FAMILY ENTERPRISE IN CZECH CIVIL CODE

RODINNÉ FARMY V ČESKOM OBČIANSKOM ZÁKONNÍKU

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I. Introduction

After the democratisation of the society and privatisation of the national economy in Czechoslovakia after 1989 (since 1993 Czech Republic and Slovak Republic) only gradually, small enterprises that appeared and started to operate were stabilised in the economic and legal form of family business enterprises. The necessary legal background defining the legal relationships and rights of all participating persons – relatives and other family members – however, lagged behind, and was limited to general provisions in the Commercial Code that has not solved many of the problems associated thereto. Only in 2012, the Czech Civil Code, Act. No 89/2012 Coll., introduced the new institute of family enterprise as completely new term in the Czech Civil law.

II. Material and Methods

The regulation of the family enterprise has no tradition in the Czech law. Thus, it is a completely new institute, the roots of which we may find in the Italian Codice Civile (Art. 230bis)⁽¹⁾. According to Explanatory Memorandum to the

Civil Code the rules are aimed at filling the gap in regulation where the family members are in fact working for a family enterprise without their rights and obligations being governed by a special contract closed for that purpose. It is true that also in the Czech business environment we could often encounter such regulation because the family business is a frequently employed arrangement of commercial relationships, where family members work under the guidance of another family member. Agricultural farms, family hotels or restaurants may serve as an example. Before the 2012 Civil Code there were no contractual rules for these arrangements. Such relationships were often solved by the use of rules on unjustified enrichment. However, this caused unequal relationships not only as regards the shares of family members on the profit obtained but also situations where some of the family members had neither decision-making powers and responsibilities, nor could they claim settlement shares at the time of termination of their participation in the family business. Working for a family business without having a labour contract was even held for illegal work and there were considerations about tax evasion and avoidance of health and social insurance.

L'Impresa Familiare was introduced. (see TARDIVO, G. – CUGNO, M., 2011)

Abstract (EN)

For more than two decades the family business enterprises of the first generation (generation of founders) are more and more dominating in the category of today's small and medium-sized enterprises in the Czech Republic. The necessary legal background defining the legal relationships and rights of all participating persons was, however, limited to general provisions in the Commercial Code that has not solved many of the problems associated thereto. Only in 2012 the new Czech Civil Code, Act. No 89/2012 Coll., introduced the institute of family enterprise as completely new term in the Czech Civil law. The presented paper aims to analyse the key rules of this new legal regulation, focusing on significant aspects of the institute in the context of commercial law and family law, as well as, to highlight the potential weaknesses and gaps existing in the regulation.

Keywords (EN)

family enterprise, family member, involvement in the operation of family enterprise, profit share and property gains

Abstrakt (CZ)

Více než dvě desetiletí jsou rodinné podniky první generace (generace zakladatelů) stále více a více dominující v kategorii dnešních malých a středně velkých podniků v České republice. Nezbytná právní úprava k definování právních vztahů a práv všech zúčastněných osob se však omezovala na obecná ustanovení obchodního zákoníku, jež neřešila většinu problémů spojených s jejich provozem. Teprve roku 2012 zavádí nový občanský zákoník, zákona č. 89/2012 Sb., institut rodinného závodu jako zcela nový termín v českém občanském právu. Cílem článku je podat analýzu klíčových ustanovení této nové právní úpravy, se zaměřením na stěžejní aspekty tohoto institutu v rámci obchodního práva a rodinného práva, jakož i upozornit na možná slabá místa a mezery existující v této právní úpravě.

Klíčové slová (CZ)

rodinný závod, člen rodiny, účast na provozu závodu, podíl na zisku a přírůstcích na majetku

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The rules of sections 700 to 707 of the Civil Code prevent the presence of such irregularities in the future. However, in the process of application of the new rules, we face some interpretation problems and gaps that the presented paper will analyse. We encounter the interpretation problems already in connection with the definition of the term family enterprise. In interpreting the statutory rules we should also take into consideration the circumstance that before the legal rules, commercial practices and customs established in the family enterprise take precedence provided that they are not contrary to the legislation in force, i.e. provisions of Sections 700 to 706 Civil Code. These commercial practices and customs may serve also as interpretation tools for the determination of rights and obligation of the participating family members.

As implied the above stated text, the aims of the regulation of family enterprise was to regulate the position of those family members who – without any legal grounds – take part in the enterprise owned by some of the family members and thus to provide legal basis to the claims for their personal contributions.

The adoption of the new legislation brought a significant limitation of rights of the family business owner and due to the somewhat vague identification of cases to that such restrictions apply; we may expect disputes concerning the interpretation of these cases and the extent of the restrictions and await the resulting case law.

The fact is that the owners of existing family enterprises were not prepared for the limitation of their ownership rights that occurred when the Civil Code entered into force. When interpreting these rules we must, further on, realize that the family community, to which the new legislation applies, may have in fact exist for many years before and to the effective date of the Civil Code did not have to meet any formal requirements. Therefore they did not have to sign any contracts, or make arrangements in order to be subjected to the new legislation. If, in the context of family communities, their relationships satisfy the conditions of the family enterprise, the legislation in question applies automatically to them.

The paper aims at analysing of selected issues of the new legal regulation, focusing on significant aspects of the institute in the context of commercial law and family law, as well as to highlight the potential weaknesses in the regulation itself. The text was prepared on the basis of general theoretical scientific methods. The use of analytic method is accompanied by the historical method when comparing the rules contained in the former Commercial Code. Comparative method is employed also in the highlighting the origin of the new institute and its relatively recent formation.

Paper starts with characteristics of the features of family enterprise. After that it defines the family members, who are legally entitled to be involved in the operation of a family enterprise. Leading role belongs logically to the owner of the family enterprise and thus the subsequent part characterises its specific position among the family members including the ownership of the enterprise. After a brief characteristic of the formation of a family enterprise, the following part focuses on claims that belong to family members involved in the operation of the enterprise. Explanations on the trans-

fer of participation in family enterprise are followed by the regulation of possibilities for termination of participation by family member and, finally, of the dissolution of the family enterprise as a whole.

III. Results and Discussion

The notion of a family enterprise

The family enterprise is most often defined as a kind of commercial enterprise (Section 502 Civil Code) in which spouses and persons within a defined family relationship with at least one of the spouses work together.

It is doubtful whether the definition of family enterprise, as a type of the commercial enterprise (Section 502 Civil Code), without further specification, does not mean only sort of „collective asset“ (*universitas rerum*). This specification does not respect that the legal regulation of family enterprises is the ruling one for rights and obligations of participating family members when operating the commercial enterprise. For the definition of the latter it is therefore necessary to stress out the personal component as the particular issue of the regulation. Undisputedly, there is no family enterprise without the specification and operation of a commercial enterprise under Section 502 Civil Code and it can be said that the focal point for the setting up of a family enterprise is establishing and operating of the commercial enterprise. A commercial enterprise, however, is defined as organised set of business assets, whereas the basis of a family enterprise it the ruling of contract-free relationships between family members in the course of operation of a set of business assets. Therefore, we hold that a more precise definition of the family enterprise is a specification emphasising the personal component and defining a family enterprise as family community that is established for the purpose of running a commercial enterprise. For the definition of the family enterprise the proprietary essence of the commercial enterprise is not a crucial issue that forms the basis of the family enterprise, but it is namely the personal participation of definer family members therein⁽²⁾.

It is irrelevant what the subject of business of the commercial enterprise is, which are its property components or what is the value of the set of assets forming the enterprise. However, it is of relevance which persons are involved on a permanent basis in the operation of the enterprise, and if these are persons as defined by the legal provisions, then it is a family enterprise – provided there is no contract between these persons or any other reason that would make applicable a different legal institute for the regulation of their relationships. We may thus conclude that the relationships between family members involved in the operation of the family enterprise are not personal component of this enterprise of that kind we may specify the latter in the case of any commercial enterprise. In the case of disposal with the family enterprise, its cancellation and/or termination of the enterprise with a family enterprise nature the personal relations will not be transferred to the purchaser of the enterprise. Therefore, we consider that the family community in the sense as defined

⁽²⁾ For economic aspects of the family enterprise, see i.a. Petlina, L., Koráb, V., 2015

above is not a part of the commercial enterprise and these relationships are placed outside the organized set of all components that make up the enterprise.

As characteristics of the family enterprise we may indicate:

- a) existence of the commercial enterprise,
- b) operation of the business,
- c) personal involvement of the family members in the operation of enterprise or keeping of a household, whereas the persons shall be relative in a degree defined by the law,
- d) permanent nature of the involvement,
- e) personal involvement in the operation is not covered by a contract.

A question may be raised whether the joint labour of the spouses or at least one of them together with relatives in the statutory defined degree (see sub c) above) should not be a separate characteristic of the enterprise.

If the above characteristics are met, we can talk about the family enterprise

Family members involved in the operation of a family enterprise

Family members, who may be involved in the operation of the family enterprise, are defined by the legislation as spouses, or at least one of the spouses and their relatives up to the third degree, or persons relative in the brother-in-law degree with the spouses to the second degree. According to this wording of the Civil Code we may conclude that the basis for the family enterprise is a married couple, or at least one of the couple. A question arises whether for the establishment of the family enterprise the existence of a married couple is a precondition – at least at the moment of its very establishment – and whether the degree of relativity or brother-in-law relationship devolves from the couple or at least one of them. It can be said that there is no justification for such a conclusion and we cannot interpret the family enterprise in such a narrow way. According to our opinion the family enterprise can thus be established even in cases where none of the family members is in the marital relationship, considering the members meet the condition of being related up to the third degree or in a brother-in-law relationship up to the second degree⁽³⁾. The narrow interpretation would not meet the purpose of the new legislation as specified in the Explanatory Memorandum to the Civil Code.

In order to specify the personal component of the family enterprise, it is necessary to determine also the notion of relatives and brothers-in-law of the spouses, as we have to deal exclusively with persons that may be involved as family members in the operation of a family enterprise and enjoy rights and obligations defined by the Civil Code. In specifying the sequence of relatives up to the third degree we shall apply the provision of Section 773 Civil Code that says that the degree of relationship between two people is determined by the number of birth, which comes in direct line from one another and in the next two lines from their nearest common

ancestor. Therefore, we have to distinguish between relatives of first degree, namely parents and their children, of the second degree grandparents and their grandchildren, and of the third degree the great-grandparents and their great-grandchildren. Further on, we may involve the side line, i.e. whether the related persons have a common ancestor and do not come from one another. In this case, the first degree is out of question and the second degree relatives are siblings and the third degree relatives are uncle, aunt and nephew and niece.

The Section 774 Civil Code applies on the persons related on the brother-in-law line. The affinity arises through marriage between one spouse and relatives of the other spouse, in which line and to what degree is someone related to one spouse, in a line in which the degree is in brother-in-law relation with the second spouse. Therefore, essential for the definition of family enterprise is the fact that after the termination of the marriage due to the death of one of the spouses or his/her declaration of dead the brother-in-law relationship shall not cease. The brother-in-law relationship is of relevance for the definition of the family enterprise up to the second degree. This means that a spouse shall be due to the marriage in brother-in-law relation of first degree with parents of the other spouse, his/her children, great-parents and grandsons or siblings of the spouse.

The legal rules require that the relatives or brothers-in-law are involved in the operation of the family enterprise in person or that they work for the family on a permanent basis, whereas no difference is made between these two categories except for the performed type of the work; all persons are held for family members involved in the operation of the family enterprise⁽⁴⁾.

It is also necessary to answer the question who represents the person in relation to that we shall determine the relativity or brother-in-law relation. The only logical person is the owner of the business enterprise, at least at the time of the establishment of the family enterprise. The Civil Code indicates the spouses or at least one of them who work in person in the enterprise. We may also encounter a broad definition of the institute of family enterprise where, in the case of existing family enterprise, every family member connection to any member of the family who is involved in the operation of the enterprise is admitted. In other words, the delegation of the involvement is possible to a person linked to any member of the family, what is the way laid down by the Section 700(1) Civil Code⁽⁵⁾. For this interpretation the link of a family member to the owner of the enterprise is not considered and the owner may influence the non-delegation of the involvement only by his/her disapproval.

⁽³⁾ KUČERA, J., Rodinný závod. 2015. Dostupné online na <http://www.kuceralegal.cz/blog/2014/01/23/rodinny-zavod-2/>.

⁽⁴⁾ See the Explanatory Memorandum to the Act No. 89/2012 Coll. /Civil Code/:"Also the family member who is permanently working for the family, in particular, takes care of the family household is put on the same level with the family members who performs labour for the family enterprise. It is a consistent fulfilment of the statutory principle that the personal care of the family and its members is of the same importance as the provision of proprietary performance."

⁽⁵⁾ ŠVESTKA, J. - DVOŘÁK, J. - FIALA, J. - ZUKLÍNOVÁ, M. et al. 2014. Občanský zákoník. Komentář. Svazek II. Praha: Wolters Kluwer, a.s.

It is convenient to deal also with the question how many family members at least must be involved in the operation of the family enterprise in order to ensure that the characteristics of the family enterprise shall be met. However, in the doctrine and/or the existing case law we will find no reference to answer that question. So we may conclude that two family members are enough to form a family enterprise and none of them have to be in marital relationship⁽⁶⁾.

Owner of a family enterprise

Section 700(1) Civil Code in the first sentence gives us the answer to the question who can be the owner of a family enterprise. According to this provision we can conclude that business enterprise that is considered to be a family enterprise, must be owned by one or more individuals⁽⁷⁾. Due to the linguistic interpretation of this provision we may think that no legal (moral) person is admitted as the owner. But in practice, we find cases when an enterprise of a legal person meets all criteria for a family enterprise and the application of the rules for family enterprises would be suitable, as they would meet the purpose and aim of the latter. As a typical example we may state a single-person limited liability companies where relatives or brothers-in-law of the shareholder of the company are together involved in its operation. We believe that in such cases there is no serious reason for non-application of the rules for family enterprises. This conclusion can be supported also by the second paragraph of Section 700 of the Civil Code that excludes the establishment of a family enterprise in cases where the rights and obligations of family members involved in the operation of the enterprise are ruled by articles of association including the founding legal act establishing a commercial company or cooperative agreement. There are thus explicitly excluded forms when a community of family members exists within a commercial company but not cases when one of the family members stands as partner (shareholder) within a legal person that operates a commercial enterprise and other family members are involved in a form that is not covered by a contract.

Given that the owner of a commercial enterprise can be, under the current legislation, a private non-entrepreneurial person, even a minor, we hold that identical conclusion can be made as regards the ownership of family enterprise. With respect to the fact whether the owner must be personally involved in the operation of the enterprise we can conclude that for the latter it is not the case. Also the management of the undertaking can be procured by other person than by the owner.

With respect to the circumstance that the new legislation admits that one and the same person may be the owner of more enterprises, we cannot preclude the alternative that the nature of the family enterprise shall have only one of them, namely the one in the operation thereof are the family members really involved in person.

⁽⁶⁾ With respect to the priority of the matrimonial property law we may conclude that the family enterprise cannot be established only between the spouses, not even in the case of their separated property

⁽⁷⁾ ŠVESTKA, J. - DVOŘÁK, J. - FIALA, J. - ZUKLÍNOVÁ, M. et al. 2014. Občanský zákoník. Komentář. Svazek II. Praha: Wolters Kluwer, a.s.

Ownership form of a family enterprise

There can be no doubt that a commercial enterprise in the operation of which are involved family members may be in single ownership or co-ownership by shares. It is, nevertheless, questionable whether commercial enterprise can be in the joint ownership of spouses. We would answer the question positively. Excluded is, however, application of family enterprise statute on situations when all family members involved in the operation of the enterprise will be at the same time co-owners of shares in the enterprise. The legislation of the ownership right must take precedence.

Formation of a family enterprise

The legislation does not cover in details the conditions for the formation of family enterprise. Since the existence of a commercial enterprise is necessary for the existence of the family enterprise, we may conclude that a family enterprise can be formed not sooner than at the moment of the formation of the commercial enterprise and/or start of its operation. No formal prerequisites are necessary for the formation of a family enterprise and the fact that we have to do with this type of commercial enterprise does not need to be recorded in the public register. We may hold that no third person must be aware of the fact that a commercial enterprise is run in the form of a family enterprise. We can thus characterise the formation of the family enterprise as being established by de facto involvement in person of relatives or brothers-in-law of the owner of the enterprise. It is obvious that the family enterprise is based on a fiction⁽⁸⁾.

The family enterprise may be also formed at any time in the course of operation of a commercial enterprise.

The family enterprise shall not be formed by leasing of an enterprise, ownership by a family member is a precondition for the formation of family.

The family enterprise is based on the fact that the claims of the family members are not covered by a contract. It remains a question whether it is according to the law to rule on some questions by mutual agreement of all involved family members.

If some family communities that suit the conditions of the family enterprise under the 2012 Civil Code have been active before January 1, 2014 and continued after the record day we may hold that the family enterprise has been formed to that day and since this time the relevant rules on family enterprise of the new Civil Code shall apply. In such a case the claims of family members incurred before December 31, 2013 would be handled according to the previous legislation and claims dated after the record day according to the new Civil Code.

Non-application of the legal rules for a family enterprise

The legal regulation of family enterprise shall not apply where the rights and obligations of the family members involved in the operation of the family enterprise are covered by a contract, whether it may be articles of association, memorandum of association, silent partnership, co-opera-

⁽⁸⁾ *Ibid.*

tive statutes, labour or other similar type of contract. The contractual regulation shall always take precedence over the rules on family enterprise, i.e. it will apply where family members involved in operation of a family enterprise do not have any other legal guarantee of their rights and obligation.

The rules of family enterprise shall also not be applied in the case when the spouses alone are involved in the operation of family enterprise. Here the Civil Code explicitly prefers the rules on matrimonial property law. Thus, the rules on Family enterprise can be held for subsidiary regulation as its application shall occur only when there is no prevalence of the above defined statutory or contractual rules.

With respect to the prevalence of the matrimonial property law the question must be asked whether a family enterprise can be founded only under the participation of the spouses. We believe that this is not the case even in situations when the commercial enterprise should be in the ownership of one of the spouses and the other is personally involved in the operation of the latter or works for the family on permanent basis. In situation like this, the rules on joint ownership of the spouses shall apply on the property rights for the operation of such commercial enterprise as the profit from the operation of what belongs only to one of them forms part of the joint ownership of the spouses. The question, however, is whether, for the other spouse who is involved in the operation of the family enterprise but is not the owner, it would not be more useful to be in a position of the family member involved in the operation. Such a member is not only entitled to the profit share but has also the right to participate in the decision-making on principal questions concerning the operation of the enterprise outside the usual business and in questions on the disposal with the enterprise merely on the basis of being a spouse and participation on the joint ownership of the spouses under statutory rules⁽⁹⁾. Those rights do not belong to the other spouse under the rules of matrimonial property law⁽¹⁰⁾.

Claims of family members involved in the operation of the family enterprise

Civil Code specifies the right to participate in profits from this operation as the basic right of family members involved in the operation of the family enterprise. The legislation does not specify more detailed conditions for determination of the amount of profit share for each member with the exception of the rule that each family member should participate in the extent corresponding to the amount and type of his work. It results from the wording of the legal provision that the decision-making of family members is a subject to the use of the entire profit of the family enterprise and, therefore, not only the part that is intended for distribution among members of the family. When this conclusion is accurate, it means that members of the family by their decision affect what portion of the profit will be invested back for the development of

family enterprise, its maintenance and operation and what portion will be divided among the family members. Family members are therefore capable to influence the primary business decision-making on the use of the profit in its entirety. The decision on the use of profit from the family enterprise belongs to all family members involved in the operation of the family enterprise, and this decision is taken by a majority of votes. At this point it should be noted that the Civil Code does not rule on the share of family members involved in the operation of the family enterprise to cover the loss of the family enterprise. We may hold that the entire business risk is borne by the owner of the family enterprise. The legislation also does not cover the obligation of the involved family members to provide any cash or non-cash deposits for the family enterprise. We believe, however, that the members of the family can mutually agree on the provision of deposits for the owner of family enterprise.

In spite of the fact that the Civil Code regulates the entitlement of the family members as the claim for share on the profit, it seems as a proper interpretation that the family members are not entitled to a regular income for their personal work for the family enterprise. With regard to the terms used, there is no reason to consider the profit for something different than the result of the current accounting period. If that was the case, then the subject of decision of the family members shall be only the so called net profit, i.e. the profit, after deduction of the tax duty chargeable to the owner of the family enterprise, after deduction, when applicable, of social security contributions and contributions to the State employment policy and health insurance premiums.

We can accept the interpretation that a family member will be entitled for his work for the family enterprise to receive incomes regardless of whether the family enterprise earns profits or not. This conclusion is also supported by the tax legislation that regulates the taxation of income of family members involved in the operation of the family enterprise and not the taxation of earned profits.

The law does not regulate for payment of profit shares exclusively in cash. We can therefore hold that a consideration can be also accepted. However, this will be in the competence of the family member community.

Family members involved in the operation of the family enterprise can waive their claim to profit shares in the form of a notarial deed. This rule is undoubtedly a mandatory one. However, it is questionable whether the members involved in the operation of the family enterprise may define by mutual agreement rules for more accurate profit distributions and concrete extent to which they will participate in the earned profit. We think that this may be the case, if such agreement is not a waiver of the right to profit shares by some of the members. We also believe that family members involved in the operation of the family enterprise can agree on what part of the profit shall be distributed among them, and will not be used for further operation of the family enterprise.

If during the operation of the family enterprise some gains occur, all family members are entitled to them, this to the same extent as to profit shares. They are entitled, to the same extent, to properties acquired from the profit earned. Therefore, the question is, what represents the gains to the

⁽⁹⁾ SOLIL, J. Ustanovení § 700 NOZ, k rodinnému závodu. Available online na <http://www.pravniprostor.cz/clanky/rekodifikace/k-ustanoveni-700-noz-k-rodinnemu-zavodu>

⁽¹⁰⁾ The reason for the usefulness of the rules family enterprise may be, inter alia, the fact that, pursuant to Section 118 Labour Code, there can be no employment relationship between the spouses

family enterprise, and what claims arise to family members therefrom. Also in this case there are significant interpretation problems. We may not exclude the interpretation that the gains to the family enterprise are not identical with the commercial enterprise and become a separate property falling to the co-ownership of family members. The share of each family member should be determined by the extent of the amount and type of his/her work. If this interpretation is correct then the concept of „collective asset“ (*universitas rerum*), the concept of mass as ruled by the provisions of Section 501 Civil Code shall be lost. Among the characteristics of collective assets belongs the definition that it is a set of two or more separate assets, all of which belong to the ownership of a single person and are used for identical purpose. And this would not be the case if the gains to the family enterprise and property acquired from the profit would fall to the co-ownership of family members. Therefore, we lean towards the conclusion that the claim to the share of family member on the gains to the family enterprise or on property acquired from the profits of the family enterprise should be settled in cash, this in the case of termination of its involvement in the family enterprise. The family members can waive the claims to gains and shares in property by a statement in the form of notarial deed. In the case that we admit the emergence of co-ownership shares to gains and property acquired from profit, this will bring great legal uncertainty for the owner of the family enterprise. Further on, the situation may arise that the family enterprise ceases to have the character of an organized set of assets eligible for running the business.

Further rights of family members involved in the operation of the family enterprise we consider for substantial, since they significantly restrict the ownership right of the enterprise owner. Family members in a family enterprise shall have the right to participate in decision-making with respect to operation of the enterprise and the disposal with the enterprise outside the regular operation. The Civil Code explicitly provides that the principles concerning the operation of the business or its closing down are reserved for the decision of the family members. To interpret properly the questions, what kind of changes specifically have to be decided will be the task of the application practice and the case law. However, we may presume that these issues involve changes of the subject of business, changes of the established place of business of the enterprise, changes in organizational structure and management and/ or questions of further development of investments in the operation of the family enterprise⁽¹¹⁾ and, lastly, the decision on termination and dissolving of the family enterprise⁽¹²⁾.

Family members have, unless stipulated otherwise, the pre-emption right to the family enterprise, which is to be

disposed. Thus, the pre-emption right belongs to family members also in the case of assignment of the enterprise by donation. The legislation states explicitly that even in the case of disposal of the property that, by its designation, should permanently serve for the operation of the enterprise, the family members do possess the pre-emption right. In practice, we may expect that family members will benefit from this pre-emption right even as regards the immovable properties belonging to the family enterprise. Due to the fact that the nature of the commercial enterprise as a family establishment is not recorded in any public register and cannot be ascertained from public sources, the person acquiring the property will not be able to find out prior to the conclusion of the purchase agreement that the transferor is restricted by the pre-emption right of the family members.

Transfer of the participation in the family enterprise

The legislation is based on the non-transferability of participation of family members. Any claims of family members have personal character and are non-transferable. An exception is allowed if and only if the transferee is one of the family members exhaustively defined by the provisions of Section 700(1) Civil Code and all family members who are involved in operation of the family enterprise agree with such transfer of participation. It is therefore obvious, that the transfer can occur only if the person who transfers or assigns ceases to be involved in operation of the family enterprise personally and this will be taken over by the person of transferee, who meets the preconditions of being a relative or brother-in-law of the owner. The legislation does not regulate the contract to transfer the participation in a written form and does not provide for the prior consent of family members as a condition for the implementation of the transfer. It is therefore possible, that the transfer will occur also on the basis of an oral agreement, which shall be approved subsequently by all family members involved in the operation of the family enterprise. In the case that such consent was not given and the transfer or assignment would have taken place without the consent of all family members, such act can be considered invalid due to the fact that the rule of Section 703 of the Civil Code regulating the transfer of participation has mandatory character. It is, therefore, a legal rule that does not allow for any derogation and legal act arranging for transfer or assignment of the participation would, without the consent of family members, conflict by its content with the law⁽¹³⁾. If we agree with this argumentation we shall conclude that this is the case of absolute nullity. With regard to the fact that we may expect a broad spectre of opinions concerning the degree of the invalidity and/or character as the statutory rule - mandatory or relatively mandatory, we may admit that the invalidity is a rule provided to protect the family members involved in the operation of the family enterprise, that may be invoked only by these members that are protected by granting the right to provide consent to the transfer/assignment of the participation. Another issue of interest is the assessment of the legal conduct, on the basis of which the transfer of participation to

⁽¹¹⁾ ŠVESTKA, J. - DVOŘÁK, J. - FIALA, J. - ZUKLÍNOVÁ, M. et al. 2014. Občanský zákoník. Komentář. Svazek II. Praha: Wolters Kluwer, a.s.

⁽¹²⁾ We consider the resolving of this question for essential. In the case the owner of a commercial enterprise should not be allowed to cease, according to his/her own will, the operation of the commercial enterprise run as family enterprise, it can be expected that it will be more suitable for owners to give preference to contractual arrangement with working family members

⁽¹³⁾ LAVICKÝ, P. et al. 2014. Občanský zákoník I. Obecná část (§ 1-654). Komentář. 1. vydání. Praha: C. H. Beck, 2014.

other person than to a family member referred to in Section 700 (1) Civil Code would occur. In such case, we can conclude that this would be a legally non-existent conduct.

We can presume that the transfer in accordance with the legislation can occur even for consideration. We hold at the same time that only the case law will resolve the question whether by the transfer of participation the claims and rights associated therewith shall be transferred as well, for example, entitlement to payment of profit for the period preceding the transfer of participation. Making this conclusion we should deal with the fact that the transfer of participation has the same consequences for the family member whose participation terminates, as the cease of the involvement in the operation, according to Section 705 Civil Code⁽¹⁴⁾. We believe that this is not so and that the transfer of the participation is mentioned by the legislator deliberately in a separate provision than the one that terminates the participation. We tend to believe that with the transfer of the participation, rights associated with the involvement in the operation of the enterprise are transferred as well and therefore the unpaid and outstanding claims shall follow. Thus we may interpret the assignment in that way that the legal status, which enjoys the family member in question, shall be assigned to another member in unchanged extent. We must realise that in the transfer of participation the family member cannot apply the pre-emption right.

It remains a question whether the transfer of participation to other family member can occur in the case of a death of family members. This conclusion we may refuse because by the death of a family member involved in the operation of the family enterprise its participation ceases and outstanding claims from this participation should be subject of the succession.

Termination of participation of a family member

Family member's involvement in the operation of family enterprise shall cease in the case he/she stops to perform work for the family. The Civil Code does not specify any formal requirements to this termination and it can be therefore expected that the demise shall occur by a de facto cease of work for the family enterprise. Another reason for the termination of the participation of a family member may be that he/she concludes an employment contract or similar contract or enters in another relationship with the owner of the commercial enterprise that precludes his/her participation in the family enterprise. It can be expected that with regard to the eligibility requirements for family members entitled to be involved in the operation, the termination may occur by cease through divorce of the marriage that is basis for the brother-in-law relationship. And, finally, the termination of the participation of a family member occurs also by his/her death.

For practical reasons, we consider for necessary that the termination of involvement in the operation of family enterprise shall occur also due to a unilateral act of the owner of the enterprise or on the basis of the decision of the family members involved in the operation of the family enterprise. We may admit that in the application of this unilateral ter-

mination of involvement the practices and conventions set during previous operation of the enterprise. On the other side, completely unclear is the specification of claims arising to a member family member upon termination of his/her involvement in the operation of the enterprise and their settlement. According to the wording of Section 706 Civil Code we may expect that the entitlement of the member is of pecuniary nature as the rules admit that it may be broken down into instalments should an agreement to such end be concluded or instalments shall be approved by decision of the Court. However, there is not any closer definition of nature of this claim and its amount. We may suppose that the legislator refers to settlement of all claims of member whose participation terminated and, therefore, including the share on the gains and property acquired from the profits of the family enterprise, which we consider for a meaningful interpretation. This means that obviously the member's share in the property shall be settled. If it stands up to the conclusion of a mutual ownership to these increments and things taken from the profit, it would be a cancellation and settlement of the mutual ownership, when a family member whose participation to lapse, would always be entitled to a settlement amount in the money. If the conclusion on the co-ownership by shares in the gains and property acquired from the profits will stand, it would be a cancellation and settlement of the co-ownership, where a family member whose participation shall terminate, is always entitled to a settlement share in money. Due to the fact that the person that shall be obliged to pay the share, would be probably the owner of the family enterprise - even if the legislation completely avoids this issue - the claims of the former member would accrue to the ownership of the owner of enterprise. Associated issues to the latter are whether the profit of the family enterprise can be used for repayment to a former member and whether there is any obligation to repay the member with participation terminated, which shall not arise to all family members whose involvement in the enterprise continues. Specification as, to whom the claim on the settlement upon the termination shall be raised will therefore remain to be settled by the case law. Whereas the question of locus standi in this dispute seems to be clear, different conclusions can be reached with regard to the legal capacity to be sued. The authors of this paper are of the opinion that the latter belongs only to the owner of the family enterprise.

Dissolution of the family enterprise

As we have defined, one of the characteristics of family enterprise is its keeping in the operation, we may conclude that the family enterprise ceases to exist due to the suspension of its operation that is not of a temporary character. The dissolution of family enterprise comes by its disposal and we expect that also due to the succession to the family enterprise. The question is whether the dissolution of the family enterprise occurs when the one or more of the family members make use of their pre-emption right to the family enterprise⁽¹⁵⁾ and, naturally, the dissolution of the family en-

⁽¹⁵⁾ ŠVESTKA, J. - DVOŘÁK, J. -, FIALA, J. - ZUKLÍNOVÁ, M. et al. 2014. Občanský zákoník. Komentář. Svazek II. Praha: Wolters Kluwer, a.s.

⁽¹⁴⁾ *Ibid.*

terprise can also occur by agreement of the persons involved in its operation.

We hold that the existence of the family enterprise shall be influenced by declaration of bankruptcy on the property of its owner. To continue in the operation of the enterprise as family enterprise after such declaration would be contrary to the principles of the bankruptcy proceeding and the operation of the enterprise would also interfere with the disposal rights of the liquidator of the bankruptcy. We may also find the interpretation that the operation of the family enterprise may be terminated due to the circumstance that the liquidator of the bankruptcy will not declare towards the family members involved in the operation of the enterprise within 30 days after declaration of the bankruptcy that he shall meet their requirements. This interpretation rests on the provision of the Bankruptcy Proceedings Act that affects the contracts on fulfilment of mutual obligations, so far as they remain unfulfilled on the opening day of the bankruptcy by the other party to the contract as well. With regard to the fact that the existence of a non-fulfilled contract is the condition for application of this statutory provision – and we characterise the family enterprise as arrangement of contract-free relationships between family members, we may hold this provision of the Bankruptcy act for non- applicable to the family enterprise.

IV. Conclusion

In conclusion of our analysis and considerations, we should remind you that, unless otherwise provided by law, family members can rule for their rights and obligation in a way of derogation from the law. Prohibited are only legal acts that contra bonos mores, violating the public order or rights relating to the personal status of persons, including rights for protection of the personality of individuals.

In the next year, after the settlement of the re-codifying rules of the Czech civil law, we may expect further interpretation of the rules on family enterprise by the case law of general courts to be established on this issues, but also the one of the administrative courts, e.g. in the context of defining the legal and illegal labour in the decisions of the labour inspectorates relating to bailout the family without labour relations⁽¹⁶⁾. In the event that the labour will be defined as personal performance of a family member, we shall exclude the conclusion that it could be held for illegal labour.

⁽¹⁶⁾ These questions are dealt by the case law already several years before the introduction of the institute of the family enterprise. Most consequently were the features of dependent labour defined by the Supreme Administrative Court in its decision of December 13.02.2014, sp. zn. 6 Ads 46/2013. Available at http://www.nssoud.cz/files/SOUDNI_VYKON/2013/0046_6Ads_13_20140220123634_prevedeno.pdf

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