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19-21 February 2015, Tbilisi, Georgia

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UNIVERSAL SERVICES IN EU LAW IN THE ERA OF LIBERALIZATION

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Abstract

Universal services were used in many laws as a form of state intervention. The European lawmaker also introduced this concept to guarantee the provision of certain services to all citizens in all Member States. However, liberalization of different sectors of the economy strengthens competition and removes state monopolies. The aim of this article is to determine whether the concept of universal services is still needed. Doubts about the need for that concept arise because of another European concept of services of general economic interest, which enables particular Member States to introduce certain public services. The article will focus on several sectors of the economy in which universal services were introduced and will try to justify maintaining such services.

Keywords: Universal Services, Public Services, Services of General Economic Interest

Introduction

In general, universal services aim to prevent citizens from social exclusion. By such services, member states can assure the availability of certain services for society in those cases in which the market would otherwise fail. This means that universal services are a means of state intervention in the market. Although such intervention leads to the restriction of competition, the European lawmaker recognized that in many situations pure economic goals like efficiency and economic progress are less important than social goals. It can be seen in the concept of universal services that state intervention in the market is more important than the mechanism of competition itself. However, the introduction of universal services in specific sectors of the economy does not occur often. Some even argue that this appears to be a dying concept (van Eijk, p. 3). It was introduced only because the liberalized sectors of the economy were not able to guarantee every member of society specific services, and by the time the market would be able to do so, the universal services would no longer be needed.

This paper aims to explain the role of universal services in EU law in the situation in which many sectors of the economy were liberalized. Especially it will try to find common features of universal services to define where such services must be introduced. The last aim of the article is to determine whether such a legal concept is still needed, since the European lawmaker introduced a very similar concept of general economic interest and liberalized many sectors of the EU economy.

Definition of universal service

Universal services have many definitions. There are many European legal acts that describe this concept. According to Art. 3 of Directive 2002/22/EC, a universal service should be considered a service that is available in specified quality for all end users, regardless of their geographical location, taking into account the specific national conditions and at an affordable price (OJ L 108/51, 24/04/2002). In addition, in the European

Commission Communication - Services of general interest in Europe from 2001, the European Commission concluded that the universal service, in particular the individual definition of this type of service, is an important part of the liberalization of service sectors, such as telecommunications, in the European Union. It is a universal service to ensure passage from the provision of services by monopolies to a fully competitive market. Member States are responsible to determine the conditions to ensure the provision of universal services (Communication from the Commission—Services of General Interest in Europe [2001] OJ C/17/4).

Similarly, universal services are defined in the Green Paper on services of general interest of 2003. It emphasizes that the aim of these services is to ensure access to everyone, regardless of their economic, social or geographical situation, to certain services. Moreover, the concept of universal service in the liberalized economy ensures that everyone will have access to a particular service at an affordable price, and the quality of the provision of this service will be maintained at a constant level (Commission Green Paper of 21 May 2003 on services of general interest, COM(2003) 270 final, OJ C 76 25.03.2004, p. 14 and 16).

Sauter argues that universal services are characterized by their universality for consumers and a set of obligations that are imposed on undertakings (Sauter, 2008, p. 10). Carter adds that there is no uniform definition of universal services but that, based on American law, such services have several core features. These features are availability (level, price and quality), affordability (low income services), accessibility and continuity (Carter, 2010, p. 16). Nenova adds that universal service can be both a simple and a complex concept. A simple goal of universal services, for example, is to provide energy for every home. On the other hand, there are issues that make this concept more complex – human rights and state intervention (Nenova, 2006, p. 1). Murroni and Collins add that some universal services cannot be provided without state intervention, because they are unprofitable for companies (Murroni, Collins, 1995, p. 4).

The reason for introducing universal services

The European Commission presents the idea of introducing a universal service. The aim of the EU legislator is primarily to bring free competition to the various sectors of the economy. Due to the fact that it is a long process, the aim of universal service is primarily to fulfil social needs. These needs can be fulfilled by state monopolies, but they are often not able to provide these services to every user or to provide them at high quality or affordable prices. This means that the concept of universal service is a way to eliminate the failure of state monopolies. Furthermore, as already indicated, the concept is transient. It forces the state monopolies to provide services of a specified quality, but the EU legislator is seeking to liberalize certain sectors of the economy and to eliminate this type of monopolies.

Some argue that universal services are crucial for politicians and policymakers, because their aim is to redistribute certain services among the poor and underdeveloped regions (Estache, Laffont, Zahn, 2004, p. 2). In the US, there is also a debate on the concept of universal services. Some authors argue that this concept is flexible and changes over time. They also contend that it is determined by many various contexts, in which members of society use different services (Cherry, Wildman, Hammond, 1999, p. 6). Moreover universal services are influenced by many different government policies (Nenova, 2006, p. 1).

Davies and Szyszczak argue that universal service obligations play an important role in the state's task. By such obligations, a state can redistribute public services to those consumers who cannot afford them in real market situations (Szyszczak, Davies, Andenaes, Bekkedal, 2011, p. 161). Undoubtedly, the liberalization process leads to the development of competition, which in turn produces products and services of better quality and at lower prices. But this process can be long and still leave specified services too expensive for some part of society. It can even be said that the dissemination of universal service and its affordability speaks for its disqualification as a universal service in the view of the lawmaker.

As Micklitz states, universal services aim to prevent social exclusion, which may arise as a result of privatization of state-owned monopolies. This concept allows for the purchase of specific services by those users, who cannot afford to purchase them at market prices (Micklitz, 2009, p. 1). In relation to the position of Micklitz, it can be concluded that the universal services are related to fundamental human rights. Universal services are so essential that everyone should have access to them.

The reason why universal services are being introduced is the failure of the market to deliver such services. In many member states, liberalized public services will not be provided in the pure market regime (Wollmann, Marcou, 2010, p. 3). Still, since such services are simply unprofitable for companies, state intervention is required.

As we can see, there are many reasons why the lawmaker introduces universal services. The most important reason is to prevent the exclusion from society those who do not have access to very basic services. Of course, basic services have not been defined, and it is obvious that they can change over time. Furthermore, societies differ from one to another with regard to which services are deemed to be universal. So, what is the role of EU law? It can be argued that the European lawmaker should decide which services are essential for society, which should be available for everyone in every member state, and provide them.

Universal services and services of general economic interest

The above mentioned interpretation of universal services is not consistent with the concept of services of general economic interest. Universal services are those that are so common that their provision should be guaranteed to everyone. When introducing such services, the demand for a given service is not tested nor is it determined whether such services are needed in a particular territory. It is considered that universal services are so basic that everyone should have guaranteed access to them. This means that the universal services will often overlap with services of general economic interest. However, the latter are not as ‘basic’ or even necessary for the whole society.

Thus, the concept of universal service assumes that particular services will be provided in the whole territory of a Member State. Therefore, it is clear that this concept is similar to the concept of services of general economic interest, with the proviso that the latter may relate only to a particular part of a Member State.

In distinguishing between universal services and services of general economic interest, another difference, perhaps the most important, should be mentioned. The concept of services of general economic interest has its source in the laws of the Member States. Consequently, it is up to each State to decide what needs each State should provide. Consequently, each Member State decides whether to recognize a specific service as a service of general economic interest. The concept of universal service was created by the legislation of the European Union. The EU directives state which services should be considered universal and what duties are charged to the Member States. Consequently, in the case of universal services, the decision-maker is the EU legislature, not the Member States. The latter are responsible only to ensure the provision of universal services within their territory. Moreover, the European Union legislature decided that universal services such a basic dimension that they must be provided in each of the Member States, as the result of which such services are regarded as fundamental in the European Union. Such a definition has been confirmed by the Court of Justice of the EU in the Corsica Ferries case, in which the Court held that the universal service was based on the company's commitment to provide the service at any time to every user (Case C-266/96 Corsica Ferries, ECR 1998 I-3949, para 45).

Neergaard argues that, in the EU secondary law terms, universal service and services of general economic interest are used interchangeably, which is misleading especially in the distinction between the general interest of the European Union and the individual interests of the Member States (Neergaard, Nielsen, Roseberg 2008, p. 73).

The European Commission stated that, if universal service is implemented in a specific sector of the economy, everyone should have the right to access those services that are considered to be important. This also means that companies are obliged to provide such services and to ensure certain quality, availability in a given territory and affordability. Moreover, universal service is a dynamic concept that must be updated from time to time in each of the sectors in which services are rendered universally (Communication from the Commission Services of general interest, including social services of general interest: a new European commitment, COM (2007) 724 final**,** p 10).

As rightly pointed out, Micklitz's concept of universal service is not a general approach adopted for many sectors of the economy. Consequently, an analysis requires the separate examination of each of the sectors in which universal service is to be introduced, because they are so related to the specifics of a particular sector that they cannot be tested together (Cremona, 2011, p. 74). Universal services are characteristic of several sectors of the economy, particularly telecommunications, postal services and energy.

Universal services in the telecommunications sector

The concept of universal service originated in the US. It was used for the first time in 1907, when AT&T's commercial aim was to have a telephone in every home. In 1914, this concept evolved into interoperability of different telephone service providers (Gale, 1997, p. 2). According to Garnham, universal service in the telecommunication sector is access to telecommunications services. Such access is understood as essential for existence in society as a basic element of freedom of expression and communication (Murroni, Collins, 1995, p. 4). A report from the US Department of Commerce stated that the concept of universal service assumes that everyone should be able to communicate with each other by telephone at affordable prices and on equal footing (Telecommunications in the Age of Information: The NTIA Infrastructure Report, DIANE Publishing 1994, p. 292). Markova has a similar view arguing that, in telecommunications, universal service consists of connecting individual households to a public telecommunications network (Markova, 2008, p. 105). Collins and Murroni claim that such services consist of universal access to voice telephony at prices affordable for everyone (Collins, Murroni, 1996, p. 76). Many authors agree that universal services in telecommunications consist of access to telecommunication networks for every member of society at affordable prices. Initially, as universal services were recognized, they included only voice connections.

The telecommunications sector was the first sector in the EU in which universal services were introduced, because in many places private operators refused to construct the technical infrastructure necessary to provide telecommunications services due to the very small number of potential customers. This economic calculation caused such operators to decide to leave this type of areas without the benefit of this type of services. This resulted in the introduction of the first universal service in the Member States. Initially, it included services related to wholesale phone calls, separating provision of telecommunications services from maintaining technical infrastructure. One of the first directives in this sector of the economy was Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment in 1988 (OJ L 131/73, 1998). In its preamble, the Commission noted that in the majority of Member States provision of telecommunications services is a full or partial state monopoly. Moreover, companies that provide telecommunications services are also often granted a monopoly on the supply of telecommunications terminal equipment. This leads to a situation in which users do not have freedom to choose communication equipment that can meet their needs in terms of price and quality, regardless of their origin. The Directive changed this situation by requiring Member States to withdraw special or exclusive rights relating to the sale of terminal equipment. The provisions of the directive required Member Stated to allow all operators to import, market, connect, and maintain terminal equipment. The Member States were also required to provide anyone interested access to terminal equipment and to provide the parameters of these devices. This means that the market for these devices was liberalized, and end users were provided broad access to competing devices from different manufacturers.

The next step in the process of widening availability of terminal equipment in the telecommunications sector was Directive 91/263 /EEC of 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity (OJ L 128/1, 1991). The purpose of this directive was to enable an even broader choice of terminal equipment for users. It introduced uniform technical requirements for terminal equipment so that these devices could be offered in many Member States.

Partial liberalization of the telecommunications sector led to the adoption of Directive 95/51/ EC of 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services. On this basis, every limitation on the capacity of cable television networks was changed, and it was allowed to use the cable network for the provision of telecommunications services other than voice telephony. This directive also abolished restrictions on the connections between cable television networks and public telecommunications networks (OJ L 256/49, 26.10.1995).

In the end, Directive 96/19/EC of 1996 was issued amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ L 074/13, 22.03.1996). The directive obliged Member States to abolish all exclusive or special rights for the provision of telecommunications services, including the establishment and maintenance of telecommunications networks required for the provision of these services. It was aimed to expand telecommunications networks further, including investments in new technology to extend the geographical coverage availability of telecommunications services.

The first universal service in the telecommunications sector was introduced on the basis of directive 98/10/EC of 1998 Directive 98/10/EC of the European Parliament and of the Council, of 26 February 1998 - on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ L 101/47, 01.04.1998). In accordance with Art. 1, second sentence of the directive, its purpose was ‘to ensure the availability throughout the Community of good quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access in the context of universal service in the light of specific national conditions, at an affordable price’. The provisions of the directive required Member States to ensure the availability of telecommunications services for all users in their territory irrespective of geographical location. As is characteristic for universal services, the directive also required that the affordability of these services be assured, especially for such user groups as the elderly, people with disabilities and people with special social needs. Their provision was guaranteed throughout the territory of the Member States for every user at an affordable price.

Finally, directive 2002/22/EC of 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) was adopted (OJ L 108/77, 24.04.2002). This directive introduced more universal services in the telecommunications sector. It recognized as the universal service providing access to fixed networks (so that users can make calls at local, regional and long distance, use fax machine and access the Internet), the creation of inquiry and a public directory, and provide public pay telephones. As in previous directives, the universal services introduced by Directive 2002/22/ EC had to be provided throughout the territory of a Member State to fulfil quality requirements and offered to users at affordable prices.

This directive indicated that the introduction of universal services may cause some recipients of such services to pay prices that do not result from normal market conditions. For this reason, it is necessary to compensate companies that provide these services in such cases for losses, but such compensation cannot be permitted to distort competition. The directive also obliged Member States to designate companies that will be required to provide universal services. Moreover the choice of such an undertaking should be made on the basis of objective and non-discriminatory factors. This directive also pointed out how universal services should change in the future. It stated that the concept of universal service should be developed to reflect advances in technology, market development and user demand. This directive established the mechanism that enables broadening universal service in the future (Sauter, 2014, p. 187). This directive was amended by Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337/11, 18.12.2009), which expanded the scope of universal service. As universal services were recognized, they included such services as connection (supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access), public pay telephones and other public voice telephony access points, telephone directory enquiry services, emergency services. Moreover such services should be provided with a specified quality and at affordable prices.

The directives reveal that there is still a place for universal services in the telecommunications sector. It is very important initially that such services were connected only with voice connections. After the development of new technologies, the European legislator found that some of those services are essential for every member of society. Moreover, as universal services were classified, such services included the public registry of telephone users or the maintenance of public telephone devices. Such services can be clearly recognized as essential for everyone in order not to be excluded from participating in society. Apparently, the European lawmaker decided that universal services cannot be associated with very basic services. As universal services can be recognized, so can other services that the European lawmaker believes to be needed for society. No clear criterion is used to select those services. Simply, such assessment is used by the lawmaker, and provisions of directives do not contain them.

Universal service in the postal sector

For many years, postal operators were obliged to provide universal service consisting of the delivery of letters and parcels to the whole territory of a Member State at uniform tariffs. To compensate for losses that occurred in unprofitable areas, like rural areas, states allowed a monopoly to provide certain services in those areas. Such a monopoly was granted by exclusive rights to provide, for example, parcel services or the delivery of letters up to a certain weight. Those exclusive rights were meant to provide universal services. Over time, the European legislator decided that the scope of exclusive rights had to be limited. During the late 1990s, the European Commission issued several directives that aimed to liberalize this sector of the economy, changing at the same time the scope of the universal services.

As occurred with the telecommunications sector, the introduction of universal service in the postal sector preceded its liberalization. The first directive liberalizing the sector was Directive 97/67/EC of 1997 on common rules for the development of the Internal market of Community postal services and the improvement of quality of service (OJ L 015/14 , 21.01.1998). The directive obliged Member States to ensure the provision of postal services of specified quality throughout the territory of the country and at affordable prices for all users. According to the directive, postal services were services involving the clearance, sorting, transport and distribution of postal items. The Directive set out that the universal service defined by it should be provided every working day and at least five days a week. Moreover, the services offered were to be identical under comparable conditions, meet certain quality requirements and take account changes associated with the development of technology, the economic environment and the demand from users.

The directive included a catalogue of services that were recognized as universal. These were: the clearance, sorting, transport and delivery of postal items up to two kilograms; receiving, sorting, transport and distribution of postal packages up to 10 kilograms; and services for registered items and insured items.

To implement the provision of universal service in the postal sector, Directive 97/67/ EC required Member States to establish independent national regulatory authorities. These bodies were intended primarily to uphold the proper functioning of the universal service and to take action to prevent distortions of competition in the postal sector.

Directive 2002/39/EC of 2002 amending Directive 97/67/EC with regard to further opening Community postal services to competition (OJ L 176/21, 05.07.2002.) was another directive that liberalized the postal services market in the EU.

Full liberalization of the postal market occurred when Directive 2008/6/ EC of 2008 amended Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 052/3, 27.02.2008). The Directive required Member States to withdraw all special or exclusive rights granted to undertakings providing postal services. The preamble of the Directive states that the gradual opening of postal markets to competition enabled universal service providers to carry out the modernization and restructuring necessary to ensure their functioning in a competitive economy. This Directive upheld previously defined universal services, which led to greater competition connected with its provision. By limiting the exclusive and special rights, the postal services sector can offer new services that are provided by new companies. This made it possible to expand the choice of services to users. The Directive required the full liberalization of the postal sector by the end of 2012.

Monti argues that full liberalization of the postal sector is controversial. In recent systems, universal services were provided by postal companies which were granted special or exclusive rights. Such rights entitled those companies to compensation for losses incurred in providing universal services. Monti quotes the European Commission, which stated that compensation granted to postal companies leads to overcompensation, which in turn causes postal companies to lose interest in introducing new products to the market or to rationalize their business (D. Chalmers, G. Davies, G. Monti, 2010, p. 1044). The Commission recognized that postal companies are now very different from what they were in the past. Today, postal companies are engaged in different economic activities that are not limited to postal services. The Commission recognized that reducing prices, improving the quality of products and services and introducing new services can occur only by the mechanism of competition. Such outcomes will be made by new companies that enter the market. This is why full liberalization of this sector was introduced. On the other hand, competition issues were more important than universal service itself. The Commission recognized that opening the markets and developing competition will guarantee the provision of such services. This does not mean that there is no place for state intervention. Directive 2008/6/WE enables such intervention but clarifies that the State is no longer entitled to grant special or exclusive rights to companies. Instead, Member States can ensure the provision of public services in the postal sector by public procurement. By such selection, Member States can compensate companies for providing universal service or establish a mechanism for cost sharing by the operators of universal services and the end users.

New directive also specified the minimum requirements for universal service. Member States must guarantee that universal service is provided not less than five working days a week, which includes minimum one clearance and one delivery (Art. 3 of Directive 97/67/WE amended by directive 2008/6/EC).

Directives issued by the European Commission in the postal sector show that the treatment of universal services has evolved over time. For many years, such services were treated as essential for society, and Member States granted companies special or exclusive rights to ensure the provision of such services. This situation changed significantly in recent years when the European lawmaker simply recognized that competition issues are more important than maintaining forms of state monopolies. However, the full liberalization of the postal sector does not mean that there is no place for universal services. The European Commission still recognizes postal services as essential for society, and Member States are still responsible for providing such services. However, it can be done today by public procurement.

Universal services in the energy sector

The energy sector, which includes electricity and natural gas, is another sector of the economy under liberalization. This sector is characterized by the presence of state monopolies in each of the Member States, which have provided services related to the transmission, storage and supply of electricity and natural gas. Due to such a strong restriction of competition in the sector, in particular, barriers to entry, the European Commission decided to liberalize the sector gradually through the introduction of public services. The liberalization process was undertaken only at the end of the 1980s due to the resistance of the Member States, which wanted to maintain a monopoly on the provision of services in the field of energy.

The first directive that liberalized the electricity sector was Directive 96/92/EC of 1996 concerning common rules for the internal market in electricity (OJ L 027/20, 30.01.1997). Its aim was to introduce the first rules of competition in the sector. It established common rules for the generation, transmission and distribution of electricity and the functioning of the electricity sector, including principles of market access. First, the directive required Member States to designate a system operator who will be responsible for the operation, maintenance and expansion of the network and connections to other networks (Art. 7 of the Directive 96/92/EC). This directive allowed Member States to impose obligations of public service. It provided the following categories of such commitments: security (including security of supply), regularity, quality and price of supplies and environmental protection. The introduction of such obligations also contributed to the development of competition in the sector. This was reflected in the fact that Member States had to specify the obligations to provide these services in a way that was clearly defined, transparent, non-discriminatory and open to scrutiny. The Directive introduced the possibility of disabling some of its provisions relating to the liberalization of the electricity market, which had to restore the rule of competition in the market, to the extent that it was necessary to ensure the provision of public services.

Gradual liberalization of the electricity market in the EU went hand in hand with the liberalization of the natural gas market. Introduced in the late 1990s, directives liberalizing these sectors had, according to the European Commission, become insufficient. For this reason, further introduction of competition rules was planned. By 2001, it was noted in the Communication from the Commission to the European Parliament that public services cover a wide range of aspects relevant to provide users with secure access to high-quality services in the provision of electricity and natural gas. The European Commission indicated that key issues for public services are the transmission, distribution and supply of energy. For this reason, such services should be regarded as public services, and the role of the community competition policy is to ensure the highest standards for these services (Communication from the Commission completing the internal energy market proposal for a directive of the European Parliament and of the Council amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas, COM (2001) 125 final, 13.03.2001, p. 18-20).

Directive 96/92/EC was repealed and replaced by Directive 2003/54/EC of 2003 concerning common rules for the Internal market in electricity (OJ L 176/37, 15.7.2003). The preamble to the Directive stated that Member States should ensure that household customers and small businesses (if they deem it appropriate) have the right to be supplied with electricity of a specified quality at clearly comparable, transparent and reasonable prices. Art. 3 of the Directive stipulated that Member States are obliged to ensure the right to use the universal service. This provision defined this service as the right to be supplied with electricity of a specified quality within a given territory at reasonable prices (These prices should also be easily and clearly comparable and transparent). Universal service was addressed to household customers and, where Member States have so considered, to small businesses (For small businesses, the Directive included such undertakings that employed fewer than 50 people and reached an annual turnover or balance sheet not exceeding EUR 10 million). This Directive was repealed and replaced by Directive 2009/72/EC of 2009 concerning common rules for the internal market in electricity (OJ L 211/55, 14.8.2009) and which broadened the scope of universal service. The most important change was the imposition on distribution companies the obligation to connect customers to their network under terms, conditions and tariffs which are in accordance with the Directive’s provisions. The Directive also strengthened the rights of consumers by imposing on companies the duty to enable the consumption of data, create a single point of contact to provide consumers information about their rights and to create a dispute settlement mechanism.

Similar regulations liberalizing the market and introducing universal services were introduced in the gas sector. The first was Directive 98/30/EC concerning common rules for the internal market in natural gas (OJ L 204/12, 21.07.1998) aimed at the implementation of competition rules necessary for the liberalization of the sector and consequently the creation of the internal market in the natural gas sector. As in the case of the first directive on the electricity market, Directive 98/30/EC enabled Member States to impose on natural gas undertakings security tasks (including security of supply), regularity of supply, quality and price of supplies and environmental protection (Art. 3 of directive 98/30/EC).

Successively, Directive 2003/55/EC concerning common rules for the internal market in natural gas was introduced and repealed Directive 98/30/EC (OJ L 176/57, 15.7.2003). As was noted in the preamble, the direct threat to a fully functioning and competitive internal market was primarily the existing barriers to entry into this market. They are reflected in the restrictions to access to the network, storage, tariff policy, interoperability between systems and the varying degrees of opening the natural gas markets in the Member States. The aim of the Directive was precisely to eliminate such barriers and to create conditions that would enhance free competition and ‘non-discriminatory, transparent and fairly priced (point 7 of Preamble to Directive 2003/55/EC)’ access to the network.

This Directive allowed Member States to impose on undertakings operating in the gas sector obligations for the provision of services relating to security (including security of supply), regularity of supply, quality and price of supplies and environmental protection (including energy efficiency and conservation climate). However, the Directive did not oblige Member States to provide each user with access to natural gas, because this type of fuel can be replaced by another, unlike electricity (Prosser, 2005, p. 194). The most recent Directive 2009/73/EC concerning common rules for the internal market in natural gas, which repealed Directive 2003/55/EC, introduced similar changes in the natural gas sector as Directive 2009/72/EC concerning the energy sector.

Conclusion

Universal services still play an important role in EU law. Universal services differ from the concept of services of general economic Interest in the sense that the European lawmaker decides which of the services can be regarded as universal services. This means that the European lawmaker can decide which of the services should be provided on specified conditions, price and quality to everyone in every Member State. This feature is the most important difference between universal services and services of general economic interest. In case of services of general economic interest, Member States decide which services can be classified in such a category. It is very important that Member States differ from one to another not only in terms of economic development but also in terms of the needs of society. Such diversity means that in Member States different services can be classified as a service of general economic interest. With universal services, there is no place for such diversity. Classification is made by the European legislator, and universal services are equal for all Member States.

Is there still a place for universal services? Even though many sectors in which universal services were present were liberalized, their scope and existence seems unthreatened. Liberalization led to improvement in competition and the elimination of state monopolies, which were responsible for providing different public services. In many cases, because of the market failure, some of these services would not be provided for everyone, which is why European law introduced the concept of universal service. In those circumstances in which providing a certain service would be not profitable for companies, there is still room for the state to guarantee universal services.

It is hard to find any other justification for introducing universal services in different sectors of the economy in EU law. However, many basic services can be classified as universal services. Even in the postal, energy and telecommunications sectors in which such services were introduced, this concept is related with services that are essential for everyone to exist in society. Examples are services such as an energy supply for every household and access to a telephone network. Without such services, it would be hard to exist in society. This is the main factor that is considered in providing universal services.

To sum up, the European lawmaker must decide whether to introduce universal services. If he decides to do so, then all Member States must guarantee that universal services will be provided. Therefore, by requiring the provision of universal services, the European lawmaker can introduce social policy goals.

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FISCAL-MONETARY POLICY INTERACTION. SVAR EVIDENCE FROM A CEE COUNTRY

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Abstract
The mix between monetary and fiscal policy actions are of vital importance on economic outcomes. The present paper integrates monetary and budgetary shock into a Structural Vector Autoregression (SVAR) model of Romanian economy. The policy mix, as well as the impact of the two policies on output gap and inflation is analyzed by means of both contemporaneous and long term identification schemes. The results over the 2000-2014 period, although generally in line with economic theory, provide no clear evidence on the strategic interaction (substituent or complementary instruments) between the monetary and public authorities. However, Granger causality and variance decomposition point to a relatively higher importance of monetary shocks in the economy.

Keywords: SVAR, monetary policy, fiscal policy, identification

Introduction and literature review

In every country, an efficient economic management depends on the understanding of shocks propagating within the economy and the interaction among them. Monetary and fiscal policy shocks interaction arises by multiple channels: monetary policy influences the budgetary one through seigniorage, inflation has effects on real public debt, fiscal discipline can affect monetary authorities' credibility, while fiscal policy and unexpected inflation have impact on employment, a major objective of the policy mix.

Both policies can and should be used for preventing extreme economic fluctuations (Sprinkel, 1963). At the same time, formulating compatible objectives of the two parties, efficient exchange of information and sustainable behavior are essential factors for assuring social welfare.

The scope of the present paper is the empirical analysis of the links intervened between monetary and fiscal policy, with an empirical application for one of the most important Central Eastern European country (Romania).

The literature focused on fiscal-monetary policy mix can be divided in four main streams: i) fiscal theory of the price level, ii) strategic interactions between fiscal and monetary policies, iii) empirical studies and iv) monetary and fiscal mix within an open economy.

Fiscal theory of the price level was developed by Leeper (1991), Sims (1994, 1997, 2001) and Woodford (1994), focusing on non-Ricardian fiscal policy.

The stream of literature related to strategic interactions between fiscal and monetary policies is mainly centered on game theory developed by Nash (during 1950-1953). In this theory, it is reached a type of uncooperative equilibrium, with unfavorable effects on general wellbeing. Dixit and Lambertini (2000) highlight that divergent objectives of the two authorities would lead to inflation and GDP values far from the ones desired.

Empirical literature aims at identifying how the two policies really behave. Mélitz (2000), using data for 19 OECD countries for 1960-1995, show that the two policies tend to move in opposite direction, thus being strategic substituents. Similar conclusions were found by Wyplosz (1999) or von Hagen (2001) for 20 OECD member states during 1973-1989.

In the last wave of studies, the correlation between fiscal and monetary policies in two or more countries is the main interest of studies (Van Aarle, 2003; Sims, 1997; Beetsma and Jensen, 2002). An important area of research is represented by Monetary and Economic Union countries, since Euro Area Member States have their own fiscal authorities, while monetary policy is realized by Central European Bank. The principal pillars of monetary-fiscal game are represented by Maastricht Treaty and Stability and Growth Pact.

Methodological framework for assessing the interactions between monetary and fiscal policies

The present paper analyses the macroeconomic effects of fiscal and monetary policy, as well as their interaction, in case of Romania, through applying a Structural Vector Autoregression (SVAR) model. This is a natural choice, as macroeconomic phenomena are characterized by feedback and reciprocal causality.

Introduced by Sims (1980), SVAR models have been used in analyzing the monetary policy, more specifically in studying the propagation mechanism of real and nominal monetary shocks. Blanchard and Perotti (2002) were the pioneers of introducing the fiscal variables (taxes and public expenses) in SVAR framework, while Favero (2002) showed that a separate estimation of monetary and fiscal policies effects would lead to biased estimators.

These models express a set of observable variables by their own lags and other factors (trend/constant). SVARs have also been used for studying money effect on GDP (Sims and Zha, 2005), demand and supply shocks importance for economic cycle (Blanchard and Quah, 1989) or the link between technologic shocks and worked hours (Gali, 1999). At the same time, these models are flexible, require only a minimum set of restrictions and offer extremely useful instruments: impulse response function (IRF), forecast error variance decomposition (FEVD) and Granger causality – comprehensively reflecting the size of impact and transmission mechanism of macroeconomic and policy shocks. These models isolate the answer of each variable to structural shocks and highlight their transmission in time.

Unrestricted VAR models are centered on investigating the shocks intervened in the analyzed variables. A shock or innovation represents the part of a variable that cannot be explained by its history or by other variables in the system. Thus, the shocks are residual terms in stochastic equation of the system. Starting from the system:

$$X_t = a_0 + a_1 X_{t-1} + a_2 Y_{t-1} + \varepsilon_{1t} \quad (1)$$

$$Y_t = b_0 + b_1 X_{t-1} + b_2 Y_{t-1} + \varepsilon_{2t} \quad (2)$$

ε_{1t} şi ε_{2t} are the innovations intervened at moment t on X and Y, while the other terms in each equation reflect the deterministic part explained by system history. The main objective of VAR analysis is examining the effects of these innovations on interest variable. For the identification of the shocks, the most used solutions are: Choleski decomposition, structural decomposition (Sims-Bernake) and Blanchard-Quah long term restrictions decomposition.

Starting from the following system with n variables:

$$Ax_t = C(L)x_{t-1} + Bv_t \quad (3)$$

where A represents a (nxn) matrix of contemporaneous relations; x_t is a $(nx1)$ vector of macroeconomic variables, $C(L)$ lag matrix; v_t innovations vector and B a (nxn) diagonal (in most cases) matrix. Multiplying by A^{-1}, we get:

$$x_t = A^{-1}C(L)x_{t-1} + u_t \quad (4)$$

where $u_t = A^{-1}Bv_t$ (5)

Equation (3) presents the structural, "real" model of the economy, which cannot be empirically observed. Only some variables in the eq. (4) can be observed, this equation representing the reduced form of the model, in which u_t are liniar combinations of structural shocks v_t, taking into account eq. (5). From here, the problem of identification of structural innovations emerges.

While a monetary shock generally refers to an unexpected movement of interest rate, a fiscal shock can be due to two basic shocks: in fiscal incomes and government expenses. Other fiscal shocks (for example in budgetary deficit) can be considered as linear combination of basic shocks. In case of fiscal policy, one has to take into account the lag between the announcement and implementation of fiscal measures, the announcement itself being able to cause movement of macroeconomic variables, before the effective change in fiscal stance.

Model estimation and results

This paper aims at estimating a SVAR with four variables: GDP (in logs), GDP deflator (in logs), money market 12 months interest rate and budgetary balance (deficit/surplus as percent of GDP) for identification of the influence of monetary and fiscal policies shocks. The model uses quarterly data for Q1/2000:Q2/2014 and was implemented in EViews and JMulti.

We followed the normal steps when dealing with macroeconomic time series: seasonal adjustment (using Tramo/Seats method for correcting outliers and eliminating special effects as "Trading Day", "Easter" etc.) and stationarity testing. Augmented Dickey-Fuller test (Dickey, Fuller, 1979) indicates that the series are not stationary and moreover, these have different integration orders (interest rate, GDP deflator and government deficit are I(1)[1],while GDP is I(2)). For assuring an easier interpretation of the results, I applied Hodrick-Prescott (1980) filter (λ= 1600) as a method for obtaining stationary series: the used series represented the gaps of the initial variables compared to their trend.

The lag length criteria (Akaike, Schwartz and Hannan-Quinn), as well as the limited number of observations, leaded to an one-lag model, for assuring a larger number of degrees of freedom. The stability tests of the model indicated that the estimated system is not explosive, i.e. the shocks' impact on variables diminishes until exhaustion after a certain period of time. Model's stability is verified if all inverse roots of characteristic polynomial of estimated VAR coefficients are inside unit circle (Figure 1[2]).

Normality, homoscedasticity and autocorrelation hypotheses (u_t are assumed to follow a white noise process) were also tested and generally confirmed for the estimated model.

The last stage of the models (identification of structural innovations) is made by imposing at least $\frac{n(n-1)}{2}$ 0 restrictions on matrix A coefficients (eq. 3), where n is the number of variables.

In case of B matrix, I use a diagonal form. I estimate an exactly identified system, imposing $\frac{4*3}{2}$=6 restrictions, reflecting the causality/interdependence among variables, manifested during a quater.

Thus, the structure of contemporaneous relations is described in Table 1: the row variable is influenced, during the quarter, by column variables. The 1 on principal diagonal shows each variables is influenced by itself, the "NA" denote that the influence between variables exists, while the 0 restrictions show the lack of influence.

[1] Meaning that the first difference of the variables is stationary.
[2] All tables and figures refer to Appendix.

The abovementioned restrictions are generated by ordinary theoretical intuition on links between variables within three months:

- The contemporaneous response of fiscal policy variable to an innovation in GDP, inflation rate and interest rate is set to 0, since, in general, more than three months are needed for the Government to approve and implement new measures and for the decision process to pass the legislative body (de Castro Fernández, de Cos, 2006; Krusec, 2003);
- The contemporaneous response of output and inflation to an interest rate shock is 0 (in line with Leeper and Gordon, 1992; Leeper, Sims and Zha, 1996). If the central bank modifies the interest rate, this effect is first transmitted to money market, it influences the commercial banks' reserves and their capacity of granting loans, thus propagating further in the economy. In general, this process takes more than three months. At the same time, on short run, the prices are sticky.
- An inflationary shock (GDP deflator) doesn't influence GDP level within the three months interval.

These restrictions are in line with well-known models (IS curve, Philips curve, Taylor rule etc.).

The next step in the econometric process is testing model's coefficients stability for checking the Lucas (1976) critique (stipulating that econometric estimates are invalidated if these ignore regime changes during the analyzed period). For testing coefficient stability and whether during the period, structural changes have intervened, I applied CUSUM test, who also offers a graphical image. Brown et al. (1975) showed that if the tested indicators exit the critical margins, there is a solid base for doubting the structural stability of the estimated model. At it is shown in Figure 2, the estimated coefficients are stable, conclusion also confirmed by recursive parameters' analysis.

Based on this model, the final results (IRF, FEVD and Granger causality) can be generated.

IRFs display the shocks effects in the system and their trajectory in time. IRF for 12 quarters (3 years) are presented in Figure 3. On the first column, a shock in aggregate demand is analyzed (ε_t^{IS}): the output gap increases, followed by an increase in prices' level, which reaches the maximum level after one period. The aggregate demand increases more than the supply, causing inflation, the situation being one in which "too much money chasing too few things" (Frisch, 1983). In face of inflationary pressures, the central bank reacts by increasing interest rate, this variable thus following Taylor rule (being an increasing function in inflation). Due to the advance in interest rate and inflation, the fiscal deficit increases in the first two periods through interest payment to public debt. As the interest rate increases, inflation, output gap and public deficit reenter the normal trajectory to equilibrium levels.

On the second column, we present a shock in aggregate supply (ε_t^{AS}): once the economy is hit by a supply shock, inflation is increasing, determining the central bank to increase the interest rate (but the results are not statistically significant). This causes, by the multiplier effect, a decline in GDP, which reaches the highest amplitude in the 5th quarter. Counterintuitively, the public deficit is decreasing until the 4th quarter. As a result of restrictive monetary policy, inflation rate and output gap declines, and after the central bank reduces the interest rate, the initial shock impact decreases till exhaustion.

In the third column, we show the responses of macroeconomic and fiscal policy variables to a shock in monetary policy (ε_t^{MP}). As expected, at a positive shock in monetary policy, the output gap declines: investment (a part of GDP) reduces, loans are granted with difficulty, deposits are perceived to be more attractive and thus the aggregate demand diminishes. At the same time, restrictive monetary policy measures lead to inflation decline, evolution also determined by budget deficit contraction. After the objective of price stability is accomplished, the central bank reduces interest rate, stimulating economic activity, recovery of output gap, inflation and deficit to equilibrium levels.

On the last column, the effects of a fiscal shock (ε_t^{FP}) are emphasized: once the fiscal deficit increases, the aggregate demand advances (as the deficit is a part of the demand) and thus the GDP (this result is consistent with the ones obtained Blanchard and Perotti, 2002). The impact on inflation rate and on interest rate is not significant, although one would expect an increase in interest rate.

Taking into account all the results, the evidence on monetary and fiscal policies is mixed: we cannot identify a clear and significant pattern of interaction between the two policies.

For assessing the relative importance of each shock in the effects' hierarchy, we proceed to variance decomposition. Since shocks are unpredictable, any shock determines unanticipated variation (forecast errors) in the variables. Variance decomposition computes the share of this variation due to innovations in each variables.

In one year time, in the case of all analyzed variables, the biggest importance in their evolution is given by their past values: output gap 84 percent, inflation rate 77 percent, interest rate 75 percent and budget deficit 87 percent (Figure 4). After 12 quarters, the importance of monetary shocks increases for all variables, although it maintains below 10 percent. Even though smaller, the influence of fiscal innovation in explaining the variation of the variables also increases during the period.

For an in-depth analysis of the link between variables, I employed Granger (1969) causality test for each pair of variables, the test indicating which variables can be used in forecasting the others. More specific, x_t causes, in a Granger sense z_t , if a forecast for z_t containing information about x_t history is better than a forecast ignoring x_t.

The results indicate that at a threshold of 10 percent (Table 3):

- Output gap influences in Granger sense the interest rate level (test p value: 0.07)
- Interest rate causes in Granger sense the fiscal deficit (p value: 0.01), highlighting the importance of monetary shocks.

The method mentioned above highlights short term effects, but the imposed restrictions could be considered rather rigid, leading to insignificant coefficients from A and B matrix, as well as insignificant IRF.

Identification of structural shocks effects on the system variables can be also effectuated by imposing restrictions on long term, cumulated effects.

Blanchard and Quah (1989), Bayoumi and Eichengreen (1992) and Shapiro and Watson (1988) introduced long term restrictions with a wide variety of applications (economic cycle, money supply shocks etc.). For example, Blanchard and Quah argue that demand shocks have no permanent effect on GDP, unlike supply shocks. Long term restrictions assume that, starting from neutrality condition on long run, one can also draw conclusions about short term dynamics, with the advantage that economic theory offers more information about long-term relationships (Van Aarle, 2003).

In the structural matrix of long term relationship, we start from the long term money neutrality as we set to 0 the answer of output to innovations in aggregate supply, monetary and fiscal policy. Dalsgaard and de Serres (2000) also impose restrictions that nominal shocks should not affect real variables. Long term money neutrality assumes that a permanent, unexpected change in money supply has permanent effects only on nominal variables, not affecting the equilibrium values for real variables. This hypothesis was tested in numerous studies, which proved its applicability (Tawadros, 2007; Bullard, 1999; Coe and Nason, 1999). Long term neutrality of fiscal deficit is supported by Ricardian equivalence, taking into account the economic agents' expectations that a present tax reduction means, in fact, an increase in the future.

Another long term restriction is that inflation doesn't answer on long term to monetary shocks, as Lucas argued that there is no monetary policy that can permanently sustain output (or unemployment rate) above equilibrium levels and cannot control in long term inflation rate.

At the same time, Fischer (1976) underlines that if fiscal policy had significant short term effects, but no long term impact, than it would be the ideal stabilizing tool. Thus, we assumed that fiscal variable in the model doesn't impact on long term monetary variable or price level. Friedman (1972) also states that fiscal policy shocks are surely temporary and most probably small. Nasir et al. (2010) assume an inexistent long term interaction between fiscal deficit and inflation rate, monetarist theory stating that the government cannot influence by itself the inflation rate. Thus, C matrix of long term relations, is defined as in Table 2.

The IRFs for each variable during 48 quarters (Figure 5) have, generally, correct signs and are in line with the results of SVAR with contemporaneous restriction. Of particular importance is the confirmation of long term money neutrality (as the effect of interest rate on GDP neutralizes after 15-20 quarters). On long run, an inflationary shock is followed by a tightening budgetary policy and the fiscal policy contracts as the monetary authority is restrictive.

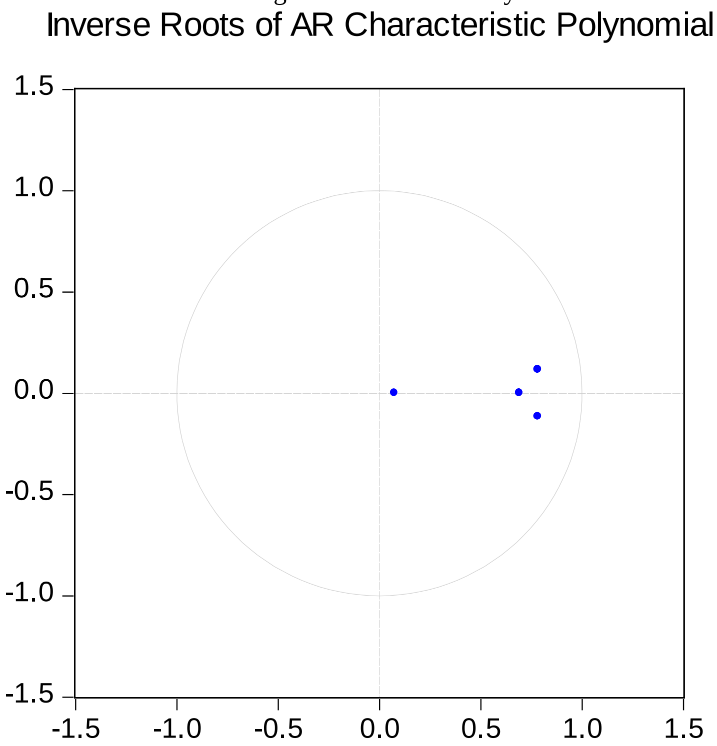
Contrary to economic intuition, it is noticed that once the interest rate is increased, the inflation rate advanced until 12 quarter. This positive relation is however often met in empirical analyses and is known as “price puzzle”, since after a positive shock of interest rate, one would expect price level to decrease (Balke, Emery, 1994). An explanation for this phenomenon is proposed by Sims (1994), who argues that the central bank responds to inflationary pressures by increasing interest rate, but this measure is not enough to prevent inflation from raising. On long term, the response of inflation to a monetary shock is neutral. The effects of a shock in fiscal policy are not in general statistically significant.

Concluding remarks

The monetary and fiscal policies' mechanism of transmission is of high importance within the analysis of macroeconomic policy. This paper used a Structural Vector Autoregression model for assessing the impact of monetary and fiscal authorities' actions in one of the most important CEE country (Romania) during 2000-2014. Beyond policies' innovation, the models identified the effects of structural shocks in demand and supply on output, prices, interest rate and public deficit. There has been found mix evidence on the effects of monetary and fiscal policy. The data didn't clearly show whether the two policies act as strategic substituents or as complementary instruments in achieving the objectives. Although some results are not statistically significant, overall, the models offer convincing explanations related to the economic variables' evolution in the mentioned time frame.

Appendix

Figure 1. Model stability



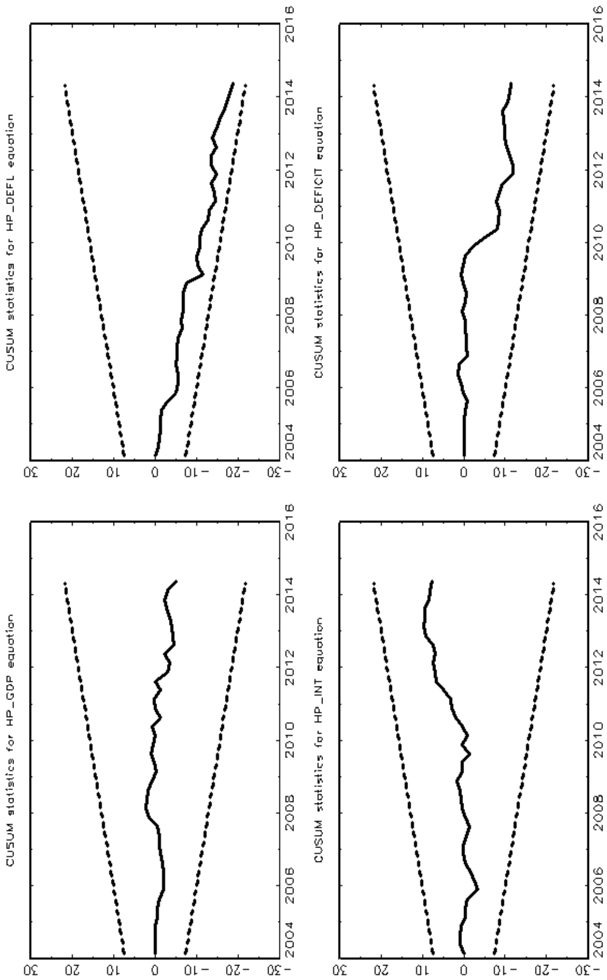


Figure 2.Cusum test

Table 1. Structure of contemporaneous relations matrix

	GDP	GDP deflator	Int. rate	Fiscal deficit
GDP	1	0	0	NA
GDP deflator	NA	1	0	NA
Int. rate	NA	NA	1	NA
Fiscal deficit	0	0	0	1

Table 2. Structure of long term relations matrix

	GDP	GDP deflator	Int. rate	Fiscal deficit
GDP	NA	0	0	0
GDP deflator	NA	NA	0	0
Int. rate	NA	NA	NA	0
Fiscal deficit	NA	NA	NA	NA

Figure 3. Impulse response functions. SVAR with contemporaneous restrictions

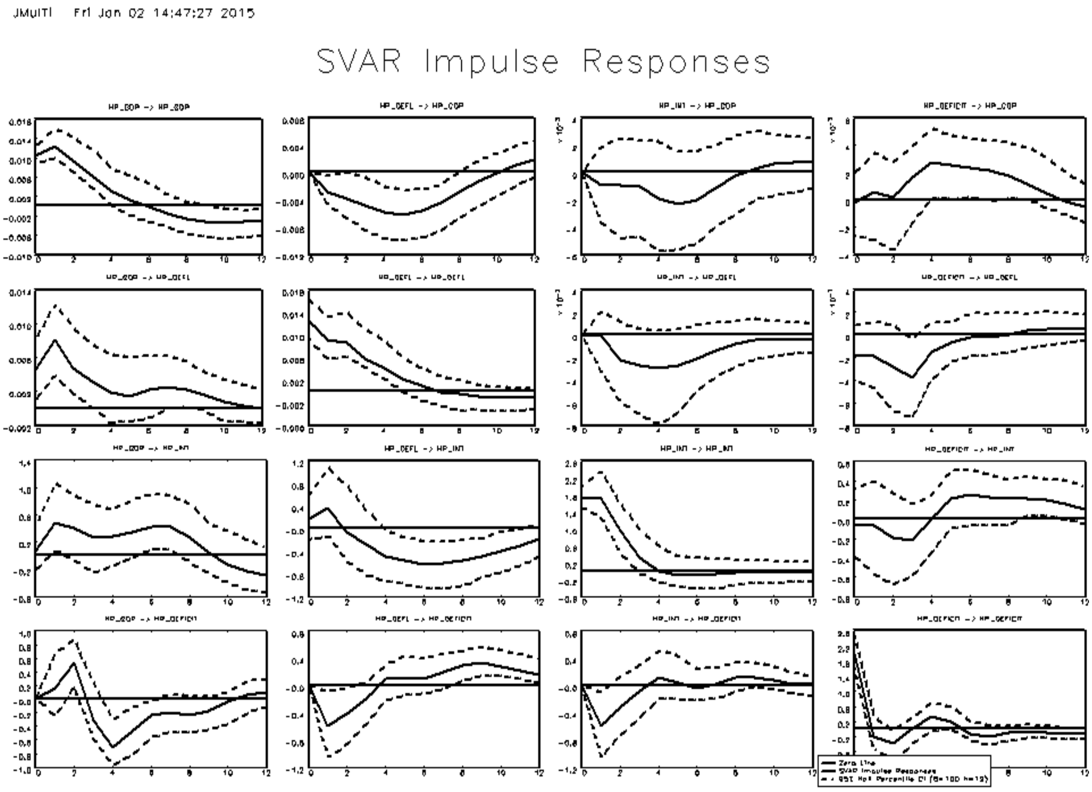


Figure 4. Variance decomposition. SVAR with contemporaneous restrictions

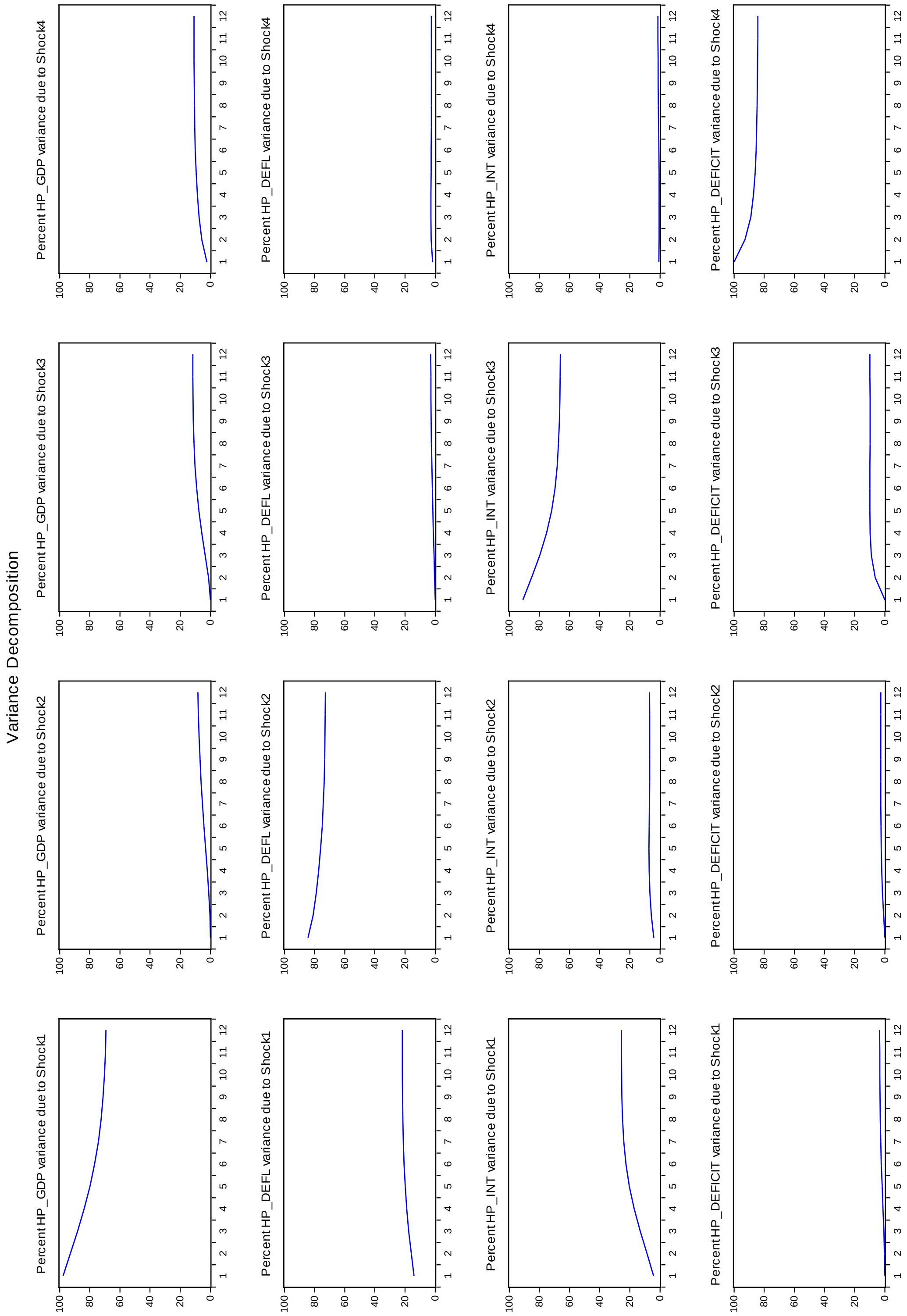
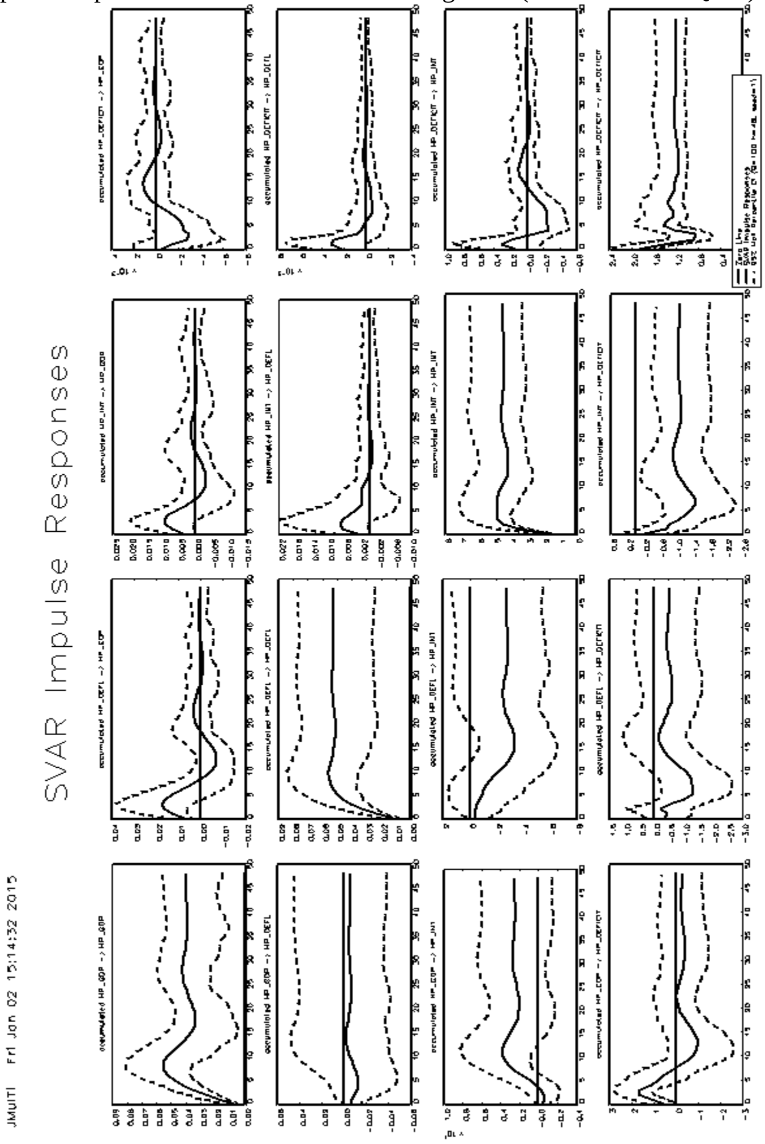


Table 3. Granger causality test

VAR Granger Causality/Block Exogeneity Wald Tests
Date: 01/02/15 Time: 10:35
Sample: 2000Q1 2014Q2
Included observations: 57

Excluded	Chi-sq	df	Prob.
Dependent variable: HP_GDP			
HP_DEFL	0.479351	1	0.4887
HP_INT	2.353398	1	0.1250
HP_DEFICIT	0.906629	1	0.3410
All	5.537494	3	0.1364
Dependent variable: HP_DEFL			
HP_GDP	1.061806	1	0.3028
HP_INT	0.704784	1	0.4012
HP_DEFICIT	0.409794	1	0.5221
All	1.375780	3	0.7112
Dependent variable: HP_INT			
HP_GDP	**3.262991**	**1**	**0.0709**
HP_DEFL	2.040443	1	0.1532
HP_DEFICIT	0.001642	1	0.9677
All	5.533278	3	0.1367
Dependent variable: HP_DEFICIT			
HP_GDP	0.178308	1	0.6728
HP_DEFL	0.427567	1	0.5132
HP_INT	**7.665657**	**1**	**0.0056**
All	8.517851	3	0.0364

Figure 5. Impulse response functions. SVAR with long-term (Blanchard and Quah) restrictions



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CYBERTERRORISM - WHEN TECHNOLOGY BECAME A WEAPON

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Abstract

Everyone is well aware that the technological revolution of the 21st century is considered to be the time when the highest level was reached by the magnitude of computerization. If we look at the process of computerization, we can have the feeling that soon there will be no need for the phenomenon of human society, "everyone" and "would" be replaced by a computer. It is impossible not to note the positive changes that computerization has brought to mankind. Nowadays, e-mail can do it in one big case that a group of people spent months. It can be said that "streamlined" Modern Human Life. Every day a person can take an unlimited amount of information through a computer which makes it a much more rational and progressive thinking makes. Entering a useful discussion of the results will take us far; the author has set a goal to review the work of the negative aspects of the phenomenon of cyberspace. At the present stage of human development, when properly prepared, include the creation of a virtual network to create a global base, the human consciousness of the real world to the virtual society. And a broad range of the protected person “solves" the virtual world, as well as by the nature of the crime and the transfer of real transformation from the virtual world, where the offender and the offense has faced more solid leverage to protect oneself. Noone disputes the matter, the present reality is so increased offender "knowledge" that is difficult to fight against crime, the virtual world, around the processes being developed so rapidly that the virtual world of the crime committed against one of the two is difficult. In this study, the author aims to review the virtual cyber crime is one of the most severe form (phenomenon) – cyber terrorism, which in many cases involves a much wider range of recipients, and in many cases the effect is much more "devastating" than the force of an ordinary computer crime. Due to increased danger of cyber terrorism has long been a subject of debate has become the leading national governments.

Keywords: Cyberterrorism, Terrorism, Cyberattack, Computer Attack, Cybersecurity

Introduction

Modern reality, the more time goes by entrepreneurship, industry and governments work becomes more and more confined to information technology, all of it in the hands of the criminal activities of the terrorist groups makes it easier. If the street stops any person who has had access to the Internet at least once and wonder how they imagine a world without the Internet? In almost all cases we will have some kind of answer. As time goes by, more and more people "get involved" in the name of good news in the virtual world of the Internet. You will do well to try to analyze the terrorist groups and their attachment to the benefit of the people in the virtual world.

Cyber terrorism is on the computer, network and information on the attack or threat of attack, the state or its people are scared politically, socially, religiously or ideologically. The scale of the Internet made it clear that cyberspace is used by individuals and groups as well as international governments and citizens fear scare. Cyber terrorism is a kind of crime which is directed against the state.

In today's reality of e-business in the financial capital of no less than the actual business relations spin. In many cases the traditional business relationships are based on at least an electronic communications. We can also say that as time goes, business and technology become the closer to each other what leads to the modern form of e-commerce. Every day millions of people in the modern world of global spatial barriers of prejudice are given the opportunity to buy and sell: capital and values. By observing e-business scientists came to the conclusion that if one day the world is about to exit the Internet, 10.5 billion worth of transaction will hamper. This follows from the fact that e-business is mainly performed by Internet, e-mail, voice communication, banking machines, credit cards and other authorization. Entrepreneurship is a driving force and it can be said that the information at the same time is a social status. Information or access increased to such an extent that it became unmeasured. With the increase in e-infrastructure, there is the growing threat of its destruction, one of the factors in the value of the damage caused by the virtual network, and the second as a result of physical damage inflicted psychological harm which carries far more serious and difficult to be forgotten - as a rule.

As time goes on, it becomes more difficult to grow and develop into a phenomenon of crime in cyberspace; cyber security professionals clearly expressed their concern about the increase in attacks against not only the Internet, but these attacks increased awareness regarding the timestamp. With the increase in the complexity of attacks globally, the level of mastery decreased. This is quite a shocking figure. Terrorists learn their attack; they learn what works and what does not, how we respond to them and what types of methods we use for the detection of attacks which increases their chances of success in doing so, they will receive knowledge.

So rapidly unfolding events in the fight against crime in cyberspace that is conventionally found in the method of tomorrow "obsolete" may also exist. This will require the full mobilization of law enforcement.

There is one problem how they manage law enforcement to follow in cyber crime phenomenon of variation, and the second issue of the regulation of the level of Justice will be able to keep pace with cyber crime phenomenon volatility trends; things may be blocking the judiciary which had a place even in the legal system; in practice it is expressed in the following way: There is action, but so altered his "criminal grounds" that in fact it is impossible to regulate the action of the legislative implementation.

One of the main factors which affects the phenomenon of crime in cyberspace is the easiest time. The difficulty lies in the fact that it is impossible to reach the virtual world of illegal behavior rinsing prediction. Society has fear, cyber security specialists during the development of methods of combating crime talk about when it would be the best time in the world for electronic attack on the network infrastructure. They give you all the possible crime forecast methods. If we look from the perspective of the subjects of a criminal offense cyberterorism is the best time; example - the war, elections, inauguration, revolution or other large-scale resonant phenomenon, which has far-reaching and devastating effect on cyberterrorism. A clear example has experienced firsthand the threat from Russia in 2008. Russia was active cyber attacks to create a vacuum of information society that usually comes as a result of the introduction of fear. The event coincided with the actions of the Russian side of cyberterrorism and cybersabotage stereotypes.

Modernity of cyberterrorism is a great popular phenomenon in the society. Unlimited possibilities of the computer are free to control the masses of society; moreover - in today's world, in many cases more devastating effect on the keyboard and properly to the agitation of the carrier, than grenade in terrorist’s hand. For the first time the term cyberterrorism was used in 1980 by American Barry Collin (Collin, 1997). Cyberspace and the definition of terrorism in the context of the safeguarded and the first definition of the concept of cyberterrorism were made by the FBI agent Mark M Pollitt. He said the secret agents or sub-national cyber terrorism is intentional, politically motivated violence against a target which is reflected in the information, computer systems, programs and data bases and in their distraction. US expert Dorothy Denning's cyberterrorism is one of the leading explanations of cyberspace and cyber terrorism mixture which consists of politically motivated hackers operations aiming at devastating effect.

In practice, it is easy to confuse the notions cyberterrorism and computer crimes; moreover, American experts also say that if all the threats of attacks against the United States through cyberspace represent a simple computer crime and the threat against the United States have not been done, it could get into the definition of the scope of cyberterrorism. It all takes place in the September 11 terrorist attacks in the background through which the scrapers of explosion, explosion-mails are more people in the society introduced by terrorists.

The main distinguishing factor between a simple computer crime and cyber crime is committed target. Although computer crime, like information technologies during the commission of the crime of cyberterrorism, or arming means, but if such a crime organization and implementation of public safety violations, spreading fear among the society or by the government in order to influence decision-making, we are faced with the composition of cyberterrorism.

Professor Lawrence V. Brown conducted interesting studies and computer comparison of cyberterrorism. He explained cyber territorial group or an individual's use of information technology and the future plans of agitation. It may involve the use of information technology: network, computer system or television infrastructure for the purpose of the attack as well as the electronic exchange of information or ideas for the broad masses to the idea. Increased due to the danger of cyber terrorism has been highlighted by various Government attentions. Many facts have prompted the government to consider the recently implemented cyberterrorism detailed legislative regulation and control of the new mechanism. I want to give the latest issues in relation to cyberterrorism illustrate an example of Georgian practice; it was as if the Islamist group's jihad against their spread fake videos. So far, the investigation into the allegations has not been completed but the fact is that the video distributor is designed to install fear in the society that the Georgian units from the NATO - led peacekeeping mission. We can say that this fully meets the terms of the notion of cyberterrorism.

Review of the highlights of cyberterrorism specialists achieved outcome scales. The computer attacks which can lead to the destruction, deaths, massive power outages, aircraft disaster, massive water pollution, loss of confidence in the overall economy of the sector can also be qualified as cyberterrorism.

Cyberterrorism and computer crimes are common phenomenon in both risk groups important to be observed in practice. The effective use of the Internet can be seen as a clear example of the negative purposes "hizballah" action which has carried out a psychological attack against the Jewish people. In particular, this organization through the Internet in the summer of 2006, Israel’s anti-terrorist campaign in Lebanon, the Jewish soldiers who died in the photos released. As a result, Israeli citizens demanded from their government to stop the anti-terrorist operation. Similar was attempt by the US anti-terrorist operations in Iraq, but in this case there was such a great impact on the September 11 tragedy in the US population, currently threatening messages that terrorists could not have been realized fully addicted.

Due to the danger of increased concern of the world in the fight against cyber terrorism, NATO Prague Summit in 2002, leaders of the member states have recognized the significant threat of cyber terrorism and considered it necessary to create a "NATO cyber defense program", which consisted of three phases of the Programme of Action - During the first phase "of the NATO Computer Incident Response capacity" (NCIRC), which is the second phase into full working mode. As for the third phase, it covers the first two phases of the experience gained during the practice and the fight against terrorism as well as cyberterrorism modern means of defense.

NATO's important role in the fight against cyber terrorism is "the NATO Communications and Information Systems Services Agency", which is "the NATO Defense Technical Information Center" (NITC). It has duty to protect NATO’s wide communication and information systems from cyber attacks. NITC - holds "NATO defense operations center of information" and "NATO Computer Incident Response Center technical capacity" which allows the organization to provide a high level of cyber defense. On June 14, 2007, a massive cyber attack on Estonia was carried out. The NATO member state's defense ministers agreed that a more active fight against cyber terrorism was required.

Cyber-terrorism, defense activities and events controlled by the North Atlantic Council also shared responsibility, "the NATO Consultation, Command and Control Agency" (NC3A) and "NATO military authorities" (NMA).

Today, the most successful country in the fight against cyber terrorism can be seen as Estonia, which is located in the center of cyber defense - the Cooperative Cyber Defence Centre of Excellence (CCD COE). It was founded on May 14 2008, in order to enhance NATO's cyber defense capabilities.

In this section I would like the reader to focus on Georgia and Georgian legislation with current trends in crime in the legislation of cyberterrorism. As I have mentioned above, cyberterrorism attacks have been repeatedly exposed to the epicenter of Georgia, according to those in the country as well as all of the concerns raised in the Government of our country's resources to improve cyber security. Cyber security plan developed several years’ figures, as for the action of the legislative regulation: December 28, 2002 has been included in the Article 324(1) of the Criminal Code -"Cyberterrorism" title, placed under the Criminal Code Chapter XXXVIII, which deals with terrorism and the door to the XI - "crimes against the state". Cyberterrorism is severely punishable under the Criminal Code, namely, computer information protected by law and unlawful appropriation, use or threat of use, which creates a risk of serious consequences, committed to intimidate the population and /or authority in order to influence is punishable by imprisonment of ten to fifteen years. The same action that led to the loss of human life or other grave consequences is punishable by imprisonment for a term of twelve to twenty years or a lifetime. According to this Article, the legal person of a crime is punished by a fine, deprivation of the activity right or liquidation.

Regulatory and legislative steps taken towards encouraging only cyberterrorism are regarded as a positive development. It is reasonable to draw the reader's attention from the authorities of the new international standards of the University of Technology and Research Center for the meetings of the government level. All of the above is encouraging the Georgian society that our country will be able to confront the challenge of technology and a good answer which can be expressed against the global threat of cases - such as cyber terrorism.

Conclusion

As time goes by, the more complex and multi-point cyberterrorism phenomenon takes the form of crime. We can say that the future of cyber terrorism is the real face of the broad masses and the virtual conflict between terrorist groups. For a long time, the technology has already lost its harmless virtual mask function and become an instrument to commit the crime.

In order to avoid the confusion of a cybercrime and cyberterrorism, I would like readers to pay attention to the modern period expressed by the arbitrary acts of cyber criminals who are more or less contained cyberterrorism/or elements of the phenomenon of cyber crime :

- ✓ Yugoslavia - US (NATO) military operations during the summer of 1999, NATO computer network was blocked in Italy, as well as for political reasons, NATO headquarters and the US Defense Ministry portals of entry into the apartments;
- ✓ Russian Federation - Chechnya since 1999 was carried out systematic attacks on Russian portals. Only one week in May 2000, there were 140 attacks on the portal of the "Caucasus";
- ✓ Armenia-Azerbaijan in February 2000 Armenian hackers groups Liazor (authorized), Apache Group, Russian Apache Team carried out a computer attack to the Azerbaijan governmental organizations and to the 20 mass website through the Internet. These actions are carried out in Armenia, Russia and the US territory. Los Angeles police detained three members of the group;
- ✓ Afghanistan - US GForce Pakistan infiltrated the group in November 2001 the US administration server and placed threats against the US and UK armed forces and demanded to cease hostilities in Afghanistan and the withdrawal of troops from Saudi Arabia;
- ✓ 2000 - 2002 (during exacerbation of the Palestinian problem) were 548 computer attacks on «il» (Israel) domain zone, In Israel it has repeatedly violated Parliament and Defense Ministry servers working;
- ✓ Russia - Georgia 2008, hired by the Russian government and the Russian citizens' programmers group of coordinated action at the expense of important disabling Georgian Web page. Among them: the President, the Ministry of Defense, the National Bank and other important information on web pages. Web pages were turned off, on some of the pages there was a deliberate change of information and disinformation determined to panic society. The influential American newspaper "New York Times" Russian aggression against Georgia was estimated as "the first fact in history, when the armed conflict between the two countries was preceded by intense cyber training;"
- ✓ Russia - Ukraine 2014-2015 from the cyber-terrorist propaganda on a daily basis, in particular television, and the Internet is going to spread the heavy staff, also received threatening calls from the separatist distribute the Ukrainian Armed Forces. All of this is part of the information war against Russia to Ukraine.

Computer crime

- ✓ 2001 - the US , UK, Australia portals neutralization was followed by destruction of some web sites of China, Kuwait, Romania, Georgia and Vietnam (accomplished by the group Pentaguard);
- ✓ 2002 May - it was carried out access to the US Space Intelligence Center network and the confidential information (by a British hacker individually);
- ✓ 2002 June - it was carried out access to the US Strategic Research Centre and to the confidential information (by Austrian hacker individually).

Finally, it can be said that cyber crime, terrorism has emerged as a result of the transformation of the real world to the virtual cyberspace; this type of cybercrime develops and transforms day after day. In the future that could turn into cyber terrorists' effective weapon is the Web wars.

Thus, the fight against cyberterrorism concerns the society in general, methods of combating cyberterrorism gradually improves. I hope that the 21st century rational minded people finally will come to the conclusion that violence is not the only way to resolve the conflict!

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CELEBRITY ENDORSEMENT AS ONE OF NOWADYAS MAJOR WAYS TO INFLUENCE CONSUMER BUYING BEHAVIOUR

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Abstract

Celebrity endorsement as a powerful advertising instrument has nowadays became a measurable element of a marketing campaign. Companies nowadays tend to spend huge amounts on this type of advertising even despite all the involved risks with a strong believe that used celebrities will add a value to the promoted brands and will eventually influence consumers to make a purchase.

The study explains how an average consumer is influenced by an advertisement which features a celebrity and also how companies manage to create beneficial associations among the promoted brands, the celebrity endorsee and a consumer by that, directing consumers in their buying decisions. The main factors which influence consumer buying behaviour are also presented in this work. The study also aims to evaluate the possible influences of celebrity endorsement on consumer buying behaviour. The initial question of the possible influences is viewed from the positive and negative aspects. First the effectiveness and positive side is presented which follows by the negative side of celebrity endorsement.

Keywords: Celebrity endorsement, consumer behaviour, advertising

Introduction

Celebrity endorsement is a type of a brand promotion where a famous person is used in the marketing campaign to advertise the product or service by using his or her fame and place in society (Keller, K. L. 2012). Most commonly the companies which use this type of promotion are the fashion and perfumes manufacturers (Mentix, A. 2010). The nowadays high-profile endorsement's undivided and actively growing part is the social media advertising (Halonen-Knight, E. L. 2010). The social platforms such as Twitter and Facebook are the most popular and influential endorsement brands which measurably influence consumers buying behaviours. Bloomberg claims 'the average expenditure of the social-media-ad is going to increase from $4.8 billion as it was at the end of 2012 to $9.8 billion by 2016 (Adam Minter 2013). In order to influence an average citizen celebrity endorsement is also used by politics. For example during the pre-election campaign 2012 of USA the main candidates used number of celebrity-followers to support their campaign (CNN 2012).

The globally recognized influence of a celebrity endorsement on consumers' behaviour is so high that on August 1, 2007 laws (China 2007) announced the banning on healthcare professionals and public figures to take part in advertisements. So the obvious influences of celebrity endorsement on consumers is proven over time the core issue here however remains the evaluation of the exact ways of these influences and the response of the consumers to them what this study aims to discuss.

Research Questions

The main three questions on which the study is concentrated at are:

- What exactly makes consumers be sensitive to celebrity endorsements?
- What are the key aspects of a positive and successful celebrity endorsement?
- What are the possible negative ways of the influence of celebrity endorsements?

Research Methodology

For the primary data collection qualitative method was chosen to be used as the important aspect of the study was the subjective observation of average consumers and their opinions towards the topic. So the factual presentation of the received results was not a priority while analysing the interview questions answers.

Interviewees					
Location	***Num.***	***Age***	***Num.***	***Occupations***	***Num.***
UK	15	**16 to 25**	13	**Students**	16
Armenia	5	**26 to 35**	8	**Full time/ Part time employees**	12
Italy	4	**36 to 45**	6	**Housewives**	4
Spain	3	**46 to 55**	4	**Unemployed**	2
USA	3	**56 to 65**	3	**Retired**	1
Russia	3	**66 and over**	1		
India	1				
Germany	1			***Overall Participants: 35***	

One of the methods of gathering reliable primary data is direct interviews (Clayman, M. 2013) so 35 cross sectional survey were conducted to carry out the research. Particularly for this study it includes revealing the individual opinions and preferences about celebrity endorsement among all the participants also going into details about the participants' feelings towards the topic, get specific examples and observe their reactions about celebrities used to promote brands. Besides as the direct interviews have the advantage of getting accurately detailed and truthful presentation about the topic from the reliable source the major part of the interview questions were open-ended including many 'WHY's and 'HOW's which drifts the research of seeking only factual and objective information. Careful information on the interviewees' profiles can be found in the table below.

Limitations

The type of interviews which was selected for the primary data collection allows including large amount of people to participate in them while only 35 people were actually interviewed. Meanwhile during the interviews some more limitations in form of the communication were faced. *First:* some of the interviews were held virtually via Skype which could not guarantee perfect conditions for the interviews with no disruptions and confusions. *Second:* Each of the interviews took a very short period (in average 15 minutes) so the participants' answers' interpretations could face unvoiced bias.

The Rationale of the Study

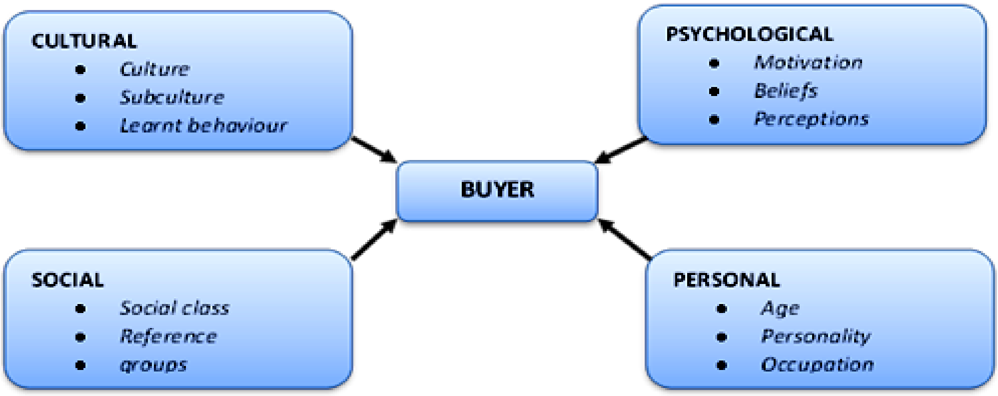
In general this work includes a view into consumer behaviour and the affecting main factors as well as the origins and basics of celebrity endorsement and its directions to influence consumers' decisions of buying the promoted products. The study is quite informative and will definitely be a useful addition to the currently existing literature on the topic.

Literature Review

Consumer Buying Behaviour

Consumer behaviour is a study of people's buying preferences and motivations for purchase (Simon, H. A. 2005). Based on list of social and psychological factors it attempts to reveal and define an average consumer's purchase decisions (Simonson, I. 2004). It is important to take into account each buyer's personal circumstances, cultural differences, demographics, and social conditions (Lancaster, G. 2001)

Cultural factors explain a learned behaviour which is reinforced in our personalities according to our life-style and beliefs (Geoff Lancaster 2001). *Social factors* include the social class, reference groups, individual buying behaviour etc. There is also a group of factors which includes *personal preferences and characteristics*. Here is important to examine the consumers' age, occupation, taste, interests etc. The last group of factors is psychological which includes consumers' motivation, beliefs and perceptions (Geoff Lancaster 2001). The generalized collection of all the factors is presented in the figure below.



Factors Influencing Consumer Buying Behaviour
Source: Geoff Lancaster (2001)

Celebrity Endorsement

According to McCracken's (1989) definition of a celebrity: it is anyone who has the recognition of publicity and who uses that his or her status in society to influence them on behalf of any sponsoring product. Another definition by Friedman and Friedman (1979) claims that a celebrity is a person with a global fame and who can be an entertainer, sportsperson etc.

The Effectiveness of Celebrity Endorsement

The recognition of the product is a priority while making a decision of a purchase by the consumers (Swait, T. E. 2004). As each consumer has a personal brand preference the most popular and prestigious products are intended to be purchased by taking into account affordability and consumer social conditions (Keller, K. L. 2012).

As a rule celebrity endorsement is mostly used in campaigns of the companies which also:

- Are prestigious and have high value
- Have large potential customer ranges
- Have diversity and flexibility of the consumers (Friedman and Friedman 1990).

So in general companies pay celebrities to use them in their products promotion however in deeper level the endorsers may be the *brand face or ambassador* (Kevin Lane Keller 2012). Brand face is a celebrity who is used to increase awareness and attract attention to the product. Usually this is a short-term contract during which the celebrity only appears in commercials, posters etc. While a brand ambassador is the one who joins the brand and becomes its representative. This goes far behind just being the spokesperson or appearing in the advertisements (a form of a non-personal promotion of goods or services by a sponsor company (Kevin Lane Keller 2012). These are long term contracts where the celebrities are selected to create and maintain the brand image by adding to it the unique personality or main activity features of the particular celebrity (Keller 2012). Celebrity endorsement is considered to be this effective as in the most of the cases it:

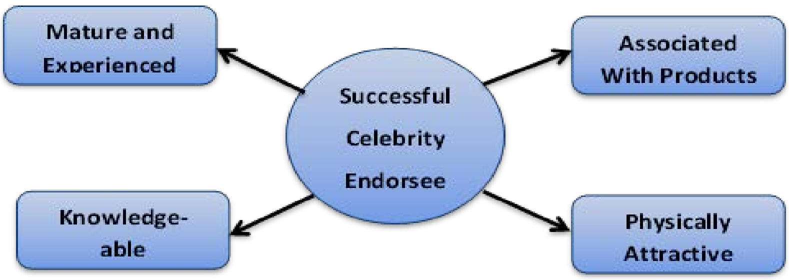
- Creates continuous awareness and information about the brand.
- Adds a real value to the brand name.
- Unique characteristics and dimensions of the celebrity becomes a part of the brand.
- Brings trust and confidence to the brand (Kevin Lane Keller 2012).

After a positive association is created companies move to the next stage where the main objective becomes building a brand loyalty and increasing current sales levels (Halonen-Knight, E. L. (2010). However the choice of a celebrity endorsee is critical here. The companies must insure that using a particular celebrity will lead to *positive feelings and bright image* to the brand among the consumers (McCracken's 1989). Also in order to deliver the basic message to the audience the *personal attractiveness, appearance and similarity* to the receiver with the celebrity need to be considered (David H. Silvera, 2004). Another aspect is creation of a *perfect match* between the personality of a celebrity endorsee and the basic brand image (Montgomery, 2005). Ideally a quality brand campaign should provide a harmonic link among the celebrity, the actual message and the brand image (Katyal, S. 2012).

Successful Celebrity Endorsement

According to Friedman and Friedman (1979), a famous spokesperson is very effective and influential as he usually represents good taste, prestige and self-image. However many research studies firstly examine the *common ideologies and emotional relationships* between brands and the celebrity endorsee to reveal the effectiveness of this type of promotion (Ashley lye, W. s. 2005). One more basic essential of a successful celebrity endorsement is the *physical attractiveness* of the spokesperson as it attracts more positive attention and pleasant impressions about the brand (Ghoshal, L. G. 2005).

According to the primary data collected during this study the spokesperson has also to be *knowledgeable, mature* and *experienced* in order to be effective as after watching an ad consumers usually try to find the actual meaning of it and read the basic message.



The Main Characteristics of a Successful Celebrity Endorsee (primary research)

In order to understand how the advertisement meaning associates with the brand name, famous persons' moves and how the consumer reacts to the McCracken's (1989) three stage Meaning Transfer Model. According to this model the meaning leads the celebrity to be associated to the brand in the consumers' mind and then at the final stage of importance of consumers is showed in brand endorsement progress.

Celebrity Endorsement Failures

Unlike general and non-famous endorsers celebrities add value and brand image to the products according to their personality and cycle of activities (Montgomery, 2005). However to make the most of effectiveness from celebrity endorsements companies should make a careful choice on a particular celebrity to ensure that he or she will produce the most preferable and positive responses from the targeted consumers and will have the appropriate characteristics to be associated and compared with the actual brand (Ashley lye, W. s. 2005). So marketers, while using celebrities in their promotion campaigns, should always remember that they are just humans like everyone else so if they can add a value to a brand and make a magical influence on consumers they can also have negative impacts because of personal issues and behaviour (Mentix, A. 2010). There also is an aspect such as overshadowing brands (Sheu, J.-B. 2010). This usually happens when a very famous person advertises multiple products simultaneously. In this case there is a major risk that consumers may focus mainly on the celebrity without paying much attention on the actual promoted brand (Grace Phang, E. C. 2012).

Because of the current constantly growing power of nowadays media it has become easier for celebrities to have an impact on consumers' personal decisions and the companies' marketing strategies according to Samman, McAuliffe and MacLachlan (2009) includes information collection in short period of time to create awareness. So in fact celebrities have a control over consumers' willingness to buy a product as everyone wants to be like them and use the same products (Campbell, M. C. 2012). However this fact can be identified as a manipulation strategy by companies which take advantage of the consumers' special fanatic feelings towards particular celebrities intending to increase sales (Sheu, J.-B. 2010). Teenagers as one of the easiest influenced groups of consumers are extremely sensitive to the celebrity endorsements. As they desire to follow and become like their idols they tend to buy almost everything their favourite celebrities would advertise (Milton Friedman, R. D. 1990).

Data Analysis and Findings

Celebrities used in the promotion campaigns therefore are one of the most effective ways to present a product or a brand by adding a special value and importance to it. However the choice of a suitable and professionally right celebrity for a particular product is the main issue for companies. In order to create a perfect match between the celebrity and the promoted brand and to eventually provide positive and beneficial associations towards the product a deep research and a careful analysis is needed. As long as the product is known and prestigious among the others in the market it is most likely to be purchased.

The Positive Influences of Celebrity Endorsements

The first step to explain the ways of influences of celebrity endorsement is the examination of the positive side and the effectiveness of it. And as it was concluded:

● The traditional ads featuring a famous person have been constantly evolving during the time especially during the last two decades due to the affordable and easy accessible wide usage of internet and social platforms. And in case the advertisement featuring a celebrity meets the basic requirements of a successful endorsement this method of promotion may lead to enormous increase in sales.

● Along with adding a value to the promoted product celebrity endorsements also make the brands trusted among the consumers as they start to think of the product as one with a high quality and even somewhat valuable without even a thought of checking the information. Their trust and appreciation to the celebrity which endorses the product automatically transfers to the promoted product itself which is very beneficial for companies. In many cases consumers buy or intend to buy the products promoted by their favourite celebrity even if they do not have an actual need of the particular item. They feel comfortable and positive while purchasing prestigious and quality products.

What Negative Influences Celebrity Endorsement May Have?

If celebrities can add the prestige and a value to the product they can also have negative influence by inappropriate actions, personal issues or incomplete and wrong brand match. So many of them eventually fail and in most cases the main reasons are:

● The celebrities' personal issues and lifestyle. Celebrities' inappropriate public behaviour and professionally ethical mistakes during a promotional contract with companies may have an immediate negative effect on the product name.

● The risk of overshadowing the promoted brands. The celebrities who are used to advertise the products may be much more famous and brighter in consumers' point of views and visions than the products themselves. So the whole project may fail because of the consumers' main concentration on the celebrity endorsees' rather than the advertised brands.

● The manipulative side of this type of promotion. Though this fact is quite beneficial for companies as the final intention of their marketing strategies is the high amount of sales many consumers find this method unfair and manipulation towards consumers which may lead to complications and sometimes even a boycott.

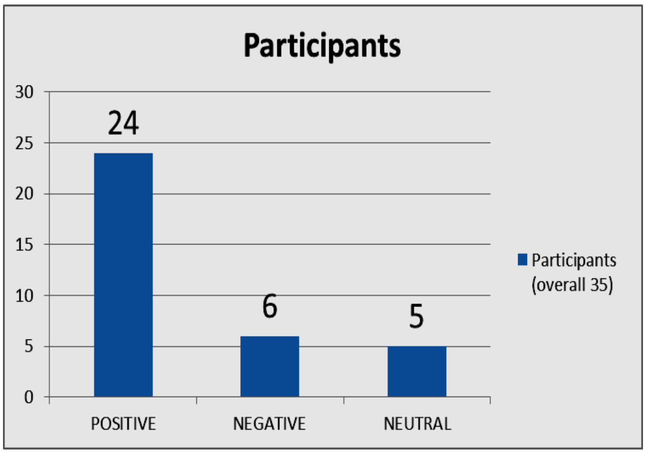
Primary Data Analysis

As a result of analysing the conducted 35 direct interviews the conclusions and findings were decided to be displayed in *three* basic directions.

● The first group of answers is the absolute majority - 24 out of 35 participant where overall impressions, feelings and preferences about the topic were the same. In general all 24 participants seemed to feel absolutely positive about the celebrity endorsement claiming that the message and the quality of an ad supposed to be higher than the others. What was also common for the majority of the representatives of this group is that almost none of them claimed that they can remember an ad with a celebrity which they had deeply disliked.

● The second group includes 6 people out of the overall 35 participants who shared the similar opinions of comparably negative impression about the celebrity endorsement. Some of the interviewees explained their position generally stating that these types of advertisements are too influential and somehow even manipulative.

● The third group includes only 5 people which had more or less neutral opinions about the celebrity endorsements. Generally they were people who were not attached to nowadays media and new technologies. 2 of these 5 people were over 50 one of which was already retired. Basically they did not see much difference between the different types of advertisements and were not even familiar with many of the currently active and popular celebrities.



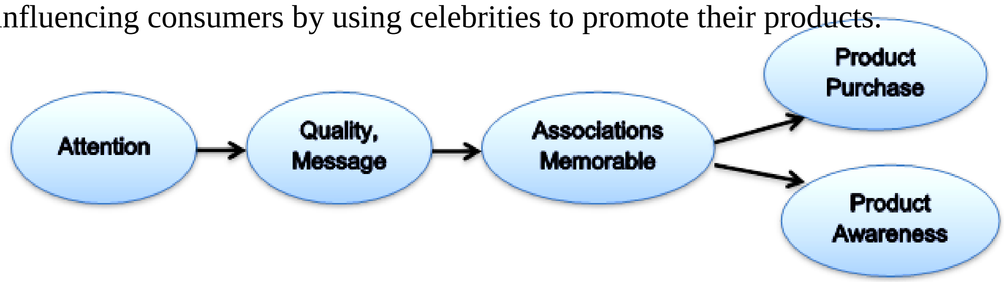
Three main groups of interview participants

Why Are Consumers Sensitive to Celebrity Endorsements?

One of the major questions which rose during the study was the actual reasons of consumers being highly sensitive to celebrity endorsements. As a conclusion the main reason might be the consumers' desire to feel as prestigious and famous as their idols. Teenagers however are the easiest targets for companies which use celebrity endorsements. They are very sensitive and easily influenced as it is typical for them to create idols and follow them in everything.

The majority of the consumers initially like not the promoted product but the celebrity endorsee. Current marketing professionals work hard on the image and appearance of the celebrities in their ads so they always look perfect and inspiring which attracts consumer's attention at the first place. So the initial attractiveness of an ad leads people to pay attention on the message of it which is also usually very meaningful and carefully chosen by the company professionals. As the primary research showed the attractive and appealing ads featuring celebrities are also highly memorable so the promoted product stays in peoples' memories and have associations even long after the endorsement contracts are expired.

The described concept was developed after analyzing the results of the interviews. The following table presents the basic four steps of the companies' strategic path of influencing consumers by using celebrities to promote their products.



Celebrity Endorsement: Two Successful Ways of Influences

So the specific effectiveness of the celebrity endorsement initially provides appealing and attractive advertisements which grab people's attention. And as they usually are with high quality and creative the message is successfully delivered to consumers therefore they become memorable and a part of the actual promoted product which eventually leads or to the purchasing the product or at least provide awareness among potential consumers which is not less important for the companies desiring attract attention and create positive and appealing brand image.

Conclusion

As it was concluded from the presented literature review and the primary research results the positive side of the celebrity endorsements overweight as looked at the effectiveness of it. The main advantages of these ads are the massive awareness and strong associative effects the featured celebrities give to the promoted products. The products become easily known with exclusive bright brand image and prestigious nature. However this type of promotion may also be very risky as celebrities not always add the desired 'magical' effect to the products. Many negative aspects also persist such as personal issues with the particular celebrities or some manipulative nature of these types of ads.

Further Research and Recommendations

The used qualitative method supposes subjectivity from both sides (interviewer and interviewee) including the limited amount of participants' opinions and the researcher's interpretation of participants' answers as an interviewer. However a further research by using larger amount of participants may argue the research results or at least add more reasoning and diversification in opinions. Also the initial principle of the selection of the interviews' participants was the age as they supposed to be older 16 in order for the answers and the provided information to be more objective and reasonable. However teenagers are a very wide range of potential consumer group who are the easiest influenced targets for companies so the separate observation of the preferences and opinions of this group could be very useful for the general topic. At last the interview questions in some aspects can be viewed as too narrow and not deep enough to reveal the actual reasoning of the participants' opinions as the questions were designed to be as simple as possible in order to get the desirable information in very short time. Further longer lasting interviews with wider ranged deep questions may lead to more careful information and deeper research on the topic.

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MONEY LAUNDERING VIA INTERNET IN GEORGIA

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Abstract

The given article mainly focuses on the money laundering crime conducted using the online gambling websites in Georgia. It offers an insight on the scheme of how advanced computer users transfer finances using digital wallets, avoid attention from the law enforcement bodies, and ultimately withdraw the laundered money. In the end of the article, a reader will find recommendations for the legislative implementations on the national/supernational level to make online fund transaction more transparent process for the law enforcement agencies.

Keywords: Money Laundering, Cybercrime, Cyber Security, Legislation, Georgia

Introduction

Technological advancements of the information era brought many profound changes to our everyday lives. Internet, indeed one of the most revolutionary inventions of the contemporary times, introduced new possibilities of interaction and socialization. Eventually, these novelties led to transformation of nearly every institution, including the financial institutions. Online banking, e-commerce, and digital monetary transactions made financial interactions much more convenient, however, led to the outburst of the new type of crime - Financial Cybercrime. While there are numerous ways to commit financial cybercrime, this article will deliberately focus on money laundering via Internet.

In fact, recent researches in the field of financial cybercrime depict that in the last decade there has been a colossal raise in property crimes using the cyber technologies. For example, the Center for Strategic and International Studies reports that in 2013 worldwide annual loss from financial cybercrime was ranged from 300 billions to 1 trillion of US Dollars (http://csis.org/publications/browse/all/all/Reports). Other researches show that from 2000 until 2010 statistical amounts of cybercrime raised more than ten times (Norton Cybercrime Report, 2012).

As finances got digitalized, money-laundering crime has become relatively easier to commit. The reason behind the stated hypothesis is that digital wallets and other types of online financial institutions are relatively less monitored by the law enforcement agencies worldwide. According to "A Global Overview of Digital Wallet Technologies” published by University of Toronto, a digital wallet refers to an electronic device that allows an individual to make electronic commerce transactions (University of Toronto, 2011). This can include purchasing items on-line with a computer or using a smartphone to purchase something at a store. Increasingly, digital wallets are being made not just for basic financial transactions but also to authenticate the holder's credentials. For example, a digital-wallet could potentially verify the age of the buyer to the store while purchasing alcohol. It is useful to approach the term 'digital wallet' not as a singular technology but as three major parts: the system (the electronic infrastructure) and the application (the software that operates on top) and the device (the individual portion).

Introduction of the digital wallets entailed many legislative and enforcement problems. The most notable of these problems are almost uncontrolled cross border transactions of finances. At the moment, it is hard, if not impossible, to monitor the actual sender and the beneficiary of the funds transacted via Internet.

In Georgia, utilization of the digital wallets became popular only recently. Nevertheless, today it would be extremely challenging to find any financial institution that does not provide its users with possibility to manage their financial accounts and make monetary transactions via Internet.

The source, which preferred to remain incognito, reported that monitoring of the online financial transactions is practically an insurmountable task; afore stated fact has several solid reasons. First and foremost, to start the investigation process of the given case law enforcement bodies require an official declaration of the committed crime. In case of money laundering, in particular, there is usually no one to report the crime incident. Consequently, such acts usually remain outside of the focus of the law enforcement agencies. Secondly, identification of the particular criminal on the Internet is frequently a futile attempt. Advanced computer users have a wide variety of software and hardware tools to disguise their IP addresses, as well as the accounts they used to register on the digital wallets. Even if the cyber criminal gets apprehended, prosecutor usually lacks credible evidence to provide it to the court in terms of proving that there was one particular person behind the used IP address to commit the crime.

From the empirical perspective, there are many methods to launder money via internet. One of the most widely used method, I would like to discuss in this article, is online gaming. In 2013, Jean-Loup Richet published an article titled “Laundering Money Online: a review of cybercriminals’ methods.” In the given article Mr. Richet advocates “Online role playing games provide an easy way for criminals to launder money. (Jean-Loup Richet, 2013: 17). This frequently involves the opening of numerous different accounts on various online games to move money. Cyber criminals are increasingly looking at micro laundering via sites like PayPal or, interestingly, using job-advertising sites, to avoid detection. Moreover, as online and mobile micro-payment are interconnected with traditional payment services, funds can now be moved to or from a variety of payment methods, increasing the difficulty to apprehend money launderers. Micro laundering makes it possible to launder a large amount of money in small amounts through thousands of electronic transactions. One growing scenario: using virtual credit cards as an alternative to prepaid mobile cards; they could be funded with a scammed bank account – with instant transaction – and used as a foundation of a PayPal account that would be laundered through a micro-laundering scheme” (McAfee Center for Strategic and International Studies, 2014).

Instead of the role-playing games, in Georgia cyber criminals usually use Internet gambling websites. As a matter of fact, online casinos have become increasingly popular in the last couple of years. Since digital gambling is relatively new phenomenon to Georgia, cyber criminals managed to successfully exploit many loopholes to achieve their illegitimate goals, including laundering of money. Regardless of several in depth investigations of the online gambling providers, some of the weak spots still remained unattained.

To extend the research I have chosen one of the most popular Internet gambling providers in Georgia. To register on the given website applicant needs to indicate:

- Country
- Name
- Family Name
- Cellphone Number
- Email Address
- ID, Driver’s License, Passport, or Residence Permit
- Physical Address
- Sex

To the date, from all the above-mentioned credentials, the given gabling service provider requires only cellphone number authentication/verification. The issue is that in Georgia, it is exceedingly easy to obtain a cellphone number without actually providing your personal information. Those who want a number for malicious activities can purchase one outside of the official branch of the telecommunication providers. Owner of such unregistered SIM card can also have a covert Internet access to perform the illegal manipulations.

To physically withdraw the money from the Casino a cashier user is asked to present his/her ID, driver's license, passport, or the residence permit. However, in case of transferring money from the personal account to any of the possible digital wallets, the user does not have to be authenticated. This is the very loophole cyber criminals use to transfer the illegitimately acquired money to a foreign country. Once digital money leaves borders of Georgia, it becomes impossible to monitor its further flaw. Experience shows, that majority of digital wallet service providers are not eager to cooperate with law enforcement agencies. However, even if they agree to cooperate, the investigation process usually takes very long time. Meanwhile, the cyber criminal transfers money back and forth from one unauthenticated digital wallet service provide to another. This is done to wind up the trace of the money flow. Ultimately, the laundered money returns back to Georgia. Eventually, it is impossible to indicate the source of the transaction.

Most sophisticated criminals use other people's banking cards to withdraw the laundered money from received abroad. Consequently, law enforcement agencies are left without any chance to investigate the case.

For the sake of making a contrast, I have observed another popular Internet gambling service in Great Britain. Perhaps not surprisingly, online transactions were relatively more complicated. One notable discovery was that it was absolutely impossible to transfer money to the unauthenticated users. To validate user was required to provide scanned digital copies of:

- Passport
- Document that indicates current place of residence
- Banking card that was used to deposit money to the given account

If the banking card did not belong to the user, he/she was required to send the scanned copy of signed declaration of liability that cardholder permits using of his banking card. Once the account was validated, Casino permitted online transactions to digital wallets.

Indeed, such credible security system may also be compromised, but it would be a complicated process for the cyber criminals.

It has to be admitted, that investigation of any type of cybercrime is a very difficult procedure. Even if law enforcement agencies apply maximum of their capabilities and efforts to investigate any given cyber criminal act, there are very high chances that it will remain without a court verdict, due to lack of convincing evidence. In future, financial cybercrime is only expected to grow in its intensity. Hence, it is still possible to implement certain legislative measures to complicate the process for the criminals.

Conclusion

World must accept the severity of the consequences of cyber criminality. Digital wallet service providers should be more flexible and willing to cooperate with law enforcement agencies. At the same time, partner nations should implement harmonized legislative acts regarding financial transactions. If any country rejects the given process, it will remain an offshore zone for the illegitimate financial activity. In the given case, these countries should be limited to use digital wallet services from abroad.

Another effective way to reduce financial cyber crime is to reconsider norms that regulate financial transactions to the unidentified digital wallet accounts. In the partner countries they should be harmonized. The best idea would be to reject/banish not validated digital wallet accounts. Doing so would seriously alter cyber criminal activity, as well as unmonitored flow of the funds.

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5. University of Toronto: "A Global Overview of Digital Wallet Technologies” – 2011.
6. Jean-Loup Richet: “Laundering Money Online: a review of cybercriminals’ methods” – 2013.

KOSOVO AS A FUTURE MEMBER OF THE WTO

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Abstract

Kosovo and its citizens need trade liberalization in order to get quality goods and also decrease the imbalance in foreign trade. Recent agreements with the European Union and future trade preferences will certainly help the trade between EU and Kosovo. With this step in hand and the already used CEFTA Agreement Kosovo will be in a much better situation than ever. As every other country after finishing its trade liberalization with its neighbors Kosovo will have to start to negotiate with the WTO since its membership is a prerequisite to join the EU. Rule of law is a very problematic issue which lacks some basic standards in this territory, until now this state responsibility was highly supported by the European Union Law Enforcement Mission in Kosovo (EULEX). Knowing this it is hard to understand why some basics of the WTO such as Intellectual property rights, Sanitary and Environmental issues are lagging far behind the WTO standards. As a non member of the UN Kosovo will have a specific status in negotiating with the WTO, certainly this will be determined mainly by the EU as it is under its interest sphere. Multilateral agreements for joining the WTO in this case will be determined mainly by negotiations with the EU. Certainly the outcome of this process will be in line with EU policies and WTO requirements as a constitutional and legal power. In this case EU will serve the function of the executive power in the system where WTO is a global trade authority. As an organization with the power to change state policies and laws the WTO will certainly reshape the Kosovo economy which will certainly be a benefit to its citizens and the end of illegal imports, sales and production.

Keywords: K12 Contract Law, K13 Tort Law and Product Liability, K22 Business Law, K23 Regulated Industries and Administrative Law, K33 International Law

Introduction

On the European continent we have a specific trade practice where we see that the EU (European Union) is the center of trade and a valuable trading partner for all countries which are its neighbors. Certainly the open system of trade is manifested in the relationship EU establishes with its neighbors. Some countries on the continent are not members of the EU but still have it as a major trading partner, it could be seen that some countries benefit from the presence of EU as a big consumer of all kinds of products. Still countries like Norway, Island and Switzerland have decided not to join the EU but to try to benefit from its hungry neighbor and save the amount of contributions an EU member pays. These countries need Europe and depend on it, but still in this work we will focus on countries which need Europe even more. We will focus on Kosovo which has EU as its future target and is even more controlled by EU and its standards than any country in the history. The most important and leading forces in Kosovo are the UNMIK (United Nations Mission in Kosovo) and EULEX (European Union Rule of Law Mission) which is among others helping the implementation of EU standards in Kosovo. The building of a free and democratic society is the basic for a country to join the world of free and liberal trade. Unfortunately such a small market with a very poor customer society does not allow much competition and investments. Property issues are a relevant factor in hindering big investments and the political situation which is actually slowly improving. If we exclude the foreign help to Kosovo after the war we can still see that the country depends on high imports from EU but mainly from its neighbors. The industrial potential which was developed during the Yugoslav era is not functional in its real capacity and the lack of investments into this field has stopped the future development of Kosovo for more than 15 years by now. The demand for goods does not reflect the conditions of the society and is constantly growing and accordingly the need for imported goods is very big and on the other hand also making a huge opportunity for new enterprises. Kosovo is able to make cheap products but the consumer attitudes are in favor of the good quality cheap products coming from outside Kosovo. There is a clear benefit for Kosovo by being a member to CEFTA (Central European Free Trade Agreement) since a big amount of traded goods are coming from this community.

The future still stands under the wings of the EU and by saying this we also know that Kosovo will have to join the WTO (World Trade Organization) in the near future. It is obvious that Kosovo will not have many problems with protecting its market and have many issues with the implementation of the WTO rules. Still the most important thing is that in the case that the Kosovo industry will start working soon by having some investments it will raise a clear need of a broader market where products could be targeted. The main role of shaping the future of Kosovo in political, social and economic sense is with the EU policy makers and by now we came very close to the time where more concrete measures have to be implemented. A recent step of shaping Kosovo borders towards Serbia in order to control its customs has been finished and now the imports coming from the north are under the control of Kosovo institutions. Now the only major thing which is not specific just to Kosovo is to fight against the black market, counterfeit products and illegal imports of all kinds.

I.
Kosovo as a market

In order to explain what we are dealing with we will explain the structure of Kosovo market and that way depict its way forward. Some facts which are representing Kosovo are ” No of Inhabitants: 2.2 million, Surface Area: 10,908 km², GDP: 4.2 billion € (2010 est.), GDP economic growth rate:4.0% (2010 est.), GDP per capita:1909 € (2010 est.), GDP – by sector: agriculture 20%, industry 20%, services 60%,Unemployment rate around 40.%, Inflation Rate: 3.5% (2010)”.[3] These numbers are taken in order to depict and can be considerably changed since the citizens movement is very high and some citizens which are registered as Kosovo citizens do not live and have their main life activities on the territory. On the other hand products used on the territory are often bought into the territory of Kosovo and not all the imports have been registered since the borders with Serbia and the import procedures were not regulated and controlled. Recently with some agreements with Serbia the customs of Kosovo have been established on North Kosovo and there is a possibility to control and measure the imports. Still some routes are open for smuggling since the citizens of North Kosovo do not respect the Kosovo authorities and do not cooperate with them. In fact the unemployment is very high and it can have many reasons and grounds. An interesting fact is that some teachers working on the North were receiving double salaries from both the Kosovo and Serbian government. It was possible since these two authorities were not recognizing each other.

Kosovo has a traditional scheme of trading partners and it is very hard to change these partners in the future. These states are building up their presence on the market for a long

[3] Ministry of foreign affairs Kosovo, Kosovo’s economy (2013) Vital economic statistics, <http://www.mfa-ks.net/?page=2,119> accessed on 05 December 2014

period of time and by using world trends these countries have as a target Kosovo as a small consuming market, it is targeted from all its neighbors.

The following table is taken from the web site of the ministry of foreign affairs of Kosovo and shows some figures of Kosovo trade:

"Main partners of Kosovo in export and import

No.	Countries	Export (000) €	Participation % in the total	Import (000) €	Participation % in the total
1.	Italy	80.193	27.1	100.603	4.7
2.	Albania	30.841	10.4	69.714	3.2
3.	Macedonia	26.308	8.9	319.313	14.8
4.	Switzerland	17.786	6.0	20.981	1.0
5.	Germany	15.587	5.3	280.617	13.0
6.	China	14.779	5.0	135.406	6.3
7.	Serbia	3.941	1.3	260.471	12.1 " [4]

It can be seen that the main trading partners have different position on the market and by having in mind the in-balance in the foreign trade: "**Exports:** 295.0 million € (2010) and **Imports:** 2,157 million € (2010)"[5] it puts Kosovo into a very hard position since this in-balance has roots in its undeveloped industry and a big demand for imported goods which could also be made in Kosovo. This great opportunity stands in front of Kosovo as helping and enabling business environment in order to change this in-balance and employ its citizens. Kosovo had some special and certain goods for import and the chance to renew its capacities for producing and importing these are very good. "**Energy and Mining -** Kosovo has great underground assets, with 14.700 million tons, it ranks fifth in the world for lignite reserves from which it also produces the highest amount of electricity." [6] The electricity producing infrastructure has been developed during the Yugoslav era and has been one of the centers of economy and employment. As an addition to this there are natural reserves "Besides lignite Kosovo is also rich in zinc, lead, gold, cadmium and bismuth, bauxite, nickel, etc. The culture of lignite extraction dates back to Roman times, modern extraction of minerals in Kosovo began in the 1930s, with the establishment of the Trepca complex." [7] A long debate has been going on for a long period of time or at least since the 2008 Kosovo declaration of independence. Namely these underground resources are blamed to be the cause of Kosovo attaining so much attention and being targeted by some western states. The production is very low now but in the future it can be a part of a well organized production line on Kosovo or just starting in Kosovo as a source of resources.

Kosovo and its current legal and trade related status

At this moment CEFTA (Central European Free Trade Agreement) has its focus on the Western Balkan region. The countries here have been just recently a part of the same economic system so it is not a surprise that they have a lot of common to trade. Kosovo was a part of Yugoslavia and it had a specific trading status for years, with having a lot of products placed from other parts of Yugoslavia on its market. The main engine of trade is CEFTA and it is of a high importance for Kosovo and also the procedure of following rules to join the EU (European Union) and WTO (World Trade Organization). "Monitoring and implementation

[4] Ministry of foreign affairs Kosovo, Kosovo's economy (2013) Main partners of Kosovo in export and import, <http://www.mfa-ks.net/?page=2,119> accessed on 05 December 2014

[5] Ministry of foreign affairs Kosovo, Kosovo's economy (2013) Vital economic statistics, <http://www.mfa-ks.net/?page=2,119> accessed on 05 December 2014

[6] Ministry of foreign affairs Kosovo, Kosovo's economy (2013) Some sectors of Kosovo economy, <http://www.mfa-ks.net/?page=2,119> accessed on 05 December 2014

[7] Ministry of foreign affairs Kosovo, Kosovo's economy (2013) Some sectors of Kosovo economy, <http://www.mfa-ks.net/?page=2,119> accessed on 05 December 2014

of the CEFTA agreement" [8] is of a great concern for Kosovo, also this puts Kosovo into the same position it had earlier as part of Serbia. During years after 1999 Kosovo was under UNMIK administration and was considered as part of Serbia, so no taxes were applicable. For a long period of time after the declaration of independence Kosovo was not able to enforce its tax procedures on the North Kosovo border crossings. With some recent agreements starting from April 2013 the Kosovo and Serbian prime ministers have agreed that Kosovo laws will be applied on North Kosovo and the customs collected here will benefit the four municipalities of North Kosovo which have a Serbian majority. The municipalities may have different authorities in regard "economic development, education, health, urban and rural planning." [9] This agreement is not final and it is still unclear in details and how its implementation will look like. State authorities of Serbia do not have a legal basis to apply it but certainly the authority of the EU and the strong commitment to EU given by the Serbian government guarantees its implementation. All the laws in Serbia still consider Kosovo as Serbia and this is also supported by the Preamble of the Serbian constitution which clearly outlines this. A serious revision of the Serbian constitution is possible which will most likely affect the trade between these two countries.

CEFTA agreement is not mentioning Kosovo since it has not declared independence when it was signed in 2006. UNMIK administration was a legal representative of Kosovo at that time and according to the UN Resolution 1244 and the UN it is still needed to outline that its status is regulated by this document. One of the points from Resolution is" Comprehensive approach to the economic development and stabilization of the crisis region" [10] One of the milestones was the declaration of independence after what some changes on the field have occurred "Since then, the objective of the Mission has been the promotion of security, stability and respect for human rights in Kosovo through engagement with all communities in Kosovo, with the leadership in Pristina and Belgrade, and with regional and international actors, including the European Union Rule of Law Mission in Kosovo (EULEX) the North Atlantic Treaty Organization (NATO) and the Organization for Security and Cooperation in Europe (OSCE). Meanwhile, KFOR has remained on the ground to provide necessary security presence in Kosovo. " [11] EULEX is enforcing laws and it can be outlined that they have not been very successful and the one of the main focuses they have is: "EULEX prioritises the establishment of the rule of law in the north." [12] The success of EULEX is highly dependent on the cooperation between the Kosovo and Serbian government and by now unfortunately has not solved many issues from the field it was targeting. It has a mandate until June 2014 and it can be predicted that as earlier this mandate will be prolonged.

After outlining the necessary legal background we can see how CEFTA looks at Kosovo. The agreement is focusing on : "Current membership criteria since Zagreb meeting in 2005: WTO membership or commitment to respect all WTO regulations, Having an European Union Association Agreement, Free Trade Agreements with the current CEFTA member states. At the EU's recommendation, the future members will be prepared for membership by establishing free trade areas. A large proportion of CEFTA foreign trade is

[8] Ministry of trade and industry of Kosovo, Trade in Kosovo (2014) <http://www.mti-ks.org/en-us/Trade-in-Kosovo> accessed on 05 December 2014
[9] European Voice/EU, Text of historic agreement between Serbia and Kosovo, 19 April 2013, (2013) <http://www.europeanvoice.com/page/3609.aspx?&blogitemid=1723> accessed on 26 October 2014
[10] Security Council, United Nations Resolution 1244, 10 Jun 1999, (1999) <http://www.unmikonline.org/Pages/1244.aspx> accessed on 06 December 2014
[11] UNMIK, United Nations Interim Administration Mission in Kosovo, UNMIK Mandate (2014) <http://www.un.org/en/peacekeeping/missions/unmik/mandate.shtml > accessed on 06 December 2014
[12] EULEX KOSOVO, What is EULEX? (2014) <http://www.eulex-kosovo.eu/en/info/whatisEulex.php > accessed on 06 December 2014

with EU countries. " [13] The commitment of Kosovo is visible through its implementation of regulations which are in line with this requirement and in fact the laws are all in line with EU which is already a member of the WTO. This is one of the key points of this work and we will be dealing with it in more detail.

Trade between Kosovo and EU

Keeping in mind that Kosovo is wishing to join the EU and one of the first steps towards it has been made just recently "2013 has been a historic year for Kosovo on its path to the European Union. The decisions of the Council in June authorising the opening of negotiations for a Stabilisation and Association Agreement (SAA) represent the start of a significant new phase in EU-Kosovo relations. The negotiations will be formally opened this month. The Commission aims to complete these negotiations in spring 2014, to initial the draft agreement in summer and thereafter to submit the proposals for the Council to sign and conclude the agreement." [14] Liberalization in all spheres and in particular trade is necessary for Kosovo and its citizens to achieve a further level of development and come closer to EU standards. Keeping in mind that EU standardizes many things and in particular market economy and its features we can see that it will be a tremendous benefit to Kosovo consumers to come close to this point. Literally every step made towards the EU is making some benefits to citizens, consumers and trade. The implementation of the EU standards will be a long path but by acquiring the *acquis communitaire* many doors will open. One of the doors will certainly be the WTO since it is a must for every serious player in the field of global trade. It is very clear that the procedures in the future will have to be made with more local support and inputs but still it is not possible if the citizens will have some concerns and doubts. On the other hand we see what is the biggest requirement in this procedure and it is not the fault of the Kosovo government solely: "Kosovo needs to continue implementing the legal framework for trade, competition and the internal market." [15] By now Kosovo institutions do not have the full control and responsibility and as previously mentioned EULEX plays an important role and the final decision about its mandate will be known in summer 2014. The current status of the EU Kosovo relationship is pretty good and gives a great basic for future cooperation "Kosovo also enjoys customs-free access to the EU market for manufactured products and almost all agricultural products, through the EU's autonomous regime." [16] These criteria clearly show the determination of EU to help Kosovo and is accepting all the products which can be produced by the Kosovo industry.

Kosovo has a good position but still all the support is not really making the institutions stronger, in particular the Ministry of trade and industry (MTI) needs to take over its role and fully take the responsibility of any further steps planned. This requirement is connected to the most important part where international stakeholders have the main role, it is

[13] Republic of Kosovo, Foreign economy, CEFTA (2014) <http://www.rks-gov.net/en-us/bizneset/ekonomiajashtme/pages/cefta.aspx> accessed on 06 December 2014

[14] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Enlargement Strategy and Main Challenges 2013-2014, page 38 (2013)<eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/strategy_paper_2013_en.pdf> accessed on 06 December 2014

[15] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Enlargement Strategy and Main Challenges 2013-2014, page 41 (2013)<eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/strategy_paper_2013_en.pdf> accessed on 06 December 2014

[16] EU Commission, on a Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo (2012) COM(2012) 602 final <http://eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/ks_feasibility_study_2012_en.pdf> accessed on 06 December 2014

necessary to stop using the system established as a support but to fully engage it in decision making and taking over the responsibility. The present system looks more like a project where the success depends on the aid and support and the local possibilities and efforts are not getting a chance in the real life. Similarly the EU Free trade agreement (FTA) does not encourage the establishment of working places, entrepreneurship and the establishment of new companies, since the systematical improvements are far from optimal. "**EU FTA and other International Agreements** will support MTI to establish the necessary institutional structures and build the capacity to enter trade negotiations on an FTA with EU. It will help MTI and other Ministries with responsibilities in areas directly concerned by international trade negotiations to acquire a good understanding of the structures, contents and implications of a future EU-Kosovo FTA. With a perspective of later EU integration, it will also ensure that the public administration is well aware of the trade and trade-related chapters of the *acquis communautaire* with immediate focus on those areas than can be related to the EU FTA." [17] It is unclear why after so many years of international support the local staff and resources still lack the necessary level of development, policy and decision making capacity.

Kosovo's steps towards trade liberalization

The procedure to join an international organization and agreement takes time and efforts, it is not always easy to follow the procedures and predict how much time a certain state will need to adjust. Every state has its specific circumstances, needs and capacities to comply with the requirements, the most important thing to mention here is that the requirement to join the WTO comes from above and Kosovo even by accepting the need has no resources to comply with the procedure at the moment. "Kosovo is not a member of the WTO and has taken no formal steps to join." [18] We can see that international institutions and we include here the EU as well has a certain key of how to proceed with the alike countries, problems and have a solution which can be widely applied. As a parallel we can have here the example of the Kosovo's neighboring countries which have followed the same pattern to join EU or just to come as close as possible to this point. EU has for example made this approach and is successfully implementing it for decades, it accepts usually countries in one accession round which have a similar history, level of development or are neighboring countries. The same states for WTO where it has a path which have to be followed in order to become a member, most likely the experience of Serbia, Macedonia and Montenegro can be valuable for Kosovo since their markets are similar and have a very similar range of products offered.

One of the main points which are of great concern to EU and Serbia as a benchmark is that GMO is not accepted on these markets. Having in mind the specific status of decision making in Kosovo there will be no special requests on the side of consumers and citizens since they have no habit of questioning decisions which benefit the international positioning of the country. This can be also approached by the great popularity of the USA in Kosovo and their support to independent Kosovo. USA products can be found on the market and even agricultural products which probably would not be able to make it to the EU markets. As we know meat products are one of the main points of disagreements between EU and the USA. For now Kosovo is very open and USA goods can be found on the market and their presence will probably rise. "U.S. embassies are committed to supporting U.S. companies to start

[17] EU trade policy project, Trade policy (2014) <http://www.eutrade-ks.eu/kosovo_nodecontent_3638444.html> accessed on 06 December 2014

[18] Kosovo 2013 progress report, WTO issues (2013) <http://eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/ks_progress_report_2013_en.pdf> accessed on 06 December 2014

exporting or grow their exports to Kosovo." [19] The focus here is not the importance of the Kosovo market but more the support of the USA and the possible future expansion of multinational companies on this territory.

At this moment the Kosovo legislation complies with EU rules and there is not much done for the WTO accession. Still at some points with the intention to apply EU rules some WTO compatible articles can be found. An example can be found in the Kosovo law on external trade. "The provisions that are listed in this law and in other legal acts and other international agreements shall remain in force in regard to external trade and are fully applicable and must be in accordance with WTO." [20] It is hard to apply this law to other future interactions on international level since it is more a role of the constitution or a state policy. Still the Parliament and the Government will be making decisions and comply with the WTO requirements anyway having a focus on its future benefits.

As a conclusion we can see that the current level of development and application of trade agreements and local laws are all favorable for Kosovo and have it on a right track to join the WTO in the future. But before we approach this issue from the solely legal perspective of Kosovo joining the WTO we need to know that it is not all about law and its enforcement, there are many other important perspectives we need to focus on to predict when and what benefits Kosovo and its business and consumer population will have. From previous statistical data we can see and conclude that the level of development does not really require immediate work on starting the WTO procedure. Kosovo has some priorities and the ones related to trade are shortly stated as here: "The transport system is inadequate for business and trade needs and incompatible with European standards. As a landlocked country, Kosovo's economy is dependent on adequate road transport and its integration into the networks of neighboring countries." [21] Kosovo was a part of a big economical system of Yugoslavia, huge efforts were made to advance the level of development of this territory which was at that time the least developed part of Yugoslavia. The dissolution of the state and the war from 1999 has just backed up the advancement of the state. By recent huge efforts of the international community a recent development in the road infrastructure has been made, a highway was build between Kosovo capital, Pristina and the Albanian capital Tirana and its harbor on the Adriatic Sea, Durres.

Benefits that WTO will bring to Kosovo

Knowing that the EU and WTO membership would bring to Kosovo new investments, help establishing new domestic enterprises and make monopolies disappear from the market. It will help to establish a stable system of dispute resolution, food quality and many other benefits for consumers. A recent trade dispute with one of the Kosovo's most important suppliers shows that the political will to cooperate and trade easily falls behind daily political matters in the Balkan region. "The recent trade war between Macedonia and Kosovo is threatening to turn into a political confrontation after Skopje implemented a tax on Kosovar nationals crossing the border. Previously, Macedonia limited quantities of flour and wheat imported from Kosovo in order to protect domestic production, and Kosovo responded to this measure by banning food imports from Macedonia. Within a matter of hours, a EUR 2 tax was imposed on persons entering Macedonia (as well as EUR 5 for cars and EUR 10 for trucks and buses). Kosovo raised the stakes one last time by imposing a full embargo. In the past, trade between the two countries had been encouraged, but now each side accuses the other of escalating the dispute. The border between the two has become congested, with

[19] Embassy of the United States, Pristina Kosovo, Exporting to Kosovo, (2014) <http://pristina.usembassy.gov/doing_business_in_kosovo.html> accessed on 07 December 2014
[20] Kosovo Law on external trade, Law No.04/L-048, 14 November 2011, art 22
[21] The World bank in Kosovo, Country snapshot (2013) page 9

many citizens crossing on foot, and the Commission is investigating the question of infringement of the Central European Free Trade Agreement (CEFTA)." [22]

This case shows that state officials do not have much sense for trade related disputes and that there is a system needed such as CEFTA to train and teach them how to behave in a world where trade is an essential everyday activity vital for economy and citizens. Both for joining the EU and WTO the Kosovo administration needs to be trained in a manner to understand that every mistake and misuse has its outcome and penalizes the wrongdoing. One of the biggest weaknesses of the systems which use to punish states for wrongdoings is that officials do not always feel and pay for their mistakes. It is more a moral and professional thing to incorporate into the minds of state officials that they have responsibility and have to take care of state interests and international obligations.

The mechanism to deal with trade disputes on Kosovo for now is the alternative way through arbitrations. The state courts and in particular the Constitutional court does not have a certain level of development and trust to attract trade related issues. "The Constitutional Court of Kosovo was established in January 2009. With its authority to review legislation and individual complaints of rights violations, the Court is the ultimate check on legislative and executive power in Kosovo and the final arbiter of the meaning of constitutional provisions enshrining human rights and freedoms." [23] The need for justice in Kosovo is very big and since it needs a lot of time for a system to start running and apply the Constitution in every sphere of life even the constitutional court states the human rights and freedoms as priority. The constitution of Kosovo does not mention trade as a particular field. It states is article 10: "A market economy with free competition is the basis of the economic order of the Republic of Kosovo." [24] In a market economy we can still have monopolies or different subsidies which will not promote local, regional or international trade. Also the chapter 9 of the constitution tells us about the general principles in economic relations. The first principle reads as follows: "The Republic of Kosovo shall ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property." [25] The wording found here "ensure a favorable" does not itself guarantee that it will be ensured and allows a claim for any breach. Certainly trade was not one of the main concerns of the constitution writers the state needs to establish itself on strong grounds. Future enactment of the trade related issues will happen in laws and the constitutional courts will have to invoke those particular laws and that way apply the constitution.

What path Kosovo will follow to reach the WTO and how its way will look like

Having explained the main statistical, legal and political issues present in the development strategy and future of the Kosovo state we now turn to see how the WTO will influence the legislation and changes in the way we can expect. The constitutional or quasi-constitutional function of the WTO agreement can be seen on many previous examples. One of the recent cases involve the Serbian last steps to join the WTO where the GMO issue plays an important role. It is not easy to finalize and make the last steps which are the hardest. "Members encouraged Serbia to adopt outstanding pieces of legislation and work closely with relevant members to conclude the remaining bilateral negotiations that could lead to its

[22] European Parliament, Parliamentary questions, 19 September 2013 (2013) <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-010713&language=EN> accessed on 07 December 2014

[23] Republic of Kosovo, Constitutional court, (2011) < http://www.gjk-ks.org/?cid=2,1> accessed on 07 December 2014

[24] Constitution of the Republic of Kosovo, 15 June 2008, art 10, page 3

[25] Constitution of the Republic of Kosovo, 15 June 2008, art 119/1, page 44

accession to the WTO in 2013."[26] The outstanding legislation concerns mainly the GMO but some other features were present as well. A recent case from 2013 shows that life has many surprises to trade and one specifically bad year for agriculture had brought another problem, namely a very carcinogenic fungal byproduct of cattle feed, aflatoxin. "Contaminated milk has been pulled from the shelves in Serbia, so any new milk purchased should meet the strict Serbian threshold level for aflatoxin." [27] The seriousness shows that the USA takes care of the well being of their citizens and informs them about a certain products harmful effects. The case was reported very late and the Serbian ministry for agriculture had taken measures which were in the favor of the trade and not consumers. "Minister of Agriculture, Forestry and Water Management Goran Knezevic said today that the government decided to change the Rules on the allowed amount of aflatoxin in milk from the current 0.05 micrograms per kilogram to 0.5 micrograms, as it was two years ago." [28] This case shows that the government does not really care for standards and takes the measures which will cause the least harm to the state, but do not care for the citizens as it should. A similar outcome could be expected in Kosovo since a big quantity of milk has been imported from the Balkan region which was affected by aflatoxin. The level of development and consumer care is still not that developed in Kosovo and the trade related issues will have preference in order to again serve the government represent itself as doing everything to implement standards. The milk which was sold on Kosovo market was polluted and consumers could not change their buying habits since this milk was either partly from domestic production or cheap imports coming from the affected region of Balkan. It can be seen that the policy makers still have many things to acquire not just in legal sense but also a support of the industry, science and professionalism. "The capacity of Kosovo's food laboratory was discussed, using the recent aflatoxin crisis as an example: whilst Kosovo's laboratories can carry out the tests to detect positive or suspect samples, these need to be confirmed by a laboratory outside Kosovo. Once Kosovo's laboratory is accredited (this year if all goes well) this will help Kosovo deal with crises such as these. " [29] So Kosovo will be able and has the necessary instruments and will to achieve and control the quality and structure of the products. Its readiness to act is always supported by the international community since the state itself does not always have the resources, instruments and personnel to achieve the EU and other standards. It is very hard to hire expert personnel and the ones working are "borrowed" from other states, mainly EU. The experts are involved in different kinds of activities which are needed for every independent state, EULEX has judges and other court staff and it deals with crimes and law enforcement. This model works since local personnel can learn from them and acquire the necessary skills and knowledge to serve this function in the future.

Kosovo and the constitutional or quasi-constitutional function of the WTO agreement

As we have previously discussed what Kosovo has in regard trade and trade regulation in the constitution and other acts, now we can turn to see what the WTO requirements are and how they can fit. By now the understanding and different approaches of WTO law has raised many trade cases involving many states and different issues. This trend will of course continue and there are new challenges in front of every state, be it part of the

[26] World Trade Organization, Serbia a few steps away from concluding WTO accession negotiations, 13 June 2013, <http://www.wto.org/english/news_e/news13_e/acc_srb_13jun13_e.htm> accessed on 08 December 2014

[27] Embassy of the United States Serbia, High levels of aflatoxin (2014) <http://serbia.usembassy.gov/messages-and-notices-for-us-citizens/aflatoxins.html> accessed on 08 December 2014

[28] Government of the Republic of Serbia, Legal level of aflatoxin in milk set at 0.5 micrograms, 28 Feb 2013 <http://www.srbija.gov.rs/vesti/vest.php?id=92434&change_lang=en> accessed on 08 December 2014

[29] Republic of Kosovo Ministry of European integration, EU Commission and Kosovo authorities reviewed progress in applying EU standards in agriculture and food safety, Brussels, 12 March 2013 <http://mei-ks.net/?page=2,5,627> accessed on 08 December 2014

WTO or not. Still the biggest influence on Kosovo trade, and also other regulation, will come from the EU. EU has a long time ago established trade practice with the necessary WTO requirements which are updated on a regular basis.

One of the most important things and leading idea in the Agreement establishing the WTO is its preamble. The whole idea and key to understanding the world of trade could be found here, it sometimes says more than we could understand and get out of it. Some of the key points mentioned in preamble are: raising standard of living, full employment and sustainable development. All these are so important for every state but still not reachable easily. Kosovo would make a big step forward by ensuring these ideas, but actually all of them go hand in hand and when you get closer to one of them the other will also pop up on the scale of standards.

Let us now turn to the legal text and apply it to the case of Kosovo. In article 2 the scope of the WTO is explained as follows: “The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.” [30] One of the most important requirements and benefits Kosovo will get is the establishment and strengthening of the institutions. The system of public administration has to be established on strong and sustainable basis, all the institutions will work in a system where it is easy to see and predict what has to be done in order to achieve certain outcomes. Institutional development is one of the priorities for Kosovo and it will certainly be based on EU standards and future WTO requirements.

Very important benefits for Kosovo could be the implementation of article 3 of the WTO which explains the functions WTO has. Form many the two most influential functions are the forum for negotiations among members and the trade policy review mechanism. The forum will help establish a systematized place to discuss and be able to approach issues or trade related problems on a level which can be the most effective. Establishing new and changing trade policies is also an important thing since it will help everyone have a say and respect the rights of all. The needs could be assessed from the right place and the best possible solutions could be achieved.

The mechanism of the WTO is present in article 11, paragraph 2 and could be applicable to Kosovo and says: “The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.” [31] It shows that even when changes are made into the system the trading parties respect the needs of the least developed countries and make some excuses. Countries which belong to the system and are unable to accommodate the high standards are given some kind of waiver and will still be respected and helped in order to develop and advance with the whole system which in fact benefits everyone. The next is article 12 and it is about accession to the WTO agreement, actually this article will be applied to Kosovo one day. “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.” [32] As we have discussed previously Kosovo has achieved its customs unification and is about to enforce it now on its whole territory. The first steps are

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[31] World Trade Organization, Agreement establishing the World Trade Organization, art 11, para 2 (2014) < http://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed on 10 December 2014

[32] World Trade Organization, Agreement establishing the World Trade Organization, art 12, para 1 (2014) < http://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed on 10 December 2014

already being made and the most problematic border issue with Serbia in North Kosovo will function in cooperation with Serbia, respecting Kosovo rules with some benefits to the local communities on North Kosovo. In authors opinion the first step prescribed by the article of the WTO which explains the accession procedure is successfully finished by Kosovo.

As a last point which is very important to mention now are the explanatory notes on the end of the Agreement establishing the World Trade Organization text. The first paragraph of the explanatory notes reads: “The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.” [33] By saying this we can see that the territory of Kosovo could be recognized by the WTO as a separate country even though we know that Kosovo struggles to get a seat in the UN. The acceptance of Kosovo to the UN is not going to happen in the near future if we take into consideration the trend of accepting new states to the UN and all the issues they cause on the global political map. The trade issues will remain separate and this is a unique opportunity for Kosovo to join and be accepted in the world.

Conclusion

Small countries and markets such as Kosovo do not get much attention in the world of trade from big and influential partners. Still the unified world of trade needs to make a circle and absorb everyone to it to make trade a benefit for everyone. Kosovo is falling under the influence sphere of EU and is probably one day going to join it. The path leading to it will be lead by EU politicians and policy makers and most likely they will try to standardize Kosovo as much as possible and in line with EU requirements and other states level of development from the region. This process will lead Kosovo close to the WTO as well and as every other member country of the EU it will benefit from both at the same time.

Kosovo and its present status as a small market but valuable for its neighbors have to do much to develop and satisfy its citizens and consumers needs. Development at this moment depends much on foreign factors but soon the institutions, companies and the people will have to live on their own ideas and entrepreneurial skills. It is hard to achieve a high level of development but still every little step will be valuable and will make the system work better.

We can conclude that one of the biggest issues of Kosovo is to be recognized and from this work we can see that one of the ways to achieve that and be respected by its partners and neighbors for Kosovo is its trade regulation and status. Trade and production could help Kosovo gain its independence, still some issues like illegal trade which is the biggest concern of the EU has to be solved soon since without that this mission will make no sense.

The system of WTO law and the global trading partners are ready to accept Kosovo to the WTO. Even if some issues like the UN chair stays under debate Kosovo obviously has good grounds for the WTO and it is the right time to invest into this valuable future asset right now.

[33] World Trade Organization, Agreement establishing the World Trade Organization, explanatory notes, para 1 (2014)
<http://www.wto.org/english/docs_e/legal_e/legal_e.htm>accessed on 10 December 2014

DEBTOR'S RIGHTS AND OBLIGATIONS DURING COURT ORDER ENFORCEMENT, CAUSES OF PROBLEMS THAT MAY ARISE AND THE METHODS OF OVERCOMING THESE PROBLEMS

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Abstract

Everything has his pros and cons. Debtor's rights and obligations during court order enforcement, causes of problems that may arise. This problem is in the whole country, not just in one city or in one social class. A very large number of families from everywhere around Georgia have been affected. How and where it started will be discussed below in the text. Rights of creditors and debtors overlap in many aspects. We need to be very careful when sorting out this issue. We cannot under any circumstances make a decision with a benefit of one party while the other party will suffer losses. Georgian law on "Law Enforcement" does not support in any ways rights of debtors and all the procedures highlighted are towards forcing the debtor to pay off the debt. At this stage based on the current law, current socio-economic problems, statistics, ways on sorting out the problem, this object of studies is very important and has a very high intrinsic value in its theoretical part as well as in its practical part. If the right approach is taken it is possible to minimise the need to protect rights of creditors or debtors in the futures, because every party will be fully aware of their abilities and punishments for failures to fulfil their obligations, before signing the contract

Keywords: Financial institutions, Debtor's and creditor's right, The Law Enforcement Proceedings

Introduction

Recent development of financial institutions in Georgia led to a very active phase of lending in the country. First active phase started in 2005-2008 that can be called the wild west of Georgia. Loans were given out with a very high interest rate, ranging from 15% and over. Necessary credit checks were not being carried out. Mainly, no affordability checks were carried out, which automatically excludes stress test to check whether the debtor will be able to pay off his loan if interest rates rise. Loans would be given out as long as collateral would have covered amount of the loan with some excess. The whole system was very fragile and risky. It could survive only by having an absolute majority of large loans secured by collaterals. This way of doing business turned out to be very profitable.

Because of this business model of financial institutions led to a quick expansion of government enforcement agency. Law enforcement agency was initially one of the departments of Georgian court, later this department was passed on to the ministry of justice and later private institution of law enforcement agency was founded. A short-lived war with Russian Federation in August 2008 in a murderous tandem with a global financial crisis shattered Georgian economy. Loads of budgetary expenses on infrastructure have been reallocated to the war, Russia embargoed any products from Georgia, Georgian export fell not only to Russia but to other countries as well further worsening government balance sheets, less tourist were visiting the country and less investments were made into the country because of the war and because of the global financial crisis.

This led to very tragic consequences for Georgian economy as a whole as well as for businessman and whole general population. Businesses and private debtors started struggling to keep up with loan repayments. This became a real problem to majority of people. Population got divided into two. Debtors vs Creditors. Creditors would require the contract to be fulfilled and if debtors didn’t pay up they required their collateral to be sold on a public auctions and proceeds used to cover the debt. Six years have gone by since this issue arouse. Although, some steps have been taken to get past this issues, but the problem still stays. And recently it has become very relevant. A large number of people, who were left without homes, are asking for government benefits and for a shelter, insisting that the government is responsible for everything. They blame the government for creating a situation where they could lose their properties to “loan sharks”, that is how they call the banks. This part of the population wouldn’t blame themselves for making wrong business decisions.

This problem is in a whole country, not just in one city or in one social class. A very large number of families from everywhere around Georgia have been affected. Even a number of suicides were seen in some cases.

Unstable financial situation has led a large number of people taking loans that they are unable to repay. Current issue becomes very difficult and unmanageable. That is why it needs prompt resolving. Actuality of the population is a consequence of factual reality which left the majority of them without a shelter. They are demanding some alternative that will not take away their shelter.

How can this issue be sorted out in the way that rights of debtors have been protected? Just writing off their debt will most likely antagonize creditors and breach their rights. Would it be a wrong precedent for government to do that?

Firstly, when we are trying to protect rights of the debtors we should think about the counterparts: creditors. The beneficiaries of the enforcement order. Not protecting the rights of the creditors will take this issue to a different level where both parties will be antagonized. Today the main problem of law enforcement agencies is divided into two parts. 1) Revoking the rights of the owner of the house and 2) selling the property via a public auction. During the first period the debtor loses the ownership De Juro, and during the second part he loses the ownership De Facto. It is very important to highlight attention on the rights of the debtors while not forgetting rights of the creditors.

Let us look at the statistics provided by the national bureau of enforcement. Revoking the right of illegal ownership of the property is the part we are interested in. This encompasses enforcements of court orders that include confiscating property of debtors and transferring the rights of ownership to the creditors.

From August 2008 to August 20013 there were 676 instances of confiscating properties by national bureau of enforcement.

If we divide it by years we will have the following. 2008 – 129; 2009 – 138; 2010 – 120; 2011 – 90; 2012 – 111; 2013 – 88. According to the information provided by the national bureau of enforcement the majority of the cases are not connected to the creditors at all.

According to their information, since 2011 private enforcement agencies have started to do the same job as national bureau of enforcement. However, we need to take into account that using national bureau of enforcement is chargeable while using private enforcers is free for the creditors. This could be one of the reasons why since 2011 number of enforcements has steadily decreased.

Rights of creditors and debtors overlap in many aspects. We need to be very careful when sorting out this issue. We cannot under any circumstances make a decision with a benefit of one party while the other party will suffer losses. Georgian law on “Law Enforcement” does not support in any ways rights of the debtors and all the procedures highlighted are towards forcing the debtor to pay off the debt.

However, certain mechanisms need to be in place that will not only support rights of creditors but will encompass a large circle of players. Otherwise we are standing at the brink of destruction and this difficult situation that Georgia finds itself in will become a complete chaos.

What can be done in order for such situations are avoided all together and rights of debtors are supported as well as rights of creditors are supported: First of all enforcing enforcement notices in the “right” way. And Secondary informing population on consequences of not repaying debts before credit agreements are signed.

This topic is very important for every social class of the society. Reality is much worth then statistics. In order to sort this issue out we need to try preventative methods instead of using reactive methods that will definitely harm rights of one of the sides or money of taxpayers will be spent. To use preventative methods what needs to be done is educating people on loan contracts. Suggesting making this a part of high school curriculum shouldn’t be gross. Since this will avoid a lot of troubles in future for pupils themselves as well as for creditors and wider society. However, this shouldn’t take a form of smear campaign against taking on a loan o against banks. It should educate pupils on negative sides of taking loans and being unable to repay it as well as on positive sides of taking loans that are very beneficial for debtor as well as for wider economy.

Also, these pupils will educate their parents on the subject. This will give quite a large chunk of population some education on pros and cons of taking a loan.

Also, adverts, that show only positive side of loans and happy faces of debtors, should strictly show consequences that may follow if they don’t make their repayments on time. Government should make it a legal requirement for banks and other financial institution to add such a warning to any advert or any contract that is signed by the debtor. And in credit agreement it should not be a small print but a largest print on the first page.

Regulations can be issued by National Bank of Georgia. According to these regulations banks should take a full responsibility on informing clients on consequences of not being able to repay a loan on time. On the other side National Bureau of Enforcement should take charge of educating new generations of Georgians. This is mutually beneficial for creditors as well as for people who will be taking loans in the future. All banks prefer their loans repaid on time and not having to use services of law enforcement agencies.

Government at the moment sees only two ways of sorting out a current situation In Georgia. Restructuring the loan which will most certainly lead to the same finale, and second – government give out loans on a very small interest rate to the debtors, so, they can pay off their debts and save their shelter. Both of the solutions need a lot of work and contemplating.

Let me show you in a few words my alternative vision of sorting out problems with AgroCredits. This issue has become very topical in recent times. This is cause by a surge of AgroCredits being taken out recently. If we follow a line of public insurance of these loans, this will give us two benefits: firstly it will reduce a risk factor for creditors, so, interest rate will automatically decrease giving a debtor more chance of developing their business and being able to repay the loan. And secondly, in case he still defaults on his loan he will not lose his shelter and insurance will pay off his debt.

Concerning educating population on credits – this is very important part of sorting out these issues for the future. Educating population will lead to two positive effects. Firstly population will have a full knowledge that they might lose their collateral in case they default on any kind of debt. This knowledge will ease the tensions when it comes to worst. And debtor who has knowingly taken the risk should blame himself for bad decisions. And secondly many prospective debtors will not take any loans when they know consequences that may follow.

Protecting rights of the debtors is linked with protecting rights of creditors. And any change in equilibrium may lead to a feeling of inequality in either of the parties. Topic of this paper is: Decreasing the feeling that rights of debtors will not be protected. Educating population to the level that every single person, before taking a loan, will be fully aware what consequences may follow if he defaults on it. Preventative actions in sorting out this issue are prevalent.

Conclusion

At this stage based on the current law, current socio-economic problems, statistics, ways on sorting out the problem, this object of studies is very important and has a very high intrinsic value in its theoretical part as well as in its practical part. If the right approach is taken it is possible to minimise the need to protect rights of creditors or debtors in the futures, because every party will be fully aware of their abilities and punishments for failures to fulfil their obligations, before signing the contract.

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MEDICATION ERRORS: IS IT MORE IMPORTANT TO FIND AND PUNISH THE GUILTY ONE, OR TO REDUCE THE LIKELIHOOD OF RECURRENCE OF AN ERROR?

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Abstract

It is always emphasised in case-law that the nature of medical personnel's liability is determined by significance of health care as a social activity area, and the related need to ensure adequate health care services to the public. People who work in the medical field make errors like everyone else. When it comes to medication errors, it is usually considered that these errors are the most preventable, but also they are the errors which may result in the greatest negative consequences. Unfortunately, the entrenched traditional approach to medication errors, which can be described as "naming, blaming, shaming and punishing", does not increase safety in medicine. This enrooted perception associating error with non-professionalism, lack of attention and negligence, not only discourages learning from mistakes, but on the contrary – promotes their hiding.

Keywords: Human error. Medication error. Criminalization

Introduction

It is always emphasised in case-law (both in criminal and civil cases) that the nature of medical personnel's liability is determined by significance of health care as a social activity area, and the related need to ensure adequate health care services to the public. It is especially emphasised that the patient and medical staff are linked by the obligation, whose content is the physician's duty to ensure that this obligation is carried out by making the maximum effort, i.e. ensuring the maximum degree of attentiveness, diligence, prudence and proficiency. The specialist's qualifications held presume the quality of service, and the person relying on the specialist needs to feel safe, therefore stricter requirements are applied to attentiveness, prudence and diligence of the person of a certain profession. Thus, the aim to ensure quality health care services led to the occurrence of artificially constructed legal maximum attentiveness, diligence, prudence and proficiency standards, but in development and application of these standards it often remains not assessed, especially in criminal matters, that "medical practice is too complex to trust in knowledge gained through locally or legally constructed snapshots of reality" [34], as "errors often ... occur in the intersecting social realities of a diverse set of people: patients, families, doctors, nurses, hospital administrators, and the legal community"[35].

[34] Schubert Ch., Winslow G., Montgomery A., Jadalla A. Defining Failure: The Language, Meaning and Ethics of Medical Error, International Journal of Humanities and Social Science, Vol. 2 No. 22 [Special Issue – November 2012: 32.
[35] Ibid.

I.

For more than a decade, the position that people who work in the medical field make errors like everyone else has started to be expressed. Kohn, Corrigan and Donaldson were one of the first, who presented the position that errors are common and cause serious consequences, they presented their insights and research in the well-known paper „To Err is Human“[36]. When it comes to medication errors, it is usually considered that these errors (especially their category *wrong route of administration*) are the most preventable, but also they are the errors which may result in the greatest negative consequences. Below are described two cases of such errors, both of which ended in death of the patients.

Austrian medical resident's case[37]. A 10-month-old baby who was subject to cytostatic therapy was hospitalized in the Oncology Department of the Hospital. To reduce the risk of infections, an antibiotic Cotrimoxazol (*Cotrim-K*, oral administration) was given to the baby for prophylaxis. The precise dosage of medicines is particularly important for babies due to their small weight, therefore orally administered drugs are given to babies not with a spoon but with a syringe (syringe content is injected into the mouth). The Oncology Department used standard syringes for this procedure (the same as those used for intravenous injection). Two additional antibiotics – *Fortum* (400 mg 3 times per day intravenously) and *Refobacin* (a short 40 mg injection 1 time per day) were prescribed to the hospitalised baby because of fever. According to the instructions for use of the antibiotic Refobacin, the patient's blood test is mandatory on the third day of its use. During visitation, the physician A told the resident to take a blood sample and said that Refobacin should be injected 30 minutes after blood collection, and one more blood collection should be made 30 minutes after the injection. The resident started a blood collection procedure according to the physician's instruction. While the resident was carrying out the blood collection procedure, a nurse came to the ward carrying 3.75 ml Cotrim-K-Saft in 5 ml standard syringe with a red retainer; when she saw that the blood collection procedure was in progress, she said that she brought an oral antibiotic (the resident did not turn around or react to the coming of the nurse in any other way), put the syringe on the cabinet and left the ward. The resident completed the procedure, left the ward and returned in about 30 minutes, he took the syringe left by the nurse from the cabinet, and injected the medicine (oral antibiotic *Cotrim-K*) into the baby's vein through a port-catheter believing that the syringe contained *Refobacin*. After the injection, he left the ward. A few moments later the physician entered the ward carrying a syringe with *Refobacin* injection and noticed that the baby was cyanotic, with severely dilated pupils and tight breathing. The baby incurred anaphylactic shock due to intravenous injection of oral antibiotic. The baby died a few hours later in the intensive care unit.

The court recognized the resident guilty of unintentional killing (Article 222 of the Criminal Code of Austria) and noted that he acted roughly recklessly. Being careful and diligent enough, he could and should have realized that he could not use intravenously the syringe filled with antibiotic Cotrim-K-Saft and placed on the cabinet, since the physician instructed him only to take blood, and her explanation that blood had to be collected for two times, and Refobacin had to be injected between those two blood collections could not be understood by the resident as the physician's instruction not only to make the first blood collection, but also to inject antibiotic. The court also noted that the nurse who brought the syringe said that it was oral antibiotic. In addition, she put the syringe on the cabinet, while intravenous medicines are brought in a tray, together with swabs and disinfectant.

[36] Kohn, Corrigan, & Donaldson. To Err is Human: Building a Safer Health System. Institute of Medicine, 1999.
[37] LG Bielefeld, criminal case No. 11 Ns 16 Js 279/11

But the most important the court considered the fact that the syringe had no label with the medicine name. The court noted that the resident should have known that all syringes for intravenous injections had to be labelled. The court considered important the circumstance that the operating model used by the hospital to use standard unlabeled syringes for administering of oral antibiotics was increasing (determining) the risk of errors only when it was making the decision on severity of the punishment.

Lithuanian case[38].An 11-month-old baby was hospitalized in Kaunas hospital for rotavirus, after his blood tests the physician prescribed to inject 40 millilitres of 10 percent glucose solution. In the treatment room, the nurse filled two syringes, as she thought, with glucose solution and went to inject it to the baby. During the intravenous injection, when about 5 millilitres of liquid was injected, the baby writhed and started becoming cyanotic. The nurse discontinued injecting the medicine and cardiopulmonary resuscitation procedure was started, however, the baby died after two hours of intensive resuscitation. The cause of death was asystole induced by hyperkalemia (potassium overdose). Kaunas District Court stated in the criminal case that the nurse, knowing that her work was related to medicines hazardous to human life and health, whose mixing, injection rate or inappropriate or inadequate concentration could directly cause harmful consequences – death or bodily injury, could cause significant property damage to the institution and natural persons, did not carry out her job duties carefully enough, ignored them, and although she did not envisage any specific dangerous consequences, her improper fulfilment of duties allowed them to occur, i.e. the nurse, without making sure that she was filling syringes with the medicines prescribed to the baby by the treating physician (glucose), filled two 20 ml disposable syringes with potassium chloride, and injected at least 7 ml of potassium chloride solution through the catheter inserted in the baby's arm vein, and it caused an acute hyperkalemia to the baby, which complicated to asystole, and the latter caused the baby's death. The Court recognized the nurse was guilty under Article 229 and Article 132(3) of the Criminal Code and sentenced her to four years' imprisonment.

The court did not address the hospital's actions (refrainment from acting), related to storage of medicines and minimization of the risk of errors. The court also did not assess the fact specified by experts that glucose solution was the most commonly administered in the route of drip infusion, and especially intravenous flow injection of 10 percent glucose solution is allowed only under vital indications of severe hypoglycaemia, while the baby did not show its signs. So basically treating physician prescribed an improper route of glucose administration – a drip infusion should have been prescribed instead of an intravenous flow injection. This enables the assumption that even if the nurse had confused the medicines, the baby's life could have been saved. The court considered the nurse the only person to blame and imposed a very severe punishment (for comparison, only a fine was imposed in the Austrian resident's case), and did not assess the circumstances (internal regulations of the hospital assuring different locations for storage of medicines, etc.; potentially excessive prescription of medicines by the treating physician (glucose injections were not necessary; etc.), which also influenced the lethal injection. In the particular case, a guilty person was found and punished, however, the question whether such punishment increased security throughout the hospital and the health care system, whether the measures which really would help to avoid such mistakes in the future have been taken remains unanswered. Unfortunately, the entrenched traditional approach to medication errors, which can be described as "naming, blaming and shaming"[39], does not increase safety in medicine. The

[38] Kaunas District Court, Criminal case No. 1-436-530/2014

[39] Heard G. Errors in Medicine: A Human Factors Perspective. Melbourne: Australasian Anaesthesia. 2005. P 3.

progress and improvement of safety are possible only subject to abandonment of this traditional approach.

In the particular case, a guilty person was found and punished, however, the question whether such punishment increased security throughout the hospital and the health care system, whether the measures which really would help to avoid such mistakes in the future have been taken remains unanswered. Unfortunately, the entrenched traditional approach to medication errors, which can be described as "naming, blaming, shaming and punishing", does not increase safety in medicine. This enrooted perception associating error with non-professionalism, lack of attention and negligence, not only discourages learning from mistakes, but on the contrary – promotes their hiding. As a result, the potential to identify mistakes and learn from them is lost. Only an open and constructive discussion of errors and learning from them allows creating an open learning culture of security (Steckhan, Kettner, 2010). As long as errors are feared (more precisely, the responsibility for errors which may occur is feared) another side effect occurs – „the practice of "defensive medicine", which increases the use of unnecessary tests and procedures and fuels the rise in healthcare costs"[40]. Just only „the establishment of a blame-free, non-punitive environment can obviate this"[41].

In addition, it is essential to note that not only changing the approach to an error is necessary without linking it to "insufficient care" and/or "try harder", but also it is necessary to reduce application of the criminal law in the medical field – after all, "criminalization should be based not only on dangerousness of the assessed and significance of defended legal goodness, but also on the necessity efficiency and economic viability of criminal liability"[42]. As mentioned before, the current system only encourages "defensive medicine". In addition, the damage caused to the patient by an error may be compensated through the mechanisms of civil law. For example, Article 24(1) of the Law on the Rights of Patients and Compensation for the Damage to their Health provides that the damage caused to the patient by the fault of a physician or a care worker shall be compensated in accordance with the procedure established by the Civil Code. Article 6.264 (1, 2) of the Civil Code sets out that an employer shall be liable to compensation for the damage caused by the fault of his employees in the performance of their service (official) duties; for the purposes of this Article, employees are considered to be persons exercising their functions on the grounds of a labour or civil contract and acting under the supervision or in accordance with the orders of the corresponding legal or natural person. Liability of health care institutions to compensation for the damage caused to the patients by the fault of physicians working for those institutions during the provision of health care services is a non-contractual civil liability (Articles 6.283, 6.284 of the Civil Code). The institute of non-contractual civil liability is based on the universal duty to abide by the rules of conduct so as not to cause damage to another by his actions or refrainment from acting (Article 6.263 of the Civil Code). A person who violates this duty, or who by law is responsible for the actions of the person who caused the damage is liable to compensate the damage. Consequently, the injured person can receive compensation for the damage sustained even without criminal law measures, and preventive function as though carried out by criminal law (protect against the damage in the future) may very well be replaced by the open system of medical errors and the development of security systems in medicine.

[40] Sharpe, V.A., 2004. Accountability: Patient Safety and Policy Reform, Georgetown University Press: Washington. P. 276.
[41] Lehmann DF, Page N, Kirschman K, Sedore A, Guharoy R, Medicis J, et al. Every error a treasure: improving medication use with a nonpunitive reporting system. Joint Commission Journal on Quility and Patient Safety, 2007; 33:401–7.
[42] Fedosiuk O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (ultima ratio): teorija ir realybė, Jurisprudencija, 2012, 19(2), 722

Conclusion

So by changing the well-established approach to error as a deplorable thing, by excluding the “naming, blaming, shaming and punishing” concept, and by openly analyzing the errors and improving the system of administration the safety of patients will be guaranteed better than by attempting to seek security by threatening with criminal law sanctions.

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THE CRIMINAL LIABILITY OF LEGAL ENTITIES IN BRAZIL IN LIGHT OF THE NEW ANTI-CORRUPTION LAW

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Abstract

The present article focuses on the study of the liability of the legal entity for acts of corruption introduced in the Brazilian system by Law no. 12.846/2013. Meeting internationally agreed commitments, the Brazilian government issued specific legislation against harmful acts to the public administration, including the strict liability of the legal person for acts of corruption committed in their benefit. Thus, in view of the discussion on the criminal liability of legal entities, of the harmfulness of corruption to the economic system and the new Brazilian form of liability, it was intended herein to draw a criticism that may contribute to improving the fight against corruption as well as the liability system of companies in Brazilian law.

Keywords: Corruption – Criminal liability of the legal person– Brazilian anti-corruption law

Introduction

Brazil assumed various international commitments for the fight against corruption as a global phenomenon that causes social and economic damage to all countries independent of their level of development. Amongst these commitments is the development of the accountability of the legal person for acts of corruption carried out in their benefit.

In face of the economic effects generated by the corrupt performance of companies when developing their economic activity and the need to build legal instruments for its prevention and suppression, the production of this study, which aims to analyse the form of accountability introduced in Brazilian Law through law12.846/2013, is justified. The object of this study is the liability of the legal person for acts of corruption arranged for in the new Brazilian code and its possible consequences as a tool to combat corrupt practices. For this purpose, it will be necessary to enter into the discussion of their actual legal nature.

Is the system of corporate liability for acts of corruption introduced in Brazil in accordance with international guidelines on the matter? Is the form chosen by the Brazilian legislature able to generate the expected dissuasive effects? These are the main points to be developed.

Thus, through a literature review of national and international articles, it is intended to bring in elements that will contribute to the evolution of the interpretation of the Brazilian code in order to move forward on the path to the solution for the very relevant problem that corruption represents.

The criminal liability of legal entities in the Brazilian legal system

The criminal liability of legal entities, initially established in countries with a *common law* model such as the US, England and Australia, is already a reality in European Criminal Law and constitutes a trend that, sooner or later, will be part of the global reality, including Latin American countries (BACIGALUPO, 2011, p. 95). Currently, in Europe, the criminal liability of legal entities is provisioned for in countries like Spain, Belgium, Denmark, Slovenia, France, Finland, Portugal, Sweden and Switzerland.

The concern with the criminal liability of legal entities stems from the use of the fictitious legal entity structure in order to commit crimes. The characteristics of a hierarchical organization model and the principle of division of labour inherent to the business activity hinders the identification of the individuals responsible for the wrongdoing and their consequent accountability, which fosters a criminal policy of liability of the legal person in order to avoid impunity (RIOS, 2011, p. 203).

There are two ways of attributing criminal liability of legal persons, with the attribution model and the model of liability for its own doing. In the first model, there is a transference relationship, the legal entity is responsible for any acts carried out by any individual in its administrative framework by means of an attribution. In the second, there is an attribution of its own responsibility as a legal person (SILVA SANCHÉZ, 2013, p. 21).

Notwithstanding a reputable part of the doctrine that understands that criminal liability of the legal person would be unconstitutional because it violates fundamental principles of criminal law such as the capacity to act, the principle of culpability, the individuality of the sentencing and punishability (DOS SANTOS, 2008, p. 431), it is true that the Brazilian legislation already provides this regulation, even if it is in a limited way for crimes against the environment. Thus, in certain penal types such as pollution and deforestation the accountability of the legal entity is possible with the application of high penalty fines and restriction of rights such as the interruption of activities.

The model adopted by the Brazilian legislature was the one of required co-authorship between the legal entity and the individual agent, in such a way that the criminal liability of the company is linked to the liability of the person responsible for the action that gave rise to the criminal act (RIOS, 2011, p. 206). In face of the limitations to criminal liability of the legal entity in the Brazilian system, there is still a big barrier to be overcome, especially concerning economic crimes and offenses against the public administration.

However, the application of the criminal standard on the corporate activity may develop in other ways, mainly through the criminal liability of members, officers and employees and through a correlate stream of the economic criminal law doctrine named by the Spanish branch the intervention law. The intervention law would be a sort of middle ground between criminal and civil liability. According to MARTINÉZ-BUJÁN PÉREZ it would be a sanctioning law situated halfway between public and private law characterized by less stringent guarantees and procedures than criminal law and which apply less harmful sanctions to individual rights, aimed at safeguarding the economic relations that violate legal interests of less importance (2011, p. 72).

This line of intervention law is the model adopted in Germany. In the German system, the legal entity may account for crimes and misdemeanours committed by its bodies or by persons exercising power of decision therein, however, such liability is limited to sanctioning through fines and does not have strict criminal law consequences (TIEDMANN, 2010, p. 178). The same is true in Italy, where there is no legal provision for criminal liability of legal entities.

The adoption of this administrative liability sanctioning model of the legal entity does not stray far from the criminal liability. There is no essential difference between the two spheres of liability, except for a quantitative distinction between the values of the fines in some cases, furthermore, some European Courts, i.e. the Spanish Supreme Court, have already positioned themselves in the sense that some postulates and criminal warranties such as legality, proportionality and culpability should be widely applied also on the sanctioning administrative law, including in relation to attribution systems (BACIGALUPO, 2011, p. 96).

Besides having limited criminal liability of the legal entity, Brazil does not feature this model of sanctioning criminal law in its legal system. The liability of companies in the Brazilian administrative law does not overlap with the model of intervention law, nor does it have a dependency relationship with the criminal law. This situation seems to have changed with the innovations introduced by Law no. 12.846/2013, named the Anti-Corruption Law, which established a new sanctioning model for legal persons involved in unlawful acts of corruption.

Corruption acts and economic losses

There is not a clear and accurate definition of what international instruments understand by corruption, given that many acts typified in the national legislations may be characterized within this concept. In its justifications the Merida Convention, i.e., addresses corruption as a very serious phenomenon in a broad sense, and relates the practices of criminal organization and money laundering, where it manifests itself in convergence to a single corruptive behaviour (DE LA TORRE e FABIÁN CAPARRÓS, 2011, p 456). On the other hand, it lists a number of behaviours to be typified that would account for acts of corruption in the strict sense, such as bribery of public officials and diversion of assets.

Corruption as a skewed manifestation of power driven by a personal or third party benefit is as old as the exercise of power itself, it reproduces itself both in democratic systems as well as in authoritarian structures and propagates negative influences on political, international and economic spheres (DE LA TORRE e FABIÁN CAPARRÓS, 2011, p. 454). Nevertheless, it is an offense considered as a major social problem that could jeopardize social stability and security, threaten social, economic development and undermine democratic values (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p. 193).

Corruption in Brazil dates back to the colonization system that was based on extractivism and the desire for rapid enrichment with the aim to extract the largest possible amount of wealth. In this context there was not a Brazilian moral standard, prevailing the individualism without any collective or patriotic sentiment (HABIB, 1994, p.73). This problem persisted throughout Brazilian history and was fostered by a domination policy imposed during the Colonial, Imperial and Republican periods (HABIB, 1994, p. 77).

The impacts of corruption in the economic activity sphere can be analysed from the perspective of transaction costs. If in the short and medium term the acts of corruption can be seen as facilitators of transactions to overcome bureaucracy and legal requirements through the payment of bribes, in the long term it is a cost that will negatively influence the development of the economic activity, especially with the loss of rationality. The costs of compliance with legal rules will be replaced by the cost of the lack of rationality in a system controlled by bribes and extortion.

The long-term effects of corruption can be devastating because they tend to perpetuate themselves in time and expand in space. This expansion occurs through acceptance and learning of corruption over time, becoming a systemic act. The practice of corruption perpetrated in an institutionalized form constitutes a corruptive cycle of which it is difficult to remain outside, especially for public officials and businessman. In a concrete manner, corruption reduces the efficiency of the use of public funds with an increase in spending and application on unnecessary or unproductive projects, leading the State to a state of economic precariousness. (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p.195). This economic loss arising from acts of corruption will be stronger felt the less economically developed the State is, to the extent that, in addition to having fewer public resources they present a greater need for investments.

Illegal payoffs due to corruption schemes generate economic losses insofar as they affect the distribution of public benefits and freedom of initiative, conditioning the public performance to the illegal stimuli provided to public officials. On the other hand, the actual costs of corruption schemes arising from the expenditures in order to remain in obscurity are forms of an economic loss arising from this system (ROSE-ACKERMAN, 2010, p. 06). The logic of public performance on behalf of the common good is subverted by a system of retribution to those who act illegally providing unlawful benefits to public officials.

Another negative consequence to the economic order is the disincentive to foreign investments. What at first might seem interesting by overcoming the bureaucracy through illicit financial incentives, in the long term proves negative. This is because a system powered by the payoff of bribes conditions the normal functioning of the foundations of the economic system and breaks the business relationships of rationality, discouraging those who come from another country to expand their business (DE LA TORRE e FABIÁN CAPARRÓS, 2011, p. 460).

In our times, corruption is a global phenomenon that affects countries regardless of their economic status or development, which is why there is international concern with its combat. The subject is a major concern in international criminal policy, which is why in recent years there has been a large movement of intensification of global public measures in its prevention and repression established through international legal instruments.

The Brazilian anti-corruption law and the accountability of the legal entity

The fight against corruption as an international public policy arises from North American pressure of disincentive to corruption practices on a global scale after the passing of the *Foreign Corrupt Practice Act* (FCPA) in the year of 1977, which originated from a scandal involving the US aircraft company *Lockheed Aircraft Corporation* who paid bribes to foreign public officials of approximately U$ 22 million between the years of 1950 and 1970 (PAGOTTO, 2013, p. 24).For over two decades the United States have expressed particular interest in the impact of corruption at an international level, especially in international negotiations, since the US companies were suffering damage when competing unfairly with domestic companies from countries that did not repress, and even encouraged corrupt practices (ELLIOT, 2005, p. 931). Currently, there are a number of international instruments addressing the issue of the fight against corruption.

There are two ways of increasing the efficiency of the fight against corruption in modern States, one is to increase public transparency and the incentives for the supervision of the administrative activity, another is the effective enforcement of the law of a “more effective law enforcement” (ROSE-ACKERMAN, 2010, p. 8). International treaties work in these two perspectives, this study will focus on the latter.

Amongst the instruments used by international policies against corruption through the strengthening of the law are the criminalization of money laundering, the typification of illicit enrichment, forfeiture and asset recovery. In this way, international criminal policy links these instruments to the accountability of legal entities.

Aware of the role that legal entities represent it in the economic activity and its relations with Public Authorities, most international anticorruption instruments require the States to adopt measures to recognize the liability of legal persons for acts of corruption in which they can be involved. The provisions are of criminal liability or other nature, provided they are effective, proportional and discouraging, with an emphasis on economic aspects (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p.215). The choice of attributing criminal liability to the legal entity is the outcome of an "international trend" and not of "international law" behold, according to international instruments, States may opt for other models such as administrative sanctions and security measures, with the option for the criminal measures, in a strict sense, a trend manifested in the continental European countries in the last two decades (SILVA SANCHÉZ, 2013, p. 20).

Within the realm of the United Nations, two Conventions stand out, the Palermo Convention and the Convention of Merida. The United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, approved on December 12, 2000 has as its main feature the promotion of legislative and administrative instruments of international cooperation to effectively prevent and punish international organized crime (BARBOSA, 2008, p. 73). This convention would be the necessary legal framework for international cooperation aimed at fighting, amongst other things, criminal activities such as money laundering, corruption, trafficking of wild species in danger of extinction, crimes against cultural heritage and the link between criminal organizations and terrorism (UN, 2004, p. 2).

In the following articles, measures are established in order to fight bribery of public officials (article 8) and the accountability of legal entities (article 10).The liability of legal entities involved with organized criminal groups should be established in the civil, administrative and criminal spheres, respecting the peculiarities of the legal systems of the States.

Shortly after the meeting in Palermo, the UN General Assembly adopted Resolution 55/61 recognizing the need to develop an effective international legal instrument against corruption independent from the Convention against Transnational Organized Crime, establishing a special committee in charge of its creation (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p. 199). Thus, on October 31, 2003 the United Nations General Assembly adopted the Convention against Corruption, known as the Merida Convention, enacted in Brazilian regulations by Decree no. 5.687/06.

The objectives of this Convention, in line with other international instruments against corruption developed by regional organizations such as the OAS, the European Counseland the African Union, are to harmonize the sanctioning responses with the internal Laws, as well as to facilitate international cooperation amongst states providing effective mechanisms for crime prevention against the difficulties faced in their pursuit on an international level (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p. 197).

The liability of legal persons is addressed in Article 26 of the Merida Convention. It is determined that countries shall take the necessary measures in order to establish the liability of legal persons for acts of corruption. The liability should be in accordance with the principles of the internal legal system and may be in the criminal, civil or administrative law spheres, regardless of the determination of the attribution to natural persons involved in the criminal activity. The sanctions shall be pecuniary or diverse in nature and should be effective and dissuasive.

In face of the international commitments undertaken by the Brazilian State, on August 1, 2013, the Law no. 12.846 was published providing for civil and administrative liability of legal persons for acts of corruption. The new Brazilian law stipulates in Article 2 that legal persons shall be objectively liable, in the civil and administrative spheres, for the acts of corruption practiced in their interest. Such liability is dependent and will not exclude the subjective liability of the natural persons involved in the unlawful conduct (art. 3º). Thus, what is perceived is that the Brazilian legal system has incorporated the guidelines of the international instruments of accountability of the legal entity, yet with some peculiarities.

The liability of legal entities is limited to the legal fields of civil and administrative law, which represents, in principle, pecuniary penalties. On the other hand, the liability will be determined in an objective way, which means that it will not depend on evidence of fault.

For the legal person to be convicted to pay a fine it will be sufficient a relation of attribution of the unlawful act, regardless of the investigation of its culpability.

In this way, in line with the commitments made by the Brazilian State in the model of the fight against corruption through the strengthening of the Law, the administrative liability of the legal entity for acts of corruption was created, with an added waiver of the evidence of culpability. However, this scenario created by Law no. 12.846/13 has characteristics that surpass the sphere of administrative liability so that its legal nature should be analysed under a material and not merely formal prism.

Criticism of the form of liability adopted in Law n. 12.846/13

The objective of the new Brazilian law is to create disincentives to corrupting practices, however, the chosen form of accountability cannot produce these effects, especially because of two major criticisms that can be made, its materially penal nature and the option for accountability by attribution.

It can be argued that the anti-corruption law, while establishing the administrative liability of legal persons in fact manifests a material nature of criminal law. Although restricted to the administrative sphere, the law has adopted a number of measures of an eminently criminal nature such as the high monetary fines (article 6^{th}), forfeiture of property, suspension of the activities and compulsory dissolution (article 19) and its criteria for imposing sanctions (article 7^{th}). However, if on one hand the law appropriates penal instruments, on the other hand, it ignores the guarantees of that system and imposes the objective liability in total disregard of the material and procedural limits of application of criminal provisions (DE OLIVEIRA, 2014, p. 3).

This characteristic of the law 12.846/13 does not stand alone in the legal system, on the contrary, it represents a trend of recrudescence of other areas of law through severe sanctions. It is noticed nowadays that the administrative law and, also, the civil law, advance in directions of greater control, with eminently sanctioning characteristics, imposing severe restrictions of rights without, however, carrying with it the same guarantees inherent to criminal law such as the presumption of innocence and legal defence. The problem becomes even more serious when a "labels fraud"is noted. It does not matter the labelling that is given to a law, if its contents are of social regulation through the most serious legal sanctions that the State can provide it will be a criminal law, and, therefore, it should bring with it the guarantees to such harsh penalties prescribed in the Rule of Law (BUSATO, 2013, p. 62).

This characteristic may impede the implementation of the new law making it ineffective for the purpose of its publication, which was to discourage corruption. The norm also lacks regulation and there is no certainty of how it will be applied, however, when establishing an objective liability with strict penalties while ignoring penal procedural guarantees it might not move towards its applicability, except to its unconstitutionality for violating the principles of culpability, the presumption of innocence and legal defence. Moreover, by creating a very rigid instrument and limiting guarantees a counterproductive norm that does not generate any effects can be produced and stimulate negative behaviours in face of the feeling of impunity created.

On the other hand, the adopted model by the new Brazilian law was the responsibility of the legal person by attribution; this means that the liability of the legal entity is tied to an act attributed to a natural person. To be able to attribute liability to a legal person, even in objective modality, evidence of the attribution of the act to the physical agent and the demonstration of their guilt will be required.

Although Article 3 of the law provides that the accountability of the legal person does not exclude that of the natural person agents and which is independent of their individual liability, in order to be able to attribute a corrupt act to the legal person it is necessary to demonstrate at least objectively the relationship of attribution with the natural person agent and that the illegality was committed to the advantage of the legal entity. With an established attribution model, there is no way to establish the causal link between the act of corruption and the legal person without the imputation of conduct to some natural person.

What at first glance seems simple and efficient when ruling out the guilt factor and avoiding the pursuit of authorship in the context of an offense of corporate corruption does not survive a more detailed analysis of its contents. There is no way to establish a causal link between the corruptive act and the legal entity without stepping into the imputation of the act to a natural person agent, and in a more assured view, their culpability for the act. Thus, the effectiveness of the new law as a means of inhibiting corruptive behaviours can be very limited.

Conclusion

Brazilian law provides for criminal liability of the legal entity limited to cases of crimes against the environment.In these cases the attribution model is adopted, imposing the necessary co-authorship between natural persons and legal entities. Brazil neither has an intervention, or administrative sanctioning law, in this way economic crimes and crimes against the public administration cannot be attributed to a legal entity, but only to the natural persons that compose it, which must pass through the difficult task of authorship attribution for the acts committed in the exercise of the business activity.

While corruption is as old as the exercise of public power in Brazil and can be associated with its process of colonization, it constitutes a practice that generates losses of major consequence to the State, including those of an economic nature. Corruption causes detrimental effects to market relations insofar as it breaks down the relations of rationality and the free initiative, as well as causing losses to the State with the misuse of public resources, unnecessary investments and the reduction of foreign investments.

There are two ways to fight against the corruption promoted by international legal acts, by enhancing transparency and the strengthening of repressive laws for this practice. In respect of the strengthening of repressive laws, the international acts encourage the liability of the legal entity for acts of corruption, be it through the civil, administrative or criminal channels.

Brazilian legislators met the commitments assumed internationally with the enactment of Law n. 12.846/13, through which it was established the administrative liability of the legal entity for acts of corruption practiced in its benefit. According to the law, such liability will be determined regardless of guilt and accountability of natural persons who have participated in acts of corruption.

However, the Brazilian legislators' choice may not generate the expected effects on the fight against corruption. The possible lack of effectiveness of the Brazilian law is due to two factors, its criminal materiality and the option for the liability by attribution.

Although the studied provision is formally on administrative law, the analysis of its contents, such as the severity of the provided sanctions, allows the assertion that it is a law of criminal content symbolically nominated as an administrative law. Even more serious is that, despite attributing materially criminal penalties it leaves out the guarantees of the criminal system, especially with the liability being independent of any evidence of guilt.

On the other hand, although an objective liability is established, the imputation model is of attribution, thus, the liability will only be attributed when some natural person of its organizational structure can be objectively attributed, which may generate inefficiency of the system adopted in the new law.

Therefore, despite the objectives of the Brazilian legislators in forming an efficient instrument in the fight against a phenomenon that is so severe as corruption, the adopted model is not suitable for its purpose. As opposed to the expected effects, the difficulty of implementation of the legal entity liability system created by the Brazilian anti-corruption law can result in the sensation of impunity and in the stimulation of corrupting behaviours.

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DELINQUENT BEHAVIOR, ITS CHARACTERISTICS AND DETERMINING FACTORS

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Abstract

Delinquent behavior is defined as a criminal action committed by a human confronting the laws of the civil society. Crime understanding is based on the principle of normalization, which means that an individual`s guilt is based on the norms and laws applicable in the civil society. The society conducts control over individual behavior not only by the applicable legislation but also by ethical and moral norms of the society. The crime is a specific form of a behavior that is different from other types of behavior in its contextual load and the community`s assessment of it. Delinquent behavior comprises many components; therefore, according to the complexity of the case, it is the subject of numerous scientific disciplines, including criminology, sociology, psychology, psychiatry, law, etc.

Keywords: Temperament, Impulsiveness, Prevalence of negative emotional background, Search risky sensations, Empathy, Altruism, Honesty, Acceptability

Introduction

For characterization of personal qualities of a deviant individual it is important to separate the features influencing the development of a criminal behavior. Psychological and psycho-social theories explaining such behavior focus on the personal qualities of an individual and consider individual peculiarities as a criminal behavior stipulating factor. There is another understanding of a criminal act; according to this formulation an offender commits a crime because he/she has not developed an adequate attitude toward the social reality, such approach is conditioned by his/her moods. Offender assesses the outcomes of his/her offence inadequately, therefore, when talking about commitment of an offence it is very important to consider the individual psychological characteristics, such as motivational system and the general peculiarities of the activity, which form a general strategy of an individual; besides, it is significant to consider the individual's attitudes as well.

In term of a psychological characteristic the large number among the criminals tend to transfer their responsibility onto the other offenders and justify themselves in order to prove his/her innocence; this category of criminals try to achieve the above mentioned by exaggerating a victim`s guilt, confronting with social norms, depreciating social norms and readdressing the responsibility to the other / situational factors.

It should be noted that the structural features of the hierarchy of needs and motivations are different in case of offenders. Usually, a socialized individual has an aspiration for satisfaction of higher rank of demands - self-development, self-realization and self-esteem. In the case of criminals we frequently deal with the lower rank of the demands hierarchy, because their behavior is mostly motivated with low-ranking demands. They are impulsive and focused on satisfaction of their primitive, vital needs.

The following important criteria are considered while studying the causes of criminal behavior:

1. Number of factors have influence upon formation of any type of behavior including a criminal one;
2. Criminal behavior is different from a socially acceptable behavior in its content and direction, as well as psycho-regulatory mechanisms engagement level;
3. The criminal action is carried out in the manner of disclaiming the social responsibility by an offender;
4. Criminal behavior is characterized by conflict.

As the crime is always directed towards the violation of the norms of the society, it is usually followed by the intrapersonal conflict of an offender as well as the conflict between the individuals and the groups.

In reviewing the personal qualities related to the implementation of criminal conduct we can point out some dispositional and acquired personal qualities.

In reviewing the individual dispositional characteristics of an individual in term of his/her criminal action, the special attention should be paid to his/her intelligence and temperament. Intelligence is defined as a precondition for analyzing the consequences of an offense by an offender while committing such action, while possession of certain types of temperament is deemed as a factor putting the obstacles to the process of socialization with the environment and, accordingly, supporting the implementation of anti-social action and behavior.

The scientific research in this field proves the close connection between the IQ and a crime. One of the researches conducted in connection with the mentioned issue demonstrated that IQ index of the individuals having committed serious crimes was 17 scores less compared to those who had committed no crime. In contrast to this sharp difference, the IQ score difference among the individuals having committed minor crimes and those who had committed no crime was very small and equaled to 1.

The connection between the IQ and crime is also proved by the results of the longitudinal research administered towards 12 686 individuals. Assessment of the prisoners` IQ showed that the ratio of the inmates with high and low intelligence amounted 1/31.

The most common explanation for the relationship between the crime and intelligence is related to low school performance. According to this theoretical approach, low intelligence leads to poor academic performance, which, in its turn, stipulates abandonment of school/education and the formation of criminal behavior.

The recent researches revealed that the Academic Performance Index, i.e. the GPA is a better predictor for a delinquent behavior than the IQ. There is a correlation between the academic achievement and the delinquent behavior.

Temperament is an individual feature of an individual which significantly determines the individual's behavioral model. Despite the great influence of environmental factors, it is generally considered that the peculiarity of temperament is determined by the genetics. Temperament includes the following components: character, sociality, activity level, reactivity and affectivity.

Temperament plays a significant role in the relationship of a child and the environment; accordingly, the experience gained in childhood is well reflected in his/her environmental attitudes and the socialization process at his/her next age development stages.

Psychology singles out personal qualities of an individual which are human psychological traits. If consider these personal qualities with regard to a delinquent behavior they may be divided into two parts: 1) psychological signs that contribute to the fulfillment of delinquent behavior by an individual and 2) psychological signs, which protect an individual from committing any delinquent behavior. Such division is important to clarify the personal qualities having positive and negative connections with the criminal action.

Let us review these personal qualities separately:

Impulsiveness - this is the feature of a subject to act in less consideration of the consequences of his/her action. Impulsiveness prevents a person in exercising his/her purposeful behavior. Behavior of an impulsive individual in most cases is stipulated by the situation; therefore, a person can no longer afford to determine the results of the action committed by him/her. The research conducted for the purposes of the relationship between the impulsiveness and delinquent behavior showed that in 78 cases from 80 ones the relationship between impulsiveness and crime was positive. It should be noted that the general negative emotional background further strengthens the correlation between the impulsiveness and delinquent behavior.

Prevalence of negative emotional background - expresses the inclination of an individual to process the received situational cues by preliminary irritation and anger. Negative emotions background strongly correlates with delinquent behavior. This regularity is valid in the case of different genders and cultures. The research showed that the cause of negative emotional background is the lack of serotonin – a chemical element in human brain. A number of researchers believe that specifically the lack of this element is a direct predictor of a delinquent behavior of an individual.

Search risky sensations (low sensitivity threshold) - this feature is related to the adoption of active and risk perception, which leads to the individual`s search for risky situations. The category of persons who are actively looking for strong feelings and at the same time are socialized select the professions such as firefighters, police officers etc. or they go in for extreme sport. The individuals who have low level of socialization but strong desire of searching for risky feelings - with high probability – tend to self-realization in the way of carjacking, robbery etc. Review of the literature shows that there is a very high positive correlation between the risk demand and the crime.

Empathy - it is the individual's emotional and cognitive ability to understand, feel and share other people's feelings and spiritual condition. Emotional component of empathy enables an individual to feel the other person`s pain while a cognitive component allows to understand the cause of the pain. There are people who suffer from/bear a whole world`s pain, but there are the people who are unable to understand even the nearest person. Lack of psychological sign of empathy is one of the predictors of criminal behavior.

Altruism - is a concern of an individual for others and consideration of the interests of others without his/her benefit. On the other hand, altruism can be viewed as a behavioral component of empathy. If a person feels empathy toward others, he/she will be motivated to carry out such behavioral activity, which will reduce the stresses of another individual. Examination of these personal qualities revealed that the lack of altruism and empathy is directly connected with delinquent behavior; the lower is the level of empathy and altruism the higher is the index of anti-social behavior.

Honesty - is a component psychological trait. It includes the particular features such as self-discipline, orderliness, scrupulousness and responsibility. The development of the mentioned features is directly connected to the successful adaptation of individuals to the community. The lack of this feature is the impeding factor for an adaptation process.

Acceptability – generally this is the personality trait covering the openness and perceptibility of different opinions and ideas of different people. Acceptability is expressed in friendly, courteous and cooperative relationships with people. The most important sign of the acceptability is trust to people. The individuals with high acceptability can compromise in favour of others' interests and help other people. The people with this feature are focused on the implementation of the pro-social behavior and gaining social desirability. The individuals who commit crimes tend to be hostile towards others; they are egocentric, angry, jealous and indifferent to others. They have difficulties to control their impulses and have the values and beliefs different from socio-cultural context around them.

Conclusion

As a conclusion it should be noted that the development of the sense of acceptability is the kind of prevention of a crime. The meta-analysis conducted in this sphere proved the existence of a strong correlation between the acceptability and anti-social behavior.

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TRAP OF ECONOMICS THE WORLD HAS FALLEN IN A SURVEY OF KINOSHITA THEORY IN MACRO-ECONOMICS

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Abstract

This paper is a survey of Kinoshita's Macro-Economic theory and new Macro-Economic paradigm. Throughout his study, he proclaims there are two economic phases: one is expressed primal problem, and another is expressed its dual problem. And he states that the two economic phases have duality relations. His theory reaches analysis of global trade, bubble economy and its crash. His main tools for the analysis are linear programing on operations research. We summarize his five published papers which construct his theory and paradigm, and we point out that ignorance of his theory makes the world economy fall in trap of economics.

Keywords: Macro-Economics, bubble economy, global trade, thetical and antithetical economics

Introduction

This paper is a survey of Kinoshita theory[1)-5)] on Macro-Economics and explains Kinoshita's new Macro-Economics paradigm, Primal problem and Dual problem.

Primal and Dual problems in Macro-Economics

Kinoshita[1)] proclaimed two different phases exist in Macro-Economics and classified into the primal problem and the dual problem. In the primal problem phase, capital expenditures of private corporations grow, and corporations have an impetus towards the maximization of profits; the economy grows. During the bubble period collapses and into the dual problem phase in Macro-Economics, the efficiency of investment drops below the market interest rate for corporations with debt, and the goal of corporations shifts from maximization of profit to minimization of debt; the economy to shrinks. In Figure 1, we indicate corporate behavior in these two phases.

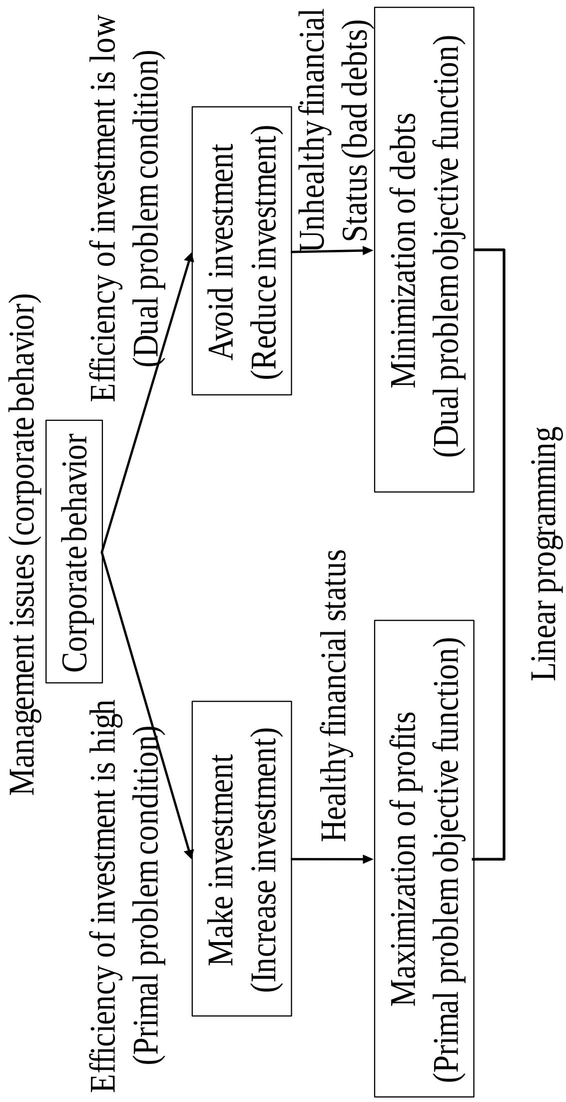

Figure 1 Corporate behavior(Kinoshita[1)], p117)

Primal Problem

Kinoshita[1)] calls Adam Smith type economics *the primal problem in Macro-Economics*. In the primal problem, economic behavior is to maximize profits, and they are expressed by an objective function that is a formula for the primal problem of linear programming (equation (1)). In other words, an economic entity will behave in such a way as to maximize profit, which is expressed by the objective function under various conditions.

Formulation of the primal problem:

$$\max \sum_{j=1}^{n} c_j x_j \qquad (1)$$

subject to:

$$\sum_{j=1}^{n} a_{ij} x_j \leq b_i, \qquad i = 1,2,\cdots,m \quad (x_j \geq 0, \qquad j = 1,2,\cdots,n)$$

where:

x_j: The number of units produced for product j;

$c_j(profit\_rate) = P - (1 + r)h$, where P is price, r is interest rate, and h is the cost;

a_{ij}: The amount of cost incurred for the production of a unit of product j under the cost category i;

b_i: Required funds (debt) under the cost category i;

Here concludes as maximization of profit.

Example 2-1. For example, let us suppose an economic entity sells two products: A and B. Assume the entity has sold x_1 and x_2 units of A and B respectively, and earned profits of c_1 and c_2 for each unit sold. The entity's goal is to maximize these profits. This behavioral principle can be expressed by equation (1). Next, assume that the manufacturing cost for each unit of A and B to be a_{11} and a_{12} respectively, and up to b_1 amount of money can be financed for the manufacture. Also, assume that the R&D cost for each unit of A and B to be a_{21} and a_{22} and up to b_2 amount of money can be financed for R&D activities. Here, we suppose that the cost incurred for the products are limited to the manufacturing cost and R&D cost. The assumption is that investment can be made by borrowing money. This situation can be expressed by the formula in equation (2). This is how the behavior of an economic entity may be expressed when it intends to maximize profit.

A formula of theory of constraints in the primal problem (example 2-1):

$$\max \quad [c_1x_1 + c_2x_2] \tag{2}$$

subject to:

$$a_{11}x_1 + a_{12}x_2 \leq b_1 \text{ (Manufacturing cost)}$$
$$a_{21}x_1 + a_{22}x_2 \leq b_2 \text{ (R\&D cost)}$$

where:

Products: A and B;

Cost categories: Manufacturing cost, R&D cost.

The manufacturing cost and R&D cost can be financed by a bank up to b_1 and b_2, respectively, and invested on products A and B.

Here concludes as Investments are made (increased).

Dual problem

Kinoshita[1)] calls the aforementioned Keynesian economics *the dual problem in Macro-Economics*. In the dual problem, the objective of economic behavior is to minimize debt. The dual problem in Macro-Economics can be expressed using the dual problem formula of linear programming (equation (3)). In other words, an economic entity will act in such a way as to minimize debt, which is expressed by the objective function.

Formulation of the dual problem:

$$\min \sum_{i=1}^{m} u_i b_i \tag{3}$$

subject to:

$$\sum_{i=1}^{m} a_{ji}u_i \geq c_j, \quad i = 1,2,\cdots,m \quad (u_i \geq 0, j = 1,2,\cdots,n)$$

where

u_i: Unpaid balance rate for the cost category i.

$$u_i = 1 - (amortization\_rate)$$

Here concludes as minimization of debt.

Example2-2. Let us consider previous example (example 2-1). On the conditions of the example, we suppose an economic entity has funds (debts) of b_1 for overall manufacturing and its unpaid balance rate is u_1. And The entity has funds of b_2 for overall R&D and its unpaid balance rate is u_2.

Here, unpaid balance rates are defined as $u_1 = 1 - (amortization\_rate)$ (manufacturing cost) and $u_2 = 1 - (amortization\_rate)$ (R&D cost). The economic entity will act to minimize its debt and this behavioral principle can be expressed by equation (4). This principle applies because the debt (manufacturing and R&D cost) per each product A and B becomes higher than the profit per unit, i.e., and the efficiency of investment drops below the market interest rate. Shifts of the behavioral principle from investment to payback of debts, can be expressed in equation (4). This explains the behavioral principle of an economic entity to minimize its debt.

A formula of theory of constraints in the dual problem (example 2-2):

$$\min \quad [u_1 b_1 + u_2 b_2] \tag{4}$$

subject to:

$a_{11}u_1 + a_{21}u_2 \geq c_1$ (Product A)

$a_{12}u_1 + a_{22}u_2 \geq c_2$ (Product B)

where:

Products: A and B;

Cost categories: manufacturing cost, R&D cost:

The debts for product A and B become bigger than respective profits, i.e. the efficiency of investment drops.

Here concludes as conclusion: Avoid investment (reduce investment).

Kinoshita proposes the Theorem of duality in Macro-Economics. Table 1 displays duality relationship items of the primal problem economy and the dual problem economy.

Table1 Summary of Duality in Macro-Economics(Kinoshita[1)], p122)

	Primal problem economy	Dual problem economy
(1) Law	The invisible hand of God	Fallacy of composition
(2) Behavioral principle	Economic entities' maximization of profit	Economic entities' minimization of debt
(3) Say's Law	Supply creates demand	Not effective results in insufficient demand
(4) Principle of effective demand	Not effective A shortage in supply, i.e. crowding out may be possible	Demand creates supply
(5) Monetary policy	Effective	Not effective Lowering the interest would not tempt corporations to borrow money
(6) Financial policy	Not effective	Effective, the government is the biggest consumer
(7) Interest	Normal rate (inflation)	Ultra-low rate (deflation)
(8) Unemployment	None	Present
(9) Saving	Savings are invested	Savings will not be invested
(10) OR analysis	Primal problem in linear programming	Dual problem in linear programming

Bubble economy and its collapse

Kinoshita[2)] defines the concept of economic growth, bubble economy, and destruction of bubble economy. He pointed out that there is a economic phase expressed by primal problem before bubble economy, and there is another phase expressed by dual problem after destruction of bubble economy. In the primal problem phase, which is mentioned in previous section, capital expenditures of private corporations grow, creating an impetus towards the maximization of profits. Adam Smith's "Invisible hand" makes the economy grow significantly.

The bubble economy is illustrated in Figure 2. Kinoshita describes why bubble economy occurs after the primal problem phase. A reason is increase of consumption coefficient infinitely close to 1 by the economic growth. This has multiplier effects and expands economic infinitely, even without an increase in corporate investment in facilities. The economic equilibrium point in the figure, moves from A' to A^1, and to A^2. He defines the state with abnormally high investment effect as *bubble economy*.

And he describes that consumption coefficient larger than 1 causes bubble economy crashes. As a result of the crash, consumption activity returns to normal, and the economy suffers a great lack of demand. He refers the state to collapse of a bubble economy. Then the economy enters into dual problem phase.

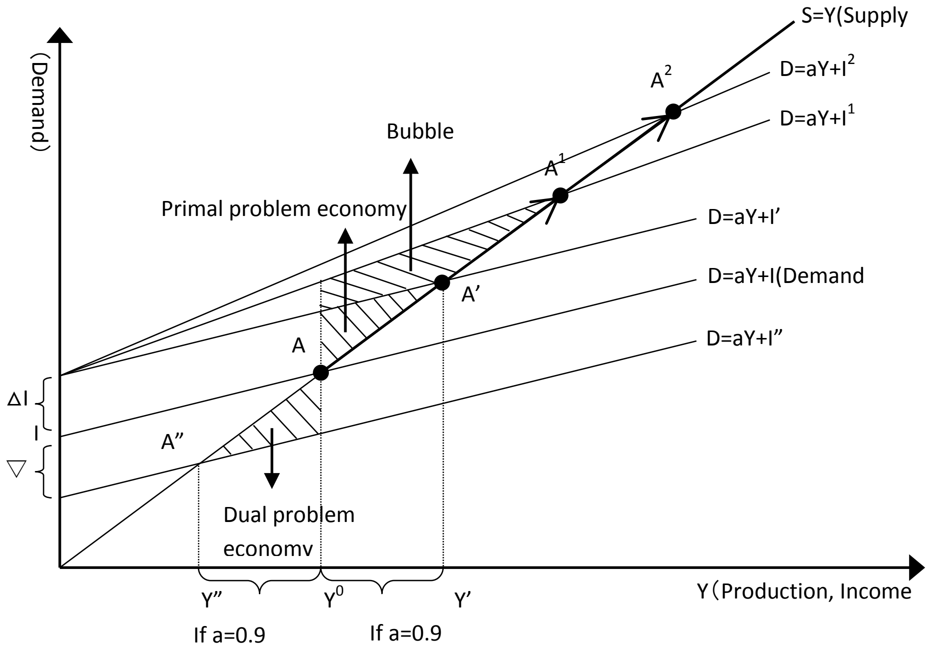

Figure 2 Bubble economy(Kinoshita[2], p114)

Globalization trade

Moreover, Kinoshita[3] found a condition when the Ricardo’s comparative advantage theory can be justified. That is only when a macro economy is in the primal problem phase. In other words, Ricardo’s theory of comparative advantage is not applicable when a macro economy is in the dual problem phase. He applied his original approach, which is based on operations research with linear programming, to prove the validity of Ricardo’s comparative advantage theory.

He concludes that Ricardo’s comparative advantage theory is applicable only when the economy in primal problem phase. In the phase, a globalization policy, or a policy of free trade, is the right choice, and they would benefit all the players. In brief, a policy of globalization is effective.

He further argues, on the other hand, the economy in a dual problem phase, Ricardo’s comparative advantage theory is not applicable, and a free trade policy is not justifiable. In brief, an isolation policy is the right choice. If a globalization policy is adopted under such economic phase, all the players would suffer a loss and become poorer.

Thetical and Antithetical economics

Kinoshita[4] arranges his contention that existence of the primal problem phase and the dual problem phase of Macro-Economics into a theory of *Thetical economics* and *Antithetical economics*. Fundamentals of the theory are naturally induced from his observations on Japanese recession and the U.S. sub-prime loan crisis. By being able to formulate corporate behavioral principles and governmental behavioral principles using the concepts of primal and dual problems in linear programming, it has become possible to establish the concepts of the thetical economy and the antithetical economy in Macro-Economics.

These two economies have their respective theorems. Theorem in the thetical economy is Say's Law (supply creates demand), and the theorem in the antithetical economy is the principle of effective demand (demand creates supply).

He also demonstrates how a bubble economy occurs in thtical economics and how the bubble economy crashes.

Mechanism of four economic phases

Mechanism of four economic phases and transitions among them are described by Kinoshita[5)]. The phases are thetical economy phase, antithetical economy phase, bubble economy phase, and bubble bursting economy phase.

He defines thetical phase and antithetical phase in Macro-Economics as subsets of economic space. These are models based on independent definitions. Under these definitions, he describes a bubble economy and the bubble bursting by investment efficiency $\frac{\partial Y}{\partial I}$, where Y is gross domestic product, and I is capital expenditure of economic entities in Macro-Economics. In the simple model, since the investment efficiency is expressed as an inverse proportionality of consumption coefficient, he describes a bubble economy and the bubble bursting through the variations of consumption coefficient. Increasing consumption coefficient increases investment efficiency $\frac{\partial Y}{\partial I}$, but when consumption coefficient surpasses 1, investment efficiency $\frac{\partial Y}{\partial I}$ drops from high efficiency level to less than zero (from $\frac{\partial Y}{\partial I} > 0$ to $\frac{\partial Y}{\partial I} < 0$). The drop is bubble economy collapse.

Conclusion

It is now almost ten years since subprime mortgage crisis or bankruptcy of Lehman Brothers. Notwithstanding, why are developed countries still in prolonged recession? Is the world economy is confused? Because we don't know two economic phases, thetical phase and antithetical phase, and then we fall in the trap of Macro-Economics.

The world economy will be released from the trap with studying Kinoshita's new Economic theory with his five papers[1)-5)], and his paradigm.

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CRIME AND VICTIMIZATION ISSUES IN CONTEMPORARY GEORGIA

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Abstract

The author analyzes the results of the four stages of victimization surveys and Unified Crime Reports prepared by the Ministry of Internal Affairs of Georgia in 2010-2013. The results of victimization surveys and statistics reports related to indexes and structure of crime became important after the parliamentary elections held in October 1, 2012, resulted by defeating of the ruling political party “National Movement” which was in power for the last 9 years. The new coalition “Georgian Dream”, headed by the billionaire B. Ivanishvili, radically changed political climate and announced the acceleration of democratization of the country and adopted the legislation decriminalization policy. According the new policy, the government of the country carried out the general amnesty, and released more than 60% of all prisoners from the custody. Such policy became the object of serious criticism from the part of the oppositions and some experts. They have expressed concerns about the criminal situation and decreasing level of security in the country predicted anarchy and disorganizations. This article is an attempt to assess the real situation in Georgia and the level of real threat to stability posed by criminality.

Keywords: Criminalization; Victimization; Registered Crime; Personal Safety; Security; Public Opinion

Introduction

Georgia is a small developing country with a population of about 4.5 million people and a gross national income (GNI) per capita of US$ 3,136.[43] Over the past eight years Georgia undertook significant economic, social and governance reforms resulting, inter alia, in progress in reducing corruption, crime rates and in developing a more favorable environment for business. Sound fiscal and monetary policies supported by structural reforms supportive of supply-side dynamics also contributed to foster economic growth particularly in larger cities. Despite shocks caused by the 2008 conflict with Russia and the following global economic downturn and a sharp decrease of the foreign investments, Georgia was capable to recuperate macroeconomic stability and to recover progressively.

The October parliamentary elections marked the first democratic transfer of power in the country’s history; the elections were widely recognized by election observation organizations as the most free and fair ever in Georgia. The program of the new governing Georgian Dream Coalition "for Strong, United Georgia" reaffirms stability-oriented macroeconomic policy as a dominant medium term objective. The program also emphasizes efficiency, transparency and accountability of public finances and reaffirmed commitments to further public finance reforms.

[43] Nationals Statistics Office of Georgia (2011). The 2012 UN HDI shows a GNI per capita of USD 5,005 (purchasing power parity terms).

Background of the problem

October's Georgian parliamentary elections brought about the nation's first peaceful transfer of power. Amidst political uncertainty, the country faces serious economic legal and governance problems. A particularly serious problem for the new government becomes the decriminalization of criminal laws and reduces the number of inmates in Georgia's prisons.

The number of prisoners dramatically rose as a result of the policy of "zero tolerance" pursued by President M. Saakashvili. Thus, in the period from 2004 to 2012, the number of inmates in Georgia's prisons grew from 11000 to 24079, and reached the average 570 persons per 100,000 populations.[44] It was the highest level of prisoners in Europe after the Russian Federation.

After the parliamentary election in October 2012, the number of prisoners has reduced by more than half for the last one year mainly because of enforcement of the broad amnesty. In January of 2013, the number was reduced to 13,170 and in February it was 11,107, by the data of the Ministry of Corrections and Legal Assistance of Georgia.

After the amnesty, the opposition party and some experts declared that the amnesty would cause a serious increase in crime and a general rise in crime of Georgia, other experts have refuted these forecasts.

For an objective analysis of the crime situation in Georgia, the author has analyzed official data on the number of recorded crimes and the results of victimization studies conducted in 2010 – 2013.

One of the most reliable sources of information of registered crimes can be found among the statistics maintained by law enforcement bodies, such as the police.

Three factors generally influence the number of registered crimes recorded by police officials:

1) The existence of a criminal code,
2) How effectively the population reports crime to the authorities, and
3) The desire and capabilities of police to react and investigate reported crimes.[45]

In general, as a country becomes more developed; a greater tendency exists in reporting crime to responsible authorities, and data is better maintained on the crime rate, per 100,000 citizens. However, official figures are not the sole indicator of the level of crime in any given country. Statistical data is additionally provided and supported by the findings of surveys, interviews and studies. Survey results are useful in determining the efficiency of law enforcement bodies, crime prevention and improvement of measures for fight against crime.

Until 2004, unbiased statistical data concerning the dynamics and level of crime in Georgia was not available. It has been widely reported domestically and internationally that corrupt and unprofessional law enforcement bodies used various measures in their attempts to conceal the actual number of crimes committed. They even blocked and/or impeded the official registration of committed crimes. As a result, the number of crimes registered by the MIA (for example 17,397 crimes were registered in 2003). However, in reality this number failed to reflect the existing situation at the time (see table 1).

The approaches towards official registration of reported crime substantially changed in 2004. As a result, the performance of law enforcement bodies in terms of detecting and investigating crimes substantially improved, which is clearly reflected in statistical data.

The number of registered crimes in 2006 was 62283, which is a three-fold increase in the crime rate since 2003 (see table 1). The overall registered crime rate peaked in 2006-

[44] Geostat, Composition of GDP, 2012.

[45] F. Adler, G.M. Mueller, W. Laufer (2007) – Criminology and Criminal Justice System. Six Edition Part 1. 1 Understanding Criminology, Chapter 2 Counting Crime and Measuring Criminal Behavior

2007, and then started decreasing. Consequently, the reflected drop as found herein is deemed as the direct result of an actual decrease of the crime rate in the society.

Table 1. Registered crimes by MIA

Type of Crimes	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total	**17397**	**24856**	**43266**	**62283**	**54746**	**44644**	**35945**	**34739**	**32261**	**31999**
Among them:										
Aggravated crime	**10326**	**17833**	**24320**	**29249**	**13158**	**13028**	**11093**	**9987**	**9016**	**8994**
Attempted and premeditated murder	**499**	**538**	**697**	**666**	**741**	**653**	**494**	**418**	**336**	**354**
Intentional bodily harm	**253**	**371**	**368**	**271**	**157**	**200**	**134**	**126**	**94**	**132**
Rape	**52**	**62**	**141**	**167**	**156**	**100**	**84**	**82**	**78**	**77**
Armed robbery	**556**	**1316**	**2087**	**2751**	**1208**	**2684**	**700**	**398**	**261**	**311**
Robbery	**1013**	**1733**	**1925**	**2160**	**1615**	**2684**	**958**	**638**	**485**	**555**
Theft	**5593**	**10634**	**16256**	**27657**	**18587**	**14814**	**11473**	**11371**	**11383**	**12111**
Categories										
Burglary	**1785**	**1887**	**2998**	**3523**	**2684**	**2347**	**1860**	**1552**	**1381**	**1298**
Car theft	**388**	**260**	**292**	**611**	**307**	**267**	**154**	**117**	**86**	**77**
Theft of Livestock	**-**	**-**	**-**	**783**	**527**	**544**	**417**	**417**	**476**	**399**
Fraud	**483**	**543**	**674**	**2395**	**2222**	**1844**	**1761**	**1326**	**1326**	**1299**
Illegal production, acquisition, keeping and etc. of drugs.	**1945**	**1941**	**2074**	**3542**	**8493**	**8699**	**6336**	**5465**	**3776**	**3654**
Hooliganism	**487**	**706**	**1314**	**1208**	**858**	**724**	**524**	**435**	**455**	**401**
Juvenile delinquency	**617**	**557**	**755**	**997**	**674**	**759**	**575**	**543**	**533**	**502**

Note: Not all registered crimes are included in the above table.

As the analysis of registered crimes MIA for the period January-March 2013 shows, the crime rate in spite of a broad amnesty to criminals increased slightly for certain types of crimes, which include theft and drug addiction. At the same time in other crimes like murder and fraud have been reported some decrease in crime rates. This indicates that despite the claims of oppositions and a number of experts, the country managed to avoid the uncontrolled growth of crime in 2013.

Table 2. Recorded and Detected Specific Crime in Georgia 2012-2013 (January-March)

Crime	2012			2013			Number/%	
	Recorded crime	Detected crime	Detection %	Recorded crime	Detected crime	Detection %	+/_	+/_
Homicid	37	28	76%	30	28	93%	-7	-18%
Attempt of Homicid	84	72	86%	52	48	92%	-32	-38%
Assault	35	21	60%	40	30	75%	+5	+14%
Rape	27	9	33%	27	12	44%	0	0%
Theft	3875	928	24%	4886	1495	31%	+1011	+26%
Car theft	30	29		29	26			
Robbery	139	75	54%	187	97	52%	+48	+34%
Armed Robbery	95	49	51.58%	192	101	53%	+97	+102%
Fraud	780	168	22%	393	66	17%	-387	-50%
Drug Crime	1275	938	73.57%	2212	1522	68.81%	+937	+73%

The dynamics of victimization in Georgia (1992-2013)

In discussing the problem of victimization in Georgia, it is necessary to conduct comparative analysis of the level of victimisation during different periods of the country's development. A victimization survey was conducted by GORBI in 1992 and 1996, and 2010-

2013. This experience gives us the opportunity to draw a clearer picture of both personal and HH crimes, and their associated dynamics.[46]

The following table shows that the victimization level in 2013 for almost every crime dropped in comparison with 1992 and 1996, and this marked reduction has been between 5 – 15 times in scale (figures are over a period of five years).

Table 3 - Level of Victimisation in Georgia 1992 – 2013

	Last 5 yrs.	**Last year**	**Last 5 yrs.**	**Last year**	**Last 5 yrs.**	**Last year**		**Last 5 yrs.**	**Last year**	**Last 5 yrs.**	**Last year**
	1992		**2010**		**2011**			**2012**		**2013**	
Car theft	**15.4**	**6.3**	**1.1**	**0.1**	**0.4**	**0.0**		**0.4**	**0.1**	**0.9**	**0**
Theft from and out of car	**31.1**	**10.8**	**7.27**	**2.2**	**3.6**	**0.9**		**3.0**	**0.9**		
Car vandalism	**14.5**	**4.1**	**1.7**	**0.8**	**0.9**	**0.5**		**1.2**	**0.5**		
Burglary	**9.9**	**2.5**	**2.7**	**0.5**	**2.2**	**0.5**		**1.6**	**0.3**	**1.3**	**0.4**
Attempted burglary	**8.2**	**2.1**	**1.2**	**0.1**	**0.7**	**0.1**		**0.5**	**0.1**		
Robbery/armed robbery	**5.8**	**1.8**	**0.6**	**0.2**	**0.4**	**0.2**		**0.2**	**0.00**	**0.6**	**0.1**
Theft of other personal property	**13.4**	**3.5**	**2.1**	**0.8**	**1.0**	**0.2**		**0.9**	**0.2**	**0.6**	**0.3**
Assault/threat *	**5.3**	**0.6**	**1.1**	**0.18**	**1.1**	**0.5**		**1.0**	**0.4**	**0.2**	**0.0**

The following table reflects the victimization level, ranging from the crime of theft from inside and outside of a car in 1992 (31.1%) compared to 2012 (3%), which is a ten-fold decrease.

In observing the pattern of crime levels in the years noted, the percentage of several types of crimes when compared to 1992 significantly decreased. For example, in 1992, 6.3% of car owners declared in the last year that their car was either stolen or driven without their permission. Compared with 1996, this figure decreased to the level of 3.3%, and in 2010, only 0.02% of car owners indicated that they had suffered from this type of crime in the last year.

In addition, the survey in 2011 did not reveal a single instance of car theft in the preceding year. However, according to the survey in 2012, 0.1% among car owners "last year: were victims of car theft.

The level of victimization according to various types of theft in 1992 was 3.5% and in 1996 - 6.5%, which was almost a two-fold increase. Last year, victimization was 0.2%, which is 32.5 times less.

The same ratios are maintained for the following five year periods: 1988-1992; 1992-1996, and 2006-2010 – the level of victimization in 2007-2011 in comparison to the 1990's, which is 5-10 times lower comparing to crime rate in 90s.

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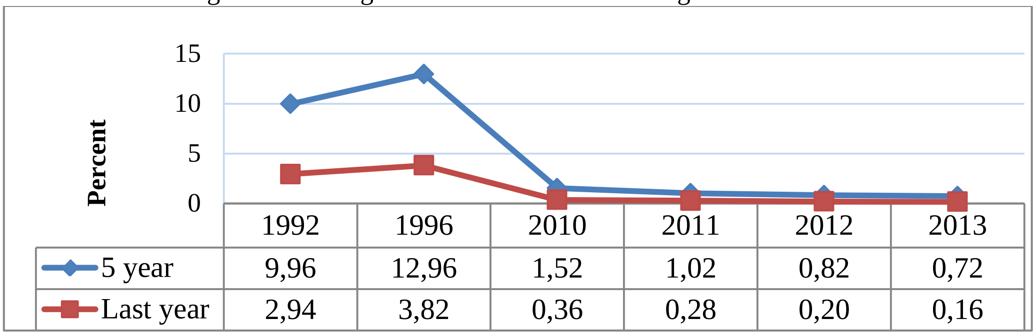
[46] Short description of survey methodology. A public opinion surveys was conducted in 2010 -2013. The survey was completed using a multi-stage national representative sampling. The respondents represented all of Georgia with the exception of the breakaway territories (South Ossetia and Abkhazia). Only those aged 16 years and older were included as respondents. The first and second waves of the survey were conducted with PAPI (Paper Assisted Personal Interview) and this third wave with CAPI (Computer assisted Personal Interview) methodology. A total of 9,000 respondents were interviewed as part of 2010-2012 surveys and in 2013 only 1,000 respondents. This sample was weighted during the data analysis stage, based on geographic representation and demographic parameters, in order to best reflect the proportional distribution of the sampling.

* In the survey of 2010 -2011 in Georgia the question for assaults and threats are asked separately. The figures in the table are combined.

Diagram 1. Average victimisation level in Georgia in 1993-2013



Great differences in data have a scientific explanation and are related to many objective and subjective factors that are not within the scope of this research.

Perception of personal safety

“The positive perception of safety leads to behaviours that reduce the risk of victimisation for vulnerable groups within society, and as it is widely acknowledged, fear of crime can result in serious curtailment of everyday activities, lost opportunity, and a reduction in the quality of life”.[47]

“If fear becomes extreme and residents retreat from going out into public spaces, the result may be a gradual decline in the character of communities which, in turn, can lead to increased disorder and a higher level of crime”.[48] Overall, the vast majority of Georgians are not worried about becoming a victim at their place of residence (home), in local areas or somewhere in the country as a whole. The analysis of questions concerning worry of being victimized (2013 Crime and Security Survey) demonstrated this positive trend. If we compare the latest results to 2010/2012 Crime and Security Survey, we observe the following: In 2013, a majority of respondents were “not worried at all” about being physically attacked over the preceding 12 months, or about a family member/person or close associate being physically attacked or falling victim to a burglary 63,9%- 66,5%. In 2012, the number of respondents who were also “not worried at all” over the proceeding 12 months about being physically attacked, about a family member/person or close associate being physically attacked or falling victim to burglary was on the same level (74.7%-76.1%). The number of respondents who were worried of becoming victim of such cases in 2013 were 2.7% - 3.3% and in 2010 - 2.7% - 4.8%.

Table 4. Fear about victimization in Georgia 2011-2013

2011	Not worried at all	Not very worried	Not worried	Fairly worried	Very worried	Worried
Worried about being physically attacked	75.8%	20.6%	96.4%	2.70%	0.40%	3.10%
Worried about family member/person close being physically attacked	73.5%	22.4%	95.9%	2.70%	0.20%	2.90%
Worried about burglary	75.5%	20.5%	96.0%	3.10%	0.60%	3.70%

[47] Johnson, H. (2005) Crime Victimisation in Australia: key results of the 2004 International Crime Victimisation Survey. Research and public policy series, no. 64: Canberra, Australian Institute of Criminology
[48] Skogan, W. (1986) Methodological Issues in the Measurement of Victimization. In Tonry, M. and Morris, N. (eds) Crime and Justice: A Review of Research. Chicago, IL: University of Chicago Press.

2012	Not worried at all	Not very worried	Not worried	Fairly worried	Very worried	Worried
Worried about being physically attacked	76.13%	21.89%	98.02%	1.48%	0.10%	1.58%
Worried about family member/person close being physically attacked	74.78%	22.19%	96.97%	2.08%	0.29%	2.37%
Worried about burglary	74.71%	22.36%	97.07%	2.38%	0.19%	2.58%

2013	Not worried at all	Not very worried	Not worried	Fairly worried	Very worried	Worried
Worried about being physically attacked	66,5%	29,9%	96,4%	3,3%	0,0%	3,3%
Worried about family member/person close being physically attacked	63,9%	31,9%	95,8%	3,5%	0,1%	3,6%
Worried about burglary	67,1%	29,4%	96,5%	2,7%	0,4%	3,1%

Combined "not worried at all" and "not very worried" categories are combined in the "not worried" column and "fairly worried" and "very worried" in the "worried" column. Do not know answers are not included in the table; they are also not treated as system missing cases.

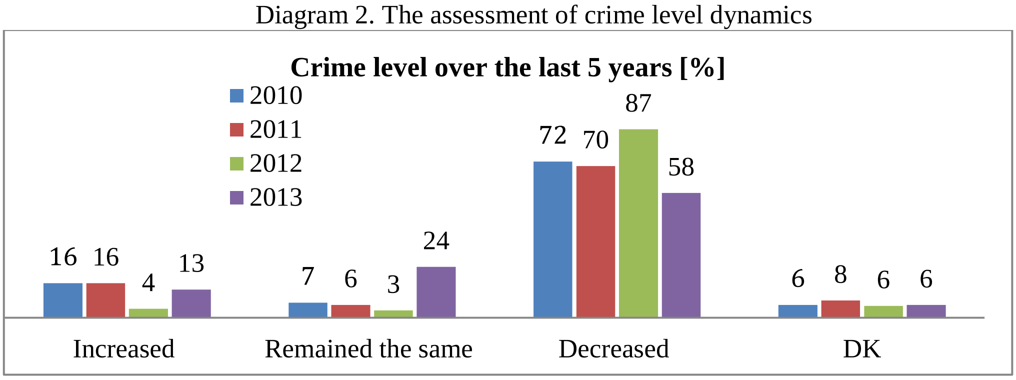
Among those who declared that they try to avoid certain places because it is not safe, 76 were females and 26 were males. They were mainly from 21-30 and 16-20 age groups; mainly residing in urban areas and in Tbilisi.

These results suggest that after a long lasting anomy, there is a steady process of improvement in interaction within Georgian society. Constitutional rights of citizens are actually being protected and they are ensured the protection of their right to life, health and private property. The decrease in trust of mutual assistance is probably linked to the difficult economic situation, especially when financial assistance is expected from a third person.

Assesment of general criminal conditions in Georgia

The survey of 2010-2013 showed that 70% - 87% think that the level of crime was reduced; the number of those who believe that the level of crime increased fell from 16% to 4%, and the number of those who think that crime remained the same fell as well, from 7% to 3%.

Diagram 2. The assessment of crime level dynamics

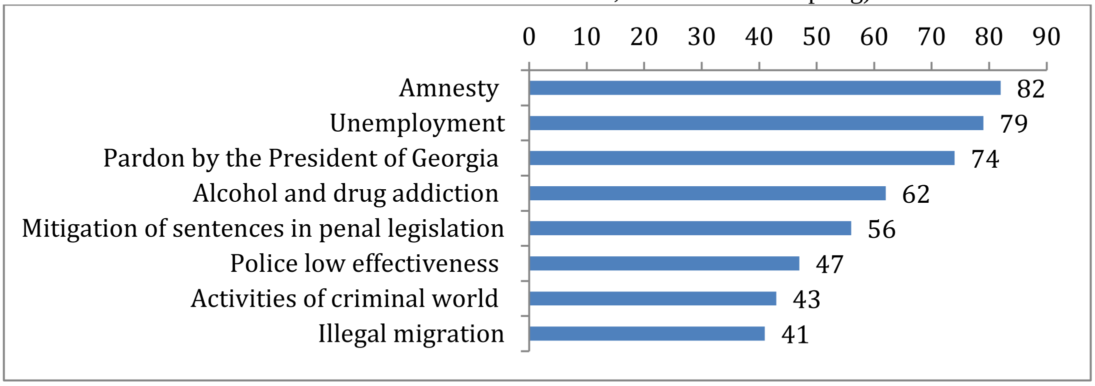


When considering the reasons why crime rates have decreased, in 2010-2012 respondents primarily mention the following:

1. The result of judiciary reforms - proper performance of law enforcement - 58%-82%;
2. Effective performance of a reformed judiciary system 7%-18%;
3. Appropriate criminal law policy 9%-12%;

4. Effective measures taken in combating against of the “thieves in law” 30%-37%;
5. Overcoming corruption in the state government 11%-12%;
6. Improvement of economical conditions 2%-5%.

Table 5. Reason for crime increase since the last parliamentary elections in October 2012 in Georgia (those who consider that the crime is increased, 30% of total sampling)*



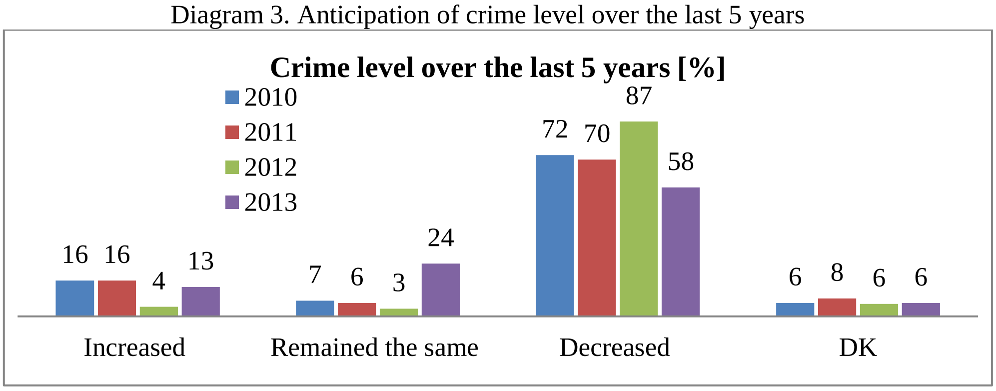
*The findings for “Most important” and “important” are combining

The following reasons were named by the respondents for increased in the rate of crime in since the last parliamentary elections in October 2012:

1. Amnesty of 60% total criminals in Georgian prisons in November-December 2012 - 82%;
2. Economic instability and the current financial crisis – increased unemployment 73%-79% (in 2011 was 73.3%);
3. Pardon of the President of Georgia 2013 – 74%
4. Increase of drug and alcohol usage 62%;
5. Mitigation of sentences in penal legislation56%;
6. Parenting problems – poor parenting skills 10.9% (in 2011 - 11.1%);
7. The gaps in the performance of law enforcement bodies - lack of professionalism in law enforcement bodies 47%
8. Illegal migration 41%.

The respondents are optimistic about future trends in fighting crime. According to survey of 2010-2012, 45% - 68% respondents believe that the level of crime will decrease. The number of respondents who think that the crime level will increase has fallen from 8% to 2%; 31% - 36% of respondents said that they “do not know”.

Diagram 3. Anticipation of crime level over the last 5 years



The following data was obtained from the question: what crime prevention measures have you heard about? The majority of respondents (56.7%) named broadcasting of TV commercials and analytical programs; less than half (40.2%) mentioned special rehabilitation and re-socialization programs being developed by Georgian Orthodox Church for drug users; just every fourth (25.7%) respondent mentioned meetings at schools, and other educational institutions in support of legal literacy and crime prevention; 7.5% named meetings with the district police inspector; creating billboards about specific crimes (i.e., against trafficking or drugs) was also mentioned by 10.6%; a limited number of respondents, 6.2%, named the distribution of leaflets and brochures in the struggle against specific crimes. Every fifth (21.2%) respondent hasn't heard about any crime prevention measures.

Main findings and Conclusions

1. In the last decade, Georgia was characterized by volatility and fluctuations in the crime rate, structure, and distribution, which is reflected in all the main statistical figures (of crime rate, all registered crimes by MIA, convicted persons, prisoners and probationers).
2. Since the 2003, the fight against crime has become a state priority, gaining a systematic character that is reflected in the decrease of crime indexes and the stabilization of crime conditions.
3. Neither the Russian-Georgian war in 2008, and the parliamentary election in 2012, nor political or economic tension and amnesty have influenced the crime level and tendencies. The results of all four waves of the Crime and Security survey shows a decrease in every statistical representation of crime level, stabilization and a drastic improvement of the crime situation.
4. According to the survey results from 2010-2013, citizens have gained a more optimistic attitude toward the crime situation in Georgia. For the last three years, the number of respondents who believe that the crime rate has dropped increased. Meanwhile, the number of respondents who believe that the crime level has risen decreased. The number of those respondents who believe that the crime level has remained the same has decreased as well.
5. According to the surveys in 2010-2013, respondents less worried about being physically attached personally or worried about family member or about burglary

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ROLE OF THE ORGANIZATIONAL DESIGN IN THE COMPANY'S SUCCESS

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Abstract

Organizational structure is necessary for the organizational activity of any business company. Expediently selected structure fully responding the existing challenges and meeting the requirements of the strategic view is the guarantee for the company's success. The goal of the article is to evaluate the role of the organizational structure, identify the problems associated with the organization structure of the companies and ways of development. The theoretical analysis used in the study is based on the works of the worldly famous scientists, and the practical analysis is based on the qualitative study of the selected companies working in the industrial branch of Georgia. Questionnaires, interviews and information sources of companies are used for this purpose. The study uses graphical methods and methods of grouping, comparison and analysis. The results of the study revealed the factors hampering a company to efficiently use the resources and give the recommendations helping the companies to improve their business and competitiveness and strengthen their positions on the market.

Keywords: Management, organizational structure, authority

Introduction

Business companies permanently strive to introduce themselves on the market and strengthen their positions there. However, not every company reaches the desired goal. There are a number of external and internal factors making some companies successful, others – not successful. In this respect, the company management and particularly, one of its principal functions, the organization, is extremely important. It is the function of an organizational structure determining how successful and efficiently the company will distribute or use its resources. A clear reflection of the function of the organizational structure is the organizational design, which is a set of formal tasks, authorities and responsibilities to be discharged by the individual employees and structural units of the company on the one hand and set and management standards of the hierarchy levels and efficient employee coordination systems on the other hand.

As the international practice suggests, one of the principal reasons for the failure of the companies in the developing countries is their failure to choose the right organizational structure. The companies failing to build their real organizational structures fail to establish the structural units in line with the existing strategy and efficiently distribute the authorities and responsibilities among their employees; as a result, they fail to swiftly react to the changes in the surrounding environment. In this way, they devastate the creativity of their employees, hamper their professional growth and finally, miss important opportunities and deteriorate their competitive positions on the market. Therefore, the study of the organizational structure is topical and has practical value for the companies.

The goal of the study can be formulated as the following question: what are the major principles of the organizational structure to be considered by the companies to use the resources efficiently and rationally and to be successful. The following tasks were set to reach this goal:

- Identifying the major principles and steps to form the organizational structure.
- Evaluating the role of the organizational structure at the companies.
- Identifying the gaps hampering the organizations in efficient organization and setting the recommendations to reach progress.

The object of the study is the manufacturing industry of Georgia, in particular, the business companies operating in the manufacturing industry of Georgia.

The results of the study will be of great value for the business companies either starting, or running their business on the market. The recommendations will help the companies to evaluate the organizational processes, design better organizational structure and strengthen or improve their market positions.

Theoretical aspects of the organizational structure

Establishing a company's organizational structure depends on a number of factors, including the size of the company, field of activity, consumers' demands, existing resource potential, etc. In addition to analyzing these factors, the major principles of the organization design should be observed, with the following ones being outstanding: division of labor (Khomeriki, 2008), departmentalization, chain of command, centralization /decentralization, span of management, degree of formality (Robbins, 2014).

Work specialization (also called *work division*) must guarantee the division of the whole work into smaller portions by the company. It must be done in two directions: horizontal (sequence of works) and vertical (in hierarchical stages). Every employee must accomplish a certain portion of work.

In order to coordinate the assigned tasks of the organization, the jobs and employees must be united as sub-divisions, departments or sectors by means of departmentalization in management. The tasks assigned to the structural units must be grouped according to their concrete functions (marketing, manufacturing, etc.), or product or geographical area. Following its choice, the company chooses between the functional, divisional or matrix departmentalization.

In order to determine the associations, mutual subordination and sequence of the tasks and subsequently, of the employees at the organization, an authority line or chain of command is needed. As it is known, authority is associated with a post in the company; it is distributed vertically, from top down and is the formal and fair right of the company employees to issue decrees to achieve the organizational goals and make decisions. The highest-level authority is given to top-managers.

In managing the organizations, sometimes the top-managers delegate their authorities to the lower-level managers. Identifying the degree of delegation of organizational authorities is associated with the principle of centralization/decentralization. Small portions of authorities are delegated at the organizations with high degree of centralization, and vice versa, large portions of authorities are delegated at the organizations with high degree of decentralization. Decentralization is more acceptable for modern companies, as in this case decisions are made not only in the top-managers' offices, and employees' engagement is higher.

When creating any structure, it is important to choose an optimal span of Control (Daft, 2012). This means fixing the number of employees under a single management. The choice of the span of management depends on the peculiarities of the assigned tasks. The less the span of management, the less the number of the employees under a single management and consequently, the more the number of tiers and hierarchy levels, and vice versa, the more the span of management, the more the number of the employees under a single management and consequently, the less the number of tiers and hierarchy levels. At the company where the manager wishes to establish close relation with his subordinates the managerial standard must not be high. As the traditional view suggests, the standard is 7 to 10 employees being subordinate to one manager.

When establishing an organizational structure, it is important for the company to identify the degree of formalization or the number of procedures, rules and regulations (Robbins, 2014). The more formalized the company is, the less the misunderstandings and ambiguities are; however, on the other hand, a homogenous behavior of the company employees in concrete cases reduces the motivation and job satisfaction. In addition, high degree of formalization reduces innovations and prevents the companies from acting in response to the consumers' demands.

Creating a flexible and transformable organizational structure adapted to the external changes needs consecutive steps, which can be simply formulated as follows:

Step one. This step means identification of jobs following the kind of the company activity and its classification depending on different signs, such as priority, functional homogeneity, etc (Chokheli, 2013).

Step two. This step shows the unification of tasks and their grouping into structural units (departments, sub-divisions, etc.).

Step three. This step covers the distribution of authorities, identification of responsibilities and development of detailed documentation. At this stage, each individual has a clear understanding of whom he receives the tasks from, to whom he is accountable and kind of actions he may be made responsible for. After taking all three steps, the organizational structure must be formulated and all employees must be informed about their functions in the structural units of the company (Boddy, 2012).

Methodology

At present, the number of business companies in Georgia increases year after year. However, most of them are not viable and stop operating within 3 years. During the study, the analysis with the selective method was carried out with the companies working in the branch of industry. As per the data of 2014, there are approximately 588 782 companies registered in Georgia, 113 017 being active, including 28 216 companies in manufacturing industry, with 8 904 companies, i.e. 4,8% being active (See Figure 1.). Of them, 60 companies operating in different sub-branches were selected and given the questionnaires. The answers were received from 48 companies; the staff of up to 20 companies was interviewed and the relevant information was gained.

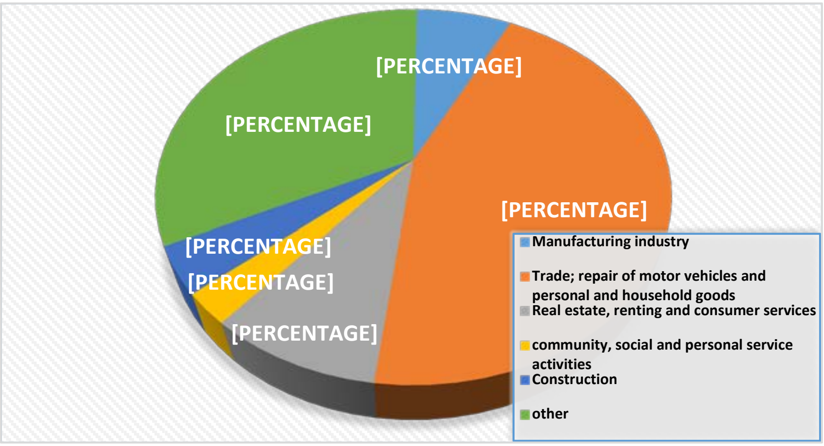

Figure 1. Number of entities by kind of economic activity
Source: http://www.geostat.ge/index.php?action

The study included three questionnaires:

The first questionnaire inquired about the companies' view of the major reasons hampering the companies to reach success and improve their viability.

The second questionnaire asked the companies to name three important factors affecting the efficiency of their business out of the following elements: strategic view and goals, strategy, personnel, organizational structure, style of management, organizational culture, etc.

The interview method was used for the third research and it was about the aspects, such as: Authorities, the tasks to be performed, the number of subordinates, delegating level, degree of centralization, frequency of changes in the organizational structure, the horizontal and vertical communications.

The study also used such methods, as analysis, synthesis, comparison and statistical analysis.

Results

The conclusions made on the basis of the received answers are as follows:

As the results of the first study suggest, the analysis of the answers demonstrated that 41 % of the companies think of poor management in terms of the factor to improve the chances for success and viability, 18% of them think of instable environment, 12% think it is taxes, 13% think it is variation of currency exchange rates, 7% think it is legal barriers and 9% of the companies think of some different factors.

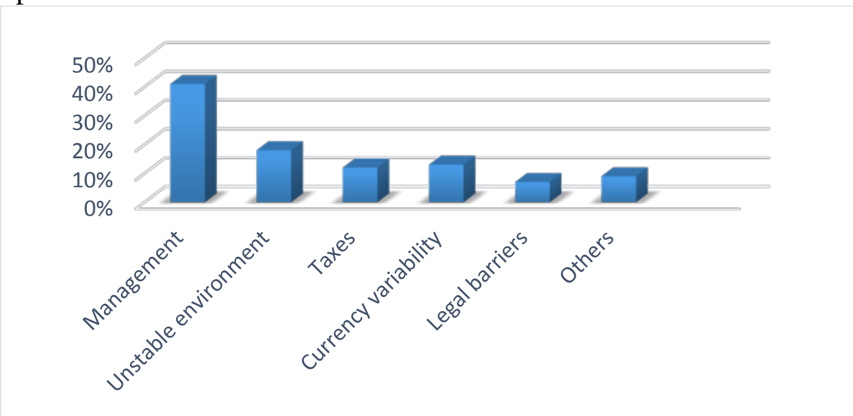

Figure 2. Factors affecting the success of the companies

The results of second study showed that 23% of the companies think of incorrect strategic view and goals as the management element hampering the companies to improve their efficiency, 15% think in terms of strategy, 22% think in terms of the organizational structure and 18% think of the staff qualification, 5% think in terms of leadership style, 7% think in terms of technology, 8% think in terms of organizational culture.

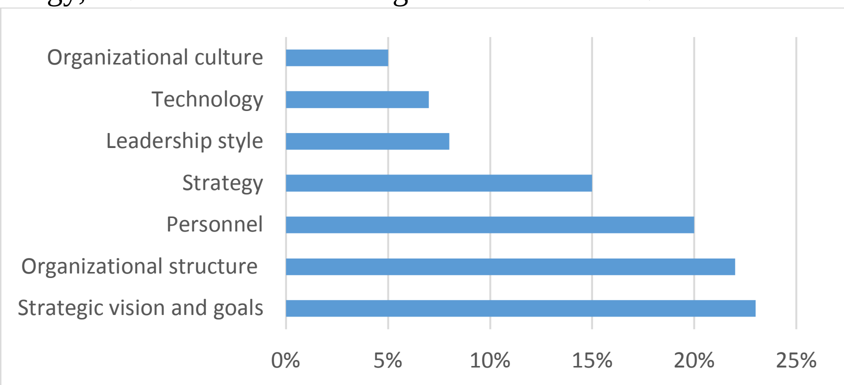

Figure 3. Elements of management determining the effectiveness of the companies

The results of third study revealed the following factors: authority duplication (91% of the companies), ambiguous tasks and responsibilities (78%), inflexible structure (57%), high span of management (62%), low level of delegation (60%), lack of horizontal associations (52 %).

Conclusion and Recommendations

The accomplished study once again demonstrated the importance of the organizational structure for the company's activities. We also identified the gaps hampering the organizational activities of the companies. After analyzing the organizational structure of the companies, we set recommendations to help the companies to remedy the existing gaps:

- The organizational structure must be reviewed on a frequent basis and changed by using the principles of the organizational design.
- The degree of delegation of authorities to the medium- and low-level managers must be maximum at the company. This will support their engagement in the decision-making process and will improve the employees' creativity.
- Span of management must not be high, and every manager must have at most 10 subordinate employees.
- Representatives of a concrete structural unit of an organization must not be focused on their own goals only, but must share the common goals of the organization and make concrete decisions following the general interests of the organization.
- The authorities and responsibilities of the organization employees must be clearly defined. This will help avoid duplication of functions or lack of functionality.
- The structure must be flexible and adaptive, retaining coordination in terms of the organizational growth.
- The objectives must be clearly set, analyzed and the priorities must be agreed upon among the top management members.
- The processes at the company must be determined and principal processes must be identified. No structure is capable of creating ideal conditions for all processes. Therefore, it is necessary to choose 5 to 7 processes, which are most important for the organization. Development and review of the processes by the management, their correction and agreement are a good precondition to immediately start working on the company's structural design.
- The structure is to be described and detailed documentation is to be drafted. At the final stage of the structure formation, as the principal design is ready, the detailed description of the structure and all necessary documents must be drafted. Providing the description of all goals, objectives, responsibilities, functions, rights and obligations, as well as internal structure and positions within the structure is a necessary precondition to use the full potential of a new structure.

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"SECURITIES" – BASIC PRINCIPLES OF LEGISLATIVE REGULATION, ISSUES FOR DEVELOPMENT

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Abstract

Securities law exists because of unique informational needs of investors. Securities are not inherently valuable; their worth comes only from the claims they entitle their owner to make upon the assets and earnings of the issuer or the voting power that accompanies such claims. The value of securities depends on the issuer's financial condition, products and markets, management, and the competitive and regulatory climate. Securities laws and regulations aim at ensuring that investors receive accurate and necessary information regarding the type and value of the interest under consideration for purchase.

Keywords: Securities regulation, principles, development of legislative regulation

Introduction

Securities exist in the form of notes, stocks, treasury stocks, bonds, certificates of interest or participation in profit sharing agreements, collateral trust certificates, preorganization certificates or subscriptions, transferable shares, investment contracts, voting trust certificates, certificates of deposit for a security, and a fractional undivided interest in gas, oil, or other mineral rights. Certain types of notes, such as a note secured by a home mortgage or a note secured by accounts receivable or other business assets, are not securities.

The increasing pace of economic integration across borders challenges the traditional concept of national regulation. Nowhere is this discrepancy between the global reach of markets and the national limits of regulation more manifest than in financial markets.

In order to develop effective proposals for standardization and unification of legislation on Securities it is necessary to analyze and review two largest systems of securities turnover, American and European and to reveal common and different characteristics in them.

Comparing u.s. and eu regulations

There are differences in securities rules and approaches on both systems as in US Securities regulations as in EU Securities regulations

Regarding the trading venues, MiFID is not currently applied to dark pools, while in the United States, dark pools are considered as ATS and register as broker dealers. They have to make their quotes available to the public above a certain trading volume threshold.

EU regulators have more discretion in authorizing investment firms and intervening in their management since they can judge whether the managers of investment firms or Regulated Markets are sufficiently experienced and reputable, while the U.S. regulator can only control their reputation and competences. The EU regulations go one-step further in allowing supervisors to control the integrity of ultimate controllers of Regulated Markets regardless of their ownership, while the U.S. rules generally base the notion of control on ownership.

Organizational requirements are broader in scope for exchanges in the United States and focus on disciplinary powers. This is explained by the self-regulatory role of exchanges in the United States versus a more limited role in the EU.

Capital requirements are risk based in the EU and based on the concept of maintaining a highly liquid core of capital in the United States.

The mitigation of conflicts of interest is a broad and general obligation for investment firms in Europe while it is focused on more specific situations in the United States.

Investor protection rules in Europe are two tiered between retail and professional investors (client categorization is binding), while the U.S. regulatory scheme protects all investors, with some carve outs for institutional investors.

Best execution in the United States covers a number of factors, with price being typically the most important; in Europe price is one factor among others to assess whether the client has obtained the best possible result for the execution of its trade. In addition, under MiFID, investment firms are responsible for the best execution of client orders, while in the United States, the responsibility rests with trading centers. This provision implies that market centers in the United States need to link and route orders to one another.

Data consolidation on equity trades exists in the United States and not in the EU: in the United States, quotes and transaction data reported by national exchanges and associations are consolidated into a single system and disseminated to market participants, whereas in Europe, quotes and trades are fragmented between multiple trading venues and no consolidation is required. But the objectives of the two regulations are similar, and some outcomes are comparable: Both regulatory systems aim to maintain fair and orderly markets, protect investors, and provide price transparency.

Equity securities are subject to more scrutiny and transparency requirements than bonds or derivatives. In the two regions, pre and post trade transparency requirements apply to equities while there is currently no or limited transparency requirements for derivatives and bonds. Reg NMS only applies to equities. Internalization is regulated solely are regards equity trades in Europe (concept of Systematic Internalizer).

Investor protection regimes are broad and offer better protection to individual investors, whether the rules to achieve such protection are strictly tiered or not.

There are concerns on both sides regarding the fragmentation of oversight. The U.S. SEC does not oversee futures and government bonds; it also shares supervisory responsibility with the banking supervisors, which supervise commercial banks dealing with securities. In Europe, MiFID is implemented by 27 national supervisors which may lead to different interpretations. For instance, a recent report by CESR emphasizes that pre trade transparency waivers which exclude trading platforms from transparency requirements are interpreted differently across Europe; the report also hints at different interpretations of the concept of SI, given the few firms that have registered as SI (13 so far).[49] A discussion on the outcomes cannot really be achieved without looking at the implementation of the securities regulations. Thus the study suggests some directions for future research:

Assess enforcement on both sides, at the SEC and SRO level in the United States, and at the level of the 27 supervisors in the EU.

Deepen the knowledge of dark pools on both sides and examine how to improve disclosure and price discovery. In Europe in particular, examine ways to achieve **quotes and trades consolidation**.

[49] CESR, "Impact of MiFID on Equity Secondary Markets Functioning," June 10, 2009.

Conclusions for development of regulations

➢ The Securities Law Legislation, should be compatible to the highest degree possible with the Unidroit Convention on Substantive Rules regarding Intermediated Securities (Geneva Securities Convention); however, within Europe we hope for a form of harmonization that focuses less on making divergent European legal systems compatible for its own sake and more on effective measures to ensure investor protection with minimum disruption to individual legal systems.

➢ An SLL should apply to transferable securities:

1. As defined in directive 2004/39/EC, art. 4(18), i.e., securities that are capable of being credited to a securities account (Unidroit art. 1(a));
2. That are dematerialized or immobilized pursuant to the pending CSD Regulation;
3. That are held by account providers that safe-keep and administer securities for account holders.

➢ It should be recognized that legal systems at the national level determine legal requisites of title transfer. Among other divergences, some legal systems involve trust concepts, and some do not. It is not possible or necessary to harmonize these legal systems. Instead, to the extent possible, the focus should be on clarifying and harmonizing the moment at which legal title transfer occurs in order to protect investors, i.e.,

1. At the moment of settlement under the rules of the relevant settlement system (whether operating in the EU or not) and not on trade date or some other time;
2. An Account Provider should undertake to debit or credit an Account Holder's account on the moment of settlement, which should be determined with reference to the rules of the relevant settlement system, which in turn may be a designated settlement system under the Settlement Finality Directive or some other securities settlement system, including a non-EU system, as per the Third Country CSDs regime of the undertaken CSD Regulation; and
3. Account Providers and Account Holders should be able to rely with finality on debits and credits to relevant securities accounts, unless and to the extent necessary to correct an error.

➢ There should be a clear distinction between (1) crediting and debiting of securities accounts, as dispositive incidents of transfer of ownership, whatever the underlying consideration could be (outright sale or title transfer collateral), and (2) the means of providing collateral under a security financial collateral arrangement, which operate to vest possession and/or control of the subject securities in the collateral taker and limit an account holder's or third parties' access to those securities. In the former case, the circumstances under which an Account Holder's ownership rights would arise and cease would be clarified. In the latter case, AFME believe this would further the twin objectives of (a) ensuring investor protection through clarity in respect of when ownership is actually transferred on the enforcement of a security interest by a collateral taker granted under a collateral arrangement and (b) clarifying that title does not transfer on the provision of securities as collateral under a security financial collateral arrangement under the Financial Collateral Directive. AFME believes that the specificities of the manner in which securities may be effectively provided as collateral should be left to national law and the Financial Collateral Directive and, consequently, should be considered beyond the scope of the SLL.

➢ The laws, regulations, rules and procedures governing the operation of an SSS should be clearly stated, understandable, internally coherent and unambiguous. They should be public and accessible to system participants.

➢ The legal framework should include principles that support appropriate contractual choices of law in the context of both domestic and cross-border operations. In many cases, where otherwise appropriate, the law chosen will be that of the location of the central counterparty or a CSD

- Key aspects of the settlement process that the legal framework should support include: enforceability of transactions, protection of customer assets (particularly against insolvency of custodians), immobilization or dematerialization of securities, netting arrangements, securities lending (including repurchase agreements and other economical equivalent transactions), finality of settlement, arrangements for achieving delivery versus payment, default rules, liquidation of assets pledged or transferred as collateral, and protection of the interests of beneficial owners
- In relation to collateral it should be made clear that an account holder's creditor may enforce its rights against an account holder only in relation to the securities held by the account holder's relevant intermediary, and not in the books of an upper-tier account provider, including where that account provider holds the debtor's securities in segregated accounts.
- The recognition of different holding structures (including via nominees and intermediaries, whether on a segregated or omnibus account basis), of foreign legal systems, without need of each legal system having to incorporate other structures and legal concepts into its own legal system, is indispensable to overcoming perceived legal barriers and to achieving increased efficiency and cost effectiveness; however, further steps of harmonization will be required to enable the unhindered exercise of rights attached to securities.
- In respect of corporate actions-related requirements, any SLL should be compatible with developing market standards and guidance from market implementation groups.
- In relation to corporate actions, as well as in relation to any instruction for the debit and or credit of a securities account, it must be made clear that the account provider may accept instructions only from the account holder or any person designated for that purpose by the account holder.
- The Legal Certainty Group's recommendations (in particular, recommendation 3) in respect of "core duties" of intermediaries, as set out in its Second Advice and as embodied in the Geneva Securities Convention, Article 10, should be adopted.
- The EU Commission should adopt the legislative form of a Regulation, especially in respect of those parts of the legislation that must not suffer from incoherent transposition into national laws.
- The proposed regulation of charges levied by an account provider is inopportune as the comparison with the payment area is inappropriate given the continued fragmentation, e.g., in the fields of company law and fiscal regimes.
- Insolvency rules should be harmonised, between Member States, so that there is clear recognition of the segregation of financial instruments held by: (a) a firm for its clients, when acting in a custodial capacity; or (b) a CCP, in respect of client collateral. Minimal intervention would be required to settle a rule that would give greater assurance to investors in the Union and support the obligations already imposed on firms to achieve segregation. While title transfer and security interest arrangements should continue to be recognised, the presumption should be that a firm acting in a custodial capacity, which is under a legal obligation (whether statutory or contractual) to segregate client financial instruments, has done so. Accordingly, upon the insolvency of the firm, client financial instruments would be available to be returned, irrespective of the legal system under which they are held, in a consistent and certain manner.

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EC Directive 2006/73/EC of 10 August 2006 implementing directive 2004/39/EC of the European Parliament and the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purpose of that directive.
Securities Act of 1933
Securities Exchange Act of 1934
Securities Act 1978.
Securities Act R.S.O. 1990.
Unidroit convention on substantive rules for intermediated securities, also known as the Geneva Securities Convention, was adopted on 9 October 2009.

Abbreviation

AFME (Association for Financial Markets in Europe)
ATS Alternative Trading System
CAR Capital Adequacy Requirement
CDS Credit Default Swaps
SEC The Securities and Exchange Commission
CESR Committee of European Securities Regulators
DJIA Dow Jones Industrial Average
ECN Electronic Communication Network
EC European Commission
EU European Union
MiFID Market in Financial Instruments Directive 2004/39/EC
FESE Federation of European Securities Exchanges
MiFID Market in Financial Instruments Directive 2004/39/EC
NMS National Market System
Reg NMS Regulation National Market System
SEC Securities and Exchange Commission
SRO Self-Regulatory Organization

SCIENCE-INDUSTRY COOPERATION: THE ISSUES OF PATENTING AND COMMERCIALIZATION

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Abstract

Advancement of science-industry cooperation is a popular trend in modern world. Developed and developing countries try to boost their economy's growth by the transferring of knowledge between scientists and businesses. Intellectual property transfer is the central area of cooperation between scientific organizations and businesses. It takes place mainly by patent licenses as it allows dissemination of technology to the private sector at market price. Governments may incent researchers to license their inventions by economic stimulus as well as determine conditions – patent regime – on which new technologies are transferred. Undoubtedly, success of science-industry cooperation also depends on research institutions' innovative policies – their practical approaches towards licensing.

Nowadays we could distinguish two commercialization models - supply-push and demand-push models. The second model should be considered as a more effective one as it is based on collaboration between scientific institutions and businesses. Innovative policies of many countries let us conclude that a demand-push model has a greater potential to boost economic development based on innovative ideas.

Keywords: Science-industry cooperation, IP transfer, patent licensing, supply-push and demand-push commercialization models

Introduction

2014 was known as the EU-Russia Year of Science ("Twelve Months of EU-Russia Cooperation in Science, Higher Education and Innovation", 2014). The advancement of science is highly valued in today's world as well as the development of cooperation between companies and research organizations. Science-industry cooperation is one of the basic components of the knowledge-based economy. It is included in all the major indexes of competitiveness and innovative development of national economies (Global Competitiveness Index, Global Innovation Index, Knowledge Index, Knowledge Economy Index, etc.), (Simachev, Kuzyk, Feygina, 2014, p. 7). Economic development based on scientific innovative ideas is the goal that Russia and many other countries have.

The success of science-industry cooperation depends on how supportive its legal framework is. Legal framework could influence on cooperation by reforming higher education systems; creating clusters, incubators and science parks; regulating technology transfer; and encouraging public research institutions to file for and commercialize their intellectual property. In the last three decades the legislative trend to increase universities' and public research organizations' (PROs') contribution to the economic growth has clearly intensified (WIPO, 2011, p. 144). This article concentrates on the central issue that needs to be considered to reach this goal – on patenting and commercialization of inventions.

I.

Science-industry cooperation in performing R&D has an over two-century-old history. Through this period of time differing trends in the interaction between universities and research institutions on the one side and companies on the other side have been noticed. For example, long periods when firms were reluctant to cooperate with researchers or periods of active science and business cooperation. For example, before 1960s, intracorporate research was more common than external cooperation with research institutions (Simachev, Kuzyk, Feygina, 2014, p. 6). On the contrary, since 1980s due to growing technological complexity of products and processes, rapid technological change, higher competiveness as a result of higher costs and risks of innovation firms were forced to acquire technologies from universities and public research organizations. These institutions provide human capital and training as well as transfer technology. Firms depend on the contributions of public researches because it produces innovation of commercial significance.

Public-private cooperation occurs through a large number of formal and informal channels. Informal channels include the transfer of knowledge through publications, conferences and informal exchanges between scientists and businesses. Though formal channels include hiring students and researchers from universities and PROs, sharing equipment and instrumentation, contracting technology services, collaborating in research, creating university spin-offs or joint firms, and transmission of IP via such channels as licensing (Foray and Lissoni, 2010, pp. 275-314). We can make a point that intellectual property transfer is not just one but the central area of cooperation between scientific organizations and businesses.

For knowledge transfer to work, firms need to be able to assimilate and exploit public researches. According to a number of studies, big business is more enthusiastic towards this cooperation (Mohnen and Hoareau, 2003, pp. 133-146; Arundel and Geuna, 2004, pp. 559-580; Laursen and Salter, 2004, pp. 1201-1215). This is because it has sufficient labor and organizational resources to support cooperation with R&D organizations (Simachev, Kuzyk, Feygina, 2014, pp. 8-9). Company's age is also an important factor influencing on relationship with research sector. On the one hand, startups are the main providers of innovations (Cohen, Nelson, Walsh, 2002, pp. 1-23). On the other hand, among enterprises founded over 20 years ago there are some who participate in innovative development very actively. For example, among the world's most innovative companies of 2014 there are Alexion Pharmaceuticals (second place, founded in 1992), ARM Holdings (third place, founded in 1990), Unilever Indonesia (forth place, founded in 1930), (The World's Most Innovative Companies, 2014). As well as large industrial companies, big and strong universities and research organizations are more likely to interact in R&D process with businesses. Those research institutions are able to allocate more significant scientific and technological basis and, thus, develop sustainable relationships with businesses (Simachev, Kuzyk, Feygina, 2014, pp. 9-12).

Intellectual property transfer mainly by patent licenses became the main way to cooperate as it allows for formal market-based exchange of knowledge. Licensing provides a channel by which patented technology can be disseminated and utilized at a price negotiated by buyer and seller (OECD, 2004, p. 16). By the way, patents play dual role in science-industry cooperation. Firstly, they facilitate technology transfer through the exchange of licenses on markets for technology (market coordination). Secondly, they play a key role in framing collaborations and alliances (non-market coordination). In non-market coordination the earliest stages, stage of collaboration itself and post-collaboration stage may be identified (Cohendet and Penin, 2011). The main role of patents in the earliest stages of collaboration is to let actors signal their competencies in order to invite potential partners to cooperate. Patents also play a key role in determining the terms of the cooperation. Being a credible asset, they allow the skills and the bargaining power of each party to be assessed. After the collaboration, patents are used for sharing the outcome of the cooperation through a joint application (Hagedoorn, 2003, pp. 1035-1050).

However, the main aim of a patent is to foster innovative growth by allowing the private sector to use innovation and entitling inventors to profit from their inventions. If researchers do not patent their inventions, government may encourage them to license it to business that will commercialize them. Besides direct influence on innovative development by economic incentives, government determines patent regime which also influences on the successful science-industry relationship. Patent subject matter, patenting requirements and patent breadth are three basic components of patent regimes (Encaoua, Guellec and Martinez, 2003, pp. 1423-1440).

• Patent subject matter is the domain of knowledge that should meet patenting criteria of novelty, non-obviousness and usefulness.

• Patenting requirement is the height of the inventive step required for an application to be granted a patent or the extent or the invention’s contribution in particular technology field.

• The breadth of a patent is the degree of protection granted to a patent holder against imitators and follow-on inventors.

Taken together, these aspects compose the strength of patents. Excessively weak and narrow patents might deter business investment in R&D, as they do not prevent effectively imitating of an invention. Conversely, an excessively strong and broad patent on a basic invention may hinder further patenting and using follow-on inventions. By carefully balancing these criteria, policy makers could create a patent regime fostering science-industry cooperation (OECD, 2004, p. 10).

However, not only government could influence on science-industry cooperation, the success of the cooperation also depends on universities’ and PRO’s innovative policies. “Nine Points to Consider in Licensing” offers some practical approaches for universities to uphold. Among these is the right to practice licensed inventions; structuring licenses in ways that promote technology development; using special agreements for inventions that address important unmet social needs like agricultural, medical and food needs of less advanced countries. Licenses are proposed to be structured as exclusive, co-exclusive (granted to a limited number of licensees) or non-exclusive. Besides, they may be field-restricted (cover only specific areas), convertible exclusive (may be converted to co- or non-exclusive license if a licensee has not marketed an idea on time) or convertible nonexclusive licenses (conversely, may be converted to an exclusive license through a defined period of time). Using particular type of license depends on licensing subject matter. For example, if a technology needs significant investments, it is better to use exclusive or co-exclusive license, if not - non-exclusive licensing can help to maximize benefits of inventions and further develop them (“In the Public Interest: Nine Points to Consider in Licensing University Technology”, 2007).

Besides this, universities and PROs are trying a number of interesting additional approaches. These include licensing strategies, free access to research materials and copyrighted works. Some licensing strategies may be highlighted:

1) a preference to grant companies non-exclusive rather than exclusive licenses (Nill, 2002);
2) differentiation in price of licenses - making them cheaper if used for non-profit purposes (WIPO, 2011, p. 173);
3) free licensing for small companies or start-ups;
4) providing hardware licenses.

Licensing represents one of the key elements of the first commercialization model - a supply-push model. In this model inventions are generated by the public research system and then diffused via the sale, transfer or licensing, often on an exclusive basis, to existing firms or new ventures (e.g. academic spin-offs).

The second commercialization model should be considered as a more effective one. It is a demand-pull model based on collaborative research and development. In this model universities, scientific institutions and businesses work together in order to find needed solutions to production and innovation problems. In recent years, many countries have moved towards using this model providing patenting by private sector. The USA have developed technology transfer and licensing offices (TTOs/TLOs) at universities and research institutions in order to enable inventors to found their start-up companies (OECD, 2012). Russia tries to foster its innovative growth by creating Technoparks where resident companies promote their products and services, participate in various exhibitions to attract investors as well as get marketing, accounting, legal support from servicing companies (Zhelobanov D., 2013). The United Kingdom was the first country to have reduced a period of time for patenting environmentally-friendly technologies (fast-track system for "green patent applications"), (WIPO, 2013). In Europe as a whole great attention was drawn to IP and IPR (intellectual property rights) management to provide help to firms that patented their technologies. In this area of expertise the European IPR Helpdesk started to offer free first-line support to small and medium-sized companies across the Europe (Enterprise Europe Yorkshire Network, 2015).

Conclusion

Transferring of knowledge between scientific institutions and businesses counts for an over two centuries. Now it is fostering due to increasing technological complexity of products and processes, rapid technological change and higher costs and risks of innovation. Science-industry cooperation includes the exchange of knowledge through formal and informal meetings, hiring researchers, sharing equipment, contracting technologies, research collaboration, and IP transmission.

Intellectual property transfer is one of the key areas of cooperation. Its advantage is that it is market-based exchange of knowledge. Licensing is the most common way of transferring IP as it provides a dissemination of a patented invention at market price. In the process of licensing role of patents is very high. From the one side, they incent the transfer of technology, determine its conditions and outcomes as well as make it real. From the other side, patent subject matter, patenting requirements and patent breadth influence on business involvement in R&D and other aspects of science-industry cooperation. Success of business & science synergy depends also on research institutions' innovative policies. Some practical and innovation-friendly approaches are practicing licensed inventions; differentiation of licenses; having special agreements for some inventions that are of the very high importance for the society.

Licensing represents a supply-push commercialization model. It is traditional model which helps for generated academic researches to be marketed. Though, a demand-pull commercialization model should be considered as a more effective one. It is based on collaborative research and development (R&D) between public and private sector. The key elements of this model are Technoparks, technology transfer and licensing offices (TTOs/TLOs) at universities and research institutions. The second model is more likely to make scientific advances marketable. Moreover, it facilitates joint problem solving as well as opens up new avenues for research. So we should expect that in the nearest future the second commercialization model would be more popular and be prepared to some changes in science-industry cooperation.

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MORTGAGE AS A MEANS OF GUARANTEE

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Abstract

Among all real rights granted by way of security, mortgage, as the "King of Guarantee" has the special advantage. At the time with prosperous market economy, to maintain the speed and the safety of transactions is the essential task of civil and commercial law. The responsibility of maintaining the safety of transactions and decreasing the risks of transactions falls in the guarantee system (Guohua She, 2010). A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower. In most jurisdictions mortgages are strongly associated with loans secured on real estate rather than on other property (such as ships) and in some jurisdictions only land may be mortgaged. A mortgage is the standard method by which individuals and businesses can purchase real estate without the need to pay the full value immediately from their own resources. The object and purpose of this article is to analyze and review development of Institute of Mortgage (Hypothec) - from the ancient Greek period till the present time, especially in those conditions, when Mortgage is real "King of Guarantee" in Georgia.

Keywords: Mortgage, Hypothec, Pledge, Lender, Borrower

Introduction

In comparative law, there are many situations where the same legal term has different meanings, or where different legal terms have same legal effect. This can often cause confusion to both lawyers and their clients. This confusion most often occurs when civil lawyers have to deal with common law, or vice versa, when common law lawyers deal with civil law issues. While there are many issues which are dealt with in the same way by the civil law and common law systems, there remain also significant differences between these two legal systems related to legal structure, classification, fundamental concepts, terminology, etc.

For example - the debt instrument is, in civil law jurisdictions, referred to by some form of Latin *hypotheca* (e.g., Sp *hipoteca*, Fr *hypothèque*, Germ *Hypothek*). A civil law hypotheca is exactly equivalent to an English mortgage by legal charge or American lien-theory mortgage.

A hypothec-Mortgage is a real right on immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosoever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking. A hypothec is merely an accessory right, and subsists only as long as the obligation whose performance it secures continues to exist (Cristea Silvia Lucia, 2012).

According to the Georgian Civil Code "an immovable thing may be used (encumbered) for securing a claim in such a manner as to grant to the creditor the right to receive satisfaction out of this thing and to have priority over other creditors in receiving such satisfaction (mortgage)." (Article 286).

Historical Development

The hypothec-mortgage-guarantee system is originated from ancient Greek. The term "hypothec" was first used by Archon Solon in 6-th century BC. During the reforms in 594, Solomon established the new rule, according which - the column was raised on the land of borrower and there was written "This Land is Guarantee for Obligation". This column was called "Hypotheca", which means - Base (Shengelia Tamar, 2002).

At the late Roman Empire, the Roman private law has been introduced and gained complete development, which has turned into the most popular guarantee mode. In Medieval European Law - Institute of Mortgage was formed in 8^{th} Century and it wasn't different from the present one (Chechelashvili Zurab, 2009).

According to the old Georgian Legal History, Mortgage was not separated from Pledge and it was called Pledge – in Georgian "Giravnoba", which is Persian word. According to Beqa-Agbuga Law, right of mortgage was very developed property right in old Georgian Legislation. The Object of mortgage could be both - movable and immovable property (Zoidze Besarion, 2003). But nowadays, after the serious reform of Georgian Civil Legislation, Georgia similar to other European Civil law Jurisdiction countries made differentiation between Mortgage-Hypothec and Pledge.

Under the imitation of other countries, the mortgage gains more attentions. Especially along with the development of modern market economy, its types and applications have been extended. The continental legal system differentiates the pledge and the mortgage. It adopts three standards to differentiate the two. The first standard is about whether transfer the possession of property or not. For example, the French Code Civil regulates that the mortgage is the real right of fixed assets for the sake of paying off debts. It is sorted into the legal mortgage, the judgment mortgage, and the agreement mortgage. The pledge includes the chattel pledge and the pledge of immovables. Japan Civil Code takes the transfer as the standard. Transferring the possession of property is the pledge, and if not, the mortgage. The second is to take the transfer and the nature of property as the standard. For example, German Civil Code regulates that for the immovables, there is only mortgage. And the mortgage does not transfer the possession of immovables. The pledge is to transfer the possession of property. The third is to take the nature of property as the standard. For example, German Civil Code regulates that the mortgage is for the immovables in guarantee and the pledge is for the movables, not matter whether transferring the possession or not. In contrast, the Anglo-American law system does not distinguish the pledge and the mortgage clearly. It lays stresses on mortgage (Kropholler Jan, 2014). The Anglo-American law system divides the mortgage into the mortgage in common law and the mortgage in equity law. In practice, any property can be used for the corpore of mortgage. Conditions in America are similar to that in British.

Participants

Legal systems in different countries, while having some concepts in common, employ different terminology. However, in general, a mortgage of property involves the following parties. The borrower, known as the mortgagor, gives the mortgage to the lender, known as the mortgagee.

A mortgage lender is an investor that lends money secured by a mortgage on real estate. Typically, the purpose of the loan is for the borrower to purchase that same real estate. As the mortgagee, the lender has the right to sell the property to pay off the loan if the borrower fails to pay. The mortgage runs with the property, so even if the borrower transfers the property to someone else, the mortgagee still has the right to sell it if the borrower fails to pay off the loan. So that a buyer cannot unwittingly buy property subject to a mortgage, mortgages are registered in Public registry or recorded against the title with a government office, as a public record. The borrower has the right to have the mortgage discharged from the title once the debt is paid.

A mortgagor is the borrower in a mortgage - he owes the obligation secured by the mortgage. Generally, the borrower must meet the conditions of the underlying loan or other obligation in order to redeem the mortgage. If the borrower fails to meet these conditions, the mortgagee may foreclose to recover the outstanding loan. Typically the borrowers will be the individual homeowners, landlords, or businesses who are purchasing their property by way of a loan.

Because of the complicated legal exchange, or conveyance, of the property, one or both of the main participants are likely to require legal representation. The agent used for convincing varies based on the jurisdiction. In the English speaking world this means either a general legal practitioner, i.e., an attorney or solicitor, or in jurisdictions influenced by English law, including South Africa, a (licensed) conveyancer. In the U.S., real estate agents are the most common. In civil law jurisdictions convincing is handled by civil law notaries.

The debt instrument is, in civil law jurisdictions, referred to by some form hypotheca and the parties are known as hypothecator (borrower) and hypothecatee (lender).

Types and Legal aspects of Mortgage

Common law and Civil law jurisdictions have evolved two main forms of mortgage: the mortgage by demise and the mortgage by legal charge.

Mortgage by demise

In a mortgage by demise, the mortgagee (the lender) becomes the owner of the mortgaged property until the loan is repaid or other mortgage obligation fulfilled in full, a process known as "redemption". This kind of mortgage takes the form of a conveyance of the property to the creditor, with a condition that the property will be returned on redemption. Mortgages by demise were the original form of mortgage, and continue to be used in many jurisdictions, and in a small minority of states in the United States. Many other common law jurisdictions have either abolished or minimised the use of the mortgage by demise.

For example, in England and Wales this type of mortgage is no longer available in relation to registered interests in land, by virtue of section 23 of the Land Registration Act 2002 (though it continues to be available for unregistered interests).

Mortgage by legal charge

In a mortgage by legal charge or technically "a charge by deed expressed to be by way of legal mortgage", the debtor remains the legal owner of the property, but the creditor gains sufficient rights over it to enable them to enforce their security, such as a right to take possession of the property or sell it.

To protect the lender, a mortgage by legal charge should be recorded in a public register. Since mortgage debt is often the largest debt owed by the debtor, banks and other mortgage lenders run title searches of the real estate property to make certain that there are no mortgages already registered on the debtor's property which might have higher priority.

Laws of few civil law jurisdiction countries also regulate that the mortgage appears naturally as there is certain relation according to the needs of some relations instead of agreements of parties. It is the essential difference between legal mortgage and common mortgage. Take French Civil Code for example. The legal mortgage includes: the wife has the legal mortgage right to husband’s property; the ward has the legal mortgage right to guardian's property; the state, public community, and state-operated enterprise have legal mortgage right to receiving teller and accountant's property; creditors have the legal mortgage right to debtors' property; tax authority has the legal mortgage right to tax payers' property; the exchequer has the legal mortgage right to special taxation for the sake of insuring the success of wars. The legal mortgage right happens due to laws' Articles. The special rules in laws will enjoy the priority in practice. If there are no special rules, relevant regulations on common mortgage right are effective. Besides the legal mortgage right, there is a judgment mortgage, which happens due to the judgment of court.

In modern time, in order to guaranteeing the trading safety, many countries set strict limits on legal mortgage. For example, Georgian Civil Law, similar to the German law recognize the legal mortgage right to the debts generated only from construction contracts. Japanese laws replace legal mortgage system with first-get priority system and unmovable pledge right. Only France recognizes the legal mortgage right to a wider scope and regulates the judgment mortgage right.

Equitable mortgage

Equitable mortgages don't fit the criteria for a legal mortgage, but are considered mortgages under equity (in the interests of justice) because money was lent and security was promised. This could arise because of procedural or paperwork issues. Based on this definition, there are numerous situations which could lead to an equitable mortgage (Davis G, 1956). As of 1961, English law required the consent of the court before the equitable mortgagee was allowed to sell (Hannigan ASJ, 2014).

When the borrower deposits a title deed with the lender, it has historically created an equitable mortgage in England, but the creation of an equitable mortgage by such a process has been less certain in the United States.

Differentiate the combined mortgage and the common mortgage

The common mortgage is in contrast to the single mortgage. The single mortgage is only for certain special property. The common mortgage is based on several different properties. The meanings for differentiating the single mortgage and the common mortgage are: as the gages include several different properties, the mortgagee has the mortgage right. The mutual relations of several properties should be dealt with properly. Otherwise, it will hurt others' interests, whose interests relate with the common gages. The common mortgage is based on parties' contracts that agree to take several properties as the mortgage. In another condition, the common mortgage happens because of the separation of gages after the mortgage.

Foreclosure and nonrecourse lending

The civil law hypothec differs from the common law mortgage, particularly, that it confers on the hypothecary creditor no immediate right to possession of the property, but only a right against the proceeds of sale of the property after enforcement of the right in judicial proceedings. The common law mortgage, on the other hand, gives and immediate right of property to the mortgagee, who can take possession of the property by a simple notice, without the necessity of taking suit, as well as a right of foreclosure at law.

Under common law, when foreclosure process is completed and the mortgagor failed to pay his debt to the mortgagee, from that moment the mortgagor has lost his property right and the mortgagee obtains the absolute control of the property. As a consequence, the mortgagor's right to recover his property is extinguished and the mortgagee can exercise all property rights. On the other hand, under civil law the mortgagor remains the owner of the property until the purchaser obtains ownership, and the mortgagee acquires property only of the money paid by the purchaser in the amount of his claim plus interest (Caslav Pejovic, 2001).

In most jurisdictions, a lender may foreclose on the mortgaged property if certain conditions – principally, nonpayment of the mortgage loan apply. Subject to local legal requirements, the property may then be sold. Any amounts received from the sale (net of costs) are applied to the original debt. In some jurisdictions, for example in the United States (Ghent Andra C., 2011), mortgage loans are nonrecourse loans: if the funds recouped from sale of the mortgaged property are insufficient to cover the outstanding debt, the lender may not have recourse to the borrower after foreclosure. It‘s same regulation in Georgian Civil Code. According to article 301 of Georgian Civil Code, if the funds recouped from sale of the mortgaged property are insufficient to cover the whole debt, borrower is n’t responsible for any remained debt and obligation is considered to be fulfilled, unless otherwise is considered by agreement.

In other jurisdictions, the borrower remains responsible for any remaining debt, through a deficiency judgment. In some jurisdictions, first mortgages are nonrecourse loans, but second and subsequent ones are recourse loans.

Specific procedures for foreclosure and sale of the mortgaged property almost always apply, and may be tightly regulated by the relevant government. In some jurisdictions, foreclosure and sale can occur quite rapidly, while in others, foreclosure may take many months or even years. In many countries, the ability of lenders to foreclose is extremely limited, and mortgage market development has been notably slower. The relatively slow, expensive and cumbersome process of judicial foreclosure is a primary motivation for the use of deeds of trust, because of their provisions for non judicial foreclosures by trustees through "power of sale" clauses.

Conclusion

In this article, we tried to overview the development and importance of Mortgage, as a mean of guarantee from the ancient Greek period till the present time. We discussed types and legal Aspects of Mortgage and difference of them between Common Law and Civil Law Jurisdictions, as well as between Civil Law Jurisdiction Countries. The aim of this article was not to judge which type of Mortgage is better. The task of lawyers should not be to defend their legal systems, but to improve them. Each legal system may have some advantages and deficiencies. If a foreign legal system has some advantages, why not incorporate them in the domestic legal system? In that way the resulting convergence of the different legal systems can only contribute to their common goal of creating a fair and just legal system which can provide legal certainty and protection to all citizens and legal persons.

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CONSUMER PROTECTION IN RELATION WITH THE EUROPEAN BUSINESS ENVIRONMENT

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Abstract

The present paper highlights the importance of protecting consumers in their relations with the representatives of business environment in general and with those of European business environment in particular, in order to enhance the benefits they can get from transactions carried out in the market and to ensure that they can take full advantage of the European single market. Analyzing the results of research undertaken by the European Commission, which regularly monitors markets and national consumer conditions and assesses business attitudes toward cross-border trade and consumer protection, the paper argue that consumer environments differ considerably across European Union's Member States. Furthermore, it identifies the persistence of unfair commercial practices and low knowledge of consumer rights among both consumers and businesses as issues of particular concern.

Keywords: Consumer rights, enforcement, legislation

Introduction

The protection of consumer rights in its relations with business environment was done at European Union's level in close connection with the liberalization of movement for persons, goods, services and capital between Member States and contributes unequivocal to improve the environment for their action within the European single market, which is obvious due to the increasing degree of their involvement in cross-border transactions

The level of consumer satisfaction on purchases made for the European single market depends, however, not only on the quality and price of products / services contracted, but also on compliance by representatives of business environment of consumers' economic interests throughout the course of the transactions, beginning with the first contact established by means of advertising for example, and ending with providing after-sales services. In all the stages of a transactions is very important to establish precise rules that reduce costs arrising from such transactions and to eliminate, as much as possible, the risks associated with the occurrence of a possible misunderstanding between consumers and traders that could further affect their confidence to engage in future transactions.

Consumer protection, a necessity in its relations with the business environment

The explanation for the intervention in favor of consumer protection within the market is substantiated especially on the practical findings which point out more and more that the consumer appears objectively disfavored in his connections with the suppliers of products and services, even if, with his own needs and necessities, he represents the origin and, at the same time, the end of production. (Gheorghiu, 2012) Various reasons lie at the basis of this imbalance.

Firstly, economically – consumer's resources are obviously more reduced than those at the producer's disposal, the latter investing in sysThemetic concerns for the correct identification of consumer's objective needs and necessities, not being aware of many of them.

Secondly, at the informational level – the producer knows more characteristics with regard to his product than its consumer, because the latter does not have adequate possibilities and means in order to evaluate its quality.

Also, legally – the producer is permanently in touch with the laws which govern commercial relations, he uses them by the help of legal advisers, while the consumer may sometimes ignore the existence of a law by which defends him through its provisions.

Not lastly, at the level of representing its interests – offerors are very well organized, their interests being represented both by the agency of employers, professional and commercial organizations, and by the influence exercised toward governmental authorities on purpose to adopt some regulations which take account of their points of view; on the contrary, consumers represent a mass of individuals of whom few know how to promote their interests by specific and organized actions. (Gheorghiu, Popovici, Bunda, 2010)

Starting from these cleavages in the relation between consumers and the representatives of business environment, as a distinctive side of the social protection that must be promoted by a democratic society, consumer protection actually represents a set of measures belonging to public or private initiative in order to assure and improve continuously the observance of consumers' interests within the market.

Consumer protection in the European Union

Assuming that the consumer is generally in the market in a vulnerable position economically in relation with its trading partners, as argued above, at European level has been developed a coherent policy designed to protect consumers, which has four main objectives:

- ✓ consumers protection from serious risks and threats that they cannot stand on their own;
- ✓ taking the necessary measures to enable consumers to make choices based on clear, accurate and consistent information;
- ✓ consumer rights protection by establishing rapid and effective procedures for resolving trade disputes;
- ✓ adaptation of consumers' rights to economic and social developments, especially in the food energy, digital and transport sectors.

Improving consumer conditions in the Member States is of crucial importance not only for the welfare of consumers themselves, but for the economy as a whole. Only informed consumers and decision makers, whose rights are adequately protected, are able to play a full role in the market, thereby enhancing competition and growth. European Union Strategy for Growth until 2020, entitled suggestively "Europe 2020" invites Member States to commit to improve the business and consumption environment as part of reforms to enhance growth.

The quality of consumption environment in the European Union is estimated by means of a composite index – Consumer Conditions Index - covering the enforcement of consumer and product safety legislation, the effectiveness of redress as well as consumer empowerment and information. This index is based on the results of wide surveys of and retailers conducted at the European level with respect to 12 indicators reflecting five main aspects of the consumer environment:

- ✓ feeling protected as a consumer measured through consumer trust (in public authorities, retailers, consumer organisations and existing consumer protection measures);

- ✓ illicit commercial practices, measured through the experience of misleading/ deceptive and fraudulent advertisements/offers;
- ✓ consumer complaints, measured through consumers' propensity to take action in the event of problems and satisfaction with complaint handling;
- ✓ redress, measured through the perceived ease of resolving disputes through courts and out-of-court bodies;
- ✓ product safety, measured through consumers' and retailers' trust in the safety of non-food products on the market. (European Commission, 2014)

The 12 components of the index are weighted equally, and the maximum total score is 100.

According to the latest calculations from 2012, consumer conditions continue to differ considerably across EU member states. There are marked differences (of between 30% and 60%) in country results on all 12 indicators which make up the Consumer Conditions Index. The index suggests that the countries with the best consumer conditions are Finland, the UK, Netherlands, Luxembourg (with index values greater than 70), Ireland, Denmark, Austria, Sweden, Belgium, Germany and Portugal (all above the EU average of 62). Outside the EU, a relatively high index value is registered in Norway. Consumer conditions appear to be less favourable in most of the eastern and southern member states, with Greece, Cyprus, Croatia and Bulgaria recording the lowest values (less than 50). (European Commission, Scoreboard, 2013)

Following its annual evolution, the index showed a slight drop (of 2 points) between 2011 and 2012, after two years of improvement, following a fall in 2009.

At the national level, out of 27 EU countries, 14 have seen an improvement since 2011. Portugal's index has improved by more than 4 points, continuing the positive trend since 2008. Slovenia, Finland and Lithuania have each improved by around 2 points.

The biggest drops were noted in Denmark, Germany, Cyprus (all of which have lost almost 5 points since 2011), France and Austria (-4 points) and Greece (-3 points). This breaks the positive trend seen in all these countries -with the exception of Cyprus and Greece - in the two previous years.

The enforcement of consumer protection legislation in the European Union

Proper enforcement of consumer legislation is essential to strengthen consumer confidence, but also to ensure a fair playing field for businesses and to guarantee that competitive advantage will not be granted for rogue traders.

Unfortunatell, both consumers' and retailers' perceptions of the latter's compliance with consumer legislation deteriorated in 2012 compared to the previous year. Among retailers, 68,6 % believe that their competitors comply with consumer legislation (down from 72.2 % in 2011). (European Commission, Flash Eurobarometer 359, 2013)

The picture becomes even more sobering when looking at consumers' opinions: 58,6 % agree that retailers respect consumers' rights and this percentage has decreased significantly compared to the last two years (65,1 % in 2011 and 65,2 % in 2010) (European Commission, Flash Eurobarometer 358, 2013).

But the efficiency of markets and the protection of consumer interests depend on the extent to which the vast majority of consumers and retailers meet consumer rights established by existing legal provisions. However, the 2012 surveys results show that this requirement is far from being fulfilled and that there are no clear signs of improvement.

For example, in the case of distance selling, where consumers cannot try or see directly the goods they are buying, being able to give up a purchase during the cooling-off period is an important safeguard. Although the 2012 survey reveals that 69,3% of European consumers (70,5% in 2011) know that they are entitled to return goods ordered by mail, phone or internet four days after delivery without any special reasons, almost a quarter of respondents (23,8% compared to 22,8% in 2011) wrongly believed that they have no right to do so.

Also, considering the fact that consumer products with defects are quite common, it is important for consumers to know what are the conditions for return of a defective product. More than half of European consumers (56,2%) correctly answered the question about the right to free repair or replacement of a new refrigerator that has broken without any fault from them, within two years after purchase (up from 50,9% in 2011). It is worrying that 43,7% of respondents were not aware of this right.

On the other side of the "barricade", most representatives of business environment (85,2%) stated in 2012 that they know where to look for information and advice on consumer legislation in their country, but fewer than four out of ten (38%) agree they know where to find information and advice relating consumer legislation in other EU countries. However, the actual level of knowledge, measured in terms of the incidence of correct answers, is maintained low, and between 2009 and 2012 found only a slight improvement.

For example, in 2012, less than a third of retailers (28,8%) were able to correctly identify the length of period during which consumers have the right to return defective products for repair, even though there was a slight improvement over previous years (27,1% in 2011 and 25,7% in 2009). However, retailers who claimed to know where to find information about consumer legislation in their own country did not score better on this question than the overall average (29,1 %).

A quarter (25 %) of EU consumers reported in 2012 that, in the past 12 months, they had had a legitimate cause for complaint when buying or using goods or services in their own country. Of those who experienced problems, more than eight out of ten (83,4 %) consumers took action to address them. The most likely action following a problem is complaint to the retailer/provider (71,6 % of consumers having experienced a problem), followed by complaint to the manufacturer (12,1 %).

Successful handling of complaints by businesses is crucial to avoiding consumer harm and increasing consumer loyalty. In 2012, 65,6 % of consumers were satisfied with the way their complaints were handled by the retailer/provider and 59,8 % of them with the way their complaints were dealt with by manufacturers. It’s worth mentioning that 16,6 % of cases, consumers who experienced a problem decided not to take any action.

The limited sums involved and the length of the procedure are the two main reasons for not complaining (37,4 % and 36,6 %, respectively). Slightly over a quarter of respondents (27,1 %) thought that they were unlikely to get a satisfactory solution, while a fifth (19,0 %) said that they did not know how or where to complain.

Finally, uncertainty about individual rights as a consumer and unsuccessful experiences when making complaints in the past were given as reasons for not complaining by 18,0 % and 14,6 % of respondents, respectively. Encouraging consumers to communicate their problems and to seek solutions tends not only to bring benefits to the consumers themselves, but also has a positive impact on the functioning of the market. If consumers do not complain when they experience a problem, redress is denied to them and businesses miss out on valuable feedback.

Conclusion

The internal logic of functioning of market economy, approached from the perspective of the interests and motivations of the consumers in economic activity – producers and consumers, points out the fact that they are in an out of balance proportion, objectively, at the expense of the latter, even if the consumers, with their needs and necessities, should represent the origin and at the same the final point of the production activity. Whether it is about an imbalance of economic, informational, judicial nature or at the level of the representation of interests, the cleavages which intervene within the market in the relations between producer and consumer unequivocally call for the intervention in favor of the latter.

European Union aims at improving the business and consumer environment by deepening the single market and enforcing single market and competition rules. Examining consumer conditions across the Member States is fundamental to this end: the Member States and the European Union must ensure that goods and services markets are wellfunctioning, open and competitive and that empowered consumers make informed consumer choices in these markets.

With 28 member states the internal market of the European Union has the potential to be the largest retail market in the world, however this potential has yet to be realised, as the internal market remains fragmented.

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A FAIR PRICE PRINCIPLE IN SQUEEZE-OUT ACQUISITIONS

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Abstract

Fair price is the important criterion in squeeze-out acquisitions. Entrepreneur's law of Georgia unites mandatory tender offer and mandatory acquisition of shares under this hood. Both institutions are examples of compulsory contracting and with their essence are interruptions into shareholders property rights. In those cases, redemption is almost only measure offered to minority shareholders, which is exactly why it is vital to ensure, that shareholders receive adequate compensation for the unwilling disposal of their property.

Keywords: Squeeze-out, fair price, shareholders rights

Introduction

Fair price is the important criterion in squeeze-out acquisitions. For the purposes of this article, the term 'squeeze-out" is considered as a situation, where a controlling shareholder exercises his legal right to oblige the minority shareholders of a targeted listed company to sell their shares of the target to him. Entrepreneur's law of Georgia unites mandatory tender offer and mandatory acquisition of shares under this hood. Both institutions are examples of compulsory contracting and with their essence are interruptions into shareholders property rights. In those cases, redemption is almost only measure offered to minority shareholders, which is exactly why it is vital to ensure, that shareholders receive adequate compensation for the unwilling disposal of their property.

The article overviews lapses in the process of assessment of fair price under Georgian legislation and is based on international experience. It offers some modified approaches in order to protect minority shareholders interests.

The research is based on general scientific methodology. Abstractive-logical methodology is broadly used which includes analysis and synthesis, induction and deduction. Comparative legal methodology of research is also applied.

The article consists of the introduction, one main part and three paragraphs and the conclusion. The main text discusses all the problems connected with evaluation of fair price in Georgian legislation and judicial practice.

Problems of establishment of fair price in Georgian legislation and practice

General overview

Fair price principle applies in many corporate law relationships, but it is especially important in the process of squeeze-out, since, in some cases, it is the only remedy to protect minority shareholders interests. Unlike the mandatory tender offer, in case of mandatory acquisition of shares, minority shareholders have no opportunity to avoid selling shares. The only benefit that they might get from the transaction would be fair price, but the question is how faire that price will be.

The squeeze-out acquisitions are relatively new institutions in Georgian legislation. Emerging from common law into European law and through EU regulations into Georgian law, squeeze-out is highly disputed in legal doctrine or practice. As much as it is possible to say on advantages or disadvantages, it is highly important to ensure that minority shareholders receive due compensations so that they would not have to give away their property for nothing. “Striking the right balance between the interests of minority/majority shareholders or, in other categories, interests of minority shareholders and facilitation of the efficient takeover market is one of the most troublesome tasks for the legislature and the judiciary dealing with the squeeze-out cases. This seems especially true with regard to compensation paid to the expelled shareholders in squeeze-out transactions” (Miliutis, 2013).

Mandatory tender offer

The approach is different with mandatory tender offer and mandatory acquisition of shares. As already mentioned above, mandatory tender offer still leaves the chance to minority shareholders to reject tender offer if the redemption price is inappropriate. This conclusion is made on the basis of the Article 15.3 of the Law on Security Market (LSM) according to which “all proposals or recommendations […] on acceptance or repudiation of tender offer, as well as tender offer, must be conducted in accordance with regulations established by National Bank of Georgia.” Since Entrepreneurs Law of Georgia (EL) refers to LSM, the Article 15.3 must be applied in case of mandatory tender offer (Burduli, 2007, 24).

The Article 53^2 of EL regulates mandatory tender offers. One of the aspects of takeover is that a buyer must offer fair price for the shares to minority shareholders.

According to the Article 53^2.2 of EL “An auditor or a brokerage firm shall establish the offered redemption price. The offered redemption price must be no less than the maximum price that the redeeming shareholder has paid within the last six months for the company’s share of this class. The auditor or the brokerage firm shall draw up a report indicating the documented facts establishing the basis for the offered redemption price. The buyer shall reimburse the expenses of the auditor or the brokerage firm. The buyer shall also be obliged to provide the auditor or the brokerage firm with all information available to him/her/it on the purchase of shares. The auditor or the brokerage firm shall be held responsible with all his/her/its assets for damages he/she/it caused to the shareholder as a result of negligence or deliberately misestimating of the offered redemption price.“

Based on this article the main principles of the redemption of shares could be highlighted:

1. The price must be fair;
2. The definition of fair price is not established by legislation;
3. Price is evaluated by auditor or brokerage;
4. The minimal price is established by EL which equals to the maximum price of the share for past six months.

The problem with this regulation is that minority shareholders have no option to bargain and argue the established price. It is not comforting that EL establishes minimal price of redeeming shares, since this price equals to maximum price of the share for past six months. Squeeze-outs are usually associated with a preceding low market flee-float, which affects the price of shares. Even though EL refers to “minimal price”, in reality this is the only approach of calculation of fair price that is offered by Georgian legislation or doctrine in contrast with the experience of European countries (Germany and Austria, for example) where several methodologies of evaluation are set in place and often applied simultaneously (Dollinger, 2008).

Next problem is that assessment is delegated to audits or brokerage firms, while brokerage is completely underdeveloped in Georgia. I am inclined to agree with the position offered in Georgian legal doctrine, which considers the possibility for the minority shareholders to address the court if they do not consent with offered tender price. The Article

53[1].6 of EL must be applied in that case (legal analogy) (Burduli, 2007). Also, it is still unclear what part the court system will play in the process of establishment of fair price. Price of the share, itself, is not a legal category and evaluation requires special knowledge, which brings the necessity of expert conclusion. Some legal precision on the methods of evaluation must be welcome.

Mandatory acquisition of shares

The approach is much stricter in case of mandatory acquisition of shares. The Article 53[4].2 of EL states that the court shall decide on a mandatory acquisition of shares as determined in the Civil Procedure Code of Georgia. The fair value and the date of share redemption shall be fixed by court decision on a mandatory acquisition of shares as determined in the Civil Procedure Code of Georgia (CPC).

It is important to keep in mind that the first redaction of mandatory selling out of shares was declared void by the Constitutional Court of Georgia. Basic argument was that the law did not ensure offering fair price to minority shareholders. Constitutional court supported the idea of evaluation shares by independent brokerage companies or experts. Nonetheless, it is still doubtful whether the procedure adopted after the decision of the Constitutional Court guarantees necessary protection to minority shareholders and ensures them with due compensation for their the restriction of their property.

Though EL declares boldly that court fixes fair price, the appropriate articles of CPC and practice have different impression.

The Article 309[12] (1-2) of CPC declares that to determine the fair redemption price of the shares, the court shall appoint an independent expert or a broker company within seven days after an application has been filed. An independent expert or a broker company shall prepare a redemption report that shall include documented circumstances of redemption as well as the method to be used for determining a fair redemption price of the shares and the price of the shares determined on that basis. The costs of an independent expert or a broker company shall be borne by the offeror.

The participation of parties is ensured only on the level of appointment of expert or brokerage.

The Article 309[12] (3) states that when selecting an independent expert or a broker company, the court may take into account the opinions of the parties. The parties may recommend to the court candidates to be appointed [as experts]. The final decision as to who is to prepare a redemption report shall be made by the court. The parties may challenge an independent expert or a broker company on the grounds provided in the Article 35 of this Code.

CPC does not grant the possibility of disputing the offered price or representation of alternative evaluation to minority shareholders. In fact, court makes decision based on the evaluation provided under the Article 309[12]. Though, CPC states that when establishing a fair price for redemption of shares, a court shall take into account:

a) the value of these shares on the stock market;

b) estimated revenues that the joint stock company may expect to gain in the future;

c) assets (including reserves, goodwill, experience, prospects and business relationships of the enterprise) and liabilities of the joint stock company.

CPC does not state based on which data the court should enquire these measures. As already mentioned, those criteria are not legal and require special knowledge and basically, court completely relies on the assessment of expert or broker. Generally, under CPC, all parties enjoy the possibility to challenge any proof provided by concurring party and represent alternative expert conclusion or evaluation. They are entitled to request additional or repeated expertise, while in the process of hearing cases on compulsory acquisition of shares, parties lack those options. Of course, the fact that those procedures are monitored by court is much batter regulation but the interests of parties are not sufficiently protected and by "parties" both - the offeror and minority shareholders are meant, since broker might suggest risen or diminished redemption for shares.

Since the legislation is so imprecise, court practice must suggest at least some instructions on calculation of fair price. Today, this kind of case law is missing. There are really few cases on compulsory acquisition of shares and courts just make copy-pastes of the Article 309[14] of CPC and do not even mention whether the offered price is fair indeed. It is probable that situation would be different if these particular cases where brought in front of the Supreme Court of Georgia, but, unfortunately, the decision of the Appeal Court on mandatory acquisition of shares is final.

Conclusion

After the summarization of all the above mentioned, it is clear that Georgian legislation does not properly protect minority shareholders rights by guarantying them fair redemption in the process of squeeze-out acquisitions. The only approach of calculation of fair price offered in EL is based on the price of share for past six months. The approach is insufficient and too vague leading to unfair results in most cases. In case of mandatory tender offer, minority shareholders have no opportunity to discuss the offered price. It would be more appropriate if they at least had possibility to address the court. Although, nowadays, without further clarifications from legislation, court only plays part of some kind legalization institution and, roughly to speak, only puts seal on the offered price by expertise or broker not taking into account that under the Article 309[14] of CPC, courts not only have right to say final word on fairness of price and, unless they find it due, turn down squeeze-out, but it is their obligation as well.

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GOOD LAW AND POLICY-MAKING: A PREREQUISITE FOR COMPETITIVE INNOVATION STRATEGIES?

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Abstract

The contemporary environment requires policy-makers to act responsible. However, in existing literature, there is no explicit agreement on which aspects of institutional environment, including common law are more important than others for a country's prosperity, economic growth, entrepreneurship, or innovativeness. Therefore, the paper aims to reveal whether fair, transparent and effective policy-making fosters the emergence of competitive strategies for innovation, or instead limits the range of commonly-acceptable means of fair and legal competition. The empirical research covers 60 innovation variables across 127.674 organizations, 12 core and 19 additional industrial sectors, 16 European economies and 368 institutional variables, thus pointing to the impressive scope of the research. What makes the paper original is its focus on the responsible policy-making as a contributor to competitive practices for innovation.

Keywords: Innovation strategy, institutions, policy-making

Introduction

As Fagerberg et al. (2009, p. 432) state: "At any point in time many new ideas emerge, but only those that are well adapted to the contemporary selection environment are likely to be applied and form the basis for continuing adaptation and improvement." The 'contemporary selection environment' requires policy-makers to act responsible, i.e. in a transparent and fair way. However, existing literature does not provide sufficiently clear answers to the question whether such policy-making fosters entrepreneurship and innovativeness. It is sometimes stated that the rule of law tends to limit innovativeness, commercialization, etc. due its inflexibility and inability to adapt to the modern dynamic business environment.

Therefore, the paper aims to reveal which institutional factors – both based on law and order, and common law – foster the emergence of competitive strategies for innovation. In broad terms, the competitiveness can be defined as a firm's capacity to manage its resources or gain access to the new ones so that the firm, more rapidly than its competitors, could deliver goods and services containing exclusive features and meeting the expectations of the customers, given the proper evaluation of the firm's internal and external environment, and respective transparent, fair and effective actions. Hence, the essence of fairness and obedience to law is embedded in the very definition of competitiveness, but it is still not clear whether fairness, transparency, etc. really foster innovation or simply limit the range of commonly-acceptable competitive spirit.

Theoretical Background

The major problem of not being able to prove the positive impact of law on innovation is the variety of opinions about the relationship between institutions, policy-making, law and innovations. Different scholars indicate different aspects of policy-making as prerequisites for successful innovation. Hence, Paus (2012) shows that *strategic, proactive and coherent government policies* for organizational capability advancement are a key determinant of upgrading in open economies, such as Chile, the Dominican Republic, Jordan, Ireland or Singapore. Varieties of capitalism approach distinguishes the management of *financial and industrial relations*, *education and training*, and *intercompany systems* as the institutions that form either a liberal market economy or a coordinated market economy and foster, respectively, either radical or incremental innovations (Casper 2009). Similarly, Freeman and Soete (1997) state that environments with dominating *technical and economic demands* favor effectiveness, novelty, radical innovations, whereas environments with dominating *social demands* favor values, rules, trust and incremental innovations. Then, Dau (2013) claims that *institutional coordination* of the *economic learning* plays a central role in fostering rates of innovativeness and competitiveness of the largest Latin American companies. He investigated 500 companies from 1989 to 2008 that acquired market knowledge abroad and used it when responding to reforms at home, thus gaining a first-mover advantage over other local organizations. Next, Eapen (2012) states that the ability of domestic enterprises to *absorb new knowledge* depends on the *social structure* in which they are embedded.

So, how many aspects of innovation-related policy-making can we distinguish? In fact, the list based on the theoretical insights is hardly definite (Stankevice, Jucevicius 2013). Therefore, first, it is necessary to test the relationships between innovation strategies and elements of institutional environment empirically. And second, it is necessary to define whether the institutional elements that have the strongest impact on the most competitive innovation strategies incorporate the dimensions of responsibility, fairness, effectiveness and transparency.

Methodology

Both innovation strategies and institutional factors were identified by EFA. The input variables were borrowed from CIS8 microdata[50] and the Institutional Profiles Database III. Then, innovations and institutions were interrelated via regression analysis.

Based on the standardized coefficients of the regression models, the following comparative values of the impact of the institutional factors on innovation strategies were produced:

- non-directional general impact = |sum of values|;
- directional general impact = sum of values;
- non-directional relational impact = |sum of values| / number of related innovation strategies;
- directional relational impact = sum of values / number of related innovation strategies;
- non-directional impact per strategy = |sum of values| / number of all the innovation strategies; and
- directional impact per innovation strategy = sum of values / number of all the innovation strategies.

Finally, the informed institutional factors were made subject to logical analysis in order to identify whether they incorporated the aspects of responsibility, and, if yes, what kind of responsibility (i.e. ecological, social, financial, etc.).

[50] European Commission, Eurostat, 2008 Community Innovation Survey microdata. Eurostat takes no responsibility for the results and conclusions, which are those of the author of the paper.

Empirical Results

Six innovation strategies were distinguished. They are described in detail if my previous works (Stankevice 2013; Stankevice 2014a, Stankevice 2014b), and the results are strongly supported by the findings of other scholars (Battisti, Stoneman 2010; Filippetti 2011; Paananen 2012; Bettencourt, Brown 2013; Drechsler et al. 2013; Trigo 2013).

Interestingly, some of the identified innovation strategies tend to emerge in contexts with lower education quality, too loose prudential and labor regulations, low support for large labor formations, governments that are not capable to properly communicate and implement the countries' long-term visions, etc. On the contrary, some other innovation strategies require high quality of institutional factors inducing them. Typically, they are the strategies implemented by the best-performing firms. Table 1 describes the direction and intensity of the impact of the institutional factors on the emerged innovation strategies.

Table 1. Standardized coefficients: the impact of institutional factors on innovation strategies

	IS-1	**IS-2**	**IS-3**	**IS-4**	**IS-5**	**IS-6**
Government's capacity to implement its long-term vision	1.169					-0.296
Efficiency of institutional cooperation		0.567				0.262
Extent of the privatization of large non-financial firms			-0.661			-0.354
Level of support for large labor formations			-0.291	-1.200	-0.167	
Efficiency of mining resources usage for R&D	-0.532				0.996	
Tightness of prudential and labor regulations		-0.253		0.385	0.280	-0.752
Efficiency of the rule of law		0.345				
Extent of the transparency of capital and labor markets	0.326	0.379		0.276		
Practical quality of education		-0.407	-0.176		-0.358	0.216
Quality of the free operation of the capital market			-0.291		0.156	

Legend: IS-1: semi-open, knowledge-intensive leadership; IS-2: expansive, marketing-intensive leadership; IS-3: product marketing- & scale-based innovating; IS-4: process- & cost-oriented incremental innovating; IS-5: transformative, strategic innovating; IS-6: responsive, service-oriented innovating.

Based on the standardized coefficients of the regression models, the comparative values of the impact of the institutional factors on innovation strategies were produced. They are presented in Table 2.

Table 2. Comparative values of the impact of the institutional factors on innovation strategies

	No. of related innovation strategies	Non-directional impact	Directional impact	Non-directional relational impact	Directional relational impact
Government's capacity to implement its long-term vision	2	1.465	0.873	0.733	0.437
Efficiency of institutional cooperation	2	0.829	0.829	0.415	0.415
Privatization of large non-financial firms	2	1.015	-1.015	0.508	-0.508
Level of support for large labor formations	3	1.658	1.342	0.553	0.447
Efficiency of mining resources usage for R&D	2	1.528	0.464	0.764	0.232
Tightness of prudential and labor regulations	4	1.670	3.660	0.418	0.915
Efficiency of the rule of law	1	0.345	0.345	0.345	0.345
Extent of transparency of capital and labor markets	3	0.981	0.981	0.327	0.327
Practical quality of education	4	1.157	3.275	0.289	0.819
Quality of the free operation of capital market	2	0.447	-0.135	0.224	-0.068

Concerning the values of non-directional general impact of institutional factors on innovation strategies, one can note that tightness of prudential and labor regulations and level of support for large labor formations have the greatest values (> 1.6). However, the impact of support for large labor formations is totally negative, thus meaning that the related innovation strategies (i.e.: product marketing- & scale-based innovating; process- & cost-oriented incremental innovating; transformative, strategic innovating) tend to emerge in institutional environments not supportive of trade unions, employees' associations, professional associations, etc. Besides, these strategies are medium and less competitive. Similarly, tightness of prudential and labor regulations is associated with four innovation strategies, but the positive impact can only be observed in case of two medium-competitive strategies (i.e.: process- & cost-oriented incremental innovating; transformative, strategic innovating), and the impact is rather small. Otherwise, the negative impact is mostly associated with responsive, service-oriented innovating and, to a smaller extent, with expansive, marketing-intensive leadership.

Contrarily, the evaluation of the directional general impact shows that extent of the transparency of capital and labor markets, government's capacity to implement its long-term vision, and efficiency of institutional cooperation have the greatest values (> 0.8). Besides, positive impact is mostly associated with the most competitive innovation strategies, i.e. semi-open, knowledge-intensive leadership and expansive, marketing-intensive leadership.

If to measure the impact of institutional factors on innovation strategies in non-directional relational values, efficiency of mining resources usage for R&D and government's capacity to implement its long-term vision could be noted (> 0.7). The directional relational measures point to government's capacity to implement its long-term vision and efficiency of institutional cooperation (> 0.4), followed by efficiency of the rule of law and extent of the transparency of capital and labor markets (> 0.3).

Interestingly, one can draw a parallel between the regression equations and competitiveness of the assessed innovation strategies. Thus, the equations constructed for the most competitive innovation strategies, i.e. semi-open, knowledge-intensive leadership and expansive, marketing-intensive leadership, include mostly positive signs for the institutional variables. This finding implies that more advantaged institutional profiles condition the emergence of the strategies of this kind.

Then, in the equations of the medium-competitive innovation strategies, i.e. transformative innovating and process- & cost-oriented incremental innovating, the impact of positive predictors is varied: the transformative & strategic innovating is mostly positively influenced by the institutional factors, whereas the lack of support for large labor formations strongly contributes to the emergence of the process- & cost-oriented incremental innovating.

Finally, the most negative equations are those of the less competitive innovation strategies – responsive, service-oriented innovating and product marketing- & scale-based follower. Hence, these two strategies are prone to emerge in countries with the lowest average quality of institutions. At the same time, these strategies are considered to be the least competitive.

Institutions and Innovations – What Matters?

To summarize the presented empirical results, four institutional factors have to be discussed in more detail.

Transparent capital and labor markets include such institutional qualities as the freedom of association, independent labor inspectorate, promotion by merit, good functioning of labor–management dialogue both within firms and at the national level, publication requirement for firms issuing shares, and the existence of arrangements to combat restrictive collective agreements (i.e. cartels). What unites the innovation strategies that are positively related to the given institutional factor is the need for transparent collaboration in order to either receive funding from the EU or acquire new knowledge or organize external relations, including those with government, public research institutes and higher education institutions, i.e. the need for several actors to work together along the value chain. Hence, if labor and capital markets are not transparent enough, it becomes much more difficult to build reliable external relationships and to cooperate on a more tangible basis than simply working under a paradigm of blind trust. Moreover, high standards of transparency attract global investors, thus enabling technology transfer and learning and, consequently, fostering innovation.

Transparency is closely related to the *efficient implementation of the rule of law*. This institutional factor includes respect for contracts between local private players and foreigners, setting up a foreign business subsidiary at ease, no or few administrative barriers to market entry for new firms, low percentage of land disputes and a high capability of ruling classes in driving the society to take up major domestic or external challenges. The content of the institutional factor has much in common with the most competitive innovation strategies. In general, the factor represents not only transparent, but also highly dynamic economy that tends to generate just as dynamic and change-oriented businesses and societies. Hence, the innovation strategies are aimed at entering new markets and include the development and realization of new-to-market innovations. Moreover, they may include innovation in marketing or business strategy, and therefore, require some degree of creativity that could be viewed as a consequence of the economy's dynamics and openness to new market players and ingenious ideas.

Admittedly, a dynamic economy necessitates *efficient institutional cooperation and coordination*. This institutional factor includes efficient court rulings in commercial matters, efficient bankruptcy law, low young graduates' unemployment rate, efficient arrangements to encourage technology and skills transfers from foreign players to domestic ones, and close cooperation between ministries as well as between national authorities and local stakeholders. The very inclusion of the young graduates into the labor market demonstrates the right direction of the labor market at its initial stage when the graduates' and employers' expectations match. Besides, the coordination in policy-making has widely been acknowledged as an important precondition for strengthening knowledge management and innovation capacities at both national and regional level.

Ultimately, efficient institutional cooperation and coordination are hardly imaginable without clear, purposeful and consistent guidelines. Therefore, the *government's capacity to implement the country's long-term vision* is crucial for the most competitive innovation strategies. This institutional factor includes the strong vision of the international or regional integration strategy, strong long-term strategy for the development of human capital, high government's capacity to motivate public and private stakeholders to work towards the long-term strategic vision (e.g. via fiscal, financial, commercial and regulatory incentives), the education system that is well associated with the long-term vision of skills requirements in the country, transparent economic policy, freedom of assembly and demonstration, and low level of large-scale corruption between administrations and foreign firms. Hence, the well externalized vision and adequate mix of instruments towards its successful implementation create routines that have to be followed, thus confining all the players to a definite logic which it could be difficult to escape.

Conclusion

Whenever one thinks of both the high quality of institutional performance and rather sophisticated innovation strategies, a more deliberate intent is needed to foster certain innovation strategies by means of policy-making. Therefore, it is important to note that *transparent capital and labor markets, efficient institutional cooperation and coordination* and *rule of law* contribute to the emergence and successful performance of the most competitive innovation strategies to the greatest extent. The aforementioned parameters are lead by the government capable of implementation and clear communication of the country's *long term vision*, as well as strong tangible and moral motivation for realizing the vision, i.e. the government's ability to consolidate business, science, political and legal elite, and broader society.

The systemic interplay of the informed institutional factors results in a sophisticated, transparent and dynamic economy that fosters innovation. Hence, responsible policy-making is truly important for successful organizational strategies for innovation. The lack of overall legal and practical responsibility for labor and capital markets, as well as for efficient and transparent institutions, hinders firms from embarking on more competitive innovation strategies and pushes them into less efficient innovation loop.

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LEGAL RIGHTS OF HOMELESS CHILDREN AND SINGLE MOTHERS - GENERAL OVERVIEW

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Abstract

The article includes a review-analysis of the issues of the legal status of children and single mothers. In particular, this concerns legal rights of underprivileged children and single mothers who regularly require the support and contribution of the state. Although international law made an impact on the creation of Georgian legislative defense mechanisms of the children's and women's' rights, some norms are only partly fulfilled. This is the main purpose of the article, based on European legislation, to quickly and effectively implement those rights in Georgia and legally regulate social and moral issues of homeless children and single mothers.

Keywords: Law, homeless children, single mothers

Introduction

The Georgian nation has undergone an almost complete way of human development - including pre-tribal and tribal ones. It also underwent historical path of family development which, in turn, led to further development of its various forms.

"Family has its roots in ancient times and is a major contributor to the development of the society. The power of the society is always conditioned by the strength of the family. There is no better place for upbringing and developing a child than a family" (R. Shengelia, 1999).

In the State, where marriage is a focus, single mothers often feel socially isolated and humiliated, and it is impossible to fulfill their obligations. Strange and extensive word "alone". People are born alone and leave this world alone. The status of being single sounds like a verdict or equals to social status (Iv. Javakhishvili, 1928).

It would be interesting to learn about the status of marriage in the previous centuries. How to protect the interests of children born to unmarried people?

While studying the Georgian Institute of marriage, Ivane Javakhishvili states in his work: "Children born to unmarried people in Georgia were inferior with their dignity and rights, according to the law, compared to those who were born to official families" (Georgian constitution, Article 36).

Georgian law limited the hereditary rights of children born in illegal families based on Vakhtang VI's law book in which directly is stated that "there is no place for illegitimate child in the motherland" (Iv. Javakhishvili, 1984).

In 1645-1676, in Russia, during the reign of Aleksei Mikhailovich (Romanov) there were facts of children’s illegal killing due to which mother was punished as she doomed her child to death. This case was considered to be a serious crime and deserved servitude in penal institutions, being a refugee or service in a monastery (O.A. Ruzakova, 2001).

During the reign of Peter the Great, an order was issued according to which, children born illegally were secretly transferred to the designated charity homes to prevent their murder.

In the 18th-century Russia, there was such a concept which combined the two categories of children: "Children who were born out of wedlock and children who were abandoned by their parents; this included the underprivileged children or those from extremely poor families" (Georgian constitution, Article 36).

It is also known that until 1902, the Russian legislation did not equalize the legal rights of children being born illegally or in marriage.

In many countries of Asia, giving birth to a child out of wedlock was banned by law. In Morocco, women were arrested if convicted of having an illegal relationship with a man and for that inappropriate behavior, they were tried, not the abusive man. Unfortunately, many countries in Asia still use this type of punishment.

In Georgian society, different categories of single mothers are still being discussed:

1. Women who gave birth to children out of wedlock, but with the actual consent of the Father (the father or the court officially recognized paternity).

2. Women who are divorced, raising children alone. Former husband is obliged to pay child support for each child.

3. Even when the former husband dies, the family receives annuity as the one who lost bread-winner

4. Women who marry after the birth of a child, but they have a document confirming paternity, although this person is not the biological father.

In this list, there are not mentioned those women who gave birth to children out of wedlock and the father did not recognize the child.

The main goal of the article is to protect the legal status of this category of single mothers, as being in such complicated situation, they have to survive in much tougher conditions and defend their as well as their underprivileged children’s rights.

According to Article 36 of constitution, "the state contributes to the prosperity of the family. Mothers and children's rights are recognized, protected by law "- However, in many cases mothers are not able to protect their rights under the law (Sh. Chikhvashvili, 2000).

Based on our traditions and mentality, especially oppressed and isolated from the society is the category of those single mothers who give birth to children out of wedlock. That's when their loved people and family members turn away from them, when they need support most of all.

There are many single mothers in Georgia. According to the National Statistics Office, each year, from the hospital, on average every 3000th baby is taken home only by mother. Experts claim this figure is alarming (Mitropolit Surajelia, 2000).

During the past 20 years single-parent families’ number has significantly increased. The main reason is rapid increase in the number of divorced women who have not married again, and also the women who bear children out of wedlock.

The majority of Georgian population is Orthodox Christian; therefore for Georgian society religious wedding ceremony of couples is very important.

The church has its own views about the relationship before marriage; 10 Commandments teach- "Do not commit adultery" - a legitimate child born outside marriage is illegal. Those who create a family against the God will not be sanctified (Chikaval, 2004).

How does the society consider a child out of marriage?

Nowadays, such cases have become quite frequent. A part of people think that the future spouses will get to know each other better and it will become clear if they can get on with each other in the future.

It is understandable that a woman could not start a family, but has a desire to have a baby; the baby will encounter problems, because only giving birth to a baby is not enough. They need a name, father, education and an appropriate environment, which will create a long of anxiety in the future of the single mother.

Single mothers' economic situation is getting worse. In many cases, a single mother lives below the poverty level or beyond. For centuries women have lived in a traditional society, in which men dominated, gaining the same rights and freedoms as men do (Law of Religion).

In Georgian society, single mothers often feel socially isolated and humiliated, and it is impossible to fulfill their obligations. Numerous studies allow expressing an opinion, that children born out of wedlock or those raised by single mothers often require increased material and moral assistance and support from the state. According to the principles of humanity, such families should receive the support necessary for them (http://www.education.ge).

In Germany the concept of the traditional family is slowly being lost. In the 1990s, 35% of German households were made up of one member, while 31% - of two.

The situation is similar in France: fewer marriages, those who marry become divorced more frequently than in the past (http://www.socium.ge).

The situation is alarming in terms of divorce, but the state itself is no longer surprising in the in society.

There was a remarkable boost in the percentage of divorce in Spain. For example, 25 years ago every 100th marriage ended in divorce.

At the beginning of the last decade of the 20th century, Britain, Europe, was the most outstanding in terms of highest level of divorce (4 out of 10 marriages are doomed to divorce), therefore the number of single-parent families is constantly growing (http://www.socium.ge).

Nowadays, most of the people prefer to live without family responsibilities. Similar trends are observed worldwide.

Children born out of wedlock bear the official stamp of being underprivileged, just because they were not accepted by their father, but every person is equal before the Lord, so such a classification is not allowed (Law of Religion).

The number of single parents in the United States "is rocketing dramatically". In this regard, none of other countries have a more favourable position. Families break down, illegal children are born, and millions of parents are children are being devastated year by year. Many single parents find it difficult to support their family, especially if these are young, single mothers. If such mothers are devoted more attention and social aid from the government, that would be a reasonable step.

The survey among South African black girls revealed that poverty is an integral part of single-parent families, the study's authors say: "About 50% of teenagers are unlikely to return to school" and many unwed mothers start prostitution and drug trafficking (http://www.socium.ge).

The situation is much more critical in Western countries. For instance – based on data from year 1995, 10% of children in the United States, who have both parents, suffer from poverty, while 50% of single-parent families were in the same condition.

Some single parents are forced to care for themselves, are entirely drowning in responsibilities and are not able to spend adequate time with their children.

As noted above, the United States has a far higher teen pregnancy rate than other developed countries; the problem of births out of wedlock is global.

In some European countries, such as England and France, the birth rate is equal to that of the United States. In some countries of Africa and South America, the birthrate among teenage girls is nearly double than that of the United States.

NGOs showed that 94% of women nowadays 94% of women in Georgia are by domestic violence. This is not an individual problem, it's a social problem, but proper attention is not paid to this issue in society (http://www.education.ge).

According to Belgian law, children out of wedlock would be recognized legal only if the mother formally recognized herself as a parent. In this case the European Court stated that a biological connection between mother and child creates family life (Article 8), which also applies to the case of illegitimate children and their mothers, since the Convention does not distinguish between "legal" and "illegal" children (http./www.ka.wikipedia.org).

For the harmonious development of the child, parents are required and all children have the right to have both parents. The mother has the right not to leave the child outside the law. It is sometimes said that the child's mother left him or her in an orphanage, but the child was not abandoned only by mother, but both – mother and father. Parents are individuals with equal rights.

The European Court also found that judging children legally based on different marital status of parents' is prohibited by law (Article 8 of the Constitution, the prohibition of discrimination with regard to Article 14).

We welcome the fact that Parliament introduced a change in the law. Based on it, the paternity of a child born out of wedlock in Georgia is proved using a new rule. All fathers who refuse paternity will have to obtain the status in the name of law. It has become compulsory to take undergo genetic analysis, so called DNA. This need was resulted from recent statistics, according to which the number of children born out of wedlock and as well as that number of single mothers has risen sharply.

International human rights law provides a variety of mechanisms, but in order to use these international mechanisms more effectively, it was necessary to have additional tools, which guarantee women's rights and freedoms more.

In 1919, the organization received a Labour Convention, which dealt with women's social and professional status. At present, based on international laws and treaties, there are established standards, which will ensure creation of effective mechanisms to protect women's rights. Each state has its own constitution and laws to comply with international standards and obligations (http./www.ka.wikipedia.org).

Human rights and freedom represent the most important values in the modern society, recognition and protection of which is the primary achievement of democracy, however, the recognition of women's rights and gender equality is still problematic.

For all families recognition of each member’s inalienable right of dignity and equality represents basis for freedom, justice and peace in the world.

International instruments are those documents, which have been adopted by international organizations and contain human rights norms and principles. These are: the different types of agreements, declarations, resolutions and conventions (http.//www.almustafa.ge).

Gender equality aims to promote public awareness on gender issues and improve its level, also to obtain a state policy in the same field, which will introduce the same access and possibilities for both men and women in terms of social and economic activities. This represents one of the most important instruments which enables considering specifics of equal rights and opportunities for both men and women, as a socio-demographic group to create an optimal policy (http.//www.epn.ge).

Conclusion

It is necessary to make relevant amendments to the Civil Code, and most importantly, a normative act, where the legal status of single mother and child will be specifically regulated. All of these issues are quite problematic, and it is necessary for the state to take measures to help single parents and underprivileged children and to protect both children and their parents' legal rights.

The above-mentioned changes will enable us to reach such a result when the present normative acts in Georgia are adequate towards representatives of the social status, which exists not only in Georgia but also many other countries.

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GERMAN "TREUHAND" VIS-Á-VIS AUSTRIAN "TREUHAND" (TERMINOLOGICAL STUDY)

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Abstract

The trust is an "equitable" concept, which was initially administered by the Court of Chancery. It historically developed in the English common law and gradually crept into some systems of civil law jurisdiction. However, the civil legislations have not fully acknowledged the common law mechanism and created approximate "counterparts" – the so-called trust-like mechanisms. The given paper makes an attempt to study innovative processes of the European legal system. It highlights the peculiarities of the "trust-like" mechanisms of the German and Austrian laws. The major emphasis is put on the terminological elements denoting different components of entrusting relationships. The investigation shows, that on the one hand, some Austrian terms (*Treuhand, Stiftung, Ermächtigungstreuhand*, etc.) coincide with the German lexical system and on the other hand, they are similar to the terms of the Roman law.

Keywords: Law, terminology, Treuhand, trust, trust-like device

Introduction

The trust is an "equitable" concept, which was initially administered by the Court of Chancery. It historically developed in the English common law and was based on the law of equity. However, the contemporary view-point states, that the "trust" is a legal device which is not exclusively found in common-law systems. "Numerous civil-law or mixed-law systems have institutions which although may not make use of the distinction between common law and Equity (which is unknown in these systems), perfectly reflect the legal structure of trusts created according to the traditional English model"[51]. Some scholars even believe, that there are links between the English trust and several institutions (*fiducia, fideicommissum, Treuhand*) of Continental law countries. "Maurizio Lupoi, for example, argues that the English Chancellors (without mentioning their sources) drew on a wealth of thirteenth- and fourteens-century civil law authority in their development of the English trust. For this it is therefore not far-fetched to refer to these civil law institutions as being the "foundation" of the English trust"[52].

The given paper does not aim at the determination of the origin of "trust". It is focused on the comparative analysis of the terminological units related to the contemporary trust-like devices which are presented in the German and Austrian juridical systems. The major emphasis is put on the similarities and differencies of these lexical units.

[51] Lupio, Maurizio, Trusts: A comparative study. Cambridge University press, 2000.
[52] Reimann, Mathias, and Zimmermann, Reihard, eds. The Oxford Handbook of Comparative Law. Oxford University press, 2008.

Trust Relationships

"Trust is an element that has been approached in the last decades by many disciplines and through many and varied means"[53]. In the juridical system it is usually defined as "a particular legal relationship whereby property is transferred from one person to another, who controls it for the benefit of a third person, or for a special purpose"[54]. "A trust may also be defined as a right or (real and personal) property held by one party for the benefit of another"[55].

A valid common-law trust considers the existence of the following compulsory elements:

- A trustor/settler – a creator of the trust;
- A beneficiary (also called cestui que trust (pl. cestuis que trust) – the holder of the equitable title;
- A trustee – a legal owner, who acts in the best interest of the beneficiary;
- A trust fund - the "trust property" the title to which passes to the trustee. It's also worth mentioning, that "the trust fund is not part of the general assets of the trustee; thus it does not pass to his heirs in the event of the trustee's death"[56].

The German "Treuhand"

Many scholars believe, that the German law does not have a specific concept that works as the Anglo-American "trust". Fiduciary relationships exist only in the form of "*fiduziarische Treuhand*" (a fiduciary trust) - a construction by which an individual transfers the full right *in rem* to the other individual, who is obliged to deal with the assets in the manner specified by the contract. A trustee *(Treuhänder)* usually becomes a legal owner. However, he (she) can transfer the legal title to the third person, while the settlor/beneficiary *(Treugeber)* has only damages claims in those cases when the trustee violates the obligations. It means, that the "*fiduziarische Treuhand*" does not fully protect settlor's rights. Therefore, the practical implementation of this construction seems quite risky.

However, the German legal system gives *Treugeber* an opportunity to make the safer agreement (the so-called *Ermächtigungstreuhand* - trust by authorization), "under which he (she) does not transfer the full right *in rem* to *Treuhänder*, but simply authorizes him (her) to manage or dispose of the assets in a specific manner. When the trustee exceeds his authorization the disposal of the assets is not valid … no real separation of property takes place and the protection of the settlor is of minor importance because he is still the legal owner with all of his power"[57].

The German law presents a concept of a foundation (*Stiftung*), that functions like a charitable trust. "In order to devote assets or patrimony to specific aims, a person can create a new legal entity, the Stiftung. The founder must declare such an intention in writing or by will (testamentary foundation), the *Stiftungsgeschäft* or endowment transaction"[58]. The given transaction consists of two parties:

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[53] Zanini, Marco, Tulio, Trust within organizations of the New Economy. A cross-industrial Study. Dissertation Universitat Magdeburg. Gabler Edition Wissenschaft, 2007.

[54] Sims, Vanessa, English law and terminology. Lingua Juris. Auflage, 2010.

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[58] Rehahn, Johannes, and Grimm, Alexander, Country report: Germany. The Columbia Journal of European Law Online, http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

- a ***founder***, which transfers a patrimony to the new legal entity and sets up rules of administration;
- a ***foundation*** **–** a newly-created legal entity, which administers assets, but is supervised by the Bundesland.

Moreover, the "*Stiftung*" can be created only with the permission of the "Bundesland", or federal state, where a newly-created legal entity will have its seat. It's worth mentioning, that "apart from the creation of a new legal entity, the trustor can also transfer the property to an already existing person with the declaration that the transferee must separate these assets from his own property and has to administer them on a continuing basis as the trustor has set it up"[59]. Such type of a transaction is nominated as "*Stiftungstreuhand*" or "*unselbständige Stiftung*" (foundation trust or dependent foundation).

Therefore, the relationship between the Anglo-American "trust" and "*fiduziarische Treuhand*" can be outlined in the following way:

1. The creation of a "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "*fiduziarische Treuhand*", a trustor *(Treugeber)* enters into a written contract with a trustee *(Treuhänder)*;
2. The Anglo-American "trust" can be subject to a *mortis causa deed,* while the German "*fiduziarische Treuhand*" is never subject to it;
3. The "trust" nominates beneficial owners of the property ("beneficiaries") or simply implies the delegation of authorities in behalf of the "trustor" himself (herself). "*Fiduziarische Treuhand*" considers only a simple delegation of authorities of management in behalf of *"Treugeber"* and underlines the fact, that the German legal system identifies the concept of "trustor" with the concept of "beneficiary";
4. In the German law *"Treuhänder"* can transfer the legal title to the third person, while the Anglo-American law does not consider such circumstances.

The Austrian "Treuhand"

It's a well-known fact, that the Austrian law does not present a concept similar to the Anglo-American "trust". However, there is a possibility of setting up the so-called "*Treuhand"*, which has no legal status. Moreover, "The Treuhand is a civil contract which is not regulated in law, but is based on the general principle of the autonomy of the contracting parties (i.e. the ability of any person to enter into any contract which whomsoever they chose) and delimited by jurisprudence and doctrine"[60]. The Austrian "Treuhand" considers the participation of two major parties:

- "***Treuhänder****"* **–** a person, who is authorized to exercise rights over property in his or her own name, on the basis of and in accordance with a binding agreement with another person. *"Treuhänder"* is a legal owner of the assets;
- "***Treugeber****"* **–** another party, which maintains "economic ownership".

The Austrian law distinguishes two types of "Treuhand": the "***fiducia****"* and the "***Ermächtigungstreuhand*"**. "With the *Fiducia* most of the rights connected to the assets are transferred to the Treuhänder, whereas the *Ermächtigungstreuhand* only entails a transfer of certain rights connected to the assets such as the right to manage them"[61].

"The Austrian Treuhand entails a form of split ownership: the Treuhänder is the legal owner of the assets, but the Treugeber maintains the "economic ownership" and may

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[59] Westebbe, Achim, Die Stiftungstreuhand. Baden-Baden. Nomos, 1993

[60] Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

[61] Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

therefore, claim compensation for his or her property in certain circumstances, such as the Treuhänder's bankruptcy"[62].

It's worth mentioning, that Austrian law presents the concept of foundations. "A foundation (*Stiftung*) is an organization intended to promote on a long-term (indefinite) basis a particular purpose (designated by the founder) through assets dedicated to that purpose. Austrian law allows for the creation of:

- public benefit foundations under the Federal Foundations and Funds Act (*BStFG*). These foundations can only be set up for charitable purposes. They may carry on a minor commercial activity to the extent that this activity supports the main purpose of the foundation; and
- private foundations under the Private Foundations Act (PSG). In such foundations, the founder dedicates property for private purposes devoid of any self-interest. There is a legal prohibition which prevents foundations from carrying on any commercial activity"[63].

The Austrian "Treuhand" can be created orally i.e. it may exist without any written record. The "Treuhand" is usually concluded "between any two persons who have the necessary legal capacity to conclude to a contract. The *Treugeber* and the *Treuhänder* may choose to inform third parties of the legal arrangement between them (*offene Treuhand* or open *Treuhand*) or not (*verdeckte Treuhand* or hidden *Treuhand*)"[64]

Therefore, the study of the lexical units related to the Austrian "trust-like" device revealed, that on the one hand, some Austrian terms (*Treuhand, Stiftung, Ermächtigungstreuhand)* coincide with the German lexical system and on the other hand, they are similar to the terms of the Roman law. It's a well-known fact, that "fiducia" was an integral part of Roman legal system. Generally, the Latin term "fiducia" means "the act based on the trust". However, the following abstract from "A Dictionary of Greek and Roman Antiquities" gives a more precise description of entrusting relationships: "If a man transferred his property to another, on condition that it should be restored to him, this contract was called **Fiducia,** and the person to whom the property was so transferred was said **fiduciam accipere** (Cic. *Top.* c10). A man might transfer his property to another for the sake of greater security in time of danger, or for other sufficient reason (Gaius, II.60)…trustee was bound to discharge his trust by restoring the thing: if he did not, he was liable to an **actio fiduciae** or **fiduciaria**, which was an **actio bonae fidei** (Cic.*de Off.* III.15, *ad Fam.* VII.12; **ut inter bonos bene agier oportet**). If the trustee was condemned in the action, the consequence was **infamia**"[65].

Therefore, the relationship between the Anglo-American "*trust"* and Austrian "*Treuhand*" can be outlined in the following way:

1. The creation of both - "trust" and "Treuhand" - requires a trustor's intent presented orally or in a written form;
2. The Austrian law makes distinction between "*offene Treuhand"*(open *Treuhand)* and "*verdeckte Treuhand"* (hidden *Treuhand),* while the Anglo-American legal system does not present the similar distribution;

[62] Austria: Detailed Assessment Report on Anti-Money Laundering and Combating. International Monetary Fund. Staff Country Reports. International Monetary Fund Washington D.C., 2009.
[63] Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.
[64] Austria: Detailed Assessment Report on Anti-Money Laundering and Combating. International Monetary Fund. Staff Country Reports. International Monetary Fund Washington D.C., 2009.
[65] Smith, William, A Dictionary of Greek and Roman Antiquities. London, 1875.

3. The Austrian law distinguishes two types of "Treuhand": the *"fiducia"* and the "*Ermächtigungstreuhand*". The Anglo-American legal system does not present the similar distribution;
4. The "trust" nominates beneficial owners of the property ("beneficiaries") or simply implies the delegation of authorities in behalf of the "trustor" himself (herself). "*Treuhand*" considers only a simple delegation of authorities of management in behalf of *"Treugeber"* and underlines the fact, that the Austrian legal system identifies the concept of "trustor" with the concept of "beneficiary".

Conclusion

The comparative analysis of the German and Austrian "Treuhands" can be summarized via the following outcomes:

- The Austrian *"Treuhand"* must be presented orally or in a written form, while for the creation of "*fiduziarische Treuhand*", a trustor *(Treugeber)* enters into a written contract with a trustee *(Treuhänder)*;
- The Austrian and German "Treuhands" present similar components of entrusting relationships. The same can be said about terminological units related to them: a trustor *(Treugeber)* and a trustee *(Treuhänder);*
- Although the Austrian legal system equalizes the concepts "trustor" and "beneficiary", the Austrian juridical language presents the term **"***Begünstigter***"** - an equivalent of the English "beneficiary";
- The Austrian law distinguishes two types of "Treuhand": the *"fiducia"* and the "*Ermächtigungstreuhand*". The German legal system does not present the similar distribution. However, a special attention must be paid to the term "*Ermächtigungstreuhand"*. In the German law it denotes a separate agreement, which simply authorizes *Treuhänder* to manage or dispose of the assets in a specific manner. In the Austrian legal system "*Ermächtigungstreuhand*" is a type of *Treuhand,* which only entails a transfer of certain rights connected to the assets such as the right to manage them"[66]. Therefore, the Austrian "*Ermächtigungstreuhand*" does not conceptually fully coincide with the German "*Ermächtigungstreuhand*";
- The Austrian law makes distinction between "*offene Treuhand"* (open *Treuhand)* and "*verdeckte Treuhand"* (hidden *Treuhand),* while the German legal system does not present the similar "distributional components" and terms related to them;
- The German law presents the concepts of *"Stiftung"* (a foundation, that functions like a charitable trust) and *"Stiftungtreuhand"* (which considers the transfer of the property to an already existing person). The Austrian law unites both of these transactions under the term *"Stiftung"* and therefore, makes this lexical unit conceptually different from its German analogue.

Therefore, all the above mentioned enables us to conclude, that the German and Austrian laws have already allowed mechanisms similar to the Anglo-American "trust". However, the resulting instruments present quite complex terminological systems. On the one hand, some Austrian terms (*Treuhand, Stiftung, Ermächtigungstreuhand)* coincide with the German lexical units and on the other hand, they are similar to the terms of the Roman law. We suppose, that the flow of time and interference of globalizing processes will change the legal landscape. Nowadays, Europe is facing the tendency "to draw up a uniform law on the

[66] Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obligates the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law"[67]. The creation of uniform legal system presupposes the change of terminological landscape. All the works dedicated to the comparative study of juridical terms acquire great urgency. We believe, that our work can be useful in this respect.

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THE LEGAL INSTITUTION OF THE TRUST IN THE ECONOMY AND LAW OF EASTERN EUROPEAN COUNTRIES

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Abstract

The Anglo-Saxon trust is a legal institution that can be characterised by a rich variety of types and can serve a wide range of social and business needs. The popularity of the trust is attributable to its flexible structure, which allows asset partitioning, the function of the trustee and tracing. Without the adoption of English law in some form, the rules of civil law systems do not permit two different forms of ownership of the same thing at the same time. Strong economic demand, however, has forced several civil law countries to introduce a trust-like legal arrangement.

The legal institutions drawn up in Russia, Georgia, Lithuania, Romania, the Czech Republic and Hungary, show varying degrees of similarity to the trust. The legal structures introduced include the contractual form, the right in rem, property without an owner and a contract with limited in rem effects. The rules of these legal vehicles differ from the trust in several ways. As a result, these institutions may fulfil the main functions of the trust to some extent, but they can approximate the trust only on a step-by-step basis to become real substitutes of the trust in the economy.

Keywords: Trust, fiduciary asset management, common law, civil law

Introduction

In the history of law, the English institution of the trust is one of the most original institutions in the field of private law. The research of this topic may provide value and substantial benefits for economic operators. A jurist who studies civil legal systems based on the traditions of Roman law applies the rules of property law and the principle of the *numerus clausus* of property rights and the unity of ownership. This is the reason why the Anglo-Saxon institution of the trust appears to be an alien, barely understandable concept in the theory of civil law. The contemporary importance of this study is related to recently adopted legislation in Eastern European countries, where unique trust-like devices have been introduced.

In Continental European laws, the regulation of institutions that resemble the English trust is quite difficult. As we may observe, there are different responses to this challenge. The function of the trust can be fulfilled by contractual legal arrangement or by the establishment of independent trustee rights, or even by introducing the model of property without an owner. With respect to the adoption of the trust, or of any modified instrument thereof, it helps to examine this institution with a functional approach.[68] We also have to take into account that

[68] Hansmann, Henry – Mattei, Ugo: *The Functions of Trust Law: A Comparative Legal and Economic Analysis*. 73 New York University Law Review 434 (1998). p. 435.

there are major efforts on an international level to approximate the rules of private law in the Anglo-Saxon and Continental European legal systems.[69]

The Main Functions of the English Trust

When dealing with the application of the modern trust, it is obviously necessary to take into account its special forms.[70] Its functions have changed very much during the last centuries. The trust was a legal arrangement that served the avoidance of feudal burdens and the establishment of family settlements. But according to the requirements of modern business today, it serves significantly different purposes. From this point of view, this study deals only with the express trust and leaves the rules of other types of trust, such as those of the constructive, implied trust etc., to be the subject matter of separate research.

The trust is a legal institution of the Anglo-Saxon legal system, characterised by a rich variety of trust types, which is capable of satisfying a wide range of social and business needs.[71] The trust can be established for family purposes, for example. such as the management of the property of the person creating the trust during his lifetime, or for the treatment, nursing of the settlor in case of his illness, and for his burial after death. This purpose can be extended to include the relatives of the settlor. Such specific function of the trust can be an arrangement to support the minor relative of the settlor or a mentally incompetent person, or a trust can be declared against spendthriftiness or for the provision of annuities. In addition to these goals, the trust is gaining much more relevance in the business sector. This legal arrangement can be useful for business transactions, for employees' pension trusts, the management of real property; it can be established to manage collateral in relation to the issue of securities, for the division of land and the sale of resulting lots, for pursuing business activity and the distribution of profits, the management of shares and securities (investment or unit trust), and for the exercise of shareholder rights etc.

One of the key motives for establishing a trust is to provide appropriate legal protection of property.[72] Different legal interests are defined with respect to the trust's purpose, including the protection of property against potential creditors[73], derogation from inheritance rules, or tax optimisation.[74] The arguments made against the trust principally underline its threat to the transparency of property ownership.

Hayton also lists many examples of the modern application of the trust. The establishment of family trusts is still possible, but their relevance has somewhat diminished in recent times.[75] The settlor can maintain control over family property for three or four

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[69] For example, the Convention on the Law Applicable to Trusts and On Their Recognition (Hague Convention), adopted by the Hague Conference on Private International Law at its 15th Session, the Principles of European Trust Law, chapter X of the Draft Common Frame of Reference (DCFR) drawn up by the working group organised at the faculty of law at the University of Nijmegen, etc.

[70] Hudson, Alastair: *Understanding Equity & Trusts*. Routledge, London, New York, 2013[4]. p. 26.

[71] Fratcher, W. F.: *Trus*t. International Encyclopedia of Comparative Law. Vol. VI. Trust and Property. J. C. B. Mohr (Paul Siebeck), Tübingen, 1973. p. 5 ff.

[72] Grundy, Milton – Briggs, John – Field, Joseph A.: *Asset Protection Trusts*. Key Haven Publications PLC, London, 1997[3]. p. 27.

[73] This applies predominantly to special purpose and discretionary trusts, as the creditors of the beneficiary may claim debt from the beneficiary's right to the trust property. See Lupoi, Maurizio: *Introduction. Trusts – Some observations from a Civil Law Perspective*. In Atherton, Rosalind F. (ed.): Estates, Taxes and Professional Ethics. Papers of the International Academy of Estate and Trust Law – 2002. Kluwer Law International, London, The Hague, New York, 2003. p. 6.

[74] Belle Antoine, Rose-Marie: *Trusts and Related Tax Issues in Offshore Financial Law*. Oxford University Press, New York, 2005. p. 16.

[75] In 2002, 90% of trusts were established for commercial purposes, and only 10% served the disposition of family property. Hayton, David: *English Trusts and Their Commercial Counterparts in Continental Europe*. In:

generations, and hence, maintain its efficiency. Hayton lists fifteen areas of application with respect to commercial purposes.[76]

The flexibility of the trust structure is attributable to the tripartite relationship between the settlor, the trustee and the beneficiary, which also has implications for the property. In my opinion, these specific legal advantages are asset partitioning, the office of the trustee and the possibility of tracing.[77] Asset partitioning ensures that the creditors of the settlor, the trustee and the beneficiary may have no, or only very limited options to lay claim against the trust property in exceptional cases. The office of the trustee differs from the mere contractual legal relationship, which can be terminated in case of the death of any parties. The possibility of tracing allows the beneficiary, and in some cases also the settlor, to claim back the trust property from third parties, who are not bona fide purchasers. Of course, there are other relevant characteristic features, such as the duration of the relationship, personal requirements applicable to the trustee, the right of survivorship if there are several trustees, the right of the termination of the settlor, the possibility of the private purpose trust etc., which may also influence the application of this institution for business purposes.

The Possible Adoption of the Trust in Civil Law

Without the adoption of English law in some form, the rules of legal systems built on the traditions of private law in civil law systems do not permit two different forms of ownership (legal title) to the same thing at the same time. With respect to the adoption of the trust, the question is whether regulation with a function similar to the arrangement of the legal and equitable title can be introduced in an environment of civil law, or a different legal institution is unfit to fulfil the role of the trust, thus the regulation of the trust is only possible through the adaptation of divided ownership. On the basis of views put forth in jurisprudence, substantial arguments are made in favour of both solutions.[78] However, experience suggests that legislators in several countries with civil law systems made efforts to introduce a trust-like legal arrangement without the duplication of ownership.

Continental European legal systems recognise neither the dual legal system (common law – equity), nor the divisibility of ownership under Anglo-Saxon law.[79] The *numerus clausus* of property rights also poses an obstacle to the adoption of the trust, as the parties lack free maneuvering room to establish new rights to things beyond what is permitted by law.[80] Bolgár argues that neither the principle of publicity, nor the numerus clausus of property rights should be an obstacle to the adoption of the trust in civil law systems.[81] Other authors share this view, because Anglo-Saxon law also regulates the *numerus clausus* of property rights, albeit in different cases.[82] The examples in Scotland and South Africa

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David Hayton (ed.): Extending the Boundaries of Trusts and Similar Ring-Fenced Funds. Kluwer Law International, The Hague, 2002. p. 33.

[76] Hayton: op. cit. p. 35 ff.

[77] Banakas, Stathis: *Understanding Trusts: A Comparative View of Property Rights in Europe*. InDret. Revista Para el analisis de derecho 1/2006. p. 4.

[78] Chalmers, James: *Ownership of Trust Property in Scotland and Louisiana*. In: Vernon Valentine Palmer – Elspeth Christie Reid: Mixed Jurisdiction Compared. Private Law in Louisiana and Scotland. Edinburgh University Press, Edinburgh, 2009. p. 137. Kötz, Hein: *Trust und Treuhand. Eine rechtsvergleichende Darstellung des anglo-amerikanischen Trust und funktionsverwandter Institute des deutschen Rechts*. Vandenhoeck & Ruprecht in Göttingen, 1963. p. 12.

[79] Hansmann – Mattei: *op. cit.* p. 441.

[80] Hansmann – Mattei: *op. cit*. 442.

[81] Bolgár, Vera: *Why No Trusts in the Civil Law?* The American Journal of Comparative Law 2 (1953). p. 214.

[82] Fusaro, Andrea: *The Numerus Clausus of Property Rights*. In: Elizabeth Cooke (ed.): Modern Studies in Property Law. Vol. 1. Property 2000. Hart Publishing, Oxford-Portland Oregon, 2001. p. 314. See also Ryan, K.

prove that the *numerus clausus* of property rights is not an obstacle to the adoption of the trust. In relation to the drafting of the legal background to the separation of property, the function of the trust may be fulfilled by a legal institution if the beneficiary only holds a right *in personam* against the trustee.[83]

Lupoi defines the essential components of the trust as follows. It is necessary to transfer the trust property to the trustee, or to establish the trust by unilateral representation. The separation of the trust property and the trustee's own property is also required. It is important that the settlor should not hold rights in relation to the trust property, and there should be beneficiaries or a purpose, and the fiduciary obligation of the trustee must be regulated.[84]

The adoption of the duality of ownership is not essential for the introduction of trust-like legal devices, operated with the main functions of the trust, in civil law systems.[85] In Mexico, Panama and Liechtenstein, for example, the entire legal environment was not changed for the introduction of trust-like legal arrangements. The Scottish version of the trust is the result of natural historical development. Originally, the English version of the trust was introduced in South Africa, but local legal practice substantially transformed it to enable adaptation to the institutions of civil law *(fideicommissum, stipulatio alteri)*. In other states, such as Louisiana and the province of Québec, the trust was also introduced by legislative means with less emphasis on the question of ownership.

Others, such as Honoré, do not consider it essential for the trustee to be the owner of the trust property in relation to the introduction, adoption of the trust. He maintains it is sufficient for the trustee to keep the property under his supervision and management; his legal title to the property is not essential. The trust may be owned by the trustee, beneficiary, a business association, or it may even have no owner. Honoré believes that the adoption of separate legislation on equity is similarly not essential for the introduction of the trust.[86] Gretton notes that although Honoré and Lupoi provide a detailed list of the essentials of the trust and of its concept, they do not list elements without which there is no trust. He points out that Fratcher's definition draws a sharp line between the trust and trust-like legal institutions by approaching divided ownership as a conceptual component.[87]

I think that the distinction between common law and equity played a crucial role in the development of the trust, but the lack thereof does not substantially affect the introduction of a trust-like legal arrangement. With respect to the legal approach to the trustee's position as an office in legal systems with uncodified laws, case law qualifies the trustee by analogy to the custodian or guardian, while systems with codified laws must enact separate laws in this regard.[88] In the case of the trustee, the separation of property is possible if the trustee is owner of his own and the trust property in a different capacity.[89] The separation of property is

W.: *An Introduction to the Civil Law*. The Law Book Co. Ltd. of Austrolasia PTY Ltd., Brisbane, Sydney, Melbourne, 1962. p. 221.

[83] Verhagen, H. L. E.: *Trusts in the Civil Law: Making Use of the Experience of 'Mixed' Jurisdictions*. In: J. M. Milo – J. M. Smits (ed.): Trusts in Mixed Legal Systems. Ars Aequi Libri, Nijmegen, 2001. p. 103.

[84] Waal, Marius J. de: *Trust law*. In: Jan M. Smits (ed.): Elgar Encyclopedia of Comparative Law. Edward Elgar, Cheltenham, Northampton, 2006. p. 755.

[85] Honoré, Tony: *Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland*. In: Alfredo Mordechai Rabello (ed.): Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions. Jerusalem, 1997. p. 807.

[86] Honoré, Tony: *Trusts: The Inessentials*. http://users.ox.ac.uk/~alls0079/Burn.pdf. p. 5 ff.

[87] See Gretton, George: *Up there in the Begriffshimmel?* In Smith, Lionel (ed.): The Worlds of the Trust. Cambridge University Press, New York, 2013. p. 544.

[88] This is the case, for example, in Liechtenstein, Québec, Ethiopia, Puerto Rico, Israel. Honoré: *op. cit. (Obstacles)*. p. 808.

[89] Honoré: *op. cit. (Obstacles)*. p. 811.

not a novel device in civil law systems, either. The separation of property is one of the most important principles in company law. Honoré argues that with respect to the equivalent of the Anglo-Saxon trust in civil law, it may be appropriate to apply the model of guardianship and grant ownership to the beneficiary, and limit the right of the trustee to the management of the property.[90] To ensure the protection of the beneficiary, it could be possible to grant the option and provide protection to the beneficiary against third parties, in line with the decision passed in the Readfearn case (doctrine of notice)[91]. This could be further strengthened with the registration obligation.

The judicial supervision of the trust enables the provision of stricter rules in the interest of the beneficiaries or creditors, or, as the case may be, derogation from the provisions of the trust deed. The options for this have become wider since the application of the so-called cy-près doctrine. The authorities have no other options of intervention in the affairs of the managed trust, and no publicity or registration obligations apply, either.

Trust-like Legal Arrangements in Civil Law

I would like to summarise regulation in six Eastern European countries, where some kind of legal regulation resembling the trust has been introduced.

Russia

The term trust *(trast)* appeared in the Russian private banking sector in 1990[92], allowing banks to manage the investments and securities of their clients.[93] It was followed by other legal regulations until the codification of the private law in the middle of the 1990's.[94]

The first part of the Russian civil code entered into force on 1 January 1995[95]. Pursuant to Art. 209(4), legal title may be transferred to someone else for the purpose of property management (doveritel'noe upravlenie).[96] The second part of the Russian civil code entered into force on 1 March 1996. Chapter 53 regulates property management (doveritel'noe upravlenie).[97] Pursuant to Art. 1012 of the Russian civil code, under the agreement between the parties, one party (settlor) transfers the property to the other party (trustee) for a fixed period of time (maximum 5 years), and the other party undertakes to manage the property for the benefit of the settlor or a beneficiary designated by him. The transfer of property does not extend to the transfer of legal title to the property.[98] Thus, under the new regulation, the settlor retains legal title to the trust property, while the trustee only acquires the right to manage the property. The trustee carries out his duties for remuneration, but is not entitled to profits from the trust property. The position of trustee may only be filled

[90] The Dutch *bewind*, for example, is a such a legal scheme. Honoré: *op. cit. (Obstacles)*. p. 813.
[91] Wilson, W. A. – Duncan, A. G. M.: *Trusts, Trustees and Executors*. Scottish Universities Law Institute Ltd., W. Green, Edinburgh, 1995[2]. p. 4.
[92] "On the banks and banking activities in the RSFSR." Vedomosti RSFSR 1990 No. 27. item 327.
[93] Reid, Elspeth: *The Law of Trusts in Russia*. Review of Central and East European Law 24 (1998). p. 45.
[94] On Fiduciary Ownership (the *trast*). Sobranie aktov RF 1994 No. 1. item 6. Pursuant to the preamble, the introduction of the trust was necessitated by new forms of business administration and institutional reform related to economic reform. Reid: *op. cit.* p. 46. The federal contracting agency, Roskontrakt, became the largest asset management organisation. Reid: *op. cit.* p. 47.
[95] Sobranie zakonodatel'stva RF 1994 No. 32 item 3301.
[96] The earlier term "trust owner" was replaced with "trust manager" (doveritel'nyi upravliaiushchii), which is associated with agency, representation. Reid: *op. cit*. p. 48.
[97] Sobranie zakonodatel'stva RF 1996 No. 5 item 410.
[98] Benevolenskaya, Zlata E.: *Trust Management as a Legal Form of Managing State Property in Russia*. Review of Central and East European Law 35 (2010). p. 68 ff. Hamza draws a parallel between this arrangement and regulation in Louisiana. Hamza, Gábor: *Az europai maganjog fejlodese. A modern maganjogi rendszerek kialakulasa a romai jogi hagyomanyok alapján* (Development of modern private law systems based on traditions of Roman law). Nemzeti Tankönyvkiadó, Budapest, 2002. p. 237.

by a businessman (predprinimatel') or commercial company. Natural persons may manage property only in the case of trusts established by law (e.g. guardianship, custodianship). Property management includes assets and securities; the management of cash does not essentially fall within this scope. The trustee is required to indicate his legal status, e.g. with the abbreviation "D U", on contracts relating to the trust property. The property management contract has a maximum duration of five years.

This contractual arrangement does not quite reach the level of the Anglo-Saxon trust, but it is more than a simple agency or mandate. Although the settlor may terminate the contract at any time, the trustee holds exclusive rights to manage the property. It also varies from the arrangement of the Dutch bewind, as the legal owner is not the beneficiary, but the settlor.[99] On the other hand, the trustee requires the prior written consent of the settlor for important decisions concerning the property, such as the cessation of the business association through the exercise of voting rights attached to shares included in the property, modification of its capital, decision on the amendment to the deed of foundation. The trustee must manage the property separately from his own property, and keep it on a separate account. This arrangement is mainly applied in Russia for the operation of investment funds and pension funds.[100]

Georgia

Art. 724–729 of the Georgian civil code of 2002 regulate the legal institution that is similar to the trust (sakutrebis mindoba). Property management is established by a written trust contract (sakutrebis mindobis khelshekruleba), under which the trustee (mindobili mesakutre) is obliged to manage the property for the benefit of the settlor (sakutrebis mimndobi); thus, this is not a tripartite relationship. The settlor transfers the legal title of the trust property to the trustee, and pursuant to Art. 725(1), the trustee manages the property in his own name, but at the cost and risk of the settlor. Profits from the property are also due to the settlor. As a general rule, the property management contract is gratuitous, but the parties may derogate from this rule. The trustee is liable toward third parties for duties relating to the trust property.[101] Provisions relating to agency provide the legal framework for the property management contract.

Romania

In Romania, civil code No 71/2011. (Art. 773–791.) introduced the fiducia – a property management arrangement similar to the trust. The fiducia may be established by law or a notarised contract. Hence, it may not be established by testament. Pursuant to Art. 773 of the Romanian civil code, one or more settlors (constituitori) transfer legal title or other rights to one or more trustees (fiduciari), who manage it for a specific purpose or for the benefit of the beneficiaries (beneficiari). The trust property constitutes property separate from the trustee's own property. Under Romanian regulations, the position of trustee may only be filled by a credit institution, investment company, insurance or reinsurance company, notary or lawyer.[102]

The establishment of the fiducia must be reported to the competent tax authority within one month. The fiducia becomes effective vis-á-vis third parties once the deed of foundation has been registered (Electronic Archive of Security Interests in Personal

[99] Reid: *op. cit*. p. 52.

[100] Reid: *op. cit.*. p. 54 ff.

[101] For detailed analysis of regulation, see Gvelesiani, Irina: The *Luxembourgish "Fiducie" and the Georgian "Trust" (Terminological Peculiarities).* Mediterraneum Journal of Social Sciences Vol. 4. No 11 (2013). p. 126.

[102] See Gvelesiani, Irina: *Romanian "Fiducia" and Georgian "Trust" (Major Terminological Similarities and Differences).* Challenges of Knowledge Society 2013/3. p. 286 ff.

Property). If the trust property includes real property, it must be registered in the land register. The maximum duration of the fiducia is 33 years.

Czech Republic

The civil code of the Czech Republic (No. 89/2012.) in force as of 1 January 2014 also regulates property management. Legislators applied the concept of the civil code of Québec for drafting the regulation. Only trusts set out in a public instrument are valid. The trust may be established by contract or testament for maximum 100 years. The trust may be declared for commercial, investment, private purposes or for public benefit.

Upon establishment of the trust, the settlor no longer holds legal title to the trust property, which will become property without owner, to be managed by the trustee for the benefit of the beneficiaries.[103] Accordingly, the purpose of the property and its status as a "trust fund" must be indicated in legal relationships relating to the property. Both the settlor and the beneficiary may exercise control over the trust property. In addition, the court may also order the trustee to take appropriate actions.

The trustee is appointed by the settlor, otherwise by the court. The trustee is required to accept the appointment. A legal person can be the trustee only if it is an investment company or investment fund operating according to the Act on Investment Companies and Investment Funds (Act No. 240/2013). The settlor also designates the beneficiary, otherwise the settlor is deemed to be the beneficiary.

Lithuania

Under the earlier civil code of Lithuania in force from 1964, property management was regulated in relation to public property. The new civil code was enacted on 17 May 1994 and came into force on 1 January 2000[104], introducing property trust law for the private sector as well. The regulation was essentially only renamed, and the substance of the legal arrangement remained the same.[105] The property trust law grants an independent in rem right, which is regulated in Book Four (Material Law), Part I (Things), Chapter VI (Right of Trust) of the Lithuanian civil code. This means that the owners remain the same, while the trustee may exercise trustee rights, which is basically equal to the owner's rights over the trust property. The trustee must exercise his rights personally, if not stipulated otherwise in the agreement, and the legal relationship has a maximum duration of 20 years. The trustee is entitled to protect the trust right. similarly to the right of ownership. The trustee must report his activities to the trustor and the beneficiary at least once a year, which is very similar to ownership.

Hungary

The new Hungarian Civil Code regulates the fiduciary asset management contract in Chapter XLII, within the scope of agency-type contracts. The regulation was drawn up on the basis of the model of the trust in English law and that of the Treuhand in German law. The Chief Codification Committee codified fiduciary property management under contract law, emphasising, however, its application of the legal instrument of the transfer of ownership, based on the trust-like model. Under the rules of the new Hungarian Civil Code, the fiduciary

[103] "The ownership of the assets of the Trust Fund shall be vested in its own name on account of the fund trustee, property in the Trust Fund is neither the property manager or property of the founder, or the property of the person to be filled from the trust." Czech civil code, 1448. § paragraph (3).

[104] *Lietuvos Respublikos civilinis kodeksas, LR CK.*

[105] Justas Sakavičius: *Problematics of Property Trust Law in Lithuania*. Mykolo Romerio Universitetas. Vilnius, 2011. http://vddb.laba.lt/fedora/get/LT-eLABa-0001:E.02~2012~D_20120118_103532-96991/DS.005.1.01.ETD. p. 3.

asset management contract is an in personam legal instrument that implicitly carries substantial in rem effects. Furthermore the legal relationship may be established by unilateral declaration or by testament as well. The regulation is of a general scope; details are regulated in two separate pieces of legislation, as Act XV of 2014 on Trustees and the Regulation of Their Activity, and Government Decree No 87/2014 (III. 20.) on certain rules concerning the financial security of fiduciary property management undertakings.

The settlor transfers ownership, rights and claims or other negotiable goods to the trustee, and the settlor issues a declaration as to the manner of the management of the property. In the legal relationship of property management, it is also possible to set out other conditions, such as its duration (maximum 50 years), terms, right of unilateral termination, remuneration of the trustee, appointment of additional trustees, regulation of the delegation of other agents, and the beneficiary's right to transfer. The settlor reserves the right to discharge the trustee, appoint a new trustee, replace the beneficiary, modify given parts of the settlor's declaration, and to determine or modify the duration of property management.

The settlor may monitor the activity of the trustee falling within the scope of property management, but the costs of such monitoring are incurred by the settlor. It is a mandatory rule that the settlor may not instruct the trustee. As a general rule, the settlor designates the beneficiary, and the conditions that give rise to and terminate the rights of the beneficiary. The beneficiary may also be named by reference to a group of beneficiaries. The settlor may choose to pass on all or part of the trust property to himself, his successors or to designated third parties under certain circumstances or after a certain period of time. The declaration of the trustee as exclusive beneficiary is void.

The management of the property includes the exercise of rights arising from ownership, other rights and claims transferred to the trustee, and the fulfilment of obligations arising therefrom. The trustee may dispose of the assets belonging to the trust property under the conditions and within the limits sets out in the contract. If the trustee breaches his above obligations and illicitly transfers assets belonging to the trust property to a third party, the settlor and beneficiary have the right to reclaim these for the benefit of the trust property, if the third party did not purchase the assets in good faith or for consideration. This rule is applicable as necessary to the illicit encumbrance of the trust property.

The trustee has a duty to keep confidential any fact, information and other data he becomes aware of during his appointment as trustee or in relation thereto. Such obligation is without prejudice to the establishment of the trusteeship and remains in effect after the termination of fiduciary property management. The settlor and his successors may grant exemption from the confidentiality obligation. The trustee is liable toward the settlor and beneficiary for the breach of his obligations in accordance with general rules of liability for damages.

The trustee is liable for the fulfilment of the undertaken obligations with the trust property. The trustee assumes unlimited liability with his own property for the satisfaction of claims arising from commitments charged to the trust property, if these cannot be satisfied from the trust property, and the other party was not and could not have been aware that the commitments of the trustee exceed the limits of the trust property.

If the settlor dies or ceases without a successor, and there are no other settlors to the trust property, the court may recall the trustee from his office upon request of the beneficiary, and simultaneously appoint another trustee if the trustee seriously breached the contract.

The trust property constitutes property separate from the trustee's own property and other property managed by him, which the trustee is obliged to register separately. The parties' derogation from this rule is void. Assets registered as property managed separately from the trustee's own property and other property managed by him are deemed to fall within the scope of trust property until proven otherwise. Any assets substituting the managed assets, insurance indemnities, damages or other value, and profits thereon, constitute part of the trust property, whether registered or not. Assets not registered by the trustee as comprising part of the trust property are deemed to be the private property of the trustee until proven otherwise. The spouse, life partner, personal creditors of the trustee, and creditors of other properties managed by the trustee may not lay claim to the assets of the trust property. The trust property does not constitute part of the trustee's inheritance. The beneficiary and the settlor may take action against the spouse, life partner, personal creditors of the trustee, and creditors of other properties managed by the trustee, to secure the separation of the trust property.

In terms of liability, the new Hungarian Civil Code does not allow the creditors of the settlor and trustee to assert claims for the trust property. The creditors of the beneficiary, however, may apply for execution of the property, notwithstanding that the distribution of the managed assets and profits thereon to the beneficiary is not due yet. This rule is modified by Act XV of 2014 to the extent that the creditors of the settlor may terminate the property management contract if the execution procedure launched against the settlor is unsuccessful, or does not produce any results within a foreseeable time. I wish to note that this rule is already drawing heavy criticism in Hungarian legal literature, as it ignores differences in time between the exercise of the right of termination and the insolvency of the settlor.

Some Comparative Aspects

The trust-like legal arrangements examined in the six Eastern European countries are quite different. In Russia, this legal arrangement can be characterised as a mandate or agency contract, and the same can be stated in connection with the regulations in Georgia with . In the Czech Republic, regulation allows separate and independent ownership of property, like the regulation in the province of Québec. The trust property is neither the property of the settlor, nor the trustee; the trust property must be vested in its own name, on account of the fund trustee (must be designated as a "Trust Fund"). In Romania the French fiducie served as the model, therefore the contractual relationship reveals some property features. In Lithuania, the right of trust is an in rem right, which is quite unique because this right can exist in parallel with ownership. In Hungary, the German Treuhand was the main model for legislators, but strong property rights were also drawn up in connection with the fiduciary asset management contract. Two legal acts are required: one is a contract and the other is the transfer of property. But we have to emphasise that the Hungarian model has additional rules in connection with asset partitioning and tracing.

On the basis of the comparison we may conclude that none of these countries adapted the Anglo-Saxon trust. In Russia and Georgia, the structure is basically that of the contract of mandate and agency, while Romania followed French regulation and the Czech Republic adopted the Québec model. Hungarian regulation is also based on contract law, but property law regulations are also applied, such as the right of tracing. The Lithuanian solution is unique because the right of trust is an in rem right.

The main question is whether these legal arrangements are appropriate to fulfil the economic functions existing in the case of the Anglo-Saxon trust? Asset partitioning is well worked out in the Czech, Romanian and the Hungarian laws, a legal instrument similar to tracing is regulated in the Hungarian act, while under the Russian and Georgian rules, the owner has in rem right against third parties. The office of the trustee is regulated in Czech, Romanian and Hungarian legislation, while in Russia and Georgia, the contractual legal relationship, and in Lithuania, the independent in rem right is not absolutely in compliance with this requirement.

I also would like to draw attention to the peculiarity of these regulations from the view of the person of the trustee. In Georgia and Lithuania, no relevant. special restrictions apply to this position, while in Russia and in Romania, the position is mainly restricted to professionals. In the Czech Republic and in Hungary, regulation moves in two directions. In the Czech Republic a legal entity can be a trustee only if it is an investment company or a fund. In Hungary the trustee can be both a natural and legal person, but if the activity is conducted on a profit orientated basis, it can only be the latter. It is also very important to note that in Romania and in Hungary, the registration of the trust is mandatory.

The duration of the trust is maximum 5 years in Russia, 20 years in Lithuania, 33 years in Romania, 50 years in Hungary, 100 years in the Czech Republic, and there is no time limitation in Georgia. Generally there is a time limitation to a trust relationship (with the exception of Georgia). We may establish that these time limitations are quite short in Russia, Lithuania, Romania, and even in Hungary, compared with the international trends.

Finally, we should add that the trust is generally not allowed to be established for a purpose, except in the Czech Republic. If we observe the international trends, we can state that it is becoming quite common to establish trusts for private purposes.

Conclusion

On the basis of these findings, we have come to the conclusion that the regulations in the examined six countries only partly accommodate the Anglo-Saxon trust. The deficiencies in these legal regulations include restrictions applicable to the position of the trustee, the obligatory registration of the trust, the absence of asset partitioning, the too short duration of the legal relationship etc., which obstruct the path of using these legal vehicles to entirely fulfil the functions of the trust in the economy.

In my opinion, the underlying reason for this is the cautious approach of legislators. If we introduce new legislation without direct roots in the given legal system and in the economy, the possibility of abuses has to be considered. The historical development of the trust is in tight correlation with demand for the anonymity of the real owner, which is usually in violation of fiscal interests. When considering this aspect from a general point of view, it is understandable that legislators do not want to release this new legal arrangement in the economy like an unruly bronco. I suppose that the trust-like legal devices in these civil legal environments – where they have no antecedents in the economy – will gain ground step by step in the near future, which is in line with the demands of our globalized economy.

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SIGNIFICANCE OF CRIMINOLOGICAL RESEARCH IN TOURISM DEVELOPMENT

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Abstract

Despite the world economic crisis, Georgia is rapidly developing tourism industry. In this regard, while planning new tourist projects, forecasting crime and its seasonal variations is as important as weather forecasting. In relatively short period of time, in particular small tourist area lots of visitors are brought together what automatically means the increase of the danger of crime and thus, requires adequate and coordinated response from the state and society. The Analytical Department at the Ministry of Internal Affairs of Georgia, in 2011, delivered a statistical report “foreign visitors and crime in Georgia" which showed that along with tourism development, grew crimes committed against and by tourists and there was a significant seasonal factor. Carrying out criminological researches for good planning tourism will enable society and the state structures to effectively perform their basic function - crime prevention. For this purpose, we recommend under the Ministry of Internal Affairs, to create Criminological Research Center.

Keywords: Tourism development, criminological research, seasonal crime, crime prevention

Introduction

Despite the world economic crisis Georgia is rapidly developing tourism industry. The prognosis from the Georgian government and from experts about the number of international visitors, employees and income earned in the tourism business seems very optimistic.

According to the Ministry of Internal Affairs of Georgia, in 2015, number of international tourists reached 5 400 000 that was 10 fold increase in last decade (www.police.ge). In 2013 tourism industry brought more than 1.7 billion dollars in Georgian economy which was 6.5 % of Georgian GDP (http://gnta.ge/?lang=ge).

In general, necessary condition for the due development of tourism is to ensure safety. In this regard, while planning new tourist projects, forecasting crime and its seasonal variations is as important as weather forecasting. In relatively short period of time, in particular tourist area lots of visitors are brought together, that automatically means increase in danger of crime and thus requires adequate and coordinated response from the state and society.

Georgian government's tourism development policy of a visa-free and/or simplified visa regime for certain number of countries promoted and paved the way for a "criminal adventure-seeking tourists" and organized criminal groups in some way related to drug dealing, human trafficking, prostitution, child sex-tourism and other crimes.

Another issue for tourism safety that requires proper study is mountaineering related tourist routes. In 2013-2014, dozens of accidents were reported, namely: death, health damages, loss or messed up of the road... joint activities of Emergency Management Department at the Ministry of Internal Affairs of Georgia and the local agencies' in a number of rescue operations saved dozens of tourists from Russia, Poland, the Czech Republic, Hungary, Israel, etc. (www.police.ge).

The Analytical Department at the Ministry of Internal Affairs of Georgia, in 2011, delivered a statistical report “foreign visitors and crime in Georgia" which showed that along with tourism development, grew crimes committed against and by tourists and there was a significant seasonal factor. In 2009, there were 279 crimes committed against them, while 319 by them; in 2010: 358-333; in 2011: 529-353 - where, the majority of cases recorded in Tbilisi and Adjara region (www.police.ge). This statistics is confirmed with research: "Crime and Security in Georgia" conducted by the Ministry of justice with the EU support (http://www.justice.gov.ge/).

As for the occupied Abkhazia region, their so-called Ministry of Internal Affairs states that since 2008 the number of crime is increasing and it coincides with tourist season. If in April of 2012 were registered 75 crimes, in May the number reached 89 and its maximum 161 was in August; this is tourist season for the city of Sukhumi and Gagra (http://mvdra.org/).

Seasonal crime is long studied in criminology. Regarding to the past centuries, the problem was observed from scientists of the world's different countries, among them: André-Michel Guerry, France; Cesare Lombroso, Italy; William Douglas Morrison, England; Alexander Von Oettingen, Germany; Hugo Herz, Austria – all of them have conducted a large number of important researches.

For the test of the theory of seasonality of crime, the American scientist Gerhard Falk conducted a large-scale research, in which he examined 10 year work of the police in 8 largest cities of the USA. After this he made the following conclusions:

1. Whereas crimes against the person consistently reach their maximum frequency in the summer, such crimes do not always increase or decrease with the temperature, as evidenced by the fact thatcriminal homicide is higher in December than in June and August.

2. Crimes against a person are at a minimum in the winter months.

3. Crimes against property do not always reach a maximum in winter and a minimum in summer. This may be observed primarily in the case of larceny.

4. There is a similarity between the time of the greatest frequency of crimes against a person and crimes against property. The time of day when the largest number of offenses takes place is about two hours before midnight to midnight.

5. Weekends have a greater crime frequency than mid-week, forall offenses. The day of greatest frequency is Saturday (Gerhard J. Falk, 1952).

The next step in studying the issue was made in 1984 when Illinois Criminal Justice Information Authority published the research named: "Is the crime seasonal?" conducted by Carolyn Rebecca Block (http://bjs.ojp.usdoj.gov/content/pub/pdf/ics.pdf). Here they try to see the problem in depth and from the different angle; they put question: Does Crime Occur Seasonally, or Is It Reported Seasonally? By doing so they pointed on the problem of latency and argued that the increase in reported crime against human in summer can be caused not by seasonal fluctuations, but by visibility of public, because a lot of people are moving on the street, the windows are open and it is highly possible to witness the crime, but in winter streets are comparing empty, buildings are closed and so latency increases. To prove this, the author made a comparison in the USA between the rate of the seasonal attack and the rate of attack victim in the same period and she revealed that the rate of the attacks were facing much seasonal fluctuations than the rate of the attack victim which proved the theory about the seasonal changes of latency. The same was in case of robbery.

In the same work was made conclusion that urban settlements are more affected to the seasonal changes than village area and on example of Chicago was made the conclusion that the weapon used determines the changes in seasonal crime, the crimes committed by firearms less suffer seasonal fluctuations, because caused damage, danger suffered by the victim and society is high; accordingly, the rate of reporting is close to reality, especially in summer. Finally, there is conclusion that different types of crime are characterized by their seasonal peculiarities which can be interesting for the forecasting, but this changes are such minor and unimportant, that there is no need to make any special preventive measures by law enforcement agencies.

And the last research I want to mention is the research carried out by Carnegie Mellon University in 2003: “Estimation of Crime Seasonality” (Jacqeline Cohen, Wilpengorr, Christopher Durso, 2003) that criticizes researches conducted earlier and brings new perspectives. The reason of criticism was the fact that earlier researches where conducted on wide-scale, as are town, region or country; here they argued that the character of the seasonal crime is revealed in small places, such as district, residential quarter, and neighborhood.

Researchers studied crime statistics of Pittsburgh in 1990-1998. They divided the town into 103 action squares and in each of them separately examined the rate of the crime, the rate of the buildings, and all the important rates which affect criminological condition.

The research verified that all individual types of crime had its annual, stable seasonal rate in a particular area. Some crimes, over the year showed 15-50% of month-by-month fluctuation. It is very important for law enforcements to know it in order to make fast and appropriate preventive reaction.

Conclusion

Thus, we can conclude that seasonality of crime is a significant issue that is observed in small geographical areas, like tourist zones, and is very important to be considered for keeping safety conditions for the further economic development.

Seasonal peculiarities of crime are subject of specific short-term forecast and well-studied by methods of criminological research, were expert assessment and modeling is overwhelmed by the method of extrapolation, where accuracy of forecast is depended to the stability of criminological situation in the country.

Carrying out criminological researches for good planning of tourism will enable society and the state structures to effectively perform their basic function - crime prevention - by criminological forecasting and planning, and specifying the level of victimization. For this purpose, we believe that "Criminological Research Center" should necessarily be created under the Ministry of Internal Affairs. All the more, the system is scheduled for systemic reforms and restructuring process, so that research, analysis and conclusions should be based on it.

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DOES INDUSTRIAL CLASSIFICATION OF FIRMS REFLECT CORPORATE PERFORMANCE? EVIDENCE FROM THE EUROPEAN UNION

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Abstract

The aim of the study is to compare the industrial classification of firms in Europe (NACE) with the classification results based on corporate performance ratios. The methodology employed for this purpose includes mainly the *k*-means clustering technique as well as a similarity measure for evaluating the resemblance of grouping results. Using the total of almost 90 thousand aggregated observations from a sample of firms from 13 industries, 9 countries and 3 size groups, covering the period 2000-2010, findings provide evidence about the generally poor resemblance between the industrial classification and the grouping results based on financial ratios. There are also some country-wise differences found in the similarity level between the compared classifications.

Keywords: Corporate performance, industrial classification, European Union

Introduction

Industrial classification of firms in an important aspect of categorising corporate activity, as well as a key instrument for cross-sectional comparisons of corporate performance in the area of finance. The primary reason for organising firms into industries is to classify entities into groups of similar objects in terms of products or services. This way of classifying firms, however, might not always be effective and precise due to the fact that e.g. some firms may produce products from more than one category. As a result, the assumedly homogeneous industrial groups may be in fact quite varied internally, whereas firms from different industries may bear more resemblance. Despite the inevitable imperfections of the industrial classification systems, this kind of division seems necessary and remains one of the most ubiquitous systematics of firms. The main question addressed in this study is to find whether and to what extent the industrial classification of firms reflects their financial performance.

Corporate financial health is a complex issue and may be affected by an almost countless number of factors of both internal and external character (Koralun-Bereźnicka, 2013). Industrial classification is one of the most commonly mentioned external determinants of corporate performance. Consequently, one may assume that financial parameters describing this performance should vary along with the industrial sections of firms. In other words, corporate financial performance should, at least to some extent, correspond to the industrial classification of firms. Therefore, the aim of this study is to compare the industrial classification of firms in Europe (NACE) with the classification based on financial performance ratios.

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The research is based on a sample of all-sized firms from 13 industries, 9 EU countries and covers the period 2000-2010. Financial performance of firms is described with the use of 28 ratios grouped into several economic categories: profitability, working capital, financial income and charges, asset structure and capital structure. The similarity of groupings is evaluated for the whole population, as well as for individual countries covered by the analysis and for three size groups of firms separately.

This study contributes to the corporate finance literature in several ways. Firstly, although the topic of industry effect has already been explored on multiple occasions, this analysis provides deeper, cross-country and cross-size insights into the relationship between industrial classification and performance. Secondly, while most of research in the field tends to focus on large public companies and the easily accessible market returns data, this study extends the empirical work on the industry effect by taking into consideration private companies of various sizes, including SMEs which usually constitute the core of most economies. Thirdly, the range of financial ratios applied for describing corporate performance is much broader than in previous studies from the field. Finally, the variables characterise fundamental condition of companies and not their market value.

Literature review

The literature review provides a number of studies where industrial classifications were used to determine the extent to which industrial specificity is responsible for cross-sectional diversity of corporate financial characteristics. The study by King (1966) is considered as the first major attempt to identify industry effects in corporate performance reflected in market returns. Using principal component analysis and clustering techniques on a sample of companies from different industries, he reported that industry code explains about 10 percent of the variance in rate of returns. Industry effects in stock returns were also found by many other researchers, including Meyers (1973), Lessard (1974), Roll (1992) or Heston and Rouwenhorst (1994, 1995). The influence of industry characteristics was also searched for in other areas of corporate finance, especially in capital structure. The studies by Gupta and Huefner (1972), Remmers, Stonehill, Wright and Beekhuessen (1974), Scott and Martin (1975), Bowen, Daley and Huber (1982), Meric and Meric (1983), Martin and Henderson (1984), Maksimovic, Stomper and Zechner (1999), Hall, Hutchinson and Michaelas (2000) and more recent by Omran and Pointon (2004), Phillips and MacKay (2005), Abor (2007), Das and Roy (2007) or Talberg, Winge, Frydenberg and Westgaard (2008) are just some examples of the empirical evidence documenting the impact of industry features on financial leverage.

Contrary to the profusion of empirical studies in the area of corporate finance which use the industrial classifications to find industry effects, the literature related to the very idea of industry classification is rather sparse (Kale, Walking 1996). As to the literature referring to the impact of industry classification on financial research, an important expansion upon King's (1966) and Meyers' (1973) research into the link between industrial codes and variance was performed by Fertuck (1975) who discussed SIC (Standard Industrial Classification) codes and the industry effects of such codes. He examined whether companies can be properly classified according to their expected returns and found that some SIC groupings are more homogeneous in nature than others. The author also addressed the question about the efficiency of using industry indices to forecast returns.

The ability of SIC codes to form homogeneous groups was also examined by Clarke (1989), who measured how well the SIC succeeds at combining firms into homogeneous economic markets. The author assumed that firms in more similar economic markets should display more similar sales changes, profit rates, or stock price changes than firms in less similar economic markets, but found that the industry code is not successful at identifying firms with such similar characteristic variables.

In another study (Guenther, Rosman, 1994) the differences between SIC codes assigned to companies by COMPUSTAT and CRSP were examined. The authors reported significant differences across the two classifications in the variance of some financial ratios. Finally, the aforementioned study by Kale and Walking (1996) should be referred to as an important attempt to compare the inference from studies based on different classifications. One of the objectives of the study was to examine the extent of agreement between the two commonly used classification systems, namely the SIC codes on Compustat and the CRSP (Center for Research in Security Prices). Similarly to Guenther and Rosman (1994), the authors reported significant differences between the two sources of data, which may affect the inference from empirical research depending on which database is used.

Database and methodology

The source of data is the BACH-ESD database (Bank for the Accounts of Companies Harmonised - European Sectoral references Database). The study includes companies of three size groups: small (with the net turnover of less than EUR 10 million), medium (with a turnover of 10 million euros to 50 million euros) and large (with a turnover over EUR 50 million) in thirteen industries according to the NACE classification (Nomenclature Statistique des Activités économiques dans la Communauté Européenne) and in nine European Union countries available in the BACH-ESD database: Austria, Belgium, Germany, Spain, France, Italy, the Netherlands, Poland and Portugal. Table 1. shows the industries covered by the study and the three-letter symbols assigned to each sector used in the remainder of the paper.

Table 1. Industrial sections covered by the analysis

NACE	Section	Symbol
A	Agriculture, forestry and fishing	AGR
B	Mining and quarrying	MIN
C	Manufacturing	MNF
D	Electricity, gas, stream and air conditioning supply	ELE
E	Water supply; sewerage, waste management and remediation activities	WAT
F	Construction	CST
G	Wholesale and retail trade; repair of motor vehicles and motorcycles	TRD
H	Transport and storage	TRS
I	Accommodation and food service activities	HOT
J	Information and communication	INF
L	Real estate activities	RLE
M	Professional, scientific and technical activities	PRF
N	Administrative and support service activities	ADM

Source: Statistical Classification of Economic Activities in the European Community, Rev. 2 (2008)

The harmonised and aggregated data from the annual reports of non-financial firms were used for calculating financial performance ratios for groups of companies in each country, industry, size group and each year of the eleven-year study period covering the years 2000-2010. The diagnostic variables can be grouped into several categories illustrating different economic areas, i.e. profitability, working capital, financial income and charges, asset structure and liabilities structure. Taking into account the data availability, the analysis involves 28 financial ratios, the details of which are shown in Table 2.

Summarising, the subject of the study is formed by the groups of companies of different sizes, from different industries in different countries and years. The corporate performance, measured with the use of financial ratios is the object of the analysis. Thus the study includes 28 financial ratios for the three size groups of enterprises in thirteen sectors and in nine countries for eleven years, which taking into account the missing data gives 88,536 observations (data items).

Table 2. Financial ratios used in the analysis

Ratio category	Ratio structure	Ratio number in BACH-ESD
Profitability	Added value / Net turnover	R01
	Staff costs / Net turnover	R02
	Gross operating profit / Net turnover (ROS)	R03
	Gross Operating profit / Total net debt	R04
	Net operating profit / Net turnover	R05
	Net turnover / Total Assets	R16
	Net operating profit / Total Assets (ROI)	R10
	Profit or loss of the year before taxes / Capital and reserves (ROEBT)	R11
	Profit or loss of the year / Capital and reserves (ROE)	R12
Working capital	Inventories / Net turnover	R17
	Trade accounts receivable / Net turnover	R18
	Trade accounts payable / Net turnover	R19
	Operating working capital / Net turnover	R20
Financial situation	Interest and similar charges / Net turnover	R07
	Interest and similar charges / Gross operating profit	R06
	Financial income net of charges / Net turnover	R09
	Financial income net of charges / Gross operating profit	R08
Assets structure	Financial fixed assets / Total assets	R13
	Tangible fixed assets / Total assets	R14
	Current assets / Total assets	R15
	Current investment and cash in hand or at bank / Total assets	R21
Liabilities structure	Capital and reserves / Total assets	R22
	Provisions / Total assets	R23
	Bank loans / Total assets	R24
	Long and medium-term bank loans / Total assets	R25
	Short-term bank loans / Total assets	R26
	Long and medium-term debt / Total assets	R27
	Short-term debt / Total assets	R28

Source: BACH-ESD database.

The choice of the research methodology to a large extent is conditioned by the nature of the data, which is a relatively large collection of objects (industries, size groups, countries and years), characterised by a few diagnostic variables. The data is four-dimensional, as there is a time series for each object in the three cross-sections (countries, industries, size groups), Therefore the multivariate analysis is a natural tool for simplifying the data structure and identifying the most important regularities within the population. The review of the existing literature (e.g. Cinca, Molinero & Larraz, 2005; Gupta & Huefner, 1972; Sell, 2005; Helg, Manasse, Monacelli & Rovelli, 1995) suggests that multivariate classification often provides an effective solution to this kind of research problems.

The initial phase of the empirical research is the analysis of the descriptive statistics of the financial ratios across industries, which is aimed at the preliminary recognition of the corporate performance diversity in this cross-sections as well as detecting the basic regularities within the population.

In the event of finding differences in ratio means across industries, it should be established whether these differences are statistically significant. Then the analysis of variance (ANOVA) is applicable is as a method of studying observations dependent on one or more factors acting simultaneously. These factors are also known as grouping or manipulative variables. The analysis of variance (Fisher, 1954) allows to assess the significance of differences between many means and explains the probability with which the considered factors may be the reason for the discrepancies between the observed group means. If the means differ significantly from each other, it can be intuitively concluded that the analysed factor affects the dependent variable.

The heterogeneity of the objects from the examined population, as well as some similarities found between them imply the need for organising these objects by classifying them according to certain criteria. The idea of classification can be defined as a process of linking objects into categories, called clusters, based on their properties. Therefore, the grouping procedure is the next step of the analysis. One of the many clustering methods, which allows to extract internally homogeneous groups of objects is the *k*-means grouping, which aims at partitioning observations by creating *k* different, possibly distinct clusters, formed by the relocation of objects between these clusters in a way which minimises the within-group variance while maximising the between-group variance (Wishart, 2001).

The following sets of binominal objects were subject to the *k*-means grouping procedure:

- industries in countries – in individual size groups separately and in all size groups as a total,
- size groups in industries – in individual countries separately and in all countries as a total.

The missing data items were replaced with means. The advantage of the *k*-means algorithm is the ease of application even with large data sets. In addition, the target number of clusters must be determined *a priori*, which can also be helpful when that number can be based on certain criteria.

In order to compare the clustering results of industries in countries and size groups in industries with the NACE classification of industries, i.e. to evaluate the differentiation degree of the grouping results, the adjusted Rand's similarity measure was applied. The calculation method of the measure can be found e.g. in Rand (1971). The higher the value of the measure, the more similar the grouping results. Negative values indicate dissimilarity.

Results

The ratios used in the analysis are continuous variables, which is why they may analysed with the use of descriptive statistics, including mean value, minimum, maximum and standard deviation. The descriptive statistics for the total sample are presented in Table 3.

Table 3. Descriptive statistics for all years, countries, industries and size groups

Ratio	N	Mean value	Median	Minimum value	Maximum value	Standard deviation
R01	3317	0,357	0,368	0,000	0,848	0,129
R02	3317	0,220	0,213	0,000	0,590	0,109
R03	3317	0,137	0,111	-0,304	0,668	0,093
R04	2993	0,228	0,184	-11,65	7,967	0,340
R05	3317	0,065	0,050	-0,442	1,282	0,068
R16	3314	0,890	0,797	0,000	3,891	0,571
R10	3314	0,046	0,042	-0,249	0,475	0,036
R11	3307	0,129	0,117	-7,495	2,603	0,214
R12	3307	0,097	0,088	-6,800	2,369	0,183
R17	3314	0,131	0,067	0,000	4,823	0,278
R18	3005	0,234	0,198	0,000	1,890	0,169
R19	2381	0,186	0,169	0,000	1,499	0,103
R20	2381	0,204	0,143	-1,189	4,851	0,333
R07	3238	0,051	0,022	0,000	5,122	0,176
R06	3231	0,385	0,190	-72,25	97,55	2,837
R09	3238	0,011	-0,005	-0,857	2,169	0,143
R08	3231	0,249	-0,046	-16,79	100,9	3,671
R13	3317	0,151	0,103	0,000	0,962	0,141
R14	3317	0,345	0,317	0,000	0,881	0,201
R15	3317	0,452	0,447	0,000	0,914	0,189
R21	3006	0,082	0,074	0,000	0,487	0,047
R22	3317	0,349	0,331	-0,079	0,921	0,135
R23	3317	0,062	0,034	0,000	0,697	0,073
R24	2891	0,183	0,168	0,000	0,762	0,106
R25	2928	0,115	0,092	0,000	0,590	0,089
R26	2970	0,069	0,057	0,000	0,740	0,055
R27	3317	0,212	0,187	0,000	0,699	0,119
R28	3317	0,352	0,350	0,000	0,865	0,138

Source: author's calculations based on BACH-ESD database.

It is also relevant and informative to look at the means of the ratios by industries, as shown in Table 4.

Table 4. Mean values of ratios by industry

Ratio	Industry												
	AGR	MIN	MNF	ELE	WAT	CST	TRD	TRS	HOT	INF	RLE	PRF	ADM
R01	0,250	0,391	0,280	0,338	0,396	0,290	0,138	0,383	0,447	0,429	0,451	0,400	0,476
R02	0,152	0,206	0,191	0,104	0,227	0,212	0,091	0,266	0,330	0,280	0,127	0,304	0,346
R03	0,098	0,186	0,089	0,233	0,170	0,077	0,047	0,117	0,117	0,149	0,324	0,095	0,130
R04	0,161	0,447	0,230	0,248	0,265	0,133	0,170	0,198	0,196	0,313	0,132	0,231	0,235
R05	0,039	0,098	0,044	0,107	0,059	0,047	0,030	0,040	0,051	0,060	0,181	0,073	0,047
R16	0,884	0,698	1,147	0,446	0,551	0,978	1,984	0,850	0,910	0,879	0,247	0,710	1,025
R10	0,035	0,074	0,052	0,043	0,034	0,044	0,059	0,032	0,042	0,052	0,033	0,042	0,046
R11	0,066	0,198	0,134	0,114	0,096	0,165	0,173	0,065	0,117	0,127	0,066	0,165	0,174
R12	0,062	0,148	0,098	0,083	0,077	0,125	0,127	0,049	0,087	0,081	0,058	0,125	0,126
R17	0,225	0,169	0,146	0,041	0,046	0,348	0,116	0,023	0,034	0,048	0,517	0,074	0,024
R18	0,212	0,249	0,196	0,225	0,343	0,285	0,147	0,192	0,102	0,251	0,212	0,383	0,253
R19	0,196	0,188	0,163	0,204	0,206	0,264	0,150	0,155	0,126	0,186	0,214	0,245	0,130
R20	0,250	0,305	0,192	0,065	0,230	0,374	0,129	0,074	0,019	0,132	0,591	0,233	0,171
R07	0,022	0,039	0,018	0,077	0,030	0,023	0,012	0,030	0,031	0,026	0,147	0,206	0,025
R06	0,233	0,622	0,201	0,627	0,171	0,300	0,241	0,253	0,274	-0,153	0,410	1,679	0,192
R09	-0,009	0,012	0,002	0,048	-0,001	-0,004	-0,002	-0,013	-0,010	-0,001	-0,060	0,171	-0,004
R08	-0,150	0,833	0,023	0,561	-0,003	-0,031	-0,039	-0,105	-0,076	0,156	-0,159	2,184	-0,020
R13	0,098	0,174	0,154	0,164	0,111	0,098	0,114	0,099	0,163	0,192	0,151	0,308	0,141
R14	0,401	0,370	0,258	0,524	0,502	0,174	0,174	0,508	0,470	0,202	0,536	0,111	0,339
R15	0,478	0,413	0,553	0,259	0,330	0,696	0,673	0,345	0,302	0,490	0,269	0,538	0,458
R21	0,067	0,084	0,077	0,059	0,070	0,093	0,088	0,078	0,070	0,105	0,059	0,121	0,085
R22	0,412	0,418	0,375	0,393	0,354	0,259	0,316	0,333	0,327	0,347	0,389	0,401	0,249
R23	0,025	0,113	0,064	0,078	0,091	0,054	0,045	0,071	0,049	0,071	0,021	0,069	0,041
R24	0,200	0,136	0,165	0,170	0,199	0,189	0,165	0,212	0,233	0,106	0,301	0,103	0,216
R25	0,111	0,076	0,080	0,132	0,139	0,100	0,060	0,159	0,180	0,058	0,239	0,059	0,120
R26	0,091	0,062	0,088	0,039	0,061	0,092	0,108	0,056	0,057	0,051	0,060	0,043	0,096
R27	0,197	0,156	0,161	0,276	0,232	0,165	0,127	0,260	0,308	0,167	0,343	0,159	0,235
R28	0,354	0,301	0,388	0,228	0,271	0,496	0,501	0,306	0,297	0,381	0,217	0,347	0,434

The table indicates that the diagnostic variables are far from homogeneous across industries. There are several ratios with clearly better discriminating properties, i.e. the most varied in this cross-section, namely the interests to gross operating profit (R6), financial income to gross operating profit (R8) and the net turnover to total assets (R16).

The one-way ANOVA procedure was carried out in two sections, for which the qualitative predictors were: industry and year. The discrimination power of the ratios can be analysed on the basis of the *F* statistic and probability *p* calculated for the entire data set and presented in Table 5.

Table 5. Univariate significance tests

Ratio	Industry		Year	
	F	p	F	p
R01	F(2,404)= 297,56*	0,000	F(0,007)=0,425	0,935
R02	F(1,798)= 327,26*	0,000	F(0,012)=1,041	0,406
R03	F(1,263)= 304,06*	0,000	F(0,005)=0,619	0,799
R04	F(1,549)=14,097*	0,000	F(0,393)=3,422*	0,000
R05	F(0,371)=111,26*	0,000	F(0,015)=3,243*	0,000
R16	F(45,06)=276,54*	0,000	F(0,317)=0,972	0,465
R10	F(0,035)=29,089*	0,000	F(0,016)=12,24*	0,000
R11	F(0,496)=11,202*	0,000	F(0,139)=3,046*	0,001
R12	F(0,247)=7,521*	0,000	F(0,171)=5,168*	0,000
R17	F(5,021)=84,662*	0,000	F(0,056)=0,727	0,700
R18	F(1,312)=55,715*	0,000	F(0,016)=0,549	0,856
R19	F(0,320)=35,232*	0,000	F(0,004)=0,380	0,956
R20	F(3,861)=41,956*	0,000	F(0,108)=0,973	0,465
R07	F(0,821)=29,398*	0,000	F(0,019)=0,612	0,805
R06	F(48,289)=6,114*	0,000	F(0,008)=0,411	0,942
R09	F(0,703)=39,517*	0,000	F(7,327)=0,910	0,523
R08	F(105,74)=8,052*	0,000	F(10,73)=0,796	0,633
R13	F(0,824)=48,178*	0,000	F(0,016)=0,818	0,611
R14	F(6,035)=325,01*	0,000	F(0,021)=0,517	0,879
R15	F(5,436)=335,02*	0,000	F(0,067)=1,871*	0,045
R21	F(0,072)=37,933*	0,000	F(0,008)=3,707*	0,000
R22	F(0,743)=47,418*	0,000	F(0,179)=10,06*	0,000
R23	F(0,154)=31,802*	0,000	F(0,008)=1,486	0,138
R24	F(0,613)=69,800*	0,000	F(0,031)=2,796*	0,002
R25	F(0,631)=116,45*	0,000	F(0,013)=1,620	0,095
R26	F(0,117)=44,998*	0,000	F(0,016)=5,202*	0,000
R27	F(1,100)=106,83*	0,000	F(0,018)=1,270	0,242
R28	F(2,139)=190,23*	0,000	F(0,145)=7,812*	0,000

Note: The table presents the results of the one-way ANOVA procedure performed for all the ratios in the two cross-sections, i.e. across industries and across years. Values significant at p=0,05 are marked with *.
Source: author's calculations based on the BACH-ESD database.

The calculations show that all of the considered ratios demonstrate good discriminating abilities across industries. However, the opposite is the case for the majority of ratios when the other factor – year – is taken into account. Even in the few cases where the ratio means do differ significantly in time, their discriminatory power is much poorer in this cross-section, as indicated by the values of the F statistic. The results of the analysis of variance across time are important from the methodological point of view of the further analyses, since significant variation in time would mean that it is purposeful to perform clustering procedures separately for each year. However, the lack of significant differences indicates that for most ratios the time means of variables can be considered as typical ratio levels in the analytical period.

The grouping procedure was carried out in several versions. In all cases the number of clusters was established at 13 so that it corresponds to the number of industries analysed and therefore enables more reliable comparison of groupings. First, the *k*-means clustering was applied with the use of all financial ratios for grouping binominal objects: industries in countries (all size groups). Than the same was repeated for individual countries, where the binominal objects in the form of size groups in industries were clustered, and for individual size groups, where the grouping was again performed on industries in countries. The above steps were then repeated for each category of financial ratios in order to find out which group of diagnostic variables best reflects the industrial classification. Table 6 shows the details of each version of the clustering procedure.

Table 6. Items subject to k-means clustering analysis.

<table>
<tr><th rowspan="2">Population</th><th colspan="6">Ratio category</th></tr>
<tr><th>All ratios</th><th>Profitability</th><th>Working capital</th><th>Financial situation</th><th>Asset structure</th><th>Capital structure</th></tr>
<tr><td>Total</td><td colspan="6">Industries in countries (IND_CT)</td></tr>
<tr><td>AT</td><td colspan="6" rowspan="9">Size groups in industries (IND_S)</td></tr>
<tr><td>BE</td></tr>
<tr><td>DE</td></tr>
<tr><td>ES</td></tr>
<tr><td>FR</td></tr>
<tr><td>IT</td></tr>
<tr><td>NL</td></tr>
<tr><td>PL</td></tr>
<tr><td>PT</td></tr>
<tr><td>S</td><td colspan="6" rowspan="3">Industries in countries (IND_CT)</td></tr>
<tr><td>M</td></tr>
<tr><td>L</td></tr>
</table>

Note: IND – industry, CT – country, S – size group

It is clear from the number of rows and columns in Table 6 that the grouping procedure was performed 78 times. Therefore, due to the abundance of clustering results, the details of the grouping results were presented only for the total population and for all financial ratios. They are shown in Table 7.

Table 7. Clustering results of industries in countries
for the total population and all ratios.
Source: author's calculations based on the BACH-ESD database.

Cluster number												
1	2	3	4	5	6	7	8	9	10	11	12	13
At_agr	At_inf	Be_min	Be_agr	Fr_min	Es_prf	At_ele	At_rle	De_min	Be_wat	At_mnf	Be_prf	At_trd
At_min	At_adm	Be_mnf	Be_cst	Pl_agr	Fr_prf	Es_ele	Be_rle	Fr_wat	Es_cst	At_cst	Es_min	Be_trd
At_wat	De_ele	Be_ele	De_cst	Pl_min	Pt_prf	Es_wat	De_wat	It_min	It_wat	At_prf	Es_rle	De_trd
At_trs	De_trs	Be_inf	Es_mnf	Pl_ele		Fr_ele	De_rle	Nl_mnf	It_cst	De_mnf	Pt_rle	De_hot
At_hot	De_prf	Be_adm	Fr_agr	Pl_wat		It_ele	Es_trs	Nl_prf	It_rle	Es_trd		Fr_trd
Be_trs	Es_adm	De_inf	It_agr	Pl_inf		It_trs	Fr_rle	Pt_inf	Pt_agr	Fr_mnf		Pl_trd
Be_hot	Fr_trs	Es_inf	It_mnf	Pl_prf		Nl_ele	Nl_wat		Pt_cst	Fr_cst		
De_adm	Fr_hot	It_inf	It_prf			Pl_rle	Pt_wat			It_trd		
Es_agr	Fr_inf	Nl_inf	It_adm			Pt_min	Pt_trs			Nl_min		
Es_hot	Fr_adm		Pl_cst			Pt_ele	Pt_hot			Nl_cst		
It_hot	Nl_adm		Pt_mnf							Nl_trd		
Nl_agr										Pl_mnf		
Nl_trs										Pt_trd		
Nl_hot												
Pl_trs												
Pl_hot												
Pl_adm												
Pt_adm												

If the grouping results corresponded ideally to the industrial classification, than each cluster would be made up of nine items representing the same industry but different countries. Obviously, such clustering results are highly unlikely. In fact, there are only two clusters (number 6 and 13) where the items belong to just one industrial section. Other clusters, however, are mixtures of both different countries and industries and in a number of cases it is not obvious which feature prevails. Therefore, in order to evaluate the similarity between the clustering results and the NACE classification, it is convenient to apply a more formal measure. The adjusted Rand's measure was calculated for all the 78 clustering results. The values of the similarity measure for the total population, as well as for each country and size group are shown in Figure 1.

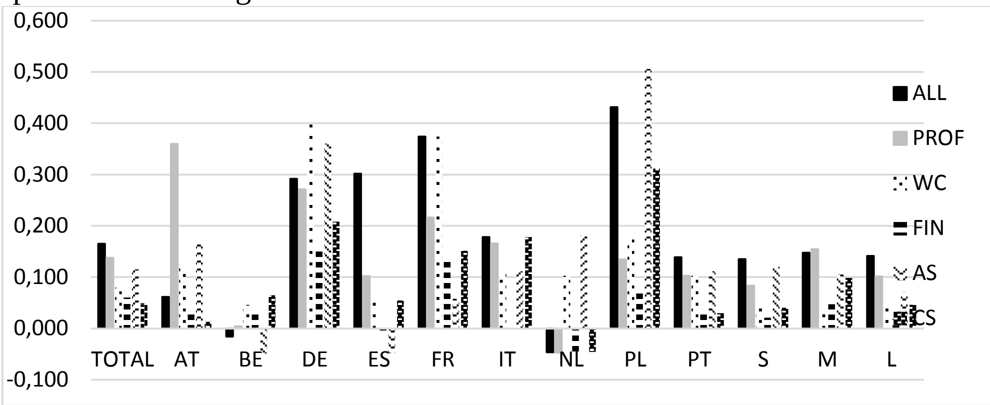

Figure 1. Similarity evaluation between individual grouping results and the NACE - adjusted Rand's measure values.

The higher the values of the adjusted Rand's measure, the more similar the compared groupings, i.e. the higher the correspondence between the NACE classification and the classification of industries in countries or industries in size groups based on corporate performance ratios. The values below 0,5 indicate low similarity, which is the case for the vast majority of the above comparisons. The negative values indicate that the compared clustering results are dissimilar, as in the case of e.g. assets structure ratios for Belgium and most of the ratio categories for the Netherlands. When the Rand's measure is around 0,5, as in the only case of Poland for the assets structure ratios, the similarity can be considered as moderate.

It should not be very surprising that the groupings based on all ratios correspond better to the NACE industrial classifications than the groupings based on narrower categories. The broader the range of financial features, the more detailed the object characteristics. However, this is not always the rule, as there are exceptions in terms of both countries (Austria, Belgium, Germany, the Netherlands and Poland) and size groups (medium enterprises), where the clustering results based on some individual categories of financial ratios bear more resemblance to the industrial code. On average, the assets structure and profitability are those categories of financial ratios which best reflect the industrial diversity, contrary to the financial situation ratios.

Conclusion

One of the most general conclusions resulting from the analytical comparison of the grouping results between the NACE industrial classification and the cluster analysis based on financial ratios is the poor resemblance between these two categorisation systems. It is also noticeable that, in general, a broader range of ratios involved in the classification procedure results in higher similarity level between the industrial code and clustering results. There are also clear differences in terms of the similarity of grouping results across countries. Germany and Poland are the two countries, where the clustering results based on corporate performance ratios are the most similar (though still weakly) to the NACE classification. The opposite is true for Belgium and the Netherlands, where the groupings are most dissimilar when compared with the industrial code. No significant differences in terms of similarity level with NACE were observed across size groups of firms.

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MECHANISMS OF LEGAL RESPONSE AND SOCIAL PROTECTION ON THE FACTS OF DOMESTIC VIOLENCE ACCORDING TO CURRENT LEGISLATION OF GEORGIA

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Abstract

Domestic violence in itself is one of the most difficult, specific and wide-spread social-legal problems containing the number of signs of violation. Conflict directly concerns people connected with coexistence; it has the local, exclusive character and the fight against it is less effective in accordance with common practice of fight against the crime. Specificity of the fight against the crime of this category is expressed in both complexity of its revealing and in effective and lawful choice of coercive measures against it. The issue of domestic violence has been tabooed in many countries for a long time, because the disclosure of such issues was considered as interference in people's private life. Although the society has gradually realized that the problem of domestic violence must not be ignored as violence endangers people's health and life. Domestic violence is not only the problem of separate individuals, it has negative effect on the other members of the family, especially on minors and leads to distortion of their psyche and consciousness which, in its turn, leads to the formation of an unhealthy situation in the society.

Keywords: Domestic violence, Victims, Criminal Code, Administrative Code, Civil Code

Introduction

It is to be admitted that despite the urgency, the facts of domestic violence are mainly in shade, as the victim avoids public disclosure of his/her problem sometimes because of shame but sometimes because of fear of revenge or aggression.

Georgian Law on “Prevention of Domestic Violence, Protection and Assistance to the Victims of Domestic Violence” sets out the definition that domestic violence implies the violation of constitutional rights or neglect and/or physical, psychological, economic, sexual violence or coercion by one member of the family against the other. Domestic violence, bearing in mind its definition, includes the number of signs of violation and is characterized by specific features of unlawful acts. Domestic violence implies both the crime prescribed by the Criminal Code of Georgia and the administrative offence prescribed by Administration Code and obligation arisen from the damage caused.

The fight against domestic violence, together with current legal and practical experience of fight against crime, needs additional mechanisms. The complexity of the problem led to definition of additional systemic measures for the fight against domestic violence, proposed by Georgian Law on “Prevention of Domestic Violence, Protection and Assistance to the Victims of Domestic Violence” and the amendments to Legislative Acts proceeding from it. According to the Article 9 of the mentioned Law, criminal, civil and administrative mechanisms prescribed by Law are used for revelation and prevention of domestic violence. It can be said that criminal, civil and administrative mechanisms are used in the process of response to the facts of domestic violence considering the context of the violation. The decisive factor, naturally, is unlawful character of the action and the degree of public danger. Also the volume and limits of damage caused.

Considering all of the above mentioned, according to paragraphs 2, 4 of the Article 9 of Georgian Law on "Prevention of Domestic Violence, Protection and Assistance to the Victims of Domestic Violence":

- Criminal mechanisms are used against the facts of domestic violence which imply the actions with the signs of criminal actions.
- Administrative mechanisms are used with the purpose of covering the damage caused by domestic violence according to the rules of Administrative Law.
- Administrative mechanisms are used in the form of issuing restrictive and protective orders, also when the unlawful action in itself does not lead to criminal liability according to Georgian Legislation and it can be prevented with the use of provisions of Administrative Code of Georgia.

Therefore, in the process of response to the facts of domestic violence, it is important to evaluate the action performed, whether it is a crime or an administrative offence. Accordingly, adequate mechanism of response is to be selected. Moreover, more than one mechanism of response can be used simultaneously against the fact of domestic response. The most serious form of domestic violence is performing an action under the Criminal Code by one member of the family against the other. During the process of response to the mentioned action, criminal mechanisms are used. Enforcement of the mechanism of criminal response to the fact of domestic violence was considered in the amendment to Criminal Code of Georgia made on June 12, 2012. According to it, two new articles were added to the Criminal Code of Georgia 11^1-Liability for domestic offence and 126^1-Domestic violence. With the help of the mentioned amendments the ability of using criminal mechanisms has been substantially broadened. The definition of domestic violence was allocated in the Article 126^1 of the Criminal Code of Georgia. With the purpose of criminal Legislation the signs of its qualification and sanctions for the mentioned action were defined. The Article 126^1 of the Criminal Code of Georgia states that domestic violence is the violence by one member of the family towards the other one, regular offence, chantage, humiliation which caused physical pain or suffrage and which was not followed by the consequences prescribed in the Articles 117 (intentional damage to health), 118 (intentional less major damage to health) or 120 (intentional light damage to health).

The signs of the qualification of crime were defined in the mentioned Article and the legislator has determined that if the action prescribed by the first part of the Article 126^1 is performed against a minor, a pregnant woman, or a helpless person, or against the member of the family in the presence of a minor, repeatedly, by a group of people and against one or more person, the criminal liability is burdened and in the case considered by the first part it is limited to community service work, the measure of criminal liability for the aggravated action is defined as restrictions on freedom for a year's period and imprisonment for the same period of time, together with the community service work.

It is to be admitted, that the Article 126^1 of the Criminal Code of Georgia applies only in cases, if the form of domestic violence does not contain any other signs of crime prescribed by other articles of Criminal Code such as serious, less serious and light body injuries, etc.

Apart from abovementioned circumstances, there was an important development in the fight against crime at the legislative level by specifying the group of people who are protected by Criminal Code. A broadened group of people was defined by the Law this provision applies to. In particular, unlike the Georgian Law on "Prevention of Domestic Violence, Protection and Assistance to the Victims of Domestic Violence", Criminal Code has broadened the area of the provision and the person who was or is engaged in a common household with the family is allocated to the category of family member.

According to additions made to Criminal Code of Georgia in June 12, 2012, a new Article 11^1 was added to the Criminal Code, which defined the crimes belonging to the category of domestic violence. According to the mentioned Article, the action prescribed by the number of articles of Criminal Code, committed by one member of the family against the other, is considered as domestic violence. In accordance with the Law, such crimes as murder, body injury of different degree, rape, humiliating treatment, illegal imprisonment, engagement in prostitution, and so forth if committed by one member of the family against the other, are punishable under relevant article of Criminal Code, referring to the Article 11^1.

The most important and effective measures against domestic violence are administrative-legal mechanisms which can be considered as an essential innovation in Georgian Legislation, namely, restrictive and protective orders. These orders were made with the purpose of rapid response to the facts of domestic violence when the actions of abuser do not reveal the signs of the crime prescribed by Criminal Code by one member of the family against the other. Restrictive and protective orders differ from each other by issuing entity, terms of validity, issues to be considered, specificity of issuing and enforcement. In particular, protective order is issued by the First Instance Court by administrative proceedings, but the restrictive order is issued by an authorized police officer with the purpose of rapid response to the facts of domestic violence and submitted to the court within 24 hours from issuing. The main distinguishing feature between these orders is that, an authorized person to submit the protective order to the court is direct victim of the violence, her family member, or the person who provides medical, legal or psychological assistance to the victim with her consent, also in case of violence against a minor-guardianship or care body. But in order to issue a restrictive order, it is not necessary to apply to police. The matter of its issuing is decided by relevant authorized person according to current urgent needs, with the purpose of protection of a probable victim, which is approved by the court within 24 hours after examining the grounds and circumstances of the case and the term of which does not exceed one month.

As for the civil mechanisms of response to the facts of domestic violence, it implies providing coverage of property and non-property damage to the victim of domestic violence in the process of criminal or administrative offense in the way of claim proceedings according to rules and procedures defined by Civil Code and Code of Civil Procedures.

Apart from the prevention of domestic violence and the mechanisms of fighting against it, Georgian Law on “Prevention of Domestic Violence, Protection and Assistance to the Victims of Domestic Violence” includes the guarantees of social protection of victims. According to the Law, a victim has the following guarantees of social protection: the right to use specific means for defending from the abuser, the right to use an asylum, the right to use emergency medical aid and psychological aid in the period of being in an asylum, the right to permanent retention. Among above listed guarantees, the most important one is to provide the victim with temporary places, asylums and crisis centers. An asylum/crisis center, according to the law, represents a temporary place for the victims of domestic violence which belongs to the state system or exists on the basis of non-private legal entity, which serves for rehabilitation of psycho-social condition of victims, providing medical and legal assistance, also the measures for their protection. Such kind of asylums and crisis centers are to meet the victim’s condition of life and provide the necessary medical and psychological assistance.

Individuals being in crisis centers stay there before defining their status and after it, only in case if victim does not have any desire to leave for an asylum and needs only psychological-social rehabilitation and/or legal assistance and/or emergency medical aid without living in an asylum.

An important guarantee of social and labor rights of the victims of domestic violence is Labor Code provision, according to which, labor relationship with the victim of domestic violence is suspended for the period of being in an asylum or crisis center, when it is impossible to perform the work duties without termination of labor relationship. The same provision applies to public officers in Georgian Law on “Public Service”.

With the purpose of formation effective and adequate system of fight against the problem of domestic violence, it is important to evaluate the area of spread and statistics of violence in the family, which may be defined on the basis of quantitative and qualitative studies carried out on appropriate issues. Increase in the number of facts of domestic violence and the necessity of formation of effective system of response in Georgia has led to preparation such special Legislative Act as Georgian Law on “Prevention of Domestic Violence, Protection and Assistance to the Victims of Domestic Violence”. With the purpose of perfect regulation of measures to be taken against the domestic violence and deciding certain issues related to it, amendments were made to such Laws as Georgian Law on “Weapons”, “Labor Code”, “Public Service”, “Police”, Criminal Code, Administrative Code, Code of administrative procedures and to the number of subordinate normative acts.

Conclusion

When reviewing the current Legislation of Georgia on domestic violence, it should be admitted that mechanisms defined by Law providing rapid and effective response to the facts of domestic violence, also provides the victim of domestic violence with the means of protection (both legal and physical). Legislation defined such additional mechanisms which should provide the prevention of domestic violence. Also permanent and dynamic renovation of the mentioned measures is taken into consideration. Substantial accents of Legislation are oriented on victim’s protection, introducing effective and acceptable mechanisms of protection.

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AMERICA IN THE SHADOW OF 2016 PRESIDENTIAL ELECTIONS AND RISE OF THE REPUBLICANS

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Abstract

Democrats and Republicans have been occupying the major part of the presidential elections in America with strong competences throughout the history. The article particularly focuses on the recent elections referring to 2016, presidential elections. In spite of some supports given to Obama due to his implemented policies such as immigration policy, the latest midterm elections substantiated the shifts in decisions of Americans. Furthermore, internal and external failures impeding President Obama and pushing him into some foreign policy changes. The article puts a couple of argumentation between Democrats and Republicans to show who possesses the preponderance for 2016.

Keywords: USA, Democrats, Republicans, Presidential Elections, Obama's Policies

Introduction

Although Democratic and Republican parties are two of the most influential power in American politics, the only political parties in the United States are not composed with them. However, we must emphasize that the two parties are parties that adopted and voted by most of the American people. The White House and the US Congress have been managed and controlled by these two parties for nearly 150 years. Although the establishment of the both parties in the late 1700s, but today their known democrat and republican statuses have been taken in the 1800s. Both parties in the 20th century had significant presidents representing their own values and as a matter of fact, despite its current President Barack Obama is a member of the Democratic Party, its former president George W. Bush was a member of the Republican Party. Besides the two parties have different values, they have catered to different social, demographic, ethnic groups. A Democratic Party official Rousselle said that today's Democratic Party goes after the values of the legend President Franklin Roosevelt known as the symbol of their party: ʼʼ Our main constituencies are young Americans, women, blacks and Latinos. We are a participating party.ʼʼ Whereas the constituencies of the Republican Party consists of mostly traditional, white and conservative Christians. (1)

However, Americans are not used to staying on one of them for a long term, even though the Democrats are much more liberal and exceeding economy, the Republicans themselves historically have gained more presidencies in the White House as such.

On the way to 2016

Constitutionally, the presidency of US President Barack Obama, who is from the Democrat Party as well, will be ended in 2016. When considering the conducted various polls, the Democrats` candidate in the top is seen the former foreign minister Hillary Clinton. However, there is no consensus on a candidate as of yet in the Republican Wing (2). In a way, when they are considered that having the Republicans a great victory in the local elections and the legislature will be in control of the Republicans over the next two years, it can be said that the Republicans will take over control in the two wings of Congress which are the House of Representatives and the Senate. This is an indication that the presidential elections in 2016 will be quite tense and competitively.

Although the last two presidential elections were won by Obama's overwhelming superiority, but as a matter of fact, the Republicans with their traditional power are overwhelmingly superior than Democrats in some regions (3). This situation and the results of local elections in 2014 with the victory of the Republicans will force Obama's Democrat party which has turned American perception in the world to positive way from hated American perception after the period of Republican George W. Bush by following peaceful strategies in foreign policy and by reducing military spending to take inevitable additional measures for 2016 president elections.

So, the question raising on keeping the implementations of President Barack Obama has done as of yet. Bluntly put, most Americans support Obama on his health care policy, positive approach to same-sex marriage, giving consent to undocumented immigrants to have a path of gaining a citizenship in America, checking backgrounds of those who want to purchase a gun, more than half prefer to ban on buying rifles and what Obama gains more support from, is to increase taxes to the wealthy with the intention of assisting to the poor. In an interview with Time magazine, Republican McConnell answered the question of being able to maintain the support that Democrats have obtained on these issues above: "Well, it will be to keep majority"

The latest Thursday` midterm elections ostensibly indicated that most Americans believe on being better off in terms of Congress under the aegis of Republicans in the following years to come. 53% of overall results referred to Republicans but 44% to Democrats (4).Does not mean a wave yet for 2016. Although the Republicans obtained an eight-point marginal advantage (49% to 41%) over Democrats in the midterm elections of 2010, abortive tea-party troops could not halt Obama to regain presidency in 2012 and the same occurred during the 1994 elections for Bill Clinton (5). However, it is ineluctable that "wingless bird" Barack Obama will possibly lose his leverage as already his party in Congress ran away from him. In actuality, Obama got started losing his reputation when he issued in the late summer that he had no strategy in terms of ISIS and a year later declared their underestimation on ISIS (6). Plus, as Obama showed little power on settling the Ebola matter and the following Republicans` speeches turned Americans into shifts (7) resulting with a couple of foreign policy alterations to save 2016 and push the tea-party troops into failure once more. For instance, Obama`s recent declaration on weakening the antagonistic relations of America with Cuba might positively keeps the Democrats ahead, but seems Americans already decided to whom has to take the presidency in 2016. The policy Obama taking is an "old policy" to occupy the young aging groups in 2016 as 62% of 18-29 year-old Americans want see no embargo against Cuba (8). However, Americans probably are no longer willing to see a "state intervention" in their prospers for 2016 which is the core value of the Democrats and endeavoring to tear a state-based system down which has been the core theory of the Democrats since 1800s. The theory of "Each person is accountable for himself or herself" has proved that it is on its way to win through in US (9). The eye-catching triumph of right-leaning side might scrape off Obama and puts his name in history of successful democrats as his presidency deserves it. Decreasing military spending, focusing more on internal economy, fiscal-policy and not intervening with no consent of a state, in a word, liberal way of Mr. President satisfied Americans. However, history got started to substantiating a couple of switches in America. Not too much power both have, it is what makes 2016 very essential for the world not just for the United States.

To sum up, after eight years presidency Barack Obama will compete with the opponents on behalf of Democrats and it is what concerns the USA a lot. The spillovers will definitely influence not just the Pacific states but all around the world. Winning the midterm elections of The Republicans and obtaining majority in both wings of Congress will increase competitions much more between President Obama and The Congress in USA and this will cause next Presidential Elections to pass in a competitive atmosphere. As a result of this competition will be the harbinger of a new era for the USA (10).

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IF THEY FINANCE YOUR CLAIM, WILL THEY PAY ME IF I WIN: IMPLICATIONS OF THIRD PARTY FUNDING ON ADVERSE COSTS AWARDS IN INTERNATIONAL ARBITRATION

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Abstract

Third party funding is a *new* industry which provides financial support to parties in litigation and arbitration proceedings. The full variety of its implications on international commercial arbitration is yet to be seen. For that reason national courts, arbitral tribunals and doctrine are widely dealing with its repercussions on arbitration proceedings. In order to contribute to this wide discussion, this paper focuses on one particular aspect within the arbitration proceedings influenced by a third party funding: responsibility for payment of adverse costs in cases involving impecunious claimants. The problem presented in this paper is whether, in case where the claimant cannot cover the costs, the third party funder should be responsible for the successful adverse party's costs, and on which legal basis? The two parts of the paper analyze the possibilities for such funder's responsibility at two stages of the proceedings: (1) at the stage of a final award and (2) during the proceedings when the security for costs may be sought. The analysis encompasses the court practice and national arbitration laws from several jurisdictions (the United States, the United Kingdom and Germany), the arbitration rules of two leading arbitration institutions (ICC Rules, LCIA Rules), as well as arbitral practice, in order to predict possible issues and illustrate available solutions.

Keywords: International arbitration, third party funding, costs

Introduction

This article analyzes whether a third party funder may be liable for the successful adverse party's costs. As, at present, there is no universally accepted definition of third party funding, in this article we rely on the definition formulated by Lord Justice Jackson: third party funding means the funding of arbitration or litigation proceedings by a party who (i) has no pre-existing interest in the proceedings, (ii) will be paid out of any amounts recovered as a consequence of the proceedings, often as a percentage of the sum recovered, and (iii) the funder is not entitled to any payment if the funded party's claim fails (Jackson, 2009, p. xv).

The tendency in international commercial arbitration is to apply the "costs follow the event" principle unless the parties have agreed otherwise, or there are other circumstances that warrant different allocation of costs among the parties (Born, 2014, p. 3096; Williams & Walton, 2014, p. 437). In other words, if a claimant files a suit that proves to be meritless, such a claimant will usually be liable to cover the successful respondent's reasonable costs and expenses.

In general, presence of a third party funder serves as a red flag signaling to the respondent that the claimant is in a shaky financial situation and may not be able to meet an adverse costs award (Kirtley & Wietrzykowski, 2013, pp. 18, 21; Kuhner, 2014, p. 813). Some legal commentators described a specific instance of third party funding abuse as “the arbitral hit and run”, where the claimant’s legal fees and expenses are covered by a third party who gains the proceeds if the claimant wins, but is not liable for any costs award if the claimant loses, and the claimant itself is already impecunious or starts to dispose of its assets with an aim to avoid meting an adverse costs award (Rubins, 2000, p. 361; Kalicki, 2006; Kirtley & Wietrzykowski, 2013, pp. 20, 26; Kuhner, 2014, p. 814). Such conduct may alarm the respondent to seek protection against the aforementioned claimant’s state and behavior. In the authors’ opinion, in order to provide such protection to respondents, awareness of these issues should be raised in the doctrine as well.

This paper focuses on international commercial arbitration and takes into account relevant litigation practice. The situations which will be analyzed presuppose that the claimant, *i.e.* the funded party, is impecunious or bankrupt – that it is not in a financial position to cover the costs. With regard to such factual pattern this paper will cover, first, the issue of the funder’s responsibility for the adverse costs as set in the *final award* and, second, the possibility to seek an order for security for costs, against the claimant or the funder, *during* the arbitration proceedings.

Liability of a third party funder for the adverse costs awards

As a practical matter, whether and to what extent the third party funder may be liable for the successful adverse party’s costs is usually stipulated in the funding agreement between the funder and the claimant (Nieuwveld & Shannon, 2012, pp. 4, 12-13). Indeed, the Code of Conduct for Litigation Funders (2014, para. 10.1) requires the funding agreement to “state whether (and if so to what extent)” the funder is liable to the funded party “to meet any liability for adverse costs.”

However, both in the U.S. and in the UK courts have ordered third party funders to pay a successful adverse party’s costs (Cremades, 2012, p. 181). Some factors, which played a role in the courts’ determination of these costs orders, included the extent of the funder’s involvement in the proceedings, whether the funder maintained litigation solely for its financial benefit, and the amount of funding advanced.

In the U.S., Florida’s Third District Court of Appeal ruled that litigation funders had “such control thereof as to be entitled to direct the course of the proceedings” and thus were a “party” to the litigation: the funders had a right to approve counsel for the plaintiffs, veto power over whether the suit was filed and how it would be pursued, and the final say over any settlement agreements; the funders paid the litigation costs, medical expenses for one of the plaintiff’s main witnesses, and were entitled to receive a percentage of sum awarded to the plaintiffs (Abu-Ghazaleh v. Chaul, 2009, p. 694).

In the UK, the Privy Council held that where a third party promotes and finances litigation proceedings by an insolvent company “solely or substantially for his own financial benefit” and without the funder’s involvement such proceedings would not have been pursued, the court has discretion to order the funder to pay the successful adverse party’s costs (Dymocks Franchise Systems v Todd, 2004, p. 2818).

Also, in McFarlane v E.E. Caledonia Ltd (1995, p. 373) Longmore J reasoned that in some cases the maintenance may be lawful even if the maintainer (for instance, a family member or a religious fraternity) does not accept liability for the possible adverse costs award, but in the business context “*the acceptance of such liability will always […] be a highly relevant consideration*.” Therefore, the Scottish company’s policy of not accepting liability rendered the funding agreement illegal as a matter of English law, and the funder was ordered to pay the defendants’ costs.

Finally, in Arkin v Borchard Lines Ltd (2005, pp. 3064, 3069) the UK Court of Appeal noted that, on the one hand, it would be just to demand that "the non-party [who] is wholly or partly responsible for the fact that litigation has taken place" reimburses the successful party's costs, but, on the other hand, no funder would be willing to advance necessary funds if the funder who contemplates "funding a discrete part of an impecunious claimant's expenses" is exposed to potential liability for the entirety of the defendant's costs. Therefore, a professional third party funder should be liable for the successful adverse party's costs only "to the extent of the funding provided" (Arkin v Borchard Lines Ltd, 2005, p. 3069).

Lord Justice Jackson criticized the Arkin approach: the principle that a litigation funder may escape liability for costs is unjust both to the opposing party, which may be unable to recover a portion of its costs, and to the funded party, which may end up liable for costs it cannot meet (Jackson, 2009, pp. 122-123). Lord Justice Jackson recommended that (i) funders should be exposed to liability for adverse costs, (ii) the extent of the funder's liability should be a matter for the judge's discretion in each individual case, and (iii) the funder's potential liability should not be limited by the amount of its contribution (Jackson, 2009, pp. 123-124).

However, in arbitration the situation is different. As Lee pointed out at the roundtable on third party funding organized by Global Arbitration Review and Fulbrook Management in 2012, one of the differences between arbitration and litigation "is that judges can make direct adverse costs orders against third party funders (if they know of their existence), but arbitral tribunals have no power to do that given the consensual nature of arbitration" (Ross, 2012, p. 19). Similarly, Howell noted that because in the UK the arbitral tribunals have no power to make costs orders that directly bind a third party, "it is a concern that funders may look to take the benefit of arbitration without being subject to the risk of the costs" (Ross, 2012, p. 19).

Indeed, textual analysis of several arbitration rules leads to the conclusion that arbitral tribunal does not have the authority to oblige the third party funder to pay the successful adverse party's costs. In particular, the 2010 UNCITRAL Arbitration Rules provide that the tribunal shall, in the final award or in any other award (if appropriate), determine an amount that "a party may have to pay to another party" as a result of cost allocation (Art. 42(2)). Also, pursuant to the 2012 ICC Arbitration Rules the final award shall decide "which of the parties" shall bear the costs of arbitration (Art. 37(4)).

Similarly, provisions of national arbitration laws generally provide that the tribunal may order the costs only against the parties to the proceedings. For instance, under the German Arbitration Act ("GAA") the tribunal shall "decide on the amount to be borne by each party" (s. 1057(2)). Pursuant to the English Arbitration Act ("EAA") the tribunal "may make an award allocating the costs of the arbitration as between the parties" (s. 61(1)).

In sum, arbitration rules and national arbitration laws generally provide that the tribunal may allocate the costs only between the "parties", *i.e.* claimant, respondent, and additional parties joined to the proceedings, but does not have the authority to order a non-"party" funder to cover the successful adverse party's costs.

The impossibility of arbitral tribunal to make an adverse costs award against the third party funder (Kirtley & Wietrzykowski, 2013, pp. 29-30; Rubins, 2000, p. 361) exposes the successful respondent to the risk that it would not be able to recover the costs neither from the unsuccessful impecunious claimant nor from the funder. There may be (at least in theory) several ways to overcome this problem.

To begin with, the tribunal would be able to render an award against the third party funder if it first "extends" the arbitration clause to the funder, so that the funder becomes a party to the proceedings. In particular, in the U.S. courts recognized a number of theories, which "arise out of common law principles of contract and agency law", that justify extension of arbitration agreement to non-signatories, namely (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel (Thomson-CSF v. AAA, 1995, p. 777). Taking into account that there is no contractual relationship between the funder and the respondent, usually the plaintiff does not assign contractual rights and obligations to the funders, but only a share of possible proceeds from the award, and the funder is a company independent from the plaintiff, the arbitration clause in the contract between the plaintiff and the defendant can hardly be extended to the funder (Levy & Bonnan, 2012, pp. 82-84). As Pinsolle pointed out, "*[e]ven in France, where we are very generous and flexible about the involvement of third parties in arbitrations, the party must have some involvement in the contract itself – not the dispute that arises, but the performance of the contract – to become a party to the case*" (Ross, 2012, p. 22).

Secondly, as Parker suggested, third party funders may develop a practice of "voluntarily submitting" to the tribunal's jurisdiction for the purpose of adverse costs awards (Ross, 2012, p. 22). However, taking into account that a funder gets no monetary advantages by accepting the tribunal's jurisdiction, whereas it potentially becomes exposed to significant liability for the defendant's costs and expenses, it is hard to explain why third party funders would be willing to engage in "voluntary submission".

Finally, the tribunals would be able to order the funder to cover the successful adverse party's costs, if the arbitral awards had effect on the third parties. Arbitration rules and laws presently in force are far from providing a clear and comprehensive framework for the effect of arbitral award *in personam* (Brekoulakis, 2010, para. 9.06). The UNCITRAL Model Law on International Commercial Arbitration ("Model Law") merely states that an arbitral award "shall be recognized as binding" (Art. 35(1)). In turn, the GAA provides that an arbitral award "has the same effect between the parties as a final and binding court judgment" (s. 1055). The EAA goes a step further: an award "is final and binding both on the parties and on any persons claiming through or under them" (s. 58(1)), since under the EAA a "party" includes also "any person claiming under or through a party" (s. 82(2)). However, English courts have interpreted section 82(2) narrowly, only allowing third party claims that could be made under "traditional" contract law theories such as assignment or subrogation (Brekoulakis, 2010, paras. 3.45, 3.46). Therefore, the international dominant view is that an arbitral award only binds and affects the parties to the arbitration proceedings ("same parties" requirement), the same way that a court decision only binds and affects the parties to the litigation (Brekoulakis, 2010, paras. 9.10, 9.12). This is not to mention that consent is the cornerstone of arbitration, and arbitration thus may not extend its effect to the parties that never agreed to arbitrate (Born, 2014, p. 1406).

However, majority of legal systems have exceptions for the "same parties" requirement: effect of judgments extends to the parties' successors, assignees, administrators, trustees, other third parties that are in privity, have identical interests with the party to the original proceedings (Brekoulakis, 2010, paras. 9.12-9.14). The category of "privies" is potentially broad, as it includes not only the parties to the arbitration, but also "*related entities and persons who would have had the opportunity to participate in previous arbitral proceedings*" (Born, 2014, p. 3752).

To conclude, if a third party funder exercises such control over the claimant's behavior in the arbitration proceedings that the funder directs the course of the proceedings and its interests align with those of the claimant (the funder is the real party in interest), the tribunal's adverse costs award may have effect on the funder. However, as at present there is no relevant court or arbitral practice to support this position, adverse costs orders against the third party funders in international arbitration remain the subject of theoretical discussions, not the legal reality.

Third party funding and an order for security for costs

As shown above, current arbitral and judicial practice does not recognize the possibility for an arbitral tribunal to make an adverse costs award against the third party funder. While this may be doctrinally justifiable, it still exposes the successful respondent to the risk that it would not be able to recover the costs. Namely, if a case involves impecunious, or even bankrupt, claimant who sought the funds from a third party, a respondent may be strongly interested in seeking a protection as to its adverse costs. Since rendering the final award against the third party funder is initially precluded due to the lack of funder's involvement in the negotiation and performance of the contract between the parties, the respondent may turn to reliefs of procedural nature, in particular, an order for security for costs.

Granting the security for costs requires many observations to be made, even if the third party is not involved. When focusing on the situations involving third party funder, there are two possible ways in which respondent may obtain protection. First, the respondent can ask the arbitral tribunal or the court to *take into account* third party funding when deciding on granting the security for costs. This is the least that the respondent can expect and claim in these circumstances. On the other hand, the most effective relief would be achieved if the respondent can successfully obtain and enforce an order for security for costs *against the funder*. Both situations can be summarized in the following question: which right shall prevail – right of access to arbitral justice or right on secured payment of potential adverse costs award?

Security for costs is an interim measure which is sought to be sure that the likely amounts which would be awarded to the party, if it prevails in the arbitration, will be covered (Born, 2014, p. 2495). Interim measures can usually be sought before two forums: the arbitral tribunal and the national courts (Wirth, 2000, pp. 32, 40; Yesilirmak, 2005, p. 48). In spite of the discussion that took place in the doctrine and in arbitral practice whether arbitral tribunals have a power to order the security for costs or not, the authors of the paper share the opinion of Born that this tribunal's power is recognized in the countries which adopted the Model Law (Born, 2014, p. 2495). Furthermore, UNCITRAL Arbitration Rules clearly encompass such tribunal's power by stating that interim measures can be issued to "provide a means of preserving assets out of which a subsequent award may be satisfied" (Petrochilos, 2010, p. 885). Besides the arbitral tribunals, *the national courts* also have a power to order such security under Article 17(J) of the Model Law (Emanuele & Molfa, 2014, p. 156). Without going in further discussion on the on the detailed jurisdictional specifics of some legal systems when it comes to granting this provisional relief, we turn to question which circumstances are usually taken into consideration when the forum decides on granting the security for costs. This analysis shall help to reach the conclusion whether third party funding shall be taken into account as well.

When granting the security for costs, the usual requirements for interim measures shall be satisfied (Berger, 2010, p. 9). These requirements are the following: (i) *prima facie* establishment of jurisdiction, (ii) *prima facie* establishment of case, (iii) urgency, (iv) threatening harm, and (v) proportionality (Yesilirmak, 2005, p. 175). Regarding the first two requirements, the former (*prima facie* establishment of jurisdiction) is considered to be automatically satisfied due to the "urgent" nature of the situation which interim measures serve, while the latter (*prima facie* establishment of case) is not specifically considered to be relevant for granting the security for costs (Born, 2014, p. 2496; Yesilirmak, 2005, pp. 175-176). Nevertheless, the second requirement, *i.e.* the *prima facie* establishment of case, can be proven by showing an existence of potential claim for reimbursement of costs (Berger, 2010, p. 9). These two requirements, however, seem not to be under influence of the fact that the party is funded by a third person.

The analysis of the other three requirements will show whether third party funding shall contribute to the decision at all. Requirement of urgency is understood as a state in which "*a party's potential losses are likely to increase with the mere passing of time and that it would be unreasonable to expect that a party to wait for the final award suffices*" (Yesilirmak, 2005, p. 149). Since the party is incurring legal costs throughout the proceedings, this is seemingly a persuasive argument for the requirement of urgency to be satisfied. The party's potential losses are here presented as future legal costs that will inevitably be incurred. Third party funding, however, can undermine the reasonability for a respondent to wait till the final award, when there is a severe doubt whether it will be paid at all by the claimant who is funding its costs from an external source. This leads us to the last two requirements.

When the requirements of threatening harm and proportionality are being assessed, financial state of the claimant can have more severe repercussions on the tribunal's or the court's decision. The threatening harm for the respondent may be presented as a potential non-enforceability of an adverse costs award due to claimant's insolvency (Sandrock, 1997, p. 34; Wirth, 2000, p. 36). Insolvency, however, does not automatically suppose the threatening harm, and the order for security for costs can be rendered in exceptional circumstances only. An arbitral tribunal sitting in Switzerland acknowledged this exceptional nature of security for costs by stating that "*[a]rbitral precedents also show that security for costs should only be granted in extraordinary circumstances and with the greatest reluctance*" (ABC AG v Mr X., 2002, p. 112). The same tribunal decided that even though it was proven that claimant is insolvent, it was not sufficient to order the security for costs: "*Given the cash available to Claimant about a month ago […] there is some likelihood that any claims for costs of Respondent […] are not at risk*"(ABC AG v Mr X., 2002, p. 114). In other words, insolvency may be used as an indicator of financial incapability to cover the final costs. However, it will not automatically grant the protection to the other party, as to the exceptional nature of this remedy. This rule *argumentum a maiore ad minus* should be applied to the state of impecuniosity. It remains to see in which situations insolvency or impecuniosity of a claimant will be considered to be an extraordinary circumstance that justifies ordering the security for costs, and whether third party funding can contribute to such justification.

A sole arbitrator decided to grant security for costs because claimant was bankrupt, and the fact that bankruptcy proceedings were suspended due to lack of assets (Swiss entity v Dutch entity, 2001). The claimant had already obtained the funds from an external source at that point in proceedings, however, although this fact was mentioned, the arbitrators did not refer to it again in its reasoning for the security for costs (Swiss entity v Dutch entity, 2001; Kirtley & Wietrzykowski, 2013, p. 25). Quite the opposite was done by another arbitral tribunal which granted the security for costs: "*If a party has become manifestly insolvent and therefore is likely* ***relying on funds from third parties*** *in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred*" (Berger, 2010, p. 11). It follows that third party funding may be one of the circumstances which are taken into account by an arbitral tribunal when deciding on security for costs. It can be, for example, an indicator of potential harm, *i.e.* that the funded party will not be financially capable of paying the adverse costs at the end of arbitration proceedings. This is true so far as the agreement with the funder does not provide for such coverage. However, taking this circumstance into account should not contradict the exceptional nature of this relief: the fact that a claimant is using external funds should not lead to automatic granting of security for costs.

Moreover, the latter tribunal made an observation about the third party funding not regarding the requirement of threatening harm, but regarding the proportionality requirement when assessing the granting of security for costs. Under that requirement, "*the possible injury* *caused by the requested interim measure must not be out of proportion with the advantage which the claimant hopes to derive from it*" (Yesilirmak, 2005, p. 182). When this is applied to cases which involve an external funder, the following question can be raised: should the protection of the solvent party's rights prevail over the impecunious party's right of access to arbitral justice? Namely, if the impecunious party has to obtain funds from an external source it means that, otherwise, it would not be able to finance the arbitration proceedings. If the continuation of the arbitration is conditioned by payment of security for costs, the impecunious party who does not have such payment covered by its agreement with the funder might be denied access to arbitral justice. The cited decision was obviously in favor of imposing security for costs on the funded party and insisting on such payment by the external funders as it stated that "*arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred*" (Berger, 2010, p. 11). Some authors are of the opinion that the third party funders, even if the initial agreement does not cover such payment, will make it any way in order not to lose the investment already made (Kirtley & Wietrzykowski, 2013, p. 27).

At the same time, the doctrine warns about several strong reasons why the third party funding as a relevant circumstance should be approached with caution when deciding on these issues. The main three issues which may arise if the third party funding is taken into account anyways are: otherwise meritorious claim may be stifled, arbitration proceedings may be delayed and/or funded claimant may complain that it is threated worse than those parties who are suing other forms of financing, for example, bank loan (Kirtley & Wietrzykowski, 2013, pp. 23-25). Furthermore, the doctrine suggests that taking this as a relevant circumstance into account is not backed up in the theory of arbitration as well. It was said that respondent's right on security as a reaction to the claimant's external funding "*seems contrary to essence of an arbitration agreement where the possibility of a third party funder of either side's legal costs is not contemplated at the moment of consent to the arbitration, at which point each side accepts the risks around the other party being able to pay the costs or damages, or provide security for costs, associated with any future arbitration under the relevant contractual jurisdiction clause*" (Nieuwveld, 2012, p. 27 ft. 8).

Therefore, while third party funding may be used as an indicator that will contribute to ordering the security for costs to be paid, the arbitral tribunal will be faced with many equally relevant circumstances why this should not be taken into account. It would be advisable to look at the third party funding only as an additional, but not the crucial justification for making such order, and to give the force to all relevant circumstances of each case.

If respondent is successful in obtaining an order for security for costs, a following issue might arise: whether this order can be enforced against the funder? If the order is rendered by an arbitral tribunal, the tribunal will lack any power to give any directions to the third parties (Yesilirmak, 2005, p. 72). However, on the other hand, the national courts may be able to order more effective relief, directed to the third party funder itself. It is considered that under Article 9 of the Model Law, the national courts can grant interim measures vis-à-vis third parties (Srinivasan, 2010). To the authors' knowledge, no such decision was rendered specifically related to security for costs. Assuming that third party funders did not agree to such coverage in the first place, this solution might never come to life. However, as shown in the first part of this paper, the national courts did not refrain from ordering the adverse costs against the third party funders. Therefore, there is a theoretical possibility that they will not refrain from ordering an interim measure in the form of security for costs against them as well. It remains to see whether the judicial practice will ever adopt this solution.

Conclusion

Since the tendency in international commercial arbitration is to apply the "costs follow the event" principle unless the parties have agreed otherwise, the payment of successful respondent's adverse costs might be jeopardized by impecuniosity or bankruptcy of a claimant. This article analyzed whether a third party funder may be liable for the successful adverse party's costs.

The first part of the paper, therefore, addressed the possibility for an arbitral tribunal to render a final award against the third party funder. It was found that when there is no voluntary submission to the tribunal's jurisdiction on the funder's side, the effect of the award might be extended to the funder only if it is *the real party in interest*. Regarding the security for costs and its relation with the third party funding which was discussed in the second part of the paper, it can be concluded that third party funding *should be taken into account* when deciding on this type of interim measures. Arbitral tribunal, however, has no power to *order the funder* to cover such security. The national courts may have a reasonable legal ground to make such an order against the funder, but this remains to be confirmed in the practice.

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HISTORICAL REVIEW OF THE INSTITUTE OF APPEAL AND ITS DEVELOPMENT CHARACTERISTICS

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Abstract

The presented work - “Historical Review of the Institute of Appeal and Its Development Characteristics” concerns the Appeal and its legal nature. The work is about the historical development and the establishment of appeal in various countries. In the work the following issues are defined: essence of Appeal, notion of Appeal and complete (unlimited) and incomplete (limited) types of Appeal.

Keywords: Court, Appellate, Trial, Judge

Introduction

"Appeal" is a Latin word which means to request a formal change to an official decision. In the Civil Procedure Law, it means to ask a higher court to reverse the decision of a trial court. Appellate court is the court of the second instance which is empowered to review decisions of lower courts. It means that it does not only check those decisions in terms of how legal they are but also in essence researches those circumstances which were not examined by trial court or were given a wrong assessment (A. Kobakhidze, 2003).

The Article 364 of the Code of the Civil Procedure stipulates: "Parties and the third parties may appeal the decision of the trial court based on independent appeal request in the prescribed time in the Court of Appeals"; also, according to the Article 366, paragraph 2, an unattended decision is a subject to appeal if it was made during repeated absence. That is why it cannot be appealed in the same court. Such a decision may be appealed in the Appellate court only on the grounds that there were no appropriate legal preconditions for it (Georgian Civil Procedure Code, 2015).

The current Civil Code strictly specifies the rules of appealing court decision in the Appellate court; however, its development history is rather interesting.

Rome

Even at an early stage of development of the state, court represented a free and independent public-civic institution and it conditioned the fact that the court decision was final and was not a subject to appeal. Over time, with the strengthening of the government, judiciary system developed and therefore, it became possible to check the court decisions by central authorities. At this early stage of development, there was no court of appeals and the issue of reversing or amending the court decision was discussed in the original decision-making court (A. Kobakhidze, 2003).

In the early period of the development of the Roman state, central state authority development stage, there was no such institute of appealing court decisions. During the first half of the Roman Republic, there were two stages for law-making for Roman citizens: the process "in jure" and the process "in juducio". The process "in jure" involved the parties and court magister. It should be noted that the latter had no function and his duties were limited to attending the festive ceremony arranged by the parties and making a replication what was foreseen in the ritual. In this case, major activities were carried out by a plaintiff and a defendant; a plaintiff delivered his/her request and a defendant could have either accepted or refused this request. If a defendant did not recognize a claimant's claims, the case was transferred from "in jure" to "in juducio" stage which included determining the actual truth of provided factual evidence. This was carried out by the judges selected by the parties themselves from the list of senators. The latter's decision was final and was not a subject to further appeal" (G. Kiria, 2002).

The stages of the above-mentioned proceeding were slowly modified; they lost their original function. Firstly, in Rome there was established such a legal process that the court decision, no matter if it was fair or not, was not a subject of appeal. At this stage, the court of appeal had been encountered in the first experiments which were aimed at changing the original decision (on appeal). Obviously, the above-mentioned institute's purpose was to refer the case back to the initial stage; however, it should be mentioned that such appeal was only possible in certain circumstances; for example, if it was established that there had been violence and threats on judges, which was eventually reflected in the decision, as well as bribing the judge, or failure to appear on the process. All of these cases could result in the court to repeal a new trial. Nevertheless, at this stage of development there still were not other instances of courts. Later, when the judicial and administrative functions were united under one administrative body – magistrate, it became possible to appeal court decision in higher instances which might have even included the Emperor in the process. Exactly this kind of intervention was called "appeal" (appellatio).

From the above-mentioned it can be concluded that the institution of appeal was formed in civil proceedings at the end of III century A.D. (G. Kiria, 2002). Later, during the reign of Diocletian and Constantine, appeal proceedings gained the organized form, while during the reign of Justinian, appeal as the form of the legal form finally established its place in legal system. Hereby, the specific time period was determined for making an appeal application and sending it to the court. It should be noted that the parties could orally appeal the decision straight after it was made or in writing within 10 days.

The appeal of the court's decision stopped it from being executed which indicates a high development of the Roman legal system. By this time, the appeal procedure changed itself. If the Emperor used to take a decision only based on the written explanation of the interested parties and the judge, during the reign of Justinian, a completely new process was formed according to which the parties could submit additional evidence and make an examination of their trial which was the so-called Full appeal.

Existence of the appeals system led to some complications as well. In particular, the court procedure became slower and more expensive due to the introduction of court fees. However, the appeal was one of the most important achievements of the Institutional Law of Rome which ensured its role and place in the history of jurisprudence.

France

In France, as well as in Georgia, the Court of Appeals is placed under the general court system and was established in 1804 for the revision of the appeal cases. Appellate review of the case is going on from the legal as well factual point of view (New Civil Procedural code of France).

In France, the notion of appeal appeared at the end of XIII century but for a long time the appeal was a complaint to the judge, not the decision. Therefore, the judge defended his decision with weapon in his hand, but later, in XVII century, in 1667, the appearance of ordonnance turned the appeal action against the decision rather than the judge. After many attempts, French Civil Procedure Code was adopted in 1806 and entered into force on January 1, 1807. Based on it, several types of court appeals became established in France, such as appeal and cassation. The Principles of the above-mentioned Code for appeal and cassation were also considered in France's new, 1976 Code of Civil Procedure" (G. Kiria, 2002).

England

Compared to France, Roman law had a less effect on the development of England's national law. As it had no practical value, Roman law, to some extent, affected the English legal thinking. Roman law introduced England to legal terms, the legal definitions, and a number of general concepts of Roman law.

In English legal system, appeal was established as an institute. In its essence, it was different from the appeal of the continent. English rule considered appeal on the matters of law and the matters were based on facts. The latter method considered revising the verdict of the jury who determined the facts of the case. In England, this peculiar system of appealing the court's decisions the so-called characteristic of "the English Institute" still remains." (G. Kiria, 2002).

United States

In the United States, the court has the following sequence:

1. The Supreme Court
2. The Court of Appeal
3. The District Court
4. Special Court’s jurisdiction

The United States does not have a constitutional court. The Constitutional Control is carried out by every court; however, the Supreme Court makes the final decision.

Forming and abolishing courts in the United States is a prerogative of the Congress. The number of judges in the Supreme Court is 8 and the President appoints them in agreement with the Senate.

Sweden

In Sweden, the Supreme Court leads a system of common courts. The Supreme Court consists of 22 judges, of the High Court of Sweden made up of three sections. The Supreme Court’s main function is to receive and deal with the appeal of the rulings and decisions made by the court of appeals.

Sweden has six courts of appeal based on territorial jurisdiction. They are divided into departments and are their heads are called lay judges or laymen.

Swedish court of appeals re-considers the rulings and decisions of the lower courts, with the participation of 4-5 judges.

In Sweden, there is no special constitutional court and based on this, the courts of general jurisdiction often fulfill this function; they are also assessing constitution of court cases.

Great Britain

The UK’s judiciary system is described below and at the head of it stands: Supreme Court; Royal Court; Court of Appeal. The High Court consists of three sections - the throne, the Chancellor and Family Affairs. Number of the Supreme Court judges is 78. They hear the first instance cases, as well as appeal.

Royal Court can consider serious criminal cases. Appeal of Royal Courts decisions takes place in the House of Lords Court which is headed by Lord Chancellor and is composed of 18 judges.

Lower courts are the County Courts which consider civil cases. The price of the above-mentioned costs should not exceed 5000 pounds, while if the value is even less, such cases might be considered by the County Court judge's assistant. Less significant criminal cases are dealt with in magistrates' courts.

In the UK, there are "tribunals" which may consider administrative cases. Senior judges are appointed by the monarch, lower judges - by the Lord Chancellor. A judge is appointed for life until the age of 72 and can only be dismissed by the Lord Chancellor if they commit an illegal act.

As to the Constitutional Court, it is not in the UK. The competence for development of decision-making is attributed to: the High Court of Justice, the Court of Appeal and House of Lords which has the right to review a case"(Kh. Khokh. U. Magnus. P., 2001).

Appeal is a new legal institution which was not a characteristic of the Soviet legal concept. In the early development of European cultural people states, court represented an institution of holy people. It enjoyed full independence as initially the government did not exist at all, and even afterwards it was so weak that could not subordinate and operate the courts. Later, the gradual development of a centralized state power and the strengthening of public institutions already demanded control of public institutions, and the court began to gradually lose independence. This led to the origin of the rights of members of society who could file a complaint against the court or governmental bodies and apply to the government with it. In this stage of state development, the method of appeal was unknown, while current rules made it possible to amend or revoke the decision only by the decision-making court itself. The origin of method of appeal was possible only if the central government was strong enough to place control and hierarchically subordinate the public court or at least change it will its own institution. These general provisions find proof in the old Roman and European people’s history of state and law development (G. Kiria, 2002).

Examination of appeal institution is not possible unless it signs and concepts are defined. According to the Georgian Civil Procedure Code, the aim of appeal is to re-solve the case i.e. revising the case again, either wholly or partially (Sh. Kurdadze, N. Khunashvili, 2012). The appeal involves reviewing the decision made by the trial, re-examination of those requests which were the subject of the discussion at the first instance. Reviewing new demands in the court of appeal after trial court is unacceptable. New requirements may only be the subject to the discussion by the first instance (Sh. Kurdadze, N. Khunashvili, 2012).

According to the contents, appeal can be divided into two types: full (unlimited) and incomplete (limited) appeal.

Full or unlimited appeal – it is such an appeal, according to which the following might be checked: materials of the case, the facts, the evidence, the legality of the decision and whether the proceedings are in accordance with legal standards which define the legal rules. In addition, the parties can submit new facts of the case and the evidence which was not presented in the first instance (4).

Therefore, in the case of full appeal, the court re-considers the case again and does not return to the first instance court for re-examination.

Limited appeal represents a review of the decision taken by a lower court based on the factual basis submitted in the Court of the First Instance by the parties. Based on the general rule of limited appeal, no new references general rule of appeal at the Court of facts and evidence at trial of a new reference of facts and evidence is permitted; however, citing certain conditions or circumstances is allowed. Thus, in the case of limited appeal, the Court of Appeal usually reviews the case based on the current evidence which had already been considered by the court of the first instance (i.e., was examined the Court of the First Instance).

In case of incomplete appeal, the appeal court has the right to return the case to the trial court for reviewing and re-considering the decision (Sh. Kurdadze, N. Khunashvili, 2012).

The Georgian civil procedural law gave advantage to limited appeal between these two. This type is widespread in France and Italy.

As for submitting new facts and evidence in the court of appeal, according to the Georgian Civil Procedure Code: "New facts and new evidence may be presented at the court of appeal. The Appeals court will not accept those new facts and evidence which could have been submitted to the Court of First Instance, but were not without any good reasoning".

Therefore, the Code of Civil Procedure does not prohibit the parties of the new evidence submitted and the new facts to bring in the Court of Appeal, but the two sides have been said they could if they had the facts and evidence presented to the trial court, and a good reason, whether they submit the first-instance court.

It also treats respectively traditions of some countries which involve unlimited right to appeal a case in the second instance. The Consultative Council of European Judges expresses its own attitude towards the fact that it does not approve such approach. There must be some limits for all parties to present new evidence or new issues of law. The appeal should not be treated as an unlimited opportunity for filing amendments to the factual and legal issues, which could and should be submitted by the parties in the first instance. This diminishes the role of the judge of the first instance and in fact could potentially lead to emphasizing the unsuitability of the judge in the case management.

Conclusion

Thus, we can conclude that generally ancient Rome laws have a special role in shaping and development of the legal space. The legal system was quite highly developed there and with time it was modified so that eventually it became the basis of almost all countries. The first historical evidence of the emergence of appeal can be found in the ancient Rome laws.

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JUSTICE AGAINST «LAW AND ECONOMICS»

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Abstract

The main issue of the paper is the problem of adaptivity of «law and economics» as universal doctrine. For example some cultural specificity of Russia put barriers on the development of economic analysis of law in the country. However it pointed in that all problems are not crucial and there are some tools to solve it. The most popular argument against the «law and economics» is that efficiency which is the main category of this field, sometime contradicts Justice as the main category of law. Nevertheless it was proved that there is no «gap» between Justice and efficiency.

Another problem of «law and economics» in some countries is the doubtfulness of rational behavior assumption which is very important part of «law and economics». Although some oncoming investigations of this theme are required, it does not look as a big problem.

The conclusion is that economics analysis of law is a science field which is universal, although it can be some variations because of national specificity.

Keywords: Efficiency, Justice, corporate law, economic analysis of law, freedom of contract

Introduction

Economic analysis of law is a science tendency that has been developing quite extensively in the US and Western Europe since 1960-Th. It dates back to Adam Smith, Jeremy Bentham, Cesare Beccaria. However, in its present form economic analysis of law appeared in the works of Ronald Coase, Guido Calabresi, Richard Posner, Gary Becker, etc (Posner, 1998, p. 2-4).

No wonder, therefore, that western scholars are ahead of this field. Many problems discussed for example in Russian science currently, were investigated a few decades ago by R. Posner, G. Calabresi and their prominent associates.

However, to be considered as a universal theory economic analysis of law has to prove its applicability in different parts of the world, not only in the West. Thus, the hypothesis of this paper is: whether economic analysis of law is self-sufficient, powerful science field of activity its methods and theoretical models could be used in different countries regardless of political, cultural, historical and religious backgrounds. Certainly, the factors mentioned above, determine specificity of economic analysis application in the definite state, however the general application is the same. I will demonstrate it on the example of the Russian Federation.

I.

Russia is very difficult country. There are few hundred ethnic groups; all confessions are represented in our country. We also have not an easy political history. During the tsar's time state power was closely linked with the church, in the soviet period, on opposite, the church was persecuted. Of course, all that was reflected in the law.

The present legal system as well as legal science follows of the soviet ways and habits. Surprisingly, but soviet science, despite its economical determinism, did not accept economic analysis of law. It was quite conservative system of knowledge.

Generally there are two models, two conceptions of legal consciousness. In European tradition the historical school of law is very powerful. It formed dogmatism and internalism of legal thinking. That means treating law as separate, independent part of humanitarian science. The lawyers look responds to the questions they face in practice, in the intrinsic logic of law. If the law has gaps a judge or another practitioner applying to dogmatic methodology, has to cover the gaps based on intrinsic rules of the legal system.

The other type of legal consciousness is American tradition to consider the law externally, «from the outside». Lawyers based on this approach can find practical solutions of their problems by means of economic analysis of law.

Such a specificity of American legal practice caused creation and development of the special science fields. For example, «law and economics» deals with strategic economic decisions taken by official state agencies. Economic analysis of law investigates efficiency of such decisions.

European science due to the little language barriers, better academic mobility, accepted American standards rather soon and began to develop «law and economics». However the Soviet science (and respectively the Russian science) being isolated, overcomes dogmatism very problematically.

The first interpretations of American papers appeared in 1990-th. The first experts of this problem also came into being 20 years ago only.

No wonder that this tendencies faced strong opposition. For example the new Civil Code was worked out for last five years. During this period, the contradictions between «old school» and economic analysis of law were clearly revealed. In order to explain the nature of this contradiction I have to make some explanations.

R. Posner characterizing economic analysis of law, points out that it has 2 branches. The first one (and the older one) deals with laws regulating economic activity. The other one (relatively new) analyses nonmarket activity (Posner, 1998, 4).

So the economic analysis of law treats the legal phenomena using economical methodology. The cornerstone of this method is category «efficiency». «Law and economics» sees the law system through the lens of efficiency. Based on this viewpoint experts suggest the most effective way of regulation.

This is exactly the point which is highly criticized by some Russian experts. They consider law to reflect some moral values and imperatives, not only efficiency. The thesis often noted is that efficiency contradicts Justice, and the latter is endogenous to Russian law (due to many historical, religious and other reasons).

To make it clearer let's examine a definite case.

The corporate law was changed significantly in the current edition of Civil Code of the Russian Federation. One of the most important changes is a possibility of non-proportional representation in the equity capital of the legal entity. Previously, the Civil Code permitted only proportional representation, i.e. the amount of corporate rights depended on the sum invested in the corporate's capital. The current edition of Civil Code suggests to the shareholders to decide if they use proportional or non-proportional representation.

This idea faced very strong opposition in the Russian academic circles. One of the most respectful civil law expert in the country, professor E.A. Sukhanov wrote: «it is obvious the injustice and immorality of such a conception which allow to limit the rights of minority shareholders in any way» (Sukhanov, 2013, 8). He continued: «the justice and morality are the base of the law…The attempts to give unreasonable privileges for one group of shareholders to the prejudice of another, including minority shareholders cause violation of private and public interests» (Sukhanov, 2013, 8).

To generalize the position of E.A. Sukhanov, I will quote the following: «the law should be based on the noneconomic features of morality and justice. The parties of monetary dispute wait a fare decision from the court, but not a transaction cost cut» (Sukhanov, 2013, 6).

So we see a conflict between the economic analysis of law supporters and their opponents. They initial positions are clear. For economic analysis the efficiency is the main value which could be provided by the freedom. Therefore the Constitutions of all leading countries suggest the freedom of economic activity as a tool of achieving the efficiency. The antagonists of such a way emphasize that a Justice must be taken into considerations. Moreover, it is more important value than efficiency. As far as Justice and efficiency can contradict sometimes, one has to remember that law is a tool of providing Justice, not efficiency.

Here arisen a question, whether efficiency and Justice contradict and is it possible to find a balance between them? If the conflict is real, it seems an obstacle on the way of «law and economics» in such countries as Russia.

In order to answer this question first of all we need to define the Justice. It is an uneasy task. The matter is that Justice is more philosophical definition, than legal. However, many laws mention this term. For example there are the goals of American Constitution in its preface, and among these goals is stated «establish Justice». German Constitution, declaring the recognition of human rights, proclaims they are the base of peace and Justice in the World. Preface of Brazil Constitution states that National Constituent Assembly promulgates the Constitution with the aim of providing Justice.

Such a non-legal definitions are used in the many law fields. For instance the civil law of many jurisdictions prescribes to act prudently and with a good faith.

The obvious question is how to determine a good faith in economic agents' behavior? Which benchmark a judge possess, investigating this question? Historically the western law was based on the religious ideas. Consequently the Justice was Christian oriented. However the secular states were established in the West in 18-19-th century, therefore it is impossible to use religious rhetoric nowadays.

So the problem of Justice is a philosophical question, the question of ideology of the society.

There are two concepts of Justice in the philosophy: deontology and consequentialism. The first one insists on that there are some basic moral values to be taken into account regardless of the consequences. Meanwhile the consequentialism points that the results of some actions is the only criteria for the moral estimations of this actions (Michaels, Alexander, Larry & Moore, 2012).

The first-class minds have been working on this problem for few millenniums. However, they failed to achieve a clear understanding. In the light of mentioned above, it looks too strange that lawyers claim something as fare or not. It is really an uneasy task to determine the fairness of something, except some clear cases, such as slavery. Lawyers often accuse economists in the so-called «economic imperialism». This term addressed by attempts to use economic methodology to all science problems. However the spreading of legal understanding of Justice to all aspects of life looks like «legal imperialism». Is this kind of imperialism better than economic imperialism? It is dubious.

Moreover if one examines economic agents in dynamic, not in static, he will see there is no strong contradiction between Justice and efficiency. It could be illustrated by the example of Professor E.A. Sukhanov, mentioned above. If one considers non-proportional representation in the equity capital of the legal entity in static, it really could look not fare. However in dynamic the situation is different. The person, who agrees to have a non-proportional representation, obviously has some reasons to do this. Arguably that reduction of corporate rights let him to benefit from some extraordinary skills or knowledge of his partner. Another possibility - the owner of the company can make good incentives for the top-management of the company by means of this scheme. Probably the social status of the person on its own benefits his partner.

To make a long story short: the freedom of contract provides efficiency. This formula is widely recognized by the experts. Thus, Cooter and Ulen underlined that «the presumption for freedom of contract is supported by its conduciveness to welfare…» (Cooter & Ulen, 2012, 341). Peter Cserne also emphasized that freedom of contract has been traditionally supported by its likely benefits in terms of social welfare (Cserne, 2014, 2).

Recurring to the non-proportional representation in the equity capital, it could be mentioned that: «Most people look after their own interests better than anyone else would do for them» (Cooter & Ulen, 2012, 342).

One more citation: «If two parties are to be observed entering into a voluntary private exchange, the presumption must be that both feel the exchange is likely to make them better off, otherwise they would not have entered into it» (Trebilcock, 1993, 7).

Moreover, the economic analysis of law has internal resources for modification in accordance with specificity of definite country. Let’s consider the example from the contract law. The freedom of contract is a cornerstone of this field; however the limits of freedom of contract are the main subject of investigations in contract law. One of the reasons of such a limits is so-called externalities, i.e. a cost or benefits imposed by contract to the third parties who are not involved in the transaction. As far as there are many externalities of different kinds, the question arises: what externalities must be taken into consideration and what must not. For example there are «moral externalities» when some people find certain type of contracts morally offensive. Mainstream economics is unlikely to provide help in this matter (Hatzis, 2006).

However this position is not a dogma. If the scholars of some countries suppose this conception is not acceptable under the circumstances of local culture, they can modify it, saving the theoretical models of «law and economics». Thus, the contradiction between Justice and efficiency is mainly illusory. Consequently this is not an obstacle on the way of «law and economics».

There is one more difficulty with «law and economics» in many countries. Richard A. Posner put forward very interesting question. Is it plausible to suppose that only inhabitants of modern Western (or Westernized) societies are rational? (Posner, 1998, 1-2).

The assumption of rationality of human behavior is very important for «law and economics». Many its principles, conceptions and models were deduced from this assumption. If maximization of wealth is not an obligatory requirement of non-Western societies, the «law and economics» is not an appropriate method of investigating their legal system.

Once again we face the problem which runs over the scope of the legal field. Psychological, culturological, philosophical researches are required. The conceptual apparatus constructed by «behavioral economics and law» could be used in such works.

Nevertheless in the absence of such results some theoretical conclusions could be made. No doubts, that cultural difference between people of different countries is significant. However this difference mainly concerns the non-market behavior, such as marriage, religious, human rights etc. In the economy people of all countries are more or less the same. They can produce some goods and they want take as much money for it as it possible. This is exactly what is called maximization of utility or maximization of people satisfaction. The obvious evidence of this assumption is the fact that market economy can work effectively in completely different countries. The majority of countries which tried to build socialistic economy failed to do it and began to create «market». It proves that basic necessities of people are the same regardless of some cultural differences.

In the light of mentioned above the validity of «law and economics» at least in its «market» part (i.e. in analysis of market behavior) is not depended on the countries historical background. As for the analysis of non-market behavior it is more complex issue. It could be supposed that economical tools are not appropriate in some cases. Additional examinations of this problem on base of «Behavioral economy and law» methods are required.

Conclusion

It was shown that «law and economics» faces many antagonists on the way of its development in some countries, particularly in Russia. Their typical argument is that efficiency contradicts Justice. However it was proved in this paper that idea of efficiency is very close to the ideas of freedom and social wealth. It is unlikely to be said that freedom and wealth are not fare. So the thesis that Justice and efficiency contradict each other is not correct.

However it could be accepted that every country has its own cultural specificity and certainly, this fact can determine the difference in the way of «law and economics» application. Nevertheless it is also not a critical point, because there are some internal resources of law and economics for modification in accordance with specificity of definite country.

A more difficult problem is to define if the assumption of rationality of human behavior is right for non-Western societies. If it is not, «law and economics» is not really applicable in such countries. In the light of mentioned above additional investigations in this field are required. From theoretical perspectives it could be said that market behavior of people is more or less equal regardless of cultural differences. Consequently «law and economics» is valid method of research at least in its «market» part all over the world.

The conclusion is that economics analysis of law is a science field which is universal, although it can be some variations because of national specificity. It is also important to stress out that there is no strong contradiction between the values of efficiency and Justice.

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