DIVERSITY AND INTEGRATION OF EUROPEAN COMMUNITY BUSINESS LAW IN THE CONTEXT OF BUSINESS ACTIVITY

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Abstract

In the future, European Union is to become a single economic zone. Achieving this goal requires creating good and unified legal grounds for business, which presently are lacking. This paper describes the main problems with conducting business across-borders, evaluates current EC business legislation and formulates some de lege ferenda ideas.

Keywords: business law, company law, contract law.

JEL Classification: K_{22}, K_{12}.

1. Introduction

European Community has been founded on economic grounds. Fathers of Europe decided that there is one economic target for Member States to be achieved: one European economy. The target was to be achieved incrementally, through several steps:

- customs union, meaning free movement of goods between Member States and one customs policy (regulation) towards non-EU countries;

- internal market, meaning customs union and free movement of persons, services and capital;

- and finally – economic and monetary union (EMU), meaning internal market, having one currency and strongly harmonized economic policies between Member States (Przyborowska – Klimczak, A., 2006, p. 27-50).

The future target is to introduce EMU in the whole of European Union. Certainly, it would be naive to declare success in achieving EMU. A few examples of the difficulties involved speak volumes: three of the countries belonging to the so-called old Union haven't accepted euro as a single currency (the UK, Sweden and Denmark); several transitional periods concerning free movement of workers are still in force; protectionist measures are taken by the EU countries governments because of the financial crises in 2008-2009.

Nobody had officially decided to transform EU into one federal country, including the authors of the former draft of the Treaty establishing Constitution for Europe and authors of the Lisbon Treaty[1]. This is why it seems to be clear, that European Union will become at least a supranational organization, having legal personality, after the successful ratification of the Lisbon Treaty. But it must be emphasised that EU Member States will be still independent, and in legal terms – able to regulate majority of socio-economic life. The idea of one country – Europe – is extremely far from becoming a real project. These are the reasons why it isjustified to ask a question: what is the correlation between the idea of single economic zone on the one hand, and 27 (or more in future) countries able to serve their regulatory function - on the other hand.

One may ask: is it possible to create one economic zone on the territory of 27 different countries? The answer depends on many factors, but, in my opinion, one of them is decisive. Nowadays we face the overregulation problem. Governments regulate diverse spheres of our lives, which can create obstacles both for natural persons and business entities. This problem is becoming more and more difficult for those running businesses according to the principles of free market economy. Running a business in the past was relatively easy: just some management principles and maths to calculate income and costs. Now you have to add law, as a fundamental and risky element to take into consideration. Law regulates the organisational forms of business, codifies rules governing the undertaking the business activity, levies and taxes, authorisations and licences, regulates the formation of contracts and contracts' performance, and covers many other issues. So, running business is free, but limited by the borders set up by law. The above mentioned examples illustrate the importance of law for business. Law influences business activity deeply – this is why it is worth discussing whether the differences between national legal rules constitute an obstacle to the creation of a single economic zone in Europe.

It would be extremely difficult for a single economic zone to exist on the basis of 27 different legal orders. I would even say, that if we take into consideration the deep influence of law on business activity, a single set of rules governing this activity is necessary in order to create single economic zone. Being realistic, I do not propose to abolish national regulations, and establish pan-European law. But it is possible to design a unified set of rules concerning running a business on a European level. Some steps have been made in this direction, mainly by the European Union. Are they satisfactory for business entities? Is the integration of business regulations complete? What else should be done to achieve the single economic zone

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007

in Europe based on a unified set of business regulations? These are the questions that need to be answered.

2. Freedom of establishment and freedom to provide services vs. obstacles arising from lack of unified business law

The freedom of establishment and the freedom to provide services are the core provisions of the Treaty establishing the European Community which focus on business activity. The European Community introduced these freedoms to make sure that all citizens of EU and all companies based in EU would be able to run a business across the whole of Europe (Fallon, M., 2003, p. 159, 467). Unfortunately, the Treaty provisions do not unify business law – they grant very general rights, based on the principle of non-discrimination (Article 12 of TEC). As I already mentioned, EU started legal action in the field of business law a long time ago. But from the point of view of those running businesses, the results of this action do not seem to be satisfactory. Persons running business see many legal obstacles to their activity.

Each business activity has to be organized in a particular way, according to national law. Domestic legal orders decide on the organizational forms of business. Certainly, diversity in this scope is not huge, the idea of three basic forms, like sole-trader, partnership and company is recognized all over Europe. On the other hand we may find diversity in detailed national regulations. For example, English and Irish law recognize only one type of company (Lyall, F., 2003, p. 423-425), but countries belonging to continental system of law are based on two types of companies: limited liability company and joint-stock company (Cairns, W., McKeon, R., 2003, p. 314-316). There is no coherence in the system of companies' bodies: it is possible to distinguish a monistic system (single board of executive and non-executive directors) and a dualistic one (management board and supervisory board). These differences can cause problems in cross-border business relations. A lack of knowledge of foreign law inhibits cross-border contracting. Differences in the sphere of company law can also appear in the case of representation (do we sign a contract with an appropriate person), minimum capital requirements (can we obtain compensation in case of non-performance of the contract), etc. The more diversity in company law we have, the more difficult there is in engaging in business relations without doubts.

Taxation is a problem as well. The European Community is empowered to legislate in the matter of indirect taxes (like VAT or excise tax- Article 93 of TEC). But from the point of view of business entities, corporate income tax is of much importance too. There are no

direct legal grounds for Community legislative action concerning CIT (Article 94 of TEC). The European Community was able to regulate some elements for double taxation issues, which seems not to be enough.

One of the most important issues, especially in business to business (B2B) relations, is diversity in contract law. Each business relation generating income has a contractual character. It is possible to distinguish at least three systems of contract law in Europe: common-law, continental and Scandinavian. The diversity of contract regulations is the most important and pushes contracting parties to choose the law governing a particular contract. The parties can choose the law of one of the parties - that is the most common situation. This choice puts one of them in a relatively worse position. This party has to cover additional expenses concerning legal assistance. No one wants to act according to unfamiliar legal rules. Sometimes parties choose the legal system of a third country or one of model laws prepared by international organizations or even well established scientific centres. Additionally, the problem of private international law arises.

Last, but not least, is the case of business to consumers (B2C) relations. Business entities have to go through accumulation legislation from both the Community and national levels, starting from advertising issue and distribution channels, ending with abusive clauses in the B2C contract. Diversity in this case makes consumer product placement too expensive, due to legal assistance costs, and compliance with the domestic environment (not only cultural and traditional, but mainly legal).

Examples shown in point 2 of this essay confirm, that despite the basic business rules arising from the TEC, it is still difficult to run cross-border business within EU, especially for small and medium-sized enterprises. I do believe that the European Union should consider a huge action plan eliminating legal obstacles and creating a single legal zone for running cross-border business. It is obvious that costs of the business activities should not be higher than in case of intra-Community activity, because it will be difficult to find candidates working in this field, apart from huge corporations.

3. EC legislation in the field of business law – scope and evaluation

3.1. Company law

The EC legislated a lot in the field of business law. In the case of company law, the regulation of mergers and divisions have been harmonised by:

- Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (OJ L 295, 20.10.1978, p. 36–43);

- Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31.12.1982, p. 47–54);

- Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1–9).

Other issues of Community company law are: safeguards which, for the protection of the interests of members and others, are required by Member States of companies within, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital[1], single-member private limited-liability companies (OJ L 395, 30.12.1989, p. 40–42), takeover bids (OJ L 142, 30.4.2004, p. 12–23) and accountancy.

The above mentioned issues are of great importance, so harmonization was necessary. Unfortunately, the issues covered by the directives do not help in solving basic problems which arise during cross-border running business by small and medium-sized enterprises. Polish *"spółka akcyjna"* is an equivalent of German *"Aktiengesellschaft"*, French *"societe anonyme"*, Italian *"societa par azioni"* or British *"limited liability company"* (private or public). Being equivalent means that the juridical construction of the companies is similar, but not identical. The common core is more or less the same, but market needs similarity not only as far as ideas are taken into consideration, but especially details. Similarity is just not enough.

The most important act of the secondary legislation in the field of company law is definitely the Regulation on Statute of European Company (OJ L 294, 10.11.2001, p. 1–21). The European Company is also known by the Latin term *"Societas Europaea"* or SE. The Regulation envisages several ways of establishment the SE[2]. The SE must have a minimum capital of 120 000 euro. It can transfer its registered office within the Community without dissolving the company in one Member State in order to form a new one in a different country. Unfortunately, the Regulation on SE is far from perfect. Too many important issues have been left to national legislators, eg.: taxes (SE is treated as any other type of a company,

[1] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L 26, 31.1.1977, p. 1–13

[2] merger, formation of a holding company, formation of a joint subsidiary, or conversion of a public limited company previously formed under national law

in consequence has the same tax problems as other multinational companies), winding-up, liquidation and insolvency, etc.

European Union needs better, more comprehensive, more complex regulation on SE. The EU should finally establish a real *Societas Europea*, without too many national elements. The idea behind the Regulation was great – to have capital companies regulated in the same manner in all EU Member States. As the result of the efforts, we have 27 different SE companies: Romanian, Polish, English, French. All because of the decisive room left for national legal systems. Many professors of European Union law strongly criticize the present state of EC company law (Wouters, J., 2000, p. 275). This is why a new program has been established in 2007 in order to prepare a European Model Company Law Act (Kruger, P., 2006, p. 263). Academics working in the Group emphasize the need to adopt a single company law, avoiding the disadvantages characteristic of the present Regulation.

The European Union is working on the project of European Private Company (*Societas Privata Europea*): the Commission presented the draft of a regulation[1]. The main reason for presenting this draft was a fact: small and medium-sized enterprises account more than 99% of companies within the territory of EU. At the same time only 8% of them engage in cross-border trade and 5% have subsidiaries or joint-ventures abroad[2]. New regulation is supposed to stimulate business people to start cross-border activity. In my opinion, the success of the new regulation is doubtful, mainly because the regulation on European private companies repeats almost all disadvantages of the Regulation on European Company: too much room is left for national legal systems. Similar opinions have been expressed by important academics (Baums, T., Sołtysiński, S., 2009, p. 5).

Business needs a totally unified form of running economic activity, both for activities run on huge scale and for activities run by small and medium-sized enterprises. Not only should the formation, internal structure and minimum capital requirements be regulated, but issues like taxation, winding up, insolvency and liquidation procedures should be unified on a European level.

3.2. Contract law (B2B relations)

Contracts are the basic legal instrument for doing business. But even the term "contract" does not have the same meaning in different legal orders (Tallon, D., 2002, p. 2-3). In the UK

[1] Proposal for a Council Regulation on the Statute for a European private company, SEC (2008) 2098, SEC (2008) 2099

[2] See more: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: „A single market for 21st century Europe", COM (2007) 724 of 20.11.2007

two legal orders exist: "typical" common law in England, Wales and Ulster, and common law of Roman origin in Scotland (Lyall, F., 2002, p. 22-25). In France, Belgium and Luxemburg the old *Code Napoleon* is still in force. Countries of Eastern Europe (like Poland) have civil codes based on German *BGB* (Youngs, R., 1998, p. 342-351). Scandinavian countries follow totally different norms of civil law – mainly formation of the contract makes the law of these countries different from the rest of European civil law regulations (Hultmark, Ch., 2000, p. 273). Diversity of national civil law regulations concern, *inter alia*, the following issues:

- Statutory character of legislation or common law system;
- Formation of the contract (invitation to offer, offer, acceptance of offer, revocability of offer);
- Conditions of validity of the contract (*causa* in continental law, *consideration* in English and Irish law, *promise* in Scandinavian countries law);
- Obligation to disclose information;
- Interpretation of declarations of will;
- Evidence rules in court proceedings (Ch. von Bar, Lando, O., Swann, S., 2002, p. 195).

The diversity of civil (contract) law of EU Member State countries create huge risks for doing business and constitute an obstacle to free business activity. Parties are pushed to use private international law regulations, which have been regulated on European level[1]. In my opinion, it is doubtful that unification of "conflict of law" rules is the best solution. In the case of the huge diversity of national rules of contract law, the action is justified. But this direction should not be treated as the target itself. Codified private international law is necessary now, but the direction should be different: unification of contract law.

The fragmented harmonization of private law (mainly in consumer matters) causes decomposition of national civil laws. The only way to avoid that risk is unification of private law on a European level (Van Gerven, W., 2001, p. 3). Some Authors claim that it is necessary to adopt the European Code of Obligations (Hondius, E., 1997, p. 457). The Cecchini Report is clear: abolishing legal barriers in the internal market is extremely profitable for consumers and professionals (Arora, A., Favre-Bulle, X., 1996, p. 202) Supporters of the idea of European Code of Obligations claim that law is product of a need. Cultural diversity should not be an obstacle for the Code. Even differences between the

[1] Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, OJ C 27 of 26.01.1998, Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [COM(2005) 650 final] will complete the harmonisation of the rules of private international law relating to both contractual and non-contractual obligations in civil and commercial matters.

common law system and the continental system of law are not impossible to challenge. Legal integration should go along with economic integration (Smits, J., 1998, p. 328), and this is possible, as in Italy (1866) and Germany (1900). Certainly, not everyone shares the above mentioned ideas (Van den Bergh, R., 1998, p. 129).

European Commission is working on a unified contract law instrument – advanced research is in progress (Kurowska, A., 2007, p. 63-76). From the point of view of business, the above mentioned legal instrument is really necessary. In my opinion, in future we should obtain a regulation (in the meaning of Article 249 of TEC) covering contract law for cross-border, B2B, contractual relationships, based on an opt-in principle[1]. This is an obvious need for European business.

3.3. Consumer contracts (B2C relations)

EU consumer policy is well established. During more than last 30 years the following areas has been regulated:

- unfair business-to-consumer commercial practices (OJ L 149, 11.6.2005, p. 22–39);
- misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21–27);
- protection of consumers in respect of distance contracts (OJ L 144 , 4.06.1997, p. 19 – 27);
- distance marketing of financial services (OJ L 271, 9.10.2002, p. 16–24);
- protection of consumers in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31–33);
- contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83–87);
- unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29–34).

EC Consumer legislation covers many areas of socio-economic life and influences business a lot. According to contractual directives *professional* is a counterpart for *consumer*. This is why consumers' rights constitute business entities' obligations. Unfortunately, consumer legislation does not create a set of well organized rules, neither at European nor national level. Private law matter of the consumer directives is strongly fragmented and inconsistent (Roth, W.H., 2002, p. 761). Evaluation of the present legislation is critical because of fragmentation and because of the method of harmonization - mainly minimal, which is week instrument of integration legal norms (Wiewiórowska – Domagalska, A., 2001, p. 330-331). Present legislation is hardly acceptable for business: rules are vague, complex,

[1] In this case, opt-in principle means, that parties may choose a legal instrument as binding.

incoherent and impose huge costs on professionals. Additional problems arise from the process of implementation of the directives into national legal orders, causing deep fragmentation of the internal market. Minimal harmonization of the consumer directives does not eliminate diversity between national consumer legislations. That pushes business to follow 27 different legal orders. The alternative cost is huge. Some Member States decided to adopt more severe rules than those arising from the directives, e.g. by granting consumer protection to certain category of business entities. In consequence, some business entities can be treated as consumers, some cannot. Granting too many rights to consumers makes competitive position of professionals worse and creates obstacles for freedoms of the internal market.

It is worth noticing that European Union has decided to change the direction of harmonization Consumer legislation into maximum strength and more coherent legislation, according to postulates of recasting, consolidation and codification (Karsten, J., Sinai, A.R., 2003, p. 160). Directives and drafts of directives adopted after year 2000 are much more acceptable for business and internal market. On the other hand, they are far from perfection, and the process of improving consumer law is really long.

4. Conclusions and recommendations

The development of the European Union is difficult to predict. We do not even know if the Treaty of Lisbon will be ratified. EU development is a question of a political nature. On the other hand, businesses are facing difficulties every day and cannot wait too long for change. It is certain that the lack of uniform law in several areas is causing problems for business, making running the economic activity within EU more difficult and influencing the efficiency of the internal market. Brussels should understand that quick legislative action is needed in order to create a single legal zone for doing business:

1) Company law needs to change: EU business needs good (much better than nowadays) legislation on two types of companies, identical in all EU Member States. The legislation should ensure complete regulation of the entities (including taxes, insolvency procedures, etc.).

2) Contract law needs to establish a single opt-in contractual instrument. This instrument could be the element approaching national legislations in future. But at present, business needs a unified contract law, and that is why the EU should feel obliged to adopt one as soon as possible.

3) Consumer law is advanced, but week. A lot of business relations are of a consumer nature. EU should work hard on the adoption of a European Consumer Code based on the

maximum harmonization principle. Both consumers and professionals should profit from a good legislation in these consumer matters.

Strong efforts will have to be taken to enact these proposals. Politicians have to understand that a single economic zone can only be built on the grounds of a single legal zone for business. It is worth suggesting that professionals should undertake consistent lobbying action in the Member States and Brussels as well.

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