

CONSORTIA IN CENTRAL AND EASTERN EUROPE

WYDAWNICTWO UNIWERSYTETU GDAŃSKIEGO



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EASTERN EUROPE

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About Societas – CEE Company Law Research Network

The Societas – CEE Company Law Research Network is a private, non-political, non-profit, volunteer, collaborative organisation, promoting and facilitating legal research into business law and company law with a special focus on Central and Eastern Europe (CEE). It encourages collaboration among lawyers and academics in different countries, as well as the exchange of information on sources, publications and practice, and strives to contribute to the development of European Company Law and Comparative Company Law. The Network's aim is to promote the study of Company Law in national and international educational and research institutions. Currently, SOCIETAS members represent 8 countries (Poland, Hungary, Romania, Czechia, Austria, Lithuania, Slovakia, Bulgaria).

About University of Gdansk

The University of Gdansk is one of Poland's leading institutions of higher education and one of the biggest in Northern Poland. It offers tuition and produces research across a wide range of subjects in Humanities, Social Sciences, Law, and STEM, for 50 years. The Faculty of Law and Administration at the University of Gdansk has been consistently ranked within top 5 law faculties in Poland.

Foreword

This book is an outcome of the joint conference “Consortium in Central and Eastern Europe” organised by the University of Gdansk and Societas – CEE Company Law Research Network, which took place at the Faculty of Law and Administration at University of Gdansk (Poland) on the 9th of November 2018.

Every year, thanks to the commitment and consistency of all SOCIETAS members, a scientific conference is held, on the most current issues of company law presented from a comparative perspective. As a part of cooperation in SOCIETAS network, conferences are carried out in the academic centres of network scholar members. The effect of each conference is a monographic publication, thus creating a series of comparative legal publications devoted to the selected problems of company law.

The scholars of the Faculty of Law and Administration of the University of Gdansk are involved in the operation and development of the network from the very beginning. Professor Dorota Maśniak contributed to the establishment of the organisation as its founder and, from the beginning, holds the function of the Vice President of SOCIETAS. Professor Edvardas Juchnevicius is the member of SOCIETAS, responsible for the representation of Lithuania in the part of research, led by himself. In addition to influencing the direction of research, choice of topics, they are both active participants of the SOCIETAS conferences and authors of publications, as well as coordinators of working meetings in Gdansk. Also, scholars and employees of the Department of Commercial of Law at the Faculty of Law and Administration of Gdansk University take an

active part in the work of SOCIETAS: the Head of the Department – Professor Joanna Kruczalak-Jankowska, Professor Bartłomiej Gliniecki and Kaja Zaleska-Korziuk, M.A. Their active participation in the conferences is documented by scientific publications, which significantly influence the development of cooperation within SOCIETAS.

Currently, company law in the European Union and Eastern European countries is at a turning point when the old approaches are not working anymore. At the same time, a clear understanding of how to regulate and apply company law has not yet been developed. The articles discuss different approaches in selected European Union countries to regulatory and juridical practice in the sphere of consortiums. This book is prepared for those who would like to become a specialist in the field of consortiums. It will serve them as a reliable source of information in selected areas of company law in various countries of the European Union. Teachers, graduate students, and students of law schools, as well as practicing lawyers and everyone interested in company law, will most likely make a good use of it.

SOCIETAS is grateful for the generous support it received from the University of Gdansk, that facilitated its work and hosted the conference. In addition to the support from the University of Gdansk, SOCIETAS received extensive, detailed comments and organisational support. For these contributions, SOCIETAS would like to especially acknowledge Professor Joanna Kruczalak-Jankowska and Kancelaria Radców Prawnych i Adwokatów Głuchowski, Siemiątkowski, Zwara.

Gdansk 2019

Edward Juchniewicz
Dorota Maśniak

CONFERENCE PLAN

Gdansk University

Faculty of Law and Administration

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Room 2042

Gdansk, November 9th 2018

CONSORTIUM IN CENTRAL AND EASTERN EUROPE CONFERENCE PROGRAM

November 8, 2018, Thursday

Arrival of the Participants

19:00 Dinner

November 9, 2018, Friday

10:00 Opening of the conference

Welcome and Opening – Professor Jakub Stelina, Dean

10:10–11:30 PANEL I

Chair: **Professor Dorota Maśniak** (Gdansk University, Poland)

Professor Martin Winner (Wirtschaftsuniversität Wien, Austria):

Consortium Regulation – General Issues/Consortium Regulations –
the Austrian and German Experience

Professor Tekla Papp and **Associate Professor Ádám Auer** (National University
of Public Service, Hungary): Consortium Regulations in Hungary

Professor Emőd Veress (Sapientia University, Romania):

Consortium Regulations in Romania

Discussion

11:30–12:00 Coffee break

12:00–13:00 PANEL II

Chair: **Professor Joanna Kruczalak-Jankowska** (Gdansk University, Poland)

Associate Professor Kateřina Eichlerová (Charles University, Czechia):

Consortium Regulations in Czechia

Professor Branko Malagurski (Educons University, Serbia):

Consortium Regulations in Serbia

Professor Szymon Byczko (University of Lodz, Poland)

and **Associate Professor Bartłomiej Gliniecki** (Gdansk University, Poland):

Consortium Regulations in Poland

Discussion

13:00–13:30 Coffee break

13:30–14:30 PANEL III

Chair: **Professor Martin Winner** (Wirtschaftsuniversität Wien, Austria)

Associate Professor Edvardas Juchnevicius (Gdansk University, Poland):

Consortium Regulations in Lithuania

Professor Maria Patakyova (Comenius University, Slovakia):

Consortium Regulations in Slovakia

PhD. Student Dimitar Atanasov (University of National and World Economy, Bulgaria): Consortium Regulations in Bulgaria

Discussion

14:30–15:00 Lunch break (buffet lunch)

15:00–16:30 Organisational meeting of the Societas Network, establishing the working agenda for 2019

17:30 Dinner

20:00 Jazz concert

November 10, 2018, Saturday

Departure of the Participants

Introduction

The following contributions result from the international seminar held at the University of Gdansk (Poland) in November 2018. The conference was organised by Societas,¹ an academic network of Central and Eastern European company law scholars.

The conference's subjects were consortiums, i.e. organisations of two or more separate businesses joining together for a common purpose. The conference and the contributions in this volume focus on the company law aspects of these consortiums. Issues of public law, especially of the public procurement law, which is not of primary interest as far as this book goes; are nonetheless dealt with in many contributions.

Of course, there are major differences between the types of consortiums: some may be permanent, such as Hulu, the US streaming service, or Airbus, the aircraft manufacturer, while others may be formed *ad hoc*. The last type is probably more prevalent. Such *ad hoc* consortiums typically have a limited purpose; we can encounter these in syndicated loan agreements, underwriting groups, building societies, or collateral pools. Additionally, such consortiums may be disclosed against third parties or, as undisclosed consortia, may be purely internal; the latter is typical for syndicated loans.

One can easily understand that it is hard to meet the differing demands of all these practical applications in one form of legal entity. This is only possible if the form provides sufficient flexibility and is not characterised by mandatory law, at least not for internal matters, as between

¹ <http://societas-cee.org>.

the members of the consortium. Hence, it is not surprising that, comparatively speaking, the use of legal entity forms for consortiums differs considerably between jurisdictions. While in many countries the most basic form of a partnership is prevalent in consortiums, namely the civil law partnership (or simple partnership), the reader will see in the following, that in many other jurisdictions, market participants predominantly use other legal entity forms.

Of course, regardless of the legal form used, the core issues for the members of the consortium remain the same. Some of the more pressing matters are the following.

1. First, they concern the contributions the members make for the common purpose. Do these contributions become the property of the consortium? Do they become the common property of all partners? Alternatively, do they remain the property of the original proprietor? Obviously, this will primarily depend upon the contract, as of course members may dedicate property only for the use of the consortium without any change in proprietorship. However, this is also a legal issue; if the consortium does not have legal personality, it cannot acquire property in its own name. Rather, under these circumstances all contributions by necessity will become common property of the partners if, according to the contract, setting up the consortium property shall pass.
2. Secondly and closely connected to the first point, there is the issue of representation. On the one hand, there may be differences as to who is represented by the managing partner; either the consortium, if it has legal personality, or all the members of the consortium concurrently. On the other hand, in many countries consortiums are not entered into any business register. Therefore, it may be difficult for third parties to ascertain who can represent the consortium or its members. Hence, legislators have to address the issue of protection of *bona fide*

third parties if one partner acts without power of representation, either for the consortium or for all of its members.

3. Third, liability of the members is another issue. Many jurisdictions foresee joint and several obligations of all partners; in most jurisdictions' proportional liability or exclusion of liability of one or more of the members is only possible in case of private ordering in a contract with an individual creditor. The question of liability is closely related to the issue of representation of the partners. Thus, when determining the liability of the consortium members, the creditor will first have to solve the problem of determining who actually is the member, especially if this body is not entered into a public register.

Thus, the issue of publicity is a central one for consortiums. While most other business entities are registered, consortiums very often are not. This certainly puts third parties at a disadvantage.

Against this background, it becomes clear that the regulation of consortiums is a rich field for comparative endeavours. The national solutions in Member States of Central and Eastern Europe are path dependent; therefore, they have developed in different ways. The contributions to the present volume will hopefully help the reader in getting a picture of the issues at stake (which are similar internationally) and the legal mechanisms in place to address these issues.

Martin Winner

Dimitar Atanassov¹

Consortium regulations in Bulgaria

Introduction

The following paper addresses some key points in the legal regulation of consortia under Bulgarian law.

Under the current Bulgarian law, there are two forms of consortia, namely: 1) consortia organized as an incorporated company and 2) consortia organized as an unincorporated partnership under the civil law.

The paper is a brief overview of the legal framework of consortia organized as a partnership under civil law. Thus, the paper covers only the most important and/or controversial statutory provisions. In the following, the term “consortium” will be used to describe a consortium organized as a partnership under the civil law.

The paper was presented in a significant part in 2018 at the “Consortium in Central and Eastern Europe” Conference, at the University of Gdansk, Poland.

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Legal regulation

Consortiums are regulated in Section One, Chapter Eighteen of the Bulgarian Commerce Act of 1991² (hereinafter: CA). According to the legal definition given in Art. 275 CA, a consortium is a contractual grouping of merchants created for carrying out specified activities.

The applicable provisions are regulated in Art. 276 CA, which states that the respective rules either for partnerships under the civil law or for the company in the form of which a consortium has been organized shall apply to consortia.

The explicit statutory regulation governing consortia is partial and refers to the imperfect and archaic provisions governing the partnership under the civil law. The general legal regulation of the partnership under the civil law consists of the provisions of Art. 357 – Art. 364 of the Bulgarian Law on Obligations and Contracts of 1951³ (hereinafter LOC).

With few exceptions, the above-mentioned provisions are mainly default rules, which give the partners flexibility to regulate their legal relations. The legal relations of the partners to one another are determined primarily by the consortium agreement, and the statutory provisions apply only to the extent that the consortium agreement does not state otherwise.

There are, however, some mandatory rules, e.g. the rules governing the right to vote, the right to veto, and the rule that agreements in terms of excluding some partners from participation in the losses or profits shall be invalid.⁴

² Published in Gov. Gazette (GG) No. 48, dated 18th June, 1991, in the version of GG No. 88, dated 23rd October, 2018.

³ Published in Gov. Gazette (GG) No. 275, dated 22nd November, 1950, CIF 1st January, 1951, in the version of GG No. 42, dated 22nd May, 2018.

⁴ Supreme Court of Cassation (SCC), Decision 469 of 6.07.2010, civ. case 409/2010; See С. Чаначев, *Договорот за дружество*, Sofia 2009, pp. 79–80.

Since by definition all partners in the consortium are merchants, some of the rules of the Bulgarian Commerce Act of 1991 shall apply, e.g. the rules regarding the formation and conclusion of business transactions and contracts, the performance and fulfillment of contractual obligations and duties, the civil responsibility (liability) for breach of contract etc.

Legal nature. Legal personality

By its legal nature, the consortium under Bulgarian law is a contractual grouping. The consortium is no corporation and does not have its own separate legal personality,⁵ nor does it have a corporate body and structure other than the partners themselves. In the Bulgarian legal theory,⁶ as well as in the jurisprudence,⁷ consortia are regarded as non-personified entities with no legal capacity.

Given the lack of legal capacity, a consortium, organized as a partnership under the civil law, cannot be a contracting party, holder of rights or bearer of duties and obligations, does not have a general capacity to be a party to legal proceedings before a court, nor does it have insolvency capacity.

⁵ SCC, Decision 469 of 6.07.2010, civ. case 409/2010; SCC, Court Ruling 103 of 8.02.2010, pr. comm. case 68/2010, SCC, Court Ruling 429 of 20.06.2013, pr. comm. case 2485/2013; SCC, Decision 678 of 16.10.2007, comm. case 322/2007.

⁶ See С. Чаначев, *Договорът за дружество...*, pp. 33, 34; А. Кожухаров, *Облигационно право. Отделни видове облигационни отношения. Нова редакция и допълнения*, София 2002, p. 303; А. Калайджиев, *Търговски дружества. Персонални дружества. Дружество с ограничена отговорност*, София 2014, pp. 18, 19; Р. Илиева, *Търговско право: Общо положения. Видове търговци*, София 2018, p. 395; П. Голева, *Облигационно право*, София 2015, p. 399; О. Герджиков, *Коментар на Търговския закон. Книга първа*, чл. 1–112, София 2007, p. 352.

⁷ SCC, Decision 131 of 21.03.2014, comm. case 1121/2011; SCC, Decision 423 of 20.03.2000, civ. case 1489/99; SCC, Court Ruling 564 of 22.08.2014, pr. comm. case 744/2014; SCC, Court Ruling 749 of 25.11.2014, pr. comm. case 2737/2014; SCC, Decision 306 of 17.06.2010, civ. case 4555/2008; SCC, Decision 126 of 14.10.2011, comm. case 701/2010.

A contracting party in the legal relationship with third parties are the partners or those of them who acted in their name for the consortium. The partners are the holders of the rights and bearers of the duties and obligations, they are liable for any breach of contract and can be submitted to execution against their property.

In some cases, however, the law explicitly regards consortia as if they were legal entities with their own legal personality and capacity.

That is the case in tax law where, according to Art. 2, § 2 of the Corporate Income Taxation Act of 2007⁸ (hereinafter CITA), for tax purposes consortia are treated as tax subjects, and are required to pay corporate taxes on profits under the Corporate Income Taxation Act.

According to Art. 3, § 1 of the Value Added Tax Act of 2007⁹ (hereinafter VATA), tax liable person under VATA shall be any person carrying out independent economic activity regardless of the objectives and the results of it. According to Art. 132, § 5 and 6 VATA unincorporated partnerships such as consortia shall be obligatorily registered if one of the participants in the consortium is registered under VATA.

For accounting purposes, according to Art. 2, item 4 of the Accountancy Act of 2016¹⁰ (hereinafter AA), unincorporated partnerships such as consortia are equated to corporate entities with their own legal capacity, i.e. consortia are required to organize their ongoing accounting in accordance with the procedures described in the Accountancy Act. Consortia are required to carry out ongoing accounting under the double-entry bookkeeping methodology for all business transactions leading to changes in their financial position, financial performance, cash flows,

⁸ Published in Gov. Gazette (GG) No. 105, dated 22nd December, 2006, CIF 1st January, 2007, in the version of GG No. 105, dated 18th December, 2018.

⁹ Published in Gov. Gazette (GG) No. 63, dated 4th August, 2006, CIF 1st January, 2007, in the version of GG No. 98, dated 27th November, 2018.

¹⁰ Published in Gov. Gazette (GG) No. 95, dated 8th December, 2015, CIF 1st January, 2016, in the version of GG No. 13, dated 12th February, 2019.

and equity in chronological order, and to keep the required documentary evidence for such transactions.

In labor law, according to § 1, item 1 of the Additional Provisions of the Labor Code of 1987¹¹ (hereinafter LC), consortia have the capacity to be an employer within the meaning of the Labor Code and thus have a legal duty, according to Art. 5, § 1 of the Social Insurance Code of 2000¹² (hereinafter SIC), and Art. 40, § 1, item 1 of the Health Insurance Act of 1999¹³ (hereinafter HIA), respectively, to make insurance contributions for other natural persons.

In order to be regarded as legal entities with their own legal personality and capacity in the above-mentioned cases, as well as for publicity and legal security reasons, consortia are required to register in the BULSTAT register, and undergo tax registration in the registers maintained by The National Revenue Agency.

Due to the lack of legal capacity, in general, consortia also cannot be a party to court proceedings. Thus, all of the participants of the consortium should be parties to the court proceedings.¹⁴ That is the case e.g. in civil proceedings, as well as in insolvency proceedings.

On the other hand, according to Art. 9, § 2 of the Tax-Insurance Procedure Code of 2006¹⁵ (hereinafter TIPC), in the proceedings under TIPC non-personified partnerships such as consortia are equated to

¹¹ Published in Gov. Gazette (GG) No. 26, dated 1st April, 1986, CIF 1st January, 1987, in the version of GG No. 92, dated 6th November, 2018.

¹² Published in Gov. Gazette (GG) No. 110, dated 17th December, 1999, CIF 1st January, 2000, in the version of GG No. 12, dated 8th February, 2019.

¹³ Published in Gov. Gazette (GG) No. 70, dated 19th June, 1998, CIF 5th July, 1999, in the version of GG No. 105, dated 18th December, 2018.

¹⁴ SCC, Court Ruling 895 of 19.12.2014 priv. civ. case 5793/2014, SCC, Court Ruling 206 of 07.04.2014 comm. case 2301/2013 r.; SCC, Decision 423 of 20.03.2000 civ. case 1489/99.

¹⁵ Published in Gov. Gazette (GG) No. 105, dated 29th December, 2005, CIF 1st January, 2006, in the version of GG No. 17, dated 26th February, 2019.



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