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Corporate Income Tax in 2018 – Systemic Changes or Paradigm Crisis? (Selected Issues)

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The aim of the article is to appoint general idea of the serious amendment made to CIT act, which have entered into force since 1st January 2018 and moreover to evaluate its normative realization. In this respect some crucial changes have been elaborated, such as the extraction of the capital gains as the separate source of income, minimal income tax concerning commercial buildings or disallowance of tax deductions for expenses linked to so called bad debts. Author's main thesis is that the recent amendment does not fully comply with its goals, since taken measures raise doubts from both domestic (constitutional) and international (i.e. EU) perspective.

Keywords: corporate income tax, tax system, theory of taxation, tax policy

1. Introduction.

The legislator is constantly trying to catch up with and "colonize"[1] the rocketing social reality. The goal seems to be elusive and today it is so more than ever. Legal categorization of reality turns out to be unsuitable for the practical needs, and lawyers are forced to more or less artificially "push" new objects into the existing categories.[2] And it is symptomatic that this problem is transferred like the domino effect onto the broader and broader scope of human activity. If one takes into account Benjamin Franklin's famous quote that "in this world nothing can be said to be certain, except death and taxes", surely the tax system is located at the very heart of these transformations.

[1] J. Habermas, *Theorie des komunikativen Handelns*, vol. II, Frankfurt am Main, 1981, p. 222.

[2] T. Gizbert-Studnicki, *Język prawny a obraz świata* [*Legal Language and View of the World*], in: G. Skąpska (ed.), *Prawo w zmieniającym się społeczeństwie* [*The Law in the Changing Society*], Kraków 1992, p. 161. From the perspective of taxation, recent judgement of the Supreme Administrative Court on cryptocurrency (i.e., Bitcoin) trading offers an interesting example of that; the judgement can be considered an excellent illustration of an open texture of tax and legal regulations (cf. judgement of the SAC of 06/03/2018, II FSK 488/16, the Central Database of Judgements of Administrative Courts – CBOSA). As regards EU VAT regulations, cf. judgement of the Court of Justice of the European Union (CJEU) in case: C-264/14 *David Hedqvist.*

From the economic point of view, the obvious problem here is naturally the issue of relative taxation limits, which is roughly described in the Laffer' hypothesis, and thus finding an Archimedes' point of balance between the political (or ideological) vision of the state with its budgetary needs[3] and the substantive right of ownership accompanied by the unveiling psychological, cultural, and economic propensity to escape from taxes[4] in the *prima facie* legally permitted way (through tax avoidance) as well as the explicitly illegal manner (through tax evasion).[5] The other side of the problem is regulatory (legal) in character, as it consists in balancing between the need for adaptation of the legal solutions to changes that the socio-economic environment undergoes and striving for quality and coherence of the law, which is supposed to ensure fiscal efficiency while protecting budgetary revenue sources at the same time – in accordance with the classic Edinburgh rule (i.e., leave them as you find them).[6]

In this respect, Poland's case is not an exception and the problem of finding balance between the effectiveness of market mechanisms and the fairness of division of product as well as income generated by the market remains unresolved.[7] These struggles are well-illustrated by the recent amendments to the Corporate Income Tax Act of 15 February 1992.[8] Their main source is the Act of 27 October 2017 amending the Personal Income Tax Act, the Corporate Income Tax Act, and the Act on Flat-Rate Income Tax on Certain Revenues Earned by Natural Persons.[9]

We are dealing with a true Gordian knot of issues from the world of economics, the law, philosophy, and politics, which corresponds to Thomas Piketty's claim that "taxation is not a technical matter. It is preeminently a political and philosophical issue."[10] Therefore, it is unquestionable that each of the above-mentioned methodologies considered separately seems somewhat impoverished as far as the capability of describing the above-mentioned phenomena is concerned.[11]

[3] See P. Felis, *Wybrane współczesne społeczno-ekonomiczne uwarunkowania reformy systemu podatkowego* [*Selected Contemporary Socio-Economic Circumstances Surrounding the Reform of the Tax System*], in: H. Dzwonkowski, J. Kulicki (ed.), *Dylematy reformy systemu podatkowego w Polsce* [*Dilemmas over the Reform of the Tax System*], Warsaw 2016, pp. 119–129.

[4] An attempt to combine these perspectives can be found, for instance, in the study by A. Alstadsæter, N. Johannesen, and G. Zucman, *Tax Evasion and Inequality*, http://www.nber.org/papers/w23772 (accessed on 04/05/2018). As far as domestic relevant literature is concerned, cf. especially D. Gajewski (ed.), *Międzynarodowe unikanie opodatkowania. Wybrane zagadnienia* [*International Tax Avoidance. Selected Issues*], Warsaw 2017; M. Kudła, *Ekonomiczne problemy kosztów opodatkowania i nielegalnego unikania podatków* [*Economical Problems of Tax Deductibles and Illegal Tax Evasion*], Warsaw 2004, pp. 124–144.

[5] To read about differences between these terms cf. e.g., D. Gajewski, *Granica pomiędzy unikaniem a uchylaniem się od opodatkowania na gruncie działalności holdingów międzynarodowych* [*Boundary between Tax Avoidance and Tax Evasion Based on the Activity of International Holding Companies*], "Monitor Prawa Celnego i Podatkowego" 2014/3, *passim*; M. Kurzac, *Unikanie opodatkowania a uchylanie się od opodatkowania – o kryteriach rozróżniających* [*Tax Avoidance and Tax Evasion – about the Criteria Differentiating between Them*], "Studia Prawno-Ekonomiczne" 2017/25, pp. 11–22.

[6] A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe* [Taxes and Tax Law], Warsaw 2016, p. 66.

[7] M. Sosnowski, *Wpływ zmian w konstrukcji podatku dochodowego od osób fizycznych na obciążenia fiskalne przedsiębiorstw* [*The Influence of Changes in Personal Income Tax on the Fiscal Burden of Businesses*], in L. Patrzałek (ed.), *Finanse – nowe wyzwania teorii i praktyki. Finanse publiczne* [*Finance – New Challenges of the Theory and Practice. Public Finances*], Wrocław 2011, pp. 444–445.

[8] Consolidated text: Journal of Laws of 2017, item 2343, as amended, hereinafter referred to as the CIT Act.

[9] Journal of Laws of 2017, item 2175, as amended, hereinafter referred to as the amendment act.

[10] T. Piketty, *Kapitał w XXI wieku* [*Capital in the Twenty-First Century*], translated by A. Bilik, Warsaw 2015, p. 612. Similarly, A. Gomułowicz, *Zasada sprawiedliwości podatkowej w polskim systemie podatkowym* [*The Principle of Fairness of Taxation in the Polish Tax System*], "Ruch Prawniczy Ekonomiczny i Socjologiczny" 1989/3, pp. 54–56.

[11] It is worth adding that at a meta-theoretical level, each perspective is subject to further stratification. For instance, in a dispute over the essence of the fiscal policy, which is considered a problem of the theory and philosophy of the law, different concepts of rationality are clashing (i.e., the instrumental rationality offered by M. Weber vs the communicative

Bearing in mind the above-mentioned limitations, predominantly legal optics were adopted and other perspectives were merely signalled. However, seeing the problem described in the title from the legal perspective is enough to allow us to notice numerous dilemmas that the legislator was faced with when introducing an array of amendments to the CIT Act on 01 January 2018, which in principle (with some exceptions) have been in force since 01 January 2018 or starting from the new tax year, if it was different from the calendar year and had started before the above-mentioned date and would come to an end after 31 December 2017 (Article 4, section 1–2 of the amendment act).

The main purpose of the amendments, which has been openly declared by the legislator, "is to seal the corporate income tax system so as to ensure that there is a link between the amount of tax paid by large enterprises, in particular multinational enterprises, and the place where their income is actually generated. (...) the Act is intended to take another step towards restoring income from taxes, especially income from CIT."[12] However, one can have some reservations as to whether this goal has been achieved by the legislator. Some of the new regulations met with a cool reception both from the doctrine of tax law and the practitioners who do not deny the intentions behind the amendments yet challenge the manner of their implementation in connection with, among others, the legislative hurry accompanying the changes in question.

Selected problems posed by the above-mentioned amendment act are discussed below and particular emphasis is placed on the ones that may raise doubts from the perspective of – as it seems – the dominant idea of taxation of (pure) income and its various variations[13] (i.e., an economic surplus over the costs of generating it and securing its source, which is produced within a specified period of time), which is supposed to be the foundation of the tax construction in question.[14] This certain kind of detachment of the legal concept of income from its economic basis, which manifests itself in numerous amendments to the CIT Act, poses a threat that the tax will become counter-intuitive and incomprehensible to the addressee, which may translate, on the one hand, into objective effectiveness (in terms of application and observance) but, on the other hand, open up possibilities for abuse.

2. Isolation of the source of revenues in the form of capital gains.

In the first place, it behoves to pay attention to the most prominent amendment that has been announced. In the light of the legal status pertaining to the corporate income tax, which was in force until 31 December 2017, there was unitary (cumulative) tax revenue. In this respect, the legislator decided to introduce a fundamental systemic change[15] to the CIT Act by way of isolating the source of revenue in the form of capital gains and separating income obtained from this source from the remaining taxpayer's income (Article 7, sections 1–2 and Article 7b of the CIT Act). Such (capital) revenue is divided into six revenue groups:

– revenue from legal persons' profit sharing;

reality presented by J. Habermas and developed by H. Arendt as well as J. M. Buchanan); both lead to dissimilar answers to the question about the possibility and methods of influencing and controlling social reality by means of tax norms (cf. M. Zirk-Sadowski, *Polityka fiskalna a polityka prawa* [*Fiscal Policy versus Legal Policy*], Acta Universitatis Lodziensis. Folia Iuridica 2015/75, pp. 7–21).

[12] Sejm's publication VIII.1878.

[13] To learn more about the variants of the concept of a pure increase in capital from a historical perspective, cf. G. Matysek, *Założenia modelowe opodatkowania dochodów* [*Model Foundations of Income Taxation*], Annales Universitatis Maria Curie-Skłodowska 2009/2, p. 56 et seq.

[14] H. Litwińczuk, *Podatki dochodowe* [*Income Taxes*], in: L. Etel (ed.), *System prawa finansowego* [*The System of Financial Law*], vol. 3, Warsaw 2010, p. 182.

[15] M. Thedy, M. Opoka, *Rozdzielenie źródeł przychodów w podatku dochodowym od osób prawnych* [*Separation of Income Sources in Corporate Income Tax*], Przegląd Podatkowy 2018/2, p. 21.

– revenue from making a contribution in kind to a company with share capital and a PLS or another legal person;
– revenue from shares in a legal person or a company with share capital and a PLS, other than in points 1–2, including from disposal of shares and exchange of shares;
– revenue from the disposal of all rights and obligations in a company that is not a legal person;
– revenue from disposal of receivables previously acquired by a taxpayer and receivables arising from revenue recognized as capital gains;
– revenue from property rights, securities, derivative financial instruments, participation in investment funds or collective investment institutions, rental, lease or other agreement of a similar nature concerning the above-mentioned rights, and disposal of the above-mentioned rights.

The consequence of this change is the separate estimation of the amount of income from these two sources and the lack of the possibility of offsetting losses on financial capital against income from other economic activity. In other words, settlement of tax deductibles between these sources will not be possible; losses inured on the source recognized as capital gains will not be reducing tax imposed on other areas of the taxpayer's activity and vice versa.[16] Pursuant to Article 7b, section 2 of the CIT Act, an exception to the principle of revenue allocation indicated above only applies to insurers, banks, and other financial institutions[17]; their revenue will be recognized as one source, excluding:

– dividends, excess balance in cooperatives, and income of investment funds or collective investment institutions received by the participants in this fund or institution, if the statute provides for payout of this income without repurchase of participation units or buyout of investment certificates;
– the equivalent of profit of a legal person, a partnership limited by shares or a foreign company that has no legal personality but is treated as a legal person and whose total income is taxed in its state of residence, which is used to increase its share capital, as well as the equivalent of excess balance of a cooperative, which is used to increase members' funds, and the equivalent of the amounts of other capitals (or funds) of such a legal person or company, which are contributed to that capital (or fund).

In effect, as the project promoter themselves explained: "if in the course of running their business and economic operations, the taxpayer earns both income from «capital gains» and income from other activities within the tax year, then the total income obtained from both sources will be the subject to taxation with income tax (at 19% tax rate). If, however, in the course of running their business and economic operations, the taxpayer obtains income from only one of these sources and suffers a loss on the other source, then the income derived from one source will be subject to taxation with income tax, without reducing it by the loss incurred on the second source of revenue. Nevertheless, the taxpayer will be able to reduce their income from a given source of income (revenue) in the next consecutive five tax years by the amount of such loss incurred in a tax year on this source of income (revenue) but the amount of such reduction in any of these years may not (as it was before – added by T.G.) exceed 50% of the said loss. An analogous deduction of loss only on a given source of income through a reduction of income obtained from this source within the next five tax years also applies in a situation where the taxpayer suffers loss on both revenue sources in a tax

[16] R. Kowalski, *Zmiany w podatkach dochodowych 2017/2018* [*Changes in Income Taxes 2017/2018*], Warsaw 2018, chapter 4.2.

[17] As regards the former, allocation of their funds to securities remains in direct relation to their activity as insurers since it is necessary to secure financial means allowing to meet obligations under insurance contracts when running this type of activity; whereas banks and other financial institutions are entities that deal with turnover of property rights as part of their typical activity. Participation of non-financial revenue is marginal here.

year, that is, loss on the source of revenue (income) recognized as «capital gains» and loss «on the source» which is revenue earned from other revenue sources."[18] Shareholders in partnerships (that are tax-transparent), who are CIT taxpayers, are currently in an analogous situation (Article 5, section 1a of the CIT Act).

It is worth adding that the deduction of the loss incurred prior to the entry of the amended provisions into force takes place in accordance with the rules applicable beforehand, that is, the loss may be deducted from income from both sources (Article 6 of the amendment act).[19] In addition, as far as revenue and tax deductibles related to restructuring transactions are concerned, the legislator adopted a rule that both of these categories are subject to regulations applicable at the time they were generated. And so costs are qualified in accordance with the legal status as of the date of obtaining revenue related to mergers or divisions of companies; that is, the regulations existing before apply, if the revenue was generated before 01 January 2018 or the new regulations apply, if the revenue was generated after that date. On the other hand, the change also produces a retrospective effect as the remaining costs incurred but not settled before entry of the provision into force are qualified (i.e., attributed to the source) under the new rules (Article 9 of the amendment act).[20]

From a theoretical point of view, the regulation under discussion is a considerable deviation from the principle of uniformity of corporate income tax applicable until now, which introduces separation of income from economic activity and such separation has so far been unknown to the Polish tax system.[21] At this point, it is worth remembering that from a model perspective, one can distinguish:

– schedular (analytical) income tax;
– unitary (synthetic, worldwide) income tax;
– and mixed income tax.

Schedular taxation consists in applying different taxation rules to individual sources of income obtained by the taxpayer. Depending on the type of income source, different rules for determining the tax base or different tax rates apply. The schedular approach to income taxation ensures better adaptation of the structural elements of the tax to the nature of individual income sources, which makes tax imposed on income assigned to individual schedules potentially more effective. However, the basic disadvantage of schedular taxation is the fact that it does not ensure fair distribution of financial burdens due to the fact that the whole taxpayer's financial situation is not taken into account and, therefore, such taxation is not adjusted to the taxpayer's payment capacity contingent upon the total sum of all their incomes. In contrast, unitary income tax is imposed on total taxpayer's income regardless of its sources and the advantages and disadvantages of this concept unfold asymmetrically to the above. In particular, it is often stressed that lack of differentiation among the rules governing income taxation may cause the system of unitary income taxation to be perceived as unfair (and it is enough to take into consideration abuse that has been mentioned in this paper, which the legislator pointed out quite fairly). Finally, the mixed model combines the features of both of the above-mentioned models. The ultimate total burden arising from income taxation in a mixed model depends not only on the source of taxpayer's income but also on the amount of their total income obtained in a given taxable period from various sources (cf. notes on the construction of Article 7b, section 1 of the CIT Act provid-

[18] Sejm's publication VIII.1878.

[19] That way the legislator solved the temporary problem of incompatibility of the system of loss settlement functioning within the framework of the new legal status (where loss is deducted based on the source of revenue) and the old one (where general income was reduced).

[20] As the project promoter pointed out, "the provision is intended to make it clear that the separation of revenue sources for the purposes of CIT applies to costs incurred before the entry of this act into force as well" (Sejm's publication VIII.1878).

[21] Taxpayers of personal income tax are familiar with separation of revenue sources but in this case settlement of entrepreneurs' revenue is not subject to further stratification either.

ed above). The introduction of the elements of a schedular system into unitary taxation undoubtedly facilitates the process of carrying out the tax policy as it enables the use of special instruments that are more adequate and better adjusted to the construction of a particular revenue source, that is, it allows to take into account the particular nature of these sources. Due to the establishment of categories of income that comprise the taxpayer's total income, it becomes possible, for instance, to introduce a special type of deduction or to introduce completely separate and more favourable taxation rules intended to support the development of certain kinds of businesses or discriminate against some sources, for example, through prohibition of offsetting losses on these income sources against income from other sources or the total income.[22]

The change regarding isolation of the source of revenue from capital gains is thus a turn towards a mixed model (i.e., a worldwide model with schedular elements), and taking into consideration its theoretical assumptions, it seems accurate to note that the justification of the change provided in the draft amendment does not fully reflect its essence.[23] As indicated, "one of the frequent optimization mechanisms used by corporate income taxpayers is (artificial) creation of loss through economic operations on the assets that they own and reduction of income generated as a result of conducting their primary activity (i.e., operating activity) by the amount of such (artificial) loss."[24] Without denying the functional link of the regulation in question with the above-mentioned goal, it must be noted that tax authorities already have a whole range of measures to protect the interest of the State Treasury as regards the above, including in particular:

– detailed anti-abusive clauses regarding contributions in-kind, mergers, divisions, and exchange of shares (Article 12, sections 13–14 of the CIT Act) as well as dividends (Article 22c of the CIT Act);
– general clause on tax avoidance[25] (Article 119a et seq., op. cit.)[26].
– regulations regarding transfer pricing (Article 11 of the CIT Act).

The idea of system sealing declared by the legislator is thus implemented in Article 7b of the CIT Act primarily through a certain normative qualification of economic operations from a tax perspective, which allows not to examine the objectives of individual transactions, conduct appropriate proceedings in this regard or defend one's claim in court. Therefore, the burden of securing budgetary revenues has somewhat been shifted from tax authorities to taxpayers, which means that instead of the tax authorities assessing the factual circumstances surrounding an individual case in line with tax regulations, they are subject to "rigid" statutory qualification. And the wording of the above-mentioned normalization compensates for this state of affairs with a clear (i.e., indisputable) definition of the relationship between the taxpayer and the tax authorities only to a limited extent.

Thus, the economic burden of the reform (and its objectives) is born by the taxpayer whose effective tax burden may increase under certain circumstances, even if the tax rate remains unchanged. This is because the adopted solution inherits the defects of the schedular approach to income taxation, that is, it can lead to a situation where the taxpayer is forced to pay tax despite their overall negative economic situation. The change that is being implemented may, in particular, affect taxpayers earning revenues from both sources due to the nature of their business. The following industries can serve as examples of that:

– real estate development industry where sale can take place directly through dispos-

[22] G. Matysek, *Założenia modelowe…* [*Model Foundations…*], pp. 58–60 and 63.

[23] M. Thedy, M. Opoka, *Rozdzielenie źródeł…* [*Separation of Income Sources*], pp. 22–23.

[24] Sejm's publication VIII.1878.

[25] Recently, issues related to it have been discussed in the monograph edited by D. Gajewski, *Klauzula przeciwko unikaniu opodatkowania* [*Clause Countering Tax Avoidance*], Warsaw 2018.

[26] Tax Ordinance Act of 29 August 1997 (consolidated text: Journal of Laws of 2018, item 800 as amended).

al of assets or, for instance, through sale of shares in special purpose vehicles created for the purpose of implementation of individual projects;
– IT industry where interrelated advisory services are often sold as well as copyright or related property rights (e.g., a company licenses a computer program and renders services related to its maintenance/servicing irrespectively).[27]

If both areas of activity bring dissimilar results, the possibility of offsetting between them will be ruled out, nonetheless. Therefore, such entities will be in a worse position compared to those whose primary activity focuses on a single revenue source.

This is tantamount to far-reaching interference in the constitutional freedom of economic activity (see Artcile 20 of the Constitution) as the Tax Act may enforce or restrict certain market activities. "Inhibition" of sale of assets is often indicated as an example of a potential consequence of the regulations under discussion – even when it comes to taxpayers that try to improve their negative economic situation that way (e.g., through sale of shares in a subsidiary) – and thus there will be a negative impact on capital raising, if needed, for instance, to secure a revenue source of a purely operational nature. As far as subsidiaries are concerned, the issue is even more pronounced due to the fact that the scope of the so-called participation exemption was simultaneously reduced; the exemption is applicable to revenues related to shares held in subsidiaries, excluding, for instance, liquidation and compulsory redemption of shares (Article 22, section 4 of the CIT Act).[28] The above is also correspondingly relevant for other methods of capital raising, for instance, through royalties or sales of know-how. For instance, a company that wants to sell a patent in order to obtain funds for its operating activity cannot reduce its income from the sale of this patent by loss from economic activity despite using the funds for this very activity (such as remunerations, purchase of goods, etc.). Despite loss suffered on primary activity, the company would need to pay tax on the sale of the patent.[29] In turn, as regards investment, a similar freezing effect may be produced by ruling that capital gains shall include profit destined for increase of share capital, the equivalent of excess balance of a cooperative destined for increase of members' funds, and the equivalent of the amounts of other capitals (or funds) of a legal person or company, which are contributed to that capital (or fund) – not without irony the change was referred to as "tax on common sense, foresight, and security of the company's finances and its shareholders."[30]

Importantly, the obligation to recognize revenues as capital gains is imposed on almost every taxpayer, regardless of the profile of their activity. The taxpayers who deal with other types of activity on a daily basis and only make capital gains additionally should bear this in mind in particular. At the same time, the legislator imposed a 19% income tax rate on capital gains included in the first group, that is, revenues from participation in profits of legal persons, regardless of whether the taxpayer is, for instance, the so-called small taxpayer (Article 22, section 1 of the CIT Act).

All this proves there is a need to consider whether the solution under discussion adheres to the principle of proportionality (discussed in more detail below as part of elaboration on settlement of losses from bad debt).[31] As it was noted, the organizational and economic burden of

[27] It seems that the legislator has only taken into consideration a situation where the rights and services related to them are sold in a bundle (cf. Article 7b, section 1, point 6 of the CIT Act).

[28] M. Thedy, M. Opoka, *Rozdzielenie źródeł…* [*Separation of Income Sources*], pp. 23–24.

[29] R. Kowalski, *Zmiany w podatkach…* [*Changes in Income Taxes…*], chapter 4.2.

[30] A. Czernik, *Źródła, algorytmy i meandry architektury czyli zmiany w CIT 2018* [*The Sources, Algorithms, and Architectural Meanders – that is Amendments to CIT, 2018*], "Doradca Podatkowy" 2018/1, p. 12.

[31] M. Thedy, M. Opoka, *Rozdzielenie źródeł…* [*Separation of Income Sources*], p. 26.

sealing the system of income taxation was shifted towards the taxpayer by way of reforming the settlement system so that it would facilitate verification – from a tax perspective – of economic operations carried out by the taxpayer, which the legislator does not hide. Under such circumstances, the abundance of anti-abusive clauses becomes to some extent accessory at most, if not redundant. Although one should look approvingly at the legislator's attempts to seek budgetary revenues from capital gains as this corresponds, as it seems, to the postulate of vertical equity of the tax system, the scope of this indirect interference in the choice of forms and methods of conducting business by entrepreneurs (especially corporate ones) does raise doubts. Moreover, one shouldn't lose sight of the problem of international tax competition as the solution under discussion is not commonly used in other countries.[32]

3. Limits on costs of intangible services

In particular, the correlate of changes in regulations on revenue sources is the new provisions on the limits imposed on costs of the so-called intangible services. At the point of departure, it should be noted that the changes discussed in this section are part of a broader reform consisting in implementation of the 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[33] (i.e., the Anti-Tax Avoidance Directive – ATAD), which is oriented at counteracting the phenomenon known as Base Erosion Profit Shifting (BEPS).[34] This objective is to be achieved through implementation of the most common legal solutions (i.e., regulations) counteracting aggressive tax optimization into the tax legislation of all EU Member States. The solutions provided for in the Directive include:

- limitation on interest deduction;
- exit taxation of unrealized capital gains in case of transfer of assets, residence for tax purposes or a permanent establishment;
- General Anti-Avoidance Rule (GAAR);
- rules on Controlled Foreign Companies (CFC);
- and rules for counteracting hybrid mismatch arrangements.

At the same time, the provisions of the Council Directive (EU) 2016/1164, which are being implemented, are de minimis regulations in character, that is, they only establish the general minimum level of protection against aggressive tax planning on the internal market. In consequence, it is possible to adopt stricter conditions on the domestic level or more stringent criteria for counteracting tax avoidance practices than the ones provided for in the Directive. The legislator decided to take that opportunity. In so far as the modification of the provisions on the so-called thin (insufficient) capitalization – that is, regulations preventing excessive debt financing of taxpayers (Article 15c and Article 15ca of the CIT Act in conjunction with Article 7 of the amendment act) – is a typical instrument mentioned by the ATAD, the regulations on the costs of intangible services have been authored by the Polish Ministry of Finance.

The legislator justifies the introduction of regulations (Article 15e of the CIT Act) limiting the amount of tax deductibles arising from agreements on intangible services (e.g., license agreements or agreements on advisory, management, and control services) by claiming that "they are an ideal tool for creating a «tax shield» (i.e., an artificial and economically unjustified means of generating tax deductibles). On the one hand, their transfer to other entities has a purely formal character and, on the other hand, there are objective difficulties in determining the mar-

[32] M. Thedy, M. Opoka, *Rozdzielenie źródeł*... [*Separation of Income Sources*], p. 23. The authors offer the example of Ireland in Europe and simultaneously stress that most of our neighbours stuck to the unitary construction of income tax.

[33] OJEU L, item 193, p. 1.

[34] The issue of international tax avoidance is presented in the monograph by D. Gajewski, *Holding International Taxation in the European Union*, Warsaw 2017.

ket value of such rights (e.g., a trademark – added by T.G.). This also applies to certain types of intangible services, including consulting, management, and control services. These services are characterized by the lack of the possibility of actually linking their price to the «product» that is received for that price. Such services are often provided by foreign entities to their Polish subsidiaries and remuneration of the foreign head offices for their services is determined as the percentage of capital invested in the Polish company (calculated based on the subsidiary's revenue)."[35]

In this respect, the new Article 15e of the CIT Act provides for a limit on recognizing costs as tax deductibles within a tax year of up to 5% of EBITDA[36], which is imposed on costs incurred directly or indirectly for the benefit of related entities listed in Article 11 of the Act or for the benefit of entities that reside, have a registered office or the management board on the territory of or in a country listed in the provisions issued on the basis of Article 9a, section 6 of the Act; these are the costs of:

– advisory, market research, advertising, management, control, data processing, and insurance services as well as guarantees and sureties, and similar services;
– all kinds of fees and receivables for using[37] or the right to use the rights or values referred to in Article 16b, section 1, points 4–7;
– transferring debtor insolvency risk associated with loans other than the ones granted by banks and credit unions, including liabilities arising from derivative financial instruments and similar renderings (section 1).

Therefore, the scope of the limitation under discussion is *ratione materiae* and *ratione personae* in character. It applies to the above-mentioned services and rights indicated in the Act, which are provided directly or indirectly by entities related to the taxpayer or entities that reside, have a registered office or the management board on the territory of or in a country applying harmful tax competition (i.e., the so-called tax havens).

The up-to-date list of these countries and territories is provided in the regulation of the Minister of Development and Finance of 17 May 2017 indicating countries and territories applying harmful tax competition in terms of corporate income tax.[38]

Expenses incurred indirectly on behalf of eligible entities are considered to be expenses incurred on behalf of an entity unrelated to the taxpayer, if the actual owner of all or part of the receivables from services or rights subject to limitation is an entity related to the taxpayer or an entity residing, having a registered office or the management board on the territory or in a country listed in the above-mentioned regulation of the Minister of Development and Finance.[39] The limitation also applies to shareholders in tax-transparent companies (section 6). It is to be applied when calculating the amount of advance tax payments during the tax year.

The list of services provided in section 1, point 1 of the Article 15e of the CIT Act is not exhaustive. According to the Ministry of Finance, interpretation of this provision should not, how-

[35] Sejm's publication VIII.1878.

[36] Earnings before interest, taxes, depreciation, and amortization (EBITDA) – an indicator used in financial analysis of enterprises, which signifies operational profit before deducting tax, interest on liabilities, and amortization and depreciation expenses.

[37] As far as the latter is concerned, the intention is to apply Article 15e of the CIT Act to a situation where the license holder pays license fees but does not actually use the right they acquired in their business (regardless of the reason).

[38] Journal of Laws, item 997.

[39] Communication from the Ministry of Finance of 24/04/2018: https://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset_publisher/6Wwm/content/koszty-uzyskania-przychodow-zwiazanych-z-nabyciem-niektorych-rodzajow-uslug-i-praw?redirect=https%3A%2F%2Fwww.mf.gov.pl%2Fministerstwo-finansow%2Fwiadomosci%2Fkomunikaty%3Fp_p_id%3D101_INSTANCE_6Wwm%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1%26_101_INSTANCE_6Wwm_advancedSearch%3Dfalse%26_101_INSTANCE_6Wwm_keywords%3D%26_101_INSTANCE_6Wwm_delta%3D20%26_101_INSTANCE_6Wwm_cur%3D1%26_101_INSTANCE_6Wwm_andOperator%3Dtrue#p_p_id_101_INSTANCE_6Wwm_ (accessed on 04/05/2018).

ever, disregard the service division provided in the Polish Classification of Goods and Services (PKWiU).[40] For instance, the regulation in question covers advisory services related to management, which are indicated in section M, chapter 70, within the category 70.22.1 PKWiU, or advertising services classified in section M, chapter 73 PKWiU (category 73.1). Systemic interpretation also turns out helpful, for instance, as regards insurance and reinsurance services whose normative model is provided in the Civil Code (in Article 805 et seq.) as well as the Act of 11 September 2015 on insurance and reinsurance activity[41].

Notwithstanding the above, renderings of a similar nature have also been covered by the above-mentioned provision. The general characteristics of services (or renderings) that are alike the ones explicitly listed in the CIT Act have been presented, among others, in the Supreme Administrative Court's judgement of 05 July 2016[42] making references to a similar catalogue provided in Article 21, section 1, point 2a of the CIT Act concerned with withholding tax. According to the Supreme Administrative Court, this group comprises services that have features characteristic of renderings explicitly indicated in the Act as well as elements characteristic of renderings other than those specified in this provision. It is essential for the renderings to have more characteristic elements that are explicitly mentioned in the Act than the characteristic features that are not indicated explicitly. As far as the above-mentioned advisory services are concerned – according to the communication from the Ministry of Finance quoted earlier, one should also mention, for instance, public relations or lobbying services. Whereas when it comes to market research services, public opinion polling services may be considered similar.

According to the explanations of the Ministry of Finance, the catalogue of services that Article 15e, section 1, point 1 of the CIT Act applies to does not include, among others, legal services (classified in section M, chapter 69 of PKWiU), accounting services (classified in section M, chapter 69 of PKWiU), including financial audit services, and personnel placement and supply services (classified in section N, chapter 78 of PKWiU). The Ministry also advocates that:

– as far as tax consequences are concerned, tax advisory activities should be treated in the same way as other legal services;
– the category of accounting services does not include data processing services classified in item 63.11.11.0 of PKWiU;
– acquisition of players and the rights to the image of a player are renderings similar to personnel placement and supply services.[43]

Suggestions as to services that the above-mentioned provision does not apply to are also provided in the judicial decisions concerning the above-mentioned Article 21, section 1, point 2a of the CIT Act.[44] For instance, IT system implementation services are not organizational or advisory services. They are services of a technical character, which are not, however, similar to the ones indicated in Article 21, section 1, point 2a of the CIT Act.[45] Similar is the case with software servicing and maintenance services.[46]

As far as costs arising from fees and receivables for the use of rights and intangible assets are concerned (Article 15e, section 1, point 2 of the CIT Act), the Act cross-refers directly to section 1, points 4–7 of Article 16b therein. The above-mentioned Article indicates copyright or related property rights, licenses, and the rights specified in the Act of 30 June 2000 – Industrial Property Law[47] – that is, in particular, the right to an invention (patent), trademark protection,

[40] Regulation of the Council of Ministers of 04 September 2015 on the Polish Classification of Goods and Services (PKWiU) (Journal of Laws, item 1676, as amended).

[41] Consolidated text: Journal of Laws of 2017, as amended.

[42] II FSK 2369/15, the Central Database of Judgements of Administrative Courts (CBOSA).

[43] Judgement of the Regional Administrative Court in Bydgoszcz of 28/04/2009, I SA/Bd 125/09, CBOSA.

[44] An array of examples is offered by R. Kowalski in *Zmiany w podatkach...* [*Changes in Income Taxes...*], chapter 4.6.

[45] Judgement of the Regional Administrative Court in Warsaw of 25/11/2016, III SA/Wa 2968/16, CBOSA.

[46] Judgement of the Regional Administrative Court in Warsaw of 27/03/2015, III SA/Wa 1758/14, CBOSA.

[47] Journal of Laws of 2017, item. 776.

utility pattern protection and geographical indication, industrial design registration rights, topography of an integrated circuit registration rights as well as value equivalent to information received, which is associated with industrial, commercial, scientific or organisational knowledge (i.e., know-how). The right to use a particular item or right constitutes the core of a license (or sub-license)[48] agreement as well as a rental (Articles 659–679 of the Civil Code), tenure (Articles 693–709 of the Civil Code) or lease agreement (Articles 709[1]–709[18] of the Civil Code). Due to the fact that the restriction is concerned with (all kinds of) fees and receivables for the use or the right to use the rights and assets referred to in Article 16b, section 1, points 4–7 of the CIT Act, costs (i.e., fees and receivables) of transfer of rights specified in Article 16b, section 1, points 4–7 of the CIT Act will not be subject to restrictions provided for in Article 15e of CIT Act.

The provision of Article 15e, section 1, point 3 of the CIT Act is concerned only with agreements/instruments transferring debtor insolvency risk associated with loans (other than the ones granted by banks and credit unions) granted to them, including liabilities arising from derivative financial instruments and similar renderings (e.g. credit default swaps). Therefore, this provision applies neither to costs of transferring the risk of occurrence of events other than debtor insolvency nor the costs of transferring debtor insolvency risk related to liabilities other than loans (receivables), e.g. commercial ones. An example of liability that is not covered by the point in question is a guarantee granted by a bank for repayment of the advance payment made to a building contractor or for construction works to be carried out properly. In addition, it expressis verbis does not cover the costs of transferring debtor insolvency risk associated with loans granted by banks and credit unions either. The expression “other than the ones granted by banks and credit unions” refers explicitly to the lender’s status and not the entity to which the risk of debtor insolvency is transferred. Therefore, if through granting a guarantee a bank takes over part of the risk associated with a loan granted by an entity other than a bank or credit union, the restriction stipulated in Article 15e, section 1, point 3 of the CIT Act applies. In turn, the expression “and similar renderings” – used in fine in Article 15e, section 1, point 3 of the CIT Act – refers to other services / agreements / financial instruments that result in transferring debtor insolvency risk arising from loans (other than the ones granted by banks and credit unions), for example, to a Total Return Swap (TRS).

Notwithstanding the above, the limitations under discussion are not applicable to, among others, costs of services, fees, and receivables recognized as tax deductibles arising directly from production of goods or services (Article 15e, section 11, point 1 of the CIT Act). According to the Ministry of Finance, such expenses are costs of services or rights “incorporated” in a product, goods or services to any extent, that it, such cost affects the final price of goods or services as (usually) one of the many expenses that need to be incurred in the process of production and distribution of goods or rendering services. The necessity to seek a link between a cost and a product, goods or services eliminates from the scope of the exemption under discussion (just as the case with costs directly related to revenues) costs that generally serve the taxpayer to run their business and are in no way connected with particular goods or services. The communication from the Ministry of Finance indicates the following examples covered by the above-mentioned exemption:

- purchase of a license for photos used in albums, calendars, and books;
- purchase of a license for the purpose of carrying out a distribution agreement;
- purchase of the right to use images of characters from animated or fiction films through placing them on one’s own products;

[48] The license agreement (or the license) is regulated in the Act of 04 February 1994 on copyright and related rights (consolidated text: Journal of Laws of 2017, item 880, as amended) in Article 41, section 2 therein as well as in the above-mentioned Industrial Property Law in Article 66, section 2 and Articles 76–81 (regarding invention) as well as in Article 163 (regarding trademark) therein.

– purchase of rights to use a musical composition in a commercial spot prepared for a client;
– purchase of a service by an advertising agency (i.e., outsourcing) to be used in an advertising campaign of its client;
– purchase of a consulting service by an advisory company from a related entity in order for this company to use it for the purposes of rendering a service.

Moreover, the limitation set out in Article 15e, section 1 of CIT Act does not cover:

– services that are re-invoiced by the taxpayer; that is, services that the taxpayer purchased on their own behalf but at the expense of another related entity. The exemption applies especially to a situation where a related entity purchases a service from another related entity and then re-invoices it further to other entities from the group (e.g., purchase of a service by a shared services centre from a related entity and then further re-invoicing to regional centres);
– insurance services provided by domestic or foreign insurance or reinsurance companies;
– guarantees and sureties granted by a domestic bank, credit institution, credit union, national credit union or domestic or foreign insurance or reinsurance company;
– services / rights provided within a tax capital group (TCG);
– services, fees, and receivables that are remunerated in line with the decision on recognition of the correctness of the choice and application of a method for determining transaction prices between related parties (the so-called Advance Pricing Agreement).

The 5% EBITDA limit indicated earlier is applicable to costs of the above-mentioned services, fees, and receivables, if they exceed PLN 3 million in total in a tax year (section 12).[49] Expenses for any of the above services, fees, and receivables that do not exceed this threshold are not subject to limitations. Thus, the threshold is to serve as a kind of "tax allowance"; the legislators are reasonably not interested in links among small taxpayers but in large-scale aggressive optimization and such an approach deserves to be evaluated positively. In accordance with the explanations of the Ministry of Finance, this limit applies to the total amount of expenses incurred in all three cost groups (accumulation ratione materiae). So, in order to calculate it, it is necessary to sum up the costs of services and rights incurred in particular categories enumerated in Article 15e, section 1, points 1–3 of the CIT Act. The calculation takes into account neither revenues that are exempt or not subject to taxation with CIT nor tax deductibles associated with them. In addition, the sum of tax deductibles and the amount of interest are calculated without taking into account the deductions arising from the application of this limitation or from the limitation imposed on recognizing excess borrowing costs as tax deductibles (Article 15c, section 1 of the CIT Act).[50] In the case of a tax capital group, this limit applies to individual companies forming a tax capital group and not to the group itself as a CIT taxpayer.

The amount of tax deductibles subject to exclusion under Article 15e of the CIT Act is figured in a revenue source proportionally to the amount of "eligible" costs incurred within the framework of this revenue source given the separation of revenue sources discussed above (section 7). In turn, the amount of costs indicated in Article 15e, section 1, which is not deducted in a given

[49] If, however, the taxpayer's tax year is longer or shorter than 12 months, the threshold, above which the limit on the costs of "eligible" rights and services is calculated, is then estimated by multiplying PLN 250,000 by the number of months of the taxpayer's tax year.

[50] Therefore, EBITDA is in principle calculated with the following formula: Limit = 5% × [(Rsum – Rinterest) – (Csum – Depreciation – Interest)] + the amount of threshold, where: Rsum – the sum of revenues from all revenue sources; Rinterest – revenue from interest; Csum – the sum of tax deductibles; Depreciation – depreciation allowances indicated in Articles 16a–16m of the CIT Act; Interest – interest costs. A slightly different algorithm applies to non-residents conducting activity through an establishment and to financial institutions, banks, and credit unions (Article 15e, sections 2 and 8 of the CIT Act).

tax year, is subject to deduction within the next 5 tax years in line with Article 15e (section 9) and within the limits it establishes and which are applicable in a given year.

In accordance with the communication from the Ministry of Finance mentioned earlier – in the light of Article 4 of the amendment act, the above-mentioned rules are applicable regardless of the date of conclusion of the agreement (i.e., purchase of rights or services), if the tax-deductible expenses arising from it are recognized by the taxpayer after 01 January 2018.

Additionally, it is worth noting that as far as the limits on recognition of costs of intangible assets are concerned, the legislator also reduced the scope of depreciation of intangible assets in Article 16b, section 1 of the CIT Act in response to the judicial decisions of Administrative Courts regarding unregistered trademarks. Namely, the possibility of their depreciation was excluded in case of "first" acquisition (in consequence of a decision to subject the trademark to protection)[51] and a reservation was implemented that only intangible assets that were "acquired from another entity" (i.e., secondary acquisition) are subject to depreciation. This change was introduced so to say "in a bundle" comprising, among others, settlement of the costs of intangible services.

Although the solutions presented here are not taxpayer-friendly, they have been justified convincingly. It is noteworthy that the legislator took care of their appropriate implementation by way of minutely regulating the rules for deducting tax-deductible expenses within the indicated scope[52] as well as by limiting them explicitly to aggressive tax optimization that substantially affects the budget – and hence displayed a common-sense approach. Taxpayers were left with a "safe haven" in the form of a threshold of PLN 3 million as the restriction does not apply below that amount. It seems that this time legislator managed to find relative balance between the desire to seal the tax system and the reality of the free market economy.

4. Minimum income tax on the value of commercial real estate.

The same cannot be said of another previously unknown tax structure that has been introduced with the amendment act of 27 October 2017, which provoked controversy as to its interpretation even before it came into force.[53] It is concerned with the so-called minimum income tax imposed on taxpayers who own commercial real estate (Articles 24b–24c of the CIT Act). In this case, the taxable product is – at least formally – revenue arising from ownership of certain fixed assets located on the territory of the Republic of Poland. The tax is dependent on the value of taxpayer's assets and its financial burden is only borne, if adequate income taxable with income tax has not been generated. The taxable products are:

- commercial and service buildings classified in the Classification of Fixed Assets[54] (cf. Article 16i, section 2, point 3 of the CIT Act) as a shopping mall, department store, independent store or boutique, and other commercial and service buildings,
- office buildings classified in CFA as office buildings.

[51] It is claimed that "within the meaning of this provision, «acquisition» is also considered to be conferment of the right to trademark and utility pattern protection on a taxpayer as well as the rights arising from industrial design registration by a constitutive decision of the Patent Office" (cf. e.g., judgement of the Supreme Administrative Court of 06/04/2017, II FSK 996/15, CBOSA and the judicial decisions quoted therein).

[52] A drawback that needs to be stressed (again) is, among others, the lack of a provision that would allow not to apply cost limitation, if expenses for the purchase of intangible services are incurred for the purpose of production or acquisition of fixed assets or purchase of intangible assets.

[53] See explanations of the Ministry of Finance as to the possibility of deducting the above-mentioned tax from advance payment despite not having paid it: https://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset_publisher/6Wwm/content/id/6221877 (accessed on 04/05/2018).

[54] Regulation of the Council of Ministers of 03 October 2016 on the Classification of Fixed Assets (CFA) (Journal of Laws, item 1864).

The income tax on the value of commercial real estate was qualified based on the initial value of the above-mentioned fixed assets and is calculated on a monthly basis at a 0.035% rate, if the initial value of a fixed asset exceeds PLN 10,000,000 (Article 24b, sections 1 and 3 of the CIT Act). A taxpayer who is a co-owner of a building along with unrelated entities determines the initial value only with respect to the part they own, in accordance with the principles governing determination of initial value of fixed assets for CIT purposes. Similar is the case when a building is a fixed asset owned or co-owned by a company that is not a legal person (and under such circumstances individual shareholder's profit participation is the decisive factor) (Article 24b, sections 4–5 of the CIT Act). However, if a fixed asset is co-owned by a taxpayer and a related entity, the total initial value of this fixed asset is taken into account; so the entire facility is verified against the limit of PLN 10,000,000 and the initial value of the fixed asset determined on the basis of the share in co-ownership, which arises from the accounts, is taken into consideration only at the time of estimating tax (sections 6–7). The status of a taxpayer will also be acquired by an entity that is not the owner of a building subject to minimum taxation, if they receive depreciation allowances on its initial value (financial leasing – section 12). In principle, each moth the taxpayer should establish the initial value of the property, subtract 10,000,000 PLN from this amount, and estimate 0.035% tax on the difference. The taxpayer is thus required to pay the minimum tax each month and deduct it from advance income tax payments, regardless of whether they make such payments on a monthly or quarterly basis. Quarterly payments do not exempt the taxpayer from making monthly minimum tax payments and in such a case the tax calculated for the months in a given quarter is deducted from the advance payment (sections 8–9). However, taxpayers may refrain from paying tax, if it is lower than the amount of advance income tax payment in a given month (section 10). In such a case, its economic burden is included in the advance payment. Moreover, this tax must ultimately be recognized in the annual tax result (section 11). The minimum tax is not payable in the absence of depreciation allowances but only in the event of suspension of business operations (e.g., total depreciation does not affect the applicability of the minimum tax); it is also not payable on fixed assets that are office buildings used exclusively or mainly for taxpayer's own needs (section 2).

As concluded in the explanatory memorandum to the draft amendment act, "the introduction of the proposed solution is dictated by the fact that taxpayers frequently do not declare taxable income or declare income in an amount inadequate to the scale and type of their business. This may imply that the taxpayer adopts optimization mechanisms. From the point of view of the state budget, such a situation is unacceptable and calls for taking steps intended to close such opportunities."[55] Therefore, this new construction is underlain by an assumption that an entrepreneur should pay some minimum income tax when using high value assets. The legislator thus maintains certain legal fiction that the mere fact of owning and using property of certain type and value in one's business generates taxable income.

From the legal point of view, the commentators have no doubt that the taxable product in fact has little to do with income (or revenue) and is closer to property tax structures since the tax was qualified based on the initial value of fixed assets listed in the Act.[56] Whereas from the economic point of view, this tax invokes the concept of taxation of the so-called normative profit, which in turn refers to the principle of equivalence.[57] In order to avoid a situation where an enterprise pays no

[55] Sejm's publication VIII.1878.

[56] P. Banasik, A. Kałążny, W. Morawski, *Minimalny podatek dochodowy od wartości obiektów komercyjnych – wybrane problemy* [*Minimum Income Tax on the Value of Commercial Real Estate – Selected Issues*], Przegląd Podatkowy 2018/2, p. 33 and 35; R. Kowalski, *Zmiany w podatkach...* [*Changes in Income Taxes...*], chapter 2.10.

[57] In the simplest terms, the principle of equivalence can be understood as follows: tax is a price (and payment) for the benefits that citizens received from the state as a purposeful

levy for using the infrastructure financed from public money (including due to tax avoidance), this theoretical proposal advocates introduction of the so-called equivalent part within the framework of income tax. It would be based on the adopted rate of return on capital and – as a form of payment for using state infrastructure understood in broad terms – it would be independent of the current economic situation of an enterprise (and so it would resemble a fixed business cost). Taxation applying such a principle treats the value of capital used by an entrepreneur as a measurable basis. In the remaining (non-equivalent) part, the tax would still be based strictly on income (and the accounts).[58]

Thus, from a theoretical perspective, the logic of the above change seems noteworthy and interesting. Nevertheless, irrespective of the adopted point of view, irresistible doubt arises about the consistency of the above-mentioned tax structure with the principle of income taxation, which corporate tax (CIT) was built upon as well. Indeed, in this respect, the regulations on the minimum tax on commercial real estate disrupt the architecture of the tax act to some extent since there has been a peculiar (though partial) change in the logic of the tax system. Namely, as far as the tax in question in concerned, wealth tax ceases to serve its traditional predominantly complementary role that "seals" the tax system[59] but becomes a normative (if not artificial) component of taxable income.

However, this is not the biggest problem of this solution. This is because strong constitutional reservations arise regarding both the method and manner of determining the tax base. The following templates for evaluation of the constitutionality of the regulation in question appear to be particularly relevant here: the principle of exclusivity of statutory law when essential elements of tax are determined (Article 217 of the Constitution) and the principle of correct legislation (Article 2 of the Constitution). The relevant literature[60] rightly signals that a taxable product must be specified in an act of law[61], whereas in this case there is only reference to the regulation on Classification of Fixed Assets. As far as the minimum tax is concerned, adherence to the principle that public levies must be defined by the law should also be evaluated critically.[62] It also seems fitting to agree with the voices that indicate, on the one hand, the existing discrepancy between the definition of a building provided in CFA and the one applied for the purposes of taxation of real estate and, on the other hand, the applicability of the minimum tax to the inadequately defined category of "other commercial and service buildings" (Article 24b, section 1, point 1, letter d of the CIT Act). Moreover, it is not known how one should treat buildings used for more than one purpose – that is, ones that are both residential and service buildings.[63] The scope of exemption from the minimum tax is not clear either, especially as regards the category of fixed assets used "mainly for the taxpayer's own needs" (section 2, point 2 in fine)[64] as there is no guidance as to interpretation of this parameter for assessment. Finally, the statutory tax base may in practice turn out cumbersome at the least – starting with determination of the initial value of a fixed asset (especially considering the systemic context of the homologous regulations on real estate tax – cf. Article 16g of the CIT Act and Article 4, section 1, point 3

organization established in order to achieve common objectives (A. Gomułowicz, D. Mączyński, *Podatki*... [*Taxes*...], p. 91).

[58] M. Dobija (ed.), *Teoria pomiaru kapitału i zysku* [*Theory of Capital and Profit Measurement*], Kraków 2010, p. 165 et seq.

[59] A. Hanusz, w: A. Hanusz (red.), *Źródła finansowania samorządu terytorialnego* [*Local Government's Sources of Financing*], Warsaw 2015, p. 59.

[60] P. Banasik, A. Kałążny, W. Morawski, *Minimalny podatek dochodowy*... [*Minimum Income Tax*...], p. 37.

[61] To see an overview of this principle, see in particular judgement of the Constitutional Tribunal of 06 March 2002, P 7/00, OTK 13/2A/2002.

[62] For explanatory notes on this principle, see, e.g., judgement of the Constitutional Tribunal of 13 December 2017, SK 48/15, OTK 2/A/2018.

[63] A. Czernik, *Źródła, algorytmy*... [*The Sources, Algorithms*...], p. 9.

[64] P. Banasik, A. Kałążny, W. Morawski, *Minimalny podatek dochodowy*... [*Minimum Income Tax*...], pp. 34–35.

of the Act on Local Taxes and Charges[65]) and ending with its applicability exclusively to "large" fixed assets, that is, taxpayers that do in fact own property of considerable value but it is dispersed over smaller items of real estate are disregarded (which is tantamount to unequal treatment of owners of property having different construction characteristics).[66] There is also a gap in the regulations concerned with adjustment in plus of tax after the end of the tax year (as section 11 of Article 24b of the CIT Act literally refers to "tax paid but not deducted within the tax year"[67]).

In conclusion, it is worth noting that the Ministry of Finance also notices some of the problems posed by the minimum tax as in communication with the European Commission it plans to modify it through:

- imposing tax only on the buildings (or parts thereof) that are given over for use in exchange for payment on the basis of a rent, lease or leasing agreement, etc. Buildings (or parts thereof) that are not leased will not be subject to taxation; this solution, which is beneficial for taxpayers, would also apply to the minimum tax paid in 2018;
- changing the manner of applying the real estate value threshold of PLN 10 million, below which the minimum tax is not applicable, by ceasing to apply this threshold to every building. The taxpayer will be entitled to apply the threshold once regardless of the number of buildings they own (i.e., the taxpayer will be entitled to a single allowance and not one for each building);
- imposing the minimum tax on all buildings, excluding residential buildings given over for use as part of national and local government programs related to social housing (to the extent permitted by the regulations on state aid);
- introducing the possibility for a taxpayer to apply to the tax authority for a rebate of minimum tax (if it exceeded CIT or PIT). The minimum tax will be reimbursed after tax authorities verify that transactions with related entities were carried out on an arm's length basis and thus confirm the correctness of income tax settlement. This change will also apply to the minimum tax paid in 2018;
- introducing a special anti-tax avoidance clause concerned with the minimum tax. The clause would be applicable to transfers made solely for the purpose of avoiding the minimum tax. The tax authorities would not recognize such transfers for the purposes of taxation with the minimum tax.[68]

5. Recognition of bad debt as tax deductibles.

Finally, it is worth to discuss the new regulations on bad debt. Under the legal circumstances in force since 01 January 2018, the possibility of recognizing bad debt as tax deductibles was reserved to banks and credit unions, excluding institutions granting smaller loans, within the meaning of Article 5, point 2a of the Act of 12 May 2011 on consumer credit[69]. Currently, Article 16, section 1, point 25, letter b of the CIT Act no longer provides for a possibility of deducting receivables written off as unrecoverable that

[65] Act of 12 January 1991 on Local Taxes and Charges (consolidated text: Journal of Laws of 2017, item 1785 as amended).

[66] R. Kowalski clearly states that "no summing up of the value of individual fixed assets may be the key to exemption from such a tax. (...) The solution may be to separate part of the property and enter it in the register of fixed assets and intangible assets" (idem *Zmiany w podatkach...* [*Changes in Income Taxes...*], chapter 2.10).

[67] As pointed out by the authors quoted above, this will most likely not stop tax authorities from demanding payment of tax on commercial real estate that has not been paid earlier due to high advance income tax payments (P. Banasik, A. Kałążny, W. Morawski, *Minimalny podatek dochodowy...* [*Minimum Income Tax...*], p. 38; R. Kowalski, *Zmiany w podatkach...* [*Changes in Income Taxes...*], chapter 2.10).

[68] Communication from the Ministry of Finance of 16/04/2018: https://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset_publisher/6Wwm/content/id/6350707 (accessed on 04/05/2018).

[69] Consolidated text: Journal of Laws of 2016, item 1528.

were "granted by organizational units authorised to grant credits (loans) pursuant to separate acts of law regulating their operation" but it is concerned with credits (loans) granted "by an organizational unit whose activity is subject to supervision by a state authority supervising the financial market and which is authorized to grant credits (loans) pursuant to separate acts of law regulating its operation". Administrative courts had been interpreting the above-mentioned provision that was in force until 31 December 2017 to the advantage of the sector offering smaller loans as the courts claimed that "professionalization of this market and imposition of additional requirements subject to severe criminal sanction do not justify differentiated treatment of institutions granting smaller loans in relation to entities such as banks or credit unions from the perspective of execution of their right to recognize revenue from the receivables referred to in Article 16, section 1, point 25, letter b (of the CIT Act) as tax deductibles."[70] The current wording has made it clear that the legislator only allowed banks and credit unions that are subject to the supervision of the Polish Financial Supervision Authority to recognize bad debt as tax deductibles.[71] Credit firms – even if they enjoy the status of an institution granting smaller loans – are not subject to such supervision carried out in line with the Banking Act, Act on Credit Unions as well as the Act on Supervision of the Financial Market[72]. Here, the legislator confined themselves to the establishment of a regulated character of the latter activity through the obligation to register in the register of institutions granting smaller loans, which is maintained by the Polish Financial Supervision Authority (cf. chapter 5a of the Act on consumer credit).

The above conclusion regarding the scope of changes introduced in the CIT Act is indirectly confirmed by the justification to the draft amendment act of 27 October 2017[73], which extensively elaborates on the new principles for recognizing specified losses on credits (loans) as well as revaluation allowances for receivables whose unrecoverability was rendered credible in the tax base of banks and credit unions.[74] Not a word was mentioned in this context about credit firms, nor was their exclusion from the group of taxpayers entitled to recognize losses on bad debts as tax deductibles justified in any way.

The consequence of these changes is an introduction of a significant deviation from the principle of tax neutrality of granting a credit or loan. In principle, granting a loan does not entail the right to recognize the expenditure (incurred due to disbursement of the debt capital) as a tax deductible. Likewise, its subsequent repayment is not income (excluding interest). Therefore, if the borrower pays the loan off, the adopted solution will not cause problems with tax settlement (so tax neutrality of lending will be preserved). However, if the debtor fails to pay the loan off, the institution granting smaller loans incurs economic loss just as a bank or a credit union, however, in this case the loss will not be reflected in the tax statement. In other words, the fiscal effect remains the same for the lender both in the case of repayment of the principal of the loan and in case of non-repayment, that is, the principal of the loan paid to the borrower will never become tax-deductible – neither at the time the loan is granted and disbursed to the borrower nor when it turns out irrecoverable. This leads to differentiated taxation of institutions granting smaller loans compared to banks and credit unions – as in the case of the latter the principle of tax neu-

[70] See appealable judgement of the Regional Administrative Court (RAC) in Warsaw of 13/02/2018, III SA/Wa 952/17. Cf. also the following appealable judgements: of the RAC in Bialystok of 06/06/2017, I SA/Bk 238/17, and the RAC in Poznań of 10/05/2017, I SA/Po 1544/16 (CBOSA).

[71] Cf. respectively: Article 131, section 1 of the Banking Act of 29 August 1997 (consolidated text: Journal of Laws of 2017, item 1876 as amended) and Article 60 of the Act of 05 November 2009 on credit unions (consolidated text: Journal of Laws of 2017, item 2065 as amended).

[72] Act of 21 July 2006 on Supervision of the Financial Market (consolidated text: Journal of Laws of 2018, item 621 as amended).

[73] Sejm's publication VIII.1878.

[74] Intertemporal rules regarding the latter (among others) are defined in Article 12 of the amendment act.

trality of a credit (loan) was fully maintained – and simultaneously to further privileging (i.e., strengthening the market position) of the latter, if the changes under discussion are considered comprehensively (cf. also Article 7b, section 2 and Article 15e, section 1, point 3 of the CIT Act). While banks and credit unions recognize loss due to bad debt as tax deductibles and so expenses due to its economic effect (in the absence of repayment) are reflected in the tax assessments, institutions operating in the sector of smaller loans cannot reflect such economic loss in their tax assessments. Therefore, the deviation from the principle of tax neutrality of loans (credit) is negative in character.

Prima facie, therefore, and somewhat a rerum natura, the above seems to contradict the idea of income tax that should burden entities making profits. Thus, as already hinted earlier, this constitutes a huge gap between the economic and the legal basis for taxation. Despite undoubtedly bearing the economic burden of a loan (credit), institutions granting smaller loans are obligated to settle income tax without taking into account loss incurred on the loan. Whereas as the Supreme Administrative Court stressed in the resolution of 11 June 2012[75], failure to recognize the whole (economic) loss incurred on unrealized receivables leads to "the establishment of an incorrect tax base for the purpose of income taxation, which results from breach of the fundamental principle governing these taxes consisting in taxation of income understood as the difference between revenue and the costs of generating it."

Irrespective of the above-mentioned issue concerning the essence of the construction of income tax, the above situation can be considered from two perspectives:

– the legal and tax aspect of the domestic legal system, and so the admissible freedom of the legislator to shape tax burdens and diversify them with respect to individual entities functioning on the financial market, taking into account differences among them;
– the Polish obligations as an EU Member State, and thus taking into consideration the EU legal system, including in particular the treaty freedoms and the legal principles underlying this system.[76]

It seems that the solution adopted in the CIT Act raises doubts in particular from the latter perspective mentioned above. This assessment is based, in particular, on the following perspectives for argumentation:

– treaty freedoms of establishment and movement of capital, and in this context:
– the EU principle of proportionality;
– the principle of granting state aid.

As far as the first two are concerned, it should be noted that direct taxes have not been subject to comprehensive harmonization in the European Union so far. In the above-mentioned respect, Member States enjoy significant autonomy as regards this part of the domestic tax systems. However, the judicial decisions of the Court of Justice of the EU indicate that Member States should exercise their tax autonomy in a way that guarantees respect for the freedoms enjoyed on the EU internal market. The Court of Justice consistently advocates that this autonomy is not unlimited and should be exercised in compliance with the EU law.[77] This is a manifestation of the so-called negative integration consisting in such design of domestic regulations – covering even the areas that are formally not subject to harmonization (but the legislative autonomy of the Member States) – that ensures the widest possible access to the domestic markets.[78] In this respect, the Court invokes the principle of proportionality[79]

[75] Case Identifier I FPS 3/11, ONSAiWSA 2012/5/76.

[76] Whereas the broader international context of a country's jurisdictional sovereignty in terms of taxation can be disregarded, e.g., due to the fact that the ECHR shows a far-reaching moderation in this respect (cf., e.g., the decision of the Tribunal of 14 November 2017 on case *P. Plaisier et al. against the Netherlands*, complaint No. 46184/16).

[77] Cf., e.g., judgements in the following cases: C-279/93 *Schumacker* (points 21, 26), C-80/94 *Wielockx* (point 16).

[78] T. Tridimas, *The General Principles of EU Law*, New York 2007, p. 193.

[79] Cf. judgement in C-8/55 *Fédération Charbonnière de Belgique*; for more information cf. J. Maliszewska-Nienarto-

that is considered fundamental for the EU law and has been "discovered" in the judicial decisions very early; it is currently explicitly regulated in Article 5, sections 1 and 4 of the Treaty on European Union.[80] In accordance with the judicature of the Court, which has been theoretically conceptualized, among others, in R. Alexy's doctrine[81], the proportionality test – also concerned with (tax) limitation on the freedoms enjoyed on the internal market[82] – assumes, in particular, that specific action intended to achieve a given goal may be deemed appropriate, if it can actually measure up to the objective of its methodical and consistent performance. The action should also be essential (i.e., necessary) and this is the case if out of many possible actions appropriate for the achievement of a given goal, the said action is the one that is the least burdensome for given interests or goods.[83] Thus, improper restriction of the freedom of movement takes place when domestic measures – despite their contribution to the fulfilment of an objective that lies in the interests of the general public – would lead to a disproportionally substantial interference in the freedom of movement.[84] Consequently, restriction of the freedoms enjoyed on the internal market requires that a Member State justify in detail that the adopted legal (or actual) measure is really necessary to achieve the specified objective(s) and that it is impossible to adopt solutions that are less burdensome for the addressees.

Considering the above, the above-mentioned solution adopted in the Polish law may give rise to serious reservations as to compliance with the principle of proportionality, even if only because the domestic legislator provided no justification whatsoever for the differentiated treatment of banks and credit unions in terms of taxation in relation to professional institutions operating in the sector offering smaller loans. One can only surmise whether the degree of regulation of these entities is enough of a justification for such diversification of tax statements; nevertheless, under such circumstances, it is difficult to find a sufficient reason for such substantial limitation of the possibility of shaping the tax base by entities operating on the financial market other than banks or credit unions.

In this context, it is appropriate to note that preliminary estimations show that in effect of the changes that have been introduced into the CIT Act since 01 January 2018, the effective tax rate imposed on institutions granting smaller loans and operating in line with the regulations may reach 40%. It can be predicted that this will translate into lower return on investment than the one expected by international entities conducting such activity in Poland and lower investors' profits; it may also affect the cost of debt financing and thus the availability of such financing to entrepreneurs. Thus, a potentially negative economic effect of the introduced changes in the sector of smaller loans is noticeable.

Furthermore, it should be indicated that there is a Europe-wide trend for the tax law in most countries to treat bad debt of banks and receivables from loans granted by institutions professionally involved in granting smaller loans to consumers in a similar way. As far as institutions granting smaller loans are concerned, if they meet domestic requirements, EU Member States allow them to recognize both special-purpose provisions / loan revaluation allowances and receivables recognized as bad debt as tax deduct-

wicz, *Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym* [*Development of the Principle of Proportionality in the EU Law*], "Studia Europejskie" 2006/1, pp. 60–65.

80 Journal of Laws of 2004, No. 90, item 864/30 as amended.

81 R. Alexy, *On the Structure of Legal Principles*, Ratio Juris 2000, vol. 13, No. 3, pp. 297–298.

82 R. Lipniewicz, *Zasada proporcjonalności a podatkowe ograniczenia swobód rynku wewnętrznego Unii Europejskiej* [*Principle of Proportionality versus Fiscal Limitations on Freedoms on the Internal Market of the European Union*], Ruch Prawniczy Ekonomiczny i Socjologiczny 2015/4, pp. 98–101.

83 Bearing harmonized taxes in mind, the CJEU stresses, among other things, that even if regulations laid down by Member States under a directive on fiscal matters are intended to possibly successfully protect the state budget, they should not go beyond what is necessary to achieve this objective (see, e.g., judgement on case C-384/04 *Federation of Technological Industries et al.*, point 30).

84 See, e.g., judgement on case C-169/08 *Regione Sardegna*, point 42 and the judicial decisions quoted therein.

ibles (or recognize them in the tax result in a different way). Poland and Lithuania are the only EU Member States whose tax systems do not have regulations allowing credit firms to recognize bad debt as tax deductibles.

In the absence of a justification for the above-mentioned changes, this regulatory clash may be interpreted as a disproportionate restriction of the freedoms of the internal market, especially the freedom of establishment arising from to Article 49 et seq. of the Treaty on the Functioning of the European Union[85] (TFEU). Although the Court of Justice indicates that Member States enjoy freedom in shaping the structure of income tax and, in this context, quotes preservation of effectiveness and coherence of the tax system[86] as one of the reasons for limiting the above-mentioned principle, however, justification for that should be provided as any direct or indirect (secret) discrimination in this respect is prohibited, especially on a national level. This is because the freedoms enjoyed on the internal market have normatively been based on the principle of non-discrimination on the grounds of nationality. In this case, discrimination is admittedly concerned first and foremost with individual participants of the sector of financial services but it does not change the fact that the regulations in question may cause difficulties, which were discussed above, on a cross-border level. Such difficulties may create a barrier for entities operating in the sector of smaller loans within the common market, if they do not meet the regulatory requirements specified in particular in the Polish banking law, and in consequence put up a certain wall for potential investors, including foreign ones.

In turn, the last observation leads to a conclusion that the Polish regulations on loss on bad debt may also indirectly threaten free movement of capital provided for in Article 63, section 1 of the TFEU. Since as indicated in the judicial decisions of the Court of Justice, there is a restriction of the free movement of capital, for example, when domestic regulations discourage or may discourage non-residents from making investments in a given Member State.[87] Let us also not forget that when restrictions on free movement of capital are introduced, it is also required that a Member State respect the above-mentioned proportionality test, subject to conditions specified in Article 65 of the TFEU.[88] At the same time, it is unquestionable that the so called-grandfathering clause (stipulated in Article 64, section 1 of the TFEU) concerning restrictions on capital, which were applicable in Member States until 31 December 1993, will not apply in this case.

The above conclusions correspond with the observation that these actions of the Polish legislator may be perceived as illicit state aid – within the meaning of Article 107, section 1 of the Treaty on the Functioning of the European Union – distorting competition among entrepreneurs, which is also integrally connected with the concept of the common market. It is also unquestionable that differentiated treatment of individual participants of the Polish financial market is validated neither by the general (automatic) nor optional exemptions from the prohibition of granting state aid on the EU level (Article 107, sections 2–3 of the Treaty). There is also no doubt that according to the guidelines of the European Commission, various tax privileges – both those understood in a strict sense (such as allowances or exemptions) and those concealed within the construction of a tax – should be classified as state aid.[89] Therefore, there is a risk that the tax privileges awarded to banks and credit unions, which are not available to other participants of the sector of smaller loans, especially institutions granting such loans, can be classified as indirect (pas-

[85] Journal of Laws of 2004, No. 90, item 864/2 as amended.

[86] See e.g., judgement on case C-250/95 *Futura Participations and Singer*, points 31 and 33.

[87] Cf., e.g., judgement on case C-326/12 van Caster, point 25 and the judicial decisions quoted therein.

[88] Cf., e.g., judgement on case C-112/14 the United Kingdom of Great Britain and Northern Ireland vs the Commission, point 23 and the judicial decisions quoted therein.

[89] *Ninth Survey on State Aid in the European Union*, COM (2001) 403 final, Brussels 2001, p. 94, item 196.2 (http://aei.pitt.edu/39125/1/COM_(2001)_403.pdf, accessed on 04/05/2018).

sive) transfer of public funds reducing the cost of functioning of enterprises that are treated preferentially.[90] This is because the above-mentioned entities will be entitled to preferential treatment in terms of shaping the tax base compared to other credit firms in an identical economic situation. Severe doubts may arise as to whether banks and credit unions would pass the so-called private investor test, that is, would they still undertake activities that would benefit them under these circumstances, if they were not allowed to shape their tax statement as described above.[91] Thus, the tax structure has a selective character within the scope indicated above, that is, not all entities interested in receiving this support will receive it, and it is irrelevant whether the selectivity is ratione personae or ratione materiae in nature.[92]

It is obvious that the European Commission[93] currently pays special attention to tax preferences as regards potential breaches of treaty regulations on state aid, which is apparent from flagship cases pending at the Court of Justice, that is, *Apple Sales International* and *Apple Operations Europe vs the Commission* (T-892/16) and *Ireland vs the Commission* (T-778/16).[94] And so, bearing in mind the context under discussion, there is some symmetry between the proposal to introduce a barrier against market entry by, inter alia, foreign credit firms – as entities not using the above-mentioned forms of support – and the above observations concerning the potential breach of the principle of proportionality through illicit restriction of the freedom of establishment; since the overriding objective of the regulations on state aid is to protect competition on the common EU market and international economic exchange (within the framework of trade understood in broad terms).

In the light of the above observations, it should be postulated de lege ferenda that it is necessary to consider amending the CIT Act as regards bad debt written off by institutions granting smaller loans as well as revaluation allowances. There is no doubt as to the discriminatory character of taking away a limine the possibility to recognize bad debt as tax deductibles from financial market participants (other than banks or credit unions) that are professionally involved in granting loans and credits in accordance with the legal provisions applicable in Poland. However, in the light of the differences between banks as well as credit unions and institutions granting smaller loans in terms of the level of regulation of activity, capital thresholds, and the scope of supervision[95], the degree of unification of these regulations compared to the ones applicable to banks and credit unions remains open for discussion. Certainly, issues that are immanent for the tax system, such as tension between the principles of protection of property rights and universality of taxation, manifest themselves here (Article 64, sections 1–2 and Article 84 of the Constitution). However, any public levy is a form of interference in one's property or other property rights and is inevitably associated with interference in the property rights of an individual.[96]

Nevertheless, transposition – even if appropriate – of the remarks made from the EU per-

[90] M. Spychała, *Pomoc publiczna w warunkach gospodarki rynkowej* [*State Aid in Market Economy*], Studia Ekonomiczne. Zeszyty Naukowe Uniwersytety Ekonomicznego w Katowicach 2013/139, p. 241, 244.

[91] Cf., e.g., judgement on case 234/84 *Belgium vs the Commission.*

[92] M. Spychała, *Pomoc publiczna…* [*State Aid…*], p. 240.

[93] I.e. a body that serves a key regulatory and supervisory role in the European state aid system (I. Postuła, A. Werner, *Pomoc publiczna* [*State Aid*], Warszawa 2006, p. 90).

[94] According to press reports, despite the fact that the Court of Justice's decision is expected in autumn this year, Apple has already started accumulating around EUR 13 billion of unpaid taxes on a special account; the amount is to be paid in instalments and the payment is to be finalized in September this year so approximately at the time the judgement is to be issued by the CJEU (http://www.rp.pl/Telekomunikacja-i-IT/304269878-Apple-jednak-zaplaci-Irlandii-13-mld-euro-zaleglych-podatkow.html, accessed on 04/05/2018).

[95] Cf. especially the above-mentioned Article 131 of the Banking Act and Article 60 of the Act on Credit Unions, and chapter 5a of the Act on consumer credit.

[96] See, e.g., judgements of the Constitutional Tribunal of 11/12/2001, SK 16/00, OTK ZU 257/8/2001; of 14/09/2001, SK 11/00, OTK ZU 166/6/2001; and of 30/01/2001, K 17/00, OTK ZU 4/1/2001.

spective above on the level of the domestic general proportionality clause (Article 31, section 3 of the Constitution)[97] may turn out problematic. This is because taking the regulation in question out of the context of treaty freedoms changes the optics making the economic context cease to play such an important role in comparison to assessment of the legal and tax-related situation of institutions granting smaller loans, on the one hand, and banks and credit unions, on the other. Nonetheless, it seems that the issue under discussion requires additional consideration also in the context of domestic constitutional regulations. On the one hand, the cost formula adopted for bad debt is subject to assessment from the perspective of state tax jurisdiction (Article 217 of the Constitution). The Constitutional Tribunal, unlike the EU Court of Justice[98], relatively rarely and not without controversy (including within the formation of the court) interferes in the legal substance of a tax structure.[99] On the other hand, although the judicial decisions essentially focus on the fulfilment of certain formal boundary conditions within the above-mentioned scope, which are set out, among others, by the principle of equality before the law (Article 32, section 1 and Article 64, section 2 of the Constitution)[100] or the above-mentioned principle of proportionality, especially the latter is understood as prohibition of excessive interference in constitutional rights ratione personae (including property rights), in particular by way of incorrectly defining the principles, rules, and circumstances governing execution of these rights.[101]

6. Instead of conclusion – a meander through fiscal policy

As the doctrine claims, "in order to design a rational tax system its constructors are required to not only adapt it to the needs of the market economy but also to accept specific tax proposals that contribute to the economic development of the country and its international competition. There is no doubt that this is a complicated task. Especially that, as it is traditionally indicated, there is conflict between economic efficiency and tax justice."[102] Correspondingly, the corporate tax system – with CIT as one of its elements – should meet the conflicting expectations of entrepreneurs and the state to the largest possible extent; it should be structured in a way that ensures stable revenue for the state budget but simultaneously does not affect the economic capability of enterprises to continue their operation.[103]

[97] In principle, Article 64, section 3 of the Constitution does not apply in this case and so it does not serve as a model for assessing constitutionality of the regulation in question. The judicial decisions claim that imposition of a tax obligation is not in itself limitation of the constitutional rights ratione personae that are provided for in Article 64, section 3 of the Constitution. This is because it was established at a constitutional level that one of the boundaries of the constitutional right to property is a tax obligation within the meaning of Article 84 of the Constitution (cf. judgement of the Constitutional Tribunal of 13/10/2008, K 16/07, OTK ZU 8/A/2008).

[98] R. Lipniewicz, *Zasada proporcjonalności…* [Principle of Proportionality…], p. 99 et seq.

[99] An example here may be a recent judgement regarding the amount reducing personal income tax (cf. judgement of 28/10/2015, K 21/14, OTK 152/9A/2015).

[100] See, e.g., judgement of the Constitutional Tribunal of 08/10/2013, SK 40/12, OTK 97/7A/2013.

[101] See, e.g., judgements of the Constitutional Tribunal of 22/05/2007, SK 36/06, OTK 50/6A/2007; and of 19/06/2012, P 41/10, OTK 65/6A/2012.

[102] P. Felis, *Wybrane współczesne…* [*Selected Contemporary…*], p. 150.

[103] I. Górowski, *Sprawiedliwe opodatkowanie dochodów przedsiębiorstw jako determinanta wzrostu gospodarczego* [*Fair Taxation of Income of Enterprises as a Determinant of Economic Growth*], "Czasopisma Uniwersytetu Rzeszowskiego": Nierówności społeczne a wzrost gospodarczy [*Social Inequalities versus Economic Growth*], Zeszyt No. 26, Rzeszów 2012. The author is right to notice that "reasoning based exclusively on the level of low tax / high tax is false. In fact, all constructional elements of the tax, and the taxable product in particular, are equally important. Changes in the definition of income may be equally or more severe for taxpayers than an increase in tax rates. Likewise, if the circumstances giving rise to a tax obligation are unfair and unreasonable from the taxpayer's point of view, they may contribute to tax evasion or avoidance. Exclusion of a specific group of costs – for example, «representation costs» understood in a broad sense or the costs related to the use of passenger cars – from the tax base

At the level of corporate income tax, the changes that were selectively described above[104] are so far-reaching that a valid question arises as to whether this is still essentially the same tax structure as the one that was introduced in 1992[105]. In fact this is an uneasy but actually a universal question about the development of the idea of income taxation, which the domestic legislator is faced with, and it is connected with the tendency – emphasised by the aforementioned Piketty – for capital concentration and for "entrepreneurs to inevitably try to transform themselves into rentiers and assume increasing dominance over people who only have their own work"[106]. This is evidenced, for instance, by initiatives undertaken within the framework of the European Union. Apart from the aforementioned ATAD, one should also take note of the efforts to establish a consolidated tax base, which are intended – just as the Directive – to prevent – through two-stage harmonization of CIT – international corporations from exploiting legal loopholes to erode the tax base and making profit transfers that are advantageous from the point of view of taxation – so that taxes would be paid where profits and value are generated.[107] However, a representative of the doctrine throws the proverbial cat amongst the pigeons and notes that such actions only serve to "immunize the paradigm"[108] which is in crisis and jokingly acknowledges that it is "just as before the heliocentric Copernican revolution" when "the Ptolemaic astronomical system was being saved from falling apart due to overwhelming anomalies by way of adding to its complexity – by introducing new elements: the so-called equants – when it turned out that the existing deferents and epicycles are not enough to explain the observable phenomena."[109]

Regardless of the assessment of the individual solutions discussed in this article, the direction of the reforms that have been introduced since 01 January 2018 is clear – its motto is the old principle that Joseph Stiglitz captured with winsome flippancy by saying: "reach out where there is money."[110] At the same time, the goal of the changes is lofty and prima facie consistent

creates a sense of injustice in a taxpayer who must use passenger cars due to the character of their business. From the point of view of running a business, tax is perceived as one of its costs so there must be an actual link between the amount of tax and the economics of an enterprise."

[104] Among others, issues related to the implementation of the ATAD have been overlooked, such as regulations on controlled foreign companies (cf., e.g., B. Kuźniacki, *Wątpliwości związane z implementacją dyrektywy ATA. Nowe przepisy o CFC, spółki z rajów podatkowych oraz swoboda przepływu kapitału* [*Doubts Arising in Connection with Implementation of the ATA Directive. New Provisions on CFC, Companies in Tax Havens, and Free Movement of Capital*], "Przegląd Podatkowy" 2018/3, pp. 12–27) or publicizing tax data of TCGs and taxpayers whose revenue exceeded EUR 50 million (Article 27b of the CIT Act introduced pursuant to the Act of 24 November 2017 amending the Corporate Income Tax Act, Journal of Laws, item 2369), that is, the issue of public (social) control of the largest entrepreneurs.

[105] Nota bene, the Act of 26 July 1991 on Personal Income Tax, which is already extremely eclectic now, is also confronted with the same problem (consolidated text: Journal of Laws of 2018, item. 200)

[106] T. Piketty, *Kapitał…* [*Capital…*], p. 723.

[107] On 15 March 2018, the European Parliament adopted two draft directives: on the Common Corporate Tax Base (CCTB) and on the Common Consolidated Corporate Tax Base (CCCTB). The resolutions will now be handed over to the Council of the EU and the Commission for examination and further processing (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20180315+TOC+DOC+XML+V0//PL&language=PL, accessed on 04/05/2018). The first directive provides for the adoption of uniform rules for the calculation of the tax base and cross-border loss settlement (CCTB) and the second is concerned with the rules for income consolidation (i.e., group results) and its distribution among individual Member States based on the key provided (CCCTB). The drafts stipulate that the provisions should be applicable starting from 1 January 2020. However, it is believed that this is not a realistic date.

[108] Concepts collectively referred to as Destination-Based Corporation Tax (DBCT), which advocate imposition of corporate income tax on income in the state of sale (where the final recipient is located) when income is calculated as the difference between revenues and the costs of obtaining them in a given jurisdiction, are offered as an alternative to the above.

[109] H. Filipczyk, *„Zmiana paradygmatu" albo zmierzch podatku dochodowego od osób prawnych* [*"Paradigm Change" or the Dusk of Corporate Income Tax*], http://torun-pl.academia.edu/HannaFilipczyk (accessed on 04/05/2018).

[110] J. E. Stiglitz, *Cena nierówności. W jaki sposób dzisiejsze podziały społeczne zagrażają naszej przyszłości?* [*The Price

with the claim expressed already by the author of *Badania nad naturą i przyczynami bogactwa narodów*[111] [Study of the Nature and Reason behind the Wealth of Nations] as the principle of the ability-to-pay. Moreover, this undoubtedly evaluative perspective evokes A. Wagner's social thought on taxation, which postulates higher taxation of capital income than labour income (from remuneration for work or what would nowadays be referred to as operational income)[112]; this postulate expresses the belief that "the rich should pay more taxes than they think, while the poor should think that they pay more than they actually do."[113] Thus from an axiological point of view, the legislator intends tax justice to take – if I understand correctly – its rightful place of one of the factors guaranteeing justice in general.[114]

This message that is conveyed by the changes discussed above is additionally confirmed by mitigation of the tax rigours imposed on smaller taxpayers in particular, which manifests itself through, among others:

– raising the deduction limit imposed on fixed assets of lower value from PLN 3,500 to PLN 10,000, which is applicable to assets accepted for use after 31 December 2017 (Article 16d, section 1 of the CIT Act in conjunction with Article 11 of the amendment act) or
– exemption from the obligation to pay small-value advance income tax payments (Article 25, section 18 of the CIT Act).

This is a continuation of changes initiated earlier, such as, for example, the introduction of a reduced (15%) tax rate for small taxpayers and start-ups, which took place in 2017. Therefore, it cannot be denied that the legislator maintains consistency and imposes a certain vision of corporate tax.

The point is that these ideas should be implemented following thorough consideration (and discussions that preferably take the form of an extensive institutional and professional dialogue, etc.); to put it differently by paraphrasing the master, Kotarbiński – in order to do a good job. Hence tax justice understood as above and the intention to seal the tax system, which is related to the former, should not make the legislator blind to the necessity of ensuring coherence and legibility of a tax structure as it is the principal determinant of its fiscal effectiveness and, at the same time, a factor legitimizing the state's tax authority, that is, one that ensures appropriate social reaction to the changes understood in a broad sense (such as market-related, professional, scientific sense, etc.). This is particularly important when it comes to income taxes that distort the labour and capital market to a much greater extent than indirect taxes (proportionally to the tax wedge that is being introduced).[115] The discrepancy between the theoretical concept of income tax and the relevant legal solutions is undesirable and harmful and its symptoms signal the possibility that the foundations of the concept might be revised.

From this perspective, evaluation of the changes introduced with the amendment act of 27 October 2017 may not be clear-cut. In particular, if one sympathizes with the general direction of reforms, which the legislator proposes, one may have doubts as to whether (at least some of) the implemented changes will constitute an effective tool for achieving the objectives formulated by the legislator or whether – on the contrary – they will be interpreted as discriminatory, which would certainly affect their effectiveness. One

of Inequality. How Today's Social Divisions Threaten our Future], Warszawa 2015, p. 358.

111 A. Smith, *Badania nad naturą i przyczynami bogactwa narodów* [*Study of the Nature and Reason behind the Wealth of Nations*], Warsaw 2017 (reprint by PWN)

112 Z. Fedorowicz, *Historia podatków do końca XIX wieku – ze szczególnym uwzględnieniem Polski* [*History of Taxes until the End of the 19th Century – Focusing in Particular on Poland*], in: C. Kosikowski (ed.), *Encyklopedia podatkowa* [*Tax Encyclopaedia*], Warszawa 1998, p. B/71.

113 Adolf Wagner, quoted after A. Gomułowicz, *Zasada sprawiedliwości*... [*The Principle of Fairness*...], p. 61.

114 J. Rawls, *Teoria sprawiedliwości* [*Theory of Justice*], Warszawa 2009, p. 405 et seq.

115 P. Felis, *Wybrane współczesne*... [*Selected Contemporary*...], p. 141.

should bear in mind that the structure of tax is not the only factor that ensures its efficiency but the "external conditions are equally important and constitute an environment for the tax and the policy followed by the authorities to function in"[116], that is, the way the tax works is also important and not only the normative assumptions behind it.

[116] M. Kudła, *Ekonomiczne problemy...* [*Economic Problems...*], p. 248.

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