VILNIUS UNIVERSITY

AGNĖ PETKEVIČIŪTĖ

TAXATION OF REORGANIZATIONS AND TRANSFERS IN LITHUANIA: IMPLEMENTATION OF THE COUNCIL DIRECTIVE 2009/133/EC

Summary of Doctoral Dissertation

Social sciences, Law (01S)

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VILNIAUS UNIVERSITETAS

AGNĖ PETKEVIČIŪTĖ

REORGANIZAVIMO IR PERLEIDIMO OPERACIJŲ APMOKESTINIMAS LIETUVOJE: TARYBOS DIREKTYVOS 2009/133/EB ĮGYVENDINIMAS

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CONTENTS

1. Scientific novelty of dissertation, relevance of topic, research conducted

Striving to maximise their capacity, occupy larger market share, diversify their products, services or risks, to reduce costs (including tax-related ones) or simply to survive, companies tend to take part in reorganisations or transfers which are regarded as neutral in the meaning of corporate income tax[1] – both on national level and transcending the boundaries of one single state.

As pointed out by the weekly newspaper *The Economist*[2], the year 2015 saw a boom of acquisitions and mergers throughout the world[3] – the volume of these operations on a global scale amounted to USD 5.5 trillion during this year, and the majority of them were carried out in the United States of America. In 2015 reorganisations and transfers were often mentioned in Lithuanian context as well, however, this was not influenced by their number or volume but rather by the scandal involving "Vilniaus prekyba" group. It was alleged that by way of use of these operations payments of taxes due to the state budget of the Republic of Lithuania have been avoided[4].

In terms of volume of reorganisations and transfers in Lithuania, it is hard to give any specific figures. Upon addressing an individual inquiry to the state company "Registrų centras"[5], a structured information about the number of companies in Lithuania which have registered "under reorganisation" as their status within 2016 has been obtained. However, sometimes there might occur practical situations where reorganisation shall not be finalised during the same calendar year (particularly in cases where the financial year of a company do not coincide with the calendar year as attempts are being made to commence and finalise reorganisation during the same financial year) or it might not be finalised at all. Moreover, this dissertation deals not only with reorganisations but also

[1]It should be noted that this dissertation examines two types of operations, i.e., first of all, reorganisations which are also being differentiated as independent operations and thus are regulated accordingly in the civil law, and transfers which are not dealt with as independent operations within the context of the civil law. In the meaning of the civil law, transfers would be implemented as a group of operations, for instance, material/financial contribution, increase of authorised capital.

[2]"The Economist" [interactive content, seen on 29 December 2015]. Online access: < >.

[3]The article deals not only with reorganisations and transfers which are being analysed in the present dissertation but also with purchase-sale and other types of transactions.

[4]"15 minučių" [interactive content, seen on 1 August 2015 – 31 December 2015]. Online access: < min.lt >. "Delfi" [interactive content, seen on 1 August 2015 – 31 December 2015]. Online access: < www.delfi.lt >.

[5]State company "Registrų centras" [interactive content, seen on 28 February 2017]. Online access: < http://registrucentras.lt/>

with transfers. The latter ones are not regarded as reorganisation in the meaning of civil law and therefore are not included in the aforementioned statistics on reorganisations. When implementing transfers, the increase of authorised capital and payment thereof with one`s property is being carried out in the meaning of the civil law. Since the corporate authorised capital may be increased due to other reasons and not necessarily transfers, it is not possible to provide any structured information about the number of transfers implemented in Lithuania during the span of a year.

It must be further noted that in terms of taxation both reorganisations and transfers are neutral operations and that their fiscal neutrality as well as the protection of financial interests of the states where such operations are conducted has been regulated on the level of the entire European Union (hereinafter referred to as European Union, EU, Union) as early as in 1990 upon adopting the Council Directive No. 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (hereinafter referred to as the Directive)[6]. Provisions thereof have been transposed into the national legal acts of Member States. In Lithuania they have been transposed into Chapter IX of the Law on Corporate Income Tax[7]. The provisions of the Directive have been implemented in Lithuania well before the accession of the Union, namely, upon adopting the Law of the Republic of Lithuania on Corporate Income Tax in 2001, and Chapter IX thereof provided the taxation of reorganisation, transfer and individual cases of liquidation as well as recognition of income and losses of the increase in property value in certain cases of reorganisation, liquidation and transfer.

The said Directive has been put into practice on the EU level not immediately since the transactions governed by this legal instrument could not be implemented between the companies established in different Member States due to the fact that these issues had not

[6]Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. *Official Journal L*, 225, p.1.
The Directive has been amended a few times and in 2009 it was codified and title thereof was replaced with the following title: Council Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States. The latter title is indicated in the present dissertation title since this dissertation analyses not only the initial version of the Directive but also all other currently effective amendments thereof.
[7]Law of the Republic of Lithuania on Corporate Income Tax. *Official Gazette*, 2001, No. 110-3992.

been regulated by the company law. That situation has been solved (even though only partially) by way of application, since 2004, of the Statutes for a European Company and for a European Cooperative Society[8] and after 2005 when the Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies[9] was adopted.

As we have already stated, the year 2015 saw the boom of acquisitions and mergers throughout the world; due to tax neutrality of these transactions which has been enshrined both on national and international levels they have remained an attractive tool for the purposes of creating company group structures or for achieving other goals referred to above. However, it must be said that while implementing reorganisations and transfers in practice one may still encounter various inconsistencies and gaps which raises doubts whether the existing regulation of these transactions – on EU and national levels – does ensure both tax neutrality and financial interests of business entities and Member States. Moreover, given the public attitude towards reorganisations and transfers in Lithuania, it may be reasonably concluded that wide awareness of the taxation mechanism directed at these transactions which has been introduced by the Directive and implemented via the Law on Corporate Income Tax is still not a reality in our country.

A comprehensive research of the taxation of reorganisations and transfers in the context of legal science of Lithuania has been carried out only in a MA paper of a student of the Faculty of Law of Vilnius University[10], however, major part of the latter paper is of descriptive nature, a lot of attention is being given to the regulation of these operations in civil law; legal acts discussed in the said MA paper have been amended since the date this paper has been drawn up whereas certain conclusions presented therein are to be questioned as well. In addition, it should be pointed out that some issues of reorganisations and transfers in Lithuania have been analysed in periodic media or information portals, however, only from a practical aspect.

[8]Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). *Special Edition*, 2004, No. 1.
Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). *Special Edition*, 2004, No. 1.
[9]Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies. *Official Journal L*, 310.
[10]LADIETA L. *Legal relations of taxation in the process of reorganisation of companies:* MA paper. Social sciences, law (01S). Vilnius: Vilnius University, 2007.

In the foreign scientific literature the provisions of the Directive have been mostly analysed in the book "*European Tax Law"*[11] by *Ben J. M. Terra* as well as in the book "*Introduction to European Tax Law: Direct Taxation"*[12] which has been written by *LANG, M. et al.*, however, the subject-matter of these scientific works is – as referred to by their titles – the entire EU tax law, thus the analysis of the Directive is quite fragmented and limited by the operation mechanism of the Directive as well as description of its major gaps. Considerable attention to the Directive is paid in the research work by *Harm van den Broek*[13]. This work presents quite thorough analysis of the history of adoption of the Directive, however, due to the stated subject-matter of this research work author thereof analyses only reorganisations via merger and does not analyse neither reorganisation via division, nor transfers. Separate problematic issues such as e.g. application of the provisions of the Directive with regard to companies established in the countries of the European Economic Area, mechanism of tax loss carry-over stipulated in the Directive or the application of measures against tax avoidance enshrined in the Directive have been analysed in periodicals such as "*European Taxation"* or *"EC Tax Review"*.

In the said foreign scientific literature the Directive has received considerable criticism, mostly regarding uncertainty of its text (the Directive does not give certain definitions of some particularly important concepts which are used in this legal instrument, such as permanent establishment or tax avoidance). This issue may not be solved by way of applying theological method since no integral history of adoption of the text of the Directive has been announced thus far[14]. The necessity to amend the Directive and to expand the scope of its application thereof has been acknowledged as early as in 2001[15], in 2005 the Directive has been amended[16] and supplemented by new provisions, however,

[11]TERRA, B., WALTER P., *European Tax Law*, Netherlands: Kluwer Law International, 2012, p. 689-670.
[12]LANG, M. *et al. Introduction to European Tax Law: Direct Taxation*, Vienna: Spiramus Press, 2013.
[13]VAN DEN BROEK, H. Cross-Border Mergers Within the EU. Netherlands: Kluwer Law International, 2012, p. 239.
[14]VAN DEN BROEK, H. *Cross-Border Mergers* <...>, p. 124, 146.
[15]*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards an Internal Market without tax obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities* [interactive content, accessed on 13 June 2013] Online access: <>
[16]Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. *Official Journal L*, 058, p. 19-27.

quite a considerable part of gaps (as shown by the research carried out in this dissertation) have not been remedied yet.

The Directive and its implementation in all (at that time) 27 EU Member States has been thoroughly analysed from a practical aspect at the level of the entire EU by the international audit company EY in 2008. This document has been posted in the website of the European Commission in January 2009[17]. Even though the author of the present dissertation participated in the preparation of this study, some of its statements and conclusions have been questioned in the dissertation. It must be noted that since the preparation of this study the provisions of the Law on Corporate Income Tax, both regarding taxation of reorganisations and transfers and other related issues, have been amended many times. However, the mere grammatical analysis of the text of the Directive and the currently effective Law of the Republic of Lithuania on Corporate Income Tax allow assuming that certain provisions of the Directive have not yet been properly implemented in Lithuania.

Thus, to sum up the research works on the topic of dissertation referred to above, it must be noted that the relevance of the topic discussed in this dissertation is confirmed not only by the absence of thorough and multilateral legal research into taxation of reorganisations and transfers in Lithuania but also by the fragmentation of such research throughout the EU. With due consideration of both national and international practice and volume of reorganizations and transfers, such vacuum of legal thought is unjustifiable. The present dissertation not only thoroughly analyses national and EU regulation of this issue, gives reasoned suggestions on how to improve legal regulation of reorganizations and transfers not only on the national level of Lithuania, but on EU-level as well where the tax-related legal relations in question have been regulated by means of the Directive.

The topic of the dissertation maintains its relevance from a scientific point of view also while taking due account of the processes of the fight against aggressive tax planning and tax avoidance which are taking place at the time of preparing the dissertation, initiatives of new legislative acts. For instance, EU directive which stipulates the principles

[17]Survey of the implementation of the Council Directive 90/434/EEC (The Merger Directive, as amended) [interactive content, accessed on 20 June 2013]. Online access:

of taxation of dividends on the EU-level[18] has been amended twice while preparing this dissertation. Special provisions against tax avoidance were introduced. The amendments of the Directive have been also implemented in the Law on Corporate Income Tax of Lithuania[19] and came into force on 1 January 2017.

During the times of preparation of the dissertation the Organisation for the Economic Co-operation and Development (hereinafter referred to as the Organisation for the Economic Co-operation and Development or OECD) has published its report on the fight against aggressive tax planning (hereinafter referred as BEPS)[20] which deals with 15 steps which ought to ensure a transparent and fair taxation of international business in the future.

BEPS is directed against such structures which take advantage of all available gaps in tax law provisions and inconsistencies existing at international level so that they could artificially (without engaging in any actual activity) transfer their profits subject to taxation to such jurisdictions where a lower corporate income tax tariff is being applied or where such tax is absent altogether and in this manner low or zero amounts of corporate income tax are being paid. Since BEPS is a global problem, it requires global response. The final set of BEPS documents provide countries with the tools based on which the corporate profit would be taxed in places where the activity generating such profits is actually pursued and where added value is obtained. At the same time this tool provides business with certainty about specific tax law provisions which would be applied in case of potential tax dispute and which standardise all forms and reports which are required to be submitted to tax administrators.

EU Member States, which constitute the basis of OECD, have been actively striving to make the plans declared by OECD become reality. On 18 March 2015 the European Commission, following the standards prepared by OECD, introduced a set of legal instruments aimed at combating tax evasion. This set consisted of, *inter alia*, proposal regarding the Council Directive laying down rules against tax avoidance practices that

[18]Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. *Special Edition*, 2004, No. 1.
[19]Law on Amendments to Articles 32, 33, 34, 35, 36, 40-1, 47, 51, 53 and Appendix No 3 of the Law of the Republic of Lithuania on Profit Tax No. IX-675. *TAR (Register of Legal Acts)* 25 March 2016, 2016-06346.
[20]Base Erosion and Profit Shifting [interactive content, accessed on 18 March 2016]. Online access: < http://www.oecd.org/ctp/beps.htm>

directly affect the functioning of the internal market [21]. This draft directive stipulates common rules for combating tax abuse as well as other measures aimed at fighting tax avoidance, it introduces exit taxes as well.

The said draft was adopted by the Council Directive of 12 July 2016[22] stipulating the rules of the fight against the practice of tax avoidance directly impacting internal market operation which will have to be implemented, with certain exceptions in Member States, by 31 December 2018 and which will have to be practically applied since 1 January 2019.

With due consideration of these initiatives aimed at combating tax avoidance, one needs to have in place a systemic and thorough scientific analysis of taxation of reorganisations and transfers which would disclose the essence of these operations and mechanism of taxation thereof, namely, that this mechanism stipulates not the *exemption* of taxation but only the postponement of taxation moment until further transactions involving the assets being transferred are carried out. In addition, such postponement of taxation moment is not unconditional – the mechanism introduced by the said Directive also assists in protecting financial interests of Member States by way of preventing *physical* movement of property. There is a need for a thorough analysis and justification, from a scientific aspect, that the mechanism put in place by the Directive is not a tax advantage but rather special taxation conditions in cases where there is no objective basis for the payment of taxes since while carrying out the said operations pecuniary payments are not being conducted. The use of the rules created by the Directive which have been further transposed into a domestic law does not constitute tax planning or tax evasion *per se* either.

Having assessed the complexity of reorganisations and transfers there is a need for a thorough inquiry into specific provisions directed against tax avoidance and how they must be applied in cases where a reorganisation or a transfer is being carried out as a part of the group of economic operations in the context of the schemes of aggressive tax planning (or tax avoidance). Moreover, it must be analysed what kind of problems

[21] European Commission [interactive content, accessed on 23 May 2013]. Online access: http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm.
[22] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. *Official Journal* L, 193/13.

currently arising in the sphere of taxation of reorganisations and transfers may be solved by the aforementioned international initiatives regarding common rules for fighting tax abuse and exit taxes. The author of the present dissertation holds that it is only a systemic and detailed analysis of the currently existing regulation that will help to avoid such situations where a package of EU legal acts related to the said initiative aimed against tax evasion would be just mechanically transposed into the Lithuanian law without any further considerations on how a specific legal provision would operate (or whether it would operate at all).

Thus, this dissertation presents – for the first time since the implementation of the Directive in Lithuania in 2001 – a detailed and systemic analysis of the mechanism of taxation of reorganisations and transfers put in place by the Directive, discloses its essence and problems related thereto as well as proposes certain recommendations on how to improve it.

2. Object and subject-matter of dissertation

The object of this paper is revealed by the title of the dissertation, namely, taxation of reorganisations and transfers.

It must be noted that the dissertation deals with a specific area of corporate income tax since it analyses the implementation of the directive unifying taxation of reorganisations and transfers with the corporate income tax in Lithuania. For the sake of clarity it should be noted that reorganisations and transfers may also constitute the object of value added tax (hereinafter referred to as VAT, value added tax) (to be more specific, transfer of economic activity as a complex is not regarded neither as the supply of goods nor the provision of services for the purposes of value added tax whereas the transfer of the object subject to the right of ownership due to dissolution of a legal entity by way of reorganisation is regarded as the supply of goods or provision of services for a certain fee in the meaning of value added tax). In cases where the shareholders of entities taking part in reorganisation and transfer are natural persons the issues of taxation with residents' income tax arise naturally. For the purposes of a more in-depth analysis of the aspects of taxation with corporate income tax neither the issues of value added tax nor residents' income tax have been explored in the present dissertation. Besides, it should be noted that

these taxes do not fall into the sphere regulated by the Directive which is being analysed in the present disertation.

However, one should bear attention to the fact that in certain cases, for the purposes of disclosing the essence of taxation of reorganisations and transfers, certain problems inherent in this issue and to offer proposals, this paper deals with the *practice of authorities handling tax disputes* not only in the sphere of direct taxation but also in that of indirect taxation. According to the opinion of the author of this dissertation, such methodology of the research is of particular relevance when discussing the provision directed against tax avoidance which has been enshrined in the Directive since the extent of case-law in the sphere of direct taxes is very limited, which prevents us from making any conclusions on the issues under question. Moreover, the author of the dissertation holds that the said practice is useful for the purposes of trying to understand the common stance of the Court of Justice which, even though presented while applying and interpreting legal acts governing other spheres, is based on the same common principles of EU law.

It goes without saying that an objective, thorough and useful analysis of taxation of reorganisations and transfers would not be possible without a research into the contents of specific legal provisions defining this form of taxation. In addition, it should be highlighted that regarding direct taxes, including corporate income tax, in the context of an international practice, every jurisdiction independently handles the issues of taxation with these taxes, that is, specifies the object of a specific tax, tax basis, tax payers, tariffs etc. Contrary to indirect taxes such as value added tax or excise duties where the principles of taxation may be set by the group of states forming the common market such as, for instance, European Union. Due to this reason it would be quite complicated to review the taxation of reorganisations and transfers which is effective throughout the whole world and it is hardly likely that such review would be at all possible. With due regard of this fact the present dissertation deals with national regulation only, namely, relevant provisions of the Law on Corporate income tax which were in force earlier on and during the preparation of the dissertation as well, as already mentioned, Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (including all subsequent adjustments and amendments thereof) setting the

mechanism of taxation of the operations in question on the level of internal market which is in force on the EU level and is implemented by its Member States including Lithuania.

Thus the initial subject-matter of the research conducted in this dissertation is the provisions regulating taxation of reorganisations and transfers which have been enshrined in the Directive and national law on corporate income tax. The subject matter of the research of the present paper also comprises the provisions of other legal acts on other issues (tax administration, taxation with other direct and indirect taxes in Lithuania) to the extent which is required for the analysis of issues discussed in the dissertation and for the provision of proposals regarding further improvement of legal acts. The subject matter of the research of this academic paper is also the conclusions and proposals put forward in the publications of other scientists and, as it has been already mentioned, the review of the practice of taxation of reorganisations and transfers applied in EU Member States provided in the study on implementation of the Directive in the Member States.

It should be noted that both reorganisations and transfers are relevant in another context which is private law. Regulation of implementation of these operations by means of private law provisions also poses both theoretical and practical issues and questions. However, for the purposes of carrying out a thorough analysis of taxation of the operations in question with corporate income tax and avoiding any deviations from the subject-matter being researched as well as for avoiding descriptive form of this paper, this dissertation only deals with the aspects of public law, that is, tax law, whereas the issues of private law are analysed only to the extent that is required for the purposes of setting out all relevant problems linked to taxation.

3. Aim of dissertation

Upon the commencement of this dissertation the author has raised a hypothesis that the provisions of the Directive have been in fact properly transposed into the Law of the Republic of Lithuania on Corporate Income Tax. However, due to mechanical transposition of these provisions or any other reasons in certain cases the regulation of taxation of reorganisations and transfers as provided in the Law on Corporate Income Tax is inconsistent with the regulation ensured by the provisions of the Directive. During the research such hypothesis is confirmed or dismissed in the light of results obtained.

4. Objectives of dissertation

For the purposes of achieving the aim of research pursued in this dissertation the following objectives have been set:

1. To disclose the tax neutrality of reorganisations and transfers in comparison with other operations, for example, sales; to answer the question whether such mechanism of taxation of the said operations is to be regarded as tax incentive.

2. To analyse and disclose the mechanism of taxation of reorganisations and transfers as well as protection of financial interests of EU Member States as specified by the Directive, that is, to analyse which entities and operations are subject to the application of this mechanism; how the tax neutrality is being ensured on the level of companies taking part in reorganisations and transfers as well as shareholders thereof, how the issues of tax loss carry-over are being solved alongside with the protection of financial interests of Member States. To provide relevant proposals on how to improve the mechanism defined by the Directive.

3. To analyse the provisions of the Law on Corporate Income Tax and all related legal acts. Upon determining any cases of improper regulation, to put forward relevant proposals for the legislator with regard to further improvement of relevant provisions of the Law on Corporate Income Tax.

4. To discuss individual problematic aspects of the mechanism introduced by the Directive and to disclose how the issues regulated or insufficiently regulated by the Directive are being solved in the national law stipulating taxation with corporate income tax. To put forward relevant proposals on how any potential contradictions should be solved in such cases and how any gaps in legal regulation should be eliminated.

5. To analyse how the Directive has been implemented in other Member States and, while giving proposals for further improvements of the Directive and national law on corporate income tax, follow the best practice of the foreign countries.

6. To prove that, both regarding the provisions of the Directive and the aims sought to be achieved through adoption thereof as well as the national regulation, the provisions of the Law on Corporate Income Tax are in some cases interpreted improperly by the tax administrator and to offer suggestions on how such inconsistencies ought to be solved on ad hoc basis.

5. Statements supported by the dissertation

1. The provisions of the Directive regulating the mechanism of taxation of reorganisations and transfers and ensuring neutrality thereof have been – in essence – properly transposed into the Law of the Republic of Lithuania on Corporate Income Tax.

2. In several cases the problems of operation of the mechanism enshrined in the Directive in Lithuania may be actually eliminated only by amending the currently effective national regulation, e.g. (1) by way of cancelling specific prior restrictions provided for in the Law on Corporate Income Tax (in cases of maintenance of shares for a 3-year term and tax loss carry-over linked to continuation of activities) which are contrary to the provisions of the Directive and the principles of EU law; or (2) by way of setting a specific provision against tax avoidance which would be applied in cases of reorganisation or transfer.

3. In some cases, for example, where tax losses are being carried-over during *international*[23] reorganisation and transfer, the Directive's provisions have not been transposed directly into the Law on Corporate Income Tax. The likely solution to this situation could be partially provided by the systemic analysis of this law allowing to make a conclusion that in the given cases the Directive has also been properly implemented, however, for the sake of clarity there is a need of relevant amendments to the Law on Corporate Income Tax.

4. With due consideration of both the provisions of the Directive and purposes of adoption thereof as well as national regulation, certain provisions of the Law on Corporate Income Tax are inappropriately interpreted by the tax administrator both in the commentary to the Law on Corporate Income Tax and in practice (for instance, indicates that the activities in a permanent establishment should be pursued on a regular basis, or else the entire operation of reorganisation or transfer would be questioned, or requires for a physical separation of the activity well before the transfer), besides, by means of these instruments practical issues arising in cases of reorganisations and transfers are not being

[23]This refers to transactions crossing borders of one country, which is defined as *cross border* in English.

dealt with (for eg., nothing is being said with regard to the volume of permanent establishment in Lithuania).

5. The regulation provided for in the Directive should be improved by introducing in the Directive relevant definitions of concepts which have not been specified therein or by clarifying the ones already in the Directive; also by way of unifying the mechanism of tax loss carry-over and, with due consideration of business interests, stipulating new operations of reorganisations and transfers.

6. Practical value of dissertation paper

Firstly, the conclusions and proposals regarding possible improvement of regulation of taxation of reorganisations and transfers may serve both to the national legislator in its efforts to develop the Law on Corporate Income Tax as well as the existing legal regulation set by other legal acts and to EU authorities with regard to any amendments to the existing regulation in the field of taxation of international reorganisations and transfers.

Secondly, the analysis of taxation of reorganisations and transfers should be useful both to the tax administrator of the Republic of Lithuania and to the tax payer who are applying the provisions of the Law on Corporate Income Tax as well as to the authorities dealing with tax disputes in Lithuania.

Thirdly, this paper could be of value while carrying out various practical trainings related to the topic of taxation of reorganisations and transfers held for the purposes of in-service training of employees working for the private sector.

Lastly, this dissertation could also be of use to researchers dealing with various problematic issues arising in the field of taxation of reorganisations and transfers as well as to those who deliver lectures to the students on the topics of taxation with corporate income tax and theory of taxation of international operations.

7. Methodology of research

While preparing the dissertation the following research methods have been applied: analysis of documents, logical, historical, systemic and comparative.

In accordance with the method of document analysis, various legal acts defining the taxation of reorganisations and transfers have been analysed, namely, Directive including any further additions and amendments thereto, Law on Corporate Income Tax as well as any other legal acts governing taxation regime in Lithuania and sources of private law. Moreover, scientific literature and court decisions on the issues in question have been included in the analysis.

Logical method has been used for the purposes of interpreting the contents of the provisions of tax law and for preparing summaries and conclusions. In addition, in accordance with this method various opinions of legal researchers have been assessed and analysed and then further approved or not in this paper; another solution to these issues is proposed.

Due to historical method the dissertation presents a historical analysis of legal acts regulating taxation of reorganisations and transfers which helps to disclose why one or another regulation solution has been selected.

The method of systemic analysis has been applied when dealing with questions where it is necessary to analyse legal provisions of more than one branch of law in order to thoroughly explore these questions. For example, in order to answer the question whether, in accordance with the exception for paying 10 per cent of share value in cash as defined in the Directive and the Law on Corporate Income Tax, a redemption of shares of undesirable minority shareholders is possible one must analyse not only the said legal acts but also legal provisions regulating civil legal relations (both those of national law and international law) since the regulation of tax-related legal relations in this case is certainly related with the issues governed by the civil law. Thus, the application of systemic method in a scientific research facilitates the analysis of tax-related issues not on an individual or separate basis but rather systematically. The method of systemic analysis also allows realising links between international legal provisions governing tax-related legal relations.

Comparative research method is particularly important when disclosing strengths and weaknesses of the existing mechanism of reorganisations and transfers and when

putting forward recommendations on how one ought to improve this legal regulation. With the help of this method the regulation in Lithuania under question is compared with relevant regulation in other EU Member States.

When interpreting the contents of legal provisions linguistic, teleological and systemic legal interpretation methods have also been used. When applying linguistic method, the texts of legal acts and other documents are analysed in accordance with grammar, syntax and other linguistic rules. The meanings of words or concepts and the structure of sentences is being interpreted with the help of this method. This method is also important when analysing various sources drawn up in foreign languages. However, since during the interpretation of legal provisions it is not possible to limit analysis merely to the application of linguistic method as in this case the actual meaning of a legal provision may remain undisclosed, for the purposes of revealing the content of legal provisions teleological (interpretation of legal provisions in accordance with the aims of legal acts and tasks and objectives of the authorities which adopted them) and systemic legal interpretation methods have been used.

8. Sources of research

The main sources of the current academic research are the following: Law of the Republic of Lithuania on Corporate Income Tax and the Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (including all subsequent adjustments and amendments thereof). In addition, the list of sources includes legal acts of the European Union and the Republic of Lithuania governing other relevant tax-related legal issues; international and national legal acts governing civil legal relations, draft legal acts, *travaux preparatoires*. The study on implementation of the Directive in the Member States drawn up by the international auditing company EY has been used in this paper to the extent that is necessary for the purposes of comparing legal regulation in place in Lithuania and foreign countries or highlighting the relevance of a certain issue. Moreover, the current paper also refers to scientific literature of the authors of Lithuania and abroad which deals with the issues of taxation of reorganisations and transfers. As far as the researchers representing foreign law

are concerned, most attention has been given to the works of Finnerty C., Helminen M., Lang M., Lozev K., Petkevica J., Petrosovitch K., Terra B., Walter P. Van Den Broek H. and other scientists.

It is very important to note that for the purposes of ensuring uniform application of EU law in all EU Member States the Court of Justice of the European Union (hereinafter referred to as the Court of Justice or the Court) has been vested with the right of interpreting EU law[24]. Thus, when applying and interpreting legal provisions of the Directive (alongside with the Law on Corporate Income Tax), the case-law of this Court should also be taken into account. Therefore, decisions of this Court are a particularly important source of the research of the present dissertation. Since the case-law of this Court while interpreting the provisions of the Directive was not abundant at the time of preparation of this dissertation, the interpretations of this Court regarding other fields, for instance, taxation with value added tax, have been followed as well.

The present paper also refers to the case-law of the Supreme Administrative Court of Lithuania regarding the issue of taxation with value added tax and tax administration (the issues of taxation of reorganizations and transfers which could be of relevance to any possible solutions of the issues being dealt with in the present dissertation have not been handled by this court at the time when the present dissertation was being prepared).

9. Structure of dissertation

The dissertation is comprised of introduction, three operative parts, conclusions and proposals, list of literature and the list of scientific publications of the author of the dissertation, and two appendices to the dissertation.

The introduction to the dissertation substantiates the scientific novelty of the paper as well as relevance of the topic under consideration, reviews any researches carried out in Lithuania and abroad with regard to the topic under consideration or any publications released on this topic, defines the object, subject-matter and aim of the dissertation, formulates objectives thereof and statements supported by the dissertation, specifies the

[24] Court of Justice of the European Union [interactive content, accessed on 27 June 2013]. Online access: http://curia.europa.eu/.

practical significance of the paper, introduces methods used for this research and sources referred to as well as describes the general structure of the paper.

The first operative part of the dissertation titled "Reorganisations and transfers. Need to regulate these operations by international legal acts of tax law" deals with the ways how these operations are made subject to taxation on a domestic level – their tax neutrality is discussed which helps to differentiate them from other business transactions. In addition, the author further discusses if the said taxation in the meaning of tax law is an incentive or special taxation conditions aimed at specific cases. This part of dissertation also analyses which restrictions may arise in cases where the operations under consideration transcend the borders of one country and it is stated that for these purposes, in particular creation of a uniform market and elimination of these restrictions, the Directive discussed in the dissertation was adopted. The first dissertation part also discuses the aims and history of the adoption of this Directive as well as various operations which are subject to the provisions of the Directive.

The second part of the dissertation "Mechanism of taxation of reorganisations and transfers as specified by the Directive" sets out which entities are made subject to the provisions of the Directive as well as analyses how the tax neutrality of reorganisations and transfers is ensured on both company-level and shareholder-level and explores the mechanism of tax loss carry-over as enshrined in the Directive. Moreover, this part describes how the Directive helps to ensure financial interests of Member States.

It must be noted that the chosen differentiation between the first and the second parts of the dissertation is a conditional one. With due account of the fact that the Directive regulates complex tax-related legal relations, namely, complicated international operations, the first part of the dissertation is more descriptive – for the sake of simplicity and clarity and it aims to make the reader acquainted with the peculiarity of reorganisations and transfers, i.e. tax neutrality, and this part also identifies reorganisations and transfers as specified by the Directive – for the sake of clarity relevant graphs of these operations have been provided in the Appendices to the Dissertation. The second part of the dissertation is more analytical and its purpose is to disclose the mechanism of taxation of reorganisations and transfers. This part of the dissertation explores relevant provisions of both the Directive and the Law on Corporate Income Tax in more detail, that is, it discusses subjects at which the Directive is aimed as well as the mechanism of operation of the

Directive. It also points out problematic aspects of the current regulation and any possible gaps.

The third part of the dissertation "Separate problematic issues of the mechanism of taxation of reorganisations and transfers as prescribed by the Directive" deals with separate problematic issues regarding this field, such as, for instance, the meaning of the concept "branch of activity" or the possibility of redemption of the minority of shares of the shareholders. Considerable attention is being paid to the grounds for non-application of the mechanism prescribed by the Directive, analysis of the presumption of tax avoidance, and gaps in the current national regulation are also identified. This part discusses the possibility of direct application of the provisions of the Directive. Some issues which are being dealt with in the third part of the dissertation, e.g. concept of "branch of activity", the possibility of redemption of the minority of shares of the shareholders could have also been incorporated into the first or the second part of the dissertation. However, the author of the present dissertation is of the opinion that with due regard of the fact that the part of business is being transferred during several operations whereas the possibility of redemption of the minority of shares of the shareholders has been provided almost in all cases or reorganisations and transfers, for the sake of clarity and in order to avoid any possible repetitions these issues are to be dealt with separately. Besides, the issues under consideration as well as possible solution regarding the questions which have been raised are, according to the author of the dissertation, made clearer when they are being dealt with in the end of the research, that is, upon explaining the mechanism of operation of the Directive. For the sake of clarity, the first and the second part of the dissertation contain references to the third part of the dissertation.

Thus, with due regard to the title of the dissertation "Taxation of Reorganizations and Transfers in Lithuania: Implementation of the Council Directive 2009/133/EC" and bearing in mind the aim of the research carried out by this dissertation, that is, to confirm or to deny the hypothesis that the provisions of this Directive have been actually properly transposed into the Law of the Republic of Lithuania on the Corporate Income Tax, *the text of the Directive is consistently analysed in the dissertation* by way of starting with operations and subjects to whom the Directive is applied, which is then followed by the analysis of relevant provisions governing the mechanism of operation of the Directive (safeguarding tax neutrality, tax loss carry-over) and ensuring financial interests of

Member States (requirement of continuation of business via permanent establishment) and then the analysis is finalised by such cases where the Member States are given the right to refuse to apply the provisions of the Directive, that is, cases of application of relevant measures aimed against tax avoidance. The text of the Directive itself and structure thereof presupposes the questions analysed in the Dissertation and sequence thereof as well as their importance for disclosing the topic and for the entire research taken up in this dissertation. For the sake of clarity and consistency, relevant provisions of the Law on Corporate Income Tax are analysed in parallel with respective provisions of the Directive which are being implemented by the said law, and due to this reason the second part of the dissertation is commenced by the historical aspect, that is, by way of analysing how the provisions of the Directive have been implemented in the Law of the Republic of Lithuania on Corporate Income Tax. The dissertation sets out problems related to both international and domestic regulation as well as puts forward relevant suggestions.

With due regard to the peculiarities of national regulation and the practice in place at the time of preparing the dissertation, this dissertation does not explore certain provisions of the Directive in much detail. For example, since the practice of establishing European companies or European cooperative societies or restructuring of existing legal entities into these legal forms has not been widespread in Lithuania, the dissertation only analyses certain problematic issues of specific cases of transfer of registered establishment of a European company and European cooperative society.

At the end of the dissertation the research undertaken in this academic paper is finalised by conclusions which, according to the author of the dissertation, summarise the results and provides potential solutions of the tasks formulated beforehand; proposals are put forward with regard to possible improvement of the current regulation of taxation of reorganisations and transfers. Moreover, the list of literature used while writing this dissertation and the list of publications of the author in scientific journals are provided as well.

10. Summary of the first part of the dissertation

Contrary to general taxation rules where the income from the increase of asset value is being calculated and taxed accordingly at once when such assets are being transferred,

in cases of reorganisation and transfer the taxation of income from the increase of asset value is postponed until the moment when such property is sold, exchanged or otherwise transferred on a later date. Due to such legal regulation the operations of reorganisations and transfers are more attractive in terms of taxes. It should be noted that usually in cases of reorganisations and transfers tax loss carry-ver is admissible whereas while carrying out usual transactions tax loss carry-over is not possible.

The author of this dissertation, taking due account of both the definition of tax incentive as set out in the Law of the Republic of Lithuania on Tax Administration[25] and the definition and examples provided in the legal science, comes to a conclusion that the specified regime of taxation of reorganisations and transfers, namely, *postponement* of taxation of income from the increase of asset value until these assets are actually transferred in the course of other operations, is not to be regarded as tax incentive but rather as the taxation adapted to specific situations.

The dissertation then goes on to point out that on a *national* level (of course if this matches economic logic) in terms of taxes business sector views reorganisations and transfers (and not sales) more suitable. Then it is stated that the situation is essentially changed in cases where such operations cross the borders of one country and become subject to legal acts of several countries. In the absence of uniform international regulation which would ensure tax neutrality of such operations, companies face many restrictions and constraints.

The legal doctrine states that *international* reorganisations and transfers are aggravated by social and even psychological aspects; however, the biggest burden in these cases is unfavourable taxation which is encountered by both companies taking part in the operations and their shareholders. In this case the problem stems from the fact that bearing in mind the international nature of reorganisations and transfers, i.e. these operations transcending the borders of one country, shares and other assets may leave one country and end up in another. If analogous (as in domestic cases) regulation is applied with regard to such situations with an international component and it is provided that the shares and any other assets are moving at tax-related historical values, reorganisations and transfers

[25] Law of the Republic of Lithuania on Tax Administration. *Official Gazette*, 2004, No. 63-2243.

would not create any income from the increase of asset value, therefore, countries would not only lose their right to tax these assets at the time of „exit“ thereof but also for any future periods since these assets would not belong to their tax jurisdiction. It is therefore not surprising that the countries are not interested in applying rules applied for domestic cases in situations related to international reorganisations and transfers[26].

If it is decided to apply the principle that the assets (including shares) are being moved at the rate of market value, this would lead to income from the increase of asset value which would be accordingly taxed with corporate income tax, therefore, the companies taking part in these operations would suffer respectively. In this case it is very important to draw attention to the fact that while implementing reorganisations and transfers it is company shares and other assets which is being “moved” but not money. If national regulation is not coordinated accordingly and it is not provided that in such cases the assets are moved not at the rate of tax-related historical value but rather in accordance with market value and if the countries allow the taxation of income from the increase of asset value, this leads to a situation where the companies or shareholders thereof must pay taxes even though no pecuniary payment has been received (even though the asset value does increase). If national regulation is not coordinated accordingly, generated tax-related loss which has been accumulated in one country and has not been acknowledged in another is lost as well, which makes international reorganisations and transfers even less attractive in terms of taxation.

It goes without saying that at least on the EU level with common market and free movement of persons and capital such situation had to have a uniform solution – a set of rules analogous to national ones with regard to postponement of taxation of income from the increase of asset value were necessary also in cases where reorganisations and transfers are carried out between the companies from different Member States.[27]

With due consideration of the fact that the Directive analysed in the present dissertation directly influenced financial interests of Member States, adoption thereof lasted for even 20 years and this Directive was adopted only in 1990. It must be noted that the final wording of the Directive (in comparison with initial drafts) also expanded the

[26] VAN DEN BROEK, H. *Cross-Border Mergers* <...>, p. 120-123.
TERRA, B., WALTER P., European Tax Law <...>, p. 653-657.
[27] LANG, M. *et al. Introduction to European Tax Law* <...>, p. 152-154.

scope of application of this Directive – it provided for such operations as exchange of shares and merger thereof to the company owning 100 per cent of shares. In addition, relevant measure aimed against tax evasion has been stipulated. This Directive had to be implemented in Member States until 1 January 1992.

In accordance with Article 1 of the Directive, it is being applied with regard to mergers, divisions, transfers of assets and exchanges of shares (after the amendments of the Directive adopted in 2005 provisions thereof are being applied with regard to partial divisions and transfers of assets as well as for the transfers of the registered establishment of European companies and European cooperative societies[28]).

Prior to discussing each of these operations in more detail in the dissertation, is it noted that the provisions of the Directive are being applied only with regard to operations in which companies from two or more Member States are involved, i.e. where such operation has an international component and is not carried out on national level only.

11. Summary of the second part of the dissertation

Since the second part of the dissertation is more problematic and analytical, it explores the gaps not only in the Directive but also in national regulation, prior to consistent analysis of the wording of the Directive, firstly a *historical* analysis is carried out and the transposition of the provisions of the Directive into the national legal instrument – Law of the Republic of Lithuania on Corporate Income Tax – is discussed as well.

This part of the dissertation further explores the subjects to which the provisions of the Directive are applied. It is noted that the application of the Directive with regard to *persons* is limited – this legal instrument is applied only in cases where the *companies from two or more Member States* are taking part in the said operations.

The definition of a *company from a Member State* is given in Article 3 of the Directive and such company must have *all three* features listed below:

1. takes one of the forms listed in Annex of this Directive;

[28] Council Directive 2005/19/EC of 17 February 2005 <...>.

2. according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation treaty concluded with a third country, is not considered to be resident for tax purposes outside the Community;

3. is subject to one of the taxes listed in the Directive without the possibility of an option or of being exempt.

Each requirement is being analysed separately in the dissertation.

Then the dissertation analyses the mechanism of operation of the Directive set out in Chapter II thereof, namely, separately discusses regulation ensuring tax neutrality with regard to companies taking part in reorganisations and transfers and then specifically deals with regulation thereof at the level of shareholders of these companies; it also discusses the provisions regulating tax loss carry-over.

The dissertation summarises that the essence of the Directive is the postponement of taxation of income from the increase of asset value which is being implemented by way of transferring assets or liabilities to the receiving company at the rate of historical tax values. When the receiving company would transfer such assets later on, the income from the increase of asset value calculated as the difference between the market value of such transfer and historical asset value prior to reorganisation or transfer would be taxed accordingly[29]. The burden of taxation of income from the increase of asset value in cases of reorganisation or transfer is merely transferred upon another person (with the exception of exchange of shares where the burden remains for the same person but is linked to other shares) whereas the tax liability must remain to be met for the same country (due to the requirement to continue one‘s business via permanent establishment in the country of the receiving company).

When discussing the issue of tax neutrality *on the corporate level* the dissertation draws particular attention to the operations of the transfer of assets and exchanges of shares. During these operations the companies participating in them acquire not assets or liabilities but the shares of other companies. The Directive does not explicitly determine

[29] TERRA, B., WALTER P., *European Tax Law* <...>, p. 669.
FINNERTY, C. Fundamentals of International Tax Planning. Amsterdam: IBFD Publications BV, 2007, p. 27.
LANG, M. et al. Introduction to European Tax Law <…>, p. 158.

the values at which these shares ought to be accounted for in the companies acquiring them, therefore, a problem of double economic taxation may arise in practice. According to the author of the dissertation, given both the position set out in the scientific literature and the conclusions of the Court of Justice, double economic taxation in Lithuania should be eliminated in cases related to both exchanges of shares and transfer of assets.

The dissertation then goes on to point out that in order to postpone the taxation of income from the increase of asset value *on the level of shareholders* as well, the Directive introduced a mechanism identical to the one applied on the corporate level. This mechanism has been specified under Article 8 of the Directive. In this case, following the said article of the Directive, for the purposes of protection of financial interests of Member States the historical tax values of shares must be maintained – a shareholder must not attribute – for tax purposes – higher value to the securities acquired than the value which the securities exchanged had immediately before the reorganisation or transfer. Hence, at the level of shareholders, similarly to the level of companies taking part in reorganisations and transfers, the mechanism enshrined in the Directive secures the postponement of taxation of income from the increase of asset value but not an exemption.

The dissertation also draws attention to the fact that the Directive stipulates another safeguard measure related to the financial interests of Member States – assets and liabilities being transferred must remain linked to the *permanent establishment* of the receiving company in the state of transferring company – in cases of reorganisations and transfers[30] assets may not be moved physically.

Since the definition of permanent establishment has not been given in the Directive, the dissertation further analyses other legal acts and practice of authorities handling disputes and the conclusion is drawn that – upon taking due account of the fact that the Directive regulates international relations – the fact whether a company has a permanent establishment or not and whether assets and liabilities are involved in the generation of profit would be dealt with in accordance with relevant double taxation treaties applied between Member States. The second requirement enshrined in the Directive in particular, that is, the requirement to be involved in the generation of profit or losses through

[30] The requirement of permanent establishment is not applied with regard to operation of exchange of shares since only shares of companies are exchanged and other type of property is not transferred.

permanent establishment, shall ensure that in accordance with the provisions of a double tax treaty a permanent establishment will be definitely established in the country of the transferring company and that this country shall not lose its right to tax the assets located in its jurisdiction (i.e. in the said permanent establishment) in any way. Thus, in this way the aim to protect the financial interests of Member States where the transferring entity is located as enshrined in the Directive would be properly implemented.

The dissertation also analyses how, for tax purposes, the assets which during reorganisation or transfer are not linked to the permanent establishment of the receiving company and are physically moved abroad to the acquiring company ought to be taxed. In addition, such cases where upon reorganisation or transfer the assets are moved from the permanent establishment to the company abroad, are discussed. The analysis carried out in the dissertation is then used to make conclusions and give relevant proposals.

Then the dissertation points out that the mechanism created by the Directive is attractive not only because it postpones the taxation of income from the increase of asset value but also by the fact that by way of implementing reorganisations and transfers provided for in the Directive accumulated tax losses are not lost. The Directive stipulates that in cases where the transferring country allows the acquiring company to take over the losses of the transferring company in case of national reorganisation or transfer then it must apply analogous provisions in cases where the acquiring company taking part in such operation is the company of another Member State and it must allow non-deducted tax losses to be carried over by the permanent establishment of the receiving company remaining in its territory.

When analysing this mechanism for tax loss carry-over which has been enshrined in the Directive, first of all, the attention is drawn to the fact that the Directive directly links the possibility of tax loss carry-over to national regulation[31] and it is also noted that in cases of reorganisations and transfers the Directive ensures the tax loss carry-over of the transferring company only on the level of the permanent establishment of the receiving company and not on the level of the receiving company itself.

[31] HELMINEN, M. Must the Losses of the Merging Company be Deductible in the State of Residence of the Receiving Company in EU. EC Tax review, 2011-4, p. 172.

The dissertation also states that the Directive does not regulate the amount of tax losses to be carried-over, does not discuss the issue of definition of tax losses and, upon analysing the rules of tax loss carry-over in place in Lithuania, the dissertation provides relevant conclusions and proposals with regard to further development of the existing regulation.

12. Summary of the third part of the dissertation

While the first and the second parts of the dissertation analyse the mechanism of operation of the Directive as well as operations and subjects to which the provisions of the Directive are applied, the third part of the dissertation deals with separate problematic issues and particular attention is being paid to the grounds for non-application of the taxation mechanism as established in the Directive.

First of all, this part of the dissertation presents a detailed analysis for the purposes of finding answers to the question whether the exception of paying for shares in cash as prescribed in the Directive has been established only with the aim of solving mathematical problems related with the calculation of proportions of shares or whether it also enables to redeem the shares of the minority of the shareholders during reorganisation and transfer (in case where the admissible pecuniary contribution must not be distributed proportionately to all shareholders).

The dissertation makes a conclusion that all the sources analysed including both the case-law of the Court of Justice and the sources of civil law governing international reorganisations do not provide any specific answer as to how the 10 % pecuniary payment ought to be calculated – whether this should be done on the basis of total share value or proportionately for each shareholder. Therefore, we may conclude that the solution of this problem has been left to be dealt with by the national legislator.

With due account of this fact, the dissertation further reviews how this issue has been handled in the legal acts of the Republic of Lithuania and the conclusion is made that the redemption of the share package of the minority of shareholders in Lithuania is possible only if companies are being reorganised by division and only upon the initiative of the minority shareholders themselves.

The third part of the dissertation also draws attention to the fact that the Directive provides two operations of business transfer and the Directive gives the definition of a branch of activity. However, in practice certain issues regarding interpretation of this concept may arise. It is not clear whether, for example, a branch of activity in the meaning of the Directive means only active business (such as production) or whether this may be also understood as passive activity (such as management of qualifying holding or intellectual property)[32]. Likewise, it is not clear whether the branch of activity which is being transferred in the company must structurally divided well before transfer thereof (e.g. there must be a separate branch office or unit of the company) or whether such requirement is not applied.

With due consideration of the problematicity of this concept, the dissertation provides an in-depth analysis of the concept of branch of activity as presented in the Directive as well as interpretation thereof in the case-law of the Court of Justice and the concept of the branch of activity in the case-law of the Court of Justice regarding the spheres of VAT and capital taxes, discusses the interpretation of this concept in Lithuania and provides relevant conclusions and proposals.

Upon providing for a favourable taxation regime in cases of international reorganisations and transfers, the Directive enables the Member States not to apply it in certain cases – one of such cases is where such operations are used for the purposes of tax evasion or avoidance thereof. The dissertation particularly focuses on this provision aimed against tax evasion which has been enshrined in the Directive.

While analysing the currently effective Paragraph 1 of Article 15 (anti-avoidance provision) the dissertation discusses these aspects: 1) grounds for application of Article 15 are tax evasion or tax avoidance thereof; 2) this article provides for the presumption of tax evasion or tax avoidance and distribution of the burden of proof; 3) analysis of origin of Article 15 of the Directive and consequences for non-transposition of Article 15 of the Directive to the national law; 4) application of the measure aimed against tax avoidance in Lithuania.

The dissertation states that the first problem while applying Article 15 of the Directive is that it uses such concepts as tax evasion and tax avoidance as well as valid

[32] TERRA, B., WALTER P., *European Tax Law* <...>, p. 662.

commercial reasons, however, such concepts are neither explained nor there is any clear differentiation between them.

It must be noted that the author of the dissertation upholds the position that a uniform concept of both valid commercial reasons and tax avoidance is not possible since every specific situation is different and must be assessed individually (which has been pointed out by the Court of Justice in its case-law). This assessment has been deliberately left to the discretion of tax administrators and the courts by the legislator. The dissertation analyses the said concepts for the purposes of achieving at least partial clarity and certain guidelines which would assist in understanding when certain article of the Directive aimed against tax avoidance might be applied and when not.

While analyzing the provisions of the Directive and trying to disclose the meaning of the said concepts of tax avoidance and valid commercial reasons and bearing in mind the fact that these concepts have been used in EU directive, the case-law of the Court of Justice is explored.

As to the distribution of the burden of proof, scientific literature stipulates (and the author of the dissertation approves this position) that it is not yet clear whether the purpose of the Directive was to restrict tax planning possibilities as much as possible and to formulate Article 15 in such a way so as to ensure that economic operation would not only have valid commercial reasons but also there were no signs of tax evasion or tax avoidance. Upon reviewing the case-law of the Court of Justice where EU law is being interpreted the conclusion is made that, following the wording of Article 15 of the Directive, the tax payer is still under the obligation to justify that valid commercial reasons are *predominant* in an operation[33]. The author of the dissertation also draws attention to the fact that the Directive uses such wording as "has as its principal objective or as one of its principal objectives tax evasion or tax avoidance". Thus, in order to apply the provision aimed against tax avoidance, it is necessary that tax avoidance was the principal objective allowing concluding one or another type of transactions and that this objective would be predominant. Therefore, the practice of the tax administrator to apply the provision aimed against tax avoidance upon determining the fact of tax avoidance as one of many objectives of the transactions concluded would be defective.

[33] TERRA, B., WALTER P., *European Tax Law* <...>, p. 693-695.

Considering the case-law of the Court of Justice in the sphere of application of specific provision against tax avoidance which has been analysed in the said dissertation, the author of the dissertation assesses certain requirements enshrined in the Law of the Republic of Lithuania on Corporate Income Tax[34] as well as puts forward relevant conclusions and proposals.

With regard to cases where Article 15 of the Directive has not been transposed to national legal acts, the dissertation draws attention to the fact that in its case-law the Court of Justice came to a clear conclusion that the Member States may prohibit the use of the favourable taxation regime as provided for in the Directive even in cases where Article 15 of the Directive has not been transposed to the national law. In such cases the general measure against tax avoidance or even unwritten (formulated by the case-law) principle may serve as suitable measures for the purposes of justifying taxation[35]. However, it is also very important to note that the Court has not provided for the possibility of direct application of Article 15 of the Directive[36].

The dissertation further notes that in Lithuania Article 15 of the Directive – measure against tax avoidance – has not been directly transposed into the Law on Corporate Income Tax. It is not clear why the legislator made such a decision and what kind of measures ought to be applied in cases where by way of reorganisation or transfer it is attempted to avoid tax payment in Lithuania since the explanatory letter to the relevant draft Law on Corporate Income Tax merely states that it is being sought to make the provisions of the law in conformity with the Directive.

With regard to the principles formulated in the jurisprudence of the Court of Justice which have been set out in the dissertation, the conclusions made in the scientific literature as well as practice of other countries, the dissertation concludes that in order to prevent tax avoidance in cases of international reorganisation and transfer the Lithuanian tax administrator might follow the general provision against tax avoidance – the principle of substance over form as enshrined in Article 69 (1) of the Law on Tax Administration[37].

[34] Law of the Republic of Lithuania on Profit Tax. *Official Gazette*, 2001, No. 110-3992.
[35] TERRA, B., WALTER P., *European Tax Law* <...>, p. 688.
TERRA, B., KAJUS J., *A Guide to the European VAT Directives*. Amsterdam: IBFD Publications BV, 2013, p. 55.
IBDF Tax Travel Companions, *ECJ Direct Tax Compass*. Amsterdam: IBFD Publications BV, p. 82.
[36] LANG, M. *et al. Introduction to European Tax Law* <...>, p. 172.
[37]Law of the Republic of Lithuania on Tax Administration. *Official Gazette*, 2004, No. 63-2243.

Such opinion of the dissertation‘s author is further confirmed by the case-law of the Supreme Administrative Court of Lithuania (in the area of both direct and indirect taxes) which links the principle of substance over form with the same prohibition to the law with which Article 15 of the Directive is being linked in the jurisprudence of the Court of Justice.

Upon reaching the said conclusion, the dissertation then goes on to analyse other problematic aspects of application of the principle of substance over form in cases of international reorganisation or transfer and relevant conclusions and proposals are made.

13. Conclusions and proposals

1. When implementing the undertakings related to the accession to the European Union, both the provisions of the Directive and relevant amendments thereto have been in fact properly transposed into the Law of the Republic of Lithuania on Corporate Income Tax. However, mechanical and literal transposition of the provisions of the Directive in some cases determined the fact that the regulation of legal relations put in place by the national legal provisions enshrined in the Law on Corporate Income Tax does not conform to the provisions of the Directive nor is in compliance with objectives thereof.

2. Points 1 and 2 of Paragraph 1 of Article 41 of the Law on Corporate Income Tax ought to be supplemented with relevant provisions that, within the meaning and objectives of these provisions, the entity of both Lithuania and EU Member State – following the provisions of double taxation agreement – is not regarded as tax resident of a third country. At the time of preparing the present dissertation this requirement stipulated in the Directive has not been transposed into the Law on Corporate Income Tax. Such national regulation would not assist in achieving the objectives of EU tax policy to restrict cases where both the favourable mechanism (set in the Directive) of postponement of taxation of the income from the increase of asset value and any relevant advantages in place in third countries are being used.

3. The Directive does not regulate what value of shares ought to be accounted for in the companies acquiring them in cases of transfer of assets and exchanges of shares. This legislative omission may result in double economic taxation. In Lithuania this problem has been partly solved only in case of exchange of shares in the commentary on

the Law on Corporate Income Tax drawn up by the State Tax Inspectorate saying that in such cases the price of shares received by a Lithuanian entity by means of exchange equals the price of emission of the shares issued by such an entity. In case of transfer of assets, double economic taxation may be eliminated only partly (according to information available during the preparation of the dissertation) with the help of "participation exemption" It is recommended to eliminate double economic taxation in Lithuania in the case of transfer of assets allowing the company transferring the activity to account for the shares received at the market value of the activity being transferred. Furthermore, the author of the dissertation is of the opinion that the problem of double economic taxation in cases of both exchange of shares and transfer of assets should be solved not via interpreting relevant provisions of the Law on Corporate Income Tax in the commentary of this law but by supplementing accordingly Article 42 of the law itself.

4. For the purposes of legal certainty, it is recommended to amend the commentary to Paragraph 3 of Article 41 of the Law on Corporate Income Tax accordingly by providing that this legal provision does not require to leave all assets, rights and undertakings in Lithuania and that foreign entity ought to decide for itself the extent of activity and the assets on the grounds of which such activity would be pursued through permanent establishment in Lithuania. The linguistic interpretation of Paragraph 3 of Article 41 of the wording of the Law on Corporate Income Tax in force at the time of preparing the dissertation presupposes a conclusion that upon reorganisation or transfer all transferred assets, rights and liabilities must remain linked to the permanent establishment of the foreign entity in Lithuania, or else the entire reorganisation or transfer may be questioned for tax purposes. However, systematic analysis of legal acts allows making a conclusion that the foreign entity should decide for itself the extent of activity that it will be pursuing through its permanent establishment in Lithuania – such opinion has been verbally expressed by the State Tax Inspectorate as well.

5. The author of the dissertation maintains that, upon terminating the activity of the permanent establishment which had to continue its activity in Lithuania after reorganisation or transfer as well as in cases of asset movement from the permanent establishment in Lithuania to the foreign company, one ought to take into account specific actual circumstances and decide whether there are the requisite conditions to apply the general provision against tax avoidance (reorganisation or transfer might be questioned

only upon determining the case of tax avoidance). The dissertation draws attention to the fact that the Lithuanian tax law does not have "exit taxes", therefore, it is not clear how the asset movement from the permanent establishment in Lithuania to the foreign company would be treated for tax purposes. The position of the State Tax Inspectorate that upon reorganisation or transfer the activity through permanent establishment in Lithuania ought to be pursued constantly and in case of discontinuation thereof the entire reorganisation or transfer would be questioned, is to be regarded disproportionate.

6. Upon comparing the rules of loss carry-over in cases of reorganisations and transfers with general rules for loss carry-over enshrined in the Law on Corporate Income Tax, the dissertation draws attention to the fact that in cases of both national and international reorganisations and transfers an additional condition has been provided – continuation of the transferred activity for a 3-year term set in advance by the law (irrespective of each specific case). The author of the dissertation maintains that this 3-year rule ought to be viewed as a certain pre-restriction which is contrary to the principle of proportionality enshrined in EU law. It is recommended to cancel this requirement by way of amending Paragraphs 1 and 3 of Article 43 of the Law on Corporate Income Tax accordingly.

7. For the purposes of legal certainty Article 43 of the Law on Corporate Income Tax – to the extent that it is related to international operations – should be amended accordingly by explicitly stating therein that in such cases losses are carried-over in the permanent establishment of the foreign entity which remains in Lithuania (analogous regulation has been provided for in the Directive as well). The loss carry-over in cases of international reorganisation and transfer has not been directly regulated in Article 43 of the Law on Corporate Income Tax at the time of preparing the present dissertation, however, systematic analysis of this law allows concluding that in cases of such operations losses may be carried-over only in the permanent establishment of the foreign entity remaining in Lithuania but not in the foreign entity itself. Besides, with regard to the currently effective provisions of the Law on Corporate Income Tax, for the purposes of certainty the commentary of Article 43 thereof ought to be amended and summarised accordingly by way of providing that losses may be carried-over not only in cases of reorganisations specified under Points 1-3 of Paragraph 2 of Article 41 but also in cases

of international reorganisations and transfers specified under Points 4-6 of Paragraph 2 of Article 41 of the Law on Corporate Income Tax.

8. While analysing the concept of "branch of activity" used in the Directive and the Law on Corporate Income Tax and summarising the case-law of the Court of Justice in the spheres of the application of the Directive, taxation with added value tax and capital tax, the conclusion is made that the main criterion in interpreting and actually applying the provisions of legal acts is a functional independency of the branch of activity being transferred and not a physical separation of activity existing well before the transfer. National regulation in Lithuania formally corresponds both to the provisions of the Directive and to the case-law of the Court of Justice, however, the commentary of the Law on Corporate Income Tax may be understood ambiguously. Since at the time of preparation of this dissertation the approach and practice of the State Tax Inspectorate – in comparison with the provisions of the commentary – have changed and the requirements regarding physical separation of the activity being pursued are no longer specified, it is recommended to accordingly amend the commentary of the Law on Corporate Income Tax.

9. The author of the dissertation recommends adjusting Paragraph 10 of Article 42 of the Law on Corporate Income Tax by way of removing the requirement specified therein to maintain the shares acquired during reorganisation or transfer for a term of 3 years. According to the author of the dissertation, such a requirement is to be regarded as a distorted implementation of the measure against tax avoidance established in the Directive in the national law and it contradicts the provisions of the Directive as well as the principle of proportionality enshrined in EU law, therefore, it must not be applied. With regard to the rule formulated by the Court of Justice, i.e. that uniform principles must be applied in both cases regarding which the Directive has been drawn up directly and in cases where the mechanism put in place by the Directive is applied in situations without an international component, the said restriction set by the Law on Corporate Income Tax should not be applied in cases where only national entities participate in reorganisations or transfers. Should the tax payer sustain any damages as a result of the said provisions of the Law on Corporate Income Tax, these damages would have to be reimbursed to the tax payer in accordance with the principles formulated in the case-law of the Court of Justice.

10. In cases where it is being sought with the help of international reorganisation or transfer to avoid the payment of corporate income tax in Lithuania the general principle of substance over form established in the Law on Tax Administration may be applied; this principle is to be linked to the same general prohibition to abuse law from which the measure against tax avoidance enshrined in the Directive originates as well. When applying the principle of substance over form to international reorganisations and transfers one ought to analyse not only a separate reorganisation or transfer (reorganisations and transfers are not tax avoidance or planning *per se*) but rather the entire group and system of operations aimed at tax avoidance; in such cases not only subjective objective (intention) of a tax payer to avoid the payment of corporate income tax but also objective contradiction of transactions to the objectives enshrined in the Directive (which are identified as restructurisation and rationalisation of the activity of companies) will have to be proved. According to the author of the dissertation, the Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market might assist in solving these problems of application of the principle of substance over form in reorganisations and transfers in Lithuania.

11. Upon carrying out analysis the dissertation makes the following conclusions regarding regulation of reorganisations and transfers on a EU level:

a. Some concepts used in the Directive are not clear (e.g. "participation of the company from several EU Member States", "branch of activity", "permanent establishment") or the concepts are used inaccurately (operation of "transfer of branch of activity" is identified as "transfer of assets").

b. Certain operations important for business have been unfoundedly eliminated from the scope of operation of the Directive, e.g. transfer of registered offices of legal entities of other forms apart from European company and European cooperative society;

c. The Directive links the possibility of loss carry-over with the national regulation (it enables loss carry-over only in such international cases where such possibility has been provided for respective case of national reorganization or transfer) and this does not assist in achieving the objective enshrined in the preamble of the Directive to create a unified regulation in the sphere of taxation of international reorganizations and transfers. The Directive does not specify either which part of loss may

be carried-over nor does it specify any rules which would prevent the restriction of tax-related loss carry-over in case of international exchange of shares.

d. The wording of the provision against tax avoidance provided for in the Directive raises certain issues. There is insufficient amount of case-law of the Court of Justice regarding interpretation of the concepts of "tax avoidance" and "valid commercial reasons", and the distribution of burden of proof between tax payer and tax administrator specified in the Directive is not clear enough.

For the purposes of achieving the objectives set in the preamble of the Directive – tax neutrality of reorganizations and transfers as well as protection of financial interests of Member States – the regulation prescribed by the Directive ought to be further developed: unclear concepts which are missing in the Directive are to be defined or the existing unclear ones are to be clarified; unified mechanism of tax loss carry over is to be put in place; the possibility of including new operations satisfying business interests into the sphere regulated by the Directive is to be considered as well.

14. Approval of research results

Publications:

PETKEVIČIŪTĖ, A. Addressing Issues of Reorganizations and Transfers in Accordance with the Practice of the Court of Justice of the European Union. Law, 2014, t. 91, p. 193-211.

PETKEVIČIŪTĖ, A. Anti Avoidance Measures Established in the Merger Directive and their Transposition into Lithuanian Law. Law, 2016, t. 98, p. 114-134.

PETKEVIČIŪTĖ, A. The General Anti-Tax Avoidance Measure in the Times of Tax Planning. Interdisciplinary approach to law in modern social context: 4th international conference of PhD students and young researchers: conference papers. Vilnius: Vilnius university publishing, 2016, p. 218-226.

Presentations:

Presentation in the 4th International Conference of PhD Students and Young Researchers "Interdisciplinary approach to law in modern social context". Theme: "The General AntiTax Avoidance Measure in the Times of Tax Planning", 2016-04-21.

15. Personal details

Agnė Petkevičiūtė was awarded the degree of Master of Law at Vilnius University in 2006. She has been a PhD student at the Faculty of Law, Vilnius University since 2011.

Agnė is a senior consultant in the International Tax Services sub – service line in the international audit company – EY, which she joined in 2007. Agne also has a one-year work experience in Tax Administration of Vilnius district.

Her areas of specialization are tax administration and disputes, corporate taxation including public sector entities, corporate law, she has significant experience in reorganization projects.

16. Disertacijos reziumė

Disertacijos mokslinis naujumas, temos aktualumas. Siekdamos didinti pajėgumus, užimti didesnę rinkos dalį, diversifikuoti produktus, paslaugas ar rizikas, mažinti sąnaudas (tame tarpe ir mokestines) ar tiesiog išlikti, įmonės vis dažniau dalyvauja pelno mokesčio prasme neutraliose reorganizavimo ar perleidimo operacijose – tiek nacionaliniu lygiu, tiek ir peržengdamos vienos valstybės ribas.

Kaip nurodo savaitraštis *The Economist*[38] 2015 m. pasaulis išgyveno įsigijimo bei jungimosi operacijų bumą[39] – per šiuos metus nurodytų operacijų apimtis pasauliniu mastu siekė 5,5 trilijono Jungtinių Amerikos Valstijų dolerių – ir didžioji dalis jų buvo įvykdytos Jungtinėse Amerikos Valstijose. 2015 m. reorganizavimo bei perleidimo operacijos dažnai minėtos ir Lietuvoje – tiesa, ne dėl jų skaičiaus ar apimties, o dėl Vilniaus Prekybos grupę supurčiusio skandalo, kai neva pasinaudojant šiomis operacijomis buvo vengiama mokėti mokesčius į Lietuvos Respublikos valstybės biudžetą[40].

Pažymėtina, kad tiek reorganizavimo, tiek perleidimo operacijos mokestine prasme yra neutralios, o jų mokestinis neutralumas, kartu ir valstybių, kuriose jos vykdomos, finansinių interesų apsauga yra nustatyta visos Europos Sąjungos (toliau – Europos Sąjunga, ES, Sąjunga) lygmeniu dar 1990 m. liepos 23 d. Tarybos direktyva 90/434/EEB Dėl bendros mokesčių sistemos, taikomos įvairių valstybių narių įmonių jungimui, skaidymui, turto perleidimui ir keitimuisi akcijomis[41] (toliau – Direktyva). Jos nuostatos perkeltos į valstybių narių nacionalinius teisės aktus. Lietuvoje – į Pelno mokesčio įstatymo[42] IX skyrių. Lietuvoje Direktyvos nuostatos įgyvendintos dar iki įstojimo į Sąjungą – 2001 m. priėmus Lietuvos Respublikos pelno mokesčio įstatymą, kurio

[38] The Economist [interaktyvus. Žiūrėta 2015-12-29]. Prieiga per internetą: < >.
[39] Rašoma ne tik apie šioje disertacijoje nagrinėjamas reorganizavimo bei perleidimo operacijas, bet ir apie pirkimo – pardavimo bei kitus sandorius.
[40] 15 minučių [interaktyvus. Žiūrėta 2015-08-01 – 2015-12-31]. Prieiga per internetą: < min.lt >.
Delfi [interaktyvus. Žiūrėta 2015-08-01 – 2015-12-31]. Prieiga per internetą: < www.delfi.lt >.
[41] 1990 m. liepos 23 d. Tarybos direktyva 90/434/EEB Dėl bendros mokesčių sistemos, taikomos įvairių valstybių narių įmonių jungimui, skaidymui, turto perleidimui ir keitimuisi akcijomis. *Oficialusis leidinys* L, 225, p. 1.
Direktyva keletą kartų keista, o 2009 m. kodifikuota, pakeistas ir jos pavadinimas: Tarybos direktyva 2009/133/EB Dėl bendros mokesčių sistemos, taikomos įvairių valstybių narių įmonių jungimui, skaidymui, daliniam skaidymui, turto perleidimui ir keitimuisi akcijomis, ir SE arba SCE registruotos buveinės perkėlimui iš vienos valstybės narės į kitą“. Pastarasis pavadinimas nurodomas ir disertacijos pavadinime, kadangi šioje disertacijoje analizuojamas ne tik pirminis Direktyvos variantas, bet ir visi galiojantys jos pakeitimai.
[42] Lietuvos Respublikos pelno mokesčio įstatymas. *Valstybės žinios*, 2001, nr. .

IX skyriuje numatytas reorganizavimo, perleidimo, likvidavimo paskirų atvejų apmokestinimas, turto vertės padidėjimo pajamų bei nuostolių pripažinimas tam tikrais reorganizavimo, likvidavimo, perleidimo atvejais.

Tiek dėl nacionaliniu, tiek tarptautiniu lygiu įtvirtinto aptariamų operacijų mokestinio neutralumo, jos ir toliau pasirenkamos kaip patrauklus įrankis įmonių grupių struktūroms kurti ar kitiems, aukščiau minėtiems tikslams siekti. Tačiau tenka pažymėti, jog įgyvendinant reorganizavimo bei perleidimo operacijas praktikoje vis dar susiduriama su neaiškumais bei spragomis, kas leidžia abejoti, ar tikrai esamas šių operacijų reglamentavimas – ES bei nacionaliniu lygiu – užtikrina tiek minėtą mokestinį neutralumą, tiek ir verslo subjektų bei valstybių narių finansinius interesus. O visuomenės požiūris į reorganizavimo bei perleidimo operacijas Lietuvoje leidžia daryti pagrįstą išvadą, kad apie Direktyva sukurtą ir Pelno mokesčio įstatyme įgyvendintą jų apmokestinimo mechanizmą vis dar nėra plačiai žinoma.

Reorganizavimo ir perleidimo atvejų apmokestinimas Lietuvos teisės moksle kompleksiškai kol kas nagrinėtas tik Vilniaus universiteto Teisės fakulteto studento magistro darbe[43], tačiau didelė šio darbo dalis yra aprašomojo pobūdžio, daug dėmesio skiriama šių operacijų reglamentavimui civilinėje teisėje; magistro darbe nagrinėti teisės aktai nuo šio darbo parengimo pakeisti, o kai kurios darbo išvados kvestionuotinos. Taip pat paminėtina, kad kai kurios reorganizavimo ar perleidimo operacijų problemos Lietuvoje nagrinėtos ir periodinėje spaudoje ar informaciniuose portaluose, tačiau tik praktiniu aspektu.

Užsienio šalių mokslinėje literatūroje Direktyvos nuostatos daugiausia nagrinėtos *Ben. J M. Terra* knygoje „*European Tax Law*“[44], taip pat *LANG, M.* kartu su kitais autoriais parengtoje knygoje *Introduction to European Tax Law: Direct Taxation*[45], tačiau šių mokslinių darbų objektas, kaip nurodo ir jų pavadinimai, yra visa Europos Sąjungos mokesčių teisė, taigi ir Direktyvos analizė yra pakankamai fragmentiška, apsiribojanti Direktyvos veikimo mechanizmu bei esminių jos spragų įvardijimu. Daug dėmesio savo

[43] LADIETA L. *Bendrovių reorganizavimo procese susiklostantys mokestiniai teisiniai santykiai:* magistro darbas. Socialiniai mokslai, teisė (01S). Vilnius: Vilniaus universitetas, 2007.
[44] TERRA, B., WALTER P., *European Tax Law,* Nyderlandai: Kluwer Law International, 2012., p. 689-670.
[45] LANG, M. *et al. Introduction to European Tax Law: Direct Taxation,* Viena: Spiramus Press, 2013.

moksliniame darbe Direktyvai skiria ir *Harm van den Broek*[46], šiame darbe pateikiama ir pakankamai detali Direktyvos priėmimo istorijos analizė, tačiau dėl nurodyto darbo objekto šis autorius nagrinėja tik reorganizavimo jungimo būdu operacijas; nei reorganizavimo skaidant įmones, nei perleidimo operacijų šis autorius neanalizuoja. Atskiri probleminiai klausimai, tokie kaip, pvz., Direktyvos nuostatų taikymas Europos Ekonominės Erdvės valstybėse įsteigtoms įmonėms, Direktyva nustatytas nuostolių perkėlimo mechanizmas ar Direktyvoje įtvirtintos prieš mokesčių vengimą nukreiptos priemonės taikymas nagrinėti periodiniuose leidiniuose, tokiuose kaip *European Taxation* ar *EC Tax Review.*

Taigi, apibendrinant aukščiau aptartus mokslinius tyrimus disertacijos tema, pažymėtina, kad šioje disertacijoje nagrinėjamos temos aktualumą patvirtina ne tik išsamaus ir visapusiško reorganizavimo bei perleidimo operacijų apmokestinimo teisinio tyrimo nebuvimas Lietuvoje, bet ir tokių tyrimų fragmentiškumas ES mastu. Atsižvelgiant tiek į nacionalinę, tiek į tarptautinę praktiką ir reorganizavimo bei perleidimo operacijų mastą, toks teisinės minties vakuumas nepateisinamas. Disertacijoje atliekama ne tik išsami nacionalinio, bet ir reglamentavimo ES mastu analizė, pateikiami motyvuoti pasiūlymai, kaip reorganizavimo bei perleidimo operacijų teisinis reglamentavimas turėtų būti tobulinamas ne tik Lietuvos, bet ir Europos Sąjungos – nagrinėjamus mokestinius teisinius santykius reglamentuojančios Direktyva – lygmeniu.

Disertacijos tema moksline prasme aktuali ir atsižvelgiant į tarptautinėje bendruomenėje disertacijos rengimo metu vykstančius kovos su agresyviu mokesčių planavimu bei mokesčių vengimu procesus, naujų teisės aktų leidybos iniciatyvas. Pvz., ES direktyva, Sąjungos lygmeniu nustatanti dividendų apmokestinimo principus[47] disertacijos rengimo metu keista du kartus. Joje nustatytos specialiosios prieš mokesčių vengimą nukreiptos normos. Direktyvos pakeitimai įgyvendinti ir Pelno mokesčio įstatyme Lietuvoje[48] bei įsigaliojo 2017 m. sausio 1 d. Disertacijos rengimo metu taip pat buvo paskelbta Ekonominio bendradarbiavimo ir plėtros organizacijos (toliau –

[46] VAN DEN BROEK, H. Cross-Border Mergers Within the EU, Nyderlandai: Kluwer Law International, 2012, p. 239.
[47] 1990 m. liepos 23 d. Tarybos direktyva 90/435/EEB Dėl bendrosios mokesčių sistemos, taikomos įvairių valstybių narių patronuojančioms ir dukterinėms bendrovėms. *Specialusis leidimas*, 2004, nr. 1.
[48] Lietuvos Respublikos pelno mokesčio įstatymo Nr. IX – 675 32, 33, 34, 35, 36, 40-1, 47, 51, 53 straipsnių ir 3 priedėlio pakeitimo įstatymas. *TAR* 2016-03-25, 2016-06346.

Ekonominio bendradarbiavimo ir plėtros organizacija, EBPO) kovos su agresyviu mokesčių planavimu (toliau – BEPS)[49] ataskaita – 15 žingsnių, kurie ateityje turėtų užtikrinti skaidrų ir sąžiningą tarptautinio verslo apmokestinimą.

ES, kurios narės sudaro EBPO pagrindą, aktyviai siekė paversti EBPO deklaruotus planus realybe. Europos Komisija, vadovaudamasi EBPO parengtais standartais 2015 m. kovo 18 d. pristatė teisės aktų rinkinį, skirtą kovai su mokesčių vengimu. Šį rinkinį *inter alia* sudarė ir pasiūlymas dėl Tarybos direktyvos, kuria nustatomos kovos su mokesčių vengimo praktika, tiesiogiai veikiančia vidaus rinkos veikimą, taisyklės[50]. Šiame direktyvos projekte, be kitų prieš mokesčių vengimą nukreiptų priemonių, buvo nustatytos bendros kovos su mokesčių piktnaudžiavimu taisyklės, taip pat išėjimo mokesčiai (angl. *exit taxes*).

Projektas priimtas 2016 m. liepos 12 d. Tarybos direktyva[51], kuria nustatomos kovos su mokesčių vengimo praktika, tiesiogiai veikiančia vidaus rinkos veikimą, taisyklės su tam tikromis išimtimis valstybėse narėse turės būti įgyvendintos iki 2018 m. gruodžio 31 d. ir pradėtos taikyti nuo 2019 m. sausio 1 d.

Atsižvelgiant į šias kovos su mokesčių vengimu iniciatyvas, būtina sisteminė ir išsami reorganizavimo bei perleidimo operacijų apmokestinimo mokslinė analizė, kuri atskleistų šių operacijų esmę ir jų apmokestinimo mechanizmą, o būtent tai, kad šiuo mechanizmu įtvirtinimas ne *atleidimas* nuo turto vertės padidėjimo pajamų apmokestinimo, o tik apmokestinimo momento nukėlimas iki bus įvykdyti vėlesni su perleidžiamu turtu susiję sandoriai. Ir kad toks apmokestinamojo momento nukėlimas nėra besąlyginis – Direktyva sukurtu mechanizmu taip pat apsaugomi valstybių narių finansiniai interesai, užkertant kelią *fiziniam* turto judėjimui. Moksline prasme turi būti išsamiai išdėstyta ir pagrįsta ir tai, kad Direktyva sukurtas mechanizmas nėra mokestinė lengvata, o tiesiog specialios apmokestinimo sąlygos tais atvejais, kai nėra jokio objektyvaus pagrindo mokesčių mokėjimui – vykdant nurodytas operacijas piniginiai

[49] Base Erosion and Profit Shifting [interaktyvus. Žiūrėta 2016-03-18]. Prieiga per internetą: < http://www.oecd.org/ctp/beps.htm>

[50] Europos Komisija [interaktyvus. Žiūrėta 2016-05-23]. Prieiga per internetą: <http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm>.

[51] 2016 m. liepos 12 d. Tarybos direktyva 2016/1164/EB kuria nustatomos kovos su mokesčių vengimo praktika, tiesiogiai veikiančia vidaus rinkos veikimą, taisyklės. *Oficialusis leidinys* L, 193/13.

mokėjimai nėra atliekami. Pasinaudojimas Direktyva sukurtomis taisyklėmis, perkeltomis į nacionalinį įstatymą, taip pat nėra mokesčių planavimas ar mokesčių vengimas *per se*.

Įvertinus reorganizavimo bei perleidimo operacijų sudėtingumą, turi būti atliktas išsamus tyrimas, kaip ir kokios prieš mokesčių vengimą nukreiptos normos turi būti taikomos tais atvejais, kai reorganizavimo ar perleidimo operacija yra vykdoma kaip ūkinių operacijų grupės dalis agresyvaus mokesčių planavimo (ar mokesčių vengimo) schemose. Taip pat, kokias šiuo metu kylančias problemas reorganizavimo bei perleidimo operacijų apmokestinimo srityje galėtų padėti išspręsti aukščiau nurodytos tarptautinės iniciatyvos dėl bendrų kovos su mokesčių piktnaudžiavimu taisyklių bei išėjimo mokesčių. Disertacijos autorės nuomone, tik sisteminė ir išsami galiojančio reglamentavimo analizė padės išvengti situacijos, kuomet su nurodyta prieš mokesčių vengimą nukreipta iniciatyva susijusių ES teisės aktų paketas bus tiesiog mechaniškai perkeltas į Lietuvos teisę, nesprendžiant, kaip konkreti teisės norma veiks (ir ar ji veiks iš viso), atsižvelgiant į jau galiojantį reglamentavimą ir nesprendžiant šiuo metu kylančių praktinių problemų, kurias ES mastu sukurti instrumentai, disertacijos autorės nuomone, galėtų padėti išspręsti.

Taigi, šioje disertacijoje pirmą kartą po Direktyvos įgyvendinimo Lietuvoje 2001 m. išsamiai ir sistemiškai nagrinėjamas Direktyva sukurtas reorganizavimo bei perleidimo operacijų apmokestinimo mechanizmas, atskleidžiama jo esmė ir problematika, teikiamos rekomendacijos dėl jo tobulinimo.

Disertacijos tikslas. Pradėjus rengti disertaciją iškelta hipotezė, jog Direktyvos nuostatos į Lietuvos Respublikos pelno mokesčio įstatymą iš esmės buvo perkeltos tinkamai. Tačiau dėl mechaninio šių nuostatų perkėlimo ar kitų priežasčių kai kuriais atvejais reorganizavimo bei perleidimo operacijų apmokestinimo reglamentavimas Pelno mokesčio įstatyme neatitinka reglamentavimo Direktyvos nuostatomis. Tyrimo metu, atsižvelgiant į jo rezultatus, ši hipotezė yra patvirtinama arba paneigiama.

Disertacijos uždaviniai. Tam, kad būtų pasiektas disertacijos tyrimo tikslas, keliami šie uždaviniai:

1. Atskleisti reorganizavimo ir perleidimo operacijų mokestinį neutralumą, palyginus su kitomis, pvz., pardavimo operacijomis; atsakyti į klausimą, ar toks nurodytų operacijų apmokestinimo mechanizmas laikytinas mokestine lengvata.

2. Išnagrinėti ir atskleisti Direktyva nustatytą reorganizavimo bei perleidimo operacijų apmokestinimo bei ES valstybių narių finansinių interesų apsaugos mechanizmą – t.y. išnagrinėti, kokiems subjektams bei operacijoms šis mechanizmas yra taikomas; kaip mokestinis neutralumas užtikrinamas reorganizavimo bei perleidimo operacijose dalyvaujančių įmonių bei jų akcininkų lygmenyje, kaip sprendžiami mokestinių nuostolių perkėlimo klausimai ir kartu apsaugomi valstybių narių finansiniai interesai. Pateikti Direktyva nustatyto mechanizmo tobulinimo pasiūlymų.

3. Išnagrinėti Pelno mokesčio įstatymo bei susijusių teisės aktų nuostatas. Nustačius netinkamo reglamentavimo atvejus, pateikti pasiūlymus įstatymo leidėjui dėl atitinkamų Pelno mokesčio įstatymo nuostatų tobulinimo.

4. Išnagrinėti atskirus probleminius Direktyva nustatyto mechanizmo aspektus bei atskleisti, kaip Direktyva nereglamentuoti ar nepakankamai reglamentuoti klausimai sprendžiami nacionaliniame apmokestinimą pelno mokesčiu nustatančiame įstatyme. Pateikti pasiūlymų, kaip tokiais atvejais turėtų būti sprendžiami galimi prieštaravimai ir pildomos reglamentavimo spragos.

5. Analizuoti, kaip Direktyva buvo įgyvendinta kitose valstybėse narėse bei, teikiant pasiūlymus dėl Direktyvos ir nacionalinio Pelno mokesčio įstatymo tobulinimo, remtis geriausia užsienio valstybių praktika.

6. Įrodyti, kad tiek atsižvelgiant į Direktyvos nuostatas bei jos priėmimu siektus tikslus, tiek į nacionalinį reglamentavimą, Pelno mokesčio įstatymo nuostatos mokesčių administratoriaus kai kuriais atvejais interpretuojamos netinkamai bei pasiūlyti, kaip neatitikimai turėtų būti sprendžiami kiekvienu konkrečiu atveju.

Disertacijoje ginami teiginiai

1. Direktyvos nuostatos, reglamentuojančios reorganizavimo bei perleidimo operacijų apmokestinimo mechanizmą bei užtikrinančios jų neutralumą, į Lietuvos Respublikos pelno mokesčio įstatymą iš esmės buvo perkeltos tinkamai.

2. Keletu atvejų Direktyvoje įtvirtinto mechanizmo veikimo problemos Lietuvoje gali būti išspręstos tik iš esmės keičiant galiojantį nacionalinį reglamentavimą, pvz., naikinant Pelno mokesčio įstatyme nustatytus konkrečius išankstinius apribojimus (3 metų akcijų išlaikymo bei veiklos tęsimo nuostolių kėlimo atveju), prieštaraujančius Direktyvos nuostatoms bei Europos Sąjungos teisės principams, ar nustatant specialią prieš mokesčių vengimą nukreiptą normą, kuri būtų taikoma reorganizavimo ar perleidimo atvejais.

3. Kai kuriais atvejais, kaip pvz. dėl nuostolių kėlimo *tarptautinio*[52] reorganizavimo bei perleidimo metu, Direktyvos nuostatos į Pelno mokesčio įstatymą nėra perkeltos tiesiogiai. Susidariusią situaciją iš dalies įgalina spręsti sisteminė šio įstatymo analizė, leidžianti daryti išvadą, kad ir nurodytais atvejais Direktyva yra įgyvendinta tinkamai, tačiau aiškumo tikslais būtini ir atitinkami Pelno mokesčio įstatymo pakeitimai.

4. Atsižvelgiant tiek į Direktyvos nuostatas bei jos priėmimo tikslus, tiek į nacionalinį reglamentavimą, kai kurias Pelno mokesčio įstatymo nuostatas mokesčių administratorius tiek apibendrintame Pelno mokesčio įstatymo komentare, tiek praktikoje, interpretuoja netinkamai (pvz., nurodo, kad veikla nuolatinėje buveinėje turėtų būti vykdoma nuolat, kitaip bus kvestionuojama visa reorganizavimo ar perleidimo operacija ar reikalauja fizinio veiklos atskirumo dar iki perleidimo operacijos), taip pat pasinaudojant šiais instrumentais nėra sprendžiami praktikoje reorganizavimo bei perleidimo atvejais kylantys klausimai (pvz., nepasisakoma dėl nuolatinės buveinės Lietuvoje apimties).

5. Direktyvoje nustatytas reglamentavimas turėtų būti tobulinamas pačioje Direktyvoje apibrėžiant joje nepateiktas ar tikslinant jau pateiktas sąvokas, unifikuojant nuostolių perkėlimo mechanizmą, bei, atsižvelgiant į verslo interesus, įtvirtinant naujas reorganizavimo bei perleidimo operacijas.

Disertacijos struktūra. Disertaciją sudaro įvadas, trys dėstomosios dalys, išvados ir pasiūlymai, naudotų šaltinių sąrašas ir disertantės mokslinių publikacijų sąrašas, du disertacijos priedai.

[52] Kalbama apie vienos valstybės ribas peržengiančius sandorius, terminas anglų kalba – *cross border*.

Disertacijos įvade pagrindžiamas mokslinis darbo naujumas bei nagrinėjamos temos aktualumas, apžvelgiami nagrinėjama tema Lietuvoje ir užsienyje atlikti tyrimai ir paskelbtos publikacijos, apibrėžiamas darbo objektas, dalykas ir tikslas, suformuluoti uždaviniai ir ginami teiginiai, nurodoma praktinė darbo reikšmė, pristatomi taikyti tyrimo metodai, taip pat naudojami šaltiniai, aprašoma bendra darbo struktūra.

Pirmojoje dėstomojoje disertacijos dalyje „Reorganizavimo ir perleidimo operacijos. Poreikis šias operacijas reglamentuoti tarptautiniais mokesčių teisės aktais kalbama apie tai, kaip šios operacijos yra apmokestinamos nacionaliniu lygiu – aptariamas jų mokestinis neutralumas, kuris būtent ir išskiria jas iš kitų verslo sandorių. Taip pat kalbama apie tai, ar nurodytas apmokestinimas mokesčių teisės prasme yra lengvata ar specialios tam tikriems atvejams skirtos apmokestinimo sąlygos. Šioje disertacijos dalyje taip pat analizuojama, kokie apribojimai kyla tais atvejais, kai aptariamos operacijos peržengia vienos valstybės sienas ir dėstoma, kad siekiant sukurti vieningą rinką ir šiuos apribojimus pašalinti būtent ir buvo priimta disertacijoje nagrinėjama Direktyva. Pirmojoje disertacijos dalyje aptariami šios Direktyvos priėmimo tikslai bei istorija, taip pat operacijos, kurioms taikomos Direktyvos nuostatos.

Antrojoje darbo dalyje „Direktyva nustatytas reorganizavimo bei perleidimo operacijų apmokestinimo mechanizmas“ išdėstoma, kokiems subjektams taikomos Direktyvos nuostatos, taip pat analizuojama, kaip užtikrinamas reorganizavimo bei perleidimo operacijų mokestinis neutralumas tiek įmonių, tiek akcininkų lygmenyje; nagrinėjamas Direktyvoje įtvirtintas mokestinių nuostolių perkėlimo mechanizmas. Taip pat kalbama apie tai, kaip Direktyvos pagalba užtikrinami valstybių narių finansiniai interesai.

Pažymėtina, kad pasirinktas pirmosios ir antrosios disertacijos dalių išskyrimas yra sąlyginis. Atsižvelgiant į tai, kad Direktyva reguliuojami sudėtingi mokestiniai teisiniai santykiai – sudėtingos tarptautinės operacijos, pirmoji disertacijos dalis paprastumo ir aiškumo tikslais yra labiau aprašomojo pobūdžio, skirta supažindinti skaitytoją su reorganizavimo bei perleidimo operacijų ypatumu – mokestiniu neutralumu, šioje dalyje taip pat įvardijamos Direktyvoje nustatytos reorganizavimo ir perleidimo operacijos – siekiant aiškumo Disertacijos prieduose pateikiamos šių operacijų schemos. Antroji disertacijos dalis yra labiau analitinio pobūdžio ir skirta reorganizavimo ir perleidimo operacijų apmokestinimo mechanizmui atskleisti. Šioje disertacijos dalyje tiek

Direktyvos, tiek atitinkamos Pelno mokesčio įstatymo nuostatos analizuojamos detaliai – aptariami subjektai, kuriems skirta Direktyva, Direktyvos veikimo mechanizmas. Nurodomi probleminiai galiojančio reglamentavimo aspektai bei spragos.

Trečiojoje disertacijos dalyje „Atskiri probleminiai Direktyva nustatyto reorganizavimo ir perleidimo operacijų apmokestinimo mechanizmo klausimai“ nagrinėjami atskiri probleminiai atvejai – tokie kaip, pvz., sąvokos „veiklos dalis“ reikšmė ar mažumos akcininkų akcijų išpirkimo galimybė. Daug dėmesio skiriama Direktyva nustatyto mechanizmo netaikymo pagrindams, mokesčių vengimo prezumpcijos analizei, identifikuojamos galiojančio nacionalinio reglamentavimo spragos. Aptariama tiesioginio Direktyvos nuostatų taikymo galimybė.

Taigi, atsižvelgiant į disertacijos pavadinimą „Reorganizavimo ir perleidimo operacijų apmokestinimas Lietuvoje: Tarybos Direktyvos 2009/133/EB įgyvendinimas“ bei disertacinio tyrimo tikslą, o būtent patvirtinti arba paneigti hipotezę, jog šios Direktyvos nuostatos į Lietuvos Respublikos pelno mokesčio įstatymą iš esmės buvo perkeltos tinkamai, *disertacijoje yra nuosekliai nagrinėjamas Direktyvos tekstas* – pradedant operacijomis ir subjektais, kuriems Direktyva yra taikoma; toliau pereinant prie nuostatų, reglamentuojančių Direktyvos veikimo mechanizmą (mokestinio neutralumo užtikrinimas, nuostolių perkėlimas) bei užtikrinančių valstybių narių finansinius interesus (veiklos tęsimo per nuolatinę buveinę reikalavimas), baigiant tais atvejais, kai valstybėms narėms suteikiama teisė atsisakyti taikyti Direktyvos nuostatas – prieš mokesčių vengimą nukreiptos priemonės taikymo atvejai. Būtent Direktyvos tekstas ir jos struktūra suponuoja Disertacijoje analizuojamus klausimus bei jų seką ir svarbą temos atskleidimui ir visam disertaciniam tyrimui. Aiškumo bei nuoseklumo tikslais lygiagrečiai su Direktyvos nuostatomis analizuojamos jas įgyvendinančios atitinkamos Pelno mokesčio įstatymo nuostatos, dėl šios priežasties antroji disertacijos dalis pradedama istoriniu aspektu – analizuojant, kaip Direktyvos nuostatos buvo įgyvendintos Lietuvos Respublikos pelno mokesčio įstatyme. Disertacijoje išdėstomos tiek tarptautinio, tiek nacionalinio reglamentavimo problemos, teikiami pasiūlymai.

Disertacijos pabaigoje atlikto tyrimo pagrindu formuluojamos išvados, kurios, disertacijos autorės nuomone, apibendrina išsikeltų uždavinių sprendimo rezultatus; pateikiami siūlymai dėl galiojančio reorganizavimo ir perleidimo operacijų

apmokestinimo reglamentavimo tobulinimo. Taip pat pridedamas naudotų šaltinių sąrašas ir autorės publikacijų moksliniuose leidiniuose sąrašas.

Išvados ir pasiūlymai.

1. Įgyvendinant su stojimu į Europos Sąjungą susijusius įsipareigojimus, į Lietuvos Respublikos pelno mokesčio įstatymą iš esmės tinkamai perkeltos tiek Direktyvos nuostatos, tiek ir šios Direktyvos pakeitimai. Visgi mechaniškas ir pažodinis Direktyvos nuostatų perkėlimas kai kuriais atvejais lėmė tai, kad nacionalinėmis teisės normomis, įtvirtintomis Pelno mokesčio įstatyme, sukurtas teisinių santykių reglamentavimas nedera su Direktyvos nuostatomis ir neatitinka jos tikslų.

2. Pelno mokesčio įstatymo 41 straipsnio 1 dalies 1 ir 2 punktai turėtų būti papildyti atitinkamomis nuostatomis, kad šių nuostatų prasme ir tikslais tiek Lietuvos, tiek ES valstybės narės vienetas pagal sudarytas dvigubo apmokestinimo išvengimo sutarties nuostatas nėra laikomi trečiosios šalies mokesčių rezidentais. Disertacijos rengimo metu į Pelno mokesčio įstatymą šis Direktyvoje nustatytas reikalavimas nėra perkeltas. Toks nacionalinis reglamentavimas nepasiektų Sąjungos mokesčių politikos tikslų riboti atvejus, kai pasinaudojama tiek Direktyvoje nustatytu palankiu turto vertės padidėjimo pajamų apmokestinimo atidėjimo mechanizmu, tiek ir trečiosiose valstybėse egzistuojančiomis lengvatomis.

3. Direktyvoje nėra reglamentuojama, kokiomis vertėmis veiklos perleidimo į apačią bei akcijų mainų atvejais turėtų būti apskaitomos akcijos jas įgijusių įmonių mokestinėje apskaitoje. Ši legislatyvinė omisija gali sąlygoti dvigubo ekonominio apmokestinimo efektą. Lietuvoje ši problema iš dalies išspręsta tik akcijų mainų atveju VMI parengtame apibendrintame Pelno mokesčio įstatymo komentare nurodant, kad tokiais atvejais Lietuvos vieneto mainais gautų akcijų įsigijimo kaina yra jo išleistų akcijų emisijos kaina. Veiklos perleidimo į apačią atveju disertacijos rengimo metu dvigubas ekonominis apmokestinimas gali būti panaikinamas tik iš dalies, taikant „dalyvavimo išimties taisyklę“. Rekomenduotina dvigubą ekonominį apmokestinimą Lietuvoje naikinti ir veiklos perleidimo į apačią atveju veiklą perleidžiančiai įmonei mainais už šią veiklą įgytas akcijas leidžiant apskaityti perleidžiamos veiklos rinkos verte. Taip pat, disertacijos autorės nuomone, dvigubo ekonominio amokestinimo problema tiek akcijų mainų, tiek ir veiklos perleidimo į apačią atvejais spręstina ne plečiamai aiškinant Pelno mokesčio

įstatymo nuostatas apibendrintame įstatymo komentare, tačiau atitinkamai papildant paties įstatymo 42 straipsnį.

4. Siekiant teisinio tikrumo, rekomenduotina papildyti apibendrintą Pelno mokesčio įstatymo 41 straipsnio 3 dalies komentarą numatant, kad ši įstatymo norma neįpareigoja Lietuvoje palikti *viso* turto, teisių ir įsipareigojimų ir užsienio vienetas turėtų pats spręsti, kokios apimties veikla ir kokio turto pagrindu ji bus vykdoma per nuolatinę buveinę Lietuvoje. Disertacijos rengimo metu galiojančio Pelno mokesčio įstatymo 41 straipsnio 3 dalies lingvistinis aiškinimas suponuoja išvadą, jog po reorganizavimo ar perleidimo operacijos *visas* perleistas turtas, teisės ir įsipareigojimai turi likti susiję su užsienio vieneto nuolatine buveine Lietuvoje, priešingu atveju mokesčių tikslais gali būti kvestionuojama visa perleidimo ar reorganizavimo operacija. Tačiau sisteminė teisės aktų analizė leidžia daryti išvadą, kad užsienio vienetas turėtų pats spręsti, kokios apimties veikla per nuolatinę buveinę Lietuvoje vykdys – tokią nuomonę žodžiu dėsto ir VMI.

5. Nutraukus po reorganizavimo ar perleidimo operacijos Lietuvoje veiklą turinčios tęsti nuolatinės buveinės veiklą, taip pat turto judėjimo iš nuolatinės buveinės Lietuvoje į užsienio įmonę atvejais, disertacijos autorės nuomone, turėtų būti atsižvelgiama į konkrečias faktines aplinkybes ir sprendžiama, ar egzistuoja būtinosios sąlygos taikyti bendrąją prieš mokesčių vengimą nukreiptą normą (reorganizavimo ar perleidimo operacija galėtų būti kvestionuojama tik konstatavus mokesčių vengimo atvejį). Disertacijoje atkreipiamas dėmesys, kad Lietuvos mokesčių teisėje neegzistuoja „*išėjimo mokesčiai*“, todėl nėra aišku, kaip mokesčių tikslais būtų traktuojamas turto judėjimas iš nuolatinės buveinės Lietuvoje į užsienio įmonę, o VMI nuomonė, jog po reorganizavimo ar perleidimo operacijos veikla per nuolatinę buveinę Lietuvoje turėtų būti vykdoma nuolat; ją nutraukus, būtų kvestionuojama visa reorganizavimo ar perleidimo operacija, laikytina neproporcinga.

6. Palyginus nuostolių perkėlimo taisykles reorganizavimo bei perleidimo atvejais su bendrosiomis nuostolių perkėlimo taisyklėmis, įtvirtintomis Pelno mokesčio įstatyme, disertacijoje atkreipiamas dėmesys, kad tiek nacionaliniais, tiek tarptautiniais reorganizavimo ir perleidimo atvejais yra nustatyta papildoma sąlyga – perimtos veiklos tęsimas *iš anksto* (neatsižvelgiant į kiekvieną konkretų atvejį) įstatyme nustatytą terminą. Disertacijos autorės nuomone, ši 3 metų taisyklė vertintina kaip tam tikras išankstinis apribojimas, prieštaraujantis ES teisėje įtvirtintam proporcingumo principui.

Rekomenduotina jo atsisakyti, atitinkamai koreguojant Pelno mokesčio įstatymo 43 straipsnio 1 ir 3 dalis.

7. Siekiant teisinio tikrumo, Pelno mokesčio įstatymo 43 straipsnis, kiek tai susiję su *tarptautinėmis* operacijomis, turėtų būti papildytas jame eksplicitiškai nustatant, kad tokiais atvejais nuostoliai yra keliami Lietuvoje liekančioje užsienio vieneto nuolatinėje buveinėje (analogiškas reglamentavimas nustatytas ir Direktyvoje). Disertacijos rengimo metu nuostolių perkėlimas tarptautinio reorganizavimo bei perleidimo atvejais Pelno mokesčio įstatymo 43 straipsnyje tiesiogiai nėra reglamentuotas, tačiau sisteminė Pelno mokesčio įstatymo analizė leidžia daryti išvadą, kad esant tokioms operacijoms nuostoliai gali būti keliami tik Lietuvoje liekančioje užsienio vieneto nuolatinėje buveinėje, o ne pačiame užsienio vienete. Taip pat, atsižvelgiant į galiojančias Pelno mokesčio įstatymo nuostatas, siekiant aiškumo, turėtų būti papildytas ir apibendrintas jo 43 straipsnio komentaras, numatant, kad nuostoliai gali būti keliami ne tik 41 straipsnio 2 dalies 1 – 3 punktuose nurodytais reorganizavimo atvejais, bet ir tarptautinio reorganizavimo bei perleidimo atvejais, nustatytais Pelno mokesčio įstatymo 41 straipsnio 2 dalies 4 – 6 punktuose.

8. Analizuojant Direktyvoje bei Pelno mokesčio įstatyme vartojamą „veiklos dalies“ sąvoką bei apibendrinant Teisingumo Teismo praktiką Direktyvos, apmokestinimo pridėtinės vertės bei kapitalo mokesčiais srityse, disertacijoje daroma išvada, kad svarbiausias kriterijus, aiškinant ir taikant teisės aktų nuostatas, yra funkcinis perleidžiamos veiklos dalies savarankiškumas, o ne fizinis veiklos atskirumas, egzistuojantis dar iki perleidimo operacijos. Nacionalinis reglamentavimas Lietuvoje formaliai atitinka tiek Direktyvos nuostatas, tiek ir Teisingumo Teismo praktiką, tačiau apibendrintas Pelno mokesčio įstatymo komentaras gali būti suprantamas nevienareikšmiškai. Kadangi disertacijos rengimo metu VMI požiūris bei praktika, lyginant su apibendrinto komentaro nuostatomis, yra pasikeitę ir reikalavimai dėl fizinio vykdomo veiklos atskirumo nebėra keliami, rekomenduotina atitinkamai pakeisti ir apibendrintą Pelno mokesčio įstatymo komentarą.

9. Disertacijos autorė rekomenduoja koreguoti Pelno mokesčio įstatymo 42 straipsnio 10 dalį atsisakant joje įtvirtinto reikalavimo 3 metus išlaikyti reorganizavimo ar perleidimo metu įgytas akcijas. Toks reikalavimas, disertacijos autorės nuomone, laikytinas iškreiptu Direktyvoje įtvirtintos prieš mokesčių vengimą nukreiptos priemonės

įgyvendinimu nacionaliniame įstatyme ir jis prieštarauja Direktyvos nuostatoms bei ES teisėje įtvirtintam proporcingumo principui, todėl negali būti taikomas. Atsižvelgiant į Teisingumo Teismo suformuluotą taisyklę, kad vienodi principai turi būti taikomi tiek tais atvejais, kuriems Direktyva skirta tiesiogiai, tiek atvejams, kai Direktyva sukurtas mechanizmas taikomas tarptautinio elemento neturinčioms situacijoms, nurodytasis Pelno mokesčio įstatymo nustatytas apribojimas neturėtų būti taikomas ir tada, kai reorganizavimo ar perleidimo operacijoje dalyvauja tik nacionaliniai vienetai. Jei dėl nurodytų Pelno mokesčio įstatymo nuostatų mokesčių mokėtojas patirtų žalos, ši jam turėtų būti atlyginta vadovaujantis Teisingumo Teismo praktikoje suformuluotais principais.

10. Lietuvoje tais atvejais, kai tarptautine reorganizavimo ar perleidimo operacija siekiama išvengti pelno mokesčio mokėjimo, gali būti taikomas bendrasis Mokesčių administravimo įstatyme įtvirtintas turinio viršenybės prieš formą principas, kuris sietinas su tuo pačiu bendruoju draudimu piktnaudžiauti teise, iš kurio kilusi ir Direktyvoje įtvirtinta prieš mokesčių vengimą nukreipta priemonė. Turinio viršenybės prieš formą principą taikant tarptautiniams reorganizavimo ar perleidimo atvejams, turėtų būti analizuojama ne tik pavienė reorganizavimo ar perleidimo operacija (reorganizavimo ir perleidimo operacijos nėra mokesčių vengimas ar planavimas *per se*), o visa operacijų, kuriomis siekiama išvengti mokesčių, grupė, sistema; tokiais atvejais taip pat turėtų būti įrodinėjamas ne tik subjektyvusis mokesčių mokėtojo tikslas (ketinimas) išvengti pelno mokesčio mokėjimo, bet ir objektyvusis sandorių prieštaravimas Direktyvoje įtvirtintiems tikslams, kurie įvardijami kaip įmonių veiklos restruktūrizavimas bei racionalizavimas. Tarybos direktyva, kuria nustatomos kovos su mokesčių vengimo praktika, tiesiogiai veikiančia vidaus rinkos veikimą, taisyklės, disertacijos autorės nuomone, gali padėti išspęsti šias nurodytąsias turinio viršenybės prieš formą principo taikymo reorganizavimo bei perleidimo atvejais problemas Lietuvoje.

11. Atlikus analizę disertacijoje daromos šios išvados dėl reorganizavimo bei perleidimo operacijų reglamentavimo ES lygiu:

a. Nėra aiškios kai kurios Direktyvoje vartojamos sąvokos (pvz., įmonės iš kelių ES valstybių narių dalyvavimas", „veiklos dalis", „nuolatinė buveinė") ar sąvokos vartojamos netiksliai („veiklos dalies perleidimo" operacija įvardijama kaip „turto perleidimas").

b. Iš Direktyvos veikimo srities nepagrįstai eliminuojamos kai kurios verslui svarbios operacijos, pvz., kitų, nei Europos bendrovių bei kooperatinių bendrovių, juridinių asmenų formų registruotų buveinių perkėlimas.

c. Direktyva nuostolių perkėlimo galimybę sieja su nacionaliniu reglamentavimu (nuostolius įgalina kelti tik tais tarptautiniais atvejais, kai tokia galimybė yra numatyta ir atitinkamam nacionalinio reorganizavimo ar perleidimo atvejui) ir tai nepadeda pasiekti Direktyvos preambulėje įtvirtinto tikslo sukurti unifikuotą reglamentavimą tarptautinių reorganizavimų ir perleidimų apmokestinimo srityje. Direktyvoje taip pat nenurodyta, kuri nuostolių dalis gali būti perkeliama, nenumatytos taisyklės, kurios neleistų riboti mokestinių nuostolių perkėlimo esant tarptautiniams akcijų mainams.

d. Direktyvoje prieš mokesčių vengimą nukreiptos normos formuluotė – problemiška. Trūksta Teisingumo Teismo praktikos, aiškinant „mokesčių vengimo“ ir „tinkamų komercinių priežasčių“ sąvokas; nėra iki galo aiškus Direktyvoje įtvirtintas įrodinėjimo naštos tarp mokesčių mokėtojo ir mokesčių administratoriaus paskirstymas.

Siekiant Direktyvos preambulėje nustatytų tikslų – reorganizavimo bei perleidimo operacijų mokestinio neutralumo bei valstybių narių finansinių interesų apsaugos, Direktyvoje nustatytas reglamentavimas turėtų būti tobulinamas – apibrėžtinos joje nepateiktos, ar tikslintinos jau pateiktos neaiškios sąvokos; įtvirtintinas unifikuotas mokestinių nuostolių perkėlimo mechanizmas; svarstytina dėl naujų operacijų, tenkinančių verslo interesus, įtraukimo į Direktyva reglamentuojamą sritį.