

SUMMARY

SALE OF ENTERPRISE AND PART OF ENTERPRISE

GRADUATION THESES

Legal regulation of the contract for the sale of enterprise as a separate contractual type under the Commercial Code initially seemed to be an ambitious and courageous step of the legislator.

In my opinion, the selected model has proved successful in practice especially thanks to its concept of a complex passage of all rights and obligations associated with the enterprise. The coherent regulation within one contractual type has proved successful both thanks to its transparency and mandatory nature of selected provisions.

At the same time it is necessary to point out that the contract for the sale of enterprise represents *lex specialis* for provisions of special acts.

Therefore it is not necessary to make all the special acts which would be otherwise required for transfer of individual rights and obligations.

With respect to the quantity and diversification of individual components constituting the enterprise, the use of individual legal regulations would be much more difficult and less transparent. However, I would like to emphasize that the relationship between the Commercial Code and other legal regulation is not always that of general/special regulation, but this relationship may vary under different circumstances. The sale of enterprise as "a functioning organism" has some specific features and the statutory passage of rights and obligations should help to achieve legal certainty for the contract parties, especially the buyer, and also for third parties that entered into a contractual relationship, as long

as the subject-matter of the performance is related to the transferred enterprise (for ex. a contract of commercial lease, etc.). The purpose of the legal regulation described above is clear and understandable. It is also important to preserve the unity of tangible, personal and intangible components of enterprise in the further economic use of the enterprise.

The case law was our background for questionable issues, in particular as far as the definition of the extent of transferred rights and liabilities is concerned, but only those having private legal status, as well as definition of a part of the enterprise as a separate organizational unit, passage of rights arising from labor relations and transfer of securities.

It is possible to consider adjustments *de lege ferenda* of the text of the provisions mentioned below so that they fulfill more accurately their purpose.

As for the basic provision, we can consider the following wording "the seller undertakes to transfer the property right to the enterprise" and "the buyer undertakes to assume the obligations", as the passage of property rights and obligations occurs upon effect of the contract, without need for any further acts, as evoked by the valid text.

The provision of Sec. 477 could also explicitly exclude the rights and obligations of a public nature, as they do not pass along with the enterprise. Similarly, it is possible to exclude the passage of the industrial rights and other intellectual property rights from the rights of private nature.

Instead of the rebuttable legal presumption of establishment of the purchase price, it is possible to adjust the definition of the purchase price in such a way that it must be either agreed on directly in the contract or the method of its determination must be set forth.

The Sections 485 and 486 of the Commercial Code are to be considered as well. They mention only things, but the duty to notify as per Sec. 484 also allows for defective goods, rights and other assets.

However, it is beyond reasonable doubt that there is a necessary to put more precisely the statutory definition of a part of enterprise. The legislator should also consider whether, for the purpose of the contract for the sale of enterprise, the definition (inspired by the rich and established case law) should be identical with a part of enterprise in terms of granting consent for disposal thereof under Sec. 67a of the Commercial Code.

The contract for the sale of enterprise is a contractual type which is quite widely used nowadays. During its preparation it is necessary to take into account the complexity of the passage of rights and obligations, which occurs upon the effect of the contract. It is also necessary to make sure that the contractual provisions do not depart from the mandatory provisions, which might void the entire contract (in case of exclusion of certain liabilities from the sale) or cause "at least" invalidity of the concerned provision of the contract (for ex. in case of an agreement on passage of only some employees who belong to a part of the enterprise). Nevertheless, if all the rules are complied with, it is a very elegant, practical and fast way of transfer of enterprise. In the last sentence, however, I expect that the contract parties act in accord with the principles of fair trade.