, the latter being governed by mandatory rules. The author questions the possibility of using model company charters for various corporate forms. The paper also considers various types of shareholders agreements. The conclusion is made that there should be limits set on contractual regulation of legal relationships in corporate law.
Keywords: corporation, legal relationships in corporate law, legal relations arising out of membership, corporate law, charter, company by-laws, corporate charter.

Legal relationships in corporate law are governed at various levels by a variety of legal tools. In this paper, we will provide the definition and analysis of those levels.

The first level includes statutory law — the so-called 'hard' rules. Those are rules of corporate legislation. Corporate legislation is comprehensive and encompasses provisions of both private and public law across a number of industries.

Among corporate legislation, the major role is played by the Civil Code of the Russian Federation (the Civil Code) and other specialized federal laws that were enacted in compliance with the Civil Code and govern the status and business activity of legal entities, including corporations.

Article 3, p.2 of the Civil Code sheds light on the connection between the Civil Code and specialized federal laws: "the civil legislation comprises the Civil Code and other federal laws that were enacted in compliance therewith and regulate the relations set forth in p.1 and p.2 of Article 2 of the Civil Code". Those relations include, inter alia, legal relationships in corporate law. It is important that the legal rules contained in other laws shall conform to the provisions of the Civil Code. Furthermore, p.7 of Article 3 of the Civil Code reads that "ministries and other federal executive bodies can adopt secondary legislation that contains provisions of civil law in the circumstances and within the limits set forth by the Civil Code, other laws and other regulations". That means that "other regulations" can define the legal status of corporations only to the extent stipulated by the Civil Code or by a federal law. On their own, "the other regulations" — that is, secondary legislation — cannot define the status of legal

persons, and corporations make no exception. Otherwise, the sphere of regulation would be excessively wide and the notion of "civil legislation" largely blurred.

In connection with the said above, we consider the language of p.4 of Article 49 of the Civil Code to be inaccurate: "the specifics of the legal status of legal entities having particular organizational forms, types and varieties as well as legal entities established to conduct business in particular spheres are defined according to the Civil Code, other laws and other regulations".

The Civil Code sometimes contains a direct reference to other laws. For instance, p.1 of Article 181.1 of Chapter 9-1 reads as follows: "The rules of this chapter shall apply, unless otherwise provided for by or according to the law".

In general, the "hard" regulation in corporate law is characterized specifically by the development of corporate legislation, the gradually diminishing role of secondary legislation and a growing importance of laws (statutes) having direct application.

Federal laws can contain a reference that corporate relations can be regulated by other legal acts. By way of illustration, the law on joint-stock companies sets forth that a joint-stock company shall keep all the records required by the law, the company's charter, the company's by-laws, the decisions of the general meeting, the resolutions of the board of directors (the supervisory board), the company's bodies, and by Russia's regulations. A joint-stock company shall keep the documents in a manner and within the timeframe set forth by the regulations of the Bank of Russia (Art. 89). A joint-stock company shall provide (disclose) the required information according to the provisions of the law or other regulations (Art. 90).

At present, corporate legislation is widely using both default rules and mandatory rules and prohibitions. According to O.V.Osipenko, "legal regulation needs to find a balance between the types of legal rules: mandatory provisions ("hard" regulation), default provisions (dispositive or "either-or" approach) and the major institutional tools, such as 1) prohibition, 2) incentive, 3) local restriction, 4) general provision, 5) omission[1].

For example, public companies (*publichnoe aktsionernoe obshchestvo*) are governed by mandatory rules only (Art. 97 of the Civil Code), while private companies (*nepublichnoe aktsionernoe obshchestvo*) and limited liability companies (*obshchestvo s ogranichennoy otvetstvennostyu*) are largely governed by default rules, to the extent this does not infringe the rights and lawful interests of their members (shareholders). For instance, p.3 of Article 66.3 of the Civil Code contains a list of provisions that can be included into a private company's charter, which is subject to unanimous approval at the general meeting. This list is not a closed one: the charter can also contain other provisions where allowed by the respective laws governing a particular corporate form.

First and foremost, this refers to re-allocation of power between the general meeting, the collegial governing body (the board) and the collegial executive body (the management). For example, the law on joint-stock companies sets forth the following powers of the general meeting: approval of the annual report and the annual financial statement; decision-making with respect to the listing of the company's shares and (or) other securities that can be converted to the company's shares. At the same time, the charter can delegate this power to the board of directors (Art. 48).

[1] V.O. Osipenko. Instituty korporativnogo upravlenia i aktsionernye konflikty v Rossii [Institutions of Corporate Governance and Stakeholder Conflicts in Russia]. Eksmos Publishing House, Moscow, 2004 pp. 49 — 50.

The general meeting of a public company cannot discuss and decide on the matters that do not fall within its competence according to the law on joint-stock companies. Conversely, the general meeting of a private company can be empowered to do so by its charter that overrides the default provisions of the applicable piece of legislation.

In the same way, the charter of a limited liability company can allow its general meeting to decide on the matters that fall beyond the general meeting's statutory powers (Art. 33 of the Federal Law "On Limited Liability Companies").

In general, the default rules are also typical of the legal regulation of cooperatives: both worker and consumer ones. The provisions of the Federal Law "On Worker Cooperatives" allow many issues to be governed by a cooperative's charter. For instance, the charter can provide the general meeting with an exclusive competence over the issues which are not mentioned in the law.

We should note that the issues whose closed list is contained in p.3 of Article 66.3 of the Civil Code cannot be handed over from a private company's general meeting to its other bodies (either the board or the management).

Meanwhile, Article 66.3 of the Civil Code is titled "Public and Private Companies" and has a definition of a public company (*publichnoe obshchestvo*). The article stipulates that any company lacking the features of a public company shall be deemed private. This allowed the legislators to consider limited liability companies as private companies. This approach is erroneous and has been many times regarded as such in academic literature[2]. There might be only one rationale behind this decision, and this rationale is of a technical nature — this is, to show that private companies are generally governed by default rules. However, this invites the following question: are not worker and consumer cooperatives governed by default rules as well? Indeed, the laws on production and consumer cooperatives have always been characterized by the domination of default rules.

Therefore, it would not be illogical to specifically provide for the legal status of a public company (*publichnoe aktsionernoe obshchestvo*), and it is exactly what has been done by the Civil Code (Art. 97), the Federal Law "On Joint-Stock Companies" (Art.7, 7-1, and 7-2), the Federal Law "On Securities Market", and the secondary legislation of the Central Bank enacted under those laws. The legal status of all the other corporations (both commercial and non-commercial) is primarily determined by default rules empowering the members — where allowed to do so by the law — to override the statutory provisions in the charter. Thus, the charter can contain provisions that differ from the default rules, but do not run counter to the law. This approach is more in the corporate spirit, since corporations are based on voluntary membership. It enables the members (shareholders) to define their conduct themselves by voting at the general meeting: they can choose whether to follow the default rules set forth in the legislation or to stipulate different rules, where allowed by the law.

With respect to all corporate forms, except public companies, we take the view that Article 65.3 "Corporate Management" of the Civil Code should be supplemented by the provi-

[2] E.A. Sukhanov. Amerikanskie korporatsii v rossiiskom prave (o novoi' redaktsii gl. 4 GK RF) [America's Corporations in Russian Law: On the Latest Revision of Russia's Civil Code]// Vestnik grazhdanskogo prava [Bulletin of Civil Law]. 2014, No. 5, vol. 14, p.10; O.A. Makarova. Publichnye i nepublichnye aktsionernye obshchestva: osobennosti upravlenia [Public and Private Joint-stock Companies: Specifics of Governance]// Grazhdanskoe pravo [The Civil Law]. 2015, No. 7, pp. 15 — 16.

sions of p.3 of Article 66.3 of the Civil Code, where the latter provide for the possibility to redistribute the power between a corporation's bodies.

Corporate charters are another type of documents that ensure the "hard" regulation of corporate relations. The charter is binding on all members of a corporation, and its content shall satisfy the requirements of both the Civil Code and specialized corporate laws.

According to p.2 of Article 52 of the Civil Code, "legal persons can conduct business based on a model charter approved by a competent federal agency. The reference to the legal entity being governed by a model charter approved by a competent federal agency shall be included to the state register of legal persons".

The Federal Law "On Limited Liability Companies" (as amended by Federal Law No.209-FZ of 29 June 2015) allows the legal entities of this corporate form to be governed either by a charter approved by its members or by a model charter. The model charter shall meet a number of requirements. Firstly, it shall be approved by a federal executive agency duly authorized by the Government of the Russian Federation (specifically, the Ministry of Economy). Secondly, the federal executive agency shall send the model charter to the state registrar of legal persons within three business days following the publication date of the order approving the model charter. And thirdly, the model charter shall be uploaded to the official website of Russia's Federal Tax Service.

Both the Federal Law "On Limited Liability Companies" and Article 52 of the Civil Code use the term "model charter", which means that a company's members can adopt such a model charter in full, without any additions and amendments. Therefore, "a model charter" is different from "a template charter", the latter being only an example of a charter's provisions.

The Federal Law "On Limited Liability Companies" is the only statute that provides for a model charter. Hence, there is a question: are other types of legal persons entitled to conduct business based on a model charter? This question is not unjustified, since Article 52 of the Civil Code applies to all legal entities, including corporations. Should all the specialized federal laws accommodate the respective provisions of model charters?

According to p.5 of Article 52 of the Civil Code, the members of a corporation can adopt "an internal regulation" and other by-laws that would not belong to a corporation's constitutional documents but yet would govern their corporate relations. However, the content of this "internal regulation" has not been clarified so far.

The by-laws of a corporation are documents ensuring the "soft" regulation of legal relationships in corporate law. However, the adoption of certain by-laws is required by corporate legislation, which makes them mandatory. Other by-laws are not mandatory and can be adopted at a corporation's discretion. However, such non-mandatory by-laws shall not run counter to legal rules or the company's charter.

The role of corporate by-laws is gradually increasing at the expense of centralized regulation. The corporate legislation sets forth only the minimum (both necessary and sufficient) requirements that reflect the objective legal boundaries of the freedom of entrepreneurship[3]. This kind of regulations is fully in the nature of corporate law. According to V.F. Yakovlev, corporate relations are most effectively driven by self-regulation based on statutory provisions[4].

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[3] See: V.F. Popondopulo. Kommercheskoe (predprinimatelskoe) pravo: Uchebnik [Commercial (Entrepreneurial) Law: Textbook]// Yurist [Lawyer]. Moscow, 2003, p. 60.

[4] See: V.F. Yakovlev. Rossiia: ekonomika, grazhdanskoe pravo (voprosy teorii i praktiki) [Russia: Economy and Civil Law (Theory and Practice)]. Moscow, 2000, p. 20.

The by-laws of a company shall be adopted with due regard to the distribution of powers between the company's bodies. It follows from p.3 of Article 66.3 of the Civil Code that the adoption of a private company's by-laws belongs to the exclusive competence of its general meeting and cannot be delegated to any other body (e.g. the board of directors).

Furthermore, the law on joint-stock companies stipulates that the adoption of a company's by-laws (here the law draws no distinction between public and private companies) governing the work of its bodies (subp.19 of Art. 48) falls within the competence of the general meeting. Meanwhile, the board of directors (the supervisory board) is vested with the authority to approve the by-laws — excluding the by-laws that the legislation makes subject to the general meeting's approval — and other by-laws that are subject to the approval of the executive bodies according to the company's charter (subp.13 of Art. 65).

According to p.2.1 of Article 32 of the Federal Law "On Limited Liability Companies", a company's charter can vest the board of directors (the supervisory board) with the authority to approve or issue the documents governing the company's internal affairs (i.e. a company's by-laws).

In this respect, we should note once again that the rules of civil legislation contained in other federal laws should conform to the Civil Code. Until the specialized laws are amended so as to comply with the Civil Code, they shall have effect only to the extent they do not run counter to the Civil Code. Therefore, we should consider the abovementioned provisions of the federal law on joint-stock companies, the law on limited liability companies and of p.3 of Article 66.3 of the Civil Code from this very perspective.

It seems that in private companies the by-laws can be approved only by the general meeting of shareholders. In public companies, pursuant to the law on joint-stock companies, the by-laws delineating the authority of a company's bodies shall be made only by the general meeting, while other by-laws can be made both by the board and by the executive bodies, where it is allowed by the charter.

The "soft" regulation of corporate relations also includes the recommendations of the Corporate Management Code approved by the Central Bank's Letter No.06-52/2463 of 10 April 2014. The Central Bank recommends that this code should be used by joint-stock companies listed on a stock exchange[5]. However, some of those recommendations can be also employed by other corporate forms: first and foremost, by private companies.

Finally, the relations between the members of a corporation can be governed by a contract. As follows from p.3 of Article 307.1 of the Civil Code, the legal relationships in corporate law shall be governed by the general provisions of the law of obligations, unless provided otherwise by the Civil Code itself and other laws, as well as the legal nature of the relations in question.

At the same time, there is a need to set the limits to the role of contracts in the domain of corporate law. The legal relationships governed by corporate law are based on membership, which arises as the result of a voluntary contribution made by a member to the charter capital — that is, the purchase of stock in a joint-stock company or shares in a limited liability company. As the general rule, a company's net earnings are distributed in proportion to the shares each member paid for.

The regulation by contract means that the legal relationships that are governed by corporate law and emerge based on membership are further supplemented by a contractual framework. This framework is based on the freedom of contract and cannot be fully reduced to the

[5] Vestnik Banka Rossii [Bulletin of Bank of Russia]. 2014, No. 40.

relations of corporate membership or corporate management. In corporations, there are members (participants, shareholders) who have different amount of shares — that is, there is legal inequality from the very beginning. This inequality can be counterbalanced only by mandatory rules of law. That is why the contractual freedom in corporate law should be strictly limited. In particular, contracts can be used to resolve problems (various stalemate situations) and corporate conflicts. If the scope of regulation by contract becomes wider, the corporate law will cease to exist as an independent branch of law, because the respective sphere will be governed by the rules of contract law[6].

The Civil Code makes provisions for a variety of shareholders agreements. The first type of shareholders agreement is executed between only some of a corporation's members (shareholders), while the second type — between all members of a corporation. The third type is executed between a corporation's creditors and other third parties (not specified by the law), on the one part, and the corporation's members (shareholders), on the other part, with a view to secure the lawful interests of creditors and other third parties; this type of agreement is governed by the statutory provisions on shareholders agreements (p.9 of Art. 67.2 of the Civil Code).

By providing for a shareholders' agreement between all members of a corporation, the Civil Code sanctions an ungrounded broadening of contractual regulation. Such an agreement can change the structure of a company's bodies and their competence (p.4 of Art. 66-3 of the Civil Code). The first paragraph of p.2 of Article 67.2 of the Civil Code reads that a shareholders' agreement cannot change the structure of a company's bodies or their powers — such provisions make the agreement null and void. Meanwhile, the second paragraph allows a shareholders' agreement to set an obligation of the parties thereto to vote at the general meeting in favor of the provisions that determine the structure and powers of the company's bodies, where the Civil Code (see p.4 of Art. 66-3 of the Civil Code) and the respective law on a particular corporate form allow such changes to be introduced by the charter.

Finally, a shareholders' agreement between all shareholders of a company brings up the question about the respective roles of the charter and the shareholders agreement: which of them governs the company's affairs? In essence, this situation implies that corporations largely lose the features of business entities based on pooling of the capital. Instead, they become contract-based associations of partners, which not only blur the difference between a corporation and a partnership, but also undermine the entire notion of a legal person.

P.9 of Article 67-2 of the Civil Code contains another provision that might engender certain ramifications. It allows executing a contract between a corporation's creditors and third parties, on the one hand, and its members, on the other hand. Under such a contract, the members shall exercise their corporate rights in a particular manner or abstain from exercising their rights in order to secure the lawful interests of such third parties. This means that the creditors and third parties, though lacking any rights in the corporation, acquire the leverage allowing them to control and manage a corporation's affairs. This contradicts the notion of a body corporate and runs counter to the entire nature of a corporate form.

Therefore, the legal relationships in corporate law can be effectively governed through the balanced combination of "hard" and "soft" regulations — that is, the combination of mandatory and default legislative provisions, the charter, the by-laws, and the shareholders' agreement.

[6] E.A. Sukhanov. Sravnitel'noe korporativnoe pravo [Comparative Corporate Law]. Statut Publishing House. Moscow, 2014, pp. 214 — 215.

LEGAL REGULATION OF THE FINANCIAL MARKET OF THE RUSSIAN FEDERATION

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Abstract: The article is devoted to the characteristics of different types of financial markets and the search for the definition of the financial market in general. The authors are trying to answer the question about the necessity of the unified financial market in the Russian Federation under the supervision of the mega-regulator — the Bank of Russia. The article defines segments of the financial market, classifies financial markets, analyses the demand in creating unified rules for them, and analyses the balance of state regulation and self-regulation in this sector.
Keywords: Russian financial market, market of financial services, investment market, market of banking, mega-regulator, financial service, self-regulation, investment activity.

At present, there is a boom of financial services and products in the Russian Federation and financial markets have drastically been developed. The financial market in Russia starts to be of great importance for the economy in general, as it contributes to the economic growth by generating savings that can be converted into investments in infrastructure, industry, etc. As financial products and services have become more popular among entrepreneurs, the boundaries of the financial market have been expanded and it has made the financial market more complicated and sophisticated. The insurance market, banking market and securities market have been gathered under the control of the Central Bank of the Russian Federation, but not unified. Under these circumstances, it has become more evident that it is necessary to give a proper definition to the financial market in the Russian Federation, which does not have this definition in its legislation.

Characteristics and laws in various financial markets in the Russian Federation

As noted by A.V.Tourbanov, the establishment and development of financial markets has different characteristics in different countries. In some of the countries the dominant role is played by banks (e.g. in Russia), in others a large segment of the financial market belongs to

non-banking financial institutions[1]. At current, in the Russian Federation, a unified financial market has not been formed yet and there is no legal act that regulates the financial market in general. Draft of such a legal act No.436190-4 "On the Regulation of Business Activity in the Financial Markets" was rejected in 2008, due to the recognition of a premature attempt to unify the regulation of all financial markets because of possible destabilizing effects for some developing areas (in particular, the securities market).

There are, though, many special laws in each financial market (the market of banking, insurance, securities, etc.) or, as it can be called, different segments of the financial market.

Banking legislation includes, in particular, Federal Law of 2 December 1990 No.395-FZ "On Banks and Banking Activity"[2], Federal Law of 10 July 2002 No.86-FZ "On the Central Bank of the Russian Federation (the Bank of Russia)"[3] and a number of specific federal laws concerning regulation and the legal status of banking entities and banking services. A major role in the banking market regulation belongs to normative legal acts of the Bank of Russia, which is a regulatory and controlling authority to all banks in the country. The market of banking services, as the object of legal regulation, can be defined as social relations associated with the provision of banking services by banking credit organizations through banking operations as an exclusive activity. As pointed out by A.Ya.Kurbatov, the allocation of the bank (credit) market as a kind of a financial market has happened due to economic implications and credit institutions acting as financial intermediaries, organizing cash flows in the economy[4].

The basic legal act regulating the insurance market is Federal Law of 27 November 1992 No.4015-I "On the Organization of Insurance Business in the Russian Federation"[5]. Currently, the insurance market also falls under the regulation of the Bank of Russia, becoming a segment of the unified financial market that has started to be created by the government of the Russian Federation. The insurance market can be defined as social relations associated with the provision of insurance services by insurers. As mentioned by V.I.Kazantsev and V.N.Vasin, the insurance sector has become a necessary element of the socio-economic system of the society that protects the property interests of citizens, organizations and the state itself. It has a positive impact on strengthening the country's finances[6]; it gives legal entities a guarantee to restore their property status which they used to have before harmful factors occurred. It is important to mention that similar tools can be used within the framework of the state regulation of the banking and insurance activities of insurance and credit institutions, for instance, measures against money laundering.

1 A.V. Tourbanov. Megareguliator finansovogo rynka i problemy pravovoi' neopredelennosti [Mega-regulator of the Financial Market and Problems of Legal Vagueness]// Bankovskoe pravo [Banking Law]. 2013, No. 5, pp. 3 — 9.

2 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 1996, No. 6. art. 492.

3 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2002, No. 28. art. 2790.

4 A.Ya. Kurbatov. Pravosub'ektnost' kreditnykh organizatsii: teoreticheskie osnovy formirovaniia, soderzhanie i problemy realizatsii [Legal Status of Credit Organizations: Theoretical Basics of Forming, Maintaining and the Problems of Realization]. Jurisprudence Publishing House, Moscow. 2010, p. 280.

5 Vedomosti S'yezda narodnykh deputatov i Verkhovnogo suda RF [Gazette of the Congress of People's Deputies and the Supreme Court of the RF]. 1993, No. 2, Art. 56.

6 V.I. Kasantsev, V.N. Vasin. Pravovye aspekty razvitia rynka strakhovykh uslug v usloviiakh rynochnykh preobrazovanii' v Rossiiskoii Federatsii [Legal Aspects of Development of the Insurance Services Market in the Conditions of Reformation in the Russian Federation]// Jurist [Lawyer]. 2006, No. 10.

The main source of legal regulation of the securities market is Federal Law of 22 April 1996 No.39-FZ "On the Securities Market"[7]. It must be noted that since the stock market also falls now under the regulation and control of the Bank of Russia, the increasingly important role in the regulation of this segment has been taken by the normative legal acts of the Bank of Russia, for example, Regulation of the Bank of Russia of 11 August 2014 No.428-P "On the Standards of the Issue of Securities, the Procedure of State Registration of the Issue (Additional Issue) of Securities, the State Registration of Reports on the Issue (Additional Issue) of Securities and Registration of Securities Prospectuses"[8], Act of the Bank of Russia of 21 July 2014 No.3329-U "On the Requirements to Own Funds of Professional Securities Market Participants and Management Companies of Investment Funds, Mutual Funds and Private Pension Funds"[9], etc. The activities in the securities market are separate from the work of other markets — commodities, foreign exchange, insurance market, etc. In this sense, any activity in the securities market is typical only for this market; therefore, most of the services in this market are called professional. Professional services are the activities based on the invested capital provided by issuers, investors and other participants of the market, whose capital is directly related to the existence of the security[10]. Professional participants should obtain a license from the Bank of Russia to conduct their business. Any misconduct can be a reason to stop the license.

Apart from the securities market, it is possible to name the futures market as a segment of a newly formed unified financial market under the power of the Bank of Russia. The futures market is determined by G.A.Malov as a certain economic system, where high-risk relations are developed between economic actors about making exchange and off-exchange transactions, which are financial derivatives[11].

G.V.Melnichuk identifies the futures market as a set of transactions, which include buying and selling not real goods but the rights and obligations in respect of standard contracts[12]. Currently, the futures market is undeveloped in the Russian Federation, but step by step regulation of this market is being created.

The foreign exchange market is mainly regulated by Federal Law of 10 December 2003 No.173-FZ "On Currency Regulation and Currency Control"[13]. As indicated by B.Yu.Dorofeev, the foreign currency market is the system of economic and organizational relationships for the acquisition and alienation of currencies, the technological system of technical (electronic) methods of forming conditions and rapidly concluding foreign exchange transactions, and the organizational system of terminology in a complex social interaction of market participants, etc.

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7 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 1996, art.1918.

8 Vestnik Banka Rossii [Bulletin of the Bank of Russia]. 2014, No. 89 — 90.

9 Vestnik Banka Rossii [Bulletin of the Bank of Russia]. 2014, No. 75.

10 A.A. Kirillovykh. Professional'naia deiatel'nost' i organizatsiia torgovli na rynke tsennykh bumag: voprosy pravovogo regulirovaniia [Professional Activity and the Organization of Trade in the Securities Market: Issues of Legal Regulation]// Zakonodatel'stvo i ekonomika [Legislation and Economy]. 2014, No. 8, pp. 33 — 39.

11 G.A. Malov. Pravovye aspekty srochnogo rynka kak ekonomicheskoi' kategorii [Legal Aspects of the Futures Market as an Economic Category]// Predprinimatel'skoe pravo [Business Law]. 2014, No. 2, pp. 85 — 91.

12 G.V. Melnichuk. Sdelki na srochnykh rynkakh [Transactions in the Futures Markets]// Zakonodatel'stvo [Legislation]. 1999, No. 10, p. 22.

13 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2003, No. 50, art. 4859.

The transactions in the foreign exchange market are related to a special commodity — foreign currency (or the rights to it), and the content of the acquisition or disposal of foreign currency (or the rights to it)[14]. The foreign currency control in the Russian Federation is also exercised by the Bank of Russia, but also by the federal agency and other federal bodies empowered by the government of the Russian Federation. I.V. Khamenushko notes that depending on the economic situation of the state, the Bank of Russia can strengthen or weaken the control of the foreign exchange market. In the foreign currency exchange regulation, the main purpose of the law is the protection of the national currency[15].

Necessity to create a unified financial market of the Russian Federation

When Federal Law of 23 July 2013 No.251-FZ "On Amendments to Certain Legislative Acts of the Russian Federation following Assignment of Financial Markets Regulation, Monitoring and Supervision Powers to the Central Bank of the Russian Federation"[16] (hereinafter referred to as the Law on the mega-regulator) came into force, a trend towards the unification of various financial markets under the supervision of the Bank of Russia has become clear. As it was indicated in the explanatory note for the above mentioned Law, the functions of regulation and supervision over the financial market participants in all sectors (credit institutions, insurance companies, infrastructure organizations, microfinance institutions, professional securities market, and private pension funds) by one regulatory authority will enhance the stability of the financial market. Thus, in case of mega-regulation the legislator outlines the new boundaries of the financial market, where securities market, banking and insurance segments are included. But the concept of the financial market cannot be limited just to these markets only. For example, the investment market, which can be deemed as a financial market, does not fall under the regulation of the Bank of Russia.

Legal scholars distinguish between real and portfolio investments. In RSFSR Law of 26 June 1991 No.1488-1 "On Investment Activity in the RSFSR"[17], the legislator refused to include portfolio investments under its regulation taking into account that that has already been regulated by corporate law and the securities market legislation. As a result of this decision, Federal Law of 25 February 1999 No.39-FZ "On Investment Activity in the Russian Federation in the Form of Capital Investments"[18] does not mention portfolio investments at all, and the law is dedicated solely to real investments. Thus, the portfolio investments market as a part of the securities market can be deemed as a part of the financial market under the control of a mega-regulator, however, the market of real investments does not fall under its control.

[14] B.Yu. Dorofeev. Valutnyi' rynok Rossiiskoi Federatsii: poniatie i obschaia kharakteristika [Foreign Currency Exchange Market of the Russian Federation: Definition and General Characteristics]// Rossiiskii yuridicheskii zhurnal [Russian Law Journal]. 2010, No. 2, pp. 57 — 64.

[15] I.V. Khamenushko. Valutnoe regulirovanie v Rossiiskoi Federatsii: pravila, kontrol', otvetstvennost' [Foreign Currency Regulation in the Russian Federation: Rules, Control, Responsibility]. Norma Publishing House, Moscow, 2013, p. 352.

[16] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2013, No. 30 (part I), art. 4084.

[17] Vedomosti Syezda narodnykh deputatov i Verkhovnogo Suda RSFSR [Gazette of the Congress of People's Deputies and the Supreme Court of the RSFSR]. 1991, No. 29, art. 1005.

[18] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 1999, No. 9, art. 1096.

At the same time, the Law on the mega-regulator has made a significant step towards the establishment of the boundaries of the financial market and its segments. The markets, which are united under the control of a mega-regulator, can be determined as segments (sectors) of a unified financial market. At the same time, as noted in the scientific literature, there are significant differences between these segments: the banking sector is closely linked to macro-economic and financial stability, the insurance sector does not have such a big influence on the stability of the financial system; however, due to the nature of insurance, the insurance market has an impact on the citizens and legal entities, therefore good faith behavior of insurance companies means a lot in the market. The sector of other financial services such as securities, futures, etc. is very wide, but the main requirements in these markets are information disclosure and market discipline[19]. At the same time the segments of the financial market are always closely connected, and the more developed the unified financial market is, the closer the connections between its segments are.

With all the positive aspects of harmonization of regulation of the financial market, it always goes hand in hand with the erosion of the boundaries of the financial market segments. Therefore, it is important not to forget that the impact of each sector in the entire market is different, so the regulation cannot be similar, though similar tools can be used in some cases. For example, from the viewpoint of certain risks, financial markets are totally different: problems in the insurance market can never cause such destruction for the economy in general as the same problems in the banking segment that can cause a crisis. And in terms of flexibility, the regulation of the freedom that is granted to professional participants in the securities market can never be given to banks which deal with citizens.

Definition of the financial market

The doctrinal understanding of the financial market is more developed by representatives of the economic science, because the market itself is an economic category. In the economic literature, the financial market is defined as the economic field of reproduction of forms of fictitious capital[20], and its essence is seen in the fact that it reflects the specific form of organization of the movement of financial resources by means of the financial and credit mechanism[21]. In the economic literature, the terms "financial market" and "the market for financial services" are used as synonymous.

As mentioned before, there is no legislative definition of a financial market or the financial services market in the Russian Federation. Moreover, in the legal field scholars have yet to agree on the definition of the financial market. Some scholars understand the financial market as the market of securities and futures[22]; others identify it with the market of financial services. Some scholars believe that financial services are available in the financial market,

[19] M.D. Efremov, V.S. Petrishev, S.A. Rumyantsev. Zashchita prav potrebitelei' finansovykh uslug [Protection of Rights of Consumers of Financial Services]// Edited by Yu.B. Fogelson. Norma Publishing House, Infra-M, Moscow, 2010. p. 368.

[20] M.V.Sharapov, A.A. Ermolenko. Finansovye rynki: strukturnyi aspect [Financial Markets: a Structuring Aspect]// Novye tekhnologii [New Technologies]. 2012. No. 1, p. 215.

[21] E.V. Karaeva. Rynok finansovykh uslug i ego mesto v structure finansovogo rynka [Market of Financial Services and its Place in the Structure of the Financial Market]// Issues of the Gertsen State Pedagogical University of Russia. 2008, No. 60, p. 125.

[22] A.E. Molotnikov. Sovremennoe sostoianie i perspektivy pravovogo regularovania finansovogo rynka [Contemporary State and Perspectives of Legal Regulation of the Financial Market in Russia]// Predprinimatel'skoe pravo [Business Law]. 2014, No .2, pp. 60 — 66.

but there are also financial markets trading financial assets without using financial services of third parties[23]. It is also noted that financial services are associated with the movement of cash, not in the sense of the calculations (for example, payment by the buyer of goods or services), but in terms of the transformation of money into capital[24].

Federal Law of 23 June 1999 No.117-FZ (repealed) "On the Protection of Competition in the Financial Services Market"[25], for example, was devoted to the ratio of affecting competition in the securities market, banking market, insurance market and other markets of financial services which it united under a single concept of financial services market. The financial services, defined by this Law as activities associated with attracting and using the funds of legal entities and individuals, were considered as services for banking operations and transactions, the provision of insurance services and services in the securities market, contracts of financial rent (leasing) and agreements on trust management of monetary funds and securities, and other financial services (Art. 3).

With the development of legislation, the market of financial services has become a part of the commodity market in the light of anti-monopoly regulation. Federal Law of 26 July 2006 No.135-FZ "On the Protection of Competition"[26] (hereinafter referred to as the Protection of Competition Law) defines financial services as banking services, insurance services, services in the securities market, services of the leasing contract, etc. (Art.4). The Protection of Competition Law states that the market of financial services no longer stands alone and is covered by the term "product market" because the legislator has equated the term "a financial service" to the term "commodity" which means the object of civil rights (including work, services, financial services) intended for sale, exchange or other introduction into circulation (Art.4). In the scientific literature, it is indicated that international and national regulation of financial services, investment services, monetary and settlement and clearing services is increasingly blurred in the process of elaborating unified legal norms and principles of regulation of the capital turnover. They are now used as a general concept for the description of various legal forms, mediating movement (appearance, handling, transformation) of assets, securities trading and financial services[27].

To define the concept of the financial market it is necessary to define the concept of the market in general. Under the Protection of Competition Law, the commodities market includes the financial market, and it is interpreted as the sphere of circulation of goods (including foreign goods), which cannot be replaced by other goods, or of interchangeable

[23] A.M. Ekmalyan. Bank Rossii kak mega-reguliator finansovogo rynka: tseli deiatel'nosti, funktsii i polnomochia [Bank of Russia as a Mega-regulator of Financial Services: Goals, Functions and Competence]// Jurist [Lawyer], 2015, No. 7, pp. 4 — 11.

[24] N.G. Semilutina. Investitsii i rynok finansovykh uslug: problemy zakonadatel'nogo regulirovania [Investments and Market of Financial Services: the Problem of Legal Regulation]// Zhurnal Rossiiskogo prava [Russian Law Journal]. 2003, No. 2.

[25] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 1999, No. 26, art. 3174.

[26] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2006, No. 31 (part 1), art. 3434.

[27] G.V. Petrova. Formirovanie mezhdunarodnogo prava torgovli finansovymi uslugami i ego vliianie na natsional'noe zakonodatel'stvo o finansovykh rynkakh [Forming International Law of Trade of Financial Services and its Influence on National Legislation concerning Financial Markets]// Mezhdunarodnoe pravo i mezhdunarodnye organizatsii [International Law and International Organizations]. 2012, No. 4, pp. 55 — 66.

goods, within the boundaries (including geographic) of which the acquirer, taking into consideration economic, technical or other opportunities, has a possibility or finds it reasonable to acquire goods or such a possibility or expediency is not available outside its boundaries.

In the legal literature, the market is defined as socio-economic relations between buyers and sellers, the scope of potential exchanges, through which the sale of goods is made and the final recognition of the related labor takes place[28]. At the same time, the market as the object of legal regulation is referred to as social relations associated with competition-based business activities in certain areas (regions) of the production, sale or purchase of interchangeable or identical goods (works, services) in the Russian Federation (part thereof) or outside it, and these relationships arise between the parties, at least one of which is a business entity[29].

Financial markets can be defined as the sphere of circulation of financial products (assets) and services that cannot be replaced by interchangeable or identical financial products (assets) or services in the territory of the Russian Federation (part thereof) or outside of it, and these relationships arise between the parties, at least one of which is the subject of entrepreneurial activity, and in case of the financial services market — with the obligatory participation of an intermediary — a professional participant of the financial market, which has the proper license and / or a different way of statutory professional admission.

Types of financial markets

It seems possible to offer several classifications of financial markets applying different criteria. Taking the criterion of the presence/absence of professional intermediaries in the financial services market, two markets can be allocated: the financial market with intermediaries — professional licensed business entities — and the market of financial products, which does not depend on the presence of intermediaries, since the transaction with a financial product can be accomplished between business entities that do not have special legal capacity (for example, the assignment of claims under the loan, the implementation of capital investments, etc.).

The financial market can be divided into organized and unorganized. Organized financial markets include, for example, the stock securities market, foreign currency exchange market, etc. Unorganized markets include all variety of financial transactions in the form of loan agreements, purchase and sale of shares and other securities or financial instruments (futures), investment market, etc. The development of legal regulation of the securities market in recent years tends to be on the way of expanding the legislative regulation of the organized market. The illustrative example is the adoption of Federal Law of 7 December 2011 No. 414-FZ "On Central Securities Depository"[30], Federal Law of 21 November 2011 No. 325-FZ "On Organized Trading"[31] and others.

The financial markets can be divided into strictly regulated markets and unregulated (free) markets. The foreign exchange market, banking market, insurance market, securities

[28] Predprinimatel'skoe pravo Rossiiskoii Federatsii: Uchebnik [Business Law of the Russian Federation. Textbook]// Edited by E.P. Gubin, P.G. Lakhno. 2nd edition. Moscow, 2010, p. 687.

[29] S.A. Paraschuk. Rynok kak ob'ekt pravovogo regulirovania [Market as the Object of Legal Regulation]// Zakonodatel'stvo [Legislation]. 2002, No. 7.

[30] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2011, No. 50, art. 7356.

[31] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2011, No. 48, art. 6726.

market can be characterized as regulated markets (the regulator is the Bank of Russia, which, inter alia, issues and revokes licenses of financial intermediaries). The market of real investments and the market of financial products without a corresponding provision of financial services can be called as non-regulated financial markets.

State regulation and self-regulation in the financial market

The allocation of different segments of the unified financial market has been accounted for by a different level of the government interference in business activities which means different levels of the state regulation in combination with self-regulation. The state should regulate the financial market, mainly the financial services market, through the adoption of corresponding rules and regulations by the legislator and by the authorized federal executive bodies. At the same time, financial markets now are also actively developing self-regulation, which in the Russian Federation does not mean the replacement of state regulation.

In the Russian legal science, there are three models of self-regulation: voluntary, delegated and mixed. Voluntary self-regulation eliminates any interference from the state, both in the form of a system of rules of self-regulation, as well as the use of state protection. An alternative model for the implementation of a self-regulating institution in the legal system is the decentralization of power, when the idea of self-regulation is actually suggested by the government and the state delegates some of its powers to self-regulating organizations. Such a model is called a model of delegated self-regulation (this model works perfectly well in Russia). Mixed self-regulation which is used in financial markets involves the distribution of functions between the state and self-regulating organizations, but the state through the Bank of Russia in our case issues and revokes licenses, but self-organization creates additional standards for its members in the financial market: develops and approves the basic standards of risk management, corporate governance standards, standards of internal control, standards of the transactions in the financial market, etc. In case of the mixed type of self-regulation, the state is not completely removed from the relevant regulatory relationships, and self-regulatory instruments are generally used to supplement the existing instruments of state regulation.

In fact, self-regulation can be viewed from different perspectives. At its core is independent self-regulation, which has the market nature and can be considered as a true instrument of the market self-organization. However, delegated self-regulation and mixed self-regulation which is used in the financial markets can become an effective tool of the state regulation by means of outsourcing the functions of the government.

The peculiarity of the self-regulating organization in the financial market in accordance with Federal Law of 13 July 2015 No.223-FZ "On Self-regulating Organizations in the Financial Market and on amendments to Articles 2 and 6 of Federal Law "On Amendments to Certain Legislative Acts of the Russian Federation"[32] is that the Bank of Russia, at the request of the self-regulating organization, shall be entitled to delegate its powers, in particular some regulatory and supervisory functions. But the Bank of Russia will remain in charge of self-regulating organizations in this aspect.

Summing all the information up, it should be noted that the search for a legal definition and the boundaries of the segments of the financial market has not only theoretical but also

[32] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]. 2015, No. 29 (part 1), art. 4349.

great practical impact. It applies not only to the abovementioned limits of the regulatory and supervisory state impact on the entire financial market in general, but also can help to create effective tools in each segment of the financial market. These general characteristics should not be used to unify the regulation of all financial markets, because such a decision would not be justified. However, understanding the common features of the financial market will enable to apply the most successful tools and control methods of one segment in some other segments of the financial market, and thus, ultimately, will make the legal regulation of the market more efficient.

This conclusion is confirmed by the objectives laid down in the "Guidelines for the Development of the Financial Market of the Russian Federation for the Period of 2016-2018" (approved by the Board of Directors on 26 May 2016 by the Bank of Russia). According to the Bank of Russia, the optimization of the regulatory burden on the financial market participants is a necessary condition for improving the competitiveness of the sector. Financial conglomerates existing in the Russian Federation require the use of integrated approaches to the regulation and supervision of different financial market entities, thus, providing a convergence of existing principles and methods. However, there are objective reasons why different segments of the financial market are regulated and supervised differently, and therefore not all supervisory principles and regulations should be harmonized. Thus, the Bank of Russia considers that to improve the system of regulation and supervision the basic principle is to develop different segments of the financial market as a single organism, maintaining its sustainability and the trust of participants.

DELIVERY CONTRACT AS A MEANS OF PROVIDING GOODS QUALITY AND SAFETY UNDER CIVIL LAW

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Abstract: The article is devoted to the delivery contract. The author proves its value as a means of providing goods quality and safety under civil law. A lot of attention is paid to the techniques of estimating the goods quality stipulated by the contract. The delivery contract is considered from the viewpoint of technical regulation as well as national and international standards.
Keywords: delivery contract, goods quality, goods safety, sample (standard sample), technical description, international standard, national standard, technical terms, technical regulation.

A delivery contract, being the most widely used type of civil law contracts in business activity, ensures that "the results of productive activity of enterprises" come into circulation in the form of material goods, in exchange for the monetary reimbursement of their value. This type of contract promotes satisfaction of *needs* in the specific goods, which may be intended either for the production sphere or the consumer sector. The *quality* of material goods transferred to the consumers directly determines the size of the reimbursement paid. The higher the degree of correspondence between the goods' indicators and qualities and the expectations and requirements of the consumer, expressed in the form of the relevant contract terms on quality, the higher the profit obtained by the deliverer. **Thus,** the delivery contract may serve as the main *civil law means* of ensuring the goods quality, as a specific "*compass*" showing the direction of development for the producers (deliverers) in order to provide (increase) the goods quality.

Under conditions of free entrepreneurship and open market, the product exchange causes a lot of various links in the economy. The structure of economic links nowadays can be *simple (direct)* or *complex.* Under the simple (direct) structure, the distribution process between the producer and the consumer is stipulated by a single contract. The complex structure of economic links presupposes that delivering a product from the producer to the customer requires two or more contracts[1]. *The current civil circulation is characterized by the complex structure of economic links.* Producers sign contracts with wholesale organizations and marketing specialists, turn to trading agents, and participate in distribution contracts. Production of technically complex goods requires contract relations with partner companies. Eco-

[1] V.I. Kofman. Izbrannye trudy po grazhdanskomu i khoziaistvennomu pravu [Selected Works on Civil and Business Law]// Biznes, Menedgment i Pravo [Business, Management and Law]. Yekaterinburg, 2011, pp. 494 — 495.

nomic links may arise at various stages of the goods *lifecycle*, from design to after-sale services and utilization. Each of the lifecycle stages is characterized by a specific *legal regime.* Inter-company links are often *inter-territorial.* Economic contacts may be formed along the integrated business associations (holdings, and financial and industrial groups). Currently, the economic links out of contracts become more numerous and complex. In most cases, both the possibility and structure of economic links depends solely on the *interests* of economic subjects.

An economic link out of a contract may be preceded by *questioning* and *audit* of the suppliers of parts, with various techniques of assessing their production ability. The trend when large companies *dominate* over smaller ones, specializing in producing parts or half-finished products, is typical not only for Russia, but for many developed countries. In foreign countries, this dominance of large corporations over their suppliers is supported by the system of *special order* contracts. A supplier specializes in producing goods which may be used by a single corporation only. Such specialization may be long-term[2]. *Wholesale* companies can contribute to the promotion of goods. A wholesale company may subgrade goods from various producers (suppliers), consolidate or process them, and supply the producer with the information about the actual demand for particular kinds of goods.

In recent decades, the *regulative* potential of contracts is being significantly broadened, as a contract and contractual regulation plays a backbone role in civil law. This is due to the fact that it embodies the method of civil law regulation characterized by juridical equality, independence, and initiative of the participants of relations regulated by civil law and the optional character of the regulation, as well as to the fact that it is the contract that the civil law circulation is essentially based on[3]. The *regulative role of the delivery contract* as a means of legally ensuring the goods quality and safety is being broadened because now it is possible to provide for such contractual terms which are aimed at *stabilizing* the production mechanism of the producing enterprise. The delivery contract may stipulate the obligation for the producer to launch a special *safety management* system at the enterprise. The contract terms may include the right of a consumer to carry out *the production audit* of the supplier, to apply a mechanism of *controlled delivery*, which is usually used if, during the agreed period, the supplier is unable to ensure the degree of the goods (components, etc.) quality (safety) stipulated in the contract.

Now let us view the issue of the *status* of the goods quality term in the delivery contract. The Russian Civil Code does not regard this term as *essential* (p.2 of Article 469). This provision was adopted by the Russian civil law from foreign practice. For example, according to the 1994 Sale and Supply of Goods Act (amended in 2005) of the United Kingdom[4], if a seller sells goods as part of entrepreneurial activity, it is implied that the goods delivered by the contract are of *satisfactory* quality. For the purposes of the above Act, the goods are considered to be of satisfactory quality if they comply with the requirements which a reasonable person would perceive as

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2 M.I. Kulagin. Predprinimatelstvo i pravo: opyt zapada [Entrepreneurship and Law: Western Experience]. Delo Publishing House. Moscow, 1992, p. 78.

3 M.F. Kazantsev. Grazhdansko-pravovoe regulirovanie v sisteme pravovogo regulirovania [Civil Law Contract Regulation in the System of Legal Regulation]// Nauchnyi' yezhegodnik instituta filosofii i prava Uralskogo otdeleniia Rossiyskoi Akademii Nauk [Scientific Yearly Bulletin of the Institute of Philosophy and Law of the Ural Branch of the Russian Academy of Sciences]. 2011, issue 11, p. 446.

4 Available at: http://www.opsi.gov.uk/acts/acts1994/Ukpga_19940035_en_1.htm (accessed: March 01, 2016. free access).

satisfactory (good), taking into account any descriptions of goods, price and other circumstances. It should be noted that according to the above Act, even the *reasonable* price is viewed as a feature (element) of the satisfactory quality. We consider it appropriate that the Russian civil legislation stipulate a rule that a contract should not be considered signed without an agreed term on the goods quality. Thus, we agree with those scholars who insist on making the quality term an *essential* term of the contract[5]. However, taking into account the trend to make the Russian legislation closer to the foreign ones, and the recent interpretation of the quality term as an *ordinary* contract term, this appears to be difficult. As an alternative, we suggest *stipulating in the Russian Civil Code a broader list of techniques of assessing quality in a contract (Article 469).* Such techniques may include selling (delivering) goods by *sample* and (or) by *description*; specifying the standard (State Standard, State Standard of Russia) or technical terms (TT), as well as any other document stipulating the quality parameters of the goods, which should be enclosed to the contract (for example, a drawing, a receipt or an instruction).

The main ways of defining the goods quality in a contract are as follows. In the sphere of delivery, a *sample* (or a *standard sample*) is a sample of a product (goods) approved by the acceptance board following the stipulated procedure *at the stage of prototypes* and designed to compare the ready product with it when accepting and delivering the latter. A standard sample is a kind of a control sample, *an actual item* of the product, used as a supplement to technical documentation when it is impossible to determine all requirements to the product appearance in that documentation. *Description* (or *technical description of a sample*) is a technical document for goods, serving as a supplement to the standard and used together with it as a normative and technical document for the specific product (goods). The technical description usually contains requirements to the product specifying particular provisions of the corresponding standard. The technical description refers to one or several specific products, for which standard samples are available. Generally, the technical description contains: 1) a short description (characteristic) of the item (appearance, color, weight, decorations, etc.); 2) requirements to the form of the item, its design, model, and size; 3) marking of the materials, components used when producing the goods (if not stated in the technical documentation). The technical description may also include a drawing, a sketch or a photo of the item, as well as requirements to acceptance, transportation, storage and the producer's warranty, if this information is not stated in other documents.

The foreign legislation uses all the above techniques of defining the goods quality in a contract. Thus, according to the British contract law, goods are sold using samples, descriptions and *British* standards. Unlike a sample (a standard sample) used in Russia, a sample according to the British legislation has some specific features. First and foremost, a sample is any item suitable for selling and comparing it with the produced and sold goods. Besides, the British legislation does not have any procedure of approving a certain item as a sample. The key idea is the intention of both parties to sell goods by sample[6].

The most popular means of defining requirements to the goods quality in a contract is *reference to a standard*, though technical terms are also used very often. If the counteragents

[5] A.M. Zaporozhets. Promyshlennaia politika Rossii v ispolzovanii normativno-tekhnicheskoi' dokumentastii [Industrial Policy of Russia in Using the Normative and Technical Documentation]// Biznes, Menedgment i Pravo [Business, Management and Law]. 2013, No.1, pp. 53 — 54.

[6] V.S. Belykh. Kachestvo tovarov v angliiskom dogovore kupli-prodazhi [Quality of Goods in the British Sales Contract]// Izdatelstvo standartov [Standards Publishers]. Moscow, 1991, pp. 33 — 43.

agree to define the goods quality according to the standard, the contract should indicate its number (index) and the date of adoption. The text of the standard should be enclosed to the contract. Since standards in formulating the contract terms allow to precisely define the technical characteristics of the goods, different requirements to the production process, issues of packing, marking, transportation, storing and accepting the goods, and warranties of the producer, the Russian Civil Code (Article 469) should be supplemented by the rule that standards can be used to define the goods quality terms in the contract.

The voluntary character of the standards enhances the regulative abilities of the delivery contract. For example, the parties may stipulate the indicators (concerning all or some of the features) higher than in the standards. The contract terms on the goods quality may be formulated on the basis of indicators of preliminary standards, which, compared to the existing properties and parameters of the goods, confirm the progressive ones. The data of the contractual practice may be used to improve the existing interstate (GOST — State Standard) and national (GOST R — State Standard of Russia) standards, when elaborating new standards. Thus, *a contract may serve as an efficient means to increase the quality of the standards.* Unfortunately, this standardization activity is not currently implemented.

Nowadays, enterprises are not forbidden to deliver goods of *reduced* quality compared to the standards. In practice, it results in producing goods with a minimal degree of competitiveness. Enterprises also have the right to stipulate in the contract such indicators which are not stipulated in the standards. Defining the goods quality term based on the standard does not change the *voluntary (recommendation)* character of the standard. However, if the parties to the particular contract agree to apply the standard, it becomes binding for them. Meanwhile, the Soviet legislation on delivery minutely stipulated the rules on how the goods quality should be defined in a contract. The State Arbitration Committee of the Council of Ministers of the USSR adopted instructive letters and guidelines on how to enter into and execute delivery contracts, including the issue of the goods quality. The current Russian legislation on this issue has been formed in conditions of rejecting the previous practices of economic development and at the same time lacking any national approach to building the economic system.

The analysis of the Russian Civil Code provisions on the delivery contract, as well as the law enforcement practice, shows that if the contract defines the goods quality terms, and the quality of the delivered goods is not worse than that of the average goods in the market, but is lower than stipulated in the contract, the delivery should be regarded as the delivery of goods of *inappropriate* quality. There can be a reverse situation, when the delivered product is of better quality than stipulated in the contract. If the court ascertains that the deliverer and the customer have not agreed upon the increased qualities and characteristics of the goods and have not included such provisions into the contract, such a delivery should also be regarded as *inappropriate*[7]. *If the goods quality terms are imprecisely or incompletely defined in the contract, the courts should determine to which extent such imprecise or incomplete definition has influenced the non-execution or inappropriate execution of the contract. Besides, the fact of the goods delivery proves that the contract has been entered into. Thus, if the customer makes a claim to find the contract not concluded, but the goods of appropriate quality*

[7] Decision of the Arbitration Court of the Volgograd oblast of 11 June 2013. Case No. A12-163/2013. Available at: http://ras.arbitr.ru .

are proved to have been delivered, the courts justly consider such actions of the consumer as abuse of right[8].

Under the technical regulation reform, the issue of correlation between the delivery contract and the technical regulation is of great interest. The underlying conception refers to the freedom of contract limited by the necessity to protect the public interests. "Freedom of contract is the principle of contract law (and civil law in general), according to which the civil law subjects can sign any contracts and define any terms which do not contradict the legislation"[9]. At the same time, the freedom of contract, like any other freedom stipulated and granted by law, is not absolute and cannot be as such under the modern civil circulation. The objective rules of the modern contract law require superimposition of public interest over freedom of contract. In other words, under the modern civil circulation, the freedom of contract ends where protection of the public interest begins[10].

Legislation in the sphere of technical regulation is based on the fact that the delivered goods may have properties (characteristics) potentially dangerous for human beings and thus causing harm to life, health or property of a consumer during exploitation (consumption) of the goods. Technical regulations are to set the requirements, observance of which will prevent delivery of goods with properties dangerous for consumers. Even the pre-Revolutionary lawyers grounded the limitation of goods circulation by prohibiting harmful products[11]. Thus, the autonomy of the contract parties' will may be *legally* limited by the obligatory technical rules.

As O.M.Oleynik rightly notes, in the commercial circulation the content of contractual obligations is defined by *two* essential factors: the will of the contract parties and the law existing at the moment of signing the contract. These two factors embody the *private law* and *public law* principles[12]. In this connection we should highlight that the requirements of technical regulation do not have to be reproduced in the contract. If the requirements of technical regulation are included into the contract, they (the requirements) do not become contractual, i.e. based on the parties' will. "Legal norms (in this case the norms of technical regulation — *edited by the author*), defining the content of the contractual legal relation, are not transformed into the contract terms, but they influence the contractual legal relation (defining its content) directly as legal norms"[13]. While adjudicating the goods delivery disputes, the courts should follow the rule that it is inadmissible for the parties to reject the imperative norm or

[8] Decree of the 9th Arbitration Appeal Court of April 11, 2011. 09AP-5650/2011-GK. Case No. A40-113363/2010-136-292. Available at: http://ras.arbitr.ru.

[9] M.F. Kazantsev. Kontseptsiia grazhdansko-pravovogo dogovornogo regulirovaniia [The Concept of Regulation under Civil Law]// Dissertatsiia na soiskanie stepeni doktora yuridicheskikh nauk [Dissertation for the Degree of Doctor of Juridical Sciences]. Yekaterinburg, 2008, p. 234.

[10] Ch. Osakwe. Svoboda dogovora v Anglo-Amerikanskom prave: poniatiye, sushchnost i ogranicheniia [Freedom of Contract in the Anglo-American Law: Notion, Essence and Limitations]// Russkii yuridicheskii zhurnal [Russian Law Journal]. 2006, No. 7.

[11] G.F. Shershenevich. Kurs torgovogo prava. Tom.2: Tovar. Torgovye sdelki. [A Course in Trade Law. Volume II: Goods. Trade deals]. Statut Publishing House, Moscow, 2003.

[12] O.M. Oleynik. Zakon i dogovor: sootnoshenie publichno-pravovykh i chastno-pravovykh nachal [Law and Contract: Correlation of Public Law and Private Law Principles]// Kommercheskoye pravo [Commercial law]. 2012, No. 2 (11), p. 5.

[13] M.F. Kazantsev. Kontseptsiia grazhdansko-pravovogo dogovornogo regulirovaniia [The Concept of Regulation under Civil Law]// Dissertatsiia na soiskanie stepeni doktora yuridicheskikh nauk [Dissertation for the Degree of Doctor of Juridical Sciences]. Yekaterinburg, 2008, p.202.

stipulate a term different from the one stipulated in it, either in general or in part where it concerns the protection of especially significant interests by law (public interests) (subparagraph 1 of p.3 of the Decree of the Plenum of the Russian Higher Arbitration Court of 14 March 2014 No.16 "On the Freedom of Contract and its Limitations")[14].

As some interstate and national standards are a part of *probative base* of technical regulations' requirements, the parties to a delivery contract are entitled to apply *interstate* and *national* standards (GOST, GOST R) to prove the safety of the goods delivered by the contract. They can stipulate in the contract that the goods to be delivered must undergo the safety check according to appropriate standards. Thus, we can say that in the past "the complex system of technical norms strictly and minutely regulated the content of contractual links in the sphere of delivery"[15], but nowadays the sphere of goods safety provides for, within the frameworks of legislation, certain discretion in the choice of means to observe the technical regulations. The requirements in the sphere of goods safety should not *groundlessly* limit the economic activity of entrepreneurs.

Technical regulations are designed to set a *lower limit* of the goods safety. The parties may stipulate in the contract the increased, compared to the technical legislation requirements, indicators of safety. However, they cannot set reduced requirements. Increased goods safety can be achieved by improving one of the safety indicators stipulated in the appropriate technical regulation, or by improving several indicators. In any case, delivery of the goods with increased safety must be stipulated in the contract. The possibility to stipulate such increased requirements in the contract depends on the duration or structure of the economic link, the sector of production, and the character of the delivery object. The parties may stipulate an incomplete list of safety indicators. In that case, the would-be counteragents should additionally negotiate the missing indicators, attributing them the status of *contractual safety indicators.* It would be appropriate for the contract counteragents to have an opportunity to transfer the information on the incompleteness of the technical regulation to its developer. Thus, the contractual practice may be very valuable from the viewpoint of *approbation* of the technical regulation provisions and revealing various drawbacks and deficiencies in them.

[14] Vestnik Rossiiskogo Vysshego arbitrazhnogo suda [Bulletin of the Russian Higher Arbitration Court]. 2014. No. 5.

[15] M.F. Kazantsev. Tekhniko-yuridicheskie normy v mekhanizme dogovornogo regulirovaniia khoziaistvennykh sviazei' po postavkam [Technical and Legal Norms in the Mechanism of Contract Regulation of Economic Links in the Sphere of Delivery]. PhD (Law) thesis. Sverdlovsk, 1985, p. 87.

RUSSIAN COURTS' JURISDICTION TO HEAR CLAIMS AGAINST THE PROPERTY OF FOREIGN STATES

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Abstract: The subject of this paper is the examination of innovations in the Russian legislation on jurisdictional immunity. The objective of the paper is to analyze jurisdictional immunity concepts, provisions of international treaties in this field and practice of various states in jurisdictional immunity restriction. The methodological basis for this research consisted of systemic, comparative approaches and methods of analysis.

The academic novelty of the paper stems from the coming changes in the legal regulation of these issues in Russia. The functional jurisdictional immunity theory has been forming in Russia since 2015. Federal Law No.297-FZ "On Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation" and Federal Law No.393-FZ of 29 December 2015 "On Amending Certain Legislative Acts of the Russian Federation due to the Adoption of Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation" entered into force on 1 January2016.

The results of the study make it possible to generalize the requirements of the Russian legislation in the field of restriction on the jurisdictional immunity of a foreign state and the legal grounds for consideration of disputes in this field by Russian courts.

Keywords: jurisdictional immunity, a foreign state, immunity from legal process, immunity from interim measures, immunity from enforcement, sovereign power authorities, the Russian legal system, the reciprocity principle, functional immunity, waiver of immunity

Consideration of the foreign state immunity concept is caused by its special significance, evidenced by a reasonable conclusion that the principle of foreign state immunity is a principle of modern international public law, and its detailed elaboration and specific contents are unfolded by the rules of international private law[1]. This principle is specifically important for public law because immunity of a state is based on sovereignty of the state. At the same time, implementation of absolute immunity violates, in fact, the principle of equality of the

[1] I.O. Khlestova. Problemy yurisdiktsionnogo immuniteta inostrannogo gosudarstva [Problems of Jurisdictional Immunities of a Foreign State]// Avtoreferat dissertatsii na soiskanie stepeni doktora yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Doctor Sciences]. Moscow, 2003, pp. 8, 20.

parties, since an individual is deprived of the opportunity to bring a claim against the state in civil law transactions[2].

Russia has endorsed the conception (theory) of restrictive immunity since January 2016.

In 2015, Federal Law No.297-FZ "On the Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation" (the Federal Law) regulates relations pertaining to the application of jurisdictional immunities of a foreign state and its property by Russia.

Generally, the Federal Law is in line with similar laws on state immunity in most states. Corresponding laws have been adopted in a number of foreign states, specifically in the United States, Canada, the UK, Australia, South Africa and Singapore. In other countries, the concept of limited immunity of a foreign state has not been enacted at the legislative level but is applied in judicial practice (France, Denmark, Norway, Greece, Italy and Germany). "The Federal Law is based on the concept of limited jurisdictional immunity of foreign states, their state agencies and organisations, which is in line with the tendency that has taken shape in the legislation of a number of countries and is being implemented, including in regard to the Russian Federation and its organisations. This concept is the basis for the Convention on Jurisdictional Immunities of States and their Property adopted by the United Nations Organisation on 2 December 2004, and signed by the Russian Federation on 1 December 2006"[3]. The Convention becomes effective on the thirtieth day after the date of deposition by the thirtieth state of the document on adoption or approval thereof or accession thereto. Since only 21 states are members of the UN Convention as of 4 August 2016, it is reasonable to suppose that the UN Convention is still a long way from entry into force.

Due to the expansion of foreign economic activity and foreign investment, Russia has signed an array of international treaties on the mutual protection of investment, which provide that investment-related disputes are adjudicated in an international court of commercial arbitration. Under the current legislation in a number of foreign countries, this implies waiving of immunity. By now, dozens of such treaties have been signed. Therefore, Russia's foreign trade practice, as well as international contractual practice, shows that Russia tends to recognise the jurisdiction of foreign courts, which constitutes an immunity waiver[4].

Nowadays states have widely accepted shifting from the absolute immunity concept to limited (functional) immunity "formalized by way of determining exceptions from the absolute immunity principle"[5]. Australia, Argentine, Great Britain, Canada, the USA, Singapore and others have special legislation on foreign states' immunity. The widest competence is granted to the judicial authorities of the USA, whose jurisdiction is interpreted broadly and may be extended to the transactions made in US dollars[6].

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[2] G.R. Shaikhutdinova. Yurisdiktsionnyi' immunitet gosudarstva [The Jurisdictional Immunities of States]// Avtoreferat dissertatsii na soiskanie stepeni doktora yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Doctor Sciences]. Kazan, 1991, p. 14.

[3] Law on Jurisdictional Immunities of a Foreign State and its Property in Russia. Available at: URL: http://en.kremlin.ru/acts/news/50624 .

[4] Submitting to the State Duma a draft law establishing the jurisdictional immunity of a foreign state and its property in the Russian territory. Available at: URL: http://government.ru/en/docs/19165/ .

[5] G.R. Shaikhutdinova. Yurisdiktsionnyi' immunitet gosudarstva [The Jurisdictional Immunities of States]// Avtoreferat dissertatsii na soiskanie stepeni doktora yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Doctor Sciences]. Kazan, 1991, p. 14.

[6] M.B. Feldman. The United States Foreign Sovereign Immunities Act of 1976 in Perspective: a Founder's View// Mezhdunarodnoe i sravnitel'noe parvo [International and Comparative Law]. 1986, Quarterly 302.

In Russia, similar legitimate grounds are being formed for implementation of a foreign state's functional jurisdictional immunity theory. The Federal Law sets limits of jurisdictional immunity of foreign states and their property and establishes privileges and immunities not covered by the Federal Law in line with the norms of international law. The law envisages the possibility for a foreign state to wave its jurisdictional immunity and to agree to the Russian jurisdiction. To ensure a balance between the jurisdictional immunity offered to a foreign state under the Russian legislation and that made available to the Russian Federation by the given state, the Federal Law establishes the principle of reciprocity in applying jurisdictional immunities. The law envisages a possibility for a Russian court to limit the jurisdictional immunity of a foreign state if it finds that the state in question offers the Russian Federation limited jurisdictional immunity[7].

In fact, the said Federal Law extends the competence of the RF judicial authorities. That is reasonable due to the widespread acceptance in the Russian law application practice of principles that allow ruling out a collision of legal rules by way of comparing constitutionally significant values and balancing private and public interests. In this context, the objective of the judicial examination is to overcome the collision of the sovereignty principle and the principle of equality of the parties.

Foreign states, their components, organizations, institutions, and representatives are subject to the Law's jurisdiction. The Federal Law applies to the components of a foreign state if these components are qualified to act in order to perform sovereign powers of the state and to institutions and organizations of a foreign state, regardless of whether they are legal entities, if they are qualified to act and are actually taking action to perform sovereign powers. The Federal Law does not cover the privileges and immunities of foreign states' diplomatic and consular offices, representations of international organizations, special missions, heads of states and governments, foreign ministers, space equipment, aircraft, naval ships, or other state vessels used for noncommercial purposes[8].

The Federal Law establishes the legal framework for the jurisdictional immunity of a foreign state and its property in the RF territory in conformity with the UN Convention on Jurisdictional Immunities of States and their Property.

The reciprocity principle in respect to jurisdictional immunity means that the Russian judicial authorities may proceed from the scope of jurisdictional immunity similar to that enjoyed by the Russian Federation in the relevant foreign state. Based on this principle, the jurisdictional immunity of a foreign state and its property may be restricted if it is established that restrictions exist in the foreign state on jurisdictional immunity enjoyed by Russia. The Russian Ministry of Foreign Affairs is empowered to provide its opinions on the issues of jurisdictional immunities enjoyed by the Russian Federation in a foreign state.

The Federal Law establishes the limits of jurisdictional immunity of foreign states and their property, determines the cases where a foreign state and its property do not enjoy juris-

Vol.35, No.1 — 2, p. 313 (cited by I.O. Khlestova. Problemy yurisdiktsionnogo immuniteta inostrannogo gosudarstva [Problems of Jurisdictional Immunities of a Foreign State]// Avtoreferat dissertatsii na soiskanie stepeni doktora yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Doctor Sciences]. Moscow, 2003, p. 23.

[7] Law on Jurisdictional Immunities of a Foreign State and its Property in Russia. Available at: URL: http://en.kremlin.ru/acts/news/50624 .

[8] Russian Federation: New Law Allows Seizure of Foreign Governments' Property. Available at: URL: http://www.loc.gov/law/foreign-news/article/russian-federation-new-law-allows-seizure-of-foreign-governments-property/ .

dictional immunity and provides for a possibility of a foreign state's waiver of jurisdictional immunity. In particular, the exceptions from sovereign immunity and the grounds for restricting immunity from legal process are the following:

a foreign state's consent to the jurisdiction of the Russian court (Article 6 of the Federal Law);

waiver of immunity from legal process, and namely, the following: bringing a claim to the RF court, intervention into proceedings or other actions on the merits of a case, and a written consent to consideration of disputes to which it is a party by an arbitration court;

if a dispute:

— relates to entrepreneurial activity conducted by a foreign state in the territory of Russia or in the territory of any other state if the consequences of such activity relate to the territory of Russia (Article 8 of the Federal Law);

— has arisen out of an employment contract (Article 9 of the Federal Law);

— has arisen between a foreign state and an organization having other members in addition to states and (or) international inter-governmental organizations and conducting their core activity in the territory of Russia, in the cases where a foreign state is a founder or a member of such an organization (Article 10 of the Federal Law);

— relates to a foreign state's rights to property located in the territory of Russia or to its obligations in respect to such property (Article 11 of the Federal Law);

— is a dispute for compensation by a foreign state of harm caused to life, health, property, honor and dignity, or business reputation of an individual, or to property or business reputation of a legal entity, if the claim has arisen out of such harm by any action (omission) or in connection with any other circumstances occurring in the territory of Russia (Article 12 of the Federal Law);

— relates to the establishment and exercise of a foreign state's rights to results of intellectual activity and the means of individualization of legal entities, products, works, services and enterprises equated thereto, or to alleged infringement upon the said rights by a foreign state (Article 13 of the Federal Law);

— relates to the operation of a vessel owned or operated by a foreign state, if at the time when a ground for the claim occurred the vessel was used by a foreign state for business purposes, except for war ships and other vessels and goods owned by a foreign state and intended for use thereby solely while exercising its sovereign powers and authority (Article 14 of the Federal Law).

Immunity from legal process may not be restricted with respect to exercising by a foreign state of its sovereign powers and authority (Article 8 of the Federal Law). The draft law considers that the involvement of a state in legal proceedings or other procedural actions with the purpose to declare jurisdictional immunity or to provide the proof of the existing right to the property being the subject of the legal proceedings should not be qualified as waiver of jurisdictional immunity (Article 7 of the Federal Law).

A foreign state's waiver of immunity from legal process with respect to a specific dispute is not considered as its waiver of immunity with respect to interim measures or with respect to court judgment enforcement. The following is determined as the grounds for restricting such immunities (Articles 15-16 of the Federal Law):

1) a foreign state has expressly stated its consent to the relevant measures;

2) a foreign state has reserved or otherwise marked its property in the case of satisfying the claim being the subject of the legal proceedings;

3) it is established that a foreign state's property located in the territory of Russia is used and (or) is intended for use by such a state for the purposes not related with the exercising by the state of its sovereign powers and authority. The list of such property is determined by Article 17 of the Federal Law and includes, in particular, the property of diplomatic missions of a foreign state or its consular establishments, military property, cultural values, etc.

The Federal Law determines the regulatory definition of the following concepts: "jurisdictional immunity", "a foreign state", "immunity from legal process", "immunity from interim measures", "immunity from enforcement", "sovereign powers and authority", etc. In particular, it is proposed that immunity from legal process should be understood as exception of a foreign state from the jurisdiction of the RF judicial authorities by way of establishing the duty of the Russian court to refrain from bringing a foreign state into legal proceedings[9].

Further measures include making amendments to the legislation (the Civil Procedure Code of the Russian Federation, the Commercial Procedure Code of the Russian Federation, and Federal Law "On Enforcement Proceedings" No.229-FZ of 2 October 2007). Federal Law No.393-FZ of 29 December 2015 was prepared with the aim of implementing Federal Law "On Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation" No.297-FZ of 3 November 2015 and establishes procedural particularities of examining cases with participation of a foreign state and its representatives.

The Codes of the Russian Federation are supplemented by new chapters establishing procedures for filing a claim against a foreign state, issuing judicial summons to a foreign state, establishing jurisdiction in examining cases with participation of a foreign state and the scope of procedural rights and obligations of a foreign state, and regulating other procedural issues. The Federal Law appends Federal Law "On Enforcement Proceedings" of 2 October 2007 with stipulations establishing particularities in the enforcement of sentences carried out with regard to a foreign state or its property[10].

The Federal Law is aimed at protecting Russian interests by abandoning the concept of the absolute jurisdictional immunity of foreign states in Russia, which makes it possible to take measures in response to claims filed against the Russian property abroad.

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[9] P. Vinogradova. Pravovoe regulirovanie ogranichenii' yurisdiktsionnogo immunitet inostrannogo gosudarstva [Legal Regulation of Restrictions on the Jurisdictional Immunity of a Foreign State]// Yevropei'skii zhurnal sotsial'nykh i gumanitarnykh nauk [European Journal of Humanities and Social Sciences]. SENTENTIA. 2015, No. 3, p. 11.

[10] Amendments to Certain Legislative Acts Concerning Jurisdictional Immunity for Foreign States and their Property in Russia. Available at: URL: http://en.kremlin.ru/acts/news/51048 .

RISK DISTRIBUTION IN THE SECURITIES MARKET

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Abstract: Securities create a different risk distribution among the participants of civil circulation from that implied by civil law. There are general rules of risk distribution for all kinds of securities. As for uncertificated securities, which form the securities market, there are additional rules of risk distribution.
***Keywords**:* risk distribution; securities circulation; accounting of rights to securities; joint-stock company management; mortgage collateral management; mutual investment fund management.

In countries, where highly developed monetary and credit circulation has become flesh and blood of economy, transfer of claims — the major constituent of its effective operation — seems to be natural. Nowadays, the right of claim, similarly to movable and immovable property, is considered to be a functional property object. However, it presents one of numerous physical states of estate which may be involved in manufacture by means of capital as a factor of production. That is why it is essential that the right of claim, like any other specific items of property, be transferred from one person to another. All modern legislatures have mechanisms which make such transfer possible, though in various legal forms[1].

It goes without saying that the participants of business intercourse more than anyone else are interested in the possibility to implement cession without much paperwork, and in such a way that the assignee would have the right of claim not only from the debtor but also from the assignor and its creditors as well as be able to exercise the right in case of bankruptcy. If an entrepreneur, for example, is willing to cash out his clients' debts before the maturity date or use his claim as a guarantee for a loan, he must have an opportunity to cede them with respect to each and without the formal consent of his debtors. One of the ways to implement cession is to include the claim in transferable securities. **Thus**, if the claim is "incorporated" in a security, for example, in a bill of exchange, in order to cede it, it is enough to have the consent of the parties expressed in the security transfer[2].

According to M.M.Agarkov, the very essence of the institute of securities is that it creates a different risk distribution between the legal actors than that implied by general principles of civil law[3].

First, the debtor is released from liability, before the actual lender provided he has paid to the legitimate security bearer.

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[1] K. Tsvaigert, H.Kets. Vvedenie v sravnitel'noe pravovedenie v sfere chastnogo prava [Introduction into Comparative Jurisprudence in the Sphere of Private Law]// Mezhdunarodnye otnosheniia [International Relations]. Moscow, 1998, v. 2, p. 160.

[2] Ibid. p.171, 178.

[3] M.M. Agarkov. Osnovy bankovskogo prava. Kurs lektsii. Uchenie o tsennykh bumagakh. Nauchnoe issledovanie [Basics of Bank Law. A Course of Lectures. On Securities. A Scientific Work]. BEK Publishing House, Moscow, 1994, pp. 226 — 230.

Second, the security debtor does not have the right to raise objections to the claim of the bearer on the ground of the relationship the security was associated with, while being released.

Third, the person who has been deprived of the security due to its theft, loss or destruction, loses the possibility to assert his right.

The general rules of risk distribution are intended to facilitate the exercise of rights expressed in securities with regard to both the debtor and the lender. They make it easier for the debtor to determine to whom he can carry out the obligation without putting himself at risk, and they guarantee to the lender that nobody else can receive the loan execution from the debtor[4].

The above listed rules of risk distribution apply to securities of all kinds and all types of issuance (both certificated and uncertificated).

The existence of uncertificated securities implies the appearance of additional rules of risk distribution observed in the stocks and bonds market.

1. Risk distribution in handling securities

Handling securities implies performing civil transactions resulting in the transfer of the property right to these securities. The RF Civil Code permits purchase and sale (Art.454, paragraph 2), gift (Art.572), exchange (Art.567), and bequest (Art.1118, 1119, 1120) of securities.

The exact moment of transferring the right to an equity security is determined by the way the security is transferred (Art.29 of the Federal Law "On the Stocks and Bonds Market"), i.e. it depends on the type of security.

The right to the certificated bearer security is transferred to its acquirer at the moment of transferring its certificate to the acquirer (in case the certificate is with the owner) or at the moment of making an entry in the securities account of the acquirer (in case the certificates are kept and/or the registration of the rights to bearer securities is performed in the depositary).

The right to a registered uncertificated security is transferred to the acquirer at the moment of making an entry in the personal account of the acquirer.

Let us consider the mechanism of transferring the right to an uncertificated security (and also to a security immobilized in a depositary) in more detail. The process is regulated by the Regulation of Security Holders' Register and Regulations of Depositary Activities in the Russian Federation.

The transfer order, which contains an instruction to the registrar to make an entry about the transfer of the right to the security, is issued and signed by the registered person who transfers the securities or by their authorized representative (p.3.4.2 of the Regulation of Security Holders' Register).

A depositary is obliged to perform transactions with securities of its clients (depositors) only by orders of the clients (depositors) or their authorized representatives, including account trustees. The order issued by a client (a depositor) serves as the ground for performing depositary transactions (p.4.1, 5.1, 5.2 of Regulations on Depositary Activities in the Russian Federation)[5].

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[4] M.M. Agarkov. Osnovy bankovskogo prava. Kurs lektsii. Uchenie o tsennykh bumagakh. Nauchnoe issledovanie [Basics of Bank Law. A Course of Lectures. On Securities. A Scientific Work]. BEK Publishing House, Moscow, 1994, p. 250.

[5] Polozhenie o vedenii reestra vladel'tsev imennykh tsennykh bumag: utv. postanovleniem FKCB RF No. 27 [Regulations on Introducing the Registry of Registered Securities: est. by the RF Federal Commission for the Securities Market (FCSM) Regulation No. 27]. October 02, 1997. The text is available in Consultant Plus legal information system; Polozhenie o depozitarnoi' deiatel'nosti v Rossiiskoi Federatsii, ustanovlenii poriadka vvedeniia ego v deistvie i oblasti primeneniia: utv. postanovleniem FKCB RF No. 36 [Regulations on Deposi-

The risk of accidental loss or damage of the property is borne by its owner, unless otherwise provided for by the law or the contract (Art.211 of the Civil Code of the Russian Federation).

According to the general rule, the property right is transferred to the acquirer by the contract from the moment of handing over the object (p.1 of Art.223 of the RF Civil Code).

Consequently, while handling securities the transferor carries the risk of accidental loss or damage of the property, until the entry is made in the personal account of the acquirer (the securities account).

Let us consider risk distribution during purchase and sale of securities on the stock exchange, for such purchase and sale of securities is the most frequent case of securities circulation in the market.

Unless otherwise provided for by the sales contract, the risk of accidental loss or damage of the goods is transferred to the purchaser at the moment, when, according to the law or the contract, the seller is considered to have fulfilled his obligation to transfer the goods to the purchaser (p.1 of Art. 459 of the RF Civil Code).

According to p.1 of Article 16 of the Federal Law "On Organized Trading", the right of participation in the organized trading of securities is granted to dealers, managers and brokers who have a license of a professional participant of the securities market, managing companies of investment funds, mutual investment funds, non-state pension funds, a central counterparty and also the Bank of Russia.

Any other parties may participate in organized securities trading solely through brokers and trustees as the trading participants.

In this system, a trading party (a broker or trustee) is the only person responsible before the investor who bears business risks for himself and for the exchange.

In general, the property interests of clients are protected from infringement by the stock exchange trading participants by establishing contractual liability which implies such measures as penalty and reimbursement[6].

Thus, while handling securities, the following additional rules of risk distribution are established.

First, the securities alienator bears the risk of accidental loss or damage of the property until the moment of making an entry in the personal account (custody account) of the acquirer.

Second, in case of a securities transaction on the stock exchange, civil liability before the transaction parties is borne by the trading participants (a broker or trustee).

2. Risk distribution while registering the rights to securities

The Russian system of the registration of rights certified by securities carries certain property risks, which are not typical to risks in other securities markets. The major risk is the risk of the accounting system in the stock market, which, on the contrary, is supposed to provide an adequate level of protection of the securities holders' property rights. The absence of a legal guarantee of property rights other than by means of the registrar makes him dependent on his integrity and good action[7].

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tary Activity in the Russian Federation, its Introduction Procedure and Application: est. by the RF FCSM Regulation No. 36] October 16, 1997. The text is available in Consultant Plus legal information system.

6 T.V. Kuvakina. Otvetstvennost' professional'nykh uchastnikov rynka tsennykh bumag [Liability of Professional Participants in the Securities Market]// Avtoreferat dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Juridical Sciences]. 12.00.03. Moscow, 2007, p. 24.

7 E.V. Agapeeva. Tsennye bumagi kak ob'ekty grazhdanskogo oborota po zakonodatel'stvu Rossii i SShA (sravnitel'no-pravovoi' aspekt) [Securities as Civil Circulation Objects under the Laws of Russia and

Due to the shortcomings of the registration system in the stock market, the issuer, first of all, is at risk of making the execution of a security to an improper person, and, secondly, the proper lender for the security runs the risk not to obtain its execution[8].

The agreement on the register maintenance is signed between the issuer and the registrar (p.1 of Art.8 of the Federal Law "On Securities Market"); the holder of the security is not a party to the agreement. The registrar bears the contractual liability before the issuer of a security but not before its holder.

The party issuing an uncertificated security and the party maintaining records of rights to such securities bear joint responsibility for damages caused by the violation of the rights registration procedure, the breach of account transactions regulations, the loss of credentials, misrepresentation, unless they are able to prove that the infringement took place due to force majeure (p.4 of Art.149 of the RF Civil Code).

Therefore, in case of a wrongful cancellation of uncertificated securities from the account in the register, the holder has the right to sue the issuer, the registrar or both with a tort claim of damage to property.

The registrar maintaining the register of mortgage participation certificate holders and the trustee of the mortgage cover bear vicarious liability before the holders of mortgage participation certificates for any failure to perform their duties of keeping the register (p.5 of Art.31 of the Federal Law "On Mortgage-backed Securities").

The registrar of the investment share owners pays damages to the parties whose rights are registered in the personal accounts in the aforementioned register caused by the following: (1) due to the inability to exercise the rights to the investment shares, resulting, among others, from the wrongful cancellation of investment shares from the personal account of the registered person; (2) due to the impossibility to exercise the rights certified by investment shares. The managing company (a trustee) bears vicarious liability along with the registrar (p.1-3 of Art.48 of the Federal Law "On Investment Funds").

A conclusion may be drawn that the liability for improper maintenance of the register of securities holders is distributed as follows, depending on the security type. The general rule implies joint liability of the issuer and the registrar before the investor for causing damage. While maintaining the register of owners of investment shares and mortgage participation certificates, the trustee (the person who issued the aforementioned securities and has obligations under the securities) bears vicarious liability together with the registrar in case of losses caused by the registrar.

A depositary is responsible to the securities holder by virtue of the depositary contract signed by them for the completeness and accuracy of custody accounts records.

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the USA (comparative aspect)]// Avtoreferat dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Juridical Sciences]. 12.00.03. Moscow, 2006, p. 21; I.A. Frolova. Pravovoe regulirovanie perekhoda prav na bezdokumentarnye tsennye bumagi [Legal Regulation of the Transition to Uncertificated Securities]// Avtoreferat dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Juridical Sciences]. 12.00.03. Moscow, 2006, pp. 4 — 5; V.K. Speranskii. Imennye emissionnye tsennye bumagi v sisteme korporativnogo i aktsionernogo pravootnoshenii' [Registered Equity Securities in the System of Corporate Relations]// Avtoreferat dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [Thesis Abstract for the Degree of Candidate of Juridical Sciences]. 12.00.03. Krasnodar, 2005, p. 24.

[8] Zashchita prav investorov. Uchebno-prakticheskii kurs [Protection of Investors' Rights. A Theoretical and Practical Course]// Edited under V.V. Yarkov. Publishing House of the St.Petersburg State University, Law Faculty of the St.PSU. St. Petersburg, 2006, p. 181.

The depositary contract means that the depositary is registered in the register maintenance system or with another depositary as a nominal holder of his depositor's securities.

Entering into a depositary contract excludes filing a tort claim of the holder to the registrar. In this case the depositary is entered into the securities holders' register as a nominal holder, and the registrar "does not see" what transactions are carried out within the account of the nominal holder[9].

We may conclude that while registering the rights to securities, the risks are distributed as follows.

First, the party having obligations under the security, along with the registrar, bears vicarious or joint liability (depending on the type of security) before the security holder.

Second, in case of signing a depositary contract, the depositary accepts the obligations before the depositor for the accounting system risks existing in the stock market.

3. Risk distribution while managing a joint-stock company, mortgage cover, and mutual investment fund

As it was noted by G.F.Shershenevich, "boards of directors who do not care much about savings matters, as they do not fear an impersonal owner, generate costs which exceed manifold those which would be produced under the supervision of a true master"[10].

As I.A.Pokrovsky states, "the idea of insurance is knocking on the door of our mind and it has a great future"[11].

The current legislation does not require compulsory liability insurance of a sole manager or members of a collegial management body of a joint-stock company, the managing body of a mutual investment fund, and a trustee of mortgage cover; however, it does not exclude the possibility of commercial insurance of the aforementioned parties. Then, in case of the insured event, the damage is completely or partially covered by the insurance company.

Summing up, the following additional rules of risk distribution can be pointed out:

1. The alienator of securities bears the risk of accidental loss or damage of the property until the moment the entry in the personal account (custody account) of the acquirer has been made.

2. In case of a security transaction in the stock market, civil liability before the transaction parties is borne by the trading participant (a broker or trustee).

3. The person having obligation under the security, along with the registrar, bears vicarious or joint liability before the securities holder.

4. The depositary bears obligations before the depositor for the risks of the accounting system in the securities market.

5 The risk of civil liability of a sole member or members of the collegial managing body of a joint-stock company, the managing body of a mutual investment fund, and a trustee of mortgage cover may be insured under the agreement of commercial insurance.

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9 Access to the information about real owners of securities whose rights are registered in the depositary is extremely limited, which is in great demand in the current situation (Zashchita prav investorov. Uchebno-prakticheskii kurs [Protection of Investors' Rights. A Theoretical and Practical Course]. pp. 121 — 122, 178.

10 G.F. Shershenevich. Kurs torgovogo prava. V.I: Vvedenie. Torgovye deiateli [A Course of Trade Law. V.I: Introduction. Prominent Figures in Trade]. Statut Publishing House, Moscow, 2005, p. 367.

11 I.A. Pokrovskii. Osnovnye problemy grazhdanskogo prava [Main Challenges in Civil Law]. Statut Publishing House, Moscow, 2003, p. 293.

SECURITIES MARKET AND THE CRIMINAL CODE: OPEN-ENDED QUESTIONS

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Abstract: The article is dedicated to the problems of protecting the securities market by criminal law. The author shows that shortcomings are not confined to the criminal law. The article reveals vagueness of the content of the securities market term in legal science and its legal uncertainty.
Keywords: securities market, verification of rules effectiveness, the liveability of rules, criminal law, crimes committed on the securities market, criminal liability.

Problem issues

Russian criminal law is an integral part of the legal system; therefore, rules of criminal law should be systematic; second, they should not contradict the rules of other branches of law; third, rules of criminal law should have subsidiary nature. It means that rules of criminal law are used when rules of other branches of law cannot regulate public relations. We should remember the fact that the main rules are regulatory norms, but when such rules do not guarantee appropriate regulation of public relations, enforcement rules should make up for it. We need conceptual approaches to criminal law in general and to the rules protecting the securities market in particular.

Before criminalizing, we should find answers to the following questions:

1. What is necessary to prohibit on the securities market to protect it? Such needs must go from Russian participants in the securities market and potential foreign participants in the securities market?

2. What are the consequences of the existing legal regulation of the securities market?

3. What are the risks if the rules protecting the securities market go beyond the social needs?

The existing problems in the field of the securities market protection can be explained by the review of the history.

Legal scholars say that the crimes committed in the securities market in the pre-revolutionary Russia are similar to modern crimes[1]. But the development of the securities market was stopped by the government interference. The first act was the Decree of the Council of People's Commissars of 29 December 1917 "On Ceasing Coupon and Dividend Payments". The Decree prohibited all deals with securities (Part 2 of the Decree)[2].

[1] S.P. Stavilo. Ugolovno-pravovye i kriminologicheskie aspekty rynka tsennykh bumag. [Criminal Law and Criminological Aspects of the Securities Market]// Dissertatsiia na soiskanie stepeni kandidata yuridicheskikh nauk [Dissertation for the Degree of Candidate of Juridical Sciences]. Nizhnii Novgorod, 2000, p. 132.

[2] Decree of the Council of People's Commissars of December 29, 1917 "On Ceasing Coupon and Dividend Payments"// Gazeta Vremennogo Rabochego i Krestianskogo Pravitel'stva [The Newspaper of the Provi-

By the end of the 1920s — by the beginning of the 1930s, the goal of the Decree was reached: autonomy and independence of legal entities was forced out by the planning and strict regulation by the state; joint-stock companies were reorganized into state associations; and shares stopped being used in circulation[3].

Only state securities were protected in the Soviet times. It followed from Article 59.8 of the RSFSR Criminal Code of 1926 which provided for criminal liability for the forgery of securities, including state securities[4]. But state securities could not serve as an alternative to securities in the sense in which they were understood in the countries with developed market economies. Therefore we can say that the securities market was frozen for more than 50 years.

The beginning of the 1990s saw a change of ideology and attempts to restore the efficient securities market which existed in the pre-revolutionary period, and the legislator wanted to ensure its proper protection of by the RF Criminal Code.

Regulatory norms in the securities market

Undoubtedly, the Soviet period had certain advantages. However, the securities market lost its previously gained experience in its regulation and protection. At present, it is difficult to say what is meant by the securities market. There is no definition of the securities market in the law. It is not critical; however, difficulties arise in determining the content of the securities market.

As a rule, the securities market is defined in the economic literature in the following way: 1) a system of economic relations of its members on the issue and circulation of the securities; 2) a system of economic relations between those who produce and sell securities and those who buy and become their holders; 3) a set of relations that occur during the issuance and circulation of securities, as well as its organizational structure[5].

In these definitions there are no significant differences, but two main aspects are mentioned: the issuance of securities and the circulation of securities in the market.

But such definitions of the market do not describe its importance for the state and the economy. It would be correct to speak about the securities market as an infrastructure element. This feature demonstrates the social nature of the securities market and, therefore, the importance of its protection[6].

sional Government of Workers and Peasants]. 1917, No. 43.

3 V.V. Dolinskaya. Aktsionernoe pravo: osnovnye polozhenia i tendentsii [Company Law: Main Provisions and Trends]. Monograph. Volters Kluver Publishing House, Moscow, 2006, p. 25.

4 Ugolovnyi' kodeks ot 1926 [Criminal Code of 1926]// Sbornik zakonov RSFSR [Collection of laws of the RSFSR]. 1926, No. 80, article 600.

5 See, for example: Rynok tsennykh bumag: Uchebnik [The Securities Market: Textbook]// Edited by V.A. Galanov, A.I. Basov. 2nd edition with amend. and add-s. Finansy i statistika [Finance and Statistics]. Moscow, 2006, p. 191; Obshchia ekonomicheskaia teoria. Politekonomia [General Economic Theory. Political Economy]// Rossiiskii ekonomicheskii' universitet imeni G.V. Plekhanov [Russian University of Economics named after G.V. Plekhanov]. Promo-Media Publishing House. Moscow, 1995, p. 244; Rynok tsennykh bumag: Uchebnik [The Securities Market: Textbook]// Edited by E.F. Zhukov. Uniti Publishing House, Moscow, 2009, p. 558.

6 Read more: A.A. Govorin. Infrastruktura sovremennogo predprinimatel'stva: problem teorii i praktiki [The Infrastructure of a Modern Enterprise: Problems of Theory and Practice]. Moscow, 1999; A.I. Kuznetsova. Infrastuktura. Geoekonomicheskii podkhod [The Infrastructure. The Geoeconomic Approach]. Moscow, 2007.

The structure of Federal Law of 22 April 1996 No.39-FZ (amended on 29 December 2012) "On the Securities Market"[7] enables to distinguish such components as the issuance of securities and their circulation as well as the activities of professional market participants.

Enforcement norms in the securities market

It is not enough to distinguish only those elements for proper regulation of the securities market by criminal law. We believe that observance of the rights of securities' holders should be allocated as a separate element of the market. The need in that is caused by many factors, in particular by those negative consequences which are inevitable. They are of a dual nature: on the one hand, the aggrieved party (holders of equity securities or investment shares) is not able to exercise their rights granted by the law, or to receive the due income, etc., but on the other hand, they are accompanied by unjust enrichment of persons committing wrongful acts which the legislator does not attach much importance to.

According to the Criminal Code, crimes committed in the securities market are abuse in the securities emission (Article 185 of the Criminal Code), malicious evasion from disclosure or providing information determined by the legislation of Russia on securities (Article 185.1 of the Criminal Code), violation of the order of accounting the rights to securities (Article 185.2 of the Criminal Code), obstruction or unlawful restriction of the rights of securities' holders (Article 185.4 of the Criminal Code), and making, storage, transportation or sale of counterfeit money or securities (Article 185.4 of the Criminal Code).

These articles form a system of crimes. We believe it is appropriate to apply the term "system"[8]. Therefore, crimes committed in the securities market are a system of intentionally committed socially dangerous acts directed against the legal order in the issuance of securities and their circulation, as well as against the rights of holders of securities and their proper accounting, coupled with the recovery of illegal income.

International rules in the field of securities market protection

The research of the CIS activities does not make sense in this article, because the adopted conventions do not properly regulate the relations in the securities market: for example, the Convention on the Coordination of the Member States of the Commonwealth of Independent States in the Securities Markets which was concluded in Moscow on 25 November 1998.

The activities of the International Organization for Securities Commissions are exemplary. The IOSCO is the international body that brings together the world's securities regulators and is recognized as the global standard setter for the securities sector. The IOSCO develops, implements and promotes adherence to internationally recognized standards for securities regulation[9].

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7 Federal'nyi' zakon "O rynke tsennykh bumag" No. 39 [Federal Law "On the Securities Market" No. 39]. April 22, 1996// Sbornik zakonov [Collection of laws]. 1996, No. 17, article 1918.

8 The polysemantic word "system" is of foreign origin (gr. systema = a whole something made up of parts, a combination). One of the modern dictionaries gives ten definitions of this word and the first and foremost is the one we will stick to: "a set of naturally interconnected elements (subjects, phenomena, opinions, knowledge, etc.) that make up a definite entity, a unity". A.N. Bulyko. Bol'shoi' slovar' inostrannykh slov. 35 tysiach slov [Large Dictionary of Foreign Words. 35 thousand words]. Martin Publishing House. Moscow, 2006, p. 532.

9 Cybercrime, securities markets and systemic risk. July16, 2013. Available at: [http://www.iosco.org/library/pubdocs/pdf/IOSCOPD460.pdf] .

For securities markets, risks are natural. Now markets significantly differ from the markets of the recent past. Only 20 years ago trading floors were dominated by paper trades, and “securities” were put in briefcases. Now markets are becoming increasingly digitized, with sensitive data and critical processes being moved to computer-based platforms connected to a vast cyberspace. Therefore, some securities market actors, including exchanges and banks, have already fallen victims to cybercrimes. For example:

— a recent attack on the UK Bank website when it was necessary to inject fake input fields and security warnings into an otherwise secure website in order to extract passwords and other sensitive information from users;

— in 2012, hackers targeted the websites of the world’s largest banks, overloading their servers with requests so that the bank’s customers were unable to access the bank’s online services;

— an attack on an exchange using malware to gain access to sensitive applications, which stored information on potential market success of 500 companies;

— cyber attacks on websites of a number of stock exchanges around the world which requested overloading the server and in some cases forcing trading to stall for a brief period;

However, trading platforms have not been directly affected, since exchanges usually have segregated platforms for trading and web-services to prevent systemic contagion. These attacks appear to have a range of motivations — from political to corporate interests.

— an attack against the Hong Kong Stock Exchange. After the cyber attack made the corporate information unavailable, the securities became illiquid and the trading had to be halted.

This is “the negative impact of both individual and institutional investors in that market”.

The international community has gone far ahead in the regulation of the securities market and the adoption of actions for its protection.

For example, in 2011 the International Monetary Fund distinguished countries with developed economies and 150 countries with emerging and developing economies, Russia being among them[10]. It should be noted that in January 2016 Russia still belonged to the countries with emerging and developing economies[11].

Insufficient norms of regulation and protection do not make the Russian securities market appealing for the participants outside Russia. In the current situation it is difficult to attract participants to the Russian securities market.

Substantive rules are the most serious disadvantages of the Russian legislation in the securities market.

Here are some examples.

The first is based on Article 15.24.1 of the Code of Administrative Offences.

Article 15.24.1: Illegal issue or circulation of documents certifying financial and other obligations, if these actions do not contain criminally wrongful acts.

This article provides for administrative responsibility if the actions do not contain criminally wrongful acts. Turning to the Criminal Code, we see that there are no such acts herein. So, if the legislator has not provided for anything, should we resort to the criminal law?

[10] World Economic Outlook: a Survey by the Staff of the International Monetary Fund. Washington, DC: International Monetary Fund, 2011, pp. 177 — 179.

[11] World Economic Outlook UPDATE. Subdued Demand, Diminished Prospects, January 2016, Washington, DC: January 19, 2016, p. 3.

Another example is based on Article 15.17 of the Administrative Code and Article 185 of the Criminal Code.

Article 15.17 is entitled "Dishonest issuance of securities, if these actions do not contain criminally wrongful acts".

Article 185 is entitled "Abuse in the issue of securities if it has caused large-scale damage to citizens, organizations or the state".

The first article contains some abstract provision, while the other article has a list of specific acts which, when committed, lead to criminal liability. However, only the commission of the last criminal act corresponds to the area of protection which is the issuance of securities, while the other acts are relevant to the prospectus of securities. So, the question is what is abuse in the issuance of securities? Such uncertainty on the part of public authorities in the adoption of normative legal acts exacerbates mistrust of participants in the securities market instead of benefiting them.

It is generally accepted that the legislator establishes criminal liability for committing an act with the purpose to change the public behavior for the better. Thus, the goal of prevention is achieved. However, until now it has not been proved. Criminal law for the protection of the securities market does not prove it either. Offences were committed and are still being committed. Damage was caused and is still being caused to conscientious citizens. Therefore, we will not be able to make the securities market attractive for its participants only by criminal prohibitions. Moreover, even if to impose criminal prohibitions, they should neither contradict other rules of law nor duplicate them.

For example, Article 185.2 of the Criminal Code of the Russian Federation is aimed at combating any violation of the order of registration of the rights to securities.

The first part of this article stipulates such a ground for criminal liability as a large-scale damage to citizens, organizations or the state. The second part deals with an extremely large-scale damage. The third part says that the commission of an act is sufficient for imposing criminal liability.

For the above reasons, the lawmaker considered it appropriate to establish in the third part of the above article criminal liability for *"entering inaccurate information in the register of securities holders (Note: our italics),* as well as for deliberate destruction or forgery of documents, which have been used to make an entry or change in the register of securities holders, if the mandatory storage of the documents is required by the legislation of the Russian Federation". As we know, the protection of public relations is not limited to the Criminal Code. The Code of Administrative Offences of the Russian Federation also establishes liability for violating the rules of maintaining the register of securities holders.

Article 15.22 of the Administrative Code is entitled "Violating the rules of maintaining the register of securities holders".

Part 1 of Article 15.22 reads as follows:

"1. Illegal refusal or evasion from making entries in the register of securities holders or introduction of such records without the grounds provided for by federal laws and other normative legal acts adopted in accordance with them or *entering inaccurate information in the register of securities holders (Note: our italics),* as well as non-fulfillment or improper fulfillment by the person, responsible for maintaining the register of securities holders, of the requirements of securities holders or their authorized representative, as well as nominal

holders of securities to provide a statement from the register of securities holders of the personal account".

The content of prohibitions implies a list of alternative actions, so for criminal / administrative liability it is enough to commit a prohibited act (criminal or administrative, respectively). Therefore, comparing the italicized phrases we can that they are identical. The question is what public relations are protected by criminal law and what by administrative? So, the objectives enshrined in Art.2 of the Criminal Code cannot be reached. Moreover, these prohibitions have neither proved nor refuted that it was rational to introduce them. The securities market was not attractive and has not become attractive to foreign investors yet.

The legislator has tried to specify which acts are criminally liable, though unsuccessfully. At least, if we wish to specify the rules of criminal law, we should see how efficient these rules are. The verification of their efficiency is to be based on the current needs of the society, taking into account recent trends in the development of public relations.

The corpus delicti of the administrative offense is quite formal, therefore, it is logical that the Criminal Code should contain its features but they are not established. What to do in this case? What proceedings should be initiated: criminal or administrative? Or the one that was initiated first? Or, the one at the discretion of the guilty that is most favorable to him?

Disadvantages of procedural norms

Apart from the above disadvantages, there are other difficulties associated with the procedural sphere. At present, there are no experts who will specialize in solving crimes committed in the securities market. For example, the State of Israel has established the Israel Securities Authority — the ISA[12]. The Russian Federation has the Federal Financial Markets Service, the legal position of which differs substantially from its Israeli counterpart, so it is difficult to say that the Federal Financial Markets Service is the analogue to the ISA.

Conclusion

There are no proper conditions for the qualitative development of the securities market in the Russian Federation. It is necessary to provide a proper environment for the circulation of securities. It should be achieved not only by changing the legislation. An important factor is proper education of citizens, formation of legal awareness and civil society institutions. It is important to ensure the attractiveness of the Russian securities market for foreign nationals.

It is necessary to reform the procedural rules. This applies to both the investigation of offences, including crimes in the securities market, and proper judicial staffing by experts qualified in the field of the securities market.

Before adopting the rules, we should verify their efficiency, which implies the application of the rules in practice, both for the proper regulation of the securities market and for the protection of public relations occurring in the securities market. Therefore, such a feature as the liveability of the rules should be considered in the first place.

It is necessary to build a pyramid of the rules with the Constitution of the Russian Federation as its basis. Then comes civil law. A step above is administrative law. Only if administrative regulations fail to ensure the protection of public relations, we can apply criminal provisions.

[12] The information was obtained during an internship in the State of Israel in May 2012.

THE HISTORY OF COMPARATIVE LAW IN RUSSIA

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Abstract: The current article studies the history of comparative law in Russia and presents its periodization. Alongside with the needs of comparativism in the field of state and law, the author substantiates the shift of the development stages and content of the comparative law science. The natural competitiveness between Western and Eastern civilizations, promoting the world progress development, is illustrated. Besides, the author formulates the scientific-practical connection/link between the comparative law and common theory of national security. The further perspectives of juridical comparativism in Russia are considered.
Keywords: comparative law, juridical comparativism, theory of national security, globalization, Russian policy, Western and Eastern civilizations, Russian state and law development perspectives.

The Russian Federation, overcoming the post-Soviet period degradation, manifests in the modern world its right to a dignified existence as a successor of a millennial Russian nationhood and has returned to competitive practices with other civilizations, primarily with Anglo-Saxon (Anglo-American) and Continental. Western officials have embraced the self-dissolution "of the Socialistic law family" of the late 1980s — early 1990s as their own victory. However, the opposition of self-centeredness, the prevalence of human rights over sociocentrism — "the public interest", characteristic of Western and Eastern civilizations respectively, has been observed since the time of the Greco-Persian Wars (500-449 B.C.)[1].

However, in the 1990s, nobody spoke about the unique Russian mentality, though the competition presence is a natural drive of the world progress, and the most stable form of the civilizations' coexistence is a mutual respect and a steady power balance. Probably, the Russian state in the post-Soviet era was "written off", pushing for further self-destruction. Thus, the statesmen of "the cold war" time and supporters of neoconservatism painfully reacted at the recovery in the XXI century of the national territorial integrity, spiritual unity, conditions for economic self-sufficiency and the revival of the geopolitical space, including the allies and neutral states seeking peaceful coexistence.

Meanwhile, the revival of the Russian state-building is a threat to globalization policies and plans to "the network world absorption", accelerating the time terms of their implementation. Therefore, so obvious and clumsy are the attempts to block foreign political and economic ties between Russia and China with the countries of the European Union and APEC against the background of almost simultaneous imposition on these regions of the trade agreements with the USA, making the North American states the most privileged partner with their enslaving terms.

[1] I.V. Rez'ko. Istoria voin i konfliktov v 2 tomakh, tom 1 [History of Wars and Conflicts]: in 2 vol., vol.1]. Mn, 1997, p. 196.

America, since the collapse of the Soviet Union, has been aspiring to become a global hegemon, acting improvidently in the economic and political relations, and threatening the humanity by destroying pluralism of the civilizational development, that hinders progress. Though "the bills" of globalism are to be paid by Eurasia, which is forced to give up promising cooperation with the Russian Federation, and later the People's Republic of China. However, the haste of "the network dominance" plans without completing the preparatory activities jeopardizes the ultimate objective achievement, as it discredits the states and politicians promoting it: for example, the destruction of Libyan Jamahiriya, carried out with the direct participation of the Western countries, has opened the way to Europe for immigrants from Africa. The US fight with the secular regimes in Iraq and Syria has led to the creation of "a pseudo Islamic state"; the overthrow of the legitimately elected president of Ukraine in 2014 may lead to the collapse of the young state and has already led to the restoration of the Neo-Nazism ideas that is likely to spread over other European countries, which lack the surplus product.

After "the Cold war", some partners in the international arena behave unprofessionally, imposing on sovereign states unacceptable forms of political interaction. In this regard, the President of Russia V.V.Putin rightly considers that "every people has an inalienable, sovereign right to its own path of development, the choice of allies, the forms of political organization of the society, building the economy and its own security"[2]. However, in this case the Russian Federation is primarily implied.

The point is that challenges to the national security of Russia arising at the moment are an important incentive for its increased development. The country, as it has been many times in its history, is thrown into a dilemma to become self-sufficient and win or slip into obscurity. The national consciousness revival, that manifested itself so clearly during the celebration of the 70th anniversary of the Victory in the Great Patriotic War, is apparently caused by the persistent promotion of NATO to Russia's borders and interference in the affairs of many states not fitting into the concept of globalization.

In this regard, the most important role is given to the national law as the prime tool of the state and social construction; the Theory of State and Law is the first in "the system" of jurisprudence sciences, elaborating categories and concepts used by the legislator in law practice. A theoretical and legal science must work out and provide definitions and concepts to contribute to the creation of sectoral and cross-sectoral mechanisms of combating modern threats to the mankind, the society and the state, that make up the content of "the theory of national security".

Meanwhile, it is obvious that "the Theory of State and Law", first of all, is used in Russia to satisfy educational and doctrinal needs; to achieve practical aims it uses mainly historical and legal capacity and the philosophical and legal knowledge, for example, in the context of "the History of the Theory of Law and the State". Its closer substantive and methodological interaction with "the theory of national security" and "comparative law" can contribute to the increased practical application of "law dogmas" under current conditions. Therefore, the present article is devoted to the history of the legal comparativism in Russia.

So, the comparative law has a unique potential of actualization of theoretical and historical sciences and enables to increase the degree of novelty of scientific studies undertaken in these areas. The usage of comparative methodology creates conditions for introducing new "legal

[2] V.V. Putin. Poslanie Prezidenta Rossii Federal'nomu Sobraniu Rossiiskoii Federatsii [Address of the Russian President to the Federal Assembly of the Russian Federation]. December 04, 2014. The text is available in Consultant Plus legal information system (accessed on June 05, 2015).

constructions", which are able to crystallize themselves in legal practice, thereby acquiring the value of "a legal category", that with the account of contemporary realities and threats can promote the formation of new legal concepts or improve the existing ones, for example, of the existing "theory of national security". However, in practice, some "legal constructions" do not pass the test of time and are dismissed as scholastic, but the approbation process may drag on for years. By the way, the widespread use of legal constructions in the theoretical and historical researches, sometimes to the detriment of the legal categories, and, without a goal of solving the scientific problem, is one of the typical signs of the post-Soviet jurisprudence. Though "the legal newspeak" is undoubtedly a part of comparative law, which is a platform for debate of "axioms of law" and "theorems of law", solution of educational, scientific or application tasks.

In the author's opinion, the comparative law is not a secondary theoretical and legal discipline, as its specific methodological tools are used in other branches of legal sciences, enabling to make a comparative analysis of the law norms and institutions, applicable in international, national and regional legal systems. Since the comparative law possesses a unique doctrinal potential, including for other branches, it should be described as an applied interdisciplinary legal science, which has its own object and method, and endless doctrinal and practical potential in the field of state and law.

It should also be noted that if comparative legal researches are properly organized and their results are properly presented, they always have a higher degree of scientific novelty, practical significance and approbation potential, than if to formulate a new legal concept. The very formulation of one's own theory should be based on the application of comparative legal methodology (with the analysis of related and exogenous categories), for one not to "reinvent the wheel" and, if necessary, carry out the reception. One of the illustrative examples of such a reception is the revival of Roman law in the European feudal law of the Middle Ages and Modern Age periods, that laid the foundation for "the Roman-Germanic legal family".

As it is known, the Russian legal system, since the early 1990s, belongs to "the Roman-Germanic legal family", but it has some specific features:

1. It is included into "the Slavic group of legal systems" (Belarus, Bulgaria, Bosnia and Herzegovina, Macedonia, Poland, Serbia, Slovakia, Slovenia, Montenegro, Czech Republic, Ukraine, Croatia);

2. It has a vast historical experience of belonging to "the socialist legal family" (Albania, Bulgaria, Hungary, German Democratic Republic, Cuba, Poland, Romania, the Soviet Union, Czechoslovakia, and Yugoslavia);

3. It includes a number of regional legal systems (the subjects of the Russian Federation), syncretic with the religious tacit law traditions, such as in the republics of the North Caucasus and the Lower Volga region.

It is obvious that the current state of Russia's comparative legal science is predetermined by the development of legal thought in the past; while the application of the methodology of legal comparativism in a particular historical period bore a variative character, depending on the needs of the national legal system and the content of the legal culture. The author considers that the analysis of the development of the national comparative law enables to distinguish six historical periods, the occurrence of each is associated with the practical comparative needs of the Russian state:

1) the Russian (IX — XVII centuries);

2) the Imperial (XVIII — 1917);

3) the Proletarian (1917 — 1945);
4) the Soviet (1945 — 1991);
5) the post-Soviet (1991 — 2014);
6) the New Russian (since 2014 — to present) period.

The origin of the comparative law as a method of juridical cognition is related to the times of historical occurrence of the statehood, requiring a unification of many tribes having particular tacit law, as it was the case with the eastern Slavs in the IX century, when the foundation of the Russian statehood was laid by Grand Prince Rurik. However, in "the Russian period" till the XVII century, the development of legal comparativism was of "a pre-scientific nature", corresponding only to the applied objective — the submission of the population, belonging to various regional legal systems, to the power of the common monarch. Thus, the public authorities were solving the applied problems related to the need of studying the tacit law of tribes, ethnic groups and feudal principalities, being involved into the orbit of the Ancient Russian, then of the Moscow State, in order to ensure the enforcement of "the Russian Law" in their territory, especially in the judicial and tax activities. As it is known, the first "records" of national law — "Russkaia Pravda" [Russian Truth] of 1054, and Law Books of 1497 and 1550 — were a set of folklaws and legal precedents, designed to create the conditions for a single legal space.

Yet, the sign of a traditional state, which Russia used to be in the pre-Soviet period, is the impossibility of universal dissemination of law in space, time and among people in the conditions when the country comprised new territories and peoples with a different degree of integration and with a different degree of predisposition to the Russian culture as part of the European one. Expanding the state borders required from the public authorities immediate familiarization with the particular tacit law, its adaptation to the conditions of the Russian reality and the gradual leveling of folklaws, that occurred naturally, without targeted haste and violence. To do this, in the XVI-XVII centuries, there were "territorial Prikazy" (the prototype of the ministries) in the country, for example, Kazan, Siberian or Cossack, conducting the state policy in the respective regions.

In the XVIII — early XX centuries, the national comparativistics acquired its scientific character, began to be used in universities, again for domestic needs of unification and codification of the Russian Empire law. It was connected with the fact that the Russian education received not only the ecclesiastic form, but the secular continuation. Modernization of Russia according to "the Western standards", carried out by Peter I, increased the viability of the Russian civilization, making it a truly global (transcontinental) civilization; herewith it should not be forgotten that the country's borders stretched from the Baltic states to Alaska. The juridical sphere "received the European law", but the policy of legal pluralism, allowing the simultaneous application of positive law, religious or tacit law, was widespread. At the same time the Council Code [Sobornoye Ulozheniye], accepted in 1649, was still in force.

In the XVIII-XIX centuries, officials and scholars purposefully studied the customs and traditions of the peoples of the Russian Empire. As the result of this activity there appeared not only the large-scale monographic works[3], but also a number of normative legal acts of "a targeted character" such as the "Regulations on the Jews Settlement" of 1804, "Regulations

[3] See, for example: A.Ya. Efimenko. Issledovania narodnoi' zhizni [Research of folk people's life]. Moscow, 1884, issue 1; M.M. Kovalevskiy. Sovremennyi obychai i drevnii' zakon. Obychnoe pravo osetin v istoriko-pravovom osveshchenii [Contemporary Custom and Ancient Law. Common Law of the Osetians in the

on the Don Cossack Host Administration" of 1835, "Regulations on the Turkmenian Territory Management" of 1886[4], that provided a composition of a nationwide unity within a unitary state. In addition, the results of the comparative activity found its continuation in the codification of the Russian legislation held under the direction of M.M.Speransky, when the Collection of Laws of the Russian Empire included "general governorate institutions", "special institutions" and "special rules". The latter provided for a special procedure for the distribution of legislation, including the newly introduced, allowing to take into account regional peculiarities of the legal status of the population, i.e. the legal pluralism was legitimized, although the form of the state system of Russia remained unitary.

The collapse of the Russian Empire in 1917, the activities of the Provisional Government and the establishment of the Soviet state marked a new era in the development of national comparative law, which lasted till the end of the Great Patriotic War — "the Proletarian period". The development of the national comparative law in this period (1917-1945) had the character of stagnation, as the Bolsheviks sought to impose on the world a materialistic vision of the development of the state and law, ignoring the established legal traditions. However, due to the fact that "the world revolution" stopped in 1919-1920 with the defeat in the Polish-Soviet War, the construction of the Soviet socialist state occurred just in one country. Practically, it was possible to rely only on the experience of the Paris Commune of 1871 and, theoretically, on the doctrine of Marxism-Leninism. However, to some extent, attempts to spread these ideas were carried out in Spain (1936-1939), Mongolia (1921-1940) and the Republic of China (1921-1945). Though, the special significance in the pre-war period was given to the Communist International, i.e. the international organization, which in 1919-1943 was representing the interests of the communist parties of many countries (the Comintern). The leading role in it, of course, was played by the Soviet Union.

In the Proletarian period of the comparative law development, the national legal science was characterized by materialistic legal consciousness, combined with formal legal methodology, making no difference between the categories of "the system of law" and "the legal system". Based on the fact that the object of the juridical comparativism is "the system of law", its stagnation in the period under review was predetermined, however, foreign researches in this area continued (e.g., D.Clark, G.Libesny, D.Merrimen, K.Osakwe, A.Esmeyn)[5].

At the same time, due to the fact that the comparative law in the Soviet Union was methodologically popular, it was not a rogue science; it was applied in the opportunistic critical approach in relation to the capitalist states. Besides, the methodology of comparativism was widely used by classics of Marxism-Leninism, for example, by Engels in his work "The Origin

Perspective of Historical Comparison]. Moscow, 1886; F.I. Leontovich. Adaty kavkazskikh gortsev [Adats of the Caucasian Highlanders]. Odessa, 1882 — 1883, issues 1 and 2.

[4] Polnyi' khronologicheskii' sbornik zakonov i polozhenii', kasaushchikhsia evreev, ot ulozheniia tsaria Alekseia Mikhailovicha do nastoiaschego vremeni. [Full Chronological Collection of Laws and Regulations concerning the Jews, from the Code [Ulozhenie] of the Tsar Alexei Mikhailovich to present]. St.Petersburg, 1649-1873, pp. 53 — 64; Polnoe sobranie zakonov Rossiiskoi imperii. Sobr. 2. [Full Collection of Laws of the Russian Empire. Collection 2]. V. 10, No. 8163; Svod zakonov Rossiiskoi Imperii [Collection of Laws of the Russian Empire]. St. Petersburg, 1912, v.2, pp. 427 — 446.

[5] G.G. Nebratenko. Khronologia razvitia rossiiskoi' sravnitel'no-pravovoi' nauki [Chronological Development of the Russian Comparative Legal Science]// Sravnitel'noe pravovedenie v Rossiiskom i mirovom obrazovatel'nom prostranstve: istoria i sovremennost' [Comparative Legal Science in the Russian and Global Educational Space: History and Modern Times]. Rostov-on-the-Don, 2013, pp. 10 — 14.

of the Family, Private Property and the State"[6]. Some of the approaches outlined in this work were embodied in the pre-war period in the policy of the nation-building in the Soviet Union, which, on the one hand, was aimed at the formation of national elites and cultivation of self-consciousness of the titular nations. There appeared 16 union republics (since 1956 — 15), with their own legal systems, syncretic with all-union. On the other hand, the internationalization of the Soviet society was observed, primarily of the Russians, losing their ethnic and religious mentality, getting rid of their "historical prejudices".

As a result of "the Bolsheviks' breakthrough" in the history of Russia, the modernization of public relations was accomplished, i.e. the transition from a predominantly agrarian to industrial production (this process began in the XVIII century); and the principle of universal dissemination of law in time, space and among people was put into practice. After the end of the Second World War, there appeared conditions for conducting large-scale comparative legal researches, because the Soviet Union appeared to have a rather vast political influence in the Eastern and Central Europe and it was necessary to explore "the customary legal conditions" in the states ("legal survivals").

Thus, the revival of the national comparative legal science, noted in 1945-1991 (the Soviet period of comparativistics), was one of the results of the end of the Second World War. Besides, the colonized states witnessed intensified national liberation movements, and so, in the 1950s-1970s, the political map of the world saw more than a hundred new states, many of which declared a desire to follow the socialist path of development and asked the Soviet Union to render them economic assistance and political support. As a result, there appeared a need to better know "the legal survivals" of entire regions[7]. In practice, the national "scientific thought" predicted a possibility of the spread of communist and socialist ideas all over the world and was not mistaken.

The doctrinal basis of "the Soviet period" of the comparative law was the publication in the USSR of the work by René David, who gave the classification of three main legal families, including the socialist family[8]. As a result, the Soviet legal science created conditions for testing "the legal system" category in the sense that it is given now[9]. The main achievement of the Soviet period development of the national comparative law was the emergence of "socialist legal family", which existed till the end of the 1980s. However, today some states remain faithful to the chosen path of development, such as Cuba, China and Vietnam.

[6] F. Engels. Proiskhozhdenie sem'i, chastnoi' sobstvennosti i gosudarstva [The Origin of the Family, Private Property and the State]. Zurich, 1884.

[7] See, for example: I.E. Sinitsyna. Obychai i obychnoe pravo v sovremennoi' Afrike. Istoria izuchenia. Kodeksy obychnogo prava [Custom and Common Law in the Contemporary Africa. History of the Study. Codes of Common Law]. Moscow, 1978; M.A. Supataev. Obychnoe pravo v stranakh Vostochnoi' Afriki [Common Law in Eastern African Countries]. Moscow, 1984; I.E. Sinitsyna. Chelovek i sem'ia v Afrike: po materialam obychnogo prava [Man and the Family in Africa: by the Materials of Common Law]. Moscow, 1989; M.A. Supataev. Pravo v sovremonnoi' Afrike (osnovnye cherty i tendetsii razvitia) [Law in the Contemporary Africa (its Main Features and Trends of Development)]. Moscow, 1989.

[8] R. David. Osnovnye pravovye sistemy sovremennosti (sravnitelnoe pravo) [Major Legal Systems of Today (Comparative Law)]. Moscow, 1967.

[9] See, for example: N.I. Matuzov. Pravovaia sistema razvitogo sotsializma [Legal System of Developed Socialism]// Sovetskoe gosudarstvo i pravo [Soviet State and Law]. 1983, No. 1, pp. 18 — 27; Pravovaia sistema sotsializma v 2 tomakh [Legal System of Socialism in 2 vol.// Edited by prof. A.M. Vasiliev. Moscow 1986 — 1987; I.E. Sinitsyna. Obychai i obychnoe pravo v sovremennoi' Afrike. Istoria izuchenia. Kodeksy obychnogo prava [Custom and Common Law in the Contemporary Africa. History of the Study. Codes of Common Law]. Moscow, 1978.

Meanwhile, in "the post-Soviet period" (1991-2014) the national legal science turned away from legal centralism and returned to juridical pluralism. As a result, the interest to study the legal systems of foreign countries became exclusively educational and scientifically theoretical, since the sphere of foreign policy interests of the Russian Federation did not stretch beyond the Commonwealth of Independent States, created for "peaceful divorce" of the former federal republics. The failure of government regulation in the ideological sphere led to the revival of religious and ethnic diversity in the society, and in the second half of the 1990s the question of further existence of the Russian statehood became topical.

The national comparative legal science, in practical terms, switched over to "domestic demands", concentrating on the study of the traditional legal life of the North Caucasus, Siberia, Far North and Far East[10]. On the basis of delegation of powers and the sovereignty in the subjects of the Russian Federation, the regional legal systems were created in their "reduced form". The students of different legal Master's Courses began to actively study the comparative law.

At the same time, "the winner in the Cold War" in the 1990s actively conquered the political space of the former "socialist camp", took over the Baltic States and the CIS countries, and intervened in the internal affairs of the Russian Federation. We must assume that such geopolitical projects were carried out on the basis of serious scientific, theoretical and practical training, associated with political, legal and socio-economic researches, which can be conducted by applying the methodology of comparativism. However, at the end of the post-Soviet period of the development of comparative law, the main internal threats to the national security of Russia were eliminated. In the August of 2008, the determination and potential of our country was tested for strength in South Ossetia when the Saakashvili regime ordered to attack the Russian peacekeeping contingent accomplishing the tasks on the delineating of the warring parties. The results of this adventure are well-known.

Finally, the sovereign political position of the Russian Federation on the subject of "Syrian settlement" and problems of the South-East Ukraine nowadays gives grounds to think that modern comparative legal studies must go beyond Russia itself, responding to urgent issues of security threats in various parts of the world. Besides, practically speaking, the comparative law must be aimed at solving internal state tasks (improvement of federal legislation, coordination of the socio-legal development of the regions, fight against corruption and extremism), finding the optimal combination of liberal and traditional trends in law. The future of the Russian state and the fate of our civilization will depend on the accomplishment of these tasks.

From the above stated international affairs, we see that geopolitical interests and capabilities of the country predetermine the promising research directions for the national comparative law of the modern period, which, according to the author, began in 2014 with the reunification of the Crimea with the Russian Federation. The special role is given to the modern comparative law in connection with an active participation of Russian in the BRICS, SCO, EurAsEC and CSTO organizations, predetermining coordination and even integration of certain functions of the states, including in the legal and law-enforcement spheres, as well as in the sphere of national security.

[10] O.O. Nebratenko. Pravovaia reglamentatsiia statusa natsional'nykh men'shinstv i korennykh malochislennykh narodov [Legal Regulation of the Status of National Minorities and Indigenous Minor Peoples]// Severo-Kavkazskiy uridicheskii' vestnik [North-Caucasian Collection of Laws]. 2014, No. 4, pp. 44 — 48.

At present, for the modern period of development of the national comparative law it is topical to study the legal systems of the republics, which appeared on the territory of the former Soviet Union, as well as of their neighboring countries. Moreover, the Middle East and Latin America are of the geopolitical interest. A separate theme is the legal system of the United States and its regional atypical manifestations in Alaska, Hawaii, Puerto Rico, American Indian reservations, the former Mexican states, such as Texas. Unfortunately, it should be stated that the situation with the human rights in the territory of the North American states is far from being ideal: numerous murders of Afro-Americans by the police make us look at the history of the state and law of this country where xenophobia and racial intolerance in the past was part of its legal policy (Negros — slaves, Indians — excluded people). **Thus**, the comparative law in Russia continues its development.

SIGNIFICANT REFORMS OF THE ENGLISH INSURANCE LAW: THE 2012 CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) ACT, THE 2015 INSURANCE ACT

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Abstract: The article focuses on the reform of legal regulation of the insurance relationships with participation of both consumers and economic entities. The acts passed in 2012 and 2015 have radically changed the existing standards. Now a more well-balanced approach to misrepresentation and non-disclosure prevails in English law. These changes can serve as a basis for elaborating proposals for reforming the Russian legislation.
Keywords: insurance, consumer, misrepresentation.

It is considered that the fundamental principles of the insurance law have been elaborated in Anglo-Saxon jurisdiction. For decades, the main provisions of English law in the insurance sector remained unchanged.

Therefore, significant reforms of recent years marked by the adoption of the Consumer Insurance (Disclosure and Representations) Act of 2012[1] and Insurance Act of 2015[2] are estimated by experts as the most significant changes in the statutory law over the 100 years[3].

History

Utmost good faith

Let us start with the fact that before the adoption of the Consumer Insurance (Disclosure and Representations) Act of 2012 the insurance contract was one of the few contracts based upon the principle of utmost good faith.

The essence of this principle at the stage of entering into a contract is the obligation of the insured to refrain from misrepresentation of the information that is essential for the insurer and report this information even in the absence of questions.

Breach of the pre-contractual duty of utmost good faith will give the other party the right to terminate the insurance contract "*ab initio*" — in other words, it is treated as if it has never existed, regardless of whether the breach was fraudulent, negligent or entirely innocent.

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1 Available at: URL: http://www.legislation.gov.uk/ukpga/2012/6/contents/enacted .

2 Available at: URL: http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted .

3 M. Simson. The Insurance Act of 2015. Available at: URL:http://www.mondaq.com/x/391940/Insurance/The+Insurance+Act+2015 .

If a contract is terminated, any claim may be rejected and any payments already made to the policyholder can be recovered.

The duty of utmost good faith was originally developed in common law and afterwards was codified in the Marine Insurance Act of 1906 (MIA 1906)[4]. Though strictly concerned only with marine insurance, many of its provisions are presumed to be equally applicable to other types of insurance[5].

Thus, Section 17 of the MIA 1906 confirms that the duty of utmost good faith applies to both parties and indicates the consequence of breach:

"...if utmost good faith be not observed by either party, the contract may be terminated by the other party".

Under common law, the duty of utmost good faith implies that the potential parties to a policy of insurance shall not misrepresent facts that are material to the insurer's decision whether or not to accept the risk.

Failure to comply with the duty of utmost good faith in English law may result in either misrepresentation or non-disclosure.

Non-disclosure means that the potential insured does not disclose something which is not a subject of a question but which is known to him and which he ought to consider material. The main principle is that a person has to disclose only that information which is known to him.

However, under Section 18(1) of the MIA 1906, the insured is "deemed to know every circumstance which, in the ordinary course of business, ought to be known by him". This means that where the insured fails to mention something he ought to know, the insurer may terminate the contract for non-disclosure. But this concerns only business cases. In *Economides vs. Commercial Union Assurance Plc* [1998] QB 587, the phrase "in the ordinary course of business" was interpreted literally as applying only to business rather than consumers[6].

Representation is something directly said in answer to a specific question asked by the insurer[7].

Misrepresentation of a material fact will give the insurer grounds to terminate the contract whether or not the insured was aware that information was incorrect, whereas termination for non-disclosure will be restricted to the facts which the insured was aware of and which the insured would regard as material.

By virtue of Section 20(1) of the MIA 1906, every material representation made by the insured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may terminate the contract.

The test of materiality is set out in Section 20(2) of the MIA 1906:

"A representation is material when it would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk".

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4 Available at: www.legislation.gov.uk/ukpga/Edw7/6/41/contents .

5 Insurance Contract Law. Issues paper 1: Misrepresentation and Non-disclosure, pp. 6 — 7. Available at: http://www.lawcom.gov.uk/insurance_contract.htm (on October 27, 2015); Pan Atlantic Insurance Co Ltd [1995] AC 501, 518, by Lord Mustill.

6 Insurance Contract Law. Issues paper 1: Misrepresentation and Non-disclosure, p. 61.

7 Zurich General Accident and Liability Insurance Co v Leven 1940 SC 406, 415, by Lord President Normand.

A circumstance is considered material if it affects the mind of the prudent insurer in assessing the risk and it is not necessary that it would have a decisive effect on the insurer's acceptance of the risk or on the amount of premium charged[8].

Noteworthy is the fact that the MIA 1906 makes a distinction between facts and opinions (Art. 20(5) of the MIA 1906).

Where misrepresentation is deemed to be one of fact, the insurer may terminate the contract for any material inaccuracy, even if the policyholder had or had no way of knowing that what he said was untrue.

Where it is deemed a matter of opinion, then the insurer is without a remedy unless the insurer can prove that the policyholder acted in bad faith[9].

Basis of the contract clauses

Earlier insurance contracts were concluded on the basis of the contract clauses, i.e. terms of the contract which could turn any pre-contractual statement of a policyholder into a warranty.

As a rule, potential policyholders were asked to sign a form containing a clause declaring that they warranted the accuracy of all the answers they had given. The clause stated that the answers "formed the basis" of the contract.

Such clauses converted the answers in the proposal form into contractual warranties even if the terms were not found in the contract itself. This means that the insurer might avoid liability for an inaccurate representation even if it was not material.

Let us consider the meaning of "warranty" in English insurance law.

A warranty is a term of the contract of insurance. Breach of warranty automatically terminates the contract of insurance. However, the insurer is entitled to keep it valid[10].

It is necessary to distinguish the warranty in the insurance law from the warranty in the Sale of Goods Act of 1979, where it means a promise according to the main purpose of the contract, which, if broken, gives the innocent party a right to damages but does not automatically lead to the termination of the contract. To terminate the contract is the right of the aggrieved party, and if the party does not exercise its right, the contract will still be effective.

Breach of the insurance warranty does not usually give the insurer a right to damages, but does terminate the contract of insurance.

Therefore, the breach of warranty terminates the insurance contract even if the breach does not affect the insured event. For example, if a warranty of temperance has been broken, the insurer may refuse to pay even if the death of the insured was caused by a road accident[11].

In general, experts are unanimously inclined to the conclusion that the insurance legislation is directed against the interests of policyholders[12].

Transformation of the English insurance law by means of "soft law"

Very few consumer insurance disputes are now being considered by the courts. Instead, most complainants opt to use the service offered by the Financial Ombudsman Service (FOS).

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[8] Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] AC 501.

[9] Insurance Contract Law. Issues paper 1: Misrepresentation and Non-disclosure, p. 60.

[10] Clarke M. The Law of Insurance Contracts. London: Informa Law, 6 th ed., 2009, p. 627.

[11] Ibid. p. 637.

[12] Summer J. Insurance law and the Financial Ombudsman Service. London: Informa Law, 2010, p. 112.

The FOS is empowered to consider disputes the size of the award of which does not exceed 150,000 pounds[13].

A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case (Financial Services and Markets Act of 2000, Art. 228(2)[14]. It means that the FOS is not bound by "strict law".

In cases where misrepresentation or non-disclosure is alleged, the FOS asks two questions:

1. When the consumer sought insurance, did the insurer ask a clear question about the matter which is now under dispute?

2. Did the answer to that clear question influence the insurer's decision to enter into the contract, or to do so under terms and conditions that they otherwise would not have accepted?

Should the answer to either question be "No", the FOS will not support the insurer in terminating the policy.

If the answer to both questions is "Yes", the FOS determines the dispute considering the state of mind of the policyholder at the time any misrepresentation or non-disclosure occurred.

Until recently, there were significant differences in the regulation between strict law and soft law (such as the Statement of Practice, FSA Rules, and Guidance from the FOS).

Therefore***, the gap between the approaches of statute and common law and insurance practice gave rise to a need to reframe fundamental principles of insurance law.***

Consumer Insurance (Disclosure and Representations) Act of 2012

The Act has significantly restricted the obligation of the insured consumer to demonstrate utmost good faith established by Section 17 of the MIA 1906 and has cancelled Sections 18 — 20 of the MIA 1906.

The Act requires the insurer to request the information that is material to the insurer's decision whether or not to accept the risk and what size of the premium should be set.

While checking compliance of provisions of the law by the insured consumer, it is necessary to take into account all the relevant circumstances such as the type of the consumer insurance contract, its target market, explanations of the insured, how clear and how specific the insurer's questions were, whether or not an agent was acting for the consumer and so on (Article 3(2)).

If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account (Article 3(4)).

If the answers to the questions of the insurer in the insurance application are incomplete or ambiguous, the insurer has to request additional information or to clarify an answer. Otherwise, it is considered that the insurer has waived the right to receive such information, and the policyholder has not misrepresented such information.

If the insurer finds out that the insured has violated the provisions of the law and if it is established that the insurer would not have concluded the contract, or if the insurer did but on absolutely different terms and conditions, the insurer has the right to a remedy (Article 4(1)).

[13] Available at: http://www.financial-ombudsman.org.uk/faq/answers/complaints_a3.html. .

[14] Available at: http://www.legislation.gov.uk/ukpga/2000/8/contents. .

Consequences of violations depend on the degree of guilt of the insured. The statute distinguishes such types of guilt as: deliberate misrepresentation, reckless misrepresentation, and careless misrepresentation.

If a qualifying misrepresentation is deliberate or reckless, the insurer may terminate the contract and refuse all claims, and need not return any of the premiums paid. Under the statute, the burden of proof lies on the insurer (Article 5(4)). Note that guilt has a high threshold of proof.

But it is to be presumed, unless the contrary is shown—

(a) that the insured has the knowledge of a reasonable consumer, and

(b) that the insured knows that a matter about which the insurer asked a clear and specific question is material to the insurer (Article 5(5)).

If the misrepresentation is careless, the insurer's remedies are based on what the insurer would have done if he had known the reliable information. If the insurer has fixed a higher premium, he may reduce the premium to this amount.

If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premiums paid.

If the insurer would have entered into the consumer insurance contract, but on different terms (excluding terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.

In addition, if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim (Article 5 (3-7)).

If the misrepresentation is negligent, the insurer does not have the right to terminate the contract and has to pay a full sum of indemnity in case of the insured event.

Basis of the contract clauses, which turn the information provided by the insured into warranty, are no longer used in consumer insurance contracts.

Insurance Act of 2015

The duty to volunteer information is being retained (unlike the position for consumer policies). The insured has to make a fair presentation of the risk (Article 3(1)).

The duty requires the insured to either (i) disclose every material circumstance which he knows or ought to have known; or, failing that, (ii) disclose sufficient information to notify a prudent insurer of the fact that it is necessary to make further enquiries for the purposes of revealing those material circumstances. The disclosure has to be given in a manner which would be reasonably clear and accessible to a prudent insurer.

Note that specific information relating to the risk must be disclosed regardless of the insurer's questions. Thus, the legislator traditionally sets higher requirements to professional participants of turnover than to consumers.

The disclosure required is as follows:

(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) failing that, disclosure which gives the insurer sufficient information to notify a prudent insurer of the fact that it is necessary to make further enquiries for the purpose of revealing those material circumstances (Article 3(4)).

In the absence of enquiry, the Act does not require the insured to disclose a circumstance if it diminishes the risk; the insurer knows, ought to know or is presumed to know it; and, finally, if it is something as to which the insurer waives information (Article 3(5)).

The insured is deemed to know what "should reasonably have been revealed by a reasonable search" (Article 4(6)) and so information held by non-senior management (but by those who, say, perform a managerial function) may still be imputed to the insured[15].

According to Article 4(1), the insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).

The insured ought to know not only the matters of fact but also the matters of expectation or belief. It is presumed that the insured knows the information from a reasonable search for which he waives.

The Act creates a positive duty of inquiry for the insurer too. The insurer "ought to reasonably know" something if it is known to an employee/agent who ought reasonably to have passed it on, or relevant information which is readily available and held by the insurer (Article 5(2)).

Unlike consumer insurance, the test of materiality in the Insurance Act of 2015 has not been changed in comparison with the requirements of the MIA 1906. A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms (Article 7(3)).

The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer would not have entered into the contract of insurance at all, or would have done so only on different terms (Article 8(1)).

The insurer may terminate the contract and keep the premium only if the misrepresentation or non-disclosure is deliberate or reckless. In all other cases (even where the insured is innocent), a scheme of proportionate remedies will apply as follows:

Where the insurer would have declined the risk altogether, the contract can be terminated, with a return of the premium.

Where the insurer would have accepted the risk, but included a contractual term, the contract should be treated as if it included that term (irrespective of whether the insured would have accepted that term).

Where the insurer would have charged a bigger premium, the claim should be scaled down proportionately.

As with the case of consumer insurance contracts, any provision in a proposal form which purports to convert answers in the proposal into a warranty now is ineffective.

Instead, all warranties become "suspensive conditions" (Article 10). This means that the insurer will be liable for losses that take place after a breach of warranty till it has been remedied, assuming this is possible.

Thus, for example, if the insured breaches a warranty that the alarm system is to be inspected every six months, that breach will be "remedied" if the system is inspected after seven months, and so the coverage will be suspended for only one month in such circumstances[16].

[15] M.M. Radom, J. Turnbull. The Insurance Act. Available at: http://www.mondaq.com/x/374484/Reinsurance/Insurance+Act+2015+set.

[16] M.M. Radom, J. Turnbull. Ibid.

In this way, the insurer must pay the premium if the insured event happened before the breach of warranty, or if the breach can be remedied, after it has been remedied (Article 10(4)).

The above rules abolish s.33(3) of the MIA 1906 that the insurer is not discharged from liability incurred by him only before the breach of warranty and also abolish s.34 of the MIA 1906 that the insured cannot avail himself of the defense that the breach has been remedied, and the warranty complied with, before loss.

Under the Act (Section 12), the insurer has the option of terminating the contract from the date of the fraudulent act (not the discovery of it), without any return of the premium.

The insurer can then refuse to pay any claims from that point onwards (but will remain liable for legitimate losses before the fraud).

If the insurer does treat the contract as having been terminated, it may refuse all liability to the insured under the contract in respect of a relevant event occurring after the time of the fraudulent act, and it need not return any of the premiums paid under the contract (Article 12(2)).

As in the case with consumer insurance, the Act abolishes any rule of law permitting a party to a contract of insurance to terminate the contract on the ground that utmost good faith has not been observed by the other party.

The analysis shows that the English doctrine and practice have come a long way in elaborating the issues of conclusion of the insurance contract. Undoubtedly, insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation. The principle of good faith in the rules of misrepresentation and non-disclosure is "the cornerstone" of English law.

Russian legislation

In our country, the rules of good faith of the insured in the process of negotiating the contract are designed to a much lesser extent in comparison with the English jurisdiction.

By virtue of Article 944 of the Civil Code of the Russian Federation, when entering into the insurance contract, the insured shall be obliged to communicate to the insurer the circumstances known to the insured which have material significance for determining the probability of the insured event and the amount of possible losses thereof (the insured risk), if these circumstances are not known and should not be known to the insurer.

The Russian legislator finds circumstances material only if they are specifically stipulated by the insurer in the standard form of the insurance contract (insurance policy) or in its written request.

We can make a few conclusions from the above said:

The Civil Code makes no distinction in the standards of disclosure between consumers and business entities;

The insured is obliged to communicate to the insurer only the requested information.

Unlike in English law, the insurance contract in the Russian Federation may be deemed invalid only if after the conclusion of such a contract it is established that the insured communicated knowingly false information to the insurer concerning the circumstances having material significance for the estimation of the insured risk (p.3 of Article 944).

The analysis of judicial practice shows that the insurer's communication of false information about circumstances having material significance for estimation of the insured risk is

considered as the ground for refusal to pay insurance indemnity only if willful intent of the insured is proved[17].

It should be noted that courts do not consider that the insured has given false information about the object of insurance (for example, the insured property) if, at the conclusion of the contract, the policyholder was silent about the circumstances known by him, which are essential to determine the degree of risk, which were not specified by the insurer in the standard form of the insurance contract, the application form or written request[18].

In case the insurer refers to the communication of false or insufficient information by the insured, courts are guided by the Information Letter of the Presidium of the Supreme Commercial Court of the Russian Federation dated 28.11.2003 No.75: "If the insurer, as a person carrying out a professional activity in the insurance market and therefore more competent in identifying risk factors, does not clarify the circumstances that affect the level of risk, and the policyholder has not provided the insurer with false information about the insured property, the insurer pursuant to p.2 of Article 944 of the Civil Code cannot require invalidation of the contract of insurance as a transaction made under the influence of fraud".

Courts also point out that in case of failure to report information by the insured or any doubts about authenticity of such information, the insurer may make a written request to specify the information provided by the insured and to exercise the right to inspect the insured property[19].

Thus, if the insurer does not perform these actions and the policyholder does not report false information, the insurer cannot insist on terminating the contract as a transaction made under the influence of fraud.

We can see that unlike the English law approach, the approach in the Russian legislation is less flexible. However, in our opinion, the insurance community is not currently ready for straight implementation of such foreign standards.

Given that insurers often tend to unlawfully reduce payments or unreasonably withhold insurance compensations, the imposition of obligation on the insurer to disclose information without corresponding requests can become a fertile ground for abuse.

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[17] See: Obzor Verkhovnogo Suda Rossiiskoi Federatsii po otdelnym voprosam sudebnoi' praktiki, sviazannym s dobrovolnym strakhovaniem imuschestva grazhdan [Review of the Supreme Court of the Russian Federation on specific issues of judicial practice related to voluntary insurance of the property of consumers]. January 30, 2013.

[18] See: Informatsionnoe pis'mo Prezidiuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii "Obzor praktiki rassmotrenia sporov, svyazannykh s ispolneniem dogovorov strakhovaniia" No. 75 [Information Letter of the Presidium of the Federal Commercial Court of the Russian Federation "Review of Practice of considering disputes related to performance of insurance contracts" No.75]. October 28, 2003.

[19] See also: Federalnyi' Arbitrazhnyi Sud Moskovskogo okruga [The Federal Commercial Court of the Moskovskii district]. Case No. A40-50322/11-30-421, dated March 22, 2012, No. A40-54100/12-59-501 dated January 23, 2014.

PROBLEMS OF IMPLEMENTING SOME PROVISIONS OF THE UN CONVENTION AGAINST CORRUPTION IN VIEW OF THE RULES OF THE TERRITORIAL ENFORCEMENT OF NATIONAL CRIMINAL LEGISLATION

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Abstract: The present article focuses on the problem of implementation of "foreign bribery" norms of the 2003 UN Convention against Corruption into the national criminal law. The author argues that territorial enforcement of these norms gives rise to different problems in the context of the rules of criminal jurisdiction. In most of such cases, the state has no extraterritorial criminal jurisdiction, only territorial one. In this case, neither passive personality principle nor protective principle of criminal jurisdiction nor universality principle is applicable. Territorial enforcement of "foreign bribery" norms is also problematic and not practical. Unfortunately, there is no solution in this situation, but it is obvious that such a solution is beyond the criminal law.
Keywords: criminal law, enforcement of criminal legislation, international criminal law, anti-corruption enforcement, implementation, bribe.

Introduction

On the 31st of October 2003, the UN Convention against Corruption (hereinafter — the Convention) was adopted by Resolution 58/4 of the UN General Assembly[1]. Today, almost all countries in the world are the parties to the Convention. This fact indicates that the international community considers this document a landmark achievement in anticorruption efforts.

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[1] We would like to limit our research and not to include in it the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (OECD) because its provisions, concerning "foreign bribery", are similar to corresponding articles of UN Convention with some insignificant differences. But the OECD Convention unlike the UN Convention (at least 140 member-states) does not have a universal character (only 40 countries signed it). Also, "as stated by Mr. Bonucci, the OECD Convention is much focused. It pertains only to combating the bribery of foreign public officials in the context of international trade. Conversely, the scope of the UNCAC is wide-reaching and aims to address a broad spectrum of corrupt activity within both the private and public sectors". See: D. Vlassis. Osnovnyye temy obsuzhdenii' v khode osushchestvleniia Konventsii Organizatsii Ob'edinennykh Natsii protiv korruptsii, v tom chisle rol' YUNODK i Konferentsii gosudarstv-uchastnikov i yego rabochikh grupakh [Substantive Topics of Interests in the Implementation of the United Nations Convention against Corruption, Including the Role of UNODC and the Conference of the States Parties and its Working Groups]. Available at: http://www.unafei.or.jp/english/pdf/RS_No66/No66_15VE_Vlassis1.pdf .

Most scholars note that "the United Nations Convention against Corruption represents the first binding global agreement on corruption"[2]. Thus, every year Russian scholars raise a question of the necessity to implement certain provisions of the Convention into the Criminal Code of the Russian Federation; different scholars have called this document "a comprehensive universal international treaty, hampering the development and spread of corruption into all life spheres"[3], "a legal basis of an approach to determination of corruption-related crimes"[4]. References to the Convention can be found in majority of scientific works and articles related to certain crimes. Such great interest can be found not only in the Russian law doctrine, but also all over the world. However, we do not try to analyze the Convention entirely; we focus our attention on its particular provision.

A foreign official as a subject in the criminal liability by national law

Comprehensive interpretation of the Convention allows a conclusion, that there are two principally new subjects of criminal liability for bribe-taking: a foreign public official and an official of a public international organization[5]. According to subparagraphs (b) and (c) of Article 2 of the Convention:

1) "a foreign public official" means any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

2) "an official of a public international organization" means an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.

This approach was not innovative; we can find similar provisions in the U.S. Foreign Corrupt Practices Act (FCPA)[6], and the transnational bribery offenses established by Article 1(1) of the OECD Antibribery Convention[7] and other conventions. Nevertheless, there is no country, which till the year of 2003 regimented the liability for bribe-taking in such a way: for example, Art. 129 of the Criminal Code of the Republic of Korea names only officials, Art. 197 of the Criminal Code of Japan refers to public officials and arbitrators, Art. 385 of the Criminal Code of the People's Republic of China concerns government officials, §144 of the Criminal Code of Denmark speaks about persons, exercising governmental powers or func-

[2] Philippa Webb. The United Nations Convention against Corruption: Global Achievement or Missed Opportunity? // 126th International Senior Seminar Visiting Experts' Papers pp.118 — 125. Available at: http://www.solusipintar.com/e-library/dir_dok/UNCAC-Global-Achievement-or-Missed-Opportunity.pdf .

[3] S.Y. Naumova. Kommentarii' k Federal'nomu zakonu "O protivodei'stvii korruptsii" No. 273-FZ [Commentary to the Federal Law "On Anticorruption Enforcement"]. December 25, 2008// 2009.

[4] A.Y. Fedorov. Rei'derstvo i shantazh (protsedurnye i organizatsionnye kontrmery [Raiding and Greenmail (Procedural and Institutional Countermeasures)]. Monograph. 2010.

[5] Further, we will mention only a foreign public official, however, all the information is equally related to an official of a public international organization.

[6] D. Vlassis. Osnovnyye temy obsuzhdenii' v khode osushchestvleniia Konventsii Organizatsii Ob'edinennykh Natsii protiv korruptsii, v tom chisle rol' YUNODK i Konferentsii gosudarstv-uchastnikov i yego rabochikh grupakh [Substantive Topics of Interests in the Implementation of the United Nations Convention against Corruption, Including the Role of UNODC and the Conference of the States Parties and its Working Groups]. Available at: http://www.unafei.or.jp/english/pdf/RS_No66/No66_15VE_Vlassis1.pdf .

[7] A. Lucinda. Zakon. Konventsiia Organizatsii Ob'yedinennykh Natsii' protiv korruptsii: globalizatsiia anti korruptsionnykh standartov [Low. The United Nations Convention against Corruption: The Globalization of Anticorruption Standards]. 2006. Available at: http://www.steptoe.com/assets/attachments/2599.pdf .

tions. Despite some differences, all the codes have one common feature: they consider bribe-taking only for their own officials; references to a foreign official are very rare (e.g. Art. 322 of the Criminal Code of Switzerland).

As a result, a person who took a bribe in the country of his/her citizenship could leave that country and avoid the criminal liability, as the jurisdiction of a home country was not applied to the foreign territory. In the situation when a government official took a bribe abroad and did not return, he/she was unpunished for the same reason. So, "anger becomes resignation and cynicism when people discover that the vast fortunes stolen by corrupt leaders cannot be recovered because they have been transferred abroad"[8]. Of course, in both mentioned cases the person can be extradited to the native country, but such a procedure is very complicated and rarely used, especially, if we talk about bribe-takers; also, p.3 of Article 42 of the Convention indirectly establishes priority of jurisdictional rules in this case.

Moreover, not all countries are parties to international treaties on extradition and "it is difficult to argue that there is an international law obligation on them to do so in cases where no treaty is applicable"[9]. Consequently, major corrupt officials could really avoid criminal liability, so there was a necessity to fill this gap and introduce new subjects of criminal liability for bribe-taking.

Application of national norms on criminal liability of foreign officials from the perspective of territorial enforcement of criminal law

With only a few exceptions[10], national criminal jurisdiction over foreign citizens is limited: national criminal law applies to the acts, committed on the territory of the state[11] and to the acts, aimed against interests of the country, its citizen or body (p.1, 2 of Art. 42 of the Convention) [12]. Thus, the biggest part of corruption-related crimes, committed by foreign

[8] Miša Zgonec-Rožej, Joanne Foakes. Mezhdunarodnye Prestupniki: Ekstaditsiia ili presledovanie v sudebnom poriadke? [International Criminals: Extradite or Prosecute?]// Mezhdunarodnyi' zakon [International Law]. 2013. Available at: http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713bp_prosecute.pdf .

[9] M.S. Zhuk. Obiazannosti inostrannykh dolzhnostnykh lits i tselostnost' ugolovnogo pravovykh uchrezhdenii' [Foreign Officials' Responsibilities and Integrity of Criminal Law Institutions]. Available at: http://justicemaker.ru/view-article.php?id=21&art=1762 .

[10] Regulation of territorial-and-personal application of the criminal laws of Sweden, Norway, Denmark, Finland and Iceland differs essentially from the generally recognized regulation. Crimes committed by citizens (nationals) of any of the above countries on their territories are subject to the jurisdiction of any Scandinavian country. As an example, refer to p.2 of clause 4 of art. 5 of the Criminal Code of Sweden and p. 2 of art. 7 of the Criminal Code of Denmark.

[11] The so-called territorial principle: E.g.: art.6 of the Criminal Code of the People's Republic of China, art. 1 of the Criminal Code of Japan, Art. 2 of the Criminal Code of the Republic of Korea. Read more in the paper by Peter D. Clark. See: P.D. Clark. Ugolovnaia yurisdiktsiia v otnoshenii torgovykh sudov, uchastvuushchikh v mezhdunarodnoi' torgovle [Criminal Jurisdiction over Merchant Vessels Engaged in International Trade]. J. Mar. L. & Com. 1979, vol. 11. p. 219. Available at: http://navlaw.com/articles/v5/DOC050211.pdf .

[12] The so-called real principle (common concept of passive personality principle and protective principle). E.g.: art. 6 of the Criminal Code of the Ukraine, § 6 of the Criminal Code of Denmark, Art.14 of the Criminal Code of the Republic of Tajikistan. Read more in the paper by M. Sornarajah. See: M. Sornarajah. Eksterritorial'naia ugolovnaia yurisdiktsiya: britanskie, amerikanskie perspektivy i perspektivy Sodruzhestva [Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives]. Sing. J. Int'l & Comp. L, 1998, v.ol. 2, p. 1. Available at: http://law.nus.edu.sg/sybil/downloads/articles/SJICL-1998-1/SJICL-1998-1.pdf

officials, stays beyond the law of the domestic state; they are usually committed by the country's citizens on the territory of the country and are considered its internal matter.

Let us start with a real (protective) principle[13]. This rule is applied when bribe-taking infringes the legal order of the domestic state. It is admitted by the criminal law doctrine of almost all countries[14]. Thus, the bribe taken by an English judge for acquittal of a British subject, who stole 100,000 GBP in the Bank of England, can in no way affect the interests of the US or China.

We can construct theoretical examples of bribe-taking that damage a foreign country, but such a thing rarely occurs in practice. For example, the bribe taken by a US Senator for introduction of a bill that prohibits migration from Japan to the US can be interpreted as an action against Japan. But it obviously affects, first of all, interests of the US. The norm against bribery safeguards the domestic interests, not the migration policy towards Japan. Therefore, regardless of "foreign bribery" norms, Japan has no extraterritorial criminal jurisdiction in this case.

It is possible to consider such criminal violations under the domestic criminal jurisdiction only when a foreign official takes a bribe on the territory of the state. In this situation, we see a jurisdictional conflict between the protective and citizenship principles of the US, on the one hand, and a territorial principle of Japan, on the other. Most authors give an absolute priority, under these circumstances, to the territorial principle[15]. However, even in this case, enforcement of "foreign bribery" norms has some practical problems.

To determine whether a person is an official or not and, if so, to ascertain the official's powers, it is necessary to get access to the internal documents of the foreign state[16]. Very often such documents are available only in the paper form and only in the country where they are used. We find it difficult to search for necessary documents in a foreign language, especially if you do not speak that language[17].

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[13] According to the Convention, it is not in the state's power to impose punishment on the persons for the actions, stipulated in this document, irrespective of the territory of its commitment, its purpose and the criminal's nationality. In other words, the component of crime under consideration does not fall within the universal principle of territorial action of criminal law (§2 art. 4 of the Convention).

[14] A. Alothman. Yurisdiktsiia gosudarstva v oblasti mezhdunarodnogo ugolovnogo prava [State Jurisdiction in the Area of International Criminal Law]. 2006. Available at: http://faculty.ksu.edu.sa/alothman/Documents/State%20jurisdiction%20in%20intternational%20criminal%20law.pdf .

[15] S.Y. Kapkova. Ugolovnaia otvetstvennost' po zakonam o korruptsii inostrannykh dolzhnostnykh lits i korruptsii v chastnom sektore po zakonodatel'stvu Shvei'tsarii [Criminal Liability for Acts of Corruption of Foreign Officials and Corruption in the Private Sector by the Swiss Legislation]. 2013. Available at: http://www.eurasialaw.ru/index.php?option=com_content&view=article&id=4160:2013-04-25-07-01-12&catid=183:2010-12-13-11-46-22.

[16] So, to make "A", the head of the License Issue Subdivision of the Department of Licensing and Trade of the Primorsky Krai in the Russian Federation, liable for bribe-taking (Art.322septiens of the CC of Switzerland) from "B", the Director of a limited liability company (GmbH) of Switzerland, for not drawing up the protocol of the administrative offense (art. 9.6 of the Act of the Primorsky Krai on administrative offenses), the Swiss authorities are to have, at least: the order hiring "A", job description, the Resolution of the Governor of the Primorsky Krai of April 06, 2007, No. 70-pg "On approving the list of officials, authorized to make protocols of administrative offenses" and the Act on administrative offenses of the Primorsky Krai (February 21, 2007). Read the article by S.Y. Kapkova on Swiss bribery legislation: Ugolovnaia otvetstvennost' po zakonam o korruptsii inostrannykh dolzhnostnykh lits i korruptsii v chastnom sektore po zakonodatel'stvu Shvei'tsarii [Criminal Liability for Acts of Corruption of Foreign Officials and Corruption in the Private Sector by the Swiss Legislation]. 2013. Available at: http://www.eurasialaw.ru/index.php?option=com_content&view=article&id=4160:2013-04-25-07-01-12&catid=183:2010-12-13-11-46-22.

[17] S. Hecker, M. Laporte. Should FCPA "Territorial" Jurisdiction Reach Extraterritorial Proportions? Vol. 42, No. 1. Available at: http://www.americanbar.org/publications/international_law_news/2013/winter.html .

The Legislative Guide for the Implementation of the United Nations Convention against Corruption notes: "State Parties' domestic legislation must cover the definition of "a foreign public official" given in Article 2, subparagraph (b) of the Convention, as it would not be adequate to consider that foreign public officials are public officials as defined under the legislation of the foreign country concerned. Article 16 does not require that "bribery of foreign public officials shall constitute an offence under the domestic law of the concerned foreign country"[18].

This provision makes the national criminal procedure much easier, but does not overcome all the difficulties. For example, according to Article 290 of the Criminal Code of the Russian Federation, a foreign official must possess the following features: 1) to be an elected or appointed employee of any legislative, executive, administrative or judicial state body; or 2) to perform any public function for a foreign state, a public body or enterprise.

Therefore, to start a criminal procedure against a foreign official, Russian bodies must, as a minimum, receive data about the structure of authorities of the foreign state[19]. It is possible to request the assistance of the authorities of the state, in which the guilty person has his/her citizenship. But equally obvious is the fact that this state will request to extradite its citizen, and a conflict of interests will occur. The domestic state will get into a "diplomatic zugzwang": it needs help to punish the guilty person, but getting this assistance means the violation of rules of international courtesy (refusal to extradite without adequate causes), and vice versa, compliance with these rules results in the lost opportunity to punish the guilty person.

Besides, the "preliminary" bribe, taken for the future actions (which occurs more often than the bribe afterwards), implies that the person will come back to his/her native country, as all legally important actions require the presence of the official. After the bribe-taker comes back to his/her native country, he/she is already not the subject for extradition[20]. Consequently, the authorities of the domestic state will lose every opportunity to punish the guilty person.

Conclusion

Thus, the comparison of the provisions of Part 2 of Article 16 of the Convention with the rules of territorial enforcement of the national criminal law demonstrates an absolute inviability of the national "foreign bribery" norms. Fortunately, the Convention "does not have the power to automatically implement anti-corruption mechanisms, requiring legislative reforms

[18] Rukovodstvo dlia zakonodatel'nykh organov po osushchestvleniu Konventsii Organizatsii Ob'edinennykh Natsiy protiv korruptsii [Legislative Guide for the Implementation of the United Nations Convention Against Corruption]. 2006, p. 206. Available at: http://www.unodc.org/pdf/corruption/CoC_Legislative-Guide.pdf .

[19] On this and other problems of criminal liability for foreign bribe in the Russian Federation, read the paper by A.N. Tarbagaev. See: A.N. Tarbagaev. Inostrannyi' administrativnyi' sluzhashchii' kak sub'ekt vziatochnichestva soglasno ugolovnomu kodeksu Rossiiskoi Federatsii [Foreign Administrative Official as Subject of Bribery According to the Criminal Code of the Russian Federation]// Zhurnal kriminologii Bai'kal'skogo gosudarstvennogo universiteta ekonomiki i prava [Criminology Journal of Baikal National University of Economics and Law]. 2014. No. 1, pp. 104 — 109. Available at: http://cj.isea.ru/pdf.asp?id=18903 .

[20] L.V. Ferreira, F.C. Morosini. Osushchestvlenie mezhdunarodnogo prava po bor'be s korruptsiei' v biznese: pravovoi' kontrol' korruptsii napravlen na transnatsional'nye korporatsii [The Implementation of International Anticorruption Law in Business: Legal Control of Corruption Directed to Transnational Corporations]// Brazil'skii' zhurnal strategii & mezhdunarodnykh otnoshenii' [Brazilian Journal of Strategy & International Relations]. Austral, 2013, vol. 2, No. 3, pp. 257 — 278. Available at: file:///C:/Users/1/Downloads/35615-147309-1-PB.pdf .

in the States Parties"[21], so, each state can choose whether to implement provisions of "foreign bribery" or not.

So, Canada, (one of the first countries, which has included foreign bribery in the internal legislation), does not criminalize the passive bribery of foreign public officials[22, 23]. For the mentioned reason, we cannot fully agree with the offer by Antonio Argandona about the necessity to have the monitoring mechanism to "encourage governments first to ratify the Convention and then put it into practice".

Unfortunately, we cannot offer an alternative decision to this problem, but we would like to underline that material norms cannot fill any procedural gaps. In our view, the question about arraignment of "foreign bribery" criminals, who are not on a state's territory, must be solved by reforming the procedure of extradition, but not criminal law (e.g. Art. 2 of the Model Treaty on Extradition adopted by General Assembly Resolution 45/116).

We also express the hope that the present paper will draw the experts' attention to the problem to further contribute to its early solution.

[21] L. Lafontaine. Opyt Kanady v osushchestvlenii mezhdunarodnykh konventsii' po bor'be s korruptsiei' [Canada's Experience with the Implementation of International Conventions against Corruption]// Seminar po voprosam mezhdunarodnogo sotrudnichestva po bor'be s korruptsiei' v tom chisle spravedlivoe rassledovanie praktiki [Seminar on International Cooperation on Anticorruption Including Fair Investigation Practices]. Beijing, PR China, 2006. Available at: http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Lisette%20Lafontaine%20Paper_SPP%20seminar%20June%2006.pdf .

[22] T. Martin. Kanadskii' Zakon o korruptsii inostrannykh dolzhnostnykh lits [Canadian Law on Corruption of Foreign Public Officials]. NATL J. CoNST. L. 1999, vol. 10, pp. 189 — 193. Available at: http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/MartinAT.PDF .

[23] A. Argandona. Konventsiia Organizatsii Ob'yedinennykh Natsii' protiv korruptsii i ee vliianiye na vnutrennie kompanii [The United Nations Convention against Corruption and Its Impact on Internal Companies]// Zhurnal delovoi' etiki [Journal of Business Ethics]. 2007, vol. 74, No. 4. pp. 481 — 496. Available at: http://www.iese.edu/research/pdfs/DI-0656-E.pdf .

(RE)SOCIALIZATION OF EX-PRISONERS. SIG MODEL FOR AN IDLE SOCIAL GROUP. CASE OF ESTONIA.

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Abstract: Continuous high rate of imprisonment combined with relatively long sentences, problems with recidivism (incl. among young) and low level of socialization after release ask for re-examining the current prison philosophy and measures in community building. The paper brings out the findings of the underlying survey and offers an experimental model as a ground for alternative solutions for current practices. The proposed model of (re)socialization (SIG) is treating prisoners as subjects with special demand, derives from the findings from the Estonian prison system and post-release framework against recidivism. The underlying research, which involved more than 600 persons from inmates to experts, showed that new penal facilities have to go along with modern philosophy concerning prisoners as an idle social group. The key factor in their (re)inclusion into society is the provided access and preparation to employment and legal income, opportunity to learn required skills and encouragement from the system with special attention to a person and case.
Keywords: prison, idle groups, social inclusion, labor market, special persons.

Abbreviations:
EU — the European Union
EUIF — the Estonian Unemployment Insurance Fund
EASS — the Estonian Academy of Security Sciences
JustMin — the Ministry of Justice, Estonia
SotsMin — the Ministry of Social Affairs, Estonia

Introduction

We cannot solve problems by using the same kind of thinking we used when we created them. (Albert Einstein)

Recidivism rate, among other factors, is a reflection of a general level of coping in the society. It shows opportunities for change (both at the communal level and personal), the society's level of acceptance and general care for weaker groups in reality. Recidivism and criminal lifestyle have multiple influencing factors, one of those and a significant one is what happens to the offender during his penal time and who is the man who walks in and walks out

[1] Thesis accepted by the Tallinn University

of the prison gate. Criminality and its effect to a community is merging with other issues that societies have to cope with, including immigration, issues of minority and idle or other detached groups, social stratification and social communication, governing and monetary planning et al., so the topic is not limited by a group of scholars or bureaucrats.

The first ideas about prisons as the houses of repentance and correction are known in Europe since 1589 in Amsterdam (Van der Slice, 1936). Similar facilities in Rome were opened in 1704 by Pope Clemens XI where imprisonment instead of death penalty or mayhem was used as a punishment.

The history of Estonia as a state is hardly 50 years long but the history of criminality and (re)socialization[2] of the "other", of course, comes with people at the area. As a former colony of Denmark, Sweden, Germany and later part of the Russian Empire, residents of the region now called Estonia followed the law of the rulers. The philosophy of the Russian Empire, later Soviet Union, about criminals has developed quite separately from Europe[3]. From the beginning of the 18th century, there has been nearly limitless opportunity to send unwanted persons to the far Siberia. Around the same time, Europe also tested the practice of deportation and exile. The Estonian Republic in the 1920-1930s exercised the policy of using local inhabited islands as open prisons. In the 1930s, the first educational and social programs became part of detainment; women and juvenile criminals were separated. The following Soviet times mark the beginning of mass labor for prisoners, moving gradually from forced labor in (political) prison camps to more modern policies. Colonies of correctional work in Soviet Estonia were fully self-supported and profit-making institutions, working for big factories around the USSR. Work for handicapped was adjusted. Useful level of activity was from 85-92% (Sillaots, 2003). Difficulties of the transition period from one system to another (collapse of the USSR) immediately showed in prisons but geared up quickly.

The last 25 years, times of Estonian restored independence, could be divided into three main categories in terms of prison system:

1. Chaos after the collapse of the USSR (1991-1994[4]) — massive prison crime, huge problems with staff (void left behind by Soviet forces), funding, facilities[5] (JustMin, 2004; Saar, 2002).

2. Building a new system (1995–2000) — the beginning of the local correction and police education, training and placing staff, establishing legislation and auditing system, renewing facilities and security systems, establishing programs of post-release rehabilitation.

3. Renewal of the material base, internal stagnation (2001-2015) — excessive building, professional staffing, promoting administration, finalizing legislative reforms, centralization

[2] In literature and legislative terminology, the term "resocialization" is mostly used. Hereafter the author uses the form (re)socialization as the outcome of the underlying research of this paper suggests that in many cases the need is for an initial socialization of the person. In addition, often the length of imprisonment (in life) has been so long that the (re)-part does not apply considering the depth of falling out of society.

[3] The USSR became a member of ILO (ILO, 2016) in 1934. In 1949, Estonia as a member republic of the USSR was excluded for the reason of work conditions in prison camps (Gulag). In 1954, the USSR renewed its membership in ILO; in 1965, the URRS (and Estonia) ratified the Forced Labor Convention of 1930 about convict-labor.

[4] These are just guidelines for approximate times as we are talking about the gradual process, not a phenomenon.

[5] In 1990, nine escapes from prisons were recorded in Estonia, while in 1992 there were 42 escapes. Killings in prisons: 1992 — 23, 1993 — 10, 1994 — 4, 1995 — 1. Fired for the disciplinary violation were 19% of employees in 1992, 35% in 1995.

(from 10 prisons to 4). At the same time shutting the system for third parties and public, switch to unsustainable projects, decline of (internal and academic) development (QCEA, 2007; Stewart, 2016a).

Some of the problems arise from overcrowded large prisons. On the other hand, they could be treated as a result of the prevailing politics.

95% of the prisoners are male. All male prisons in Estonia are maximum-security cell type prisons; one male prison has an open section. The Tallinn prison, one of the three large male prisons in use, was founded in 1919 and in 1944–1949 was used as a prison of war. It is budgeted to have a new construction in a few years (JustMin, 2016). The Harku prison started in 1926, was turned into a women's prison in 1965 and since 2010 holds a section for elderly prisoners. The big change in the last two decades is the turn from the camp style prisons (6-10 men in a room, up to 20 women) to chambers or cells for 1-2 persons. Two prisons out of four have modern facilities, mostly funded by the EU. As a side effect, social isolation, which in those prisons has replaced negative phenomenon of the Soviet type colonies, is creating new factors that at the end may be dismantling for a personality. Estonia has not practiced boot camp style for criminals as many other correctional systems (Ashcroft, John; Daniels, Deborah J.; Hart, 2003; Wilson, Kider, & MacKenzie, 2008). In modern prisons in Estonia, the lack or insufficiency of physical activity is a problem.

Despite all those reforms and relative success in several areas (Figure 1), Estonia remains one of the states in the EU that deals with a high rate of imprisonment (EuroStat, n.d.) (Figure 2), high recidivism and, consequently, the issues of (re)socialization of offenders.

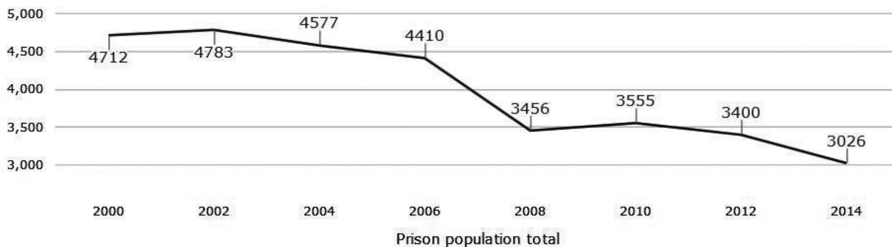

Figure 1. Prison population in Estonia 2000-2014 (ICPR , 2016)

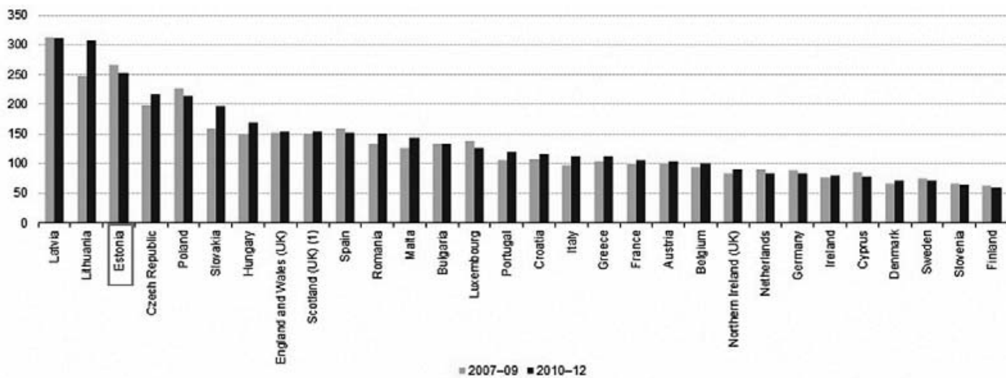

Figure 2. Prison population, average per year, 2007–09 and 2010–12 (EuroStat, n.d.)

Funds for fighting criminality and recidivism despite the criticism in local media, from audit offices (Riigikontroll (The National Audit Office), 2002) and external experts (European Committee, 2003) are still spent mostly on facilities and on strengthening the prison administrative system. Much less from the budget is allocated to prisoners' rehabilitative needs (Figure 3).

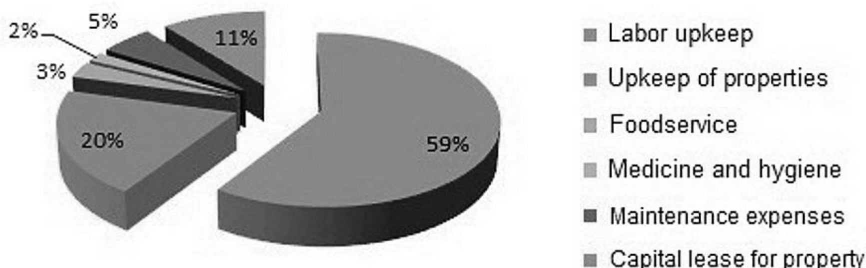

Figure 3. Cost of imprisonment in Estonia 2015 (MinJust, n.d.)

Problems with dignity and minimal human rights persist for both men and women in Estonian prisons (Palginõmm, 2013). The Ministry of Justice admits that today's system is rather maintaining recidivistic circle[6].

Quo vadis? All national development plans underline the need for principal changes in Estonia, including the jurisdiction of the Ministry of Justice in order to be a real partner in the EU (Government, 2013). It is not clear where Estonia is directing its imprisonment penal policy. Formal directives for legislative development are stated in the national acts but the holistic penal concept and philosophy of imprisonment in particular have not been openly discussed or declared during the last decade either by the state authorities, scholars or by executives. Documents like the Development Plan for Violence Reduction (Estonian Republic, 2010) or Estonian Human Development Report (started in 1995) do not talk about prisons and prison work as measures against criminality or as a part of national security. The total number of male prisoners makes up about 1% of the male population of the age.

Age group	20-24	25-29	30-34	35-39	40-44	45-49	Total
Number of men	40 480	50 866	47 635	46 068	46 282	41 717	273 048

Table 1. Number of men in Estonian population in 2015 (Yearbook, 2015)

Criminality according to the poll amongst the Estonian public is not a concern. The reason for this answer is not a satisfactory situation with criminality but it rather reflects more acute and vocalized issues in the state[7] and the methodology of the poll.

6 JustMin, 2015: the prison punishment increases the risk that the violator is not able to cope in the society following the law and this consequently increases the risk of new crimes

7 According to the Estonians, more acute than the crime rate the problems to be tackled by the state were unemployment (30%), health care and social insurance (29%), economy (28%), increase of prices (25%),

Crime Prevention through Environment Design (CPTED)

Nothing changes really until it changes inside. Despite that, a lot might change while starting from altering the surrounding. Defined ideas about this come from the 1960s (Elisabeth Wood) and were expressed in 1971 by C. Ray Jeffery (Cullen & Wilcox, 2010). The concept was based on the precepts of experimental psychology represented in the modern learning theory. CPTED is a multi-disciplinary approach to deter criminal behavior focusing on the ability to influence the offender's decisions that precede criminal acts. Even though most implementations of CPTED occur within the urbanized physical design of the communities, it is obvious that the principles are universal and affect people also in prison. Interviews with convicts (Stewart, 2016a) showed that recently established facilities replacing the old ones give illusive improvement of conditions and environment but create a new set of stress and anxiety among prisoners. Norwegian "paradise prisons" could serve as an example how nature, design, possibilities for vocational, emotional and physical development, safety and comfort have been brought to the highest possible standard for inmates. There are no studies of prisoners in Estonia concerning the (physical and nonphysical) environmental effect on them during the penal time. However, latest experiments on musical therapy in the Tartu prison (Luik, 2013) confirm the theory of rational choice in criminology. Foreign studies show a very high rate of emotionally or psychologically delinquent persons among prisoners (Andersen, 2004; Visher, Debus-Sherrill, & Yahner, 2011). Since the trend is deepening during imprisonment, the influence of surrounding and environment should not be underestimated.

The studies among employees of Estonian prisons have shown that despite good salary and numerous benefits, the turnover of staff in the prison system is enormously high. Only 14% of respondents said that the teamwork is functioning, 17% agreed that the information circulation is proper (Kiudorv, 2007). The conclusion was that satisfaction with the work is very low. This might be the reason why 78.4% of the prison guards said that the motive for choosing this job was unemployment and 71.2% said that the reason was material need (Koplimägi, 2010). Work in the prison system is considered dull and noncreative, overregulated and little motivated. If in the 1990s the problem was nonprofessional staff, then now the staff in Estonia has much higher education than their post requires.

Social exclusion/ inclusion

The problem of social exclusion of ex-convicts has various obvious and invisible impacts not only on a person as a subject but also on the society. As a problem in Estonia it has been brought out by the authorities (The National Audit Office, 2013) and shown in study reports. If in 2012 every sixth person lived in poverty in Estonia, then in 2015 it was every fifth. The unemployment rate in Estonia is not high; the main reasons arise from the balance between salaries and cost of living. Poverty and exclusion according to the Estonian authorities are one of the main problems after release from prison. At the same time, those are drives for crime and recidivism: in 2014, 72% of prisoners were unemployed prior to their sentence, only 16% worked, 4% were handicapped and 3% were students

pensions (18%), taxes (16%), education (11%). Less important than crime were e.g. terrorism (1%) and immigration (5%).

(SotsMin & JustMin, 2014). The underlying research (Stewart, 2016b)[8] did not ask for the latest employment but did map the capability to work, habit to be employed, skills and their upkeep during the sentence.

The measures for fighting against unemployment do not extend to prisoners prior to release and are not easily accessed by the released after.

SOTSIAALNE KAITSE *SOCIAL PROTECTION*

Tabel 12. Tööturumeetmed, 2011–2015[a]
Table 12. Labour market measures, 2011–2015[a]

2011	2012	2013	2014	2015	
122 117	102 653	94 125	82 191	78 689	*Registered unemployed persons during year*
30 659	27 307	26 902	24 008	24 791	*Recipients of unemployment allowance*
10 334	9 174	9 070	7 697	7 989	*Average number of recipients of unemployment allowance per month*
					Users of active labour market measures
20 958	34 898	24 982	17 845	18 245	*Labour market training*
11 660	12 854	13 213	12 550	13 501	*Job search training*
19 299	20 702	20 646	19 386	19 157	*Career counselling*
1 389	1 583	1 549	1 639	1 721	*Psychological counselling*
9 835	5 595	4 397	3 349	2 583	*Wage subsidy*
498	608	499	439	416	*Business start-up subsidy*
1 090	1 006	433	297	208	*Public work*
2 801	4 265	4 204	3 911	5 267	*Work placement*
1 305	2 696	2 971	3 543	3 725	*Coaching for working life*
2 716	3 009	3 523	3 737	3 726	*Job club*
60	98	142	276	498	*Measures for persons with disability or long-term health problem*
54	74	166	211	277	*Training for recipients of business start-up subsidy*
9	11	9	16	25	*Counselling for recipients of business start-up subsidy*
337	678	946	745	732	*Voluntary work*
470	817	1 803	2 411	3 333	*Work trial*
1 155	1 477	1 622	1 487	1 381	*Debt counselling*
72	241	105	91	141	*Mentoring*
33	158	241	54	177	*Community work*
31	169	218	138	102	*Care service*
143	157	148	688	1 334	*Other measures*
					Expenditure on labour market measures and support, thousand euros
36 631	50 026	43 798	38 949	…	*Expenditure on active labour market measures*
6 513	5 750	8 642	8 308	9 198	*Payments of unemployment allowance*

Figure 4. Labor Market Measures (Statistics in Estonia, 2015)

[8] Apart from the literature, the conducted research involved 573 responses to the questionnaire, interviews with convicts and released, focus group interviews with prison system experts and unemployment insurance fund. The questionnaire of 83 structured and open ended questions was distributed in bilingual forms in Estonian and Russian.

The latest construct being wielded by researchers and policy-makers are the twinned concepts of social inclusion and social exclusion. These represent a conceptual sophistication over social capital and social cohesion. However, there are risks in their adoption without a critical examination of the premises that underpin them. For example, how can one 'include' people and groups into structured systems that have systematically 'excluded' them in the first place? (Labonte, 2004)

Numerous studies show that the problem persists in Estonia. Most, if not all, studies emanate from the offensive position on prisoners as a uniform group:

The base of the research problem is the idea that a person with criminal mind has an attitude and understanding that one could manage life without a legal employment (Aunap, 2007). Another official source (KESA-Mauritius, 2007) describes prisoners as "...needs and interests are perverse, absolute lack of interest about their future, most are alcoholics. Egoistic, indifferent about suffering, value parasitic lifestyle — do not work — neither outside nor in prison, low educational level, lack of cultural interests". Textbook of Police Academy states that "the potential for reeducation [of prisoners] is extremely modest.

The same tendency appears when the conductor of the research is outside of the Ministry of Justice but the research is financed by the government (Saarpoll, 2009). Even when positive evidence appears, it is either ignored or even explained as "it is possible that they give misleading information". There is no evidence that the techniques of neutralization (Maruna, Shadd; Copes, 2012) are characteristic only to criminals.

The European Platform against Poverty and Social Exclusion is one of seven flagship initiatives of the 2020 Europe strategy for smart, sustainable and inclusive growth. Among other approaches, the platform is supporting:

1) delivering actions across the whole policy spectrum such as the labor market, minimum income support, healthcare, education, housing and access to basic banking accounts;

2) better use of the EU funds to support social inclusion.

In practical terms, active inclusion by the European Commission (European Commission, 2016) means providing:

1) adequate income support together with help to get a job;

2) inclusive labor markets — making it easier for people to join the work force, tackling in-work poverty, avoiding poverty traps and disincentives to work;

3) access to quality services helping people participate actively in society, including getting back to work.

Social protection and social inclusion in terms of the EU includes protection against the risks and needs associated with unemployment, housing, social exclusion and parental responsibilities. All abovementioned factors were strongly expressed by prisoners as threats at the release and obstacles in getting out of recidivism circle. The Open Method of Coordination (Williamson, 2005) that is reinforced by the European Committee frames also the conducted action research (Stewart, 2016b).

In 2015, Estonian government created a new improvement program for social security. International audit however says that the number of governmental development and improvement programs in Estonia is already too high, at the same time, the implementation of these is not efficacious and that Estonian science and innovation policy should be more focused (Christensen, Thomas Alslev; Freireich, Shaul; Kolar, Jana; Nybergh, 2012). The same is

stressed by the National Audit — local interests are not priority and the state has not created qualification for evaluating its efficiency. As an improvement attempt, detailed guidelines for critical thinking as a method have been provided to legislative actors from 2012.

Methodology

The main data was gathered during 2.5 years from Estonian prisoners, officials, experts and other parties. It formed a foundation for the proposed model of socialization of groups of special demand in integration. Those might be detached from society in different forms, depths and either temporarily or for a longer period. Considering the characteristics of the group, variations and adjustments in the conclusions and proposed solutions may appear. The following is designed based on the data concerning Estonian male prisoners of 2013-2015 as a phenomenon, in dynamics and comparable with other states and penal systems.

Based on the literature, the research assumed that the key factors that determine success in socialization are:

a) employment — legal, consistent and adequately rewarded engagement on the labor market / a possibility to start private enterprise

b) access to information, learning and developing sources in addition to real encouragement to adaptation and development

c) basic necessities for life and dignity accessible — food, residents, hygiene, health service

d) social skills for reaching the factors above

The research showed that this group — prisoners and former convicts — has previously

— not been studied as subjects directly, but through prison administration

— not been addressed in adequate quantity considering the inmate body in Estonia.

In addition, previous

— statistics is not methodologically clear and leaves space for misinterpretations

— data has not been analyzed involving other experts of rehabilitation, employment, social aid and medical treatment,

— official data is quantitative, analysis is system-oriented not person-oriented,

— statistical data collected from prisons has not been given anonymously (might affect the answers)

— literature is insufficient about Estonia — most of the scientific data is either outdated or from non-comparable systems (U.S., Scandinavia, etc.).

The research shows that gaining sufficient income through legal means is extremely complicated after release and that the current system of rehabilitation is not adequately:

— considering different clusters of prisoners;

— considering the situation on the labor market;

— implementing existing possibilities of social protection and inclusion; and

— communicating the needs and prerequisites of inmates.

The purpose of the action research was to gather adequate data, map the gaps and propose solutions on the experimental level considering existing legislation, market situation, applied preparation during the prison time, acceptance of the public, possibilities offered by and for the local government and capacity of the existing specialists. The model has been developed by the author and is described below.

Methods

The methods used in this action research were designed by the circumstances and developed in time. Traditional ways of data collection and analysis were not sufficient to reach the aims of the research. Creative approaches and persistence were much needed.

The approach was to give a neutral but multisided evaluation of the situation at hand and describe a smoother operation of multilevel governance, using a group with specific demand as an example. The ambition was to create a model that in moderation would work for other idle groups (minority, immigrants) as a vehicle for future independent employment for the subjects.

While mapping available literature, it appeared that existing gaps need more than theoretical analyses, which are mostly based on quantitative data from the uniformed source. Interviews were needed from experts who meet newly released at the reentrance to the labor market, family members and networks added much needed context to the gathered data. The target group was chosen as an example of borderline social groups.

1. The easing factor in inclusion for this group would be:
— no language and cultural barriers compared to e.g. immigrants,
— previously existing social networks,
— basic knowledge of the general culture,
— education and skills that grow out of the same market.
2. Obvious limitations would be:
— objective legislative limitations
— restrictions based on a court order.

Instrumentation of the survey consisted of the questionnaire (developed by the author of the paper, pre-piloted), focus group interviews with experts, in-depth interviews with inmates, newly released and family members, interviews with employers of the prison system and administration of the Ministry of Justice. The author's experience of serving as a volunteer in the prison system of Norway, visits to the prisons in Lithuania, Romania and Israel helped greatly to develop the research. Extended support was given by experts from other countries, inmates and academic circles outside Estonia. All materials were used with the consent of the author or provider.

The target group of the survey was convicted males who would be eligible to enter the labor market with no special preconditions. This excluded:
— minors (less than 18 years old),
— seniors (more than 60 years old),
— lifers (minimum 30 years of imprisonment in Estonia),
— persons with active addiction (incl. sexual delinquencies),
— foreigners (not entering the local labor market at the release)
— persons with less than sufficient education or/ and work experience for any kind of legal job.

The sampling method of the first phase was originally designed to be a set of introduction lectures for inmates with a request to participate in the survey. Expected permission to participate in distribution of the questionnaires was not gained from the authorities. In one of the prisons, assistance of officials in the first phase of the research was qualified and the process and results were reported back with utmost care. In the other prison the instructions from the researcher were greatly altered by the staff, the results were confusing and limited.

The second phase of the data collection through questionnaires was conducted with the help of prisoners in one of the male prisons in Estonia. All questionnaires were in two languages; the choice of the language was free to the respondent. All responses to the questionnaire in the second phase were delivered by personal mail in addition to supplement data sent by prisoners. In total, 573 questionnaires were counted valid for the research purpose.

In-depth interviews with prisoners were made with volunteers. Participation of the family members was advised. The network worked gradually on a snowball effect. Interviewed experts were chosen to represent different areas and cultural communities of Estonia.

The questionnaire consisted of 83 questions, including qualitative and quantitative data. Open-end questions were used actively; many respondents shared their thoughts and personal data. All manual answers were transferred into the electronic form to analyze, considering that variables of interest may have not a single, unambiguous meaning (Creswell & Clark, 2007; Newman & Newman, 2008; Niglas, 2010). Pilot study and several field tests were conducted.

The data of the sample group represents a valid cross-section of Estonian adult male convicts:

— appr. 25% of the total body of male prisoners at the time were questioned or/ and interviewed[9].

— All age groups of the target section were adequately represented in comparison with the official statistics about Estonian prisoners at the time.

- Both language groups were adequately represented[10].

— All three male prisons were included.

The expected findings were supposed to give an estimate to the potential of the inmates/ future released on the labor market. Considered were all options of their future success as providers and bread winners — employment, entrepreneurial activity, social aid, combined involvement and temporary activities that would serve the principles of coexistence with general society.

The scope of the study changed its character and volume in the process, experimental activity was created as the research developed. The analyses of the research continue in cooperation with the researches on other fields.

This is the first research in the area (Estonia, Latvia, Lithuania) with such a number of subjects of a group involved. Cross evaluation and parallel analyses of the mixed method of collecting data and findings were continuously conducted.

In total, 1,100 questionnaires were sent to male prisons in Estonia — Viru, Tartu and Tallinn in 2.5 years. The response was very different depending on the mediators.

First phase, prison 1: 250 delivered/ 132 received. Response rate is 52.8%.

First phase, prison 2: 250 delivered/ 81 received. Response rate is 32.4%.

Second phase: 390 delivered/ 360 received. Response rate is 92.3%.

It showed once more that: a) a lot depends on the personnel of the prison, not that much on the formal regulations; b) prisoners as counterparts are responsible, accountable and very accurate when motivated and trusted.

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[9] 573/ [3026 (prisoners total) — 87 women, 75 elderlies, 23 minors, 41 lifers, handicapped] = appr. 25%.

[10] Estonia is a bilingual country, divided into Estonian and Russian communities.

Respondents and the Statistics

The statistics about committed crimes of the respondents is hard to follow because:

— many have a combination of crimes

— the statistics varies in time and location (EU statistics for comparison, reforms change the definitions, choice of methodology, preference of the authors etc.)

In total, approximately 3,000 persons were at the time in Estonian prisons, with 170 — 180 in open prisons. The age groups of the prisoners are shown in Figure 5.

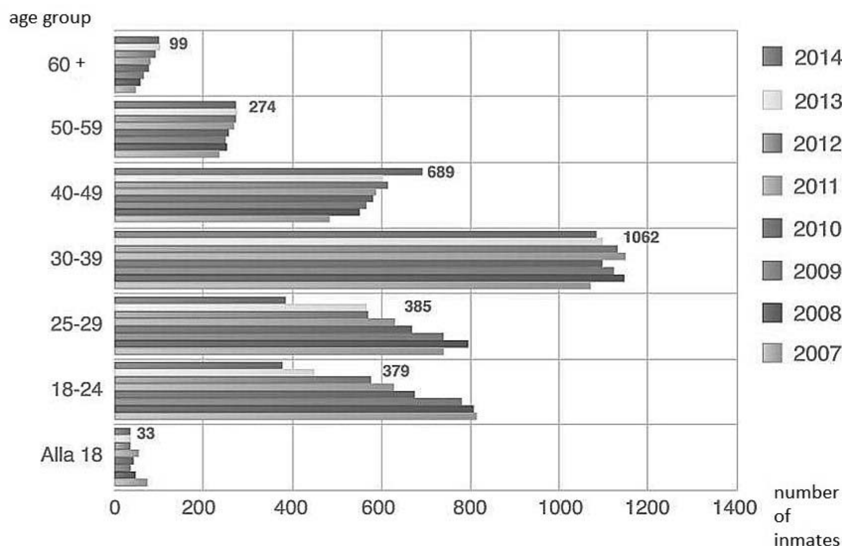

Figure 5. The number of inmates by age groups (Anvelt & Salla, 2015)

As the general population ages, so does the prison population. The average age of the respondents was 32.6 years and the average age at the first imprisonment was 22.9 years. The largest group of prisoners according to the state statistics (correlated by the research) has basic education of 9 classes (37%), 36% prisoners have finished 12 classes, 15% have less than 9 classes, 10% have special vocational education or higher education.

Results and Data Analysis
Education, Courses, Intellectual Activity

Demographic findings of the study correlated with the state statistics. The average of formal education of respondents is 9.8 classes; about half of respondents had both vocational training and skills in addition, many on numerous métiers. Most respondents had serious hobbies or activity outside of their work or studies. Those parameters are similar with Latvia but much above Poland or Lithuania. According to the law, there is no obligation for the state to educate a person above the 9th grade. At the same time, most keen to study are the ones who have habit and experience of doing it, which means that the hardest is the condition of limited intellectual environment to the ones, who are more advanced. 93% of prisoners read

every day and write a lot — 25 pages per month as an average. The same applies to physical exercise — a great number of prisoners marked sports as a serious hobby prior to detention.

On the other hand, 65% of respondents saw poor education (of the others, prisoners in general) as an obstacle to (re)socialization, 54% said that the skills of the released are not up to the requirements on the market. To the question, whether you can continue on the same profession held prior to the sentence, 57% said "no". This involved also the answers like "I have done nothing in my life but criminal activity" or "I have never worked", but nevertheless it is a large number of convicts who do not see themselves on the labor market after release. One of the main reasons according to qualitative data was no work and no choice of vocational training in prison, while the average time to serve this time was 5.2 years and the average time served in life previously was 6.4 years.

54% of respondents have not attended any courses apart from general "lifestyle" courses (37.6%) that are obligatory. The reason why 33% attended was out of boredom and du to no other choice. 8.5% said that it was prescribed by the personal performance program. The criticism about the programs may have multiple reasons but the list of choices seems rather limited and participation is a reward for good behavior. According to the employers of the prisons, the hardest time for inmates is summer when all activities are cancelled for long holiday and the number of unrest and riot rises at this time. Activities and courses from third parties are not held in prisons for security reasons[11].

One of the significant findings was the correlation of reported addiction and courses on treatment support (AA or drug-related courses): state statistics says that 20-25% of inmates are with an addiction. This correlated with the questionnaire answers — 25% according to the questionnaire. It was expected that the reported addition matches more or less with AA courses but there was almost no correlation: only 4.7% of respondents have participated and it did not match with the reported addition. These numbers need further study and analysis.

Work and Vocational Training during Captivity

As repeated in many sources, the aims of the captive punishment in Estonia are:

a) isolation of a danger and

b) preparation of a person for a socially accepted life.

Only in rational combination would those lead to a higher level of security in society. Work and activities are the keystones aside from intellectual and emotional development during the penal imprisonment. About half of the prisoners suffer from insufficient skills and even more — habit of regular work prior to their punishment. Becoming acquainted with or strengthening those should be one of the priorities in prison.

Majority of the prisoners do not work during their prison time, even the lengthy one. 7% of the respondents were reported to be engaged in, at least, some part-time occupation on some type of maintenance (not mopping a corridor or distributing food to the sector); 8% worked or have been working for, at least, some time on a full-time job or close to that. This does not correspond to the official statistics of the Ministry of Justice or *Eurostats*. The reason to that is methodology where "working" means actually a tick in a personal file "allowed to

[11] All male prisons in Estonia are maximum security establishments.

work if not stated otherwise", not actual work activity or real engagement. The same applies to the statistics about vocational training and courses.

Another reason that derives from the methodology — a criterion that normally applies to an activity called "work" has been modified in prison administrative jargon and work can apply to various activity and the forms of biding. The public budget of Estonian prisons shows no expenses for education, training or work (Figure 3).

One of the key factors of the prison environment is motivation. If in Soviet prisons inmates often suffered from excessive workload, then in modern "European" prisons in Estonia the suffering raises from nothing to do and work being a rare reward. Punishment is justified only to defend the social contract and to ensure that everyone will be motivated to abide by it (Beccaria, 2016). Could we ask any motivation from prisoners? What happens after release? Arguments that support impossibility to arrange work in prison are weak (Table 2).

Year	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
useful level of activity[12]	71,9	59,5	51,0	19,7				33,8	30,0	28,6	29,8	29,1	30,7
The cost of engagement (Mil/ kr)								4,442	3,415	8,136	8,119	7,927	7,573
Production (Mil/ kr)					7,75	12,6	16,2						

Table 2. Work statistics in Estonian prisons over the times of transition Estonian SSR >> Estonian Republic

History knows many examples of altered work conditions for prisons: 1790 — Philadelphia Walnut street prison — working in cells, 1820 — the Auburn system (also known as the New York System). Renting prison labor to the private sector has been actively used from the beginning of the 18th century. Considering investments that have been made in the last 15 years to the employment of prisoners in Estonia, the turn from profitable enterprise to huge waste of funds is dramatic.

According to statistics, in 2015, each day at least some work (including part-time and temporary assignments) was provided to 147 inmates, which from 2,749 eligible prisoners makes a bit more than 5%, meaning that 95% of prisoners are not engaged in any work at all. Another aspect is that nearly 1/3 of work-provided inmates are women, who make up just 5% of the general number of inmates. Therefore, recalculated to male prisoners, less than 4% are occupied in any kind of work-related activity during imprisonment. The data about Prison Industry as a state enterprise should be free to public access but with years it is less and less visible on prisoners' work (Estonian Republic, 2016). Despite continuous negative profit (-335,627€ in 2014) and extremely poor results in engagement of inmates (the only purpose of the enterprise), the management has been paid very generous salaries (MinJust, 2016).

[12] Ratio of persons working or studying

According to the Estonian law, any other enterprise with similar operation would be forcefully closed.

The pay as one of the motivations for work for all is not considered for prisoners. To bring the issue to the light and seek for alternatives is one of the goals of human rights protection in 2014-2015 in Estonia (Estonian Human Rights Centre, 2016).

Social Skills and Practice

The results of the questionnaire, focus group interviews with the Estonian Unemployment Insurance Fund, family members and released persons bring out grave difficulties in getting used to the life outside after release. Many convicts enter prison with weak social skills but during their captive time under the current system, even the existing ones fade away fast. Social contacts with the life outside in Estonian prisons are almost absent. According to the interviewed, fulfilling even minor daily activities might be problematic after release due to the physical and mental condition of the released. In addition, language and general communication patterns change in prison fast. The research showed that after release, there is no time to adjust, immediate pressure to find a work and pay debts are an obligation that is facing most. Almost half have lost contacts with their family, social network and the place of residence. The newly released as a weakened social minority has repeatedly been pointed out by the National Audit of Estonia. The measures of EUIF do not extend to prisoners. The current system of re-entering into society is considered humiliating or ridiculous by the respondents (even a 50-year old may need a parental consent).

According to EUIF and family members, many released face health problems[13] that often become visible after release. Estonia is practicing a long-term (up to a year) solitary confinement and for many this is unbearable. About 70% of respondents from 573 said that there is a need but lack of support after release. Even after release, returners into society are not informed about their possibilities or they have restrictions in getting those. The Estonian government has not declared the philosophy or the basic idea of the captive penalty.

(Re)entering the Labour Market

The entering phase to the labor market is not a specific problem of the newly released in Estonia. It needs special attention in regards to all idle groups and to persons who have temporary or permanent reduction of capability on the labor market. This includes mothers, injury, loss of earning capacity, age, immigrants and other weakened groups in society. They all need access to subsistence and means for increasing their capability. Sustainable states have changed their policies to pay better attention to the increasing problem. National programs for different groups are becoming more and more widespread. Legislative limitations, cumulative mass of problems to tackle legally, socially and in personal life, lack of information and support, health problems etc. reduce significantly possibility to be re-employed or to start a new page after release from prison. In many cases, alternative solutions are necessary for the ones who are willing to be legally employed.

[13] Interviews (Stewart, Interviews 2013 — 2015, 2015) brought up most often that after release people suffer of joint pain and bloatedness, tiredness (both physical and mental), loss of weight; psychological inclinations like need for acceptance, loss of concentration and difficulty to focus, agitation, urge to talk, urge to prove worthiness. Even if the signs do not qualify to be medical conditions, most specialists of EUIF said that they would spot out a person who recently came from the prison system.

The underlying research was weighing possibilities of legal employment for a specific group — released from prisons. This has to be provided during the prison time not to start after release (the average length of imprisonment in Estonia is 5,5 years but reaches to 10-15 years for drug-related crimes and criminal assault). Naturally, in every society there will remain a percentage of former criminals who cannot break the circle of recidivistic lifestyle or have chosen criminal activity as their lifelong career. A socially acceptable life should still be at least an option and supported by the overall idea of rehabilitation. Interviews during the research showed that potential for socially acceptable persons, reliable workforce and legal entrepreneurial activity among today's prisoners is much higher than it is reflected today by recidivism rate and opinions of the authorities and public. What this percentage exactly is depends on numerous factors. Experiments in other countries have proven that investments into change of prison philosophy are, in the long run, rewarding for society (see Bastoy prison, restorative justice, Delancey Street Foundation and other initiatives).

As expected, when the questions were given with a personal angle — what stops you or what is an obstacle after release — respondents were much softer with negative descriptions: 36% answered "yes" to education as a stopper, 24% saw that their skills might need improvement.

The qualitative data given by respondents showed that majority would require better guidance in numerous areas of future life starting from their career perspectives, income and support up to residence and legal paths of moving on. Especially in-depth interviews showed that the only career in reality seemed to be illegal — networks, skills, timeframes, obligations combined left in the minds of interviewees little room for alternatives.

The picture of a tough criminal from action movies changes when we look at the real man in prison (Table 3).

Question: What do you consider the most important obstacle in legal occupation of ex-convicts?	The answer Yes
Poor education or theoretical preparation	64,8%
Insufficient skills (what kind of?)	53,5%
Legislative obstacles	35,7%
Insufficient assistance (what kind of)	36,6%
Lack of support (from whom?)	44,1%
The attitude of other people and society	56,8%
General situation after release — debts, no home, personal issues	76,5%
Something else (please, enlist)	29,6%

Table 3. Obstacles at release (according to prisoners)

The finding is that majority of prisoners:
- receive no vocational training or intellectual activity,
- have no access to relevant information,
- lose contact with the market and supporting network,
- have no access to start-up funds.

In addition to decreased social and practical skills after release, all this in combination gives little hope for success in the labor market, if unsupported, except on rare occasions where there might be a return to a previous business or profession.

When asked “What stops you?”, the responses were as shown in Table 4. These obstacles affect the perceived success as a private entrepreneur as well.

Money	education	skills	age	family	criminal record	other reasons
57,7%	36,2%	23,9%	16,0%	12,2%	57,7%	13,6%

Table 4. What stops your life at the release?

To the question “Do you think that the situation gets better about that obstacle?” 70.4% of respondents answered “Yes”. The answer to the question “What is the most important issue for you after release?” most respondents gave work, residence (place for living) or debts in different combinations. To another question “Do you have a plan how to overcome this?” 72.8% said “Yes”. According to the family members and experts from EUIF, this optimism fades in a few months. Interviews with potential employers showed that a former prisoner is not welcome. The reasons relay in general attitude that is based on the preparation for release of convicts and lack of cooperation from the penal system.

Entrepreneurial Future for a Released

The overall entrepreneurial environment in Estonia compared to the 1990s cowboy capitalism and raise of the 2000s has been changed according to the GEM research (2012) and is currently rather modest with the declining trend. In addition to historical and cultural traits, the political decisions and the situation of the last decade have not encouraged the entrepreneurial development. For the released, the situation is quite complicated if one has decided to start their own business having a criminal record due to the abovementioned personal reasons and complementing legal restrictions (Stewart & Järvelaid, 2015).

Criminal offenders who at the release should have paid their debt to society sense large resentment from society and the state in particular. Majority of respondents (57%) marked the general attitude of the public as an obstacle in a new start after release, 44% said that support is needed and 37% respondents declared that the lack of aid after release is an obstacle. A similar limitation has been shown by other researchers.

Entrepreneurial preparedness in Estonia is not high — people much prefer steady contracted employment, which has also been the state policy on the labor market (access to loans, assessment of a person etc. are based on the “place of work and position”). The Estonian entrepreneurial environment has been studied only in the last 5-6 years using reliable methodology and the data has big gaps. However, the government is paying attention to the problem of low entrepreneurial potential of the society. The author is not aware of any studies that would focus on entrepreneurship specifics for former offenders or any idle groups in the area of Baltics/ Eastern Europe.

Theoretical willingness to start legal entrepreneurial activity among convicts is much higher than in general population. This could be explained by both: a) lack of seeable options on the employment market and b) false expectations, hopes and illusion for future success.

The real potential of inmates to start their private business right away after release is low, special support is definitely needed both prior to release and in the beginning of entrepreneurial activity (Stewart & Järvelaid, 2015).

The abovementioned factors are changeable with focused policies that rely on a strong philosophy and scientific studies. Resentment and mistrust was presented from the released, when courses for this purpose were set up in 2014. Courses were set at different times, several times a week for a month with an offer of beverages and all supplies. One person showed up and was ready for an anonymous meeting. This indicates again that we need a better ground for a dialogue, actually to a multisided communication and discussion.

The Model. Summary of the Proposals.

This model — SIG[14] (Figure 6) is specifically designed for prisoners but could be altered for other idle groups as seen by the context and circumstances.

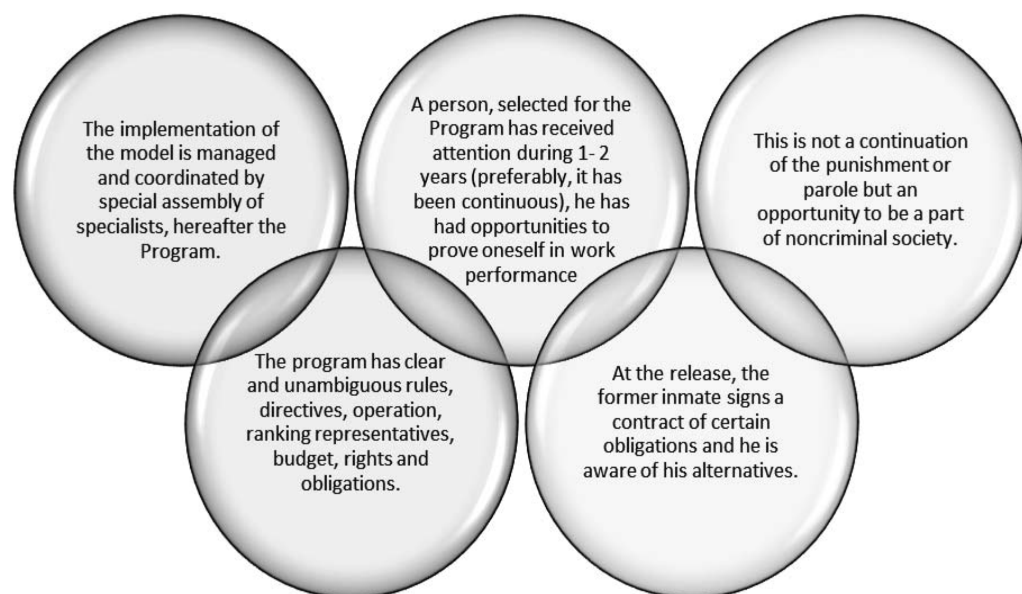

Figure 6. The model for engaging minorities to the labor market (Stewart, T.)

There have been and are in use several models for (re)integration of idle groups or persons who have fallen out of social participation. SIG is designed based on the legislative and circumstantial specifics in Baltics for the target groups:

1) The main purpose of the model is to be a bridge between disability to participate on the labor market and reach to the sustainable self-supported future with or without additional aid;

2) The liabilities and debts for a Program attendee (a person who is selected and agreed upon by the assembly) are frozen (postponed) at least to the end of the agreed adjustment time;

[14] Subordinates-Involved Governance (SIG) Model is a multilevel shared management model for policy design and problem solving. This modification is for the released from prison but it works for idle groups and weakened persons on the labor market in general. In each case the model requires adjustment according to precise circumstances. Author of the SIG — T. Stewart

3) The support-person service is available on terms set in the law (Riigikogu (Estonian Parliament), 1995; SotsMin & JustMin, 2014);

4) A Program attendee gets support for an initial residence — residence is provided but works on a dormitory principle not as a social housing;

5) If a Program attendee is starting an entrepreneurial activity, he or she receives a special-purpose loan for an entrepreneurial startup on terms and conditions that are similar to the student loan in Estonia. The business plan is confirmed by the Program;

6) An attendee knows that he or she is expected to work and this work is based on his/her skills, experience, abilities and (if possible) preference. In this part, the measures of the EUIF and social programs are used with the guidance of specialists;

7) The job is paid giving at least the average of the state if all participation obligations are met. The attendee is aware about his/her perspectives and options;

8) Contracts with a job provider or job offers are set up by the Program. Evaluation of the task and performance, payments, management and planning is done with the participation of the Program attendee — it serves as open communication and training for all parties at the same time;

9) The Program is working in cooperation with the Ministry of Social Affairs (social security and health issues), Ministry of Education and Ministry of Justice based on the methodology of the multilevel governance (SIG). In addition to traditional local counterparts, the Program is in cooperation with European volunteer programs that are accepting persons with prior criminal records;

10) The program is aware that this is not yet another prison reform and that it cannot interfere with the current penal system. The program points out that the load with the released now is on local government but with better cooperation is given an opportunity to share the responsibility and benefits;

11) Implementation of the Program requires no legislative reforms, changes in the structure of the institutional system, no special or additional investments. It does require adding prisoners to the list of idle groups who have declared (temporary) reduced working ability, as suggested by the audits (Riigikontroll (The National Audit Office), 2003);

12) The program is a mediator between the contracting party and the released. The program is a mediator for payments and liabilities (rent, alimony) free of charge for the attendee; the accounting is visible to all counterparts.

13) The cost of the program is covered by projects and government funding — see the cost of the upkeep of a prisoner (Figure 3).

The jobs that would be suitable and affordable for the Program to be contracted for are e.g. demolition, moving, transportation, guarding, elaboration of apartments and buildings, welding, carpentry, cooking and delivery, art, sports instructor, events' support etc. Depending on the attendees, it might be more sophisticated or specialized.

The Program has been proposed in 2014 to the Ministry of Justice and to the largest local government in Estonia — the city of Tallinn in 2015. The research is continuing in the fine-tuning of the details and analyzing the gathered data and context. The model is ready for the active use and for moderation for other groups.

Discussion of the Results in Relation to the Literature

The proposed model does not affect existing legislation, budget of the prison system, security measures or court orders, considers the rules of prison and penal system, uses

already available sources and measures, and tries to match the experience of other countries to the possibilities of Estonia.

The experimental level does not involve all clusters of prisoners — it operates with the sample group, which has determined characteristics, limitations and prerequisites (see Methods). The model aims to encourage all involved parties to analyze possibilities and to be opened to multisided solutions in improving the future prospects of an individual (released), community, local governance, social communication, security and as a result, cohesion of the society.

People with criminal records, like other idle groups, are affected by the society before, during and after their penal time. On the other hand, they influence the society in many ways in all three enlisted time phases. The influence is multisided and affects political, economic and social well-being of the region and in cross-border terms.

In order to be effective in this local, state and interstate cooperation in the sphere of security, including social security, the processed data and interpretation of this data should be adequate, defined, contextualized and practically usable for policy design, comparison, budgeting etc. It is obvious that work on that should be continuous, well communicated and linked. Work on the current data and the analysis is being continued following abovementioned guidelines.

The finding that in number of areas the results do not correspond or do not correlate to the data published previously in the state statistics, yearbooks of the Ministry of Justice, domestic handbooks, project reports and summaries from different authors is not considered as a problem. It is seen as an intrigue that gives a reason for deeper and extended work in this area in the near future, may raise a new form of involvement and communications in the community, gives alternatives for interpretation. The purpose of the proposed model is to encourage multilateral thinking of involved parties and multilevel operation in public and social issues.

The proposed model of socialization SIG sets a target on cohesive and inclusive society, lifelong learning, reduction of the share of adults with no professional education or vocational training, reduction of the long-term unemployment rate and increase of labor participation rate — the goals that are stated in national and EU acts and development programs. In addition, SIG supports the priorities of government policy in availability and effectiveness of education and improving health-related behavior for Europe 2020 (Table 5).

Increasing the employment rate in the 20-64 age group		
Initial level 2010	**Estonia's target 2015**	**Estonia's target 2020**
66,4%	**72%**	**76%**

Table 5. Objectives for Estonia 2020 (Government Office, 2011)

It is obvious that a seemingly small general number of inmates in Estonia (around 3000) itself is not drawing attention in the scale of much larger regions. However, the effect of those problems, considering the size of the community (appr. 1 million people) and the characteristics of the country (Table 6), have quite profound outcomes. The estimated number of children in Estonia whose father is in prison is approximately 7,000. This is half of the number of children born in Estonia a year (Yearbook, 2015). It is estimated that each person in prison

affects directly at least 6 —7 persons around delimiting their prospects in life. The rates of imprisonment were discussed above.

Table 6. Predicted labor force in Estonia (European Commission, 2015; Government Office, 2011)

	Working-age population (15-64)		Decrease			
Year	According to Estonia 2020	Eurostat, European Commission's Ageing Report	According to Estonia 2020 (from 2010)	European Commission's Ageing Report (from previous period)	Labor force 20-64	Decrease by Eurostat
2010	908 000		0			
2013		870 000		0	649 000	0
2020	843 000	805 000	-7%	7,5%	607 000	6,5%
2025		769 000		4,5%	573 000	5,6%
2030	801 000	735 000	-12%	4,4%	553 000	3,5%
Total			12%	16,4%		15,6%

On the other hand, a small state has its benefits — what better place would there be for testing novice ideas than small communities (states) like Estonia, still with very distinct cultural sections, relatively simple legislative mechanism, close geography, good e-service and surveillance possibilities. It would be easy to monitor the model (SIG) and get the results fast and obvious. Similar attempts in other countries have been successful.

With fast-declining workforce and falling population, Estonia is one of those regions where all internal sources and capacities should be taken seriously. Another alternative — immigration — replacing the aging population has not been a successful policy in the region.

The third theoretical key alternative to economic acceleration is increasing productivity per employed person. Compared to the EU average, Estonia is not showing remarkable efficiency in productivity (Table 7).

Initial level 2009	Estonia's target 2015	Estonia's target 2020
65% (of the EU average)	73% (not reached)	80%

Table 7. Productivity in Estonia compared to the EU average

According to the results of the study, estimated 1,000-1,200 (35-40%) men in prison today have the capacity and willingness to take up a part-time or full employment after release. Considering that perhaps the respondents were a more active part of the prison population, this number could be reduced by 10%. Thinking in terms of minimal 1,000 households in region (that corresponds to a medium size town in Europe) being positively affected makes this an issue of importance. The spectrum of the jobs that today's prisoners would be ready to undertake according to other studies (Saarpoll, 2009) corresponds well to the data given by the respondents of the research: construction, welding, carpentry, electrician, car repair, cooking. The number of businessmen (15%) and IT specialists (9%) seems discordant but needs further study.

Solutions and Proposals

Due to the nature and structure of the current prison mentality in Estonia, it would be idealistic to hope that alternative findings or analyses would be warmly welcomed. Effective and relatively foreseeable change could be applied through the Estonian Unemployment Insurance Fund (EUIF) and on the level of local government[15]. Little if any should be changed in the reform plan, initiated by the Estonian government (SotsMin, 2015)[16] since the measures are already existing, funded and staffed (EUIF, 2015; RMP Eesti, 2010).

The new wave of re-socialization (including for the released) in Estonia relies on the third sector projects funded by the EU structural funds. This trend is supported by the development plan of the Ministry of Justice for 2014, 2015, 2016. It has already been criticized because:

a) the third sector possibilities are limited due to the project requirements;

b) it is not sustainable;

c) the project runners often are not experts of the post-imprisonment rehabilitation;

d) third sector projects are covering just a limited area;

e) projects are constrained by the orientation (religious, addition etc.);

f) results are not reported outside of the project principal;

g) the funding body and responsible authority are not necessarily the same institution, therefore lack of coordination might be a limiting factor.

The current statistics about recidivism suggests that preparation for release could be more efficient and previous reforms have left room for improvement.

– 76% of prison-sentenced persons undergo their punishment in full term. This means that they receive all (good and bad) that this punishment and rehabilitation time involves;

– More than 50% of Estonian offenders are recidivists, meaning they have been sentenced to imprisonment for more than two times;

– More than 50% of the released commit a new crime within one year, among young offenders this percentage is above 60%. At the same time, according to the reports, only 16% of criminals get sentenced (Leps, 1991);

– Within two years, a new sentence is applied to 70-75% released. It has been estimated (Hilborn, 2007) that the actual figure in 7-8 years will be around 90%.

Recommendations for Further Research

For better understanding the obstacles in modernization and humanization of the current socialization system in the Estonian context, a set of true interviews with the employees of the correction system would be essential. These interviews would ideally be organized:

— in different prisons in Estonia;

— in the administration of the Ministry of Justice;

— involving persons from other abovementioned ministries and agencies;

— involving both — individual and group interviews;

— covering different strata of employees up to the top management.

[15] After release, a former offender is mostly a responsibility of a local government as he/ she returns to the place of residence

[16] The aim of the amendments is to change attitudes towards people with reduced working ability and to help them find and keep a job.

In the current situation, this would be difficult to accomplish by an independent researcher or a research group.

CONCLUSION

What could be done without new reforms and with the current budget?

The proposals given about the accompanying multilevel governance model SIG (Figure 7) are not conclusive but separately or in a combination with other measures (below) could, in opinion of the interviewed experts, be the base for a change of the philosophy and values in the prison of Estonia.

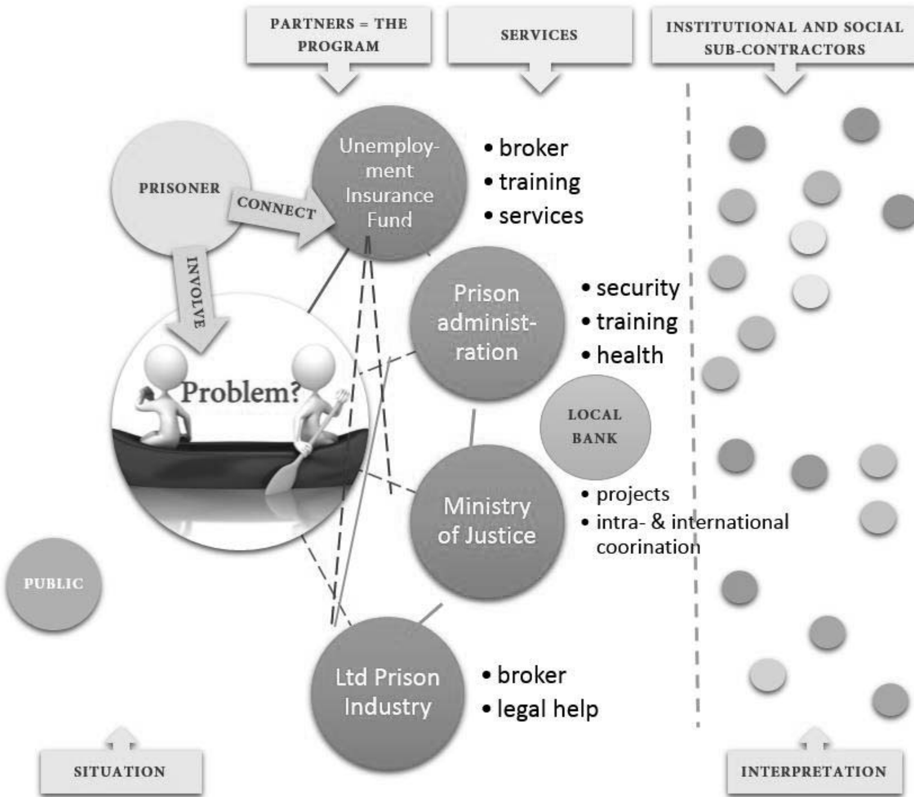

Figure 7. SIG (Subordinate-Involved Governance) model for idle groups in society (incl. released from prisons). Author: T. Stewart

Solutions — SIG Model

As a solution, this research proposes a model of the gradual socialization and integration called SIG — the Subordinate-Involved Governance model. The pivot of the model stems from the data collected during the research. The essence and details of the model are described

in specific articles (accepted 2016). In short, this is an adjustable model for gradual socialization and integration involving occupational activity in different forms (part time to full employment, entrepreneurial activity, art, craft etc.).

The novelty of the SIG model consists of following:

1. the model is adopted to the conditions of East European countries;
2. SIG integrates different parties, including the governmental experts, which are usually opposed;
3. integration with the NGO's that have already proper practical expertise on support services (Ministry of Social Affairs, 2014);
4. involvement of the local trust banks gives better control over the development of the subject. The goal is maximum independence in optimal time and with reasonable aid;
5. the model is neutral to religions, but it does not reject religious practices;
6. the model encourages entrepreneurial activity as well as it gives training that is needed for success on the labor market.

The SIG model is able to tackle and target the problems that most minorities live through and that hinder their involvement in the society like:

— legal incompetence,
— network provision,
— training in practical matters,
— finding job and activity,
— being heard,
— being informed and being able to provide information.

As most of the models, the SIG also tries as well as possible to take into account the phase of adjustment of the subject and provide adequate level of support. The model has been repeatedly proposed to the Ministry of Justice and to the City Government of Tallinn.

The model has to make selection from the general body of prisoners and released (see **Methodology**). The range of experts is a limiting factor and the place of residence plays important role. Where the job offers come from? Already in the theoretical phase of the model development, several companies have offered jobs. There are pretty good support measures in Estonia for the companies that hire long term unemployed persons.

The novelty of the model is that proposals are neither initiated nor moderated by the prison administration solely but are combining the data gathered from different social and administrative layers, ranging from academic literature to prisoners as subjects:

1.It is advisable to involve unbound experts and observers to evaluate and develop (re) socialization of inmates. Relying only on prisoners or just on the administration would bring biased opinions;

2.It should be taken into account and communicated that prisoners as a group are not a uniform amorphous body but involve different clusters of possibilities, willingness, goals, talents, disabilities etc;

3.According to the survey, most prisoners would work at least part-time or improve their formal education. They need and deserve access to that;

4.Work is currently treated not as an obligation as stated in the Imprisonment Act (Riigikogu (Estonian Parliament), 2000) or a right but a privilege for too few. If society requires

social responsibility and ability from the released, it should be exercised and practiced during the penal time;

5.Imprisonment develops (and deepens) social exclusion and homelessness in majority of prisoners. Social aid is not reaching this group adequately, according to the prisoners and EUIF experts;

6.Methodology of the data collection and interpretation about idle groups should be enriched with alternatives known in scientific practice. Domestic literature and data need advancement;

7.The essence of social and professional programs needs reevaluation.

8.Awareness about the health problems of prisoners needs advancement and better back-up data for consideration and defining of the problem.

How to select the clusters of prisoners better than the current recording by age, criminal records etc.? How to find the ones who are suitable for the program and willing to put up the effort? There are different mathematical models apart from qualitative methods that have been efficient (Liiv, I.; Kuusik, R.; Võhandu, 2007; Veski, A.; Võhandu, 2010; Võhandu, Leo; Kuusik, Rein; Torim, Ants; Aab, Eik; Lind, 2006). This is one of the directions of further study on the already gathered data and its analyses. The novelty compared to the current system is that the multilevel communication would treat prisoners as partners not only as subjects. According to the freedom that action research gives, this model is analyzed and discussed openly not only with scholars and experts but also with prisoners, released and their relatives. The value of their opinion should not be underestimated.

Acknowledgements

The analysis of the research on the Estonian prison system is not conclusive. So far, it has been conducted on a private initiative from researchers, interviewees, libraries, consultants and Estonian volunteers. The funding mostly came from the Norwegian Prison Fellowship and private sources. I am grateful to my proofreader and supporters. Special thanks go to convicts who agreed to participate and added their valuable contribution to the analysis.

Larisa Alekseevna Belykh
(26.02.1950 — 03.08.2016)

With great sorrow the Rector's Office and the Land and Environmental Law Department of the Ural State Law University announce the death of Larisa Alekseevna Belykh, honored figure in higher professional education of the Russian Federation, Candidate of Law, Associate Professor of the Land and Environmental Law Department of the Ural State Law University.

L.A.Belykh graduated from the Sverdlovsk Institute of Law named after R.A.Rudenko. She was working at this Institute (later the Ural State Law University) for more than 38 years. She was awarded by numerous diplomas and certificates of honor. L.A.Belykh published about 40 printed works devoted to the environmental protection including 3 textbooks.

Larisa Alekseevna was an open-hearted person who had many followers. Her lectures and tutorials were logical and interesting as she showed great interest to the subject she taught. She always tried to find new forms of pedagogical methods and activities. She was also a very demanding person as she tried to help her students become qualified lawyers and real professionals. She tried to foster a love of lifelong learning in her students and helped them achieve tangible results in legal science.

She will always remain in our memory and hearts as an excellent teacher, and a motivating and demanding scholar!

Alexander Ivanovich Tatarkin
(11.03.1946 —05.08.2016)

The Institute of Economics of the Ural Branch of the Russian Academy of Sciences expresses condolences in connection with the death of Alexander Ivanovich Tatarkin, a distinguished scholar and academician of the RAS, the Director of the Institute of Economics of the Ural Branch of the RAS from 1991 till 2016, and the Scientific Supervisor of the Institute since 2016.

A.I.Tatarkin published more than 1100 scientific works in Russia and abroad, with more than 100 monographs among them. Some monographs were translated and published in China, Finland, Holland, the USA, Spain, etc. In 1989 and 1991, Alexander Ivanovich received the golden medal of the VDNH (the Exhibition of Achievements of National Economy) for his work in solving problems of regional economy and the administration of territories of the Ural region. Among his awards are: the title of Honoured Worker of Sciences of the RF (1996), the honorary badge "For Achievements before the City of Yekaterinburg" (2006), the title of "Great Minds of the 21st Century in Scientific Achievements" (2006), Laureate of the Award named after the RAS corresponding member M.A.Sergeev for the best achievements in the regional economy (2009), Laureate of the Award of the RF Government in the sphere of science and technology (1999 and 2015).

A.I.Tatarkin was a member of the UB RAS Presidium and UN RAS Bureau, a member of the Expert Council of the Russian Foundation for Humanities, a member of the Higher Attestation Commission Presidium at the RF Ministry of Education and Science, Chairman of three Dissertation Councils at the Institute of Economics of the UB RAS, Editor-in-Chief of "Ekonomika regiona" [Economy of the Region] and "Zhurnal ekonomicheskoi teorii" [Journal on Economic Theory] journals, a member of editorial boards of more than 15 Russian and foreign journals, Honorary Doctor of Economics and Professor of some Russian and foreign universities.

A.I.Tatarkin was a full member (academician) of the International Academy of Regional Development and Cooperation, Honorary Researcher of the European Institute of Minor and Middle Business, Honorary Member of the Council of the EEC Institute of Industry, Honorary Member of the Council of the US Congress Library, Honorary Member of the International Academy of Regional Cooperation (Warsaw, Amsterdam), Academician of the International Academy of Ecology, Man and Nature Safety Sciences and a Member of the International Club of Economists (Astana, Kazakhstan).

The death of A.I.Tatarkin is the biggest loss for the scientific community. We express our deepest condolences to the family, friends and colleagues of such an outstanding person. We will always remember him…