UDK 356

ISSN 2217-5202 (ONLINE)

SLER

STUDENT ECONOMIC LAW REVIEW




STUDENTSKA REVIJA ZA PRIVREDNO PRAVO

STUDENT ECONOMIC LAW REVIEW

University of Belgrade Faculty of Law

YEAR III (2012/2013) / ISSUE 2.

UDK 346

ISSN 2217-5202 (Online)

Година III (2012/2013) / Број 2
Year III (2012/2013) / No 2

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The Journal is issued two times per year and may be downloaded from the Internet at www.selr.bg.ac.rs

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u ovom broju

ČLANCI – ARTICLES

PRIKAZI – LEGISLATIVE REVIEWS

ARTICLES

NEW FOREIGN DIRECT INVESTMENT POLICY AND LEGISLATION OF EU:

WHAT IS THE POSITION OF EU IN NEW FDI DISPUTE SETTLEMENT REGIME?

Milica Novaković*

After the Treaty on the Functioning of the European Union (TFEU) came into force, foreign direct investment (FDI) policy came to the exclusive competence of the European Union (EU). Consequently, most bilateral investment treaties (BITs) are to be negotiated and concluded by the EU, whereas Member States will be eligible to sign BITs with third countries only when the EU empowers them. By introducing these novelties the EU has brought many changes and challenges in investment arbitration, as well, since the EU is neither a member to ICSID of the World Bank and signatory of the Washington Convention, nor party of the Statute of the International Court of Justice. Moreover, besides most recent legislation that has introduced some clarifications, there are still lots of unresolved issues that first have to be solved, so that the new FDI policy can result in workable treaties that will manage to prevent complications in possible disputes. Accordingly this article will first present the sources of the new common FDI policy and law and the novelties introduced after TFEU entered into force. Secondly, the article will describe which constraints are coming from general principles of the EU that can both positively and negatively influence present and future position of the EU as a party in dispute settlement proceedings, whereas the third part will try to clarify the position of the EU in a few possible dispute settlement scenarios.

Key words: *foreign direct investments, European Union, arbitration, consent, jurisdiction*

Introduction

With the integration of FDI into the common commercial policy the EU has started a process in which it "is re-defining the scope and direction of its future foreign investment law policy".[1] New foreign direct investment policy of the EU and new EU-third countries bilateral agreements are going to substitute more than 1000 bilateral investment treaties signed by Member States and third countries.[2] In other words, the EU is going to appear as a party to treaties, and, eventually, as a party to disputes. But, since investment treaties are not simply revolutionary because of the substantive protection they provide, but because they usually contain provisions of procedural rights that give investors mechanisms to enforce the substantive rights directly,[3] the current unclear and a bit ambiguous position of EU in some matters brings a lot of uncertainty to future treaty negotiations and dispute settlements, in particular. Thus, and because in most cases investors not only have rights, but have an "agreed forum to redress alleged wrong"[4] related to investments, it is reasonable for them to have clear provisions to rely on, as well as positions of the parties to the agreements and possible disputes. Unfortunately, that is not the case with EU and its relations with third countries at this moment.

As some notice "Union law contains a strong indication that in areas of exclusive external Union competence action of either Union institutions or the Member States should be attributed to the

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1 S. W. Schill, "Luxembourg Limits: Conditions for Investor – State Dispute Settlement under Future EU Investment Agreements", Transnational Dispute Management, 10(2)/2013, 1

2 Hogan Lovells Brochure: Investment Protection and Arbitration, available at: http://www.hoganlovells.com/files/Publication/6f8746d1d9834402ad5614758bfe8050/Presentation/PublicationAttachment/2fd71954-1430-4f22-9c40-25717b8f6c9f/IPA_Brochure_2011.pdf (02.05.2013), 7, also in Electrabel S.A. v. The Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19, in para. 4.8. the tribunal brought more concrete data on this matter. Namely, the tribunal determined the figure of around 1200 BITs, concluded between EU Member States among each other, as well as with third countries, which represents almost a half of all investment agreements currently in force in the world, whereas almost 50% of these were made by only 6 Member States: Denmark, France, Germany, Netherlands, UK and Belgium (with Luxembourg).

3 S. D. Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, McGeorge Global Business and Development Law Journal, Vol. 19, 2007, p. 343.

4 Ibid.,Fn. 25, also in K. Llewellyn, Some Realism about Realism – Responding to Dean Pound, (44 Harvard Law Review 1222, (1931)), also published in D. Kenedy, W. Fishe, The Canon of American Legal Thought, Princeton University Press, Princeton and Oxford, 2006, 142

Union, as only the Union has the legal power to act in this field and to remedy a potential breach of international law".[5] However, this is not either framed, nor defined and unambiguously specified in the context of dispute settlement so far. Thus, this article is aimed to clarify the aforementioned, not only because current EU status requires so, but because of its large impact, since "the nature of the Union's external competence is an important factor in the allocation of international responsibility".[6]

The following lines will try to provide an overview of relevant law so that abovementioned dilemmas can be resolved. Accordingly, the first part will present the main features of the latest EU FDI legislation. The second part will deal with constraints set up by Court of Justice of European Union (CJEU, or Court) in terms of competences of the EU and supremacy of EU law, including the important role of the preliminary rulings procedure. And, then the third part will transit to the existing international investment arbitration rules, principles and case law and examine possible scenarios in which the EU can appear as a party of a dispute, with all current problems, so that in concluding remarks we can try to come to as clear and precise as possible an answer to the question posed above.

1. New EU FDI Legislation

According to Article 3(1)(e) of the TFEU the EU shall have exclusive competence in common commercial policy,[7] which pursuant to Article 207(1) shall be based on uniform principles, in particular with regard to foreign direct investment.[8] Consequently, it is only EU that has authority to negotiate and conclude bilateral investment treaties with third countries, unless it empowers a Member State to do so itself pursuant to Article 2(1) of the TFEU.[9] Since the EU has been determined to be "a new legal order in international law",[10] and later confirmed as "a municipal legal order of transnational dimension",[11] as the world's leading source and host of foreign direct investments[12] it brings novelties that will affect existing and future bilateral investment agreements not only of its Member States, but also worldwide.

In order to implement novelties introduced by the TFEU, the European Commission (Commission) issued a Communication in July 2010,[13] which sets up the agenda for EU investment negotiations. According to this communication "one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable" and "the Union will have to take into account each specific negotiation context".[14] Also, this communication calls upon the EU to implement the principle of non-discrimination, as a key ingredient, through "most-favored-nation treatment" and "national treatment", as well as to implement "fair and equitable treatment" and "full security and protection treatment".[15] Most importantly for this article, the Commission explicitly stated that the dispute settlement system will cover investment provisions of EU investment agreements, which will include investor-to-state dispute settlement mechanisms.[16]

However, the most significant document, in regards to the new FDI policy, is the most recent Regulation No. 1219/2012[17] (2012 Regulation) of the European Parliament (Parliament) and European Council (Council). It sets up the legal basis for transitional arrangements for bilateral investment agreements between Member States and third countries, as a continuation to the Parliament's May 2011 legislative resolution.[18]

5 F. Hoffmeister, Litigating against the European Union and Its Member States– Who Responds under the ILC Draft Articles on International Responsibility of International Organizations, The European Journal of International Law Vol. 21 No. 3, 2010,p.743.

6 Ibid.

7 Consolidated Version of the Treaty on the Functioning of the European Uni1on [2008] OJ C 115/47, Art. 3 (1)(e)

8 Ibid., Art. 207 (1)

9 Ibid., Art. 2(1);

10 Case 26–62, NV Algemene Transport– en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Reference for a preliminary ruling: Tariefcommissie – Netherlands [1963] ECR 1, 12

11 Opinion of the Advocate General Manduro in Joined Cases C – 402/05 P and C – 415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities [2008], European Court Reports 2008 I – 06351para. 21

12 http://ec.europa.eu/economy_finance/eu/globalisation/fdi/index_en.htm

13 European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy, COM(2010)343, Brussels, 7.7.2010

14 Ibid., 6

15 Ibid., 8

16 Ibid., 9–10

17 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitinal arrangements for bilateral investment agreements between Member States and Third Conutries, OJ L 351/40

18 European Parliament, Resolution 2012/C 377 E/33, OJ C377 E/203

The 2012 Regulation, which has been in force as of 9 January 2013, adopts the 2011 Resolution regulation proposal stipulating that Member States shall immediately inform the European Commission of any request for a dispute settlement under the auspices of the underlying agreement. As soon as the Member State becomes aware of the request, the Member State and the Commission shall fully cooperate and take necessary measures to ensure effective defense, which, where appropriate, may include the Commission's participation in the procedure.[19] On the other hand, in case of activating any dispute settlement against a third country (which shall also include consultations), the 2012 Regulation stipulates that the respective Member State shall seek the agreement of the Commission for such activation, and include the Commission in relevant procedures where appropriate.[20]

Moreover, there is another, even more important regulation that is expected to be adopted soon, since all Member States agreed on the text of proposal. It was proposed by the Commission in 2012 and, among other issues, defines a position of the European Union as a respondent in investor-state dispute settlement tribunals.[21] Also, it establishes clear division between competences of the EU and Member States in case of disputes with third countries, which is extremely important and necessary for the EU, in particular for current and future treaty negotiations and expectations third states will have.

Namely, the 2012 Proposal explicitly determines that the EU shall act as a respondent if disputes concern treatments afforded by the institutions, bodies or agencies of EU,[22] or if the Commission decides that the EU shall act instead of the Member State concerned[23], or, finally, if a Member State fails to confirm that it will act as a respondent within 30 days upon receipt of claimant's notice of its intention to initiate arbitration proceedings.[24] When it comes to the settlement, in the case when the Commission considers that a settlement of a dispute concerning treatment exclusively afforded by the EU would be in the interest of the EU, it may adopt a decision to approve the settlement.[25] However, in such a case where the dispute concerns a treatment afforded by a Member State, and Commission considers that the settlement would be in the interest of the EU, or the Member State consents to settle a dispute itself, the Commission and Member State will cooperate and consult about the necessary elements for negotiation and implementation of a settlement.[26]

So far it can be concluded that within only three years the EU quite successfully worked and quickly progressed on regulation and implementation of the new direct investment policy, shaping in particular its position towards third countries, so doubts some practitioners had regarding who would be liable and who would be eligible as a respondent in the event a future EU investment treaty is breached[27] no longer stand. However, even though the EU has already been using newly adopted and proposed rules in negotiation with some countries and markets,[28] there are some who are reasonably skeptical about wide definitions, but unexpectedly hesitant to try to explore them,[29] and some who claim that the exact scope of EU competence is still not precisely laid out.[30] Finally, some are less critical, but optimistic, and recognize the 2012 regulation proposal as an "institutional basis for additional improvements to be made in the near future",[31] but with no further elaboration on this conclusion.

Departing from the previous overview of the latest FDI legislative developments, the following part will further provide the analysis of the CJEU's

19 Regulation 1219/2012, Art. 12 (1)(b), 2011 Resolution, Art. 13(2)

20 Ibid., Art. 13(3)

21 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor state dispute settlement tribunals established by international agreements to which the European Union is party, COM (2012) 335 final, 2012/0163 (COD), Brussels, 21.6.2012

22 COM (2012)335 final, Art. 4

23 Ibid., Art. 8(1)(a)

24 Ibid., Art. 8(1)(b)

25 Ibid., Art. 12(1)

26 Ibid., Art. 13

27 P. Nacimiento, Who's a Respondent in Light of Art. 207 of the Lisbon Treaty?, available at: http://kluwerarbitrationblog.com/blog/2010/04/30/who%E2%80%99s-a-respondent-in-light-of-art–207-of-the-lisbon-treaty/ (02. 05. 2013.)

28 European Union started negotiations with Canada, India and Singapore, according to K.Kate Lalor, EU Proposal: Who will investors face off against in future investment treaty claims?, available at: http://kluwer.practicesource.com/blog/2012/eu-proposal-who-will-investors-face-off-against-in-future-investment-treaty-claims/ (02.05.2013.), as well as with Mercosur, which is confirmed by Commission in COM (2010) 343 final,

29 Ibid.

30 G. Ünüvar, Dispute Settlement Alternatives in Future EU BITS – Building the Framework for Investment Protection, IES Working Paper 5/2012, available at: http://www.ies.be/working-paper/dispute-settlement-alternatives-future-eu-bits (02.05.2013), 13

31 N. Bernasconi – Osterwalder, "Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements" Investment Treaty News, Issue 4, Vol. 2, July 2012, p. 14.

position on the issue concerned, so that in the third part we can make a transition to the rules, principles and case law already established and accepted in international investment arbitration, and try to clear out the position of the EU in the new dispute settlement regime.

2. Court of Justice of the European Union – Constraints of EU Law which Protect the EU Legal Order and Affect the Position of EU in New Dispute Settlement Regime

Despite the fact that the above described legislation has successfully commenced, implementation of new EU FDI policy, one of the challenges and most controversial issues that stands in the way of further developments is the availability and design of investor-state dispute resolution under future EU international investment agreements, but from the perspective of principles of EU law developed by CJEU and its perspective of guardian of EU law.[32] More concretely, the fundamental question is whether EU law permits investor–state dispute settlement under future EU investment agreements, under which conditions[33] and what is the role of the CJEU in this matter.[34] What can also be of great importance for future dispute settlement is the availability of the preliminary rulings procedure in investor – state disputes.

2.1. Safeguarding EU Law by CJEU and its Impact on the Dispute Settlement

Namely, it has been established that EU law is "a new legal order of international law for the benefit of which the states have limited their sovereign rights",[35] and as such it is an autonomous legal order in relation to both domestic and international law.[36] Additionally, safeguarding this autonomy is one of the most important roles of the CJEU.[37]

Stephan Schill indisputably argues that the CJEU has a duty to ensure the uniform interpretation and application of EU law, but he also states that the CJEU has embraced the role of a sort of constitutional court of the EU.[38] Can this influence future investor – state dispute settlement that involves the EU?

According to Schill's submission, based on case law of the CJEU, the court's "jurisprudence on international dispute settlement is sometimes interpreted as an obstacle to investor-state dispute settlement" under future EU international investment agreements,[39] but the court itself has not generally opposed the possibility of either the EU or its Member States to be parties in international dispute settlement.[40] Such would definitely be against sovereign rights of Member States and their rights and obligations arising from signed agreements. But, he further submits, the CJEU has conditioned participation of the EU and Member states in international proceedings in order to preserve the autonomy of EU legal order and its role as "EU's constitutional court"[41] being also, as is well accepted, the only EU body that can interpret EU law.

In its Opinion 1/91, the CJEU has determined that if one international agreement provides its own system of courts, which includes a court with jurisdiction to settle disputes between contracting parties and interpret the provisions of the agreements, the decisions of that court are binding for EU institutions, including CJEU, and, in principle, such an international agreement is compatible with EU law.[42] However, it further states that only the CJEU has the competence to decide on matters that concern the interpretation of EU law and distribution of competences within EU,[43] and not the above-described court. Such is reasonable and logical, given the division of competences in the EU according to the TFEU and the case law of the CJEU.

Thus, it can be said that the CJEU is a shield for the protection of the EU and EU law, but that does not mean that the CJEU, having that role, will negatively influence investor-state dispute settlement, nor makes it "incompatible with EU law".[44] Since it is established that "EU law is a highly developed international legal order with several particular features, in particular the primacy of EU law over national law and direct effect of EU law" but it is best viewed as a subsystem of public

32 S. Schill op. cit., 1

33 S. Schill op. cit., 3

34 Ibid.

35 ECJ, Case 26/62, NV Algemene Transport– en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Reference for a preliminary ruling: Tariefcommissie – Netherlands [1963] ECR I, 12

36 ECJ, Case C–459/93, Commission of the European Communities v. Ireland [2006] ECR 2006, I, para. 123., also in S.Schill op. cit., 6

37 Schill, 5

38 Ibid., 3–6

39 Ibid., 6

40 Ibid., 7

41 Ibid., 7

42 European Court of Justice, Opinion 1/91, ECR I–6079, [1991], paras. 39–40

43 Opinion 1/91, para. 36

44 S.Schill op. cit.,, 11

international law,[45] there is no risk nor hurdle for the EU to be signee to international agreements, as well as party to the proceedings. A perfect example of the above-described could be the Energy Charter Treaty.

However, it is suggested that in case where both the EU and its Member States appear as parties to the mixed agreements, and consequently parties to the proceedings, the fragmentation of competences, established by EU laws and principles, must be preserved so to be in a line with the Opinion 1/91[46]. Yet, this is to be examined in practice in future EU investment agreements, and so far, there is no example of this practice.

2.2. Role of the Preliminary Rulings Procedure in Investor-State Dispute Settlement

Now that it is established that there is no legal impediment arising from EU law that could constrain the EU and its Member States in a future dispute settlement, there is one more relevant issue – the issue of the preliminary rulings procedure. It is of great significance to the investment arbitration and application of EU law, particularly because it has been accepted that the function of the preliminary rulings procedure is to ensure "uniform interpretation and validity of EU law across all EU Member States"[47] and because some preliminary questions of EU may appear before arbitral tribunals in investment treaty arbitrations.

Whereas it is established that arbitral tribunals are not able to request preliminary rulings,[48] there are still a couple of *procedural channels* through which certain issues related to arbitral proceedings may come at some point to the CJEU. It could be through either the procedure of the enforcement or annulment of the awards, or even before, if the court of the seat of arbitration *intervenes* in the early stages of the arbitration proceedings.

But, still, there is another question, related specifically to the investment arbitration, and that is if investment arbitral tribunals can refer to the CJEU for preliminary rulings themselves and under which conditions. Since it is very likely that in future arbitrations the seat of the proceedings will be somewhere in the territory of the EU, some of the domestic courts could and will ask for preliminary rulings, but some suggest that the CJEU can, without amendments to the TFEU, enable investment arbitral tribunals to refer independently, as well.

Namely, John P. Gaffney argues that investment arbitral tribunals fulfill almost all the criteria established by the CJEU for what is to be considered as a court or a tribunal in the context of Article 276 of the TFEU. Namely, 1. investment arbitral tribunals exercise judicial function, 2. they are established by the treaties, 3. the jurisdiction of those tribunals is compulsory, 4. the procedure is *inter partes*, and 5. they are (and must be) independent of the State party.[49] However, right away he raises two arguments contrary to the previous arguments: firstly, that investment arbitral tribunals can regard themselves as "operating within the international legal order, separately from EU legal order" even when they are seated in a EU Member state, which can reduce the motivation of tribunals to refer to the CJEU, and secondly, in the case where the tribunal is enabled to refer to the CJEU for preliminary ruling, such an action would certainly cause delay in arbitral proceedings given the overload of the CJEU with cases and the time necessary to deal with each reference.[50]

Is Gaffney right when he states that arbitral tribunals have all the features of tribunals as determined by the CJEU? And do preliminary rulings have such importance and significance for investment dispute settlement? The answer to the first question would be – no. Quasi judicial role of arbitral proceedings is indisputable, but party autonomy and consent of the parties is what makes basic preconditions for arbitration proceedings, which is not the case with state courts in the context of Article 267 TFEU. Moreover, tribunals are not permanent bodies, as courts are, and they clearly have a "mandate" assigned by the parties and their agreement(s). As for the second question, there is no doubt that preliminary questions could already be raised in some past arbitration, and that, in the future, they will be needed even more. However, the only way to obtain the preliminary ruling, that is available for the time being, is through domestic courts of EU Member States.

Now that new FDI legislation is presented, as well as the position and *defense* of EU law and principles, we can move to a few possible scenarios and try to clear out what is the position of EU in new FDI dispute settlement regime in some practical terms.

45 Burgstaller, 468

46 Schill, 12

47 J.P. Gaffney, "Should Investment Treaty Tribunals be Permitted to Request Preliminary Rulings from the Court of Justice of the European Union?", Transnational Dispute Management, 10(2)/2013, 1

48 Gaffney, 6

49 J. P. Gaffney, 10

50 Ibid., 13–14

3. What is the Position of the EU in New FDI Dispute Settlement Regime?

As established, some of the general principles of EU law are the principle of legal certainty and the principle of legitimate expectations. Given that the CJEU has established that:

1. the principle of legal certainty requires that the EU rules must enable those concerned to know precisely the extent of the obligations which are imposed upon them,[51]
2. whereas the principle of legitimate expectations may be invoked against EU rules only to the extent that EU has previously created a situation which can give rise to a legitimate expectations,[52] and that,
3. the arbitral tribunal in *Eureko* decision determined that it is important to bear in mind that "as a paramount factor relating to jurisdiction the tribunal is established by and derives its powers (if any) from the consent of the parties"[53] and that it "cannot derive any part of its jurisdiction or authority from EU law as such; its jurisdiction is derived from the consent of the Parties to the dispute"[54], the following lines will deal with the position of the EU in future possible investment dispute settlement scenarios, taking into consideration the constraints imposed on it by very EU law, and their possible conflict with existing arbitration rules that are usually agreed upon by the parties to the agreements.

There are also a few dilemmas and impediments of a formal nature, that to a certain extent limit the EU, given that it is not a state. Moreover, there are some avenues where the EU has not appeared before as a party to the proceedings, and there is a question if it can appear at all. So, in order to finally answer the posed question, some of the solutions for dilemmas should also take into consideration these formal limitations.

It can be argued that the following is anticipation of certain scenarios, too, but what is for sure is that they are needed so that all future agreements that the EU will, hopefully, conclude can be negotiated in such way as to prevent, as much as possible, contradictions, ambiguities and lacunas.

First scenario and dilemma concern the question if the EU could be a respondent in future investment disputes, based on the Commission's regulation proposal. Namely, according to this proposal, the EU would maintain the right to act as the respondent in a claim where it determines that similar action could be brought against a Member State, where the EU could bear financial responsibility or where the Member State in question has chosen not to act as the respondent.[55] But, is this possible in practice? It is very ambiguous. Consent of the parties in investment arbitration is essential for the jurisdiction of the tribunal. But, in a situation where the EU this easily offers to be a party instead of Member States, the jurisdiction of future arbitral tribunals is already in question, unless third states clearly accept one, or all, of the above mentioned possibilities.

Moreover, in a situation where the EU itself is a contracting party to only one agreement which provides the possibility of investor-state dispute resolution it can participate in – the Energy Charter Treaty – but is not and cannot be a party to the ICSID Convention,[56] and, in a situation where there is still the opinion of the CJEU, which determined that FDI activities involving third states cannot be considered within the exclusive competence of the EU[57]

51 Case C–233/96 Kingdom of Denmark v. Commission [1998] ECR I – 5759, para. 38

52 Case C – 375/96 Galileo Zaninotto v. Ispettorato Centrale Repressione Frodi-Ufficio di Conegliano –Ministero delle risorse agricole, alimentari e forestali [1998] ECR I–6629, para. 50, also in Case T–282 /02 Cementwouw Handel and industrie BV v Commission, (judgement of 23 February 2006), para 77.para77

53 Eureko B.V. v. The Slovak Republic, UNCITRAL arbitration, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 220.

54 Ibid., para. 225.

55 Directorate – General for External Policies of the Union, Directorate B, Policy Department, Study: Responsibility in Investor-State Arbitration in the EU, available at http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=79450 (02.05.2013.), 2012, 7

56 The Energy Charter Treaty (Annex 1 to the Final Act of the European Energy Charter Conference) available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (02.05.2013), Art. 26; this has been further surprisingly clarified by the European Commission, and eventually accepted by arbitral tribunal in Electrabel case. Namely, in this case, European Union, via European Commission, intervened on the side of respondent, and in its written statement reiterated part of the written statement of the European Communities to the Secretariat of the Energy Charter, pursuant to Article 26(3)(b)(ii), which provides that „The European Comunities are a regional economic integration organization within the meaning of the Energy Charter Treaty. The Communities excercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions". Later in its decision arbitral tribunal accepted this as a main (and reasonable and logical) argument not to allow the European Union to be a disputing party. (see para. 3.21 of the decision)

57 European Court of Justice, Opinion 1/94, ECR I–5267, [1994]; However, there is a question if this is still standing because of the clear wording of Articles 3 and 207 of the TFEU

(which is in disharmony with another opinion of the CJEU that dispute settlement provisions are an exclusive competence of EU unless otherwise specified by the Treaties[58]), this gives a rise to few more questions (no matter the fact that this might be resolved differently on a case-by-case basis) that simply must be answered in the nearest future: How should the EU (re)act in case when it is not designated by a claimant as a respondent in an ongoing proceeding? To what extent will the EU be eligible to "maintain the right to act as the respondent"? Can 2011 Draft Articles on the Responsibility of International Organizations[59] be helpful in this kind of gap? How much certainty does this position bring to potential future claimants? How much confidentiality can a future potential claimant count on if the EU takes this flexible position about being a respondent?[60] Finally, since the EU (concretely, the Commission) has got significant power to determine whether to act as the respondent, there is one more question: How to define this power in the dispute settlement clause in future investment agreements?

In case of initiation of arbitration proceedings, all these questions may concern both third states and the EU (and be important, in particular, for saving the time and money on the proceedings), because, as established above, the nature of the Union's external competences is an important factor in allocation of international responsibility[61] and many potential proceedings could be blocked by this undetermined position of the EU.

The second scenario and related dilemma is what is the position and scope of responsibility of the EU in dispute settlement between a Member State and a third country. The 2012 Regulation establishes mandatory rules which, from the perspective of EU law, provide a legal basis for the EU (concretely Commission) to participate in dispute settlement proceedings both as co-claimant and co-respondent with Member States. Since the regulation concerns transitional arrangements, as well as already existing BITs with more or less clearly established and agreed dispute settlement provisions, the extent to which the EU can participate in dispute settlement under the provisions of the 2012 Regulation remains not only unclear, but makes current positions of third countries and Member States even more complicated. With certain risk that every investment entails, this uncertainty in terms of dispute settlement creates even greater risk, because it opened the door for dispute to be *extended* to the EU that originally, in existing treaties, did not even consent to possible dispute settlement mechanism(s). This is of the utmost importance, since "consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal"[62] and because the tribunals are established and derive their powers (if any) from the consent of the parties.[63] Thus, in case where the EU intends to interfere as a co-claimant, or co-respondent, there is a huge risk of not being able to do that, which will bring additional costs to the parties, as well as certain delays in the proceedings, until the tribunals decide on the jurisdiction.

Finally, the third dilemma, which is not so problematic, is about the position of the EU in different available fora – e.g. ICSID, arbitration under the auspices of International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC), and under UNCITRAL arbitration rules, and what are the possible scenarios that can occur.

Namely, as already explained, the EU is not and, so far, cannot be a member of ICSID since it is neither a state, nor a member of the World Bank, or a party to the Statute of International Court of Justice,[64] although it was announced

58 Opinion 1/91

59 2011 Draft articles on the responsibility of international organizations, see in particular Chapter IV, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf

60 In its Communication COM(2010)343 final Commission emphasized that among the main challenges EU has, in approaching investor state dispute settlement mechanisms, it is to ensure that investor-state dispute settlement is conducted in transparent manner! COM(2010)343 final, 10

61 See fn. 30

62 Z. Douglas, The International Law of Investment Claims, Cambridge University Press, 2009, p. 151.

63 Eureko B.V. v. The Slovak Republic, UNCITRAL arbitration, PCA Case No.2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 220.

64 G. Ünüvar, Dispute Settlement Alternatives in Future EU BITS – Building the Framework for Investment Protection, IES Working Paper 5/2012, available at http://www.ies.be/working-paper/dispute-settlement-alternatives-future-eu-bits (02.05.2013.), 16, also see: Statute of the International Court of Justice, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0, Convention on the Settlement of Investment Disputes between Member States and Nationals of Other States (Washington Convention, 18 March 1965), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; in most recent ICSID decision arbitral tribunal determined the following: "As to the Commission's reference to "the wrong forum", the Tribunal notes that the European Union could not be a disputing party to these arbitration proceedings (as a second respondent or otherwise) given that the European Union is not a

that the EU would explore, with interested parties, the possibility to accede to the Washington Convention, noting that this would require amendment of the Convention.[65] Thus, this forum is presently closed for the EU, and does not require any further elaboration. However, the EU *is* eligible to participate in arbitration proceedings under UNCITRAL arbitration rules,[66] which is strongly supported by some authors,[67] although, surprisingly, in its 2011 resolution the Parliament expressed its *awareness* that the EU *cannot* use existing UNCITRAL dispute settlement mechanisms.[68] The same, in terms of eligibility, is with ICC and SCC and other arbitration fora. Wording of the arbitration rules are in favor of the EU, no matter its unclear position, as to whether it is state or not.

Conclusion

The topic of this article was the position of the EU in the new FDI dispute settlement regime, as a consequence of the new EU FDI policy and legislation. As it can be seen from previous modest analysis, it is a very complex issue, and each question raised above can be separately and extensively argued and analyzed from the perspectives of EU law, international public law, investment arbitration case law and established rules and principles of international investment arbitration.

However, what can be concluded is that the EU definitely does have the subjectivity, capacity, and power to be a party to future disputes, as established by latest legislation, and provided by available arbitration rules and some international treaties. Current treaty negotiations that the EU is having with some states are, presumably, also in favor of the previous conclusion, despite the fact that neither the EU model BIT is available, nor we still know what the results of the negotiations are. One last thing to say is that new EU FDI dispute settlement regime now challenges many established rules and principles, so further research related to the topic analyzed above is absolutely necessary.

Contracting State to the ICSID Convention, as required by Article 26(4)(a)(i) ECT. The Tribunal also notes that the European Union could have been a disputing party in these proceedings, had the Claimant chosen to submit the dispute for resolution under the UNCITRAL Arbitration Rules or before the Arbitration Institute of the Stockholm Chamber of Commerce, as also provided by Article 26(4) ECT. That choice under Article 26 ECT was not, of course, available to the European Union, being a choice made by the Claimant alone." Electrabel S.A. v. The Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19, para. 3.21.

65 COM (2010)343 final, 10

66 UNCITRAL Arbitration Rules (as revised in 2010) in Art. 1(1) provide that „Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree."

67 G.Ünüvar, p.17–19.

68 European Parliament, European Parliament resolution of 6 April 2011 on the Future European international investment policy (2010/2203 (INI)), para. 33.

Milica Novaković

Nova politika direktnih stranih ulaganja i zakonodavstvo u EU: koja je pozicija EU u novom režimu rešavanja sporova oko stranih direktnih ulaganja?

Nakon što je Ugovor o funkcionisanju Evropske unije (UFEU) stupio na snagu, politika stranih direktnih investicija je prešla u isključivu nadležnost Evropske unije (EU). Kao posledica, najveći deo bilateralnih investicionih sporazuma će biti pregovaran i zaključen od strane EU, dok će države članice moći da zaključe bilateralne investicione ugovore samo uz saglasnost EU. Uvođenjem ovih izmena, EU je unela mnogo promena i izazova i u rešavanje investicionih sporova, posebno kad je u pitanju arbitraža, pošto EU nije član ICSID-a Svetske banke niti je potpisnica Vašingtonske konvencije, a nije ni članica Statuta Međunarodnog suda pravde. Ipak, i pored poslednjih zakonodavnih promena koje su donele određena razjašnjenja, ostalo je dosta nejasnoća koje će prvo morati biti rešene, kako bi nova politika stranih direktnih investicija rezultirala sporazumima koji će uspeti da spreče komplikacije u mogućim sporovima. Imajući u vidu prethodno, u prvom delu članka su predstavljeni izvori nove politike i prava stranih direktnih investicija EU i novine koje su uvedene nakon što je UFEU stupio na snagu. Zatim, u drugom delu članak će se baviti ograničenjima koja proizlaze iz prava EU, a koja mogu i pozitivno ili negativno da utiču na trenutnu i buduću poziciju EU kao strane u postupcima za rešavanje sporova, dok će treći deo pokušati da pojasni poziciju EU u nekoliko mogućih scenarija za rešavanje sporova.

Ključne reči: *strane direktne investicije, Evropska Unija, arbitraža, saglasnost, nadležnost*

AMICUS CURIAE BRIEFS BEFORE WTO DISPUTE SETTLEMENT SYSTEM: WELCOME FRIENDS?

Carlos Bellei Tagle*

Non-governmental organizations have clearly expressed their desires for participating actively in the development of trade policy within the framework of the main institution, the World Trade Organization. This intention has included the submission of amicus curiae briefs in the WTO dispute settlement system. This matter – not expressly regulated in the Dispute Settlement Understanding – has been controversial for most WTO Members. This article explores the main political and legal implications that arise from the acceptance of that sort of unsolicited communications, from the point of view of transparency in the process. The article suggests the need for regulation on the issue, a task that belongs to WTO Members and that encompasses the recognition of the contribution that non-governmental organizations may do in terms of legitimacy of WTO dispute settlement system, commonly regarded as especially closed.

Key Words: *WTO, dispute settlement system, NGOs, transparency, amicus curiae, public participation*

1. Introduction

Over the past years, non-governmental organizations have developed constant efforts in order to take part in international trade decisions. This increasingly empowered and influential attitude assumed by the civil society crashes with the traditional notion that understands that only sovereign states have the power to act and decide on the development of international trading regime. The creation of the World Trade Organization (WTO) has been seen as a valuable opportunity to realize such desires of influence, putting pressure on governments in order to open more active paths for participation.

This article focuses on the involvement of non-governmental organizations in the dispute settlement system established within the WTO by submitting *amicus curiae* briefs. As will be explained, this has been the most effective way – albeit controversial – by which civil society has expressed opinion on issues of public interest. After the introduction, the second part presents a general view on the main ideas and rules governing the WTO dispute settlement mechanism. These distinctive features are crucial to properly understand the logic but especially the difficulties arising out of the submission of this sort of briefs. The third part is divided in five sections: the first one exposes the rationale behind the participation of non-governmental organizations in the WTO dispute settlement system, which is directly linked with transparency aspects. The legal basis for the admissibility of *amicus curiae* briefs by WTO dispute settlement bodies is discussed in the second section. The next ones deal with the view of WTO Members on the involvement of non-governmental organization in dispute settlement proceedings, as well as the review of others existing approaches in different international courts and tribunals on the same issue. The fifth section brings attention to arguments exposed in favour and against the submission of *amicus curiae* briefs by non WTO-Members. Finally, the article suggests some conclusions and proposes some alternatives for the further development of the subject.

2. An Overview: the WTO Dispute Settlement System[1]

As a result of the Uruguay Round (1986–1994), the WTO was formally concluded by the *Agreement Establishing the World Trade Organization* (1995).[2] It came to replace the old GATT system as a global intergovernmental organization providing for a clear institutional framework for the conduct of trade relations among its Members.[3] Its governance structure is led by a Ministerial Conference, responsible for carrying out its functions and with the authority to take decisions on all matters under

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1 For a complete explanation of the WTO dispute settlement system, A WTO Secretariat Publication, A Handbook on the WTO Dispute Settlement System, Cambridge University Press, 2004.

2 Marrakesh Agreement Establishing the World Trade Organization (United Nations – Treaty Series, Vol. 1867, I–31874 / 1995).

3 Marrakesh Agreement Establishing the World Trade Organization (United Nations – Treaty Series, Vol. 1867, I–31874 / 1995), art. II. The single institutional framework of the WTO encompasses the GATT (modified by the Uruguay Round), all agreements concluded under its auspices and the complete results of the Uruguay Round (1986–1994).

any of the agreements.[4] A General Council has general powers for monitoring the operation of the Agreement and for acting as a Dispute Settlement Body, in accordance with the Dispute Settlement Understanding.[5] In addition, three specific Councils were also established.[6] The WTO framework provides for the so-called "single undertaking approach". This brings two significant consequences: all Members must accept all the agreements concluded during the Uruguay Round[7] and on the other hand, they are not entitled to make any reservations in respect to any provision of the Marrakesh Agreement unless specifically permitted.[8]

The system for settling disputes is a cornerstone of the WTO[9] and is based on the *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter DSU), which constitutes the Annex 2 of the WTO Agreement.[10] Regarding to the substantive scope of the mechanism (Article 1 DSU), it applies to all disputes falling within the WTO agreements listed in Appendix 1 of the DSU (referred to as "covered agreements"[11]), also including the Plurilateral Trade Agreements contained in Annex 4 of the WTO Agreement.[12] The DSU is applicable in a uniform manner to disputes under its scope, but there are some specific cases in which the system contains special and additional rules and procedures that shall prevail, included in some covered agreements listed in Appendix 2 of the DSU, and designed to deal with the particularities of disputes arising under these specific covered agreements.[13]

2.1. WTO Organs Involved in the Dispute Settlement

According with DSU, the responsibility for the dispute settlement process is in charge of the Dispute Settlement Body (hereinafter DSB[14]) which is a political organ composed of representatives of all WTO Members. This responsibility covers two main functions: the administration of the DSU and the supervision of the entire dispute settlement process.[15] In carrying out these tasks, the DSB has the authority establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements.[16]

The Director General and the WTO Secretariat also play a role in the dispute settlement process. The first one may offer his/her good offices, conciliation or mediation.[17] This power is especially relevant when a dispute involves a developing country: in this case, the Director General will – at the request of that least developed member – offer his/her good offices, conciliation or mediation before requesting the constitution of a panel.[18] The WTO Secretariat

4 Marrakesh Agreement, art. IV para. 2.

5 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex II Marrakesh Agreement.

6 Council for Trade in Goods, Council for Trade in Services and Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS).

7 In other words, "all parties to the negotiation pledged to adopt all of the agreements as a package". See C. VanGrasstek, P. Sauvé, "The consistency of WTO rules: can the single undertaking be squared with variable geometry?, Journal of International Economic Law, 9 (4) / 2006, p. 837–864.,, p. 839. This rule is with the exception of the Agreements signed in Annex 4 WTO Agreement, which are known in the WTO context as "Plurilateral Agreements". This term is opposed to "multilateral" because not all Members have ratified them, on the basis of its voluntary subscription.

8 This provision is in contrast with the Article 19 of the Vienna Convention on the Law of Treaties (1969), which allows reservations unless specified otherwise.

9 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system (DSU, art. 3 para. 2).

10 The term "Agreement" with no-specific reference incorporates all the agreements that have been concluded in the Uruguay Round, which includes the DSU.

11 It includes: (A) Agreement Establishing the World Trade Organization; (B) Multilateral Trade Agreements: Annex 1A Agreements on Trade in Goods, Annex 1B General Agreement on Trade in Services, Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights, and Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes; and (C) Plurilateral Trade Agreements contained in Annex 4 WTO Agreement, which are Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement, and International Bovine Meat Agreement.

12 See supra note 7.

13 These covered agreements and the specific procedural rules that apply are listed in Appendix 2 of the DSU (Special or Additional Rules and Procedures Contained in the Covered Agreements), and include, for instance, Agreement on the Application of Sanitary and Phytosanitary Measures, whose especial rule of procedure is contained in its art. 11 para. 2.

14 WTO Agreement, art. IV, para. 3.

15 DSU, art. 2 para. 1.

16 Thus, the DSB plays a critical role during the dispute settlement process, because it has the exclusive responsibility for referring a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing "retaliation" when a member does not comply with the ruling (DSU, art. 2 para. 1).

17 DSU, art. 5 para. 6.

18 DSU, art. 24 para. 2.

support members during the process and provide additional legal advice and assistance in respect of dispute settlement to developing country Members.[19]

Key figures in the system are the panels. They are quasi-judicial bodies established at the request of the complaining party, by the DSB.[20] They are composed of three (or five, exceptionally) experts selected on an *ad-hoc* basis.[21] The panels are in charge of adjudicating disputes in the first instance (where the dispute is not settled through consultations). To do so, a panel must make an objective assessment of the matter before it (which is the specific dispute), including an evaluation of the facts of the case and the applicability of and conformity with the relevant covered agreements.[22] As a result of its function, the panel may consider that a Member has violated the obligations established by the WTO regime, in which case it makes a recommendation for implementation by the respondent (report).[23]

One of the mayor innovations of the Uruguay Round in the dispute settlement context was the creation of the Appellate Body, highlighting the concept of appellate review.[24] This is a permanent body (unlike panels) composed by seven members, whose main task is to review the legal aspects of the reports issued by panels.[25] The Appellate Body may uphold, reverse or modify the panel's finding.[26]

Additionally, the DSU gives the possibility to resort to arbitration, by mutual agreement of the parties.[27] Arbitration is conceived as an alternative to dispute resolution by panels and the Appellate Body, but WTO Members have rarely utilized it.[28] In contrast, members have utilized much more frequently other forms of arbitration included in the DSU for specific situations and aspects, especially within the implementation process of a panel or Appellate Body decision.[29]

Lastly, experts may also take part in the dispute settlement process. The DSU grants the panels the "right to seek information and technical advance" from experts.[30] This "right" has been critical in the development of the *amicus curiae* briefs before WTO panels and Appellate body, as will be discussed below.

2.2. A Typical WTO Dispute Settlement Proceeding

But how do these bodies interact throughout the dispute settlement process? Generally speaking, a dispute arises among WTO Members when one of them adopts a trade policy measure that one or more Members consider to be inconsistent with the obligations provided in the WTO Agreement. Just in case where the parties cannot resolve a controversy informally, the formal process of WTO dispute settlement system takes place. In that case, a Member may request for consultations, where the parties to the dispute have the opportunity to reach an agreement on their own.[31] This is consistent with the idea that a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred to resorting

19 DSU, art. 27 para. 2.

20 DSU, art. 6 para. 1.

21 DSU, Article 8. This implies that there are no permanent panels: they are constituted on a case-by-case basis.

22 DSU, Article 11.

23 DSU, Articles 11 and 19.

24 DSU, Article 17.

25 It is important to mention that only parties to the dispute (and not third parties) may appeal a panel report (DSU, art. 17 para. 4), and this appellation must be limited to issues of law covered in the panel report and legal interpretations developed by the panel (Article 17.6 DSU). This constitutes the second and final stage in the adjudicatory part of the dispute settlement system.

26 DSU, art. 17 para. 13.

27 DSU, art. 25 para. 1 and DSU, art. 25 para. 2.

28 While this procedure gives more flexibility to the parties (they are free to agree on the rules and procedures they deem appropriate for the arbitration), a possible explanation for the low use is that "the arbitration provisions of the DSU are too vague and uncertain to serve as a useful guidance. For example, the DSU states that arbitration can be used to settle "certain disputes" which concern issues which are "clearly defined". However, it is unclear what types of disputes should be forwarded for arbitration and what are the issues that are clearly defined by the parties". See B. H. Malkawi, "Arbitration and the World Trade Organization, The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding", Journal of International Arbitration, 24 (2) / 2007, 173–188, p. 183–184. In fact, the only one example of arbitration under Artcile 25 DSU until date is United States – Section 110(5) of US Copyright Act. The procedure was not used as an alternative to the panel and Appellate Body procedure, but at the stage of implementation (after the panel was adopted).

29 These specific situations are two: (a) cases where the losing party considers as impracticable to comply immediately with the recommendations and rulings of panels or Appellate Body, an arbitration process may take place in order to determine the reasonable period of time for complying with the decision (Article 21 para 3 point. c DSU); (b) a party subject to retaliation may also request arbitration if reject the level or the nature of the suspension of obligations proposed (Article 22 para. 6 DSU).

30 DSU, Article 14.

31 DSU, Article 4. Formally, a request for consultations must be submitted in writing and must include the reasons for the request, the identification of the measures at issue and an indication of the legal basis for the complaint (Article 4.4 DSU).

to litigation.[32] If an agreement is reached, the DSB must be notified in order to ensure that it does not violate any provisions of the WTO Agreement.[33] Only if the controversy has not been resolved by the parties after mandatory consultation (within a period of 60 days[34]), the complainant may request for adjudication by a panel.[35] The DSB will establish the panel at the next meeting following the request unless it determines by consensus not to establish a panel.[36]

The panel proceeding consists of writing submissions and oral hearings, giving the possibility to the parties to support and develop their legal and factual arguments.[37] After that, and applying WTO law, the panel issues its report (including the ruling) within a period of six months after the initiation of the panel process.[38] The report will only become binding after its adoption by the DSB.[39] There are two exceptions: (a) if any of the parties to the dispute notifies the DSB of its decision to appeal, in which case the report will be presented by its adoption after the appellation process; or (b) in case that the DSB decides by consensus not to adopt the report.[40] If neither party appeals, the DSB will adopt the panel report, unless there is a consensus against the adoption.[41] In case of appellation, the mandate of the Appellate Body[42] is strictly limited to legal issues and panel interpretations that have been appealed.[43] The Appellate Body issues a report (within a period of 90 days[44]) that will be presented to the DSB for its adoption. The DSB must adopt the report unless it decides by consensus not to do so.[45] It is also the organ in charge of supervising the implementation of the Appellate Body report.[46] At this stage, the losing Member will have a "reasonable period of time" to implement the recommendations and ruling of the DSB.[47] In case of non-compliance within the reasonable period of time the complainant can request authorization to adopt countermeasures (suspension of obligations).[48] There is also a possibility of partial compliance with the recommendation and ruling of the DSB, where the Member takes some actions but they are considered unsatisfactory by the complainant. In that case, such dispute shall be decided through recourse to the original panel in order to rule on the effectiveness of the implementation.[49]

2.3. Some Distinctive Features of the WTO Dispute Settlement System

Having explained briefly the main aspects of the dispute settlement system provided in the DSU, it is necessary to highlight some general features of the system, whose consideration will be useful when analyzing the way in which panels and the Appellate Body have dealt with the submission of *amicus curiae* briefs by non-disputing parties.

2.3.1. SELF-CONTAINED NATURE OF THE WTO DISPUTE SETTLEMENT SYSTEM

Although the true existence of pure self-contained regimes has been in detail analyzed in doctrine[50], there is no doubt that the WTO dispute settlement system is a self-contained regime in the sense that article 23 of the Dispute Settlement Understanding (DSU) excludes unilateral determinations of breach or countermeasures

32 DSU, art. 3 para. 7.

33 DSU, art. 3 para 5.

34 However, the parties may skip the consultation stage if they resort to arbitration as an alternative means of dispute settlement (Article 25 para. 2. DSU).

35 DSU, art. 4 para. 7. There are some formal requirements for the requesting for the establishing of a panel: it must be made in writing, indicating whether consultations were held, and must identify the specific measures at issue, providing a brief summary of the legal basis of the complaint (Article 6 para. 2. DSU).

36 DSU, art. 6. para 1. This rule is known as "rule of negative (or reverse) consensus", and it means that the only possibility for not establish a panel is by consensus of the DSB. In practice, it is a guarantee for the complainant, because it implies that all Members – including itself – must vote against establishing a panel.

37 DSU, article 12.

38 DSU, art. 12 para. 8.

39 DSU, art. 14 para. 4. This is because the function of a panel is to assist the DSB in discharging of its responsibilities under DSU and covered agreements (Article 11 DSU).

40 DSU, art. 16 para. 4.

41 This is the second manifestation of the "rule of negative (reverse) consensus". Thus, the losing party cannot prevent the adoption of the report, since this decision requires consensus within the DSB.

42 The DSU does not devote many articles to address the appellation process. The specific rules are contained in Articles 16 para. 4 and 17 DSU. But according with Article 17 para. 9 DSU, the Appellate Body has adopted its own Working Procedures for Appellate Review, included in Appendix 3 to the DSU.

43 DSU, art. 17 para. 6. and DSU, art. 17 para. 12.

44 DSU, art. 17 para. 5.

45 DSU, art. 17 para. 14. This is the third application of the "rule of negative (reverse) consensus".

46 DSU, Article 2.

47 DSU, art. 21 para. This reasonable period of time cannot exceed fifteen months.

48 DSU, art. 22 para. 2.

49 DSU, art. 21 para. 5.

50 For a complete explanation of international systems and self-contained regimes, see Y. Shany, The Competing Jurisdiction of International Courts and Tribunals, Oxford University Press, 2004, p. 101 et seq.

outside the "specific subsystem" of the WTO-regime.[51] Thus, the WTO establishes its autonomous rules ranging from the dispute resolution process to enforcement of countermeasures.[52] However, and this is relevant for the purposes of this paper, in many cases panels and the Appellate body have also applied rules and principles of general international law, such as burden of proof, treatment of municipal law, *lex specialis,* judicial economy, and acceptability of *amicus curiae* briefs, among others.[53]

2.3.2. COMPULSORY JURISDICTION

According to the DSU, WTO dispute settlement system has been established as compulsory.[54] This means that when a party becomes a Member of the WTO (and therefore accepts all agreements) it automatically consents to the jurisdiction of its dispute settlement system in relation with a dispute arising under the covered agreements,[55] without requiring a separate declaration.

Two are the direct consequences of this compulsory nature: if a dispute arises, the respective Member is obliged to bring the controversy to the WTO dispute settlement system; and on the other hand, the other Member can not challenge this jurisdiction.[56]

51 UN General Assembly, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by M. Koskenniemi, A/CN.4/L682 (2006), p. 71.,, para. 134. Shany agrees: "It is a complex arrangement that has regarded itself for some time as a self-contained", Y. Shany, Ibid., p. 100. A contrary view is expressed by Anja Lindroos and Michael Mehling: "In fact, few would nowadays claim that the World Trade Organization (WTO) – being a prime example for such "special regimes" – is entirely self-contained, existing in isolation from international law. It is likely understood more aptly as a set of rules and institutions similar to other international regimes, such as human rights law, space law, and environmental law". A. Lindroos, M. Mehling, "Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO", The European Journal of International Law, 16 (5) / 2006, 857–877, p. 858.

52 P. Delimatsis, "The Fragmentation of International Trade Law", Journal of World Trade, 45 (1) / 2011, 87–116, p. 98.

53 A. Lindroos, M. Mehling, op. cit., p. 876. One of the examples cited by the authors is contained in 'Coconut'"Coconut" case, Brazil – Measures Affecting Desiccated Coconut, Report of the Appellate Body, WT/DS22/AB/R, 21 January 1997, p. 15. In its report, the Appellate Body made express mention to the application of principle of non-retroactivity of treaties (included in Article 28 of the Vienna Convention) to that particular WTO case.

54 DSU, art. 23 para. 1.

55 This is a consequence of the single undertaking approach. The only exception is referred to WTO Agreement Annex 4, which includes the so-called Plurilateral agreements (voluntarily accepted or not by the Members).

56 P. Van den Bossche, The Law and Policy of the World Trade Organization. Text, Cases and Materials, Cambridge University Press, 2005, p.189.

2.3.3. EXCLUSIVE JURISDICTION

Conceived as a compulsory system, Members shall thus have recourse to the WTO dispute settlement system to the exclusion of any other system[57] (Article 23.1 DSU). An important panel decision was clear on that sense.[58] Nevertheless, there are some provisions that in the opinion of some scholars mitigate this idea, allowing the Members some flexibility.[59]

2.3.4. PARTICIPATION OF THIRD PARTIES

Only WTO Members have access to the dispute settlement system.[60] This means that only they can take part in the proceedings either as parties (complainant and respondent) or as third parties.[61] Private entities do not have direct access to the dispute settlement system. Following the same logic, non-governmental organizations (hereinafter NGOs) are not entitled to initiate proceedings, and its direct participation during any WTO adjudicative process is excluded.

57 Ibid., p. 190.

58 "Section 301 Trade Act'Act" case, US – Sections 301 – 310 of the Trade Act of 1974, Panel Report, WT/DS152/R, 22 December 1999, para. 7.43. "Article 23.1 of the DSU imposes on all Members to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call 'exclusive dispute resolution clauseclause', is an important new element of Members rights and obligations under the DSU".

59 Shany is clear: "It should be realized that DSU permits parties to agree to settle their dispute by way of arbitration, i.e. outside the ordinary structure of WTO dispute-settlement institutions (but still subject to control by the DSB). Hence, the DSU itself allows for some measure of flexibility in forum selection". Y. Shany, op. cit., p. 184.

60 A clear statement of this was issued by the Appellate Body in 'Shrimp'"Shrimp" case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 101: "It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental".

61 Before panels, WTO Members have the opportunity to be heard and to make written submissions, but they are required to demonstrate a substantial interest in the matter (DSU, art. 10 para. 2). In the Appellate Body instance, third parties are prevented to appeal. Nevertheless, third parties that have acted also as third parties during the panel stage may make written submissions and be heard by the Appellate Body (DSU, art. 17 para. 4).

This impediment does not prevent the exercise of influence and pressure on governments, not only in cases when a particular Member is involved in a controversy.

This idea of disallowing – at least formally – the participation of non-Members is critical in analyzing the submission of *amicus curiae* briefs within WTO dispute settlement procedures.

3. Public Participation in the WTO Dispute Settlement System

3.1. The Rationale Behind the Participation of non-Members: a Question of Transparency

There are many ways in which the issue of transparency in the WTO can be addressed. This article will deal from the perspective of the dispute settlement system since it has been within this mechanism where *amicus curiae* briefs have been submitted and the issue has emerged. The starting point is that decisions taken by DSB often affect directly legitimate interests of different individuals or groups. However, as it has been mentioned that only WTO Members have the right to bring disputes before the dispute settlement mechanism. It is a government-to-government dispute settlement system for disputes concerning rights and obligations of WTO Members. Therefore, individuals or civil society do not have direct access to panels and Appellate Body, and the same applies in case of NGOs with general interest in matters brought before the system.

Nowadays, many NGOs have claimed that the rights and interests of citizens and civil society are inadequately reflected in WTO decisions.[62] For them, WTO decisions inescapably raise questions about loss of sovereignty and lack of democracy because of the nature of the system that they perceive as closed.[63]

In general terms, the participation of NGOs by means of *amicus curiae* briefs within dispute settlement system may serve at least for the next functions: (a) providing legal analysis and interpretation, including arguments not necessarily mentioned by the parties; (b) providing factual analysis and evidence; and (c) placing the dispute into a broader political and social context[64].

62 G. Marceau, M. Stilwell, "Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies", Journal of International Economic Law, 4 (1) / 2001, 155–187, p. 156.

63 D. Esty, "Linkages and Governance: NGO´s at the World Trade Organization", Journal of International Economic Law, 19 (3) / 1998, 709–730, p. 717.

64 P. Van den Bossche, op. cit., p.739.

3.2. Legal Basis and Admissibility of *Amicus Curiae* Briefs in the WTO Dispute Settlement System

As it has been suggested, the only way through which NGOs have achieved to express their own views before WTO dispute settlement bodies has been by submission of *amicus curiae* briefs. This Latin term – which literally means "friends of the court" – has its origin in Roman law and was subsequently integrated into English and American common law.[65]

The submission of *amicus curiae* briefs has a relatively long practice in trade disputes. Under the old GATT system, unsolicited briefs from non-Members were not accepted by panels. The reason was clear: the dispute was strictly between governments and thus the panelist could only address the claims and arguments that were submitted by the parties to the controversy.[66] These kinds of briefs were only taken into account if they had been adopted by one of the parties of the dispute.[67]

But the establishment of the WTO in 1995 brought important changes especially in the dispute settlement system. In particular, the panels and the Appellate Body have not followed the GATT view on the issue of unsolicited briefs submitted by non-members, and this has opened the door for the participation of NGOs and individuals in trade disputes. But the road has not been simple and this is what we will discus hereinafter.

In order to achieve a better understanding on the process of acceptance of *amicus curiae* briefs before WTO dispute settlement bodies, and the specific legal basis for doing so, it is necessary to make a distinction between the practice within panels and the Appellate Body, because they have had different approaches in the development of the issue.

3.2.1. *AMICUS CURIAE* BRIEFS FILED IN PANEL PROCEEDINGS

By virtue of Article 3(2) DSU access to the WTO adjudicating bodies is limited to

65 B. A. Garner, Black´s Law Dictionary, West Group, St. Paul, Minn. 1999, p. 83. Amicus curiae is defined as "a person who is not a party in a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that persona has a strong interest in the subject matter".

66 P. Ala´i, "Judicial Lobbying at the WTO: the Debate over the Use of Amicus Curiae Briefs and the U.S. Experience", Fordham International Law Journal, 24 (1) / 2000, 62–94, p. 67.

67 For example, in ´Semi Conductors´ case, Japan – Trade in Semi Conductors, Panel Report, BISD 35S/1164, 24 March 1988; ´Users Fees´ case, US – Customs Users Fees, Panel Report, BISD 35S/245, 27 November 1987.

WTO Members. Moreover, the possibility for submitting *amicus curiae* briefs by NGOs or individuals is not mentioned in any provision of the DSU. Notwithstanding, different groups and associations have expressed strong interest in the development of global trade, since decisions could also affect non-trade issues.

The very first disputes in which unsolicited *amicus curiae* briefs were filed for consideration of WTO panels were *US – Gasoline*[68] and *EC – Hormones*[69], two highly controversial cases. Both cases were related to environmental and health domestic regulations that potentially conflict with their WTO obligations. Following the GATT past practice, these briefs were not considered by the panels, without further explanation. In others words, panels ignored the NGOs submissions.

But the issue was effectively first discussed in the famous *US – Shrimp*[70], a dispute involving a ban imposed by the United States on the importation of shrimp and shrimp products for the protection of endangered sea turtles. The affected parties regarded this action as a measure restricting the free trade of products into the United States domestic market. The panel received two *amicus curiae* briefs from different environmental NGOs.[71] They argued that the acceptance and consideration of these briefs was permitted under Article 13 of the DSU. This Article – whose title is "Right to Seek Information" – allows panels to seek information from any relevant source and give the possibility to consult experts to obtain their opinion on certain aspects of the dispute. The position of NGOs was supported by the United States, but India, Malaysia, Pakistan and Thailand (complaining parties) requested that the panel does not accept the communications. The panel rejected the *amicus curiae* briefs, and decided not to accept them on the basis that these briefs were never requested as required in Article 13 DSU. In its opinion, accepting non-requested information from NGO-sources was incompatible with the provisions of the DSU.[72] In addition, the panel also ruled that if any of the parties wanted to use the arguments made by NGOs they should be included as part of their own submissions. Obviously, this interpretation of Article 13 of the DSU was not satisfactory for the participation of NGOs as *amicus curiae* during panel proceedings.

After the adoption of the Panel Report, the dispute was brought for consideration of the Appellate Body. On appeal, the United States argued that the panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to this position, there is nothing in the DSU that prohibits panels from considering information based on the fact that the information was unsolicited. Moreover, the United States stated that when a NGO makes a submission, Article 13 of the DSU authorizes the panel to "seek" such information.[73] The Appellate Body agreed with this interpretation, and reversed the panel's decision ruling that "(...) the authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not".[74] Notwithstanding, the Appellate Body also established that the discretion to receive unsolicited information form non-Members did not include an obligation to give due consideration to the information received, since only WTO Members have a legal right to have their submissions considered.[75]

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68 'Gasoline'"Gasoline" case, US – Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS2/R, 29 January 1996.

69 "Hormones" case, EC – Measures Concerning Meat and Meat Product Products, Panel Report, WT/DS/DS26/R/USA & WT/DS48/R/CAN, 18 August 1997.

70 'Shrimp'"Shrimp" case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998.

71 One brief was submitted jointly by the Center for International Environmental Law and Center for Marine Conservation. The second one was submitted by World Wide Fund for Nature. See "Shrimp" case, US – Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R, 15 May 1998, para. 3.129.

72 In para. 7.8, the Panel Report stated: "We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests in the panel (...). Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied (...)".

73 'Shrimp' case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 9.

74 Ibid., para. 108.10.

75 Ibid., para. 101: "It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that

This decision meant a significant step forward in increasing openness and transparency at the WTO. Moreover, since this case *amicus curiae* briefs have been submitted to the panels in several proceedings. In *Australia – Salmon* dispute,[76] Canada requested consultations with Australia in respect of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation. Canada alleged that the prohibition is inconsistent with WTO regulations. The Panel noted that according to Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement), "In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative".[77] But the reasoning of the Panel for considering information from non-Members had some particularities. First, the Panel invited the parties to submit names of experts in the subject matter. Then, the parties had the possibility to make comments on the names selected by the Panel. After that, the Panel selected four definitive individuals. Finally, the experts were invited to meet with the Panel and the parties to discuss their written responses to the questions and to provide further information.[78] For most of the WTO Members this is the context in which Article 13 DSU authorizes the submission of *amicus curiae* briefs before panels.[79] But in addition, in the Implementation Panel proceeding established pursuant to Article 25.1 of the DSU, the Panel received an unsolicited *amicus curiae* brief from "Concerned Fishermen and Processors in South Australia".[80] The Panel considered the information submitted in the brief as relevant to its procedures and had accepted this information as part of the record. It did so pursuant to the authority granted under Article 13.1 of the DSU.[81]

In *US – British Steel,* the Panel received two briefs from industrial NGOs ("American Iron and Steel Institute" and the "Specially Steel Industry of North America"), but refused to take them into account on the basis that they were untimely.[82]

Another significant dispute for analyzing *amicus curiae* briefs before panel proceedings was *EC – Asbestos*.[83] The Panel received unsolicited briefs from four non-governmental organizations ("Collegium Ramazzini", "Ban Asbestos Network", "Instituto Mexicano de Fibro-Industrias AC", and "American Federation of Labor and Congress of Industrial Organizations"). The European Communities incorporated into its submission two of these briefs ("Collegium Ramazzini" and "American Federation of Labor and Congress of Industrial Organizations"), and Canada requested the Panel reject all of them. A few months later, a fifth brief was submitted by another NGO ("Only Nature Endures"), but it was dismissed for having been submitted too late. The Panel rejected the *amicus curiae* briefs submitted by the "Ban Asbestos Network" and by "Instituto Mexicano de Fibro-Industrias AC" without explanation, and decided to take into account only those submissions that the EC had incorporated in their own submission.[84]

More recently, in *US – Tuna II,* the Panel received an unsolicited *amicus curiae* brief from "Humane Society International" and "American University's Washington College of Law". The United States requested the Panel to review and consider the submission in its deliberations, in light of the relevant and useful information it contained which it believed could assist the Panel in understanding the issues in this dispute.[85] The Panel ruled taking into account the determinations of the Appellate Body made in *US – Shrimp,* considering that it had the discretionary authority either to accept and consider or to reject information and advice

panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel. Correlatively, a panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is authorized to do under the DSU.

76 "Salmon" case, Australia – Measures Affecting Importation of Salmon, Panel Report, WT/DS18/R, 12 June 1998.

77 Ibid., para. 6.1.

78 Íbid at para. 6.2–6.5.

79 P. Ala´i, op. cit., p. 74.

80 ´Salmon´ case, Australia – Measures Affecting Importation of Salmon, Implementation Panel, WT/DS18/RW, 18 February 2000.

81 Ibid., para. 7.8.

82 "Carbon Steel" case, US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Panel Report, WT/DS138/R, 23 December 1999, para. 6.3.

83 ´Asbestos´ case, EC – Measures Affecting Asbestos and Asbestos – Containing Products, Panel Report, WT/DS135/R, 18 September 2000.

84 Ibid., para. 8.12 and 8.13.

85 "Tuna II'II" case, US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Panel Report, WT/DS381/R, 15 September 2011, para. 7.3.

submitted to it. The brief was thus accepted for consideration.[86]

3.2.2. *AMICUS CURIAE* BRIEFS SUBMITTED WITHIN APPELLATE BODY PROCEEDINGS

The same issue described above on the acceptance of *amicus curiae* briefs has been controversial in Appellate Body proceedings. In *US – Shrimp,* the Appellate Body seems to have made an important distinction between *amicus curiae* briefs that are attached to a party submission and those that are unattached.[87] In a subsequent decision, the Appellate Body gave some relevant signals especially regarding the treatment of unattached *amicus* briefs. In *US – British Steel* the Appellate Body received two unsolicited briefs from the same NGOs that submitted briefs at Panel stage, where they were rejected because they were considered untimely. As Article 13 of the DSU ("Right to Seek Information") does not apply in Appellate Body proceedings, the question arose whether unsolicited *amicus curiae* briefs were admissible in these proceedings. The Appellate Body accepted the briefs concluding that it was authorized to do so because Article 17.9 of the DSU (Working Procedures) makes it clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. It is also stated that Article 16.1 of the Working Procedures allows the Appellate Body to develop an appropriate procedure where a procedural question arises that is not covered by the Working Procedures.[88] The Appellate Body also ruled that "Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO Members which are parties or third parties in a particular dispute".[89]

The situation within the Appellate Body had its climax in *EC – Asbestos*. In this case, the Appellate Body was beyond creating an *Additional Procedure* in order to address submission from groups other than a party or a third party to the dispute, relied on Article 16.1 of the Working Procedures.[90] The Appellate Body decided for the first time formally to invite briefs from all interested sources "for the purposes of this appeal only". The Additional Procedure provided some important rules for dealing with *amicus curiae* briefs.[91] First, it established a deadline for the submission of briefs. Second, it mentioned several formal requirements that must be satisfied by all non WTO Members interested to submit a brief (for example, length of the letter, specific nature of the interest, and issues of law covered). Third, it provided that the Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave. Finally, the Additional Procedure mentioned that the parties and the third parties to the dispute would have a full and adequate opportunity to comment and respond to any written brief filed in the case. As a result, the Appellate Body received 17 applications requesting leave. Six were denied (untimely). The others were also rejected on the basis that the Appellate Body found none of them sufficiently compliant with the formal requirements established in the Additional Procedure.[92]

Another interesting case where different issues concerning *amicus curiae* briefs were discussed was *EC – Sardines*.[93] During the proceedings, two briefs were submitted: one of them by Robert Howse (a professor of international economic law), and the other by Morocco, a WTO Member that did not exercise the right for acting as third party at panel stage. This was the first case in which a WTO Member submitted a brief. Peru – the defending country – rejected the brief submitted by Robert Howse because in its opinion "the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body".[94] Regarding the submission made by Morocco, Peru also requested the Appellate Body do not consider it would imply a violation of the DSU, which clearly establishes conditions under which WTO Members can participate as third parties in dispute settlement proceedings. In its ruling, the Appellate Body

86 Ibid., para. 7.9.

87 "We admit therefore, the briefs attached to the appellants submission of the United States as part of that appellants submission (...).'Shrimp' case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 91.

88 G. Marceau, M. Stilwell, op. cit., p. 162–163.

89 "'Carbon Steel" case, US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R, 10 May 2000, para. 41.

90 Working Procedures for Appellate Review, WT/AB/WP/6 (last version 16 August 2010).

91 "Asbestos" case, EC – Measures Affecting Asbestos and Asbestos – Containing Products, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, para. 52.

92 Ibid., para. 57.

93 'Sardines'"Sardines" case, EC – Trade Description of Sardines, Report of the Appellate Body, WT/DS231/AB/R, 26 September 2002.

94 Ibid., para. 154.

stated that Article 17.9 of the DSU entitled it for accepting and considering the *amicus curiae* brief submitted by Morocco and by private individuals, but at the same time considered that both briefs were not useful for the Appellate Body and thus were not be taken into account.

3.3. General View of WTO Members on *Amicus Curiae* Briefs

The acceptance of *amicus curiae* briefs especially by the Appellate Body has not been exempt of controversy and WTO Members have expressed a variety of views about the current practice of the adjudication bodies on the issue. After the creation of the Additional Procedure in *EC – Asbestos,* most WTO Members expressed displeasure and concern. They felt that non-institutional players could end up having more rights than WTO Members, altering the government-to-government nature of the dispute settlement system.[95]

In an extraordinary meeting of the WTO General Council held in November 2000[96], most Members expressed the opinion that since there was no specific provision in WTO law allowing for the acceptance and consideration of *amicus curiae* briefs, such briefs should not be accepted and considered.[97] Uruguay "viewed with great concern the appearance and mass circulation outside the WTO of the Appellate Body communication establishing the additional procedure for the submission of written briefs form persons or institutions that were neither parties nor third parties in a particular dispute at the appeal stage". Uruguay also "believed that the practical effect had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess".[98] Egypt, on behalf of the Informal Group of Developing Countries stated that "the actions of the WTO Appellate Body and the Secretariat needed serious consideration by the whole WTO membership and at the level of the General Council, as the highest legislative and policy authority in the organization in the intervals between Ministerial Conferences, in order that such actions be rectified", and also noted that "the Appellate Body decision went far beyond the Appellate Body´s mandate and power".[99] And finally, Brazil "was also concerned with the notion that panels and the Appellate Body would be deciding who had a right to file written briefs on the basis of the applicant's membership, legal status, objectives, interests, nature of activities, sources of financing, or relationship with parties or third-parties to the dispute. If jurisprudence advanced in this direction, the dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism".[100]

On the other hand, only the United States was strongly supporting the Appellate Body's view on the issue. The representative of this country stated that "Appellate Body had acted appropriately in adopting its additional procedure in the asbestos appeal" because "the Appellate Body had the authority under Rule 16(1) of its *Working Procedures* to adopt the additional procedure regarding the acceptance and consideration of amicus briefs in that case".[101]

As may be noted, the position of WTO Members regarding the acceptance of *amicus curiae* briefs – with the sole exception of the United States – is not favorable. Virtually all of them have emphasized that acceptance and consideration of briefs raises some important practical issues, mainly because panels and Appellate Body have considered briefs without providing criteria on the circumstances under which WTO dispute settlement bodies may take into account this sort of additional information. To ensure certainty and predictability, Members need guidance as to the legal value that the panels and the Appellate Body may attach to such unsolicited briefs.[102]

3.4. *Amicus Curiae* Briefs in other International Fora

The issue of the participation of NGOs in proceedings conducted before international courts and tribunals has been also controversial, and there are also different rules governing the subject matter. In some international courts and tribunals, NGOs have a clear right to participate in disputes; in others, the chances are minimal or inexistent. Three good examples are useful to illustrate these practices and rules.

The International Center for the Settlement of Investment Disputes (ICSID) has made good efforts in order to submit their arbitration proceedings to public scrutiny. Before the revision of the arbitration rules (2006), there were two important moments in the practice of submission *amicus curiae* briefs. In *Aguas del Tunari vs. Plurinational State of Bolivia*[103] – a dispute involving a concession contract for

95 G. Marceau, M. Stilwell, op. cit., p. 162–163.

96 World Trade Organization, General Council, Minutes of Meeting, WT/GC/M/60, 22 November 2000, Geneva.

97 P. Van den Bossche, op. cit., p. 740.

98 Minutes of Meetings, op. cit., para. 6 and 7.

99 Ibid., para. 11.

100 Ibid., para. 46.

101 Íbid., para. 74.

102 G. Marceau, M. Stilwell, op. cit., p. 163.

103 Aguas del Tunari S.A. vs. República de Bolivia, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005.

the provision of water and sewerage services to the city of Cochabamba – an organized group of individuals and environmental NGOs filed a joint petition requesting the right to participate in the proceedings as *amicus curiae*. The President of the ICSID arbitral tribunal constituted for conducting the case wrote a letter to the petitioners denying the submission of the brief. The arbitral tribunal ruled that the authority to accept briefs goes beyond the power conferred to the tribunal, given the consensual nature of investment arbitration. But in another case, an arbitral tribunal showed a different approach, more favorable for the participation of non-parties in investment proceedings. In *Sociedad General de Aguas Barcelona vs. The Argentine Republic*[104], five non-governmental organizations filed a request to the arbitral tribunal for leave to submit an *amicus curiae* brief. The tribunal received observation from the two parties of the dispute. After doing so, the arbitral tribunal held that neither the *ICSID Convention* nor the *ICSID Arbitration Rules* authorize or prohibit the submission of briefs. The arbitral tribunal decided that Article 44 ICSID Convention is a grant of residual power to the arbitral tribunal to decide procedural questions not treated specifically in the Convention. Then, the arbitral tribunal established three conditions that should be taken into account in order to accept amicus curiae briefs: (a) the appropriateness of the subject matter of the case; (b) the suitability of a given non-party to act as *amicus curiae*; and (c) the procedure by which the *amicus curiae* brief is made and considered by the arbitral tribunal. These criteria have been followed by others arbitral tribunals conducting proceedings under the ICSID Convention and ICSID Arbitration Rules. Due to the increase in the number of briefs submitted, in 2006 the ICSID Arbitration Rules were amended. The new Article 37 expressly establishes that the arbitral tribunal may allow a person or entity that is not a party to the dispute to file a written submission regarding a matter within the scope of the dispute.

The International Tribunal for the Law of the Sea (ITLOS) – responsible for adjudicating dispute related to the application of the *United Nations Convention on the Law of the Sea* – has it own rules on the issue. Article 20 of the Statute stated that only States have standing before the ITLOS. In addition, Article 289 provides that a court or tribunal exercising jurisdiction under ITLOS may select no fewer than two scientific or technical experts, at the request of a party or *proprio motu*.

Finally, Article 37 of the Statute of the European Court of Justice (ECJ) provides that any individual with legal interest in the results of any case submitted to the Court may intervene, with the exception of cases involving disputes between Member States and/or institutions of the Community. In practice, the possibility for submission of *amicus curiae* briefs is very restricted, just to cases where a person files an application against a Community Institution.

The main conclusion after this brief review is that in other international fora – unlike WTO practice – criteria of some sort are applied to precise the discretion of the tribunal to accept interventions by NGOs. Thus, when a court or tribunal accepts an *amicus curiae* brief, it is usually subject to criteria that are more general and most important, previously established.[105]

3.5. Some Arguments in Favour of and Against Acceptance of *Amicus Curiae* Briefs in WTO Dispute Settlement System

The idea of allowing the participation of individuals and NGOs as friends of the tribunal in the WTO has been supported on several grounds and from different points of view. The general framework is that NGOs have strongly criticized the lack of transparency and accountability in the WTO, especially within its dispute settlement system. They believe that governments often face disputes without considering the true effects that decisions have on society, which is most evident – for example – in controversies relating to the protection of the environment. The WTO dispute settlement bodies often lack ready access to the necessary expertise for making well-regarded and broadly accepted decisions.[106] This role may be played by experts, but also by some NGOs with a proven track record in the subject matter.

The experience within other international fora may also serve as an important precedent in this regard. In many of them, NGOs are entitled to participate submitting *amicus curiae* briefs, because the policy-makers are aware of the importance of the views of civil society, that generally contribute to the resolution of conflicts in which States take part. In the same sense, often the participation of *amicus curiae* is closely linked with the concept of public interest: organizations expressing views of the major sections of the population may help to confirm the legitimacy of the decisions rendered by the panels and the Appellate Body, because in many cases the

104 Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A vs. The Argentine Republic, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19, 19 May 2005.

105 G. Marceau, M. Stilwell, op. cit., p. 175.

106 D. Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion", Journal of International Economic Law, 1 (1) / 1998, 123–148, p. 127.

briefs that are submitted provide information on the broader implications of a decision on development, health, environmental, or others relevant aspect.[107]

On the other hand, the reasons given against the idea of allowing participation of non-governmental organizations are of a very different nature. Legally speaking, those supporting this position affirm that the WTO is an inter-governmental organization: NGOs acting as *amicus curiae* do not represent governments and therefore cannot participate in the WTO dispute settlement process. In addition, the acceptance of *amicus* briefs lacks legal basis, because the authority of the Panel to "seek" information under Article 13 of the DSU does not encompass the authority to "accept" information.[108] Thus, the acceptance of briefs is a substantive matter rather than procedural issue, and should be decided by Members and not for panels or Appellate Body.[109] However, this idea starts from the false premise that NGOs have effectively the right to participate in WTO panels and Appellate Body proceedings. The Appellate Body clarified the point in several decisions, ruling that only WTO Members may take part in proceedings and it is up to the panels and Appellate Body to decide whether to accept and consider *amicus curiae* briefs.[110]

But there are also political arguments. Those who reject the participation of non-WTO Members consider that it may bring some negative effects, mainly because of the general feeling that NGOs are opposed to free trade. Many trade experts consider that formal participation of NGOs would expand protectionist notions, and that this is easier to perceive in environmental groups and labour unions intervening in WTO proceedings. This idea is directly linked with a concern about the representativeness and accountability of the NGOs: critics on the participation of NGOs in WTO dispute settlement mechanism argue that often they are manipulated for small-minder interests, and thus that they not represent really general interests. It is true that is very difficult to assess how many people a particular group represents. But within the same trade field there are good experiences for example within the World Bank system for resolving investment disputes between a State and nationals of other States (ICSID). In this forum, NGOs are expressly entitled to submit briefs, but subject to compliance with certain requirements, highlighting the proof of a significant interest in the proceeding. The representation and accountability of NGOs may be relevant to confirm their character and the interests that they are representing.

All these observations can be corrected by means of the necessary regulation that must be made by WTO Members.

4. Conclusions

As pointed out, the acceptance of *amicus curiae* briefs in WTO dispute settlement system is a contentious topic among WTO Members, in both political and legal level. Despite the negative attitude assumed by most of governments, it is important to keep in mind that problems and differences of opinions arise mainly due to the fact that it is a matter that has not been regulated in the DSU. Many governments have identified the need for Members to discuss and establish clear rules addressing the issue whether *amicus curiae* should be allowed in WTO dispute settlement mechanism, and if so, under what circumstances. Criteria applying to *amicus curiae* briefs must promote due process and ensure that they contribute to the integrity and legitimacy of the decisions rendered by panels and the Appellate Body.[111] That is the starting point for discussions, and primarily a responsibility of the Members. Only they have the key for reaching an agreement establishing the necessary regulations. To do this, it is necessary to weigh duly the different interests that are at stake.

Some inputs to take into account:

- NGOs have legitimately tried to influence dispute outcomes, promoting more transparent and informed decisions. Improved responsiveness and repre-sentativeness on tthe part of the WTO and a better understanding of the international trading system on the part of the public would enhance the WTO's legitimacy and strengthen its position as a central element of the emerging structure of international economic governance.[112]
- The problem faced by WTO Members is not exclusively of legal nature. The crucial decision is to determine on what level of formal participation within the dispute

107 G. Marceau, M. Stilwell, Op. cit., p. 180.

108 H. S. Gao, "Amicus Curiae in WTO Dispute Settlement: Theory and Practice", China Rights Forum, 1 / 2006, 51–67, p. 56.

109 Ibid., p. 55.

110 Ibid.

111 G. Marceau, M. Stilwell, op. cit., p. 178.

112 D. Esty, (Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion), p. 123.

settlement system will have in the next future organizations representing other interests (often collectives). This is mainly a political issue.

– The notion of "closed" institution could contradict democratic principles that inspire it. NGOs play constructive roles in numerous international organizations. It would be useful to analyze the practice before other international fora, since other courts and tribunals have developed clear rules governing the issue, generally contained in its respective statutes.
– WTO Members should negotiate and agree on certain criteria and clear rules regarding the acceptance of *amicus curiae* briefs. It would be desirable to limit the discretion of the panels and the Appellate Body, establishing uniform rules and practices. Inconsistency in the practice of the panels and the Appellate Body is clearly visible in the instances of acceptance and rejection of briefs in various cases. This uncertainty must be avoided.
– Even though it was rejected by WTO Members, a good draft may be the Additional Procedure established "in interests of fairness and orderly procedure in the conduct of this appeal" by the Appellate Body in *EC – Asbestos*. This procedure was developed because of the existing gap in the regulation of *amicus curiae* briefs, and contains important provisions that may be taken into account by Members. Following this Additional Procedure, the desirable regulation may include two stages: during the first stage – applying for leave – the panels and the Appellate Body should confirm *prima facie* whether a brief satisfies procedural requirements such as length, compliance with the timetable, identification of applicants, and nature of the NGO's interest in the dispute. A second stage – after the *prima facie* analysis and subsequent authorization – should include a revision on the merits of the briefs, the relevancy of the NGO's interest, quality of the evidence submitted, the expertise on the subject matter of the non-governmental organization, and the specific needs for the panel or Appellate Body for considering the brief, depending on the circumstances of the specific case.
– The government-to-government nature of the WTO is not an impediment to deprive the participation of civil society in its proceedings. It is clear that only WTO Members have access to the dispute settlement system as a "right", but at the same time panels and the Appellate Body could enrich its decisions by receiving information from different sources (accepting briefs). The key point is to agree upon a framework in which this participation should be effective.
– Although rejection of WTO Members to the participation of NGOs has been widespread, it has been stronger in the case of developing countries. They have distrust towards NGOs, believing that often they are controlled by more powerful countries. Indeed, this may be true in some cases. This legitimate fear can be mitigated by promoting accountability and disclosure of relevant information, such as funding sources, and clarifying the specific interest that the respective NGO has in the dispute.
– The lack of legal clarity provides a valuable opportunity to discuss and reflect on new ways of participation of civil society. NGOs could extend the WTO look and enrich decision-making processes.

Allowing NGOs to make submissions to the panels and the Appellate Body would be constructive in the dispute settlement system. As noted, in many cases the dispute goes beyond that of merely trade law, and non-governmental points of view may be especially illuminating before rendering a compulsory decision.[113] *Amicus curiae* must be welcome friends.

Carlos Bellei Tagle

Amicus curiae podnesci u sistemu rešavanja sporova STO: Dragi prijatelji?

Nevladine organizacije su jasno izrazile želju da aktivno učestvuju u razvoju trgovinske politike unutar okvira glavne institucije, Svetske trgovinske organizacije. Ova namera uključuje podnošenje amicus curiae podnesaka u sistemu rešavanja sporova STO. Ovo pitanje, koje nije eksplicitno uređeno u Dogovoru za rešavanje sporova, kontraverzno je za većinu članica STO. Ovaj članak istražuje glavne političke i pravne posledice koje proizlaze iz prihatanja te vrste netražene komunikacije, sa stanovišta transparentnosti procesa. Članak sugeriše potrebu da se ovo pitanje uredi, što je zadatak koji pripada članicama STO i koji obuhvata prepoznavanje doprinosa koji nevladine organizacije mogu imati u smislu legitimiteta sistema rešavanja sporova STO, koji se obično smatra veoma zatvorenim.

Ključne reči: *STO, sistem rešavanja sporova, NVO, transparentnost, amicus curiae, učešće javnosti*

113 Ibid., p. 145.

CLOUD COMPUTING FROM EU COMPETITION LAW PERSPECTIVE

Saša Markota*

Cloud computing is a new model for delivering information technology services in which data and applications are stored on a remote server and accessed through the Internet from anywhere in the world. This paper is to be viewed as an introduction to cloud computing competition problems within the EU legal framework. Rather than focusing on the positive side of EU competition law, we focused on its flaws and loopholes and the ways of addressing real and serious problems when the European Commission is unable to react due to the current legislation. The issues of open standardization, interoperability and data portability should be analyzed more closely as they represent effective means of protecting competition in cloud computing. The paper is aimed to give an overview of some competition issues in this fast-developing sector.

Key words: *Cloud computing, competition, lock-in, data portability, interoperability*

1. Introduction

In simple terms, "cloud computing" can be understood as the storing, processing and use of data on remotely located computers accessed through the Internet.[1] This means that end users have the ability to use almost unlimited computer power without having to invest large amounts of money into upgrading their own systems. Cloud computing is currently viewed by many in the industry as the "next big idea" that will see major information technology companies vying to exploit it.[2] With cloud computing even the smallest of businesses can get access to larger markets and governments can make their services more attractive and efficient while at the same time cut their spending.

Although there is a variety of definitions of cloud computing, the recently developed set of definitions provided by the US National Institute of Standards and Technology (NIST) has become the most authoritative. Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.[3] According to the same document, there are basically five main characteristics of cloud computing. (1) On-demand self-service means that users have access to cloud computing services automatically as needed, without requiring human interaction with each service provider. (2) These services are available over the network and accessed through a variety of devices such as PCs, laptops and smartphones for instance. Such ubiquity distinguishes cloud computing from the previous stages of evolution in computing: cloud services are accessible from any point, through any network, using any device.[4] (3) The provider's computing resources are pooled to serve multiple consumers using a multi-tenant model, with different physical and virtual resources dynamically assigned and reassigned according to the consumers' demand. There is a sense of the location independence as its consumer generally has no control or knowledge of the exact location of the provided resources but may be able to specify the location at a higher level of abstraction (e.g., country, state, or datacenter).[5] (4) Capabilities can be elastically provisioned and released, in some cases automatically, to scale rapidly outward and inward commensurate with demand. To the consumer, the capabilities available for provisioning often appear to be unlimited and can be appropriated in any quantity at any time.[6] For suppliers based on a server-client model, this

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1 Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions, Unleashing the potential of cloud computing in Europe, Brussels, 2012. available at http://ec.europa.eu/information_society/activities/cloudcomputing/docs/com/com_cloud.pdf, accessed on 3. April 2013, p. 2.

2 The Economist, "Battle of the clouds: Cloud computing", 381 The Economist 13; 71, 17 October 2009. Available at http://www.economist.com/node/14644393

3 P. Mell, T. Grance, "The NIST Definition of Cloud Computing: Recommendations of the National Institute of Standards and Technology", National Institute of Standards and Technology (NIST) Special Publication 800–145, January 2011, available at http://csrc.nist.gov/publications/nistpubs/800–145/SP800–145.pdf

4 J. Sluis, P. Larouche, W. Sauter, Cloud Computing in the EU Policy Sphere – Interoperability, Vertical integration and Internal Market, 2012. p. 14.

5 P. Mell, T. Grance, opopt. cit.

6 Ibid.

means change from selling software licenses to access– or subscription-based models, whereby customers will purchase services offered on the cloud computing platform on a discrete (pay-as-you-go/access) or continuous (subscription) basis.[7] Finally, (5) cloud computing is a measured service. Cloud systems optimize and control resource use which can be monitored, controlled and reported providing transparency for both the provider and the consumer.

There are mainly three cloud service models. The most visible one is the Software as a Service (SaaS). It provides access to a service whereby installing any additional software is not required. The most popular of these services like YouTube and Google Maps execute their data-intensive operations in the cloud and then return results to the user. Platform as a Service (PaaS) is a model which allows users to access development platforms for software without the need to buy or install additional software or hardware. Developers can use the cloud's service and design to implement and run their products using their firm's own server power. Finally, the Infrastructure as a Service (IaaS) offers remote computing and storage. Users can store or backup data on the servers with unlimited capacity.

2. Competition Issues

Although some of the competition issues fall outside the scope of this paper, they should nevertheless be mentioned. These are primarily two issues: first, although users may purchase services on one service provider, it is not excluded that that the service provider, let's say SaaS, uses services of another provider, for instance IaaS, and in that way the user has also engaged with the second service provider for which he may or may not know.[8] Thus the second service provider may dictate terms of business for both the first provider and also their users. The second issue which will not be discussed in this paper is derived from the fact that all cloud services are only available through various Internet service providers (ISP) and telecommunication companies who dictate the cost and terms for accessing the Internet and subsequently cloud services.[9] They can favor some cloud service providers while disfavoring others. In order to determine the competition issues in cloud computing, we are going to analyze each service model separately.

When cloud computing takes the form of SaaS, "the service provides functionality akin to an end-user application".[10] The harm to the competition comes from the practice of service providers resulting in data and application portability obstacles to enhance network effects.[11] Network effects are common in the ICT sector and mean that the more people use a product or a service, the more others will be willing to use them as well. A typical example is a telephone. This device would be of little use if there are only a few in the world, but the more people use telephones, the more people would buy them.[12] The examples in the cloud computing sector are Facebook and MySpace. The first one's usefulness derives from the size of its community of members, while the second one suffered a loss because of the small number of people using it.

When cloud services are offered in the form of a PaaS, providers offer tools for the construction of applications.[13] These platforms offer an environment for building, upgrading and maintaining applications. The competition issues in these services arise from the lock-in effect. This effect is achieved through the inability to port an application developed on that platform and associated data to another provider's platform.[14] Also the issue may arise from the abusive licensing conditions placed by the provider on developers of applications. This was the subject of recent investigations by the Commission in relation to Apple's iPhone applications. The investigation concerned Apple's decision of April 2010 to restrict the terms and conditions of its license agreement with independent developers of applications or 'apps' for its iPhone operating system. It focused on the rationale underlying Apple's requirement to use only Apple's native programming tools and approved languages when writing iPhone apps, to the detriment of third-party layers, which could have ultimately resulted in shutting out competition from devices running platforms other than Apple's.[15] If considered dominant in

7 J. Sluis, P. Larouche, W. Sauter, op. cit., pg 14.

8 K. W. Hon, C. Millard and I. Walden, "The Problem of 'Personal Data' in Cloud Computing – What Information is Regulated? The Cloud of Unknowing Part 1", London, 2011. International Data Privacy Law, 1(4)/2011, 211–228, p. 217.

9 See generally J. Sluis, P. Larouche, W. Sauter opopt. cit. and Walden (ed.) Telecommunications Law and Regulation, 3rd ed., OUP, 2009.

10 K. W. Hon, C. Millard and I. Walden, opt. cit., E.g. Facebook, MySpace, Google Docs and Office Web Apps.

11 L. D. C. Luciano, I. Walden, Ensuring competition in the Clouds: Role of competition law? (April 7, 2011). Available at http://ssrn.com/abstract=1840547 or http://dx.doi.org/10.2139/ssrn.1840547, p. 4.

12 Ibid.

13 E.g. Google App Engine, Force.com, LongJump.

14 L. D. C. Luciano, I. Walden, op. cit.

15 "EUROPA – Press Releases – Antitrust: Statement on Apple's iPhone policy changes," September 25, 2010. Available at http://europa.eu/rapid/press-release_IP–10–1006_en.htm

the market, Apple's conduct could be considered abusive as it reduces the choice of consumers.

Finally, when the cloud service takes a form of an IaaS, we are talking about the provision of virtualized application hosting or data storage. The main competition concern arises from the lack of data and application portability due to inability or prohibition by the service provider.[16]

3. Legal Regulation in the EU

The EU competition regime comprises different elements designed to address a range of anticompetitive behaviors, including conduct between market participants or carried out against consumers. We will concentrate here on Articles 101, 102 and 107 of the TFEU[17] and later there will be a word about some other, presumably more effective, mechanisms of ensuring competition.

3.1. Article 101

Article 101 of the TFEU prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Such agreements and practices can be horizontal[18] or vertical[19] and may be exempted pursuant to Article 101(3) if they "contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumer a fair share of the resulting benefit and which does not: impose on undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question". Cloud computing companies often engage in contracts which easily satisfy the first two conditions set out in Article 101(3). However, it is more difficult to prove the compliance with the third condition of the mentioned article.

It is important to note that even though a cloud company can achieve certain dominance in the market for a certain period of time as a result of agreements or concerted practice, cloud computing is a very fast-changing sector so the position of one firm in the market may quickly be changed by the innovations developed by other firms. Therefore agreements and practices in an innovation sector that would be prohibited in accordance with Article 101(1) are more likely to be exempted pursuant to Article 101(3).[20] For that reason the Commission does not tend to be overly intrusive in the ICT sector in the EU.

The commission may intervene in issues relating to standard-setting agreements and the ownership of intellectual property rights within adopted standards. In the Guidelines on the applicability of Article 101[21] it is stated that standard-setting agreements would not normally restrict competition within the meaning of Article 101(1) if the participation is unrestricted, if procedure for adopting standard is transparent, if the standardization agreement do not contain obligation to comply and if it provides access to the standard on fair, reasonable and non-discriminatory terms.[22] Nevertheless, even a closed standard-setting procedure may be permissible under certain circumstances, mainly because it was considered that the opening process to all interested parties could create logical and practical difficulties.[23]

Although standardization could be seen as something positive, as recognized by the EU[24], it is also recognized that, when a technology has been adopted as a standard, it may result in the creation of a barrier to entry, as other technologies and undertakings may be excluded from the market.[25]

3.2. Article 102

Article 102 prohibits the abuse of dominant position in the internal market or in a substantial part thereof. This article is an important tool for the Commission in the cloud computing sector. Dominance can be abused when products

16 L. D. C. Luciano, I. Walden, op. cit.

17 Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83/47, 30.3.2010.

18 A practice is horizontal when it takes place at the same level of supply/distribution chain.

19 A practice is vertical when it takes place at a different level of supply/distribution chain.

20 L. D. C. Luciano, I. Walden, op. cit.

21 European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Text with EEA relevance)" (2011/C 11/01), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF

22 Ibid., p. 59.

23 See Commission Decision of 15 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.458 – X/Open Group) (OJ L 035/36, 6.2.1987).

24 European Commission, (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Text with EEA relevance)) p. 56.

25 Ibid.

offered by undertakings in this sector become *de facto* standards protected by intellectual property rights (IPR), or undertakings may own IPR which are a part of the standard adopted by standardization bodies or that have been given preference by the public administration in relation to public procurements.

Once a standard has been adopted, the holder of IPR which are essential for the implementation of the standard can deny access to the competitors by either refusing to grant a license or requiring unreasonable terms and conditions for licensing. If the undertaking is dominant then the Commission may impose compulsory licensing of IPR on reasonable terms to avoid anticompetitive effects.[26] But, if the undertaking is not dominant, then there is not much the Commission can do about the refusal. In addition the undertaking can hold IPR over *de facto* standards. *De facto* standard is the one created by the market rather than by a standardization body. There is no law or standard associated with it and yet it is followed as though such enforcement existed.[27] Nevertheless, the situation with these standards is the same: if the undertaking is dominant then the Commission will intervene, but if it's not, there is not much the Commission can do.

Usually the market share required under EU law for an undertaking to be considered dominant, if all other market conditions point at that same direction, is at least 40%.[28] In the cloud computing sector, where network effects are likely to be strong in the same way as in the ICT sector as a whole, the non-applicability of competition law before the attainment of dominance could prejudice the goals of competition law.[29] By the time the competition law mechanisms are set into motion, the competition might already have been distorted and network effects can make it difficult to restore the competition. This was recognized by the Competition Commissioner who stated that "a case by case ex-post intervention is not always efficient to deal with structural problems, [thus] competition and sector regulation will need to work hand in hand, pursuing the same objectives through complementary means".[30]

Since EU competition law had not known of mechanisms for intervention before dominance occurred, the manner in which the relevant market is defined assumes a great significance. A number of special characteristics of cloud computing and the manner the competition authority understands them may have an impact on how "wide" or "narrow" the relevant market is defined and thus where the dominance is deemed to exist. The main issue which arises in cloud computing is the use of the tie-in or exclusivity agreements to leverage the market power of a dominant provider in the aftermarket.[31] While providers may have strong competition in the primary market, after they have had locked-in customers, they have virtually no competition in the aftermarket. On a pretext such as the need to ensure the safety or effectiveness of the service, the provider can impose the acquisition of the provider's own software.

Tying is not related only to software. Lock-in effect can be exploited at different levels. In 2010, for example, the Commission launched an investigation regarding IBM's computer mainframes.[32] IBM is being investigated for two practices in this sector: tying its mainframe hardware to its mainframe operating system and its discriminatory behavior towards the competing suppliers of mainframe maintenance services.[33] IBM appears to be using its dominance in the mainframe operating system market to leverage its position in the hardware market.[34]

This put aside, the Commission may intervene under Article 102 only when the cloud service provider is proven to be dominant in the market. Other ways for ensuring competition, like limitation of interoperability fall outside the scope of jurisdiction of the competition authorities. Nevertheless, competition law is not the only form of regulation of practices that could harm the competition and consumers.

3.3. Article 107

Article 107 prohibits a Member State from granting any form of "aid" that distorts competition by favoring certain undertakings. As such, this

26 E.g. Cases C–241/91 P and C–242/91 P RTE and ITP v Commission [1995] ECR I–743 ('Magill'("Magill") and Case C–418/01 IMS GmbH v NDC Health DmbH & Co KG [2004] ECR I–5039.

27 See Case T–201/04 Microsoft Corp v Commission [2007] II ECR 03601.

28 See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (OJ C 45/7, 24.2.2009), para. 14.

29 L. D. C. Luciano, I. Walden, opopt. cit.

30 EUROPA – Press Releases – "Competition policy for an open and fair digital economy Second NEREC Research Conference on Electronic Communications Madrid," 29 October 2010. Available at http://europa.eu/rapid/press-release_SPEECH–10–610_en.htm

31 L. D. C. Luciano, I. Walden, op. cit.; An aftermarket refers to a market where consumers are likely to buy a product or a service related to the one sold in the primary market.

32 "EUROPA – Press Releases – Antitrust: Commission initiates formal investigations against IBM in two cases of suspected abuse of dominant market position," 26 July 2010. Available at http://europa.eu/rapid/press-release_IP–10–1006_en.htm

33 Ibid.

34 Ibid.

prohibition may be relevant to cloud computing when a distortion of competition is caused by public administrations via public procurement decisions. Competitors excluded from the market may be able to complain and seek redress when, for instance, a public administration chooses specific public procurement specifications which may lead to elimination of a substantial part of competition.[35]

An example of this situation can be found in the US case of *Google v United States Interior Department*.[36] In October 2010 Google filed a claim against the U.S. Interior Department alleging that its public procurement practices illegally distorted competition by requiring, in relation to a US$59 million contract for ICT services, messaging technologies to be based on Microsoft Business Productivity Online Suite, therefore excluding Google from public procurements and restricting competition.

It is not difficult to imagine similar claims being brought in the EU, especially considering the interoperability strategy of public administrations in the EU, discussed further below. Therefore, Article 107(1) could prove to be a useful tool for competitors excluded due to public procurement criteria.

4. Other Mechanisms for Protection of Competition

So far, we have examined the potential application of EU competition law to cloud computing. One thing that could be objected to these mechanisms is that they only act as an *ex post,* reactive regime. Therefore, the ability to effectively prevent anticompetitive behavior is questionable. This part of the paper will deal with other mechanisms of protection of competition which deal with the issues before the TFEU is applied.

4.1. Open standards

One of the things that can ensure competition is standardization. Although standardization in the EU has proven as a successful tool for the achievement of the Single Market, the Commission has admitted the need for improvements in certain areas, including ICT.[37] The biggest problems of the standardization procedure of the EU are its speed and effectiveness. The rapid changes in the ICT sector are often not followed by an appropriate standardization.[38] What the EU can do is to follow the example of the US. In the US there is no hierarchical structure similar to the one found in the EU where national standardization bodies must drop the development of a national standard if an European Standardization Organization is already working on a standard for the same matter.[39] That means that standards in the US can be adopted more quickly than in the EU. Furthermore, we must recognize the important role of the informal standardization groups. The White Paper[40] proposes that reference to standards created by fora and consortia[41] in EU legislation and policies should be permissible, as a means of achieving public policy goals. However, in order for informal standards to be referenced in EU legislation they must comply with the attributes of formal standards: openness, consensus, balance and transparency. According to Commissioner Neelie Kroes, "The reform of the European ICT standardization framework is a simple way to bring relevant standards from the non-traditional standard-setting organizations to an equal footing with European standards when it comes to achieving interoperability".[42]

4.2. Interoperability

The interoperability issue in the ICT sector is of great importance. Its relevance has also been highlighted by the recent commitments in the *Intel/McAfee*[43] decision, where the Commission approved the acquisition of McAfee by Intel subject to certain interoperability commitments. The acquisition had raised concerns in respect of the possibility that, after the acquisition, security software would suffer from technical tying between McAfee's security solutions and Intel CPUs and chipsets or from a lack of interoperability with the latter.[44] The commitments accepted by the Commission contained, among other things, an obligation by Intel to ensure that instruction,

35 L. D. C. Luciano, I. Walden, opopt. cit.

36 See Google Inc. and Onix Networking Corporation v. The United States and Softchoice Corporation (United States Court of Federal Claims 2011).

37 European Commission, "Communication from the Commission to the European Parliament and the Council on the Role of European Standardization in the framework of European Policies and Legislation," 2004, p. 3.

38 L. D. C. Luciano, I. Walden, op. cit.

39 Directive 98/34/EC (OJ L 204/37, 21.7.1998), para. 18.

40 European Commission, "White Paper: Modernising ICT Standardisation in the EU – The Way Forward," July 3, 2009.

41 Fora and consortia are composed by undertakings which draft technical standards and specifications outside the framework of the recognised standardisation bodies.

42 "EUROPA – Press Releases – Neelie Kroes Address at Open Forum Europe 2010 Summit: 'Openness at the heart of the EU Digital Agenda' Brussels," 10 June 2010. Available at http://europa.eu/rapid/press-release_SPEECH–10–300_en.htm

43 European Commission, "Case n° COMP M.5984 – Intel/McAfee – Commitments to the Commission," 20 January 2011.

44 L. D. C. Luciano, I. Walden, op. cit.

interoperability and optimization information are documented and available, under request, to third party vendors of Endpoint Security Software pursuant to a license or other suitable contractual agreement.[45] Another important element of the commitments regarded the obligation by Intel not to actively engineer or design its microprocessors or chips to degrade the performance of Endpoint Security Software sold by a firm other than Intel.[46] This decision is a relevant precedent for cloud computing and for the ICT sector in general, where a purposeful creation of obstacles for interoperability can be used as a strategy to create barriers to entry and exclude competitors from the market.[47]

4.3. Data portability

Another emerging issue on the competition in cloud computing is data portability. As explained earlier in this paper, migration from one cloud service to another may be restricted pursuant to the terms of an agreement with a provider or it may be difficult due to the technical incompatibility. This is the so-called lock-in effect. An improvement in data portability would reduce the lock-in effect and require competitors to compete for their existing customers as well as increasing their customer base. It is proposed also that data portability becomes a right protected within the privacy context.[48] According to the Commission, an individual should have the right to withdraw his own data from an application or service and transfer such data into another application or service, as far as this is technically feasible.[49] Thus, regulating data portability in the cloud computing sector could prove to be more effective and straightforward via the enforcement of data portability rights under the umbrella of data protection policy than via the enforcement of competition law.[50]

5. Conclusion

This paper has analyzed competition problems in cloud computing, their regulation within EU competition law, and possible solutions outside of the mentioned legal framework.

Although EU competition law gives power to the Commission to intervene when there is some kind of anti-competitive behavior, it can only act when the firm has a dominant position in the market. Given the fact that the ICT sector is fast-developing and fast-changing, it is hard to achieve a dominant position in the Primary Market, but because of the lock-in effect, a firm can have almost complete monopoly in the aftermarket. For that reason, it is necessary to take additional measures such as adequate defining of the cloud market, informal standardizations, achieving interoperability and data portability.

This paper has dealt with these solutions presenting both the issues on which they can be implemented and the conditions for their implementation.

Saša Markota

"Cloud computing" iz ugla evropskog prava konkurencije

„Klaud kompjuting" je relativno nov fenomen koji se bazira na ideji da se podaci i aplikacije nalaze na udaljenoj mašini kojoj se pristupa preko interneta sa bilo kog mesta na planeti. Ovaj članak predstavlja uvod u probleme konkurencije u sferi klaud kompjutinga unutar zakonske regulative EU. Radije smo se fokusirali na nedostatke i pravne praznine prava konkurencije EU, kao i na to kako rešiti praktične ozbiljne probleme onda kada Evropska komisija nije u mogućnosti da reaguje u skladu sa trenutnom pravnog regulativom nego da se fokusiramo na pozitivne strane. Problemi kao što su otvoreni standardi, interoperabilnost i prenosivost podataka bi trebalo detaljnije da se analiziraju s obzirom na to da predstavljajaju efikasne načine zaštite konkurencije u sferi klaud kompjutinga. U radu se nastoji dati pregled problema koji utiču na konkurenciju u sektoru koji se svakodnevno menja i razvija.

Ključne reči: *Klaud kompjuting, konkurencija, interoperabilnost, prenosivost podataka*

45 Ibid.

46 European Commission, "Case n° COMP M.5984 – Intel/ McAfee – Commitments to the Commission," 20 January 2011.

47 L. D. C. Luciano, I. Walden, op. cit.

48 European Commission, (Communication from the Commission to the European Parliament and the Council on the Role of European Standardization in the framework of European Policies and Legislation), 2004, p. 3.

49 Ibid.

50 L. D. C. Luciano, I. Walden, opopt. cit.

THE EU'S TRADE POLICY IN THE TEXTILES SECTOR

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Worldwide, trade policies in the area of textiles and clothing are experiencing significant restructuring due to the on-going process of market liberalization. For quite a long time, the major economies managed to secure a protectionist approach for trade in textiles and clothing, envisaged in the system of quantitative restrictions on imported textiles and clothing products, which were implemented only on imports from certain countries, thus privileging some on the expense of others. Since this practice defied the core principles of world trade, such as non-discrimination, it was decided to begin the phasing-out of quotas and integrating trade policies in this sector into the regulatory framework of the World Trade Organization.

This paper focuses on the trade policy of the EU in the area of textiles and clothing. A brief outline of the scenario prior to the abolition of quotas will be given. Afterwards, the author well attempt to elaborate on the key features of the EU textiles and clothing industries and the course of its trade policy in this sector in a quota-free environment. We will take a look at how the EU is managing to maintain a significant role in the global market in this sector – the difficulties with which the domestic market is faced and the priorities it set in order to keep abreast of its competition. Finally, we will observe the past and present relationship between the EU and the Republic of Serbia with regard to trade in textiles and clothing and whether this sector could provide a possibility for further co-operation.

Key words: *trade policy, European Union, textiles and clothing, quantitative restrictions, market liberalization, Republic of Serbia.*

Introduction

The playing field of global trade has always been governed simultaneously by the rules of economics and market regularities as well as by an array of diverse political interests. Trade policies in the field of textiles and clothing are no exception to this rule. From the outset, they have been shaped by a multitude of conflicting political interests involved. The lobbying abilities of their representatives greatly determined whose interests were to prevail at a certain time. On one hand, there is the traditional gap between the developed, industrialized countries and the developing ones, out of which some are among the largest world economies today, and on the other, conflicted interests of major producers, exporters and large retail groups. What contributes generously to the intricacy of this industrial sector are the ties that link it with other sectors and policies such as agriculture (in the access to raw materials), the chemical industry (in a number of processes such as dying, bleaching etc.) environmental, social and employment polices (when it comes to complying with strict standards regarding environmental and human safety and minimum labor requirements).

The European Union (hereinafter referred to as: EU) was, and remains to date, a reputable player in the trade of textiles and clothing. It is one of the top importers of textiles and clothing products, as well as a leading exporter in high fashion apparel and in alternative uses of textiles such as technical textiles.[1]

Its policy therein has, in the span of nearly twenty years, endured significant restructuring, which ranged from an extremely protectionist approach, envisaged in a system of quota restrictions on imported products, a policy which clearly defied principles of international trade, to the full embedment of its legal framework into the rules of the General Agreement on Tariffs and Trade (hereinafter: GATT)/World Trade Organization (WTO). This transformation from dominating the world market by dictating the rules of the game to a "liberalized" environment forced the EU to redefine its priorities and find other ways and instruments of enhancing competitiveness and shielding its exposed and now vulnerable market from the surges of imports coming from the "unleashed" growing economies from the East.

The aim of this paper is to outline the key features of the EU's textile policy, from its outset up until today, as well as to present the relevance of this sector for the overall trade policy of the EU. In the chapters to come we will also focus on the external side of this sector, i.e. its position in

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1 Commission of the European Communities, Commission Staff Working Paper-" Economic and Competitiveness analysis of the European Textiles and Clothing Sector in support of the Communication "The future of textiles and clothing sector in the enlarged Europe"", SEC (2003) 1345, Brussels 2003, available at: http://ec.europa.eu/enterprise/sectors/textiles/files/sec2003_1345_en.pdf, p.28.

the global economy and EU's main trade partners in this area. Several lines will be dedicated to the threats to EU industry and measures which could enable it to respond to the global challenges, as well as the main priorities of this policy. Finally, we will take a look at the past and ongoing relationship between the EU and the Republic of Serbia in the textiles and clothing industry, and the possibility of future co-operation on Serbia's path to European integration.

1. Historical overview of the textile policy

Developed economies, namely the European Union, Canada the United States and Norway, with a view of salvaging their textile and clothing sectors from the detrimental effects of World War II and in order to shield their markets from the growing competition coming from Asia, managed to preserve a special status for their trade policies in textile and clothing sectors, thus exempting them from the principles and rules of international trade envisaged in the GATT.[2]

The unique institutional framework for these sectors was centered around a system of quantitative restrictions on products imported from third countries on the so-called country-by-country and product-by-product base.[3] This discriminatory practice meant that imported textiles and clothing items did not enjoy equivalent treatment, as the Most Favored Nation principle which governs international trade would imply, but that their fate depended on the country of origin. In this way, products coming from e.g. China and India were faced with barriers to trade in the shape of import quotas, whereas many Least Developed Countries (LDCs)[4] along with some Central and Eastern European countries were not, due to a number of preferential trade agreements with the EU and other developed countries. This environment created an image of quasi competitiveness for the least efficient countries as they were not only well-protected by the quotas imposed, but also increasingly engaged on the international scene through numerous subcontracting arrangements with the countries whose trade was hindered by quota limitations and were looking for ways to bypass them, which distracted them from focusing on the development of a competitive domestic industry.

These discriminatory arrangements came to life in the shape of several legal acts, the first one concluded in 1961 in the field of international trade in cotton textiles – the Short-Term Arrangement Regarding International Trade in Cotton Textiles.[5] It leads the way to bilaterally or unilaterally negotiated quantitative restrictions, within a one-year time frame, in case of "detrimental market disruptions" which were defined as the "possibility of singling out imports of particular products from particular countries as the disrupting source".[6] The broad definition of this concept made it susceptible to arbitrary interpretations, allowing the developed importing countries to decide upon the type of products and exporting countries to which it was to be implemented.[7] Subsequent to that, in 1962, another agreement had been signed, the Long Term Arrangement Regarding International Trade in Cotton Textiles (LTA),[8] initially intended to last for a period of five years, albeit its application had been renegotiated several times.[9]

In 1974, the Multi Fiber Agreement (MFA),[10] yet another arrangement of a similar purpose came into effect. This agreement extended the application of quantitative restrictions to include wool and man-made fiber.[11] Like its predecessors, it was meant to be only temporary. Its duration

2 J. Eckhardt, "The Evolution of EU Trade Policy towards China: The Case of Textiles and Clothing", in: J. Men, G. Balducci (eds.), Prospects and the Challenges for EU-China Relations in the 21st Century-The Partnership and Cooperation Agreement, Brussels, 2010, Peter Lang, Chapter 6, 151–172, p. 3.

3 H. K. Nordås, "The Global Textile and Clothing Industry post the Agreement on Textiles and Clothing", Discussion paper No. 5, World Trade Organization, Geneva, 2004, 1–37, available at: http://www.wto.org/english/res_e/booksp_e/discussion_papers5_e.pdf, (3.1.2013), p.12.

4 According to the WTO, the Least Developed Countries are the ones "designated as such by the UN". To date, there are 49 countries with that status such as, for example, Angola, Burkina Faso, Cambodia, Togo etc.

World Trade Organization, Least-Developed Countries, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, (3.1.2013).

5 H.K. Nordås, op.cit., p.13.

6 J. F. Francois, H. H. Glismann, D. Spinager, "The Cost of EU Trade Protection in Textiles and Clothing", Working Paper No.997, Kiel Institute of World Economics, Kiel, 2000, p.8.

7 J. C. Tan, "The Liberalization of Trade in Textiles and Clothing: China's impact on the ASEAN economies", Department of Economics, Stanford University, 2005, 1–77, available at: http://economics.stanford.edu/files/Theses/Theses_2005/Tan.pdf, (3.1.2013), p.10.

8 H.K. Nordås, op.cit., p. 13.

9 J.Francois et. al., op.cit., p.10.

10 GATT Digital Library: 1947–1994, Arrangement Regarding International Trade in Textiles, General Agreement on Tariffs and Trade, General Distribution 20 December 1973, available at: http://gatt.stanford.edu/bin/search/simple/process?offset=0&length=10&query=arrangement+regarding+international+trade+in+textiles&search=Search, (3.1.2013).

11 J.Francois et. al., op.cit., p.10.

was, however, prolonged four times, and it came to an end in 1994.[12]

This situation was unsustainable as it openly violated the core principles governing international commerce such as non-discrimination and free competition. Due to the lengthy history of protectionism in this field and extreme lobbying from parties of conflicting interests, it was decided that the process of unifying trade policies in the textiles and clothing sectors and integrating them into the framework of the international commercial rules should be incremental. For that purpose, the Agreement on Textiles and Clothing (ATC) was signed in 1995, the same year of the creation of the World Trade Organization (WTO).[13] The ATC was an interim agreement, serving as a bridge between the MFA and the full integration of textiles and clothing policies into the WTO rules within a period of ten years. Art.1 of the ATC states:"This Agreement sets out provisions to be applied by [WTO] Members during a transition period for the integration of the textiles and clothing sector into GATT 1994."[14] Nordås suggests that the course of action created by the ATC arrangement could be viewed as two separate processes – the first one being the progressive phase out of quotas and the integration into the WTO, and the second – the progressive increase of the quotas that remained in the ATC framework.[15]

The phasing out was supposed to consist of four stages, the final being full integration. The first stage began with the entry into force of the Agreement (1 January 1995), and Members were obliged to integrate at least 16% of the total volume of 1990 imports of products. The next stage began in 1998, and the due percentage rose to 17%, followed by the third stage on 1 January 2002, where another 18% of the products were to be integrated. The concluding stage was set to 1 January 2005.[16] The list of products was given in the Annex to the Agreement (however, products that had not been subject to quotas under the MFN were also included, which constituted one of the many loopholes of the ATC)[17] and signatories were allowed the liberty of deciding upon the type of product they would apply at each of the four stages of integration, albeit, they were required to include the following: yarns, fabrics, made-up textile products and clothing. The progressive increase in quotas provided that in the first stage the annual growth rates were to be scaled up by 16%, in the second 25% and in the third by a factor of 27%.[18]

Other relevant provisions of the ATC provided for an establishment of a Textiles Monitoring Body (TMB) to supervise the implementation of the Agreement and ensure that the rules are faithfully followed, and a special safeguard mechanism to deal with new cases of serious damage or threat to domestic producers during the transition period – a concession to China's accession to the WTO.[19] Namely, its textile and clothing policy was to be incorporated into the ATC framework. However, as a concession to those opposing the liberalization of trade with China, a specific clause was introduced, the so-called Textile Specific Safeguard Clause which allowed countries to invoke it in case of "material injury" to the domestic market of surges of imports coming from China, which had a limited application until the end of 2008.

Because of the above-mentioned weaknesses of the Agreement, countries managed to "waste" the first two stages on products that were excluded from the MFA regime, as well as with the removal of relatively low utilized quotas (in the EU, out of 37 quotas to be eliminated, 28 had a utilization rate of below 50 percent).[20] The most sensitive products were left for the very end.

The abolition of import quotas that governed the trade in textiles and clothing for a long time urged global players to swiftly turn to new ways of enhancing competitiveness if they were to take part in the creation of a new world map of textiles and clothing.

The quota-free scenario had mixed results. Complete liberalization was far from being fully accomplished, since now that quotas were out of the way, substitute barriers to trade, namely tariffs and non-tariff barriers (excessive labeling requirements, stringent rules of origin, excessive certification requirements, social clauses are just some of them)[21] that have been hidden under

12 Ibid.

13 World Trade Organization, Textiles Monitoring Body (TMB), The Agreement on Textiles and Clothing, available at: http://www.wto.org/english/tratop_e/texti_e/texintro_e.htm, (3.1.2013).

14 United Nations Conference on Trade and Development, Dispute Settlement, World Trade Organization-Textiles and Clothing, available at: http://unctad.org/en/docs/edmmisc232add21_en.pdf, (3.1.2013).

15 H.K. Nordås, op.cit., p. 3.

16 J.Francois et. al., op.cit., p. 10.

17 H.K. Nordås, op.cit., p. 13.

18 Ibid., p. 14.

19 World Trade Organization, Textiles Monitoring Body (TMB), The Agreement on Textiles and Clothing.

20 H.K. Nordås, op.cit., p.14.

21 M. Hayashi, "Trade in Textiles and Clothing: Assuring Development Gains in a Rapidly Changing Environment", United Nations Conference on Trade and Development, New York and Geneva, 2007, 1–33, p.14–18.

the veil of quotas for some forty years, came to the surface. If the global market were to be fully free of any obstacles to trade, it was up to the leading players under the surveillance of international organizations such as the WTO and the United Nations to weave an entirely new web in the complex policies of textiles and clothing, taking into account a vast array of interests and requests of both the developed and developing countries alike.

2. An Outline of the EU Textile and Clothing Industry

Before we take a look at the key features of the of the textiles and clothing sectors in the EU we will dedicate a few lines to the characteristics of these sectors in general, as being cognizant of the particulars of these industries as a whole will enable us to better grasp the concept of their specific environment within the EU.

Firstly, it is essential to emphasize that the textile and clothing industries are two singular industries, each comprising of a range of complex and diverse activities and processes. This does not, however, undermine the traditional co-relation of these two sectors, both in the technical (as the traditional application of the processes in the textile industry is in the clothing sector) and in the regulatory sense (their equivalent regulation on the national, regional and international scene).[22] It is precisely this connection between them that is the rationale of their continual joint analysis, as well as the reason we will be examining them in close proximity.

The textile industry consists of numerous activities which involve the treatment of natural (cotton, flax, jute...) or man-made fibers, knitting and weaving, finishing activities (which provide the product with the necessary physical and aesthetic properties) like printing, dyeing, plasticizing etc. and the transformation of these fabrics into concrete products, which have various applications in different segments of life, in the apparel industry, as technical textiles etc.[23] In the clothing industry, the differentiation between subsectors is done according to the materials used.[24]

This industry is, contrary to the clothing (apparel) industry, more capital– than labor-intensive, less flexible, has a longer life-cycle and requires constant investment in innovation, R&D and in equipping employees with adequate technological skills in order to keep up with the changing trends in this field. Both the textiles and the apparel industry are further divided into sub-sectors, by different product groups, either vertically or horizontally (e.g. man-made fibers, yarns, technical textiles, household textiles, carpets etc.).[25] In the denomination of various sectors and their sub-divisions, the commonly used sources are the Combined Nomenclature (CN), "a method for designating goods and merchandise which was established to meet, at one and the same time, the requirements both of the Common Customs Tariff and of the external trade statistics of the Community"[26] as well as the NACE[27] (*Nomenclature statistique des activités économiques dans la Communauté européenne*) codes.

The relative significance of the textile and clothing sectors in the total manufacturing industry of the EU differs from region to region. If different variables such as employment, turnover and value added are examined, in the year 2000 Italy contributed with the largest share of 28%, followed by the UK with 15%, Germany with 14%, France (13%), Spain (9%) and Portugal (6%).[28] Among these countries, some are more oriented to the production of textiles, others contribute relatively more to the clothing sector (there seems to be a traditional partition between the Members, in such a way that the northern countries like the UK, Germany, Belgium, the Netherlands, Austria and Sweden have specialized more in the textile industry, whereas the southern countries, namely

22 C. Buelens, "Trade Adjustments following the Removal of Textile and Clothing Quotas", CEPS Working Paper No.222, Brussels, 2005, 1–30, p. 2.

23 The European Commission, Directorate General for Enterprise and Industry: Textiles and clothing-The EU–27 textiles and clothing industry, available at: http://ec.europa.eu/enterprise/sectors/textiles/single-market/eu27/index_en.htm, (4.1.2013).

24 CEPS, "The textiles and Clothing Industries in an Enlarged Community and the Outlook in the Candidate States", Final Report-Part 1, In the Framework of Contract No. FIF. 20030838, 2005, 1–176, p.1.

25 The European Commission, The Textile and Clothing Sector and the EU trade policy 2011, available at: http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148259.pdf, 1–63, p.5.

26 Chapters 50 to 60 and 63 of the CN are relevant for the textile, whereas the chapters 60 to 61 are dedicated to the clothing sector.

Commission Regulation of 17 October 2006 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (Official Journal of the European Union, No 1549/2006) 31.10.2006, available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:301:0001:0880:EN:PDF, (4.1.2013).

27 In the NACE database, NACE Rev 1 17 corresponds to textiles and NACE Rev1 18 to clothing.

W. Stengg, "The textile and clothing industry in the EU-A Survey", European Commission, DG Enterprise, Enterprise Papers No.2–2001, Belgium, 2001, 1–64, p. 2 fn.1.

28 Ibid., p.12.

Spain, Portugal Greece are more oriented towards the apparel industry).[29]

As for the geographical spread of the sub-sectors, in the textile industry, wool is a dominant factor in the Italian industry, as well as in France and the United Kingdom. Man-made fibers and yarn are characteristic for Germany, Austria, Italy and Eastern European countries. Germany, France, Italy and Belgium are the leaders in technical textiles production.[30] When taking into account the "new" Member States (the past two enlargements), the top three contributors to the textiles and clothing industries in the sense of value added, production and employment are Poland, the Czech Republic and Hungary.[31]

As for the question of relative importance of sub-sectors in general, in 1998, in terms of volume, cotton was the most important natural fiber (22%), followed by wool (7%). Out of man-made fibers, polyester had a dominant share of 25%.[32]

Bearing in mind that the EU's textile and clothing sector has been impacted by a variety of outer factors other than the distress of experiencing thorough restructuring in the post-quota period, like the injurious effects of the economic crisis and the last two circles of enlargement, there has been a general downfall regarding investments in this field (due to higher financial risks), annual turnover (most of the subsectors indicate a high trade deficit) and the number of employees. In 2011 the total annual turnover nearly reached €179 billion, which shows a decrease by 28% in just 13 years.[33] Slow recovery is recorded at the end of 2009, and in 2010 it seems to be attaining levels calculated in 2008.[34] The fastest recovery has been accomplished in the production of technical textiles, one of the sub-sectors which appear to be EU's biggest competitive advantages, as well as in the production of yarns. When it comes to investments, they have been fluctuating, but the calculated figure for 2011 reached about €5 million.[35]

The downfall in employment can be linked to the re-orientation towards technological improvements and the fragmentation of the supply chain, i.e. outsourcing the assembly stage of the clothing production to lower wage countries. Sub-contracting arrangements, as well as outward processing transactions (OPTs) imply that processing of raw materials and turning fibers into garments is being internationalized i.e. transported to countries of geographical proximity, mainly to the members of the Euro-Med zone, Turkey and other countries with a preferential arrangement with the EU (prior to their accession, these arrangements had also been concluded with Romania and Poland)[36] in order to reduce costs. Thus, between 1980 and 1995, the loss of employment amounted to 40% in the apparel and 47% in the textile sector[37] and the number of employees in 2011 reached some 1.834 million in around 145.978 companies.[38] The cost-effectiveness of such arrangements was more discernible during the long period of protectionism when this method sought to benefit from lower tariff rates. After the liberalization process began, the cumbersome administrative work in relation to OPTs outweighed the benefits of such arrangements, and to date they are losing popularity, to the advantage of numerous preferential trade arrangements. However, according to Stengg, "even though official statistics show a gradual decline, the actual economic experiences show that OPTs are still very much present in world trade".[39]

As for the entrepreneurial structure of the textile and clothing industry in the EU, it is for the most part dominated by small and medium sized enterprises (henceforth: SME), employing below 50 employees, most of them which are in private property. In spite of this, a small number of large enterprises accounts for a relatively significant turnover, a trend which is mostly present in the UK, whereas this structure plays a much less prominent role in Italy.[40] In theory, several factors have been singled out as the causes of such market structure such as a slow, unstable and rapidly changing demand, limited scope of economy of scale in the fields other than design and limited product range, susceptible to quick obsolescence.[41]

29 Ibid., p.10.

30 The European Commission, The Textile and Clothing Sector and the EU trade policy, p. 9–10.

31 CEPS, op.cit., p. 8.

32 W. Stengg, op.cit, p. 7.

33 European Commission Report, The textile and clothing sector and EU trade policy, p. 10.

34 Ibid.

35 EURATEX, "The EU –27 Textile and Clothing in the year of 2011", 2012, available at: http://www.euratex.org/content/the-eu–27-textile-and-clothing-industry-year–2011,(8.1.2013).

36 W. Stengg, op.cit., p.4–5.

37 Ibid., p.3.

38 Ibid.

39 Ibid., p.5.

40 M. Dunford, "The changing profile and map of the EU textile and clothing industry", School of European Studies, University of Sussex, Brighton, 1–20, p.6.

41 Ibid., p.19.

The EU textiles and clothing sector falls under the realm of the EU Commission's DG Enterprise (Directorate General for Enterprise and Industry). Several acts regulate this domain, among which the recently adopted Regulation (EU) No. 1007/2011, which concerns labeling[42] is noteworthy, and will be discussed in more detail in the chapter dealing with technical barriers to trade. Notable is also the work of the *Commission expert group on textile names and labeling*, a group which brings together experts appointed by the Member States, responsible for providing deliberative information and opinions regarding its level of expertise, as well as the implementation of the Regulation. Another important factor is the *High Level Group on textiles and clothing*.[43] It was set up by the Commission in order to follow-up on the Communication: "The future of the textiles and clothing sector in the enlarged European Union", adopted on the 29 October 2003. Since then, the High Level Group has issued several reports in this area.[44]

Challenges which the EU industry is facing today include the battle to uphold competitiveness on two significant fronts – within its own market vis-à-vis imported products and on third markets. With regard to the first front, the main obstacles are the adverse corollary of the somber economic situation causing low consumer demand, stringent regulatory framework concerning quality requirements, environmental, social policies; labeling etc. with which products imported from outside the EU need not be compliant (and whose domestic policies in these segments provides only the minimum standards required by international rules of the e.g. ILO, if even that), and which seems to be, paradoxically, pulling the development of this industry backwards. Also, devising ways in which market requirements could be met in a timely manner and adopting new technology at a fast pace seem to be the EU's current priorities. On the external side, the EU T/C sector is confronted with high tariff peaks and non-tariff barriers to trade, lower-wage labor, especially in Asian developing countries, easier access to raw materials of countries mainly located in Asia and other competitive and anti-competitive behavior, which is certainly a challenge.[45]

3. External Dimension of EU's Trade Policy in the Textiles and Clothing Sectors and Main Trade Partners

The trade in the textiles and clothing plays an important part in the overall trade policy of the EU. Trends and figures have varied greatly over the years and especially so in extremely sensitive times such as the ones mentioned in the previous chapter. When observing the general relevance of this sector for the EU vis-à-vis other industrial sectors for its trade performance, we can see that in 2008 it accounted for 4.2% of total EU imports of industrial products and 3.3% of total exports.[46] Just a year later, the numbers altered: 6% and only close to 3% of textiles and clothing products, on the import and export sides, respectfully.[47]

The EU textiles and clothing industry is an important factor on the global commercial scene. Its high export potential is envisaged in the fact that more than 20% in the apparel sector and 23% in the case of textiles of EU production in value is sold on the external market.[48] Since reciprocal and fair trade conditions are essential for maintaining competitiveness on a global scale, the EU has been involved in a series of bilateral negotiations and arrangements with third countries – its main trade partners and competitors, in order to achieve better market access conditions.

When it comes to EU's trade performance following the quota removal, imports have been constantly increasing while exports are facing a continual decline. In 2008 its world share of exports was €37.54 billion (an equivalent of 8.5%), while in 2009 they faced a downfall and resulted in €30.46 billion. The situation is slowly but surely becoming brighter.[49] As for the extra-EU imports,

42 Regulation (EU) No. 1007/2011 of the European Parliament and the Council of 27 September 2011 on textile fiber names and related labeling and marking of the fiber composition of textile products (Official Journal of the European Union, L 272 18.10.2011), available at: http://ec.europa.eu/enterprise/sectors/textiles/single-market/reg–1007–1011/index_en.htm, (8.1.2013).

43 European Commission, Enterprise and Industry Textiles and clothing Textile and clothing high level group, available at: http://ec.europa.eu/enterprise/sectors/textiles/documents/high-level-group/index_en.htm, (5.1.2013).

44 Ibid.

45 The European Commission, The Textile and Clothing Sector and the EU trade policy, p.12–19.

46 Ibid., p.12–13.

47 Ibid.

48 The Commission of the European Communities, Commission staff working paper: "Economic and Competitiveness Analysis of the European Textile and Clothing Sector in Support of the Communication-"The future of the textiles and clothing sector in an enlarged Europe"".

49 In 2010, a slight recovery was observed, and the last available results show a mild increase of extra EU exports, in the value of €38.7 billion in 2011, EURATEX, Key figures leaflet, available at: http://www.euratex.org/news-and-publications/63, (5.1.2013).

they show an augmentation in the amount of € 93.1 billion in 2011.[50]

In 2009, the main export products were cotton, yarn and other textiles, among which the leading role was played by technical textiles.[51]

Reflecting the situation in other trade sectors, intra-EU trade in textiles and garments maintains the primary position, with intra-EU imports accounting 55% of total imports and 73% of total exports.[52] Other relevant export markets include the US, Japan, Switzerland and Canada (countries at a similar development stage and with an analogous purchase power), as well as the Russian Federation (amounting in 11.9% of EU textile and clothing exports) and, since recently, Brazil.

When it comes to imports, which are comparatively higher than exports, in 2008, its main trade partners were China (39%), Turkey (14%), India (7.7%), Bangladesh (6.3%) and Tunisia (3.6%), in terms of value.[53]

One of the key priorities of the EU trade policy is strengthening the Euro-Mediterranean zone (and extending it to the Pan Euro-Med), as the establishment of a free trade among the members, some of which are its main trade partners, is beneficial to the EU and its partners. The chief privileges of these countries is their geographical position, since the proximity of their markets allows quicker market response and the lower-wage labor makes them attractive for outsourcing arrangements in the apparel industry.[54] As much as 15% of EU exports are oriented to the Euro-Med area, and on the import side, Turkey took up 14% share in the EU market, and Tunisia 3.6% in 2008.[55]

As we have already seen, Turkey is one of the most important trade partners (both in exports and imports) to the EU, which is not surprising given its privileged access to the EU market both through the Euro-Med Arrangement and the Customs Union Pact (hereinafter referred to as: CU Pact).[56] This meant a lot for the expansion of Turkish textiles and clothing industry outside domestic borders and in the recent years it invested a lot in the development of high-value and fashionable products. Not to mention its leading role in cotton. Since the conclusion of the CU Pact, exports of Turkish textile and clothing enterprises to EU members of the time increased by 106%.[57] In a similar vein, Turkish textiles and clothing industry took up a remarkable share in the EU–15's imports (6.3%) and a share of 1.7% of its exports.[58]

However, after the changed course in world trade policies, China rose as the most prominent partner (as can be seen from the aforementioned figures). The EU-China relationship in the trade of textiles and clothing best represents the political sensitivity of this sector and the assortment of confronted interests.

Eckhardt suggests viewing the EU-China relations as a three-phased stadium.[59] In the first phase which lasted from 1978–1994, extreme protectionism in the shape of a bilateral Textile Agreement was the key feature. In the second phase, which governed their relationship in the period between 1995 and 2001, a new agreement, the so-called Silk Agreement[60] had been signed, and a slight transition towards liberalization was ahead. It was at that time that China became a member of the WTO. The final phase, which started in 2001 and has been lasting to date, is a result of a quota-free environment prevailing on the global commercial stage. Developed countries, namely the USA and the EU, rushed to sign bilateral agreements with China in 2005, at the time of the ATC termination, which enabled them to introduce quantitative restrictions on a limited number of products (in the EU, some of these 10 products were cotton fabric, bed linen, flax yarn etc.) and its application was to coincide with the possibility of invoking the Safeguard Clause.[61] A natural consequence of the expiration of these

50 In comparison to € 87.7 billion in 2008 and € 74.9 billion in 2009, European Commission, DG Enterprise and Industry, Textiles and Clothing-External Dimension, available at: http://ec.europa.eu/enterprise/sectors/textiles/external-dimension/index_en.htm, (8.1.2013).

51 The European Commission, The Textile and Clothing Sector and the EU trade policy, p.12–19.

52 Ibid.

53 European Commission, DG Enterprise and Industry, Textiles and Clothing-Trade Issues, available at: http://ec.europa.eu/enterprise/sectors/textiles/external-dimension/trade-issues/index_en.htm, (8.1.2013).

54 European Commission, DG Enterprise and Industry, "Textiles and Clothing– Euro-Mediterranean dialogue", available at: http://ec.europa.eu/enterprise/sectors/textiles/external-dimension/euro-mediterranean-region/index_en.htm, (8.1.2013).

55 Ibid.

56 The Pact came into effect in 1996, ensuring a zone void of any trade barriers between the contracting parties, alongside with a Common External Tariff for trade with third countries: T. Atilgan, S. Kanat, "The effects of the EU Customs Union with Turkey on Turkish Textile and Clothing Industry", Fibers and Textiles in Eastern Europe, October/December 2006, Vol. 14, No 4(58), 11–15, p.13.

57 Ibid.

58 Ibid.

59 J. Eckhardt, op.cit., p. 6.

60 Ibid.

61 United Nation's Conference on Trade and Development: Training Module on Trade in Textiles and Clothing-The

temporary limitation to Chinese exporters, was a strengthened role of China in EU imports of textiles and, especially, clothing.[62] Through bilateral dialogues between the government officials in the EU and China, better market access in the Asian giant are pursued, since the inclining number of wealthy consumers in China represents a great opportunity for EU's exporting capacities.[63]

4. Trade Policy Instruments

Since a detailed analysis of trade policy instruments is beyond the scope of this paper, we will give a concise summary of the most commonly applied trade mechanisms which are, in many cases, used as a substitute to the prohibited quota limitations – means of protecting domestic markets from outside competition and thus hindering free trade. One of the main goals of multilateral commercial dialogues under the patronage of the WTO is to control their implementation by countries and put an end to their misapplication.

4.1. Tariffs

Tariffs can be defined as "customs duties on merchandise imports".[64] After the elimination of quotas, they rose to the number one position in hindrances to trade. The main problem is the fact that applied tariffs in the textiles and clothing industries (as they are considered to be sensitive products) are, on average, much higher than the ones applied to the import of other industrial products.

In the EU, the average imposed tariffs on textiles and clothing are 6.9% and 12% respectively, which is well below OECD averages (9.4% for textiles and 16.1% for clothing).[65] Since the EU has an entire spectrum of unilateral preferential trade agreements with certain countries, these enable the beneficiaries to enjoy reduced or zero tariffs when their products enter EU borders. Some of these preferential arrangements are the Economic Partnership Agreements (EPA)-which includes countries of the Asia-Pacific region, the Everything But Arms Initiative (EBA)-giving preferential treatment to LDCs, the Generalized System of Preferences (GSP) scheme and the Euro-Mediterranean Association Agreements as well s the customs union with Turkey, both of which were discussed in the previous chapter.[66]

Non-reciprocal tariff removal represents one of the primary trade barriers when accessing third markets, since many developing countries maintain extremely high almost prohibitive tariffs[67] and the EU policy is dedicated to introducing more balance in this field.

4.2. Rules of Origin (ROO)

Simply put, "rules of origin" are an instrument used to establish the derivation of a product.[68] Determining the origin of a product is crucial for various aspects of commercial policy (application of tariffs, anti-dumping and countervailing duties, safeguard actions and market requirements) and in the EU establishing the origin of a product has a leading role in preferential arrangements, verifying that a product really originates from the beneficiary country, so that it could take proper advantage of its privileged regime with the EU.[69]

Rules of origin can be divided into two categories: non-preferential and preferential rules of origin.[70] Non-preferential ROO are utilized for countries which have not established some sort of preferential agreement. Before the Rules of Origin Agreement was signed under the WTO framework, which obligates the signatories to ensure that their rules of origin are "transparent and do not have restricting or distorting effects on international trade"[71] the standard rule applicable was the "substantial transformation" principle, which rendered a product to originate from a place where it underwent substantial

Post– ATC Context, New York/Geneva, 2008, available at: http://unctad.org/en/Docs/ditctncd200519_en.pdf.

62 European Commission, DG Enterprise and Industry, "Textiles and Clothing-Trade Issues", available at: http://ec.europa.eu/enterprise/sectors/textiles/external-dimension/trade-issues/index_en.htm, (15.1.2013).

63 Ibid.

64 UN Indicators for Monitoring Millennium Development Goals, Average tariffs imposed by developed countries on agricultural products and textiles and clothing, available at: http://mdgs.un.org/unsd/mi/wiki/8–7-Average-tariffs-imposed-by-developed-countries-on-agricultural-products-and-textiles.ashx, (9.1.2013).

65 The European Commission, The Textile and Clothing Sector and the EU trade policy, p.20.

66 M. Hayashi, op.cit., p.4.

67 D. Audet, "Smooth As Silk? A First Look at the Post MFA Textiles and Clothing Landscape", Journal of International Economic Law, Oxford University Press, 2007, 267–284, p.11.

68 World Trade Organization, Non-tariff barriers: red tape, etc., available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm, (9.1.2013).

69 United Nations Conference on Trade and Development, Generalized System of Preferences, Handbook on the Scheme of the European Community, 2008, p.21.

70 Ibid.

71 WTO, Non-tariff barriers. available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm

transformation.[72] The Agreement introduced the "wholly obtained" principle, or the "last substantial" mechanism in the situation in which the product passed through several processes in different countries.[73]

The EU legal framework also distinguishes between preferential and non-preferential ROOs. The non-preferential ones are distinguished by the so-called "list system", offering a detailed list of criteria on a product-by-product basis.[74] The preferential ROOs, guaranteed under the GSP scheme or a preferential trade arrangement, implements a "double transformation" system, which requires that a product must pass through two significant processes in order to be considered as originating from a certain country.[75]

It is vital that the rules of origin are neither too stringent (in which case they would cause unnecessary costs in distinguishing the origin and in the administrative work, thus adversely affecting developing countries and can have the effect of driving foreign investors away from investing in the textiles and clothing sector)[76] nor too loose (in which case they would distort competition and negatively affect domestic producers).[77] Bartels[78] argues that there are two main ways in which the rules of origin can be restrictive: *procedural* (if the process is too complicated and costly, countries prefer to utilize the MFN principle) and *substantive* (input-intolerant rules of origin limit the scope of granted preferences).

Due to the character of this paper, we were not able to go into more detail with regard to the question of the rules of origin. The aim was to briefly demonstrate the complexity and intricacy of this issue. The fact that the Doha Round failed to result in a breakthrough solution that would satisfy all the interest involved is a typical illustration of the sensitivity of this problem. It is rather difficult to allow a privileged market access for LDCs, which need some sort of protection from the incomparably more competitive Asian giants (especially so after the removal of quotas), without further compromising the competitiveness of the domestic market.[79] Only time will tell which approach regarding the rules of origin will manage to be the most successful in serving its purpose.

4.3 Technical Barriers to Trade

There is a multitude of technical barriers to trade that, under the guise of providing relevant information for consumers and contributing to a safer and healthier working environment, distort international trade and prevent fair competition coming from third countries. The European Commission identified labeling requirements and conformity assessment procedures as the most important ones, albeit there are other technical barriers that also need to be tackled on the international level, on the path to a fully liberalized trade in textiles and clothing.[80]

Labeling requirements are vital in the sphere of human and environmental health and safety issues, in such a way that they aim at providing relevant information regarding the content of a product involved and important instruction data that might be relevant to the final consumer.

Since labeling requirements differ greatly from country to country, as well as from one company to another, they pose the risk of surpassing the main objective and turning into a barrier to trade, negatively affecting economies of scale.[81] On the EU level, for instance, mandatory labeling requirements (currently only regarding washing instructions and fiber content) and voluntary textile labels, consisting of various schemes devised by a number of institutions in both the private and public sectors can be distinguished.[82] It is for this reason that the EU proposed for the adoption of minimum obligatory requirements regarding coverage (i.e. what information is available) and content (in what way this information is presented)[83].

72 United Nation's Conference on Trade and Development: Training Module on Trade in Textiles and Clothing-The Post– ATC Context, New York and Geneva, 2008, p.41.

73 Ibid.

74 Ibid.

75 The European Commission, The Textile and Clothing Sector and the EU trade policy, p.20.

76 United Nation's Conference on Trade and Development: Training Module on Trade in Textiles and Clothing, p. 50.

77 OECD, A New Worldmap in Textiles and Clothing-Adjusting to change, Publications No.53789,Paris, 2004, p.73.

78 L. Bartels,"The Trade and Development Policy of the EU", European Journal of International Law, 18(4)/ 2007, p.747.

79 D. Audet, op.cit., p.13.

80 Communication from the European Communities, "Negotiating Proposal on Non –Tariff Barriers in the Textiles/Clothing and Footwear sector", Market Access for Non-Agricultural Products, WTO, 2006, p.3.

81 United Nation's Conference on Trade and Development: Training Module on Trade in Textiles and Clothing-The Post– ATC Context, p. 28.

82 Simi T. B., "Indian Textiles and Clothing Sector-Environmental Standards and Consumer Knowledge in the EU", Briefing Paper No. 2/2012, CUTS International, New Delhi, 2012, available at: http://www.cuts-citee.org/pdf/Briefing_Paper12-Indian_Textiles-and_Clothing_Sector_Environmental_Standards_and_Consumer_Knowledge_in_the_EU.pdf, p.3.

83 Communication from the European Communities, op.cit., p. 3–4.

On the intra-EU level, a Regulation regarding labeling was recently enacted, the Regulation (EU) No. 1007/2011[84] which replaced the previous legal framework consisting of the so-called Textile Directives.[85] The rationale for this change in legal framework is driven by the need to unify the labeling requirements throughout the Member States, so as to strengthen the internal market and avoid any adverse effects on the customers.

Conformity assessment requirements are most certainly necessary, but are often misused in a sense that they often require the use of standards which do not have an international recognition, products sometimes undergo needless procedures; samples of the product may be lost etc. It has been proposed that WTO members should, amongst other things, use recognized methods for conformity assessment, substitute custom assessment with mechanisms applied to national products and unify (standardize) international standards.[86]

Given the outlined problems of technical barriers to trade (and many more such as pre-shipment inspection requirements, export taxes and export restrictions on textile raw materials, unreasonable customs valuation and others)[87] the EU has proposed the establishment of a *NTB resolution mechanism* within the WTO, so as to reduce costs and increase efficiency in the field of dispute settlements.[88]

4.4. "Trio of Compliances" – Market Entry Conditions

In the changing environment, in various industrial sectors the benchmark regarding an array of technical requirements that are supposed to ensure environmental protection and healthy and humane working conditions has been raised by developed, high-income countries. In many cases, developing countries find it difficult to keep up with these high standards, and to them this poses a barrier to entry. The so-called "trio of compliances" includes: *social conditions*, *environmental compliance* and *security compliance*.[89]

Social conditions on the EU level can, as of 2006, be linked to the new GSP scheme, the "GSP plus", which combines former incentive schemes for promoting labor rights, environmental protection and combating drug trafficking.[90] The scheme provides for duty free access of as much as 7200 products in the textile and clothing sectors for beneficiaries which fulfill the condition of ratifying and implementing a list of "key conventions" in the fields of human and labor rights (e.g. International Covenant on Civil and Political Rights) and environmental and governance principles (such as the Kyoto Protocol on the UN Framework Convention on Climate Change).[91]

Regarding environmental issues, some of the main concerns are the excessive use of chemicals in certain processes such as dyeing, using non-biodegradable waste in the manufacture of synthetics and other similar problems. The EU, in general, has a very developed environmental policy, envisaged in the Emission Trading System (EMS) hence these high requirements are transferred to the sphere of textiles and clothing.

Examples of legislation enacted with an aim of ensuring compliance with stringent requirements are the recent REACH[92] (Regulation on Registration, Evaluation, Authorization and Restriction of Chemicals) Regulation as well as the Integrated Pollution Prevention Control (IPPC) Directive[93], whose purpose is to minimize pollution. According to this Directive, working permits will be issued to plants if they meet conditions set in the Best Available Techniques for the Textile Industry program (BREF) issued in 2003.[94]

84 Regulation (EU) No. 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fiber names and related labeling and marking of the fiber composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, (Official Journal of the European Union L 272/1, 18.10.2011), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:272:0001:0064:en:pdf, (5.1.2013).

85 Directives 2008/121/EC on textile names, Directive 96/73/EC on certain methods for the quantitative analysis of binary textile fiber mixtures and Directive 73/44/EEC relating to the quantitative analysis of ternary fiber mixtures, European Commission: Enterprise and Industry, Textiles and clothing Regulation (EU) No. 1007/2011, available at: http://ec.europa.eu/enterprise/sectors/textiles/single-market/reg–1007–1011/index_en.htm, (5.1.2013).

86 Ibid.

87 United Nation's Conference on Trade and Development: Training Module on Trade in Textiles and Clothing-The Post– ATC Context, p. 28.

88 Ibid., p.29.

89 United Nation's Conference on Trade and Development Module on Trade in Textiles and Clothing-The Post– ATC Context, op.cit., p. 29.

90 Ibid.

91 Ibid., p.31.

92 European Commission, Enterprise and Industry, Textiles and Clothing-Environmental Issues, available at: http://ec.europa.eu/enterprise/sectors/textiles/environment/index_en.htm, (15.1.2013).

93 Ibid.

94 Ibid.

4.5. Anti-Dumping and Countervailing Measures

The EU considers its trade policy in the textile and clothing sector vis-à-vis unlawful practices of trade partners' defensive, rather than offensive, and that all measures are taken in accordance with international trading rules and in an attempt to remain competitive.[95]

Anti-dumping measures are instruments used to tackle "dumping" products on the EU market, i.e. selling it at a price lower than the domestic selling price on the national market.[96] On the EU level, it is under the auspices of the European Commission to conduct investigations and deal with proceedings regarding anti-dumping claims.

In the period between 1996 and 2000, the number of proceedings regarding trade in textiles had risen in comparison to the previous years. Some of the targeted developing countries were India (with 12 proceedings), Turkey (6) and China with four proceedings.[97]

5. Future of the EU Textiles and Clothing Sector (Priorities)

After the veil of quantitative restrictions had been lifted, the EU trade policy in the textiles and clothing sector changed course. As we have already mentioned, the priorities turned from protectionism to innovation, re-directing investments towards high value-added fashionable designs, R&D, technical textiles and improving the overall state of the working environment.

However, its market was now more vulnerable than ever, exposed to escalating imports from all over the world, and ways of conserving domestic production and keeping up with the global trends needed to be found. In this chapter, we will concentrate on the future outlook of the changing profile of the textiles and clothing industries.

5.1. Technical Textiles

Technical, also commonly referred to as industrial textiles, have seen a dramatic expansion in recent years. There is no universal definition[98] of these textiles, although the one given by the Textile Institute in the United Kingdom is often cited: "those textile materials and products manufactured primarily for their technical and performance properties rather than for their aesthetic and decorative characteristics".[99]

The global consumption per year reaches as much as 1000 tons in volume and $40 billion in value, which means that their consumption is about twice the consumption of traditional textile products.[100] They became a vital component in a wide variety of fields such as medicine, civil engineering, agriculture, the automotive industry etc. The relative relevance of this innovative field accounts for approximately 30% of the total EU turnover in textiles, with France and Germany contributing significantly to the production and expansion of this sector.[101]

Currently, the OECD countries (among which the EU is in the top five with a share of about 15% of world production),[102] dominate the global production of technical textiles, due to a high development level, advanced technology, skilled work-force and greater funds. Nonetheless, it is only a matter of time before the emerging economies manage to catch up, or even take the lead role, as has been the scenario in many

95 European Commission, The Textile and Clothing Sector and the EU trade policy, p.23.

96 DG Trade, European Commission, Trade Defense-Anti-dumping, available at: http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/index_en.htm, (9.1.2013).

97 E. Vermulst, P. Mihaylova, "EC Commercial Defense Actions against Textiles From 1995 to 2000: Possible Lessons for Future Negotiations", Journal of International Economic Law 527–555, Cambridge University Press, Brussels 2001, p.3.

98 A common division of technical textiles is the one offered by the Messe Frankfurt in which 12 categories are distinguished:

1. Agrotech: agriculture, forestry, and fishing,
2. Buildtech: building and construction
3. Clothtech: functional components of shoes and clothing
4. Geotech: geotextiles and civil engineering
5. Hometech: components of furniture, floor coverings...
6. Indutech: filtration and other products used in industry
7. Medtech: hygiene and medical
8. Mobiltech: transport construction, equipment and furnishing
9. Oekotech: environmental protection
10. Packtech: packaging and storage
11. Protech: personal and property protection
12. Sporttech: sports and leisure.

European Economic and Social Committee, "Working Document of Consultative Commission on Industrial Change (CCMI) on Technical Textiles-own initiative opinion", CCMI/105, Brussels, 2006, p.3.

99 OECD, A New World map in Textiles and Clothing, op.cit., p.147.

100 UNCTAD, Assuring Development Gains in a Rapidly Changing Environment, op.cit., p. 8.

101 European Economic and Social Committee, op.cit., p.5.

102 Ibid.

other industrial sectors. Among these countries, China leads the way, followed by India, Indonesia, Mexico and Pakistan.[103]

5.2. Market Access

Presence and performance of a particular exporter on foreign markets determines its competitive abilities. That is why the EU singled out efforts in obtaining better conditions for accessing third markets and overcoming trade barriers as the main objectives of its trade policy. In accomplishing the aforementioned goals, the European Commission introduced several measures out of which the Market Access Strategy devised in 1996 and further improved in 2007, the Lisbon Strategy (2008) and Global Europe (2006) are the most notable.[104]

These documents all aim at implementing ways in which obstacles to trade with third countries could be eliminated, which include active co-operation between the EU, Member States and businesses.[105] One of these mechanisms includes the formation of Market Access Teams, which are situated in countries whose markets are defined as priorities to the EU trade policy, and they exercise various methods of trade diplomacy oriented towards negotiating a better position for EU exporters.[106]

5.3. Intellectual Property Rights (IPRs) and Combating Fraud

The question of protecting intellectual property rights is essential and can certainly make room for improvement, given the fact that the percentage of fake goods on the world market reached 8% of world trade.[107]

This issue is even more relevant for the EU trade policy, as its comparative advantages include popular brands and highly fashionable products as well as a high degree of innovation, and it is crucial this aspect of its textiles and clothing industry be shielded from fraudulent behavior. Measures applied are both preventive and ex-post. It has been recognized that the EU must approach the battle against piracy and counterfeiting, namely, on an intra-EU level, at the frontiers and on export markets in third countries.[108]

5.4. Access to Raw Materials

A recent issue in EU's trade policy regarding textiles and clothing is the scarcity of raw materials, since it is obvious that countries which have free access to these inputs instead of having to rely on imports have a comparable advantage and can, thus, dictate market prices.

This question gains importance especially because of actions taken by certain countries that can be interpreted as anti-competitive (limitations to exports of cotton and jute posed by India and Pakistan, as well as the obligatory certification for raw silk imposed by China).[109] The EU's strategy devised at tackling the problem of lack of raw materials is based on the EU Raw Materials Initiative[110] which came into effect in 2008, and has three main aims: "to ensure a level playing field with regards to access to the resources in third countries, to foster the sustainable supply of raw materials from European sources and to boost resource efficiency and to promote recycling".[111]

6. EU and Relations with the Republic Of Serbia in the Sphere of Textiles and Clothing

In this chapter, we will give a brief overview of the state of the Serbian textile industry, the path of co-operation with the EU in this sector on its way to becoming a Member State and possible windows of opportunity for future collaboration that could be beneficial to both trade partners.

The current picture of the Serbian textile and apparel industry is rather dismal. Due to the political and economic turmoil that culminated in the 90s and the painful process of privatization which seems to be burdened with deficiencies, its once blooming and renowned textile industry experienced a great downfall.

Resuscitation of this dying industry is an imperative for the Serbian trade policy, and

103 Ibid.

104 A. Tiedemann, "EU Market Access Teams: New Instruments to Tackle Non-tariff Barriers to Trade", in: Benjamin Barton et al. (eds.), EU Diplomacy Papers 9 / 2009, Department of EU International Relations and Diplomacy Studies, Bruges, 2009, 1-31, p.7.

105 European Commission, The Textile and Clothing Sector and the EU trade policy, p.24.

106 Ibid.

107 DG Enterprise and Industry, European Commission, Textiles and clothing-Trade issues, available at: http://ec.europa.eu/enterprise/sectors/textiles/external-dimension/trade-issues/index_en.htm, (9.1.2013).

108 High-level Group, "The Challenge of 2005 – European Textiles and Clothing in a Quota Free Environment", Follow-up Report and Recommendations, 2004, available at: http://trade.ec.europa.eu/doclib/docs/2006/july/tradoc_123208.pdf, p.19.

109 European Commission, The Textile and Clothing Sector and the EU trade policy, p.23.

110 Heinrich Böll Stiftung, Analysis of EU Raw Materials Initiative, available at: http://www.boell.eu/web/116-661.html, (10.1.2013).

111 Ibid.

means of salvaging it by ways of innovation, investing in new technologies and enhancing competitiveness are sought. Statistical data show that this sector amounted to 7% in total manufacturing output and about 3% of GDP in 2003.[112] As for the performance of the textiles sector, it appears to be facing a decline of 7.7% when comparing data for the period January-October 2012 with the same period just a year earlier.[113] In the clothing industry, for the same period, an increase of 8.8% has been observed, showing a somewhat brighter scenario.[114]

The entrepreneurial structure of the textiles and clothing industry nowadays resembles this sector on the EU level, in the sense that it consists mainly of small and medium sized companies, most of which are privately owned, whereas the fate of large textile enterprises once dominating this industry is somber, or at best uncertain as they undergo the process of privatization. Especially in the apparel industry (although present as well in the textile sub-sectors due to the outdated machines and lack of implementation of automated processes) it is highly labor-intensive, with wages just above the ones present on Asian markets, and somewhat more skilled workforce, relying greatly on the import of raw materials. The most prominent textile products include the ones obtained by processes of spinning, weaving and knitting, textile fabrics and finishing products, whereas in the garments sector the top three products include clothing items, fur items and knitted and crocheted articles.[115]

Two main problems relating to the textile industry were identified: grey economy and uncontrolled imports from China.[116] What, perhaps, needs to be tackled even more urgently is the massive unemployment which is a consequence of the restructuring in this sector and taking advantage of free trade arrangements with various entities in order to lure investments so that this industry of tradition and potential could move forward.

This sector is extremely dependent on trade, with the share of imports drastically larger than the share of exports. In 2012, the total value of exports reached $541.6 million which is an increase of 3% when compared to the same period in 2011.[117]

EU is one of Serbia's primary trade partners, as it enjoys a share of around 70% of total textile exports (in the value of nearly € 200 million).[118] Out of the current 27 Member States, Serbia cooperates most with Italy.[119] Other relevant trade partners in this sector include Germany, France, Austria and Slovenia.[120]

The co-operation between the EU and Serbia in this field goes back to the signing of the Textile Agreement, which came into force on 1 July 2005, and whose political significance went even beyond the mere collaboration in the trade of textile products as it was the first bilateral agreement signed between Serbia and the European Union.[121]

The Agreement established an area of free trade between the contracting parties, obliging the EU to unilaterally abolish quantitative restrictions on a number of product categories, and obliging Serbia to gradually, within a period of three years, dismantle tariffs on EU textile imports. Both parties committed to abstaining from the application of non-tariff barriers and other hindrances to trade.[122] In 2008, the EU and Serbia concluded the trade part of the Stabilization and Association Agreement (SAA) – Interim Agreement on Trade and Trade Related Matters, which came into force in February 2010, establishing a free trade area for a period of six

112 B. Presnall, D. Gajić, B. Šećeragić,"Textile Industry in Serbia-A Sectoral Study and Company Overview", Jefferson Institute 2004, p.9.

113 Chamber of Commerce and Industry of Serbia, Society of the textile, apparel, leather and footwear industry, Statistics in the textile, apparel, leather and footwear industry for January-October 2012, Belgrade, 2012, http://www.pks.rs/ONama.aspx?id=241 (22.1.2013), p.3.

114 Ibid.

115 Chamber of Commerce and Industry of Serbia, Enterprise Europe network, Textile and Garment Industry-Serbia, available at: http://www.pks.rs/SADRZAJ/Files/Biro%20za%20saradnju%20sa%20EU/Serbia%20Fact%20sheet.pdf, (22.1.2013).

116 Fiber2Fashion, Investment opportunities in the textile industry, May 20 2011, available at: http://www.fibre2fashion.com/news/textile-news/newsdetails.aspx?news_id=99005, (23.1.2013).

117 Chamber of Commerce and Industry of Serbia, Society of the textile, apparel, leather and footwear industry, Statistics in the textile, apparel, leather and footwear industry for January-October 2012, p.4.

118 Serbia-Doing Business in Serbia-Serbian News, Textiles and footwear industry, available at: http://investinserbia.blogspot.com/2009/03/textile-and-footwear-industry.html, (23.1.2013)

119 Ibid.

120 Ibid.

121 A. Dražović, EU External Economic Relations with Serbia-legal, trade and economic agreements, Dissertation submitted to the University of Macedonia, Master Degree in Politics and Economics of Contemporary Eastern and Southeastern Europe, Thessaloniki, 2011, p.20.

122 Europa Press Release-Rapid, EU and Serbia conclude textiles agreement, IP/04/1532, Brussels 2004, available at: http://europa.eu/rapid/press-release_IP-04-1532_en.htm, (22.1.2013).

years.[123] These agreements, in addition to Serbia's accession to the CEFTA[124] enhance the overall economic climate in this field (thanks to the Textiles agreement, trade in 2005 flourished by 50% compared to 2004).[125]

Multiple factors have been highlighted as contributing to Serbia's image as a desirable investment destination, such as Serbia's geographic position, a favorable tax system and foreign direct investment (FDI) regime in comparison to many countries of the region, in addition to the aforementioned benefits regarding the wages and qualifications of workers in this sector.[126]

One of the potential areas of co-operation could be the outsourcing arrangements, also known as LOHN jobs, which imply transferring finishing activities in order to reduce costs.[127] After the final two waves of enlargement, the EU's traditional outsourcing partners such as Poland, the Czech Republic and Romania now form part of the EU market, hence an opportunity for Serbia to take their role is emerging. As a matter of fact, it has been estimated that "it would be realistic to expect an increase of 95% in exports regarding outsourcing arrangements".[128] Most factories are well-equipped for performing various finishing activities (e.g. printing, knitting etc.).[129] It is evident that the Serbian industry is both set and willing to further engage in such activities. There is also no doubt that outsourcing does provide the domestic country with an opportunity to emerge to the international market. However, it also diverts it from focusing on the implementation of more advanced technological processes and orienting towards the creation and nurturing of domestic brands, all of which are essential in expanding the domestic industry and making it competitive on the long run.[130] Therefore, this could only be and short-term solution for Serbia.

To date, a number of investors from Europe have recognized the potential of this industry (e.g. the Italian Benetton purchased Nitex and planned investments amounting to €50 million as well as improving the employment situation)[131] and the prospective of, it might be a bit surprising, the luxury market. Namely, in 2009, it was considered to be one of the most attractive markets for luxury products, with a decrease in sales of only 9%.[132] One of the luxury brands that invested in this region was the German brand Hugo Boss.[133] Many more showed interest, although a decline of some 10% in sales was observed in 2012.[134] There are also a number of Serbian brands like Mona, Afrodite Mode Collection and others that produce high quality apparel, and the number of young designers whose names are already well-known on world markets is constantly increasing.

As we have seen, the enhancement of the textiles and clothing industries should continue to be one of the primary goals of the Serbian trade policy. The picture is not bright, but efforts have been made on the path forward. As with all other economic aspects of a country in transition, we will just have to wait and see where the ongoing political dialogues will lead, and whether positive projections of the future of the textile industry presented by government officials and representatives of the industry will remain only hopes of prosperity rather than concrete actions or is a brighter future for the textiles industry really ahead.

Concluding Remarks

Trade in textiles and clothing represents an important factor in the global economy. That is why the regulatory aspect of this sector, on both the national and international levels, is a delicate issue, fraught with controversy and the need to compromise between a number of different interests.

123 A. Dražović, op.cit., p.24-25.

124 Ibid., p.36.

125 S. Urošević, D. Đorđević, D. Ćoćkalo, "Analysis of Finishing Works Aspects As Development Assumption of Textile and Clothing Industry in the Republic of Serbia", Tekstil ve Konfeksiyon 3/2012, available at: http://www.tekstilvekonfeksiyon.com/en/analysis-of-finishing-works-aspects-as-development-assumption-of-textile-and-clothing-industry-in-republic-of-serbia-359.html, p.2.

126 Serbia Investment and Export Promotion Agency, Doing business in Serbia 2012, available at: http://www.razor.rs/XCHNG/SIEPA_DBIS_Brochure_SML.pdf, (23.1.2013).

127 S. Urošević et al., op.cit., p. 1.

128 Ibid., 5.

129 B. Presnall et al., op.cit., p.15.

130 Ibid., p.1.

131 Fiber2Fashion, Benetton buys Nis textile company Nitex, 1 July 2011, available at: http://www.fibre2fashion.com/news/apparel-news/newsdetails.aspx?news_id=99485, (23.1.2013).

132 CPP-Luxury.Com, Business of Luxury, Update on crisis effects – luxury markets in Central and Eastern Europe, July 9, 2009, available at: http://www.cpp-luxury.com/update-on-crisis-effects-luxury-markets-in-central-and-eastern-europe/, (23.1.2013).

133 Belgian Serbian Business Association, Representatives of Hugo Boss arrived in Prvi Maj Pirot, available at: http://bsbiz.eu/new/representatives-of-hugo-boss-arrived-in-prvi-maj/, (23.1.2013).

134 CPP-Luxury.Com, Business of Luxury, Serbia's luxury market, from promising potential to negative performance, Oct 22, 2012, available at: http://www.cpp-luxury.com/serbias-luxury-market-from-promissing-potential-to-negative-performance/, (23.1.2013).

For forty years, this sector represented a matrix in which the rules of the game were dictated by developed economies and ruled by a system of quantitative restrictions on imported products on a discriminatory basis. With the aim of creating a more "fair" environment which would respect the principles of international commerce, the slow and painful process of market liberalization began. As a result of such a drastic change, which exposed their markets to imports from countries that were until then tied up by quotas (like China, India, Pakistan), most of the world players experienced difficulties in adapting to a newly changed environment, and faced a decline in production.

Another problem that arose after the eradication of quotas from the international scene in the form of other trade obstacles, such as high tariffs and non-tariff barriers that were successfully hid behind quantitative restrictions for years. Their implementation as a way of protecting domestic markets became very attractive to countries experiencing difficulties in keeping up with the competition, and eliminating the adverse effect they have on free trade became one of the priorities of members of the WTO.

Among those global players whose economy was significantly hit by the abolition of quotas was the EU. In attempting to maintain a significant position on the world market in the field of textiles and clothing, the EU realized that long-term competitiveness could only be upheld by re-orienting towards new technologies, investing in the development and protection of brands, high-value products, enhancing the qualifications of cadres, and policies that would improve the working environment. The EU seeks to advance its position on foreign markets via dialogues on various levels, and through a series of well-envisioned strategies and plans, and seems to be putting more emphasis on improving its own performance rather than seeking ways in which competition could be undermined.

The partnership between the Republic of Serbia and the EU regarding trade in general, and more specifically, in the field of textiles and clothing, appears to have a lot of potential. Serbian textile industry is one with a long tradition in high quality products. However, due to the political tumult and economic difficulties with which it has been coping for what seems to be an eternity, this industry has been constantly stagnating. However, as of the Textile Agreement signed between the parties in 2005, trade in this sector has been experiencing a significant recovery. So far, many investors from the EU recognized the possibilities of the textile industry in several regions throughout Serbia, and optimistically many more will as well.

Given the geographic closeness and cultural and historical proximity of the EU and Serbia, in addition to the latter's aspiration to accede the EU, as well as readiness on both parts to work on building better ties in the future, there is an area for potential collaboration. If "best of both worlds" were to be combined – Serbia's tradition of high quality products, skilled workers and facilities that need to be upgraded, and the EU's funds and innovative and technological advancement, it would be highly advantageous to both economies.

Bojana Todorović

TRGOVINSKA POLITIKA EVROPSKE UNIJE U OBLASTI TEKSTILNIH PROIZVODA

Na globalnom planu, trgovinska politika u oblasti tekstilnih proizvoda dugo je bila obojena protekcionističkim bojama, oličenim u sistemu kvantitativnih ograničenja na uvoz tekstilnih proizvoda iz određenih zemalja.

Ova politika, negovana od najjačih svetskih ekonomija, bila je u suprotnosti sa osnovnim principima svetske trgovine, kao što je zabrana diskriminacije, budući da su određeni trgovinski partneri bili privilegovani na štetu drugih. Stoga je odlučeno da se, u skladu sa duhom liberalizacije tržišta, započne postupak eliminacije kvota na uvoz tekstilnih proizvoda, kao i integracija svetskih trgovinskih politika pod okrilje Svetske trgovinske organizacije.

Centralno pitanje ovog rada jeste trgovinska politika Evropske unije u oblasti tekstila i tekstilnih proizvoda. Najpre ćemo dati kratak osvrt na stanje evroske tekstilne industrije i njene bitne karakteristike, kao i regulatorni korpus u periodu pre eliminisanja uvoznih kvota, a potom i situaciju nakon otklanjanja kvantitativnih ograničenja i sposobnost, ali i poteškoće, Unije da se prilagodi novonastaloj situaciji.

Na kraju, sagledaćemo i trgovinsku saradnju Evropske unije i Republike Srbije, sa posebnim osvrtom na trgovinu tekstilnim proizvodima, kao i eventualni prostor za buduću saradnju na ovom polju.

Ključne reči: *trgovinska politika, Evropska unija, tekstilni proizvodi, uvozne kvote, liberalizacija tržišta, Republika Srbija.*

ZELENE JAVNE NABAVKE I NOVI ZAKON O JAVNIM NABAVKAMA

Miljan Macanović*

Skupština Srbije je 24. decembra prošle godine usvojila novi zakon o javnim nabavkama, koji je stupio na snagu 6. januara, a počeo da se primenjuje 1. aprila 2013. godine. Njime je Srbija reformisala svoje zakonodavstvo u oblasti javnih nabavki u cilju usklađivanja sa pravom Evropske unije. Uspostavljeni su potpuno novi instituti poput građanskog nadzornika i registra ponuđača, uvedeni novi postupci poput okvirnog sporazuma i konkurentnog dijaloga, predviđena je mogućnost centralizovanih javnih nabavki i uvedeno sasvim novo načelo zaštite životne sredine i obezbeđivanja energetske efikasnosti. Ovim zakonom Srbija se uključila u red država koje nastoje da primenom ekoloških standarda u javnim nabavkama omoguće održivi razvoj svojih privreda.

Ključne reči: *Značaj javnih nabavki, zelene nabavke, životni ciklus i "vrednost za novac", novi Zakon o javnim nabavkama, načelo zaštite životne sredine*

Javne nabavke se zakonom definišu kao nabavke dobara, usluga ili radova od strane naručioca, na način i pod uslovima propisanim zakonom[1]. Država ima veliku kupovnu moć, čija se vrednost kreće između 10 i 25 odsto bruto društvenog proizvoda. Putem javnih nabavki i nabavke zelenih proizvoda, usluga i radova ona može znatno uticati na kvalitet životne sredine. U Srbiji u 2010. godini vrednost svih nabavki je iznosila 273 milijarde dinara, što je činilo 9,96 odsto srpskog BDP-a[2]. U Evropskoj uniji ukupna vrednost nabavki je 19 odsto BDP-a EU, što ukupno iznosi dva triliona evra godišnje[3]. U nekim drugim državama ovaj procenat je i viši, i iznosi, primera radi, u Indiji 43 odsto i Brazilu 47 odsto BDP-a.[4] Ovako visok udeo tržišta javnih nabavki u nacionalnim bruto društvenim proizvodima ukazuje da bi se zajedničkom akcijom većeg broja država u svetu mogao postići značajan efekat u pravcu približavanja privrede ka ekološki održivom razvoju.

Zelene nabavke se smatraju metodom ostvarivanja održivog razvoja, koji se definiše kao „razvoj koji zadovoljava potrebe sadašnjosti bez ugrožavanja mogućnosti budućih generacija da zadovolje svoje potrebe"[5]. Ne postoji jedinstvena definicija zelenih nabavki, ali sve naglašavaju da je cilj ove vrste nabavki da se unapredi zelena ekonomija, smanji zagađenje i postignu željeni efekti na životno okruženje. Evropska komisija je 2008. izdala Saopštenje COM (2008) 400 – Javne nabavke za bolju životnu sredinu, u kojoj se definišu zelene javne nabavke kao „postupak u kojem naručioci nastoje da pribave dobra, usluge i radove sa minimalnim uticajem na životnu okolinu u poređenju sa dobrima, uslugama i radovima iste namene koja bi inače bila pribavljena." Ujedinjene nacije u svojoj definiciji poklanjaju pažnju životnom ciklusu proizvoda – „nabavka proizvoda i usluga koji umanjuju uticaj na životnu sredinu. One uključuju procenu uticaja na životnu sredinu u svim fazama životnog ciklusa proizvoda, uzimajući u obzir troškove i uticaj na sredinu obezbeđenja potrošnog materijala, proizvodnje, transporta, skladištenja, upravljanja, upotrebe i odlaganja proizvoda." U Sjedinjenim Američkim Državama definicija „environmentally preferable purchasing" uključuje uticaj nabavljenog proizvoda ili usluge i na zdravlje ljudi, a ne samo na stanje u životnoj sredini.

Značaj zelenih nabavki prepoznat je od strane država tek u skorijoj prošlosti. Donose se brojni propisi kako na međunarodnom tako i na nacionalnom nivou, koji kao cilj imaju da omoguće naručiocima da svoje nabavke sprovedu po ekološkim kriterijumima. Politika zelenih nabavki je razvijena u Evropskoj uniji, Sjedinjenim Američkim Državama, Kanadi, Brazilu, Australiji, Japanu, Južnoj Koreji i mnogim drugim državama. U Evropskoj uniji se pravnim okvirom za njihov razvoj smatraju osnivački ugovori, direktive 2004/17/ES i 2004/18/ES, kao i sudska praksa Evropskog suda pravde. Novim ZJN-om naša država stupa u red zemalja koje ulažu napore da na aktivan način utiču na zaštitu životne sredine.

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1 Zakon o javnim nabavkama Službeni glasnik RS, br. 124/2012 (u daljem tekstu ZJN), čl. 3 st. 1 tač. 1.

2 Strategija razvoja javnih nabavki u Republici Srbiji, str. 1, dostupno na: http://www.ujn.gov.rs/

3 Dostupno na http://ec.europa.eu/environment/gpp/what_en.htm

4 Procuring green in the Public Sector: A checklist for getting started, str. 1, dostupno na: http://www.iisd.org/pdf/2011/procuring_green_public_sector.pdf

5 Environmental Procurement, Practice Guide Volume 1, str. 8, dostupno na: http://www.greeningtheblue.org/sites/default/files/UNDP-Environmental%20procurement_0.pdf

Koristi koje ova vrsta nabavki pruža su ogromne. Njihov cilj je da ublaže klimatske promene, porast prosečne temperature, nivoa mora i okeana, ali i da utiče na rast i razvoj zelenih tehnologija. Istraživanje Ujedinjenih nacija je pokazalo da se značajne uštede mogu ostvariti samo kupovinom energetski efikasnih sijalica.[6] Grad Beč je uštedeo 44,4 miliona evra i umanjio potrošnju ugljen-dioksida za 100.000 tona od 2004. do 2007. kroz svoj *EcoBuy* program.[7]

U primeni zelenih nabavki u Evropskoj uniji javljaju se značajne teškoće. Neke od njih su prepoznate i mogu se nabrojati:

- Ograničeni broj kriterijuma za dodelu ugovora koji su u skladu sa zaštitom životne sredine.
- Nizak nivo svesti o korisnosti zelenih proizvoda i usluga.
- Proizvodi koji su ekološki se smatraju skupljim.
- Nedostatak pravnih stručnjaka koji bi primenjivali ekološke kriterijume u konkursnim dokumentacijama.
- Nedostatak političke podrške.
- Nedostatak postojanja „dobre prakse" u ovoj oblasti.[8]

Može se očekivati da će se slične, čak i veće teškoće pojaviti i u Srbiji, naročito stoga što se ovim zakonom prvi put uvodi pojam zelenih nabavki, koji u Evropskoj uniji postoji duže od decenije.

Načelo zaštite životne sredine i obezbeđivanja energetske efikasnosti u novom srpskom zakonu o javnim nabavkama

Član 13. ZJN-a, koji uređuje načelo zaštite životne sredine i obezbeđivanja energetske efikasnosti, određuje dužnost naručioca da nabavlja dobra, usluge i radove koji ne zagađuju, odnosno koji minimalno utiču na životnu sredinu, odnosno koji obezbeđuju adekvatno smanjenje potrošnje energije – energetsku efikasnost, i da, kada je to opravdano, kao element kriterijuma određuje ekološke prednosti predmeta javne nabavke, energetsku efikasnost, odnosno ukupne troškove životnog ciklusa predmeta javne nabavke[9]. Ovo načelo uspostavlja dve obaveze za naručioca:

- Da nabavlja dobra, usluge ili radove koji ne zagađuju, odnosno koji minimalno utiču na životnu sredinu, odnosno koji obezbeđuju adekvatno smanjenje potrošnje energije – energetsku efikasnost, i
- Da, kada je to opravdano, kao element kriterijuma ekonomski najpovoljnije ponude odredi ekološke prednosti predmeta javne nabavke, energetsku efikasnost, odnosno ukupne troškove životnog ciklusa predmeta javne nabavke.

Prva obaveza je opšta, jer se odnosi na sve nabavke, tj. zahteva da se postupak javne nabavke koji počinje odlukom o pokretanju postupka, a okončava se zaključenjem ugovora o javnoj nabavci oblikuje tako da rezultira nabavkom dobara, usluga ili radova bez ili sa minimalnim štetnim uticajem na životnu sredinu, tj. takvih dobara koji zadovoljavaju uslov energetske efikasnosti. Prema jezičkom tumačenju, saglasno zakonskoj odredbi bi bilo da naručilac može da nabavlja samo ona dobra, usluge ili radove koji ne zagađuju, odnosno koji minimalno utiču na životnu sredinu, tj. koja su energetski efikasna. Ali, teško je zamisliti da je ovo bila namera zakonodavca. U suprotnom, naručilac ne bi mogao da nabavi nijedan predmet ukoliko on ne bi ispunjavao uslove nezagađivanja ili minimalnog uticaja na životnu sredinu ili uslov energetske efikasnosti, čak i kada predmet koji ispunjava te uslove ne postoji.

Druga obaveza konkretizuje prvu određujući specifične dužnosti za naručioca u određenom delu postupka nabavke – tj. određivanju elemenata kriterijuma. Naručilac može izabrati koje će kriterijume za ocenjivanje ponuda primeniti – ekonomski najpovoljniju ponudu ili najnižu ponuđenu cenu. Za koji će se odlučiti zavisi od njega, ali ako se odluči za kriterijum ekonomski najpovoljnije ponude, on mora izabrati elemente kriterijuma na kojima će zasnivati izbor ekonomski najpovoljnije ponude. Lista elemenata kriterijuma koja je data u čl. 85 ZJN-a, na kojoj su tehničke i tehnološke prednosti, ekološke prednosti i zaštita životne sredine i energetska efikasnost nije iscrpljujuće prirode, već je *exempli causa*.

6 40 odsto potrošnje električne energije ostvaruje se u javnom sektoru, dok se 45 odsto električne energije u javnom sektoru potroši na osvetljenje. Samo kupovinom energetski efikasnih sijalica ostvarile bi se velike uštede, koje bi dovele do značajnog smanjenja nivoa ugljen-dioksida u atmosferi. Dostupno na: http://www.greeningtheblue.org/sites/default/files/Savingforabrightfuture_0.pdf

7 European Commission, Buying green! A handbook on green public procurement, str. 5, dostupno na / http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf

8 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Public procurement for a better environment, str. 4, dostupno na: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:PDF)

9 ZJN, čl. 13.

Naručilac može odrediti i druge elemente kriterijuma koji nisu navedeni na listi poput ukupnih troškova životnog ciklusa predmeta nabavke, koji je naveden u čl. 13. Načelo zaštite životne sredine i obezbeđivanja energetske efikasnosti uslovljava primenu ekoloških elemenata kriterijuma opravdanošću njihove primene. Kako elementi kriterijuma ne smeju biti diskriminatorski i moraju stajati u logičkoj vezi sa predmetom javne nabavke,[10] to u tom pravcu treba tražiti kriterijume opravdanosti njihove primene.

Primena načela zaštite životne sredine

Svi naručioci su dužni da se pridržavaju načela javnih nabavki. Ipak, kako je u Srbiji veliki broj naručilaca koji vrše nabavke male vrednosti,[11] te usled toga nemaju osposobljene kadrove specijalizovane za javne nabavke, to je teško očekivati da će oni primenjivati složene kriterijume poput ukupnih troškova životnog ciklusa, koji su neophodni za ostvarivanje ovog načela. Zato zakon uređuje mogućnost vršenja centralizovanih javnih nabavki. Predviđeno je da se one mogu vršiti preko tela za centralizovane javne nabavke ili sprovođenjem postupka javne nabavke od strane više naručilaca. Tela za centralizovane javne nabavke mogu se osnivati na lokalnom, pokrajinskom ili republičkom nivou.[12] Uprava za zajedničke poslove republičkih organa je telo za centralizovane javne nabavke za potrebe državnih organa i organizacija i pravosudne organe, čije je postojanje predviđeno Zakonom[13]. Preko tela za centralizovane javne nabavke će biti moguće efikasnije sprovoditi nabavke koje će sadržati kriterijume zelenih nabavki.

Moguća je i obrnuta situacija. U Japanu je do razvoja zelenih nabavki najpre došlo kod manjih naručilaca, naročito kod lokalnih samouprava, čiji se uticaj proširio na ostale naručioce, da bi 2000. godine bio donet Zakon o promociji zelenih nabavki, koji je uveo obavezu državnih organa da prilikom sprovođenja nabavki uključe zelene kriterijume.[14]

Načela zakona se primenjuju ne samo u svim postupcima javnih nabavki, već i u postupcima nabavki određenih članom 7. st. 1. ZJN-a, kojim su određeni slučajevi u kojima se ne primenjuju odredbe ovog zakona.[15]

Za uspešnu primenu ovog načela od ključne je važnosti prethodno je isplanirati. Naručilac treba da odredi plan i ciljeve primene, kako bi znao kako i kada da ga koristi i šta želi da postigne primenom ovog načela. Kada određuje u kojim će oblastima primeniti zelene nabavke, naručilac može uzeti u obzir brojne kriterijume, od kojih su najbitniji uticaj na životnu sredinu koju određeni predmet nabavke ima i njen budžetski značaj.[16] Naručilac može u interni akt kojim bliže uređuje postupak javne nabavke inkorporirati i plan i metodologiju primene zelenih javnih nabavki.

Postupak javne nabavke usklađen sa načelom zaštite životne sredine

Da bi bio pokrenut postupak javne nabavke, ona mora biti predviđena u planu nabavki naručioca i za nju moraju biti predviđena sredstva u budžetu naručioca. U planu nabavki naručilac posebno navodi razloge i opravdanost svake pojedinačne nabavke i način na koji je utvrdio procenjenu vrednost javne nabavke. Kako naručilac, ukoliko želi da sprovede nabavku u skladu sa načelom zaštite životne sredine, mora računati na višu cenu proizvoda, time i veću procenjenu vrednost, on mora u planu nabavki odrediti koje će se nabavke sprovesti prema „zelenim" kriterijumima, i koji su razlozi opravdanosti njihove primene.

Dodela ugovora se vrši u otvorenom ili restriktivnom postupku i u drugim postupcima ako su za to ispunjeni uslovi propisani ovim zakonom.[17]

U otvorenom postupku sva zainteresovana lica mogu podneti ponudu. Pogodan je za sprovođenje zelenih nabavki zbog najvećeg izbora dostavljenih ponuda.

Restriktivni postupak je postupak koji se sprovodi u dve faze i u kojem sva zinteresovana lica mogu da podnesu prijavu. U prvoj fazi, naručilac poziva sva zainteresovana lica da podnesu prijavu i priznaje kvalifikaciju podnosiocima prijave za koje utvrdi da ispunjavaju prethodno određene

10 ZJN, čl. 84 st. 2.

11 Prema podacima navedenim u Strategiji, Upravi za javne nabavke su, u 2010. godini, dostavljeni izveštaji od 3529 naručilaca. Od toga 73 odsto naručilaca nabavlja 22 odsto ukupne vrednosti javnih nabavki, što dovoljno pokazuje kolika je fragmentiranost javnih nabavki u Srbiji. Strategija razvoja javnih nabavki u Srbiji, str. 14, dostupno na: http://www.ujn.gov.rs/

12 ZJN, čl. 48.

13 ZJN, čl. 49 st. 1

14 UN, 2008. Public procurement as a tool for promoting more sustainable consumption and production patterns. Sustainable Development Innovation Briefs, issue 5, str. 5, dostupno na: http://esa.un.org/marrakechprocess/pdf/InnovationBriefs_no5.pdf

15 ZJN, čl. 7 st. 3.

16 European Commission, Buying green! A handbook on green public procurement, str. 10, dostupno na: http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf

17 ZJN, čl. 31.

uslove za kvalifikaciju.[18] Kao uslovi za priznavanje kvalifikacije mogu se odrediti oni koji će selektirati ponuđače koji ispunjavaju najviše ekološke standarde. Od novih postupaka izdvaja se okvirni sporazum koji zbog svoje fleksibilnosti može poslužiti u postupku primene načela zaštite životne sredine.

Postupak se pokreće odlukom o pokretanju postupka. Organ koji donosi odluku o pokretanju postupka donosi i rešenje o obrazovanju komisije za javnu nabavku, u čijoj je nadležnosti, između ostalog, da pripremi konkursnu dokumentaciju i oglase o javnim nabavkama. Naručilac je dužan da pripremi konkursnu dokumentaciju tako da ponuđači na osnovu nje mogu da pripreme prihvatljivu ponudu.[19] Ukoliko je poziv za podnošenje ponuda objavljen na stranom jeziku[20], naručilac je dužan da u konkursnoj dokumentaciji navede državni organ ili organizaciju gde ponuđači mogu blagovremeno dobiti ispravne podatke o zaštiti životne sredine.

Naručilac je dužan da navede tehničke specifikacije u konkursnoj dokumentaciji koja se odnosi na svaku pojedinačnu nabavku. Tehničke specifikacije su tehnički zahtevi koji su obavezni i sastavni deo konkursne dokumentacije, u kojima su opisane karakteristike dobara, usluga ili radova. Tehničke specifikacije u slučaju nabavke dobara i usluga određuju njihove karakteristike kao što su dimenzije, nivo kvaliteta, uključujući i metode za osiguranje kvaliteta, sigurnost, nivo uticaja na životnu sredinu, potrošnju energije i drugih bitnih resursa tokom korišćenja proizvoda.[21] Naručilac određuje tehničke specifikacije na jedan od sledećih načina:

- sa pozivom na tehničke specifikacije i na srpske, međunarodne ili druge standarde i srodna dokumenta, tako da svako pozivanje mora da bude praćeno rečima „ili odgovarajuće“,
- u vidu karakteristika ili funkcionalnih zahteva, koji mogu uključivati i ekološke karakteristike i zahteve u pogledu energetske efikasnosti,
- određujući karakteristike i funkcionalne zahteve na način iz tačke 2. sa pozivom na specifikacije i standarde ili srodna dokumenta iz tačke 1.[22]

Čl. 73. ZJN-a precizira mogućnost korišćenja ekoloških i energetskih specifikacija i oznaka. Ako naručilac odredi ekološke karakteristike, odnosno zahteve u vezi sa energetskom efikasnošću kao karakteristike iz člana 71. st. 1. tačka 2. ZJN-a, može koristiti specifikacije ili njihove delove iz međunarodnih, evropskih ili nacionalnih ekoloških oznaka pod uslovom da su te specifikacije:

- odgovarajuće za definisanje karakteristika predmeta javne nabavke,
- određene na osnovu priznatih naučnih saznanja,
- određene u postupku uz učešće svih interesnih grupa, poput državnih organa, korisnika usluga, potrošača, proizvođača, distributera, ekoloških organizacija i sl.
- dostupne svim zainteresovanim licima.

Naručilac može konkursnom dokumentacijom ustanoviti pretpostavku da ponuđena dobra, usluge ili radovi sa određenom ekološkom oznakom, odnosno oznakom u pogledu energetske efikasnosti, odgovaraju definisanim tehničkim zahtevima, ali mora omogućiti ponuđaču da dokaže ispunjenost uslova i na drugi način, podnošenjem odgovarajućeg dokaza kao što je potvrda, tehnički dosije proizvođača ili izveštaj sa testiranja koje je sprovela ovlašćena organizacija.[23] „Termin „eko-oznaka“ označava proizvod koji je usklađen sa određenim nivoom ekoloških standarda. Prva eko-oznaka za industrijske proizvode, pod nazivom „Plavi anđeo“ uvedena je u Nemačkoj 1977. godine, nakon čega su svoje eko-oznake uvele druge evropske države, kao npr. Francuska (*NF Environment*) ili Velika Britanija i Italija (*Ecolabel*). Danas postoji i evropska eko-oznaka *EU Ecolabel*. U Kini od 2006. godine postoji lista proizvoda, koju sastavlja Kineski komitet za sertifikaciju i dodelu ekoloških oznaka, koji ispunjavaju uslove energetske efikasnosti i zaštite okoline. Od januara 2007. godine Vladini organi su u obavezi da prilikom nabavki daju prioritet onim proizvodima sa liste.[24]

Uslovi za učešće u postupku javne nabavke mogu biti obavezni i dodatni.

Među obaveznim uslovima je obaveza ponuđača da dokaže da on i njegov zakonski zastupnik nisu osuđivani za krivično delo protiv životne sredine. Ponuđač to dokazuje potvrdom nadležnog suda. Takođe, naručilac je dužan da zahteva od

18 ZJN, čl. 33 st. 2.

19 ZJN, čl. 61 st. 1.

20 Obavezno u slučajevima nabavki dobara i usluga čija je vrednost veća od 250.000.000 dinara i nabavki radova čija je vrednost veća od 500.000.000 dinara, ZJN, čl. 57 st. 3.

21 ZJN, čl. 70 st 2.

22 ZJN, čl. 71 st. 1.

23 ZJN, čl. 73

24 UN, 2008. Public procurement as a tool for promoting more sustainable consumption and production patterns. Sustainable Development Innovation Briefs, issue 5, str. 5, dostupno na: http://esa.un.org/marrakechprocess/pdf/InnovationBriefs_no5.pdf

ponuđača da pri sastavljanju svojih ponuda izričito navedu da su poštovali obaveze koje proizlaze iz važećih propisa o zaštiti životne sredine.

Dodatni uslovi se dele na uslove kapaciteta ponuđača i ostale dodatne uslove. Mogu se odrediti ako ne diskriminišu ponuđače i ako su u logičkoj vezi sa predmetom javne nabavke. Naručilac određuje dodatne uslove u pogledu finansijskog, poslovnog, tehničkog i kadrovskog kapaciteta uvek kada je to potrebno imajući u vidu predmet javne nabavke. Kao primer ekološkog uslova tehničkog kapaciteta se može uzeti zahtev za postojanje posebne strukture menadžmenta ponuđača – npr. uslov *EMAS – The EU Eco-Management and Audit Scheme,* koji je sredstvo ocene, izveštavanja i unapređenja ponuđačevog uticaja na životnu sredinu. Ostali dodatni uslovi se mogu odnositi na socijalna i ekološka pitanja.[25] Ispunjenost dodatnih uslova bi se mogla dokazati deklaracijom o usaglašenosti, potvrdom, akreditacijom i drugim rezultatima ocenjivanja usaglašenosti prema standardima i srodnim dokumentima za ocenjivanje usaglašenosti ili bilo kojim drugim odgovarajućim sredstvom kojim ponuđač dokazuje usaglašenost ponude sa tehničkom specifikacijom ili standardima traženim u konkursnoj dokumentaciji.

Načelo zaštite životne sredine može naći svoju primenu i u odredbama ugovora o javnim nabavkama, kojima se može odrediti način isporuke transportnim sredstvima koja zadovoljavaju najviše ekološke standarde. Čak bi se mogla uneti odredba kojom bi se ponuđaču nalagala isporuka u periodu dana u kojem nema saobraćajnih gužvi, kao prost način uštede energije.

Ograničenja primene načela zaštite životne sredine

Glavno zakonsko ograničenje primene zelenih javnih nabavki jeste načelo obezbeđivanja konkurencije. Naručilac je dužan da u postupku javne nabavke omogući što je moguće veću konkurenciju. Poznato je da sa učešćem svakog novog ponuđača krajnja cena nabavke pada. Naručilac ne može neopravdano upotrebiti diskriminatorske uslove, tehničke specifikacije i kriterijume, ako bi tako ograničio konkurenciju, a posebno ako bi tako onemogućio bilo kojeg ponuđača da učestvuje u postupku javne nabavke[26]. Mnoge norme kroz ceo zakon razrađuju ovo načelo. Primer diskriminatorskog ponašanja naručioca može biti neopravdano ponderisanje elemenata kriterijuma. Ako bi, recimo, naručilac nabavljao računare, pa kao elemente kriterijuma odredio njihovu cenu i mogućnost da računari na kraju životnog veka budu reciklirani, pa cenu ponderisao sa 30 pondera, a mogućnost reciklaže sa 70, jasno bi bilo da takav način ponderisanja ne bi bio u logičkoj vezi sa predmetom javne nabavke. Kao odličan kriterijum za dodelu ugovora nameće se kriterijum ukupnih troškova životnog ciklusa predmeta javne nabavke. Ako određeni proizvod ima višu cenu, to još ne znači da je on skuplji od drugog predmeta sa nižom cenom. Na to da li će on biti povoljniji za nabavku mogu uticati drugi faktori, poput cene njegovih rezervnih delova, garantnog roka, cene potrošnog materijala koji se koristi uz taj predmet.

Usled potrebe postojanja konkurencije, veoma značajno ograničenje je i veličina tržišta zelenih proizvoda i usluga. Ukoliko ono ne postoji ili je veoma malog obima, teško je očekivati veći obim nabavki ovih proizvoda. Ali potrebno je imati svest da je sprovođenje zelenih nabavki jedan od najboljih načina za porast ovog tržišta.

Jedna od glavnih teškoća u primeni zelenih nabavki je nedovoljna stručnost i obučenost u ovoj oblasti kadrova koji se bave javnim nabavkama.[27] U Srbiji je još prošlim zakonom uveden institut službenika za javne nabavke. Način i program stručnog osposobljavanja i način polaganja stručnog ispita za službenika za javne nabavke utvrđuje Uprava za javne nabavke.[28] Upravo je to odlična prilika da se kao poseban deo obuke predvidi osposobljavanje za sprovođenje zelenih javnih nabavki. Uprava za javne nabavke kao posebna organizacija sa brojnim nadležnostima u oblasti javnih nabavki može da odigra glavnu ulogu u implementaciji načela zaštite životne sredine i energetske efikasnosti. U državama sa dužom tradicijom zelenih nabavki razvijene su različite prakse koje učesnicima u nabavci olakšavaju sprovođenje postupka, od posebnih internet sajtova koji pružaju informacije o zelenim nabavkama do postojanja posebnih kriterijuma koje bilo koji proizvod ili usluga moraju da ispune da bi se smatrali zelenim. Postoje i posebni programi koji službenicima omogućavaju izračunavanje troškova i ušteda sprovođenja zelenih nabavki.

25 ZJN, čl. 76 st. 4

26 ZJN, čl. 10.

27 U Srbiji je, prema podacima Uprave za javne nabavke, do stupanja novog zakona na snagu sertifikovano oko 1500 službenika za nabavke. U programu obuke koja prethodi ispitu do sada nije bila uključena obuka iz ove oblasti. Do sastavljanja ovog rada na sajtu Uprave za javne nabavke nije bio objavljen novi priručnik za obuku službenika.

28 ZJN, čl. 134 st. 4.

Zaključak

Načelo zaštite životne sredine u našem zakonu je postavljeno dosta široko, kao obaveza naručioca da nabavlja dobra, usluge i radove koji ne utiču ili minimalno utiču na životnu sredinu. Od ključne važnosti za njenu primenu je prethodno planiranje svake faze postupka, kako bi on doveo do željenog rezultata. Zelene nabavke mogu dovesti do značajnih ušteda za naručioca. Takođe, zbog sve većeg broja zakona koji uređuju zaštitu životne sredine, za očekivati je da će ekološki standardi biti obavezni za nabavke sve većeg broja dobara.

Nabavka zelenih proizvoda je u potpunosti u skladu sa osnovnim načelom nabavki – „vrednost za novac". One utiču na poboljšanje životne sredine, ali i na tržište gde pospešuju prelazak sa običnih na ekološke tehnologije. Na taj način se najbolje obezbeđuje pravilna upotreba sredstava poreskih obveznika.

Green public procurement

Miljan Macanović

The Serbian National Assembly adopted the new Public Procurement Law, which entered into force on 1 April 2013. Thus Serbia reformed its legislation on public procurement in order to comply with EU law. With this law Serbia joined the governments which have recognized green public procurement as a way of sustainable development. One law principle seeks to protect the environment and to introduce energy efficiency in public procurement. Every public authority is obliged to plan its procurement in line with this principle and to procure goods, services and works with no influence on the environment. New criteria are introduced to help public entities to conduct green public procurements. Public entities may set up ecological requirements for participation in procedures. Green public procurement is a great way to use public spending for improving human environment and quality of life.

Key words: *Importance of public procurement, green procurement, life cycle and "value for money", new Public Procurement Law, principle of environmental protection*

USTAV SRBIJE I ZAŠTITA ŽIVOTNE SREDINE

Rastko Pavlović

Zaštita životne sredine u poslednje vreme privlači sve više pažnje. I dok s jedne strane raste svest javnosti o posledicama koje bi po kvalitet njihovog života imale dalje promene u životnoj sredini, čini se da na svetskom nivou još ne postoji konsenzus oko mera koje treba preuzeti u cilju sanacije postojeće štete i prevencije daljeg narušavanja kvaliteta eko-sistema. Međutim, nedostatak saglasnosti oko konkretnog pristupa problemu ne treba da spreči pravo da blagovremeno pruži odogovarajući normativan okvir za delovanje na ovom polju. Cilj ovog rada biće da analizira odredbe Ustava Republike Srbije, koje su relevantne za zaštitu životne sredine i ukaže na pozitivne primere iz Uporednog ustavnog prava, dok će na kraju biti izneta ocena trenutnog stanja u domaćem ustavnom sistemu kao i o potrebi za reformom istog.

Ključne reči: *zaštita životne sredine, ustav, ustavna prava, ljudska prava.*

1. Uvod

Ustav svake države je najviši pravni akt, koji predstavlja kamen temeljac pravnog sistema u tom smislu da se bavi pitanjima od najvećeg značaja za društvo, te postavlja osnove za dalju regulaciju tih oblasti putem zakona, uredbi i drugih nižih opštih pravni akata. Norme kojima ustav uređuje društvene odnose su vidno opštijeg karaktera od npr. zakonskih, upravo zbog toga što one čine samo početak na koji se kasnije nadograđuju sve konkretnija i detaljnija pravna pravila. Ustav je opšta, apstraktna smernica daljeg razvoja jednog pravnog sistema, ali i granica koja limitira slobodu zakonodavca. Sama činjenica da se ustav bavi nekim pitanjem ukazuje na značaj koji tom problemu pridaje pravni sistem i upravo okolnost da pravila o zaštiti čovekove okoline redovno nalaze svoje mesto u ovakvim dokumentima ukazuje na rastuću svest o značaju rešavanja problema zagađivanja eko-sistema.

2. Privreda i životna sredina

Još od prvih godina industrijske revolucije primećeni su neželjeni uticaji novih procesa proizvodnje na životnu sredinu, ali i zdravlje ljudi. Nažalost, rast globalne svesti o dugoročnim štetnim posledicama koje različite industrije mogu imati, počeo je tek u drugoj polovini 20. veka. Novi snažan talas privrednog rasta, koji je zahvatio različite delove zemaljske kugle podstakao je dalja istraživanja o povezanosti različitih fabričkih procesa i stanja životne sredine. Rezultati su pokazali da povećanje privredne aktivnosti u određenim granama ima izrazito negativne posledice po različita prirodna dobra (kvalitet vazduha, vode, zemljišta...)[1], što je podstaklo intenzivne debate oko načina na koji bi se trebalo suprotstaviti daljem narušavanju čovekove okoline.

Dva osnovna koncepta zastupana u takvim diskusijama su obligacionopravna zaštita u vidu kompenzacije za načinjenu štetu i zakonska regulacija (zabrana ili ograničenje) konkretnih štetnih aktivnosti. Mnogi empirijski podaci ukazuju na prednosti koje nudi izričita regulacija relevantnih oblasti proizvodnje[2]. Kako u ovaj način suočavanja sa problemom spada i regulacija ustavnim normama, vrlo brzo je nastala dilema da li životna sredina treba biti zaštićena i najvišim pravnim aktom jedne države. I dok su određene razvijene zemlje (posebno SAD) insistirale na potencijalnim negativnim efektima takvog čina, mnoge dinamične privrede u razvoju su u ustavnoj zaštiti prepoznale stabilan osnov za podsticanje održivog razvoja (npr. Indija)[3]. Srbija, kao zemlja u razvoju, ima mnogo razloga da se ugleda na uporednu pravnu praksu i pokuša da Ustavom obezbedi kamen temeljac za dalji privredni rast koji neće ići na štetu eko-sistema.

3. Ustavne garancije

3.1 Norme kojima se pruža primarna zaštita životne sredine

Pored članova kojima ustav izričito normira pitanja zaštite životne sredine, svakako je od presudne važnosti uzeti u obzir i druge ustavne

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1 J. G. Speight, Environmental Analysis and Technology for refining industry, New Jersey 2005, str. 131.

2 T. Swanson (ed), An introduction to the law and economics of environmental policy: issues in institutional design, Elsevier Science Ltd., Oxford 2002, str. 257.

3 B. J. Richardson, Y. le Bouthillier, H. McLeod-Kilmurray, S. Wood (eds), Climate law and developing countries: Legal and policy Challenges for the world Economy, Edward Elgar Publishing Limited 2009, str. 63.

norme, kojima se na poserdan način štiti životna sredina, odnosno omogućuje ostvarivanje prava na istu. Pravo je sistem normi, povezan skup materijalnih i procesnih pravila, koja tek posmatrana zajedno daju pravu sliku o prirodi regulacije neke materije. Propisati materijalna prava, a izostaviti odgovarajući mehanizam njihovog ostvarivanja samo stvara privid postojanja ustavne zaštite.

Iako ustav treba da bude stabilan dokument, pisan tako da dugo vremena daje efikasne normativne odgovore na društvene probleme, on nije nepromenljiv. Potrebno je uvek imati na umu trendove u uporednom pravu i iskoristiti iskustva drugih država, te unositi nove, efikasnije norme u domaći ustavni sistem. Upravo iz tih razloga će uslediti kako analiza domaćih ustavnih rešenja (koja bilo posredno bilo neposredno pružaju zaštitu čovekovoj okolini) tako i pregled interesantnih solucija iz ustavne prakse država širom sveta.

Nijedan ustav ne predstvalja puko nabrajanje zajamčenih prava građana, već stvara njihov sistem. Jedno građansko pravo povezano je sa više drugih relevantnih prava na nekoliko načina. S jedne strane, Ustav Srbije dozvoljava ograničavanje zagarantovanih prava u svrhe koje dopušta ustav, dok god se ne zadire u suštinu zajemčenog prava niti se smanjuje dostignuti nivo ljudskih i manjinskih prava.[4] To pokazuje da prva nisu potpuno neograničena, a najčešće se ograničavaju kako bi mogla da se ostvare neka druga ustavom zagarantovana prava ili poslovi od opšteg interesa. Sa druge strane, sadržinu svakog prava treba shvatati samo u kontekstu sa drugim ustavnim pravima, tj. sistemski tumačiti ustavni tekst, te je moguće da postojanje neke ustavne garancije utiče na smisao druge. Na kraju, ustavne garancije koje su na prvi pogled nepovezane u određenim slučajevima se mogu koristiti za zaštitu sličnih ili istih interesa građana. Sledi pregeled ljudskih prava zagarantovanih ustavom, koja su u vezi sa pravom na zdravu životnu sredinu na neki od pomenutih načina.

3.1.1 ZDRAVA ŽIVOTNA SREDINA KAO USTAVNO PRAVO

Dva su moguća načina formulisanja obaveze zaštite životne sredine. Prvi je metod koji vidi životnu sredinu kao poseban zaštitni objekat (štiti se jer je sama po sebi značajna), dok bi drugi pristup bio regulisati zaštitu okoline, kao sredstva za zaštitu drugih bitnih ljudskih prava kao što je, na primer, pravo na zdravlje[5]. Ustav Srbije prvo daje garanciju da svako ima pravo na zdravu životnu sredinu, te na blagovremeno obaveštavanje o njenom stanju. Dalje Ustav konstituiše opštu obavezu, kako države i Autonomne Pokrajine tako i građana da štite i poboljšavaju životnu sredinu, bez predviđanja potrebe da u konkretnom slučaju postoji ikakva pretnja po zdravlje ljudi.[6] Time naš ustav daje zaštitu eko-sistemu i kao sredstvu za očuvanje zdravlja i bezbednosti građana, ali i kao posebnom objektu zaštite. Nije bez presedana da se u ustavu države nađe i odredba koja predviđa da se kvalitet čovekove okoline štiti ne samo radi održanja zdravlja sadašnje populacije, već i kao dobro koje treba preneti budućim generacijama, približavajući time koncept očuvanja životne sredine borbi za održivi razvoj. [7] Osnovna prednost ovog rešenja je što ekološka pitanja stavlja u kontekst realnih društvenih problema, a ne apstraktne opasnosti, čije su posledice često nejasne građanstvu (posebno slabije obrazovanom delu populacije).

Iako se neretko ustavna zaštita svodi na jednu generalnu klauzulu, koja garantuje pravo na životnu sredinu, ostavljajućim nižim aktima da odrede tačan sadržaj tog prava, ustavi nekih država daju i konkretnija određenja ovog prava. Tako, na primer, Ustav Republike Moldavije izričito garantuje pravo na pristup zdravoj hrani, ali i pravo na bezbedne kućne uređaje[8], kao aspekt očuvanja čovekove životne okoline. Kenijski ustav je precizan kada su u pitanju merila kojima se određuje uspeh zaštite eko-sistema, te se kao cilj postavlja održanje minimalno deset odsto državne teritorije pod šumskim pokrivačem[9]. Ovako detaljno normiranje čini se vrlo retko, tj. samo ukoliko se država suočava sa pojedinačnim, ali vrlo značajnim problemom, te želi da i ustavom utvrdi značaj njegovog rešavanja. Iako se naša država suočava sa nemalim brojem problema u zaštiti okoline, posebno od uvođenja novih industrijskih proizvodnih kompleksa i procesa, ali kako se nijedna od ovih teškoća ne izdvaja kao dominantna, nema mnogo osnova za zaključak da u našem pravu ima potrebe za preciznijom formulaciojom od one u važećem tekstu Ustava.

3.1.2 DRUGA SRODNA USTAVNA PRAVA

1. Nepovredivost fizičkog i psihičkog integriteta

Ustav propisuje da su fizički i psihički integritet nepovredivi.[10] Fizički integritet štiti se od različitih oblika povrede, kao što je, na primer, vrše-

4 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 20.

5 Ustav Južnoafričke Republike (1997. god.) čl. 24. izričito garantuje pravo na životnu sredinu koja ni na koji način ne ugrožava zdravlje ljudi.

6 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl.74.

7 Ustav Demokratske Republike Istočni Timor (2002. god.) čl. 61., Ustav Kenije (2005. god.) čl. 30.

8 Ustav Republike Moldavije (1994. god.) čl. 37.

9 Ustav Kenije (2005. god.) čl. 69.

10 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 25.

nje medicinskih i naučnih ogleda bez pristanka. Isto tako jasno je da bi različiti oblici zagađenja, tj. povrede prava na zdravu životnu sredinu istovremeno predstavljali narušavanje fizičkog integriteta. Štetne materije nastale zagađenjem vrlo lako ulaze u čovekov organizam (najčešće bez njegove svesti o tome) i imaju mnoga štetna dejstva, istog ako ne i većeg inteziteta od povreda usled mučenja ili drugog kršenja ljudskih prava.

2. Pravo na bezbednost[11]

Pravo na bezbednost je jedno od osnovnih ljudskih prva i u suštini garantuje čoveku egzistenciju u okolini bezbednoj po život, naravno uz uobičajene rizike koje život nosi. Narušavanje kvaliteta životne sredine je može da stvori latentne opasnosti po bezbednost ljudi čineći njihovu okolinu potencijalno opasnijom nego inače. Intenzivno krčenje šuma, primera radi, može stvoriti teren koji nosi visok rizik od klizišta ili odrona, što pored štete po imovinu stvara jasnu pretnju za bezbednost građanstva. Potencijalne opasnosti koje narušavanje eko-sistema može imati po ustavno pravo na bezbednost ukazuju na širinu štetnih posledica koje mogu nastati narušavanjem balansa u eko-sistemu.

4. Zdravstvena zaštita

Svako ima pravo na zaštitu svog fizičkog i psihičkog zdravlja.[12] Ovo pravo je usko povezano i sa garancijama o nepovredivosit psihičkog i fizičkog integritea, ali je ovde akcenat prevashodno na zdravstvenim posledicama akata povrede. Ustav daje pravo na život u zdravoj životnoj sredini, i time se kao prvi kriterijum za ocenu kvalita eko-sistema postavlja njegova bezbednost po zdravlje. Norma iz člana 68. Ustava Srbije predstavlja primarno sredstvo zaštite zdravlja, dok se član 74. javlja kao dopunska mera, čiji je osnovni zadatak da skrene posebnu pažnju na značaj koji eko-sistem ima za zdrav život građana. Ne treba zanemariti ni uticaj koji zagađenje može imati na psihičko zdravlje pojednica. Posebnu opasnost u ovom smislu predstavlja zagađenje bukom (najčešće pored aerodroma i ekstremno prometnih ulica), koje redovno stvara anksiozne poremećaje kod pogođenog stanovništva. Sa povećanjem rizika po životnu sredinu, te posredno po fizičko i psihiško zdravlje stanovništva, pravo na zdravu životnu sredinu i pravo na zdravlje zajedno čine neophodan normativni minimum za stvaranje efikasnog sistema zdravstvene zaštite.

11 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 27.

12 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 68.

3.2 Ustavna prava i ograničenja koja omogućuju ostvarivanje prava na zdravu životnu sredinu

1. Pravo na obrazovanje

Svako ima pravo na obrazovanje.[13] Da bi ovo pravo bilo ostvareno, potrebno je da to obrazovanje ima i određenu sadržinu. Cilj obrazovnog proces je razvoj ličnosti i intelekta, kako bi čovek mogao da se aktivno uključi u društvene tokove. To podrazumeva i sticanje svih znanja relevantnih za život u modernom društu. Svest o značaju zaštite životne sredine, kao i znanje na koji način efikasno delovati u tom pravcu od velike su važnosti za formiranje ličnosti sposobne da poima svet oko sebe. Pojedine države u svom ustavu, u okviru prava na zdravu životnu sredinu, konstituišu i obavezu nadležnih organa da u proces obrazovanja uključe i materiju zaštite čovekove okoline[14], dajući na taj način ovom aspektu školstva poseban značaj. Iako u našem pravu ne postoji ovako izričita norma, sistematskim tumačenjem se dolazi to toga da u opus ovog prava ulazi i pravo na sticanje odgovarajućih znanja iz oblasti zaštite životne sredine, jer bi se izostavljanjem ekološki relevantnih tema znatno otežalo ostvarivanje drugog ustavnog prava, a to je pravo na zdravu životnu sredinu.

2. Sloboda preduzetništva

Preduzetništvo u Republici Srbiji je slobodno, ali se može ograničiti u interesu zaštite životne sredine i zdravlja ljudi.[15] Ekonomski razvoj svakog kapitalističkog društva počiva na preduzetništvu, kao izvoru inovacija u poslovanju, ali su pozitivni efekti tog fenomena zanemarljivi ukoliko se dozvoli istovremeno ugrožavanje čovekove okoline i zdravlja. Ograničenja ustavne garancije slobode preduzetništva upravo potrebama zaštite životne sredine, daju osnovu za ostvarivanje održivog razvoja privrede i društva. U uporednom pravu se javljaju i slučajevi kada država izričito zabranjuje stvarnje i rukovanje hemijskim, nuklearnim i drugim opasnim otpadom[16], koji najčešće nastaje upravo iz proizvodnih postrojenja, ograničavajući time u značajnoj meri privredne aktivnosti, ali u slučaju savesnog rada nadležnih državnih organa ovako detaljno ustavno regulisanje nije neophodno za postizanje optimalnih rezultata.

13 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 71.

14 Ustav Kolumbije (1991. god.) čl. 79.

15 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 83.

16 Ustav Republike Paragvaj (1992. god.) čl. 8.

3. Sloboda kretanja

Moderan način života, a posebno poslovanja, velikim delom se zasniva na slobodi kretanja. Intenzivan promet kako robe tako i putnika je odlika naše svakodnevice i podiže kvalitet egzistencije i rada. Međutim, ni ova sloboda nije neograničena, te Ustav izričito normira da se sloboda kretanja i nastanjivanja može ograničiti radi sprečavanja širenja epidemija infektivnih bolesti[17]. Zdravlje ljudi stavlja se iznad slobode istih ili drugih pojedinaca da se slobodno kreću. To svakako ne znači da je prvi i jedini odgovor na ove zdravstvene pretnje ograničenje sloboda. Ciljnim tumačenjem ove norme dolazimo do zaključka da bi se sloboda kretanja mogla ograničiti i u slučaju drugih opasnosti po javno zdravlje, iako to nije izričito predviđeno u čl. 39. Zdravstvene ustanove reaguju različitim sredstvima na ovakve probleme, ali ekološke katastrofe širokih razmera mogu često ugroziti zdravlje šire populacije. U skorijoj istoriji imamo dva primera nuklearnih katastrofa[18], koje iako ne nisu zarazne bolesti, stvaraju očigledan rizik za ljudsko zdravlje, te su vlasti u tim državama na širokim prostorima ograničavale ili čak u potpunosti ukidale slobodu kretanja, a sve u cilju prevencije narušavanja zdravlja građana.

4. Korišćenje zemljišta

Korišćenje i raspolaganje poljoprivrednim, šumskim i gradskim građevinskim zemljištem u privatnoj svojini je slobodno.[19] Međutim, Ustav u istom članu ostavlja izričitu mogućnost zakonodavcu da ograniči ovu slobodu određivanjem uslova za korišćenje, kako bi se otklonila opasnost od nanošenja štete životnoj sredini. Naše pravo poznaje opštu obavezu vlasnika zemljišta da se uzdrži od radnji kojima se otežava korišćenje drugih nepokretnosti preko određene mere, te se kao primer ovih delatnosti navode i neke radnje zagađenja životne sredine (prenošenje dima, buke, otpadnih voda itd.)[20]. Sa druge strane, ovakva zaštita se može pokazati nedovoljnom u nekim slučajevima (npr. radnje koje neko preduzima imaju posredne efekte, ili se posledice javljaju na udaljenim pracelama), pa je rešenje kojim ustavopisac ovlašćuje zakonodavni organ da uvede posebna ograničenja nedvosmisleno potrebno.

Nakon povrede prava na zdravu životnu sredinu, pored potrebe za prevencijom daljeg kršenja prava, postavlja se i pitanje naknade štete. U srpskom pravu postoji opšta obaveza uzdržavanja od postupaka kojima se nanosi šteta, te nastanak štete stvara obavezu njene naknade.[21] Šteta će biti nadoknađena ili materijalnom ili novčanom restitucijom, u zavisnosti od prirode štetnih posledica. Iako je institut naknade štete univerzalan za sva društva u kojima bilo kakav pravni poredak egzistira, u nekim državama je ustavotvorac našao za shodno da posebno reguliše ovaj institut u oblasti zaštite životne sredine. Jedan od načina jeste da se propiše obaveza sanacije štetnih posledica[22], pod čime se najčešće podrazumeva uklanjanje štetnih materija iz životne sredine, dok bi ostali oblici štete (npr. izgubljena dobit usled nemogućnosti korišćenja zemljišta) bili nadoknađeni u skladu sa zakonskim pravilima. Druge države pak, poput Ruske Federacije ili Moldavije, daju izričito ustavno pravo na kompenzaciju[23], ostavljajući na taj način drugim opštim pravnim aktima da regulišu i eventualnu obavezu sanacije štete. Prednosti ustavnog jemčenja ovih prava su značajne, u tom smislu da se na taj način konstituišu posebne garancije građanskih prava koja će stanovništvu omogućiti što brži povratak u normalne životne tokove posle narušavanja eko-sistema, pa bi buduće promene našeg ustava u tom smeru bile pozitivan korak u pravcu stvaranja efikasnog normativnog okvira zaštite čovekove okoline.

Ustav garantuje i određena prava (često političke prirode) koja treba da obezbede građanstvu mogućnost iznošenja svog gledišta o određenim problemima, te da na druge načine utiče na politiku vođenja državnih poslova. Iskustvo je pokazalo da zaštita životne sredine postaje efikasna tek kada se u rešavanje problema uključi šira zajednica, te su sledeća prava od odsudnog značaja za upliv civilnog društva u odlučivanje o čovekovoj okolini.

5. Sloboda mišljenja i sloboda medija[24]

Ustav garantuje slobodu mišljenja i izražavanja, kao i širenja i primanja ideja i obaveštenja, ograničavajući to pravo samo u slučaju povrede ugleda ili časti drugog lica ili ugrožavanja nekih opštih interesa. Sloboda mišljenja je osnov nauč-

17 Ustav Republike Srbije („Službeni glasnik RS, br. 83/2006) čl. 39.

18 Černobilj, Ukraijna - 26.4.1986. i Fukušima, Japan - 11.3.2011.

19 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 88.

20 Zakon o osnovama svojinskopravnih odnosa („Službeni list SFRJ", br. 6/1980 i 36/1990, „Službeni list SRJ", br. 29/1996) čl. 5.

21 Zakon o obligacionim odnosima („Sl. list SFRJ", br. 29/1978, 39/1985 i 45/1989, Odluka Ustavnog suda SFRJ, br. 57/1989, „Sl. list SRJ", br. 31/1993, „Sl. list SCG", br. 1/2003) čl. 16, 154. st. 1.

22 Ustav Argentine (1853.) čl. 41.

23 Ustav Ruske Federacije (1993) čl. 42, Ustav Republike Moldavije (1994) čl. 37.

24 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 46. i 50.

nog napretka i rezonovanja, koje je samo po sebi u osnovi rešavanja različitih prepreka na putu očuvanja eko-sistema. Ustavna garancija slobode mišljenja omogućuje svakome da kritički preispituje postojeće stanje životne sredine, te da na osnovu različitih izvora informacija formira sopstveno mišljenje o tom pitanju. U savremenom društvu, kao osnovni izvor informacija putem kojih građani mogu steći uvid u činjenično stanje te doneti sud o problemima zaštite životne sredine javljaju se najrazličitiji mediji, pa bi cenzura istih dovela do skoro potpunog informacionog mraka. Mediji zasnovani na informacionim tehnologijama posebno su značajni ne samo za širenje relevantnih informacija već i razmenu mišljenja o tim podacima između građana (čime se doprinosi formiranju zajedničke svesti populacije o ekološkim pitanjima), što ih čini važnim objektom zaštite koju pružaju članovi 46. i 50. Ustava.

6. Pravo na obaveštenost[25]

Svaki građanin ima pravo da potpuno i blagovremeno bude obavešten o pitanjima od javnog značaja, te ima pravo na pristup podacima koji su u posedu državnih organa. Navedeno pravo je naročito značajno upravo zbog toga što obaveštenost građana stavlja u svrhu njihovog učešća u pitanjima od javnog značaja. Garantuju se informacije koje im omogućuju stvaranje potpune slike o aktivnostima javnog i privatnog sektora u različitim oblastima, pa i u poslovima zaštite životne sredine. Ovo pravo je usko povezano sa slobodom mišljenja i medija jer omogućuje da upravo informacije koje ima država dođu do javnosti, koja tek tada može da stvori istinitu sliku o relevantnom činjeničnom stanju. Sa druge strane, neke države, pored opšte garancije prava na obaveštenost, konstituišu i posebnu obavezu države da pruži informacije o stanju životne sredine[26], dok se u Ustavu Kraljevine Tajland određuje i obaveza države da pored pružanja odgovarajućih informacija konsultuje građane o pitanjima od ekološkog značaja[27]. Poljska ide još dalje, dajući pored prava na informacije o stanju eko-sistema i ustavno pravo na informacije o aktivnostima koje država preuzima u cilju njegove zaštite.[28] Kao interesantno rešenje (i potencijalno koristan pravni transplant) javlja se odredba kojom se garantuje pravo na pristup informacijama od javnog značaja i u slučaju da se nalaze u privatnim rukama[29], što bi posebno osiguralo da građani dođu u posed relevantnih podataka o stanju okoline u kojoj žive.

7. Pravo na učešće u javnim poslovima[30]

Pravo na učešće u javnim poslovima obezbeđuje garanciju da će lica koja su pogođena određenom odlukom biti u prilici da utiču na njeno formiranje, uzimajući tako aktivnu ulogu u zaštiti lokalnog eko-sistema. Upravo mogućnost, čak i obavezu, učešća lokalne zajednice u donošenju odluka predviđa Ustav Republike Kolumbije[31]. Nije retkost, dakle, da ono što je u našem, ali i drugim ustavima[32], pravo bude određeno kao obaveza, tj. da se učešće javnosti od fakultativnog učini nezaobilaznim delom procesa donošenja odluke. Taj trend prati i Finska, koja upravo državu obavezuje da obezbedi učešće svih relevantnih subjekata u donošenju ekološki bitnih odluka.[33] Kako je pravo građana da učestvuju u ovim poslovima neretko osujećeno različitim zloupotrebama državnih organa, uvođenje ustavne obaveze države da uvek osigura prisustvo javnosti bi dalo preko potrebne garancije za uspostavljanje dobre prakse na ovom polju.

8. Sloboda okupljanja, udruživanja i podnošenja peticije[34]

Sloboda okupljanja i udruživanja je političko pravo građana, koje od početnih stadijuma razvoja moderne demokratske države stvara uslove da na jedan neformalan način građani izraze svoje mišljenje, da i pored eventualne nedostupnosti zvaničnih kanala izraze svoje nezadovoljstvo odlukama države, te da na taj način organizovano utiču na donošenje za njih relevantnih odluka. Zaštita životne sredine je u našoj državi još u povoju i kako se institucionalni sistem učešća građana u donošenju odluka o životnoj okolini tek razvija, ova prava su najčešće pravni osnov aktivnosti civilnog društva u ovoj oblasti. Pravo na peticiju, sa druge strane, daje garđanima mogućnost da iniciraju određene aktivnosti državnih organa, čak i u slučaju da ih oni primarno nisu konsultovali. Kao dobar primer normiranja ovog prava se pojavljuje odredba Ustava Ukrajine koja garantuje kako pravo na peticiju tako i obavezu državnog organa da brzo odgovori na nju[35], upravo zbog toga što tek obaveza države da odgovori (i to blagovremeno)

25 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 51.

26 Ustav Republike Letonije (1922. god.) čl. 115.

27 Ustav Kraljevine Tajland (2007. god.) čl. 57.

28 Ustav Poljske (1997. god.) čl. 74.

29 Ustav Kenije (2005. god.) čl. 47.

30 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 53.

31 Ustav Kolumbije (1991. god.) čl. 79.

32 Na primer Ustav Kraljevine Tajland (2007. god.) čl. 67.

33 Ustav Republike Finske (1999. god.) čl. 20.

34 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 54-56.

35 Ustav Republike Ukrajine (1996. god.) čl. 40.

čini peticiju efikasnim sredstvom kontrole države od strane građana.

U ustavima nekih država (na primer Kostarike[36]) postoji izričito ustavno pravo građana da odbiju da se povinuju bilo kom aktu kojim se ugrožava životna sredina. Još jedan metod posebne zaštite čovekove okoline nalazimo u kenijskom ustavu, koji ovlašćuje svakog građanina da podigne tužbu protiv lica koje svojim radnjama ugrožava životnu sredinu (bez obzira na to da li je šteta nastupila), a aktivno legitimisano lice ne mora dokazivati svoj pravni interes u toj stvari.[37] Ovakve ustavne garancije naročito su delotvorne u sistemima bez razvijenih i efikasnih javnih institucija, koje se bave problemima zaštite eko-sistema, pa i za nas predstavljaju potencijalno koristan pravni transplant.

Da bi ustavom zagarantovana građanska prava (uključujući i prava u vezi sa zaštitom životne sredine) bila ostvariva, Ustav Republike Srbije u članu 22. predviđa opšte pravo na traženje sudske zaštite u slučaju povrede prava, ali i pravo građana da se obrate međunarodnim institucijama u slučaju povrede istih. Poslednja mogućnost je svakako važna za formiranje međunarodnog sistema zaštite životne sredine. Teritorije država nisu izolovane jedna od druge i aktivnosti na teritoriji jedne mogu imati teške posledice na teritoriji druge. Iz tih razloga je jačanje međunarodnih institucija od velikog značaja za prevazilaženje ograničenja sa kojima se suočavaju državne vlasti (ograničenost nadležnosti državnim granicama).

4. Uloga države

Svako je individualno dužan da da svoj doprinos očuvanju i poboljšanju čovekove okoline. Zdrava životna sredina je u suštini javno dobro, na koje utiču aktivnosti svakog pojedinca, pa je otud i opšta, u krajnjoj liniji moralna, dužnost svakog lica da svoje aktivnosti prilagodi prvenstveno zaštiti eko-sistema. Međutim, kada razmatramo zaštitu životne sredine kao ustavnu kategoriju, postavlja se pitanje koje subjekte Ustav označava kao odogovorne za sprovođenje ustavnih garancija i vođenje drugih poslova koji se tiču očuvanja okoline. Primarnu ulogu, u skladu sa članom 97. Ustava Republike Srbije, u zaštiti ljudskih prava i sloboda zagarantovanih Ustavom ima upravo Republika Srbija. Jasno je da je uloga države, čiji su organi i učestvovali u donošenju Ustava, da osigura primenu tog akta, pogotovo imajući na umu da država kao organizacija poseduje sredstva i kadrove potrebne za tu delatnost. Dalje se u tekstu istog člana govori o nadležnosti države da uređuje i pitanja koja se tiču održivog razvoja i zaštite i unapređenja životne sredine. Ovde se govori o regulatornoj ulozi države, ona dakle određuje pravila i standarde ponašanja po kojima se pojedinci moraju vladati, a sve u cilju ostvarivanja održivog razvoja i zaštite životne sredine, što su dve strane iste medalje, a to je prosperitetna koegzistencija čoveka sa eko-sistemom. U uporednom pravu, pored obaveze regulacije nailazimo i na izričitu obavezu države da preuzima posebne mere u cilju očuvanja kvalieta čovekove okoline[38], čime se država dovodi u poziciju zauzimanja aktivnije uloge u ovom procesu.

Štaviše, svojinski režim propisan Ustavom ide naruku koncepciji o primarnoj odgovornosti države za zaštitu okoline. Naime, predviđeno je Ustavom da su prirodna bogatstva kao i dobra za koja je zakonom određeno da su od opšteg interesa u državnoj imovini.[39] Samim tim što je država Srbija vlasnik tih dobara, a prvenstveno u ovom slučaju, prirodnih bogatstava, nju čini primarno odgovornom za njihovo očuvanje. I dok i određene zemlje kako u okruženju tako i u drugim delovima sveta imaju isti svojinski režim nad ovom vrstom dobara[4041], Ustav Kolumbije konstatuje da ovakav režim svojine konstituiše i dužnost planiranja modaliteta eksploatacije, koji bi najmanje ugrozio okolinu.[42] U istoj državi je ustavni poredak preduzeo još jednu meru u cilju obezbeđenja odgovarajućeg standarda životne sredine, a to je norma kojom su očuvanje zdravlja i životne sredine definisani kao javne usluge, koje naravno pruža država.[43]

Životna sredina je specifična po tome što svaki problem u vezi sa njom zahteva iscrpno poznavanje konkretnih okolnosti slučaja. Država kao centralizovan aparat ne može efikasno biti obaveštena o svim potencijalno problematičnim situacijama, te donositi informisane odluke. Zbog toga je efikasnije da se ovim pitanjima pretežno bave jedinice lokalne samouprave. Ustav Srbije ustanovljava pravo građana na lokalnu samoupravu i pokrajinsku autonomiju.[44] Od velike bi koristi bilo da se kao u slučaju nekih manje poznatih

36 Ustav Kostarike (1949. god.) čl. 50.

37 Ustav Kenije (2005. god.) čl. 70.

38 Ustav Republike Grčke (2001. god.) čl. 24.

39 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 87.

40 Ustav Republike Hrvatske („Narodne novine", br. 56/1990, 135/1997, 8/1998, 113 i 124/2000, 28/2000) čl. 52.

41 Ustav Republike Čile (1980. god.) čl.73.

42 Ustav Kolumbije (1991. god.) čl. 80.

43 Ustav Kolumbije (1991. god.) čl. 49.

44 Ustav Republike Srbije („Službeni glasnik RS", br. 83/2006) čl. 12.

ustava[45] i u Srbiji deklariše prioritet lokalne samouprave, tj. njenih organa u ovim pitanjima. Kao što su građani koji žive u određenom mestu pozvani da učestvuju u donošenju ekološki bitnih odluka za to mesto, tako bi bilo dobro da su za odlučivanje u tim stvarima zaduženi i lokalni organi, koji mnogo bolje poznaju situaciju na terenu od udaljenih činovnika državne uprave. Na ovaj način bi se verovatnije došlo do rešenja koja su u najvećoj mogućoj meri prilagođena potrebama lokalne zajednice, te za koja se zbog toga može očekivati da budu dugoročna.

Naposletku, iako država ima značajno mesto u očuvanju životne sredine i s njom povezanih ustavnih prava i pojedinci su nekim ustavima određeni kao nosioci sličnih obaveza. Tako je u Ustavu Konga zaštita životne sredine određena kao građanska dužnost[46], dok Republika Hrvatska određuje da u vršenju svih delatnosti građani moraju posebnu pažnju obratiti na životnu sredinu. Svakako bi slične norme u našem ustavu doprinele širenju svesti o individualnoj odgovornosti za stanje eko-sistema. Iako samo zajednica kao kolektivitet ima dovoljno snage i sredstava da osigura stabilan razvoj društva uz netaknutu životnu sredinu, svaka aktivnost mora prvo da pođe od pojedinca, koji je dužan da učini prvi pozitivan korak u pravcu ostvarenja tog cilja.

5. Zaključak

Ustav Republike Srbije, predstvalja kompleksan sistem pravnih normi, koje tek u sadejstvu mogu pružiti zaokruženu regulaciju nekog pitanja. Kada govorimo o zaštiti životne sredine, treba pored članova, kojima se izričito garantuje pravo na zdravu životnu sredinu uvek imati na umu i ustavne norme kojima se štite druga važna dobra, kao što su čovekovo telo i zdravlje. Sa druge strane, Ustav garantuje i različita politička prava, koja predstavljaju osnove za aktivno učešće građana u zaštiti životne sredine, tj. u odlučivanju u sa ovim problemom povezanim stvarima. Iako je mišljenje zastupano u ovom tekstu da ustavne norme našeg prava pružaju značajne garancije u polju zaštite čovekove okoline, to svakako ne znači da nema prostora za pozitivne promene, kada se u budućnosti ukaže prilika za revidiranje ustavnog teksta. Primeri iz inostrane ustavne prakse treba da posluže kao izvor novih pravnih rešenja kojima bi se poboljšala domaća ustavnopravna regulativa, naravno, uvek imajući na umu društvene, političke i ekonomske prilike u našoj državi. Jedino ona pravna norma koja uzima u obzir sve relevantne okolnosti može na optimalan način regulisati ovako značajno pitanje, kao što je zaštita životne sredine.

45 Provizorni Ustav Nepala (2007. god.) čl. 35.

46 Ustav Republike Kongo (1992. god.) čl. 46.

Rastko Pavlovic

Serbian Constitution and Environmental Protection

While there is an increase in public awareness of the potential detrimental effects that pollution could have on their lives, it seems that on a global level there is still no consensus on the measures that need to be introduced in order to tackle the issue. Nevertheless, lack of common view on the subject should not prevent the formation of an adequate normative frame for working on the problem of environmental protection. The aim of this paper is to analyze the relevant norms of the current Serbian Constitution, and to draw attention to good examples from other legal systems.

***Key words**: environmental protection, constitution, constitutional rights, human rights*

NOTARI I NJIHOVA ULOGA U PRIVREDNOM PRAVU REPUBLIKE SRPSKE

Dejan Pilipović*

U radu se prvo, na uopšten način, govori o suštini i razlozima uvođenja notarijata u pravni sistem Republike Srpske, njegovom istorijskom razvoju, organizacionim oblicima i uređenju u EU. Zatim se konkretizuje uloga notara u privrednom pravu, posmatrana kroz prizmu osnovnih (izdavanja notarski obrađene isprave, notarske potvrde i ovjere) i dopunskih notarskih djelatnosti, a koja je utemeljena na Zakonu o notarima Republike Srpske. Drugi dio rada je, još konkretnije, baziran na eksplikaciji uloge notara kod osnivanja, registracije i djelovanja privrednih društava, specijalizovanih privrednih subjekata, kao i u privrednom ugovornom pravu. Upućuje se na određene specifičnosti, nedostatke pojedinih odredbi i de lege ferenda prijedloge. Iz sadržine rada se mogu ukazati prednosti i rezerve povodom djelatnosti notara u privrednom pravu.

Ključne riječi*: notarijat, notari, javni beležnici, privredno pravo, privredna društva.*

1. Uvodna razmatranja

U skladu sa evropskim tendencijama i potrebama širenja efikasnosti tržišta uvodi se, odnosno reafirmiše institut notarijata (javnog bilježništva). Pozitivni ciljevi u procesu pravosudne reforme, posmatrani sa aspekta uvođenja notarijata, ogledaju se u povećanju efikasnosti i rasterećenju sudova, smanjenju broja sudija i jačanju pravne sigurnosti (smanjenju rizika od nastanka sporova i efikasnijem rješavanju eventualno nastalih). Naravno, oni ovakvu ulogu mogu imati kada se njihova djelatnost postavi u jasne i precizne zakonske okvire.

1.1. Uvođenje notarijata u pravni sistem BiH

U Bosni i Hercegovini notari su uvedeni Zakonom o javnim bilježnicima Federacije BiH 1999. godine, koji nikad nije sproveden u praksi. Nakon toga Federacija BiH je donijela novi zakon o notarima[1], pravilnik i prateće akte 2002. godine. Republika Srpska je donijela svoj zakon o notarima 2004. godine.[2] Institut notara, odnosno javnog bilježnika je bio uređen Zakonom o javnim bilježnicima u Kraljevini Jugoslaviji[3] iz 1930. godine, a nakon raspada Jugoslavije došlo je do ponovnog uvođenja notarijata u novoformiranim državama. Kod nas je uveden notarijat tzv. latinskog tipa. U Buenos Ajresu je 1948. godine osnovan Međunarodni savez latinskog notarijata. Notarska služba predstavlja javnu službu i slobodnu profesiju. Osnovnu sadržinu djelatnosti notara čini sastavljanje notarski obrađenih isprava, notarskih potvrda i ovjera za pravne poslove predviđene zakonom, kao i dopunske djelatnosti u obliku potpisa, pečaćenja i čuvanja stvari itd. Notarijalnom regulativom se uređuje organizacija, ovlašćenja i način rada notara, uslovi za početak rada notara i notarski ispit, sadržina njihove djelatnosti, tj. isprave, postupak sastavljanja isprava od momenta ulaska stranke u notarsku kancelariju do dobivanja iste, odgovornost notara, kao i notarske tarife.

1.2. Kratak istorijski osvrt

Notarijat istorijski potiče iz rimskog prava i to od rimskih tabeliona (*tabelliones*) koji predstavljaju začetak modernog notarijata. Neki autori ističu i prazačetke notarijata još u vrijeme pojave pismenosti, odnosno u egipatskoj i grčkoj civilizaciji.[4] Nakon toga razvoj se proteže kroz srednjovjekovno pravo, naročito primorske gradove.[5] Kao prvi moderni zakon o notarima navodi se zakon u Francuskoj iz 1803. godine koji je danas, uz izmjene, na snazi.

1.3. Oblici organizacije notarijata[6]

U pravnoj literaturi se vrši klasifikacija na tri oblika organizovanja notarijata. Prvi je anglo-

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1 Zakon o notarima Federacije BiH („Službene novine Federacije BiH", br. 45/02).

2 Zakon o notarima Republike Srpske („Službeni glasnik Republike Srpske", br. 86/04, 02/05, 74/05, 76/05, 91/06, 37/07, 50/10, 78/11; dalje u tekstu ZoN); Pravilnik o radu notara u postupku sastavljanja i izdavanja notarskih isprava („Službeni glasnik Republike Srpske", br. 43/11).

3 Zakon o javnim bilježnicima („Službene novine Kraljevine Jugoslavije", br. 220/1930).

4 S. Avramović, „Pravnoistorijski aspekti notarijata", u: D. Hiber et alia, Javnobeležničko pravo, 2. izmenjeno i dopunjeno izdanje, Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu, Beograd, 2006, str. 37-45.

5 N. Mojović, „Od rimskog tabeliona do modernog notara", Pravna riječ, 1/2004, 129-157.

6 N. Šarkić, O javnom beležniku-notaru, Glosarijum, Beograd, 2004, str. 93-101.

saksonski sistem uz minornu ulogu notara, zbog velikog pridavanja značaja saslušanju svjedoka, a ne javnom sastavljanju isprava (pravno savjetovanje je u djelokrugu advokata; što je više izraženo u engleskom pravu). Drugi sistem jeste model državnog bilježništva, zastupljen u Njemačkoj, Švajcarskoj, Rusiji (status notara je blizak statusu sudije, ali se ipak ne javlja u čistom obliku). Treći oblik je zapravo srednje rješenje prethodnih i to je najrasprostranjeniji, tzv. latinski tip bilježništva koji je u primjeni kod nas, ali i u državama Evrope, Azije, Afrike, Južne Amerike i djelimično Sjeverne Amerike. Postoje zemlje u kojima ne postoji notarijat, kao na primjer u Danskoj.[7]

1.4. Notarijat u pravu Evropske unije (EU)

Pored različitog regulisanja notarijata u državama članicama EU, kao i konceptualnim razlikama između evrokontinentalnih modela i anglosaksonskog koncepta notarijata, postavlja se pitanje mogućnosti harmonizacije notarijalnog prava u Evropskoj uniji. Evropski parlament je istražio stanje i perspektive notarijata u Evropskoj zajednici u toku 1993. godine. Pitanje je bilo da li harmonizaciju vršiti putem direktiva ili konvencijama. Treba napomenuti da u ovoj oblasti postoje i rezolucija Evropskog parlamenta, kao i Kodeks prava notarske profesije u EU iz 1995. godine. Optiralo se između notarske djelatnosti: kao vršenja javnih ovlašćenja (ovo bi predstavljalo izuzetak od slobode nastanjivanja i pružanja usluga iz člana 55. i 66. Ugovora o EU) ili kao vida slobode pružanja usluga (u ovom slučaju je notarijat obuhvaćen slobodom pružanja usluga). Evropski sud za ljudska prava je konačno 2011. godine donio presudu u kojoj se priklonio ovom drugom stanovištu[8] Postoje autori koji relativizuju značaj ovakve klasifikacije.[9] Prema autoru N. Šarkiću, harmonizacija treba ići u pravcu identične organizacije profesije notara, identičnih postupaka ovjere i identične forme.[10] Na primjer, iako se u francuskom pravu ne zahtjeva da osnivački akt privrednog društva bude u obliku notarskog akta, notarska obrada bi se morala ispoštovati u svim državama članicama EU, pa i u Francuskoj. Isti autor ističe i mogućnost stvaranja isključivog područja uloge notara, npr. u pravu privrednih društava, poslova sa nekretninama i slično. Nasuprot tome stoji princip teritorijalne rascjepkanosti djelatnosti notara.

2. Uloga notara u privrednom pravu – opšti dio

Zakon o notarima je, u suštini, procesni zakon, ali i sa nekim odredbama materijalnopravnog karaktera, u kojima se određuju pravni poslovi za koje su obavezne notarska obrada i notarska potvrda. Zakon o privrednim društvima[11] sadrži, u suštini, odredbe materijalnopravnog karaktera i njime se daje značajna uloga notarima u privrednom pravu kroz konkretizaciju njihovih nadležnosti. Osnovne djelatnosti notara, koje su operacionalizovane u pravu privrednih društava, jesu preduzimanje notarskih obrada isprava, notarskih potvrda i notarskih ovjera. Riječ je o notarskim ispravama kojima je zakon dao karakter javnih isprava. U pravu Republike Srpske ne daje se mogućnost potvrđivanja, odnosno solemnizacije privatnih isprava od strane notara. Notarske isprave, bez obzira na to koji ih je notar sa područja Bosne i Hercegovine izdao, punovažne su na čitavom području BiH. Kakav je značaj notarskih isprava izdatih u inostranstvu, npr. u nekoj od zemalja EU? Takvim ispravama se daje isto pravno dejstvo kao i domaćim, ali uz postojanje uslova reciprociteta, pri čemu treba voditi računa da se ne može priznati pravno dejstvo takvim notarskim ispravama ako ga nemaju po zakonu mjerodavnom za njihovo izdavanje. Pored osnovnih, notari obavljaju i druge, odnosno dopunske poslove. Generalizovani prikaz funkcije notara kroz njihove djelatnosti u oblasti privrednog prava, od značaja je za kasnije razumijevanje krajnje konkretizovane uloge notara involvirane u zakonsku regulativu kojom se uređuje statusni dio privrednog prava.

2.1. Notarski obrađene isprave

Notarski obrađene isprave su isprave koje je sačinio notar u potpunosti, u pismenoj formi i ovjerio. Po ZoN-u to su: poslovi kojima se regulišu imovinski odnosi supružnika, raspolaganje imovinom maloljetnika i poslovno nesposobnih lica, pravni poslovi kojima se obećava neko činjenje kao poklon, osnivački akti privrednih društava i svi pravni poslovi čiji je predmet prenos ili sticanje svojine ili drugog stvarnog prava na nekretninama.[12] Francuska je jedina država EU koja ne

7 Ibid., str. 95.

8 D. Knežević-Popović, „Evropski sud pravde: poslovi javnih beležnika nisu povezani sa vršenjem javnih ovlašćenja", Pravni život, 12/2011, 47-61.

9 N. Šarkić, op. cit., str. 104.

10 Ibid., str. 105.

11 Zakon o privrednim društvima („Službeni glasnik Republike Srpske", br. 127/08, 58/09, 100/11; dalje u tekstu ZoPD).

12 ZoN, čl. 68.

zahtjeva da osnivački akt privrednih društava bude u obliku notarski obrađene isprave.[13] Zakonodavac, konkretno i imperativno, propisuje postupak sačinjavanja notarski obrađene isprave. Taj postupak se ogleda u sledećem: notar utvrđuje identitet stranaka, provjerava poslovnu sposobnost stranaka i ovlašćenje za zaključenje pravnog posla, ispituje pravu volju stranaka i činjenično stanje, provjerava sve dokumente, poučava stranke o primjeni propisa i pravnim posljedicama posla, sastavlja njihove izjave u obliku notarskog nacrta, čita ispravu strankama, potvrđuje da su stranke izjavile da je to njihova volja, a nakon toga stranke svojeručno potpisuju original isprave. Notar pazi da neiskusne i nevješte stranke ne budu oštećene. Iz ovoga proizlazi da je njegova uloga nepristrasna, u čemu se ogleda njegova razlika u odnosu na advokata.[14] Za sadržaj isprave notar u potpunosti odgovara i takva isprava mora imati određenu, propisanu formu. ZoN predviđa da određeni pravni poslovi, kao što su osnivanje privrednih društava i promet nekretnina, ako nisu sačinjeni kao notarski obrađene isprave, nemaju pravnu valjanost. ZoN daje mogućnost da se notarska obrada isprava može predvidjeti i drugim zakonima. Takođe, stranke mogu zahtjevati notarsku obradu i za druge poslove, osim onih koji su enumerativno navedeni u zakonu.[15] Kada su u pitanju notarske obrade osnivačkih akata privrednih društava i pravnih poslova u vezi sa prenosom i sticanjem prava vlasništva ili drugih stvarnih prava na nekretninama, ZoN poznaje izuzetak od obavezne notarske obrade osnivačkih akata kad je u pitanju država, što će biti kasnije posebno objašnjeno.

2.2. Notarske potvrde i ovjere

Pored notarski obrađenih isprava, u notarske isprave spadaju i notarske potvrde i ovjere. Notarske potvrde su notarske isprave o potvrđivanju određenih činjenica koje su se dogodile u prisustvu notara kao nosioca javne službe. U notarske potvrde spadaju potvrde o: vremenu predočavanja pismena, o životu nekog lica, o ovlašćenju za zastupanje i drugim činjenicama iz sudskog registra, zaključcima organa pravnog lica (npr. sjednice skupštine privrednog društva, gdje će u zapisnik unijeti dan i vrijeme sjednice, podatak o njegovom prisustvu, o dešavanju na sjednici i zaključcima, uz potpis i lica koje je predsjedavalo sjednicom).[16] U notarske ovjere spadaju: ovjere potpisa, prepisa, izvoda iz trgovačkih ili poslovnih knjiga i slično. Postavlja se pitanje u čemu se sastoji razlika između notarskih obrađenih isprava, sa jedne strane i notarskih potvrda i ovjera, sa druge strane. Prvo, uočava se terminološka razlika, a u literaturi se čak kritički elaborira upotreba samih termina. U drugim pravnim sistemima se koristi i drugačija terminologija, kao što je izraz „original" za „notarski obrađenu ispravu" ili pak u hrvatskom Zakonu o javnom bilježništvu[17], umjesto „notarske ovjere i potvrde", se koriste izrazi „javnobilježnički zapisnici i potvrde", što je bilo predviđeno i Zakonom o javnim bilježnicima Kraljevine Jugoslavije. Smatramo da je to stvar pravne tehnike, ali koja ne mora biti bez značaja. Meritorna razlika između navedenih notarskih isprava je u tri važna činjenična segmenta: *dokaznoj snazi, mogućnosti da budu izvršni naslov i zahtjevima postupka.*[18] Notarske obrađene isprave imaju punu dokaznu snagu javne isprave o izjavama volje datim pred notarom, a notarske ovjere i potvrde imaju dokaznu snagu javne isprave o činjenicama o kojima se u ispravi svjedoči.[19] Iz toga proizlazi i zaključak citiranog autora da se kod notarski obrađenih isprava mogu dokazivati samo nedostaci u postupku notarske obrade, a kod notarskih potvrda i ovjera se može dokazivati da nisu tačne činjenice o kojima se u njima svjedoči. Notarski obrađene isprave imaju svojstvo izvršne isprave, dok potvrde i ovjere nemaju. Takođe, kod notarski obrađenih isprava je postupak sastavljanja isprave kompleksniji, što im i daje jaču dokaznu snagu u odnosu na notarske potvrde i ovjere.

2.3. Dopunski poslovi notara u privrednom pravu

Pored osnovnih, postoje i ostali (dopunski) poslovi notara. U te poslove spadaju: čuvanje isprava, gotovog novca, stvari od vrijednosti, kao i poslovi koje notarima sud ili drugi organ povjeri, a oni na to pristanu (popis i pečaćenje ostavinske i stečajne mase, procjena i javna

13 R. Jotanović, „Sadržina djelatnosti notara u Bosni i Hercegovini", Pravni savjetnik, 1/2005, 35-40, str. 36.

14 ZoN, čl. 75.

15 ZoN, čl. 68 st. 3 i 4.

16 ZoN, čl. 87-98.

17 Zakon o javnom bilježništvu („Narodne novine Republike Hrvatske", br. 78/93, 29/94, 16/07).

18 M. Povlakić, „Stanje/situacija materijalno-pravnih odredaba nadležnosti notara kao i praktična situacija notara u sadašnjem trenutku", Nacionalni izvještaji o notarskoj službi u zemljama Jugoistočne Evrope, Sarajevo, 2009, str. 66-67.

19 M. Povlakić, „Osnovne značajke notarske službe u Federaciji BiH", Pravni savjetnik, 4/2003, str. 86.

prodaja pokretnih stvari i nekretnina u vanparničnom postupku i razdioba prodajne cijene u izvršnom postupku).[20] U okviru dopunskih djelatnosti notara nalazimo one koje mogu biti od značaja za privredno pravo. U tom pogledu treba akcentovati ulogu notara u popisu i pečaćenju stečajne mase u stečajnom postupku i u preduzimanju određenih radnji u postupku izvršenja. U literaturi se popis i pečaćenje stečajne mase naziva komesarijalnom funkcijom.[21] U postupku izvršenja od značaja su notarski obrađene isprave na osnovu kojih se može sprovoditi izvršenje bez dodatnih aktivnosti izvršnog suda. Kad su u pitanju hipotekovani krediti koje uzimaju privredna društva (ili daju bankarske organizacije), može se sprovesti neposredno izvršenje na osnovu notarski obrađene isprave i na hipotekovanoj nepokretnosti, pod uslovom da je upisana u zemljišne knjige i da je dužnik prethodno na to pristao[22], čime se pojednostavljuje i ubrzava ova procedura. U nekim drugim pravnim sistemima, notaru je dato ovlašćenje u izvršnom postupku u pogledu javne procjene i prodaje dionica.[23] Neki autori iznose prijedloge za afirmaciju uloge notara u prihvatanju jemstva dužnika u novcu ili hartijama od vrijednosti, kao i aktivnostima u vezi sa protestom mjenice i čeka.[24] Citirani autor ističe da je u Kraljevini Jugoslaviji javni bilježnik sastavljao zapisnike i svjedočio o donesenim zaključcima na sjednicama i javnim skupštinama raznih društava, zadruga i udruženja. Značajna je uloga notara kod obrade ugovora o prometu nekretnina, pošto on vrši provjeru stanja u zemljišnim knjigama. On može djelovati i uz punomoć, vršiti savjetodavnu funkciju i obavljati druge pravne poslove, kad ga angažuju privredna društva i drugi subjekti privrednog prava.

3. Uloga notara u privrednom pravu – posebni dio

Na ovom mjestu će se opisno i kritički izložiti operacionalizovana uloga notara u pravu privrednih društava i privrednom ugovornom pravu, sa aspekta osnovnih i sporednih djelatnosti notara.

3.1. Notarski obrađene isprave, notarske potvrde i ovjere kod osnivanja i djelovanja privrednih društava

Notar ima obavezu da *obradi osnivački akt* svih oblika privrednih društava.[25] Pravne forme privrednog društva su ortačko društvo, komanditno društvo, društvo sa ograničenom odgovornošću i akcionarsko društvo. Osnivanje društava lica u Republici Srpskoj je na niskom nivou. ZoPD[26] predviđa da se svaka izmjena osnivačkog akta društva sa ograničenom odgovornošću i akcionarskog društva, mora notarski obraditi. Pitanje notarske obrade navedenih osnivačkih akata je u pravnoj teoriji i praksi delikatno. Sporno je da li se notarski *obrađuju **ili** potvrđuju* pojedini osnivački akti za pojedine pravne forme privrednog društva. Međutim, nesumnjivo je koja pravna posljedica slijedi ako nije ispoštovana propisana forma osnivačkog akta pri registraciji, bez obzira na to da li je riječ o obradi ili potvrdi.[27] Posljedica je ništavost. Naime, i Zakon o obligacionim odnosima predviđa da, kad je ugovor zaključen u određenoj formi propisanoj zakonom, tada i sve kasnije izmjene i dopune ugovora moraju biti u toj formi. Pravni pisci ovu problematiku razrješavaju eksplikacijom pravne prirode osnivačkih akata dajući *de lege ferenda* određene prijedloge za koncepcijsko uređenje ove problematike. Članom 7 st. 1 ZoPD-a predviđeno je da se privredna društva osnivaju osnivačkim aktom koji ima formu ugovora o osnivanju, ako ga osniva više osnivača ili odluke o osnivanju, ako ga osniva jedan osnivač. Pored osnivačkog akta, ortačko i komanditno društvo može, a i ne mora, imati i ugovor ortaka društva; društvo sa ograničenom odgovornošću i ugovor članova društva, a akcionarsko društvo i statut. Osnivački akt, naročito kada je riječ o ugovoru, predstavlja izjavu, odnosno saglasnu izjavu volja, iz čega nedvosmisleno proizlazi da je obligacionopravne prirode. Od trenutka registracije, posebno kod društva kapitala, osnivački akt uglavnom stiče statusnopravna dejstva, tj. modifikuje mu se pravna priroda i nakon toga se mijenja odlukom skupštine društva na osnovu zakonom propisane većine.[28] Međutim, kod društva lica kasnije izmjene osni-

20 ZoN, čl. 67.

21 M. Povlakić, „Osnovne značajke notarske službe u Federaciji BiH", str. 84.

22 ZoN, čl. 85 st. 2.

23 Po ranijem hrvatskom zakonu o ovršnom postupku.

24 N. Šarkić, „Javni beležnik-notar u izvršnom postupku", Pravni život, 12/2004, 257-297.

25 ZoPD, čl. 7 st. 3: „Osnivački akt privrednog društva notarski se obrađuje i ima sadržinu utvrđenu ovim zakonom za tu pravnu formu privrednog društva."

26 ZoPD, čl. 168 st. 6 i čl. 331 st. 2.

27 ZoPD, čl. 11 st. 2 tač. v.

28 ZoPD, čl. 131 st. 2 i čl. 330 st. 1; M. Rajčević, „Notari u Zakonu o privrednim društvima Republike Srpske", Pravo i privreda, 4-6/2010, 70-83, str. 75-78; M. Vasiljević, Kom-

vačkog akta se ne vrše po navedenoj tehnici, već odlukom ortaka na osnovu saglasnih izjava volja svih ortaka, odnosno saglasnošću svih komplementara i komanditora društva, osim ako se drugačije ne predvidi osnivačkim ugovorom. Ovo s toga jer društva lica nakon registracije zadržavaju ugovornu prirodu. Priklanjamo se rješenju prof. M. Rajčevića da se osnivački akti svih privrednih društava trebaju notarski obraditi. Potrebno je da notarska obrada postoji i kod izmjena i dopuna osnivačkih ugovora društava lica, a kad se isti mijenjaju saglasnošću svih članova. Izmjene i dopune osnivačkih akata društava kapitala treba vršiti notarskim potvrdama.[29] Opravdanje ovakvog stanovišta leži u činjenici zadržavanja ugovorne prirode osnivačkog akta društva lica i kasnije, zbog čega se neophodnim nameće notarska obrada istih. A kod društva kapitala, pošto se promjene osnivačkih akata vrše odlukama organa društva, notar bi trebao prisustvovati sjednicama organa, konstatovati odluke i sve to ugraditi u izvorni tekst osnivačkog akta.[30] Takođe, prilikom unošenja prava svojine na nepokretnostima u društvo, neophodna je notarska obrada ugovora kao instrumenta putem kojeg se čini ovakva radnja. Smatramo da je, inače učešće notara kao nosioca javne službe kod osnivanja privrednih društava, od izuzetnog značaja zbog pravne snage kojom daje legitimitet takvim aktivnostima, kao i zbog predupređivanja budućih sporova, ali i efikasnosti i efektivnosti kompletnog postupka. Dakle, notar ima po obimu uža ovlašćenja kad su u pitanju notarske potvrde kod društva kapitala, jer samo svjedoči o određenim činjenicama, dok kod društva lica ima šira ovlašćenja i na taj način notarski obrađene isprave imaju jaču dokaznu snagu. Kompletan postupak notarske obrade se odvija na ranije, generalno, izložen način.[31]

Ranije je bilo predviđeno da će se vršiti potvrde statuta i svih naknadnih njegovih izmjena, ali takva odredba nije više u primjeni. Notarska potvrda je predviđena i u slučaju statusnih promjena privrednog društva (usvajanje ugovora o spajanju uz pripajanje od strane skupštine društva[32]). Notarski se potvrđuje i ugovor o sticanju ili raspolaganju imovine velike vrijednosti (na osnovu odluke skupštine akcionara[33]). Izmjenama zakona predviđa se, odnosno preporučuje notarska obrada u navedenim slučajevima. Notar može biti nadležan za izdavanje potvrda o ovlašćenju za zastupanje, pod uslovom da je data osoba upisana u sudski registar. Notar to čini tako što vrši uvid u sudski registar ili u ovjeren izvod iz registra koji mu stranka predočava, te izdaje potvrdu koja sadrži: lične podatke o zastupanju, firmu subjekta kojeg zastupa, obim, ovlašćenja, datum uvida u registar, način utvrđivanja identiteta zastupnika, datum i mjesto izdavanja potvrde, službeni pečat i potpis notara.[34] Notar izdaje i potvrde o statusnim promjenama i drugim pravno važećim činjenicama, postojanju ili sjedištu nekog pravnog lica itd.[35] Kao vršilac javne službe notar može potvrđivati i zaključke različitih organa privrednog društva. On, takođe, može biti angažovan i u svim drugim slučajevima (npr. potvrđivanje činjenica o licitacijama, različitim ponudama i poslovnim aktivnostima privrednih društava).[36] Notarska potvrda je i indirektno predviđena ZoPD-om kroz odredbe o povećanju, odnosno smanjenju osnovnog kapitala. Odlukom o povećanju, odnosno smanjenju osnovnog kapitala otvorenog akcionarskog društva mijenja se osnivački akt.[37]

Članom 89 ZoN-a je predviđena nadležnost notara u oblasti privrednog prava u pogledu ovjere izvoda iz trgovačkih ili poslovnih knjiga. Pri ovjeri navedenih izvoda, notari će uporediti izvod s datim stavkama izvorne knjige i napisaće na izvodu klauzulu ovjere s naznakom da se izvod potpuno slaže sa stavkom. U izvodu će se naznačiti datum pregleda navedenih knjiga. Kako je notaru dato ovlašćenje za izdavanje potvrda o ovlašćenju za zastupanje, tako mu je data mogućnost i ovjere potpisa zastupnika pri-

panijsko pravo, 4. izdanje, Pravni fakultet Univerziteta u Beogradu, Beograd, 2009, str. 63-64 i 252.

29 M. Rajčević, op. cit., str. 78.

30 Kod nas je prihvaćen francuski koncept po kojem su sva privredna društva pravna lica za razliku od germanskog, gdje se diferencira postupak notarske obrade osnivačkih akata d.o.o., a.d., k.d. na akcije od postupka s osnivačkim aktima društva lica, kod kojih je predviđena notarska potvrda.

31 Nakon obraćanja notaru, notar strankama šalje Nacrt osnivačkog akta, a kada se stranke usaglase, zakazuje se termin za čitanje isprave, tada se imenuju i prvi direktori društva. Nakon toga je potrebno uplatiti minimalni kapital potreban za osnivanje društva i prezentovati posebnu potvrdu banke, izvršiti plaćanje poreza prilikom osnivanja društva i registru poslovnih subjekata uputiti zahtjev za registraciju. Vidi: S. Verweijen, Die Rolle des Notars im österreichischen Gesellschafts - und Unternehmensrecht, The Contribution of Civil Law Notaries Towards an Area of Freedom, Security and Justice, Munich, 2010, str. 2-3.

32 ZoPD, čl. 381.

33 ZoPD, čl. 434.

34 ZoN, čl. 93.

35 ZoN, čl. 94.

36 M. Rajčević, „Nadležnost notara u oblasti prava privrednih društava", Pravna riječ, 5/2005, 55-70, str. 68.

37 ZoPD, čl. 232 i 253.

vrednog društva, po proceduri propisanoj za postupanje notara pri ovim radnjama.

Članom 68, poslednjim stavom ZoN-a, predviđena je mogućnost pripreme akata za notarsku potvrdu i ovjeru, kao i za zastupanje stranaka pred notarima od strane advokata. Ranije nije bila data ova mogućnost, a sada se uočava da ne postoji ni kad je u pitanju notarska potvrda, jer tu notar potvrđuje o činjenicama koje su pred njim iznesene. Ali, kad je u pitanju priprema akata za notarsku obradu ili ovjeru, ne postoje razlozi zašto se ne bi moglo omogućiti advokatima ili pravnicima zaposlenim u privrednom društvu da sačine tekstove osnivačkih i drugih akata, naročito kad su u pitanju ozbiljniji poslovi stranih ulaganja. Tada notar vrši samo formalnosti u pogledu notarske obrade, što bi značilo da je tim više za njega postupak jednostavniji, ali za stranku može biti i skuplji s obzirom na angažovanje većeg broja stručnjaka.[38]

3.2. Uloga notara u postupku registracije privrednih subjekata

Postupak registracije privrednih subjekata regulisan je Okvirnim zakonom o registraciji poslovnih subjekata u Bosni i Hercegovini i Zakonom o registraciji poslovnih subjekata u RS.[39] Zakonom je predviđena nadležnost okružnih privrednih sudova u RS[40] za vođenje registara, te kratak rok za izdavanje rješenja o registraciji (pet dana od podnošenja prijave). Po prijemu potrebne dokumentacije notar sačinjava notarsku ispravu i prijavu radi registracije poslovnog subjekta u roku od dva dana. Na ovaj način se znatno skraćuje i ubrzava postupak registracije, a naročito kroz davanje mogućnosti notaru da bude podnosilac prijave registarskom sudu. Ukoliko su stranke ugovorom ili u drugoj notarskoj ispravi ovlastile notara da može u njihovo ime izvršiti određene radnje kao što je zahtjev za upis, takve radnje će notar izvršiti u granicama ovlašćenja iz notarske isprave bez izdavanja posebne punomoći. *Ratio legis* ovakve odredbe jeste u funkciji ubrzanog i efikasnog postupka registracije putem notara, gdje se ne zahtjevaju dodatne punomoći za postupanje notara u ovom slučaju.[41]

De lege ferenda prijedlozi pravnih teoretičara, ali i notara iz prakse odnose se na omogućavanje jednostavnijeg pristupa podacima upisanim u registar, kako bi veza notara sa registrom bila brza i pouzdana i kako bi on, kao neko ko štiti javni interes, imao pravo uvida u registar i pravo efikasnijeg izdavanja ovjerenih izvoda iz registra poslovnih subjekata.[42] Postupak registracije se odvija na sledeći način: nakon što primi prijavu za registraciju od strane notara, registarski sud ispituje ispunjenost formalnih[43], a zatim materijalnih uslova. Registarski sud može posumnjati u istinitost podnesenih akata i na osnovu toga može održati ročište za raspravu, kao i naložiti otklanjanje uočenih nedostataka. Uloga notara u ovom postupku jeste u njegovom ovlašćenju da po zaključku suda izvrši dopunu ili izmjenu notarske isprave u postupku registracije. Postoji mišljenje da, kad je notar sačinio zapisnik o činjenicama, sud treba odbiti upis uz pretpostavku da sama notarska isprava služi kao dokaz ništavosti odluke, ako sve okolnosti slučaja ukazuju na ništavost skupštinske odluke donesene u prisustvu notara.[44]

3.3. Uloga notara u vođenju zapisnika i ostalim poslovima

Iz razloga pravne sigurnosti, notaru, kojem je data javna vjera radi onemogućavanja eventualnih sporova, omogućeno je vođenje zapisnika sa sjednica odgovarajućih organa privrednog društva. To je posebno izraženo kod otvorenih akcionarskih društava. Brojne radnje će notar zapisnički konstatovati u navedenom smislu (prilikom javne ponude upisa i uplate akcija, davanja posebnih prava i pogodnosti osnivačima, donošenja odluke o prihvatanju procjene vrijednosti nenovčanih uloga, o odobrenju ugovora koji su osnivači zaključili prije registracije, prilikom promjene odredaba osnivačkog ugovora o iznosu osnovnog kapitala, prisustvo kao zapisničara na skupštini kotiranih akcionarskih društava). Koliko povjerenje uživa notar kao nezavisan i samostalan subjekt, a što je i razlog davanja mu značajne uloge u ovoj oblasti, ogleda se u činjenici da,

38 M. Rajčević, op. cit., str. 60-61.

39 Okvirni zakon o registraciji poslovnih subjekata u Bosni i Hercegovini („Službeni glasnik BiH", br. 42/04) i Zakon o registraciji poslovnih subjekata u RS („Službeni glasnik RS", br. 42/05).

40 U Republici Srbiji registracija se vodi po pravilima upravnog postupka kod Agencije za privredne registre.

41 ZoN, čl. 68a.

42 I. Mojović, „Uloga notara kod registracije poslovnih subjekata", Pravna riječ, 32/2012, 647-666, str. 652. O registraciji dijela stranog privrednog društva, kao i drugim momentima značajnim za registraciju poslovnih subjekata vidi: Ibid., str. 658-663.

43 Ti uslovi se odnose na to da li je prijavu podnijelo ovlašćeno lice, da li je prijava na propisanom obrascu i da li je potpisana, da li su priložene sve propisane isprave u originalu, odnosno ovjerenoj kopiji, da li imaju propisani sadržaj.

44 I. Mojović, op. cit., str. 664.

ako zapisnik sa skupštine društva sa ograničenom odgovornošću ne potpiše predsjedavajući, odluka skupštine će biti punovažna, ako je notar sačinio zapisnik. To će biti podstrek privrednim društvima i drugim subjektima privrednog prava da angažuju notara i prilikom preduzimanja drugih pravnih poslova. Zapisnik koji vodi notar sadrži zakonom propisane podatke.[45] Zapisnik o radu osnivačke skupštine akcionarskog društva vodi notar kao zapisničar i potpisuje predsjednik skupštine, zapisničar, oba brojača glasova i osnivači društva.[46] Zapisnik skupština otvorenih akcionarskih društava čije su akcije uvrštene na službeno berzansko tržište (kotirane) vodi notar.[47] Dakle, razlikujemo slučajeve kad notar vodi zapisnik kao zapisničar i ujedno svojim prisustvom potvrđuje vjerodostojnost činjenica i slučajeve kad pored notara postoji lice koje vodi zapisnik, ali je notar tu prisutan.

3.4. Uloga notara kod osnivanja i djelovanja specijalizovanih privrednih subjekata i državnih preduzeća

Osnivanje i status banaka i drugih specijalizovanih organizacija (mikrokreditnih, osiguravajućih i dr.) regulisani su posebnim zakonima.[48] Banka se osniva i posluje kao akcionarsko društvo uz dozvolu za rad i nadzor od strane Agencije za bankarstvo RS. Mikrokreditno društvo se osniva i posluje u formi društva sa ograničenom odgovornošću ili akcionarskog društva. Štedno-kreditne organizacije[49] se osnivaju u formi društva sa ograničenom odgovornošću. To bi značilo da oni obavljaju djelatnost u odgovarajućoj formi privrednih društava, pa će se na njih primjeniti odgovarajuće odredbe ZoN-a i ZoPD-a o ulozi notara, naročito prilikom notarske obrade i promjene njihovih osnivačkih akata. Banke kao privredna društva akcionarskog tipa i osiguravajuće organizacije kao a.d. i d.o.o. trebale bi osnivačke akte takođe notarski obraditi.[50] Međutim, ovdje treba biti obazriv, zbog specifičnosti nadzora i davanja dozvole za rad od strane odgovarajuće agencije navedenim organizacijama. Logički se nameće pitanje, da li je suvišna notarska obrada[51] kada o tome na izvjestan način brine Agencija za bankarstvo. Mišljenja su u tom smislu podjeljena: od onih koji idu u prilog afirmaciji notara u konkretnom slučaju (uglavnom notara iz prakse), do suprotnih mišljenja (uglavnom pravnih teoretičara). Statusni dio područja osiguranja je regulisan posebnim zakonom[52], kojim se predviđaju društava za osiguranje u formi akcionarskih društava i društava za uzajamno osiguranje, uz osnivanje Agencije za osiguranje RS. Na osnivačke akte svih pomenutih subjekata privrednog prava u ovom odjeljku važi sve prethodno rečeno. Privredno društvo može osnovati i država zakonom, ali i jedinica lokalne samouprave upravnim aktom na osnovu zakona. Kad su u pitanju pravni poslovi koje međusobno zaključuju Republika Srpska i jedinice lokalne samouprave, kao i lokalne samouprave međusobno, a kada su Republika Srpska i jedinice lokalne samouprave subjekt tih poslova, odnosno osnivač privrednog društva, tada se ne zahtjeva notarska obrada, odnosno ne traži se učešće notara u osnivačkom postupku.

3.5. Uloga notara u privrednom ugovornom pravu i kritički osvrt

Zakon o notarima kao procesni zakon daje brojna monopolska ovlašćenja notarima. Time se oduzimaju poslovi koji su tradicionalno bili u okviru advokatske profesije i nadležnosti sudova. Slobodni građani i pravna lica u pravnom prometu i tržišnoj privredi moraju imati slobodu izbora.[53] Strankama u privrednom prometu treba dati mogućnost da mogu (ali ne moraju) da se obrate notaru u pogledu sastavljanja i ovjere trgovinskih ugovora i ugovora o trgovinskim uslugama. Njima treba dati mogućnost da prethodno sastave ugovore ili da se obrate advokatu ili drugom pravnom stručnjaku da sačini ugovor, a da ga zatim ovjere u sudu ili kod notara (po želji). Po sadašnjem stanju stvari, predviđene su sankcije ništavosti ugovora ukoliko nije notarski obrađen. To se kosi i sa modernim principom konsezualizma. Na ovaj način se izmjenjuju i odredbe Zakona o obligacionim odnosima u di-

45 ZoPD, čl. 145 st. 2. To su podaci o „o predsjedavajućem i bilo kom licu za ovjeru zapisnika ili brojanje glasova, pitanjima koji su predmet glasova, broju glasova za i protiv odluke i uzdržanih, prigovoru članova, direktora i članova upravnog odbora."

46 ZoPD, čl. 196 st. 3.

47 Ibid., čl. 292 st. 7.

48 Zakon o bankama („Službeni glasnik Republike Srpske", br. 44/03 i 74/04); Zakon o mikrokreditnim organizacijama („Službeni glasnik Republike Srpske", br. 64/06).

49 Zakon o štedno-kreditnim organizacijama („Službeni glasnik Republike Srpske", br. 93/06).

50 M. Rajčević, („Nadležnost notara u oblasti prava privrednih društava"), str. 59.

51 Imajući u vidu da notar kao nosilac javne službe svojim učešćem doprinosi vjerodostojnosti i pravnoj sigurnosti obrađenih akata.

52 Zakon o društvima za osiguranje („Službeni glasnik Republike Srpske", br. 17/05).

53 N. Mojović, op. cit., str. 156.

jelu koji reguliše ugovore, a koji se odnosi i na trgovinske ugovore, kao i Zakona o osnovnim svojinskim odnosima (sada Zakona o stvarnim pravima). Ovakva rješenja predstavljaju iskrivljenu sliku pravnih instituta, kao što su ugovori robno-novčane privrede, kojima se mijenja njihova pravna priroda, što predstavlja diskrepancu u odnosu na evropska rješenja, ali i rješenja bivših jugoslovenskih republika. Može se uputiti i prigovor o izutetno visokim cijenama notarskih usluga koje se kreću od nekoliko stotina do nekoliko hiljada evra, naročito u oblasti prava privrednih društava. Takođe, postoje i brojni propusti u radu notara (npr. postupanje lica zaposlenih kod notara, striktno nepridržavanje forme itd.), kao i neke druge nedorečenosti koje se uočavaju kada se uđe *in medias res* ove materije. Sa druge strane, nesumnjiv je značaj notara u rasterećenju sudova i efikasnosti postupka na ovom području, a da se ne ide na uštrb pravne sigurnosti sačinjenih akata.

4. Zaključak

U radu smo prezentovali opšte karakteristike notarijata u Republici Srpskoj i svijetu. Poseban aspekt je posvećen ulozi notara u privrednom pravu, kako u pravu privrednih društava tako i u privrednom ugovornom pravu. Najznačajnije funkcije notara su u vezi sa notarskim obradama isprava, notarskim potvrdama i ovjerama (gdje su Zakonom o notarima navedeni pravni poslovi u kojima se otvara mogućnost notarske aktivnosti), kao i dodatnim poslovima (popis i pečaćenje stečajne mase, značaju notarske isprave kao javne isprave u izvršnom postupku i kod realizacije hipotekarnih kredita). Zakonom o privrednim društvima i drugim relevantnim propisima uređena je uloga notara u pogledu obavezne obrade osnivačkih akata i njihovih kasnijih izmjena i dopuna. U literaturi se ističe potreba notarske potvrde izmjena i dopuna osnivačkih akata. Nemjerljiv je doprinos notarijata u postupku registracije, u kojem se pojavljuje kao podnosilac prijave, ali i u vođenu zapisnika i svim drugim poslovima za koje ga angažuju privredna društva. Shodno se, na postupak osnivanja i djelatnosti drugih privrednih subjekata, primjenjuju pravila o notarskoj obradi osnivačkih akata (uz izuzetak javnih preduzeća). Prioritetna uloga se daje notarima kod obrade ugovora privrednog prava, što je diskutabilno zbog razmimoilaženja sa drugim zakonima, monopolskog položaja notara i, po nekim mišljenjima, prenaglašene uloge notara. Notari svoju funkciju vrše kao nosioci javne službe, te njihovim ispravama pravni poredak priznaje svojstvo javnih isprava. U postupku pravosudne reforme apostrofirana je uloga notara u ostvarivanju pravne sigurnosti, efikasnosti, ubrazavanja rada sudova, naravno uz ograničenja poslova (a i *de lege ferenda* notarskih zarada i sl.) zakonskom regulativom i izbalansiranim pristupom prema svim učesnicima pravnog prometa.

Dejan Pilipovic

Notaries and their role in the Economic Law of Republic of Srpska

In this paper, firstly, we analyse in general the essence and the reason for the introduction of notaries in the legal system of the Republic of Srpska, its historical development, organizational forms and regulation in the EU. Then, we concretize the role of the notary in commercial law, viewed through the prism of fundamental (issuing notary processing documents, notary certificates and verification) and additional notarial activity, which is based on the Law on Notaries of Republic of Srpska. The second part of this paper is, more specifically, based on the explanation of the role of notaries in the establishment, registration and activity of companies, specialized businesses, as well as in commercial contract law. We refer to certain specificity, disadvantages of certain provisions and suggestions de lege ferenda. From the content of the analysis, we can indicate some pro et contra arguments regarding the activities of notaries in commercial law.

Key words: *notary, notaries, commercial law, company, act on business organizations*

LEGISLATIVE REVIEWS

OVERVIEW OF THE CHANGES OF CORPORATE INCOME TAX IN SERBIA

Slobodan Trivić*

The Serbian Parliament adopted amendments to Law on Corporate Income Tax (hereinafter: CIT) in December 2012 and in May 2013 ("Official Gazette of RS", no. 119/2012 and 47/2013), which introduce a variety of general changes, from the increase of the corporate income tax rate, to those special ones like introducing special rules for certain types of non – residents, new transfer pricing rules, etc. Next to the amendments, four rulebooks have been also adopted, which came into force on 26 December 2013. Amendments of the Law will apply to the assessment of corporate income tax for the tax period 2013, while the provisions referring to withholding taxation apply from the day of entry into force of the law. According to the explanation of the amendments, the main intent of the legislative changes is to increase the budget revenue, to regulate certain uncertainties in application of the law and other issues of procedural nature.

Key words: *Taw law, corporate income tax, corporate law, Law on Corporate Income Tax of the Republic of Serbia*

1. Introduction

The amendments of CIT came into force on 25 December 2012 (119/2012) and 30 May 2013 (47/2013), introducing a whole variety of changes which tackle some important issues Serbian fiscal policy is dealing with, such as transfer pricing rules which have been developed more thoroughly – including more detailed provisions on related parties rules, introduction of new methods of determining arm's length prices, etc. Also by these legislative changes for the first time provisions are introduced which aim to combat the so called "tax havens", what represents a global trend of governments – to put a stop to tax evasion and to increase public revenue from taxing such income. Other changes relate to the increase of the tax rate, setting stricter conditions for certain tax incentives and simplifying procedures relating the calculation of tax base, etc.

In overall, these changes represent an important step in the development of Serbian tax legislation, by implementing appropriate legal solutions that follow the experience of tax systems from the region, having in mind the leading international standards by giving more relevance to the OECD approach to the issues mentioned above.

This review contains an overview of the solutions contained in the aforementioned amendments with a particular focus on the introduction of new legal instruments that derive as a result of the current Serbian tax policy.

2. Tax rate

Tax rate for corporate income tax is increased from 10% to 15%.[1] Reasons for the increase of the tax rate are the increase of public revenues and lining the rate with the personal income tax (PIT) rate for employment and entrepreneurs. Still, Serbia remains in the group of countries with lower corporate income tax rate in the region and in Europe.[2]

3. Tax base

Rules regarding the assessment of the tax base did not change substantially, as they contain mostly changes regarding thresholds and simplifying procedural requirements for accepting certain expenses deductible for tax purposes.

Tax deductibility threshold for marketing expenditures is increased from 5% to 10%.[3] The condition prescribed for tax-deductibility of write off of collectible receivables (evidence of unsuccessful collection through court procedure) has been changed.

According to the amendments, expenses resulting from a write-off will be tax deductible if the taxpayer provides evidence that the court procedure was initiated, that non judicial process of settlement of claim secured by mortgage is initiated, or submit a claim in bankruptcy proceedings over debtor.[4] No such evidence is required in case that the court and other public fees exceed the value of the written-off receivable. In addition, amendments introduce the possibility

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1 Art. 39(2), Law on Corporate Income Tax (Official Gazette of RS, no. 25/2001, 80/2002, 80/2002 – as amended, 43/2003, 84/2004, 18/2010, 101/2011, 119/2012 and 47/2013)

2 Corporate income tax rates in the region are: Bosnia and Herzegovina 10%, Bulgaria 10%, Croatia 20%, Greece 25%, Hungary 19%, Macedonia 10%, and Montenegro 9%.

3 Art. 15(6)

4 Art 16

for the taxpayer to exclude from the tax base revenue realized on basis of subsequent collection of written-off bad debt that was declared as non-deductible item in the previous years. In the previous version of the Law the taxpayer had to prove that it failed to collect the debt from the debtor in the court proceeding, what made it very difficult and procedurally demanding for the taxpayer to declare such expense as deductible for tax purposes. Also, the loss from the sale of receivables is included as a deductible expense for tax purposes, under the condition that such expense is made in accordance with IFS/IFRS.[5]

The rule for recognizing an asset for tax depreciation is changed and aligned with IFRS and IAS.[6] According to the proposed changes, each asset which qualifies as a noncurrent asset for accounting purposes will be recognized for tax depreciation.[7]

Provisions from receivables from entities that are creditors at the same time will not be recognized for CIT purposes, but only to the amount that is owed to the creditor.[8] Also, penalty interest between related parties will be non-deductible for tax purposes.[9]

4. Tax incentives

A number of tax incentives have been abolished, for which the core reason was the approaching to neutrality of tax policy and ineffectiveness of certain tax incentives. The following incentives were abolished[10]: tax credit for taxpayers registered for specific industries (agriculture, fishing, production of textile and yarnand fabrics, etc.); tax credit for taxpayers generating profit in a newly established business unit in an underdeveloped region; tax exemption for free zone users; tax exemption for concessionaries for the profit earned on the basis of a concession; tax exemption for taxpayers that operate activities in a underdeveloped region.

The minimum investment in property, plant and equipment in order to qualify for the 10 years tax holiday proportional to the investment, increased from RSD 800 million to RSD 1 billion, and the number of newly hired employees is increased from 100 to 200.[11]

Limit for tax credit for investment in property, plant and equipment that can be used to offset tax liability is decreased from 50% to 33% of the assessed corporate income tax liability. In addition, it is specified that certain assets cannot be used for calculation of tax credit (mobile phones, video surveillance equipment, and advertising material).[12]

5. Transfer Pricing

Threshold for determination qualifying level of between two entities is downsized from 50% to 25% of shares addition, where every legal entity from haven is considered as related party.[13] Also, the amendments proscribe that non-resident entities from tax havens will be considered as related parties of resident (Serbian) entities.

New provisions also impose an obligation for taxpayers to submit documentation (which content will be subsequently prescribed by the Minister of Finance) together with corporate income tax assessment form and tax return.[14] Deadline for submission of tax return is 180 days after the expiration of the period for which corporate income taxliability is assessed, i.e. deadline is extended from 10 March to 30 June.[15]

Amendments to the CIT also introduce new methods of determining arm's length prices aligning Serbia with OECD and best international practice. The following methods for testing the emarket value of transfer prices: comparable uncontrolled pricemethod; cost plus method; resale price method; transactional net margin method; profit split method; any other method, provided that the application of previous methods is impossible or inadequate.[16] In applying these methods there is a possibility of combining the aforementioned methods, depending on the circumstances of the case.

In respect to loans between related parties, the Ministry of Finance may publish interest rates that are used for assessing the arm's length nature of related party loans. However, according to the amendments, taxpayers are entitled to determine market interest rates. In case that taxpayer decides to determine interest rates by applying general methods, it will apply such interest rates to all related party loans.[17]

Finally, it is envisaged that OECD principles and guidelines will be taken into account in further

5 Art. 16a
6 Art. 10(2)
7 Art. 10(1)
8 Art. 7a(2)
9 Art. 7a(7)
10 Former Art. 45, 46a and 48a
11 Art. 50a
12 Art. 48
13 Art. 59(3)
14 Art. 60(3)
15 Art 63(3)
16 Art. 61(1)
17 Art. 61(3), (4) and (5)

elaboration of the provisions of the Law by the Minister of Finance. This is a very valuable step forward in aligning our tax policy in the area of transfer pricing with the world-leading practices since there has been little progress so far in this field of tax law in our country.

6. Non–resident entities from preferential tax systems (tax havens)

According to the amendments, new CIT provisions will include payments to non-resident entities from tax havens. Legal entities which are considered as tax residents of tax havens for the purpose of this law are those with a place of incorporation, registered seat or place of effective management in jurisdictions with preferential tax regimes.[18]

A preferential tax regime, according to Article 3a(1) is considered as territory with tax sovereignty which applies the legislation that gives possibilities for substantial reduction of corporate income tax liability, regardless for all companies or those companies which fulfill certain conditions, so as for tax liability for dividends which are distributed to their owners in comparison to the provisions of this law and the Law on Personal Income Tax, or which disable or aggravate the assessment of beneficial owners of legal entities by the bodies of the Tax Administration and other facts relevant for the determination of the tax liability under the law of the Republic of Serbia. The list of preferential tax regimes is determined by the Ministry of Finance, with 51 territories to which these rules apply.[19]

The amendments provide for the following tax rates for certain types of income: 25% withholding tax rate on royalties, interest income, income from rent of movables and immovable property and service fees; 20% withholding tax rate on dividends or profit shares and capital gains. The new provisions also proscribe that non-resident entities from tax havens be considered as related parties of resident entities. These provisions aim to a harsher taxation of non-residents from tax havens and to set up a precondition for the application of Transfer pricing rules which rely on the concept of related parties.

This basically means that if a resident company pays dividends to a non-resident company from a tax haven listed in the Rulebook, this transaction will be taxed accordingly. Even if there is no relation between the resident and non-resident company in the sense of Article 59 of this law[20], for example – if the resident company only pays royalties to the non-resident, these two entities will still be considered as related parties and as such treated in the manner proscribed by the law.

However, the aforementioned provisions do not apply in case that a non-resident from a tax haven qualifies as a resident of the country with which Serbia has signed a Double Tax Convention. One of the countries which will benefit from this exception will be Cyprus, with which Serbia has a Double Tax Convention in place.[21]

7. The rulebooks

Four rulebooks have been put in force in order to implement the amendments of the CIT. The Rulebook on the list of jurisdictions with preferential tax system (Official Gazette of RS, No. 119/2012), as previously mentioned, defines the territories to which special rules for non–resident entities coming from jurisdictions with preferential tax system apply to.[22]

The Rulebook on the procedure determining the value of liquidation surplus for determining the taxable amount of the dividend which is realized by the shareholders of the company in liquidation (Official Gazette of RS, No. 122/2012) refers to the amendment of the law which changed the previous rule and instead of treating liquidation surplus as capital gain, now it is treated as dividend of its owners.[23]

Amended Rulebook on the content of the tax return for calculating tax on income realized by non-resident tax payers – legal entities (Official Gazette of RS, No. 8/2013) – defines that tax return is submitted to the competent tax authority in the municipality where the real estate is located or where is the seat of the company in which the non-resident legal entity has share or securities which are subject of sale. In case of sale of an investment unit or industrial property rights return for capital gains tax realized by a non-resident is submitted to the competent tax authority of the municipality where the seat of the investment fund is located i.e. in the municipality of residence or domicile of the buyer of industrial property. Additionally, the Rulebook prescribes that the tax return is submitted within 30 days from the realization of income.

Finally, the Rulebook on the form of cumulative tax return on the calculated and paid withholding tax on income realized by non-resident legal

18 Art. 3a(2)

19 Rulebook on the list of jurisdictions with preferential tax system, Official Gazette of RS, No. 119/2012

20 This article refers to transfer pricing rules, under which, if there is a relationship of subordination or substantial influence of a person to a taxpayer these persons are considered as related persons, and special rules apply to the determination of transactions made between them.

21 Art. 3a(3), CIT

22 Infra p. 4

23 Art. 35(1), CIT

entities (Official Gazette of RS, No. 122/2012) makes the technical correspondence with CIT law amendments, besides which it determines to which organizational unit of the Tax Authority the cumulative tax return is submitted to.

8. Conclusion

Even though there have been numerous changes to the CIT, having in mind that our tax practice is still in constant development, it can be said that significant changes have been made in regards to combating tax evasion by determining non-residents from preferential tax regimes, development of transfer pricing policy and some procedural issues regarding the submission of tax returns and transfer pricing documentation.

On the other hand, having in mind that one of relevant questions in our tax policy is also the issue of permanent establishment (PE), it is interesting why the legislator did not touch upon that issue, leaving it for the executive bodies to wonder about certain issues like attribution of profit, forms of PE not defined in the law, etc. The same could be said for unsolved issues regarding tax depreciation, tax treatment of asset impairment, etc.

Finally, it is left on the Ministry of Finance and its practice to show how the new legislative changes will affect our tax policy and whether we have the capacity to further develop it in the years to come.

Slobodan Trivić

PREGLED IZMENA I DOPUNA POREZA NA DOBIT PRAVNIH LICA U REPUBLICI SRBIJI

Skupština Republike Srbije usvojila je Zakon o izmenama i dopunama Zakona o porezu na dobit pravnih lica (u daljem tekstu: Zakon) u decembru 2012. i maju 2013. godine (Službeni glasnik RS, broj 119/2012 i 47/2013), koji uvodi niz opštih izmena, od povećanja poreske stope na dobit pravnih lica, do uvođenja novih rešenja kao što su uvođenje posebnih pravila za pojedine vrste nerezidenata, novih pravila za određivanje transfernih cena, itd. Pored izmena i dopuna, usvojeni su i novi pravilnici koji stupaju na snagu od 26. decembra 2012. Izmene Zakona će se primenjivati na procenu poreza na dobit za poreski period 2013. godine, dok se odredbe o porezu po odbitku primenjuju od dana stupanja na snagu Zakona. Prema obrazloženju izmena i dopuna, glavna namera je uvećanje budžetskih prihoda, regulisanje određenih nejasnoća u primeni Zakona i rešavanje drugih pitanja procesnopravne prirode.

Ključne reči: *Poresko pravo, porez na dobit pravnih lica, kompanijsko pravo, Zakon od porezu na dobit pravnih lica Republike Srbije*

ZAKON O USLOVNOM OTPISU KAMATE I MIROVANJU PORESKOG DUGA

Stefan Cvetković*

Narodna skupština Republike Srbije usvojila je 15. decembra 2012. godine Zakon o uslovnom otpisu kamate i mirovanju poreskog duga (Službeni glasnik RS br. 119/2012) koji je objavljen u Službenom glasniku Republike Srbije 17. decembra i stupio na snagu narednog dana. Osnov ovog zakona se nalazi u članu 97, stavovima 6 i 8 Ustava Republike Srbije, prema koje Republika Srbija uređuje i obezbeđuje poreski sistem i sistem u oblasti socijalnog osiguranja i drugih vidova socijalne sigurnosti. Cilj koji treba postići usvajanjem ovog akta je vrsta poreske amnestije za one poreske obveznike prema kojima Republika Srbija kao poverilac potražuje, preko Poreske uprave, dospelu glavnicu i kamatu na neplaćene poreze i doprinose.

Ključne reči: *porez, otpis kamate, mirovanje poreskog duga*

1. Uvodna razmatranja

U redovnim okolnostima potreba za donošenjem ovakvog zakona, te za stvaranje novog pravnog osnova ne postoji, jer su poreski dužnici u skladu sa zakonima dužni da sve svoje obaveze ispunjavaju. Naime, država kao aktivni poreski subjekt zakonima ustanovljava i nameće obaveze svim licima koja se nalaze pod njenom poreskom jurisdikcijom. U skladu sa načelom zakonitosti[1] poreske obaveze, uključujući i obavezu plaćanja poreskog duga sa pripadajućom kamatom, mogu se ustanoviti ili ukinuti isključivo aktom zakonske pravne snage. Poreski dužnici se moraju ovakvim zahtevima povinovati, a zabranjeno je i pregovaranje između poreske administracije i dužnika u pogledu postojanja i visine poreske obaveze[2]. Kada se u realnom životu desi događaj koji može da se podvede pod zakonski opis činjeničnog stanja poreskog zakona, nastaje poreska obaveza[3]. U situaciji kada poreski dužnik ne izvrši o roku

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1 D. Popović, Poresko pravo, 7. izdanje, Beograd, 2011, str. 38-39.

2 D. Popović, Poresko pravo, 7. izdanje, Beograd, 2011, str. 42.

3 D. Popović, Poresko pravo, 7. izdanje, Beograd, 2011, str. 103-104.

nametnutu mu obavezu, Poreska uprava nakon upućene opomene i nakon još jednog poziva da se dugovano plati, pokreće postupak prinudne naplate u kome se namiruje u pogledu glavnog poreskog duga sa pripadajućom kamatom zajedno sa troškovima prinudne naplate.[4]

Donošenjem ovog zakona[5] država kao titular subjektivnog poreskog prava iskazala je akt dobre volje prema poreskim obveznicima, privrednim društvima i preduzetnicima. Privredni subjekti su tokom proteklih kriznih godina izbegavali izmirenje poreskih obaveza, težeći da se na taj način makar privremeno finansijski rasterete. Doslednom primenom poreskih propisa te pokretanjem postupaka prinudne naplate[6] Poreska uprava bi direktno ugrozila opstanak hiljada privrednih subjekata čija su se dugovanja po osnovu neplaćenih poreza enormno uvećala. Očigledno je intencija zakonotvorca bila da se kreiranjem ovog alternativnog pravnog osnova kojima se zaobilazi onaj redovni, izbegne gušenje već posustalih privrednih aktivnosti. Omogućavanje da se poreski dug plati u ratama, te da se nakon toga otpišu kamate stvorilo bi uslove za rasterećenje poreskih obveznika. Kako bi oni bili u mogućnosti da redovno plaćaju svoje tekuće obaveze, čime se istovremeno stvaraju uslovi za oporavak privrede i preduzetništva. Država se na ovaj način svesno odriče dela poreskih prihoda, koje bi dobrim delom bilo izuzetno teško naplatiti, a sa ciljem sprečavanja gašenja privrednih subjekata i omogućavanja njihovog ponovnog uvođenja u sistem i obezbeđenja kontinuiranih i stalnih poreskih prihoda. Teži se uvođenju finansijske discipline i konsolidovanju finansijskog sistema na jedan bezbolniji način, svojevrsnim kompromisom.

2. Rešenja predviđena Zakonom

Ovim zakonom stvoren je pravni osnov za uslovni otpis obračunate, a neplaćene kamate na obaveze po osnovu javnih prihoda koje su dospele za plaćanje zaključno sa 31. oktobrom 2012. godine, kao i za mirovanje glavnog poreskog duga po tim osnovama koji bi bio isplaćen u ratama. Država se, dakle, odriče kamata kako bi motivisala obveznike da plate glavnicu u ratama i kako bi izbegla redovni put prinudne naplate. Zakon dalje precizira uslove i obim otpisa, otpis dospele obaveze po snovu doprinosa za obavezno zdravstveno osiguranje zaključno sa 31. oktobrom 2012. godine kao i otpis kamate u drugim slučajevima propisanim ovim zakonom.

Otpis kamata i mirovanje duga omogućava se fizičkim licima, preduzetnicima, malim, srednjim i velikim pravnim licima koja na dan 31. oktobra 2012. godine imaju dospele, a neplaćene obaveze po osnovu ovim zakonom određenih javnih prihoda.

Reč je o javnim prihodima koje utvrđuje, naplaćuje i kontroliše Poreska uprava i to: porezu na dohodak građana (uključujući i porez na prihode od samostalne delatnosti), porezu na dobit pravnih lica, porezu na prenos apsolutnih prava, porezu na nasleđe i poklon, porezu na registrovano oružje, porezu na premije neživotnog osiguranja, doprinosu za obavezno penzijsko i invalidsko osiguranje, doprinosu za obavezno zdravstveno osiguranje, doprinosu za obavezno osiguranje za slučaj nezaposlenosti, porezu na dodatu vrednost, akcizama, porezu na promet, porezu na fond zarada, i porezu na finansijske transakcije.

Takođe, pod istim uslovima propisanim ovim zakonom predlaže se omogućavanje otpisa kamata i mirovanje duga po osnovu javnih prihoda koje utvrđuju, kontrolišu i naplaćuju jedinice lokalne samouprave[7].

Ovim zakonom[8] se istovremeno bliže precizira i značenje pojedinih izraza poput poreski obveznik, glavni poreski dug, kamata, tekuće obaveze, mali i veliki poreski dug i nadležni organ.

Poreskim obveznicima koji ostvaruju prava po ovom zakonu mirovaće glavni dug od 1. januara 2013. godine, sa tim što trajanje perioda mirovanja zavisi od ekonomske snage obveznika tako da malom poreskom obvezniku dug miruje do 31. decembra 2014. godine, a velikom poreskom obvezniku do 31. decembra 2013. I poreski obveznik kome je odloženo plaćanje poreskog duga ili prema kome je pokrenut postupak prinudne naplate može ostvarivati prava iz ovog zakona. Za vreme mirovanja poreskog duga sve do njegove otplate u celosti, ne teče kamata, ali se iznos duga valorizuje indeksom potrošačkih cena. Obveznik stiče pravo na mirovanje ako obaveze dospele za plaćanje, počev od 1. novembra 2012. godine do 31. decembra 2012. godine, plati najkasnije do 31. januara 2013. godine. A nakon toga je dužan da redovno izmiruje tekuće obaveze. Zakon[9] ob-

4 Zakon o poreskom postupku i poreskoj administraciji („Službeni glasnik RS", br. 80/02, 84/02 – ispravka, 23/03 – ispravka, 70/03, 55/04, 61/05, 85/05-dr, član. 77.

5 Zakon o uslovnom otpisu kamata i mirovanju poreskog duga („Službeni glasnik RS", 119/2012).

6 Zakon o poreskom postupku i poreskoj administraciji („Službeni glasnik RS", br. 80/02, 84/02 – ispravka, 23/03 – ispravka, 70/03, 55/04, 61/05, 85/05-dr, član. 77.

7 Zakon o poreskom postupku i poreskoj administraciji („Službeni glasnik RS", br. 80/02, 84/02 – ispravka, 23/03 – ispravka, 70/03, 55/04, 61/05, 85/05-dr, član 2a.

8 Zakon o uslovnom otpisu kamata i mirovanju poreskog duga, („Službeni glasnik RS", 119/2012).

9 Zakon o uslovnom otpisu kamata i mirovanju poreskog duga („Službeni glasnik RS", 119/2012).

veznicima koji iskoriste mogućnosti iz ovog zakona daje još jednu pogodnost, predviđeno je i otpisivanje celokupnog glavnog duga i kamate po osnovu doprinosa za obavezno zdravstveno osiguranje, pod uslovom da u periodu mirovanja izmire glavni poreski dug u celosti. Ovo je značajna olakšica jer se poreskom obvezniku oprašta obaveza po jednom pravnom osnovu samo zato što je izmirio glavnicu po drugom, po kome mu je kamata takođe oproštena. Otpis kamate kao i doprinosa obavezan je da izvrši nadležni organ po ispunjenju ovim zakonom propisanih uslova za otpis. Glavni poreski dug čije se plaćanje odlaže, plaća se u 24 rate, pri čemu nije potrebno polagati nijedno sredstvo obezbeđenja, što stvara značajan rizik poveriocu, ali istovremeno i značajnu olakšicu i podstrek obvezniku da iskoristi ovu mogućnost. Mali poreski obveznik počinje sa isplatom duga u ratama počevši od 1. januara 2015. godine, a veliki od 1. januara 2014. godine. Nije na odmet još jednom napomenuti da je obveznik dužan da redovno izmiruje i tekuće obaveze ukoliko želi da iskoristi mogućnost otpisa kamate. Poreskom obvezniku koji u periodu mirovanja ne izmiri tekuće obaveze glavni poreski dug uvećava se za kamatu koja se obračunava počevši od prvog dana narednog meseca od meseca u kome je propušteno plaćanje, a Poreska uprava pokreće postupak prinudne naplate u skladu sa odgovarajućim propisima[10] kojima se isti reguliše.

Analizirani zakon predviđa i otpis kamate u nekim posebnim slučajevima i to obvezniku čiji je dug nastao neplaćanjem jednokratne poreske obaveze i preduzetniku koji je brisan iz registra koji se vodi kod nadležnog organa pod uslovom da isplate glavni dug do 31. decembra 2014. godine.

Prava po ovom zakonu mogu ostvarivati i obveznici lokalnih poreza. Reč je o porezima kod kojih se u ulozi poverioca pojavljuju jedinice lokalne samouprave. U tom cilju Skupština jedinice lokalne samouprave donosi Odluku koju bazira na članu 11. Zakona o uslovnom otpisu kamata i mirovanju poreskog duga, kao i na članu 60. a u vezi sa članom 6. Zakona o finansiranju lokalne samouprave[11]. Tokom mirovanja duga ne teče rok zastarelosti prava na naplatu poreskog duga, a za period mirovanja produžava se rok apsolutne zastarelosti. Danom stupanja na snagu ovog zakona Poreska uprava prekida postupak prinudne naplate.

10 Zakon o poreskom postupku i poreskoj administraciji („Službeni glasnik RS", br. 80/02, 84/02 – ispravka, 23/03 – ispravka, 70/03, 55/04, 61/05, 85/05-dr, član. 77.

11 Zakon o finansiranju lokalne samouprave („Službeni glasnik RS", br. 62/06, 47/11 i 93/12), član 60. u vezi sa članom 6.

3. Primena Zakona

Nesvakidašnje u primeni analiziranog zakona, a šta zavređuje poseban osvrt, jeste naknadno produženje roka za otpis kamata i mirovanje poreskog duga. Naime, Vlada Republike Srbije je na predlog Ministarstva finansija i privrede donela Zaključak[12] kojim se navedeni rok produžava do 31. marta 2013. godine.

Ovim aktom Vlade Republike Srbije omogućava se preostalim obveznicima sa nagomilanim poreskim dugovima, a koji u Zakonom određenom roku nisu ostvarili pravo na otpis kamate i mirovanje poreskog duga da to ipak učine tako što će naknadno, u produženom roku, a pod nepromenjenim uslovima izmiriti tekuće obaveze. Zaključak je tako omogućio da se sve uplate poreskog duga zaključno sa 31. martom 2013. godine smatraju za izmirenje tekućih obaveza, te da uplatilac-obveznik ostvari pod istim uslovima, kao i oni koji su to učinili u Zakonom predviđenom roku, pravo na otpis kamate i mirovanje poreskog duga. U obrazloženju akta Vlade, kao razlog za njegovo donošenje, navodi se veliki broj zakasnelih uplata po ovom osnovu. Verovatno je intencija Vlade, odnosno u prvom redu Ministarstva finansija i privrede, bila da se produženjem roka ostvari efekat Zakona u punom obimu tako što će se obuhvatiti sve neblagovremene uplate poreskog duga. Ali sa teorijskog aspekta svakako je sporno to što se ovaj akt poreske amnestije koji je izuzetnog karaktera i koji takav karakter mora da zadrži, dodatnim produženjem roka relativizuje. Uprkos dobroj nameri ovakvim potezima se ne daje doprinos stvaranju efikasnijeg poreskog sistema.

Sa druge strane, statistika koju je objavila Poreska uprava o ukupnom iznosu neplaćenog poreskog duga sugeriše opravdanost pokušaja da se na ovaj način poboljša naplata. Naime, prema podacima Poreske uprave, ukupan dug po osnovu svih javnih prihoda zaključno sa 31. oktobrom 2013. godine iznosio je 967,8 milijardi dinara, od čega je 340,6 milijardi bila glavnica, a 627,2 milijarde dinara kamata. Do kraja januara poreski obveznici su uplatili ukupno 239 milijardi dinara na ime isplate tekućih obaveza u skladu sa Zakonom. Ako svi oni nastave da u skladu sa Zakonom ispunjavaju svoje obaveze, biće na ime otpisa kamate izbrisano 361 milijarda dinara.

4. Zaključak

Po donošenju ovog zakona bilo je dosta kritika od kojih su mnoge na mestu. U prvom redu ona koja govori o podsticanju moralnog hazarda

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te o stavljanju u neravnopravan položaj obveznika koji redovno izmiruju svoje poreske obaveze u odnosu na one koji to ne čine. Opravdan je strah da bi ovakva rešenja mogla motivisati neplatiše da i u budućnosti odlažu izmirenje svojih obaveza nadajući se sličnim olakšicama. Kako bi se nastupanje ovakve opasnosti predupredilo, neophodno je ovaj akt poreske amnestije tako i tretirati, kao izuzetan akt koji se u budućnosti neće neopravdano ponavljati. Uprkos tome, nesumnjiva je dobra namera zakonodavca da se ovim zakonom postigne svojevrsni kompromis između potrebe ka jačanju finansijske discipline i stvaranja kontinuiranih fiskalnih prihoda sa jedne strane i očuvanju i podsticanju privrednih subjekata i privrednih aktivnosti sa druge.

Stefan Cvetković

The Law on Conditional Write-off Interest and Tax Debt Standstill

The National Assembly of the Republic of Serbia adopted on 15 December 2012. The Law on conditional write-off interest and tax debt standstill (Official Gazette of RS No. 119/2012) which was published in the Official Gazette of the Republic of Serbia 17 December and came into force on the day after that. Basis for this law is found in Article 97 Item 6 and 8 Constitution of the Republic of Serbia, according to which the Republic of Serbia regulates and ensures the tax system in the field of social security and other forms of social security. The objectives to be achieved by adopting this act is a kind of tax amnesty of those taxpayers, of which the Republic of Serbia as a tax creditor claims by the Tax Administration of the outstanding principal and interest on unpaid taxes and contributions.

Key words: *tax, write-off interest, tax debt standstill*

KODEKS KORPORATIVNOG UPRAVLJANJA

Danijela Milenković*

Na sednici održanoj 17. septembra 2012. godine Skupština Privredne komore Srbije donela je novi kodeks korporativnog upravljanja, koji predstavlja sistematizovan skup pravila i ponašanja o upravljanju društvima kapitala i načinima vršenja kontrole. Danom stupanja na snagu ovog kodeksa prestaje da važi Kodeks korporativnog upravljanja Privredne komore Srbije („Službeni glasnik RS", broj 1/06). Novi kodeks korporativnog upravljanja donesen je usled potrebe usaglašavanja Kodeksa sa novim zakonom o privrednim društvima i njegov krajnji cilj se ogleda u doprinošenju boljem, efikasnijem i racionalnijem poslovanju članica Privredne komore Srbije, kao i u lakšem pristupu kapitalu.

Ključne reči: *kodeks, korporativno upravljanje, društva kapitala, principi, preporuke.*

Korporativno upravljanje se može shvatiti kao sistem pomoću kog vlasnici preduzeća kontrolišu menadžment, kako bi time osigurali efikasno poslovanje tog preduzeća i osigurali maksimizaciju bogatstva njegovih članova.[1] Dobro korporativno upravljanje zahteva kao svoju osnovu kako zakonsku tako i autonomnu regulativu. Prednost zakonskog regulisanja se ogleda u tome što je takav vid regulisanja za investitore sigurniji, jer u slučaju nepoštovanja ovakvih odredbi predviđene su sankcije, međutim moramo imati u vidu da i autonomna pravila imaju svoje prednosti. U odnosu na zakon, koji teži tome da pruži pravnu osnovu za što veći broj različitih slučajeva, autonomna pravila se najčešće odnose na odabrani krug adresata i odlikuje ih mogućnost podešavanja, odnosno oblikovanja regulatornog okvira, koji u konkretnim slučajevima, u zavisnosti od okolnosti, vrši adresat. Još jedna od prednosti autonomnih pravila se ogleda u tome što ih ne nameće zakonodavac, već ih oblikuje praksa, koja je samim tim spremnija da ta pravila primenjuje. Jedan od mogućih oblika autonomnog prava je kodeks koji predstavlja sistematizovan skup pravila i ponašanja o upravljanju društvima kapitala i načinima vršenja kontrole.[2] Uprkos svojoj neobaveznoj prirodi, odredbe kodeksa su

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1 M. Vasiljević, Korporativno upravljanje, Pravni aspekti, Beograd, 2005, str. 22.

2 D. Vujisić, Kodeks korporativnog upravljanja, Pravo i privreda, 5–8/2008, str. 194–202.

od velikog značaja. Kodeks daje preporuke koje predstavljaju rezultat najbolje prakse i standarde kojima treba težiti, a primenjivanje kodeksa ima za posledicu dobru reputaciju na tržištu. Razlozi koji iziskuju donošenje kodeksa jesu, pre svega, formiranje i negovanje dobrih poslovnih običaja, ali i potreba da se korporativno upravljanje približi privrednim subjektima i da se unapredi etičko ponašanje kompanija.

Usled donošenja novog zakona o privrednim društvima[3] u maju 2011. godine, nastala je potreba za donošenjem novog kodeksa korporativnog upravljanja[4] (u daljem tekstu: KKU), koji bi trebalo da pomogne efikasnijem, racionalnijem i boljem poslovanju članica Privredne komore Srbije. U odnosu na prethodni zakon o privrednim društvima, novi zakon donosi izvesne promene. Najveća novina je omogućavanje izbora sistema upravljanja privrednim društvima. U svetu dominiraju dva glavna modela: jednodomni i dvodomni (nazivaju se još i monistički i dualistički; jednoslojan i dvoslojan).[5] Jednodomni postoji ako društvo pored skupštine ima još samo jedan organ (najčešće je to odbor direktora ili direktor), pri čemu nema nadzornog odbora. U dvodomnom sistemu, osim skupštine, postoji upravni odbor (odbor direktora) i nadzorni odbor. Nadzorni odbor bira upravu, ali i odobrava značajnije odluke, a uprava (direktor i eventualno još neki organi) odgovara nadzornom odboru. Za zemlje sa evropsko-kontinentalnim pravnim sistemom tipičan je dvodomni sistem, dok je u zemljama anglosaksonskog prava karakterističan jednodomni.[6] Ideja domaćeg rešenja je da se samim osnivačima ostavi izbor uređenja organa privrednog društva između jednodomnog i dvodomnog, što predstavlja dobar pravac razvoja korporativnog upravljanja u Srbiji.

Stupanjem na snagu novog KKU-a, koji je Skupština Privredne komore Srbije usvojila na sednici održanoj 17. septembra 2012 godine, prestaje da važi Kodeks korporativnog upravljanja iz 2005. godine. Raniji kodeks je ocenjen od strane velikog broja privrednika i stručnjaka, kao preobiman (sadrži 345 članova) i složen za primenu, što je dovelo do toga da u praksi nije u dovoljnoj meri primenjivan od strane privrednih subjekata. Kodeks korporativnog upravljanja se primenjivao na sva kotirana akcionarska društva koja su članovi Privredne komore Srbije.[7] Novi kodeks korporativnog upravljanja je namenjen svim društvima kapitala, s tim što su pravila Kodeksa obavezujuća samo za javna akcionarska društva koja su članovi Privredne komore Srbije. Upravo u tome što je namenjen svim društvima kapitala ogleda se njegova novina i ukazuje na to da ima znatno širu primenu u odnosu na Kodeks korporativnog upravljanja iz 2005. godine. U Srbiji društva sa ograničenom odgovornošću predstavljaju najbrojnija društva kapitala, te je nastala potreba za donošenjem kodeksa koji će pomoći unapređenju korporativnog upravljanja u svim društvima kapitala, posebno u porodičnim društvima, malim i srednjim društvima, kao i u društvima u kojima je država vlasnik.

KKU predstavlja dopunu važećoj zakonskoj regulativi i ni na koji način ne menja smisao niti pravilno tumačenje zakonskih odredaba. Kreće se u granicama zakona i odnosi se na onu materiju koja nije uopšte uređena zakonom ili je nedovoljno uređena.

Kodeks korporativnog upravljanja iz 2005. godine grupiše pravila u tri vrste:

1) zakonska pravila, koja su u Kodeksu često formulisana drugačije nego u zakonskom tekstu, čime se ni na koji način ne menja smisao niti pravilno tumačenje zakona; zakonska pravila se u Kodeksu mogu prepoznati po upotrebi reči „mora", „ne sme", „dužan je" i sl.;
2) preporuke ili tzv. primeni ili objasni pravila, koja lice treba da prihvati i po njima postupi, a ako to ne učini ili ne učini na način predviđen ovim kodeksom, mora da pruži objašnjenje, odnosno opravdavajuće razloge za učinjeno odstupanje; „primeni ili objasni" pravila se u Kodeksu mogu prepoznati po upotrebi reči „treba"; i
3) predloge, koji predstavljaju pravila koje lice ne mora da prihvati, niti da pruži bilo kakvo objašnjenje za odstupanje od njih, a koja se smatraju poželjnom praksom u oblasti korporativnog upravljanja kotiranim akcionarskim društvima; predlozi se u Kodeksu mogu prepoznati po upotrebi reči „može", „trebalo bi" i sl.[8]

Za razliku od ranijeg kodeksa, novi KKU sadrži dve vrste pravila, a to su preporuke i predlozi. Preporuke se mogu prepoznati na osnovu reči „treba" i predstavljaju pravila koje društvo kapitala treba da prihvati i primeni, dok predlozi predstavljaju željenu praksu u oblasti korporativnog upravljanja, predstavljaju poželjnu primenu, a mogu se prepoznati na osnovu reči „može" i „trebalo bi". Principi i preporuke sadržani u KKU-u nisu obavezujući, odnosno obavezujući su samo za javna

3 „Službeni glasnik RS", br. 36/2011.

4 „Službeni glasnik RS", br. 99/12.

5 D. Vujisić, Poslovno pravo, Priština, tj. Kosovska Mitrovica, 2012, str. 226.

6 M.Vasiljević, op. cit., str. 43–45.

7 Kodeks korporativnog upravljanja („Službeni glasnik RS", br 1/2006), čl. 4.

8 Kodeks korporativnog upravljanja („Službeni glasnik RS", br 1/2006), čl. 7.

akcionarska društva koja su članovi Privredne komore Srbije. Ova društva mogu da primenjuju i neki drugi kodeks, s tim što su principi i preporuke sadržani u KKU-u minimalni. Do njihove primene može doći na direktan način donošenjem odluke nadležnog organa društva, ili ukoliko je potrebno razradom u sopstvenom kodeksu koje bi to društvo donelo, odnosno donošenjem drugih internih akata društva.

Zakonom o privrednim društvima je predviđena dužnost za javna akcionarska društva koja su članovi Privredne komore Srbije, da obaveste Komoru da li primenjuju KKU. Izjava o primeni KKU-a je sastavni deo godišnjeg izveštaja o poslovanju javnog akcionarskog društva i sadrži naročito:

- obaveštenje o kodeksu korporativnog upravljanja koji društvo primenjuje kao i mesto na kojem je njegov tekst javno dostupan;
- sva bitna obaveštenja o praksi korporativnog upravljanja koje društvo sprovodi, a posebno onim koje nisu izričito propisane zakonom;
- odstupanja od pravila Kodeksa korporativnog upravljanja koje društvo primenjuje ako takva odstupanja postoje i obrazloženje za ta odstupanja.[9]

Kodeks se sastoji iz tri dela. Prvi deo „Društva kapitala" sadrži principe i preporuke dobre prakse korporativnog upravljanja i svoju primenu nalazi u akcionarskim društvima i društvima sa ograničenom odgovornošću, a karakteriše ga stepenasti pristup.

Principi i preporuke koje se nalaze u prvoj glavi primenjuju se na sva društva kapitala, druga glava sadrži pravila koja se primenjuju samo na veća društva kapitala, a treća glava sadrži samo principe i preporuke za javna akcionarska društva. Stepenasti pristup podrazumeva da se na javna akcionarska društva pored pravila koja se primenjuju na sva društva kapitala i pravila koja se primenjuju samo na veća društva kapitala primenjuju i posebna pravila sadržana u trećoj glavi, kao i to da se na veća društva kapitala, pored pravila koja se primenjuju na sva društva kapitala, primenjuju i posebna pravila sadržana u drugoj glavi.

U svakoj glavi su prema sličnosti grupisani principi i preporuke u pet kategorija: članovi i skupština članova, odbor direktora (nadzorni odbor i izvršni direktori), interni nadzor, objavljivanje i odnos između društva i nosica interesa za poslovanje društva (interes privrednog društva, interes vlasnika, interes poverilaca, interes zaposlenih, interes uprave i interes društva).

Drugi deo „Dodatni principi i preporuke za porodična društva kapitala" je posvećen izazovima korporativnog upravljanja koji su karakteristični za privredna društva u porodičnom vlasništvu. Ova društva daju ključan doprinos razvoju privrede i predstavljaju veliki procenat ukupnog broja privrednih društava. S obzirom na to da nisu bila u fokusu zakonodavca i teorije, kodeks nastoji da pruži podršku i smernice porodičnim društvima u Srbiji.

Treći deo „Dodatni principi i preporuke za društva kapitala u kojima je država član" bavi se problemima na koje nailaze privredna društva u kojima je država vlasnik, gde se razlikuju posebni principi i preporuke za državu, a posebni principi i preporuke za same kompanije.

Svako društvo kapitala samostalno procenjuje kojoj kategoriji društva kapitala pripada.

Očekuje se da će primena Kodeksa omogućiti kompanijama da efikasno upravljaju poslovanjem, kao i da ostvare lakši pristup kapitalu i da obezbede dugoročan i održiv razvoj. Kodeks je potreban svim privrednim društvima koja žele da rastu i da se razvijaju, kompanijama koje su u fazi razvoja da urede poslovanje na način koji je najbolji i koji će im olakšati pristup kapitalu, kao i svim privrednim društvima da usklade poslovanje sa zahtevnim standardima upravljanja, jer ukoliko žele da se uključe u lanac snabdevanja velikih svetskih kompanija, moraju da postave visoke standarde upravljanja i efikasnosti, jer te kompanije upravo to i očekuju od njih. Kompanijama se ništa ne nameće, od njihove volje zavisi kako će se pozicionirati na tržištu, a ovaj kodeks može ostati „mrtvo slovo na papiru" samo ukoliko društva kapitala ne žele da sagledaju dugoročnu održivost svog poslovanja i ukoliko nisu svesna konkurencije sa kojom će biti suočena ili sa kojom su već suočena na tržištu.

Danijela Milenkovic

Corporate Governance Code

At the session held on 17 September 2012, the Assembly of the Serbian Chamber of Commerce adopted the new Corporate Governance Code that represents a systematic set of rules and conduct in the management of limited liability companies and supervision models. This Code shall supersede the Code of Corporate Governance Chamber of Commerce of Serbia ("RS Official Gazette", No. 1/06). Enactment of the new Corporate Governance Code is required for harmonizing the Code with the Law on Enterprises and its ultimate goal is reflected in contributing to better, more efficient and rational business operations of the Serbian Chamber of Commerce as well as easier access to capital.

Key words: *codex, corporate governance, limited liability companies, principles, recommendations.*

9 Zakon o privrednim društvima („Službeni glasnik RS", br. 36/2011), čl. 368.