

**Regina Hučková, Diana Treščáková**

**LIABILITY FOR DEBTOR'S DELAY – DE LEGE LATA  
AND DE LEGE FERENDA CONSIDERATIONS<sup>1</sup>**

**1. Introduction**

Liability for delay has its origin in the Roman Law. Then it was the consequences of non-fulfilment of obligations, regardless of the fact that it is due to impossibility to fulfil or due to other reasons. The only thing that mattered was whether the debtor or the creditor was the one who was liable for the non-fulfilment or neither of them was reliable<sup>2</sup>.

According to who committed the breach of obligations two groups were distinguished: debtor's delay (*mora debitoris*, *mora solvendi*) and creditor's delay (*mora creditoris*). Latin conceptions used in the Roman Law have been remained and are being used not in the legal theory, but also in practice.

The title of the work implies that the authors shall deal with liability for debtor's delay in detail, while their effort shall be to offer not only a picture of the recent status of legal regulations of this kind of liability, but also to find a solution for its further development in the light of re-codification of private law in Slovakia.

**2. Legal Regulations relating Liability for Debtor's Delay  
from Aspect of Commercial Law and Civil Law**

Debtor's delay, but also creditor's delay is regulated by the Commercial Code. This legal regulation is present even in the Civil Code. Delay in the Civil

---

<sup>1</sup> This work has been elaborated within the grant task APVV No. 0263-10 titled „Efficiency of Legal Institutions and Economic and Financial Tools in the Period of Crisis Phenomena and Situations in Enterprising“

<sup>2</sup> I. Pelikánová, *Comments to the Commercial Code*. Part 3. Commercial obligation relationships Section 261-408 Prague: Linde Praha a.s., 1996, p. 788, ISBN 978-80-7357-428-4.

Code is included in the regulations relating changes in the content of obligation (provisions of Section 517–523 of the Civil Code) titled „Changes in the Content of Obligations“. This modification results in new rights and duties on both sides. Beside the basic duties, on the side of the debtor, further duties, so-called derived ones are arising, e.g. the duty to pay interest from delay or the duty to assume risk for liability for damages that is transferred to it at the moment of delay. On the side of the creditor in case of debtor's delay, beside the basic right, i.e. to request fulfilment, further rights are arising, e.g. the right to claim payment of interest from delay in case of financial claim, and/or to request payment of the contractual penalty, if there was a written agreement between the contracting parties or even to use the right to withdraw from contract, in case if it is a serious breach of contractual obligations on the side of the debtor.

In the Commercial Code delay is in the part titled „Breach of Contractual Obligations and its Consequences“ (provisions of Section 365–372 of the Commercial Code).

Judging the extent, content and uniqueness of the legal regulation of the delay in the Commercial Code, we can state that this legal regulation is of complex character and thus the provisions of the Civil Code on delay in respect of the principle of subsidiarity shall not be applied to commercial obligations<sup>3</sup>.

As Ovečková states, that despite of certain variations in the mentioned regulations, undoubtedly they have one thing in common that is that debtor's delay and creditor's delay is considered as a separate form of non-fulfilment of contractual duties. This independence is conditioned by the substance of the delay stemming in the fact that although the non-fulfilment of contractual duty occurred, but consequently its additional fulfilment is anticipated. This results in the legal regulation of the delay itself separated from other forms of non-fulfilment of obligations<sup>4</sup>.

The legal regulation of liability for delay in the Commercial Code valid until Feb. 1, 2013 showed interconnection with the legal regulation of delay in the Civil Code. The Commercial Code referred to the legal regulation in the Civil Code in provision of Section 369 relating debtor's delay to fulfil financial obligations. This provision regulated interest from the delay with fulfilment of financial obligations.

Although, from Feb. 1, 2013 is the amendment of the Commercial Code as Act No. 3/2013 Coll. effective that modified the provision on statutory interest on from delay, in such way that the Commercial Code itself, more specifically

---

<sup>3</sup> O. Ovečková, in O. Ovečková, L. Žitňanská, *Basics of Commercial Law 2*. Bratislava: Iura Edition, 2010, p. 150. ISBN 978-80-8078-345-7.

<sup>4</sup> O. Ovečková, in O. Ovečková, *a kol. Commercial Code. Comments. Third amended and revised edition Part 2*, Bratislava: Iura Edition, 2012, p. 262. ISBN 978-80-8078-434-8.

the regulations of the commercial code contain own legal regulation on interest from delay and thus the Commercial Code makes no reference to the legal regulation in the Civil Code.

A legal definition of the delay of the debtor is in the provision of Section 365, according to which *„the debtor shall be in delay, if he fails to fulfil his obligation properly and in time, until the time of proper and timely fulfilment or until the time when the obligation extinguishes by other reasons. Although the debtor is not in delay, unless he can fulfil his obligation in consequence of the delay of the creditor“*.

Within the above-mentioned legal definition of the delay of debtor one can find even the negative determination of the delay of the debtor<sup>5</sup>. It is this negative definition of debtor's delay that refers to the legal definition of the creditor's delay that is specified in the Commercial Code, provision of Section 370. According to this provision *„debtor shall be in delay, if in conflict with his duties resulting from the obligation, he fails to receive offered fulfilment properly or fails to provide co-operation that enables the debtor to fulfil his obligation“*.

Analogically, under the concept of delay, whether at the debtor or at the creditor, the Commercial Code defines as *„Inevitable timely non-fulfilment of a certain duty resulting from a legal relationship“*.

Debtor's delay in the Civil Code is specified in Section 517 Sub-section 1 of the Civil Code, and in such way that *„a debtor who fails to fulfil his debt properly and timely, is in delay. If he fails to fulfil it within additional reasonable time given to him by the creditor, the creditor has the right to withdraw from the contract: if it is a case of dividable fulfilment, the creditor's withdrawal can affect only particular fulfilments“*.

Generally, we can state that provision of the Civil Code relating debtor's delay is specified more extensively, as it is in the Commercial Code, due to the fact that directly after the definition of debtor's delay it contains also the calculation of the creditor's law to withdraw from contract after providing additional period for fulfilment. The definition of delay itself is – in contrast with the legal regulation in the Commercial Code – defined more strictly, because the law-maker states that *„the debtor who fails to pay his debt properly and timely, is in delay“*. In respect of the definition of the concept the Commercial Code further states that *„the debtor is in delay if he fails to fulfil his obligation properly and timely even to the date of proper fulfilment or to the date when obligation is terminated otherwise.“* In this case the law-maker specifies the duration of delay and beside it in the same provision the debtor's delay is directly specified, i.e. *„the debtor is*

---

<sup>5</sup> Compare also D. Treščáková, *Debtor's and Creditor's Delay as Reason for Liability in Commercial Law*. In: *Commercial Law and its Broader Conceptions: Collections of Scientific Works*. Košice: UPJŠ, 2010, p. 258. ISBN 9788070978382.

*not in delay unless he can fulfil his obligation as consequence of the creditor's delay.*“ We have found that the definition of the debtor's delay is better in the law of commercial law regulation, since it defines delay in a more precise way that is more evident and definite that excludes doubts when judging if it is debtor's delay or not and the duration of the delay. Finally, we can state that such doubled legal regulation of liability for debtor's delay is recently not appropriate. In our opinion unification of these private-law regulations would help. Although, we shall come back to it later within our *de lege ferenda* considerations.

The Commercial, and even the Civil Code finds even a situation, when the debtor failed to fulfil properly, to be a debtor's delay. Thus, the act requires for proper fulfilment of obligation not only timely, but appropriate fulfilment. These elements are not cumulative and thus need not to be fulfilled at the same time. If only one of these two elements is not fulfilled and the debtor is in delay, breach of contractual duty occurs and obligation relationship arises. Non-fulfilment of duty timely and properly, i.e. duly, and non-fulfilment are on the same level. This is so, because economic effects of complete non-fulfilment and fulfilment in contrast with the contract practically does not differ many times<sup>6</sup>.

If we take the theory of liability as basis, we can distinguish objective delay that incurred due to circumstances for which the debtor is not liable, and subjective delay caused by circumstances for which the debtor is liable. According to F. Rouček and J. Sedláček „*subjective delay includes even objective delay*“<sup>7</sup>.

Definition of debtor's delay, whether it is a commercial law relationship or civil law relationship, is important for judging whether the objective or subjective liability principle shall be applied. By passing of the Commercial Code in 1991 even the definition of differences between debtor's delay in commercial law sphere and civil law sphere was provided. One of them is the distinction, whether it is a delay based on the subjective or objective principle. Generally we can state that the subjective principle is a less strict one that is applied on civil law level. Upon this understanding the debtor's delay requests infliction. On the contrary, on civil law level the debtor's delay is based on objective principle, i.e. this delay and the consequences resulting from it occur regardless of the infliction of the violating person.

The debtor's delay occurs objectively in case, if he fails to fulfil his obligations timely (within a specified time) and properly. The only case when debtor's

---

<sup>6</sup> See J. Bejček, In: J. Bejček, K. Eliáš, P. Raban, a kol.: *Course on Commercial Law. Obchodní závazky (Commercial obligations)*, 4th edition, C.H.Beck, Prague, 2007, p. 91, ISBN 978-80-7179-781-4.

<sup>7</sup> F. Rouček, J. Sedláček, *Comment to the Czechoslovak General Civil Code and Civil Code of Slovakia and Podkarpatská Rus*. Part IV. Prague: Právnícké knihkupectví a nakladatelství {Legal Bookstore and Publisher} V. Linhart 1937, p. 323.

delay does not occur is when the debtor is not able to fulfil his obligation due to the creditor's delay. In case, when the fulfilment of the debtor's obligations is disabled by other circumstances (except for creditor's delay), the debtor is in delay regardless of the fact whether these circumstances occurred or did not occur on his side, and/or whether he could or could not prevent them or affect them<sup>8</sup>.

We have found that making distinction between objective and subjective principle is important mainly when judging strictness of legal relationships. While in the civil law sphere it is the issue of relationships between citizens, and/or between entrepreneurs and consumers, in commercial law sphere it is the issue of relationship mainly between entrepreneurs, where certain experience with trading, knowing law on a higher level – as it is in case of a natural person, non-entrepreneur – are expected. In commercial-law relationships it is also necessary that the enterprising entities are present in these relationships, having professional competence and they have to fulfil their duties with due diligence (e.g. mandate contract, forwarding contract, etc.). Thus – since professionalism is assumed – the rules are adjusted more strictly and it is reasonable to judge these relationships upon the objectivity principle regardless of the infliction with the possibility, and/or necessity of predictability of damage occurrence.

Likewise according to the Principles of International Commercial Contracts (UNIDROIT) non-performance is „the failure of the party to fulfil any of his contractual obligations, including faulty or late fulfilment“<sup>9</sup>. Thus, within the principles of doing business in international trade debtor's delay is a situation when the debtor fails to fulfil properly and timely.

In case of delay it is necessary to meet the following prerequisites. The debtor's delay assumes maturity of the claim. If no maturity date is specified, the debtor is to be called by the creditor for fulfilling his obligations<sup>10</sup>.

The Commercial Code contains a provision relating specification of validity, namely Provision of Section 340. This provision defines that „*the debtor is obliged to fulfil his obligation in time specified in contract (Sub-section 1). If the date of fulfilment is not specified in the contract, the debtor is entitled to request fulfilment of obligation immediately after the conclusion of the contract and the debtor is obliged to fulfil the obligation without undue delay after the creditor requests fulfilment (Sub-section 2)*“.

---

<sup>8</sup> See M. Tomsa, In: I. Štenglová, S. Plíva, M. Tomsa a kol.: *Commercial Code Comments. 13th edition Prague: C.H.Beck, 2010, p. 1025. ISBN: 978-80-7400354-7.*

<sup>9</sup> See art. 7.1.1. UNIDRIOT principle.

<sup>10</sup> According to the Czechoslovak General Civil Code the debtor could be called for fulfilment either by court or outside the court. If the maturity date is specified precisely, there is no need for a reminder and the following principle is applied: „Dies interpellat pro homine (Section 1134) and requires definition of the calendar day.

In respect of the fact that specification of the date of fulfilment is not the obligatory requirement of the contract, the date of fulfilment need not to be stipulated in the contract. An exception is for example the contract on future contract, of which obligatory requirement is the date on concluding the contract itself.

Legal arrangement of the Civil Code is similar. The difference is only in the fact that the act provides no „without undue delay“ to the debtor for the fulfilment, although the debtor is obliged to pay the debt on the first day after the creditor requests for fulfilment<sup>11</sup>.

Interpretation problem in practice can arise in connection with „without undue delay“. The law-maker states the concept of „without undue delay“, although this concept is not determined, specified anywhere. It is possible to specify this concept in the contract, eventually in practice one can be faced with „without undue delay“ directly in commercial, eventually in insurance conditions.

Civil law regulation is more precise in this aspect when it specifies the concrete time when the debtor is to fulfil to creditor, i.e. after the call for fulfilment.

A specific consequence of debtor's delay with fulfilment of financial obligation is the creditor's claim for interest from delay.

The interest from delay represents the institute that is applied in commercial and in civil law as well.

As it was in the previous period, recently it is also possible to distinguish between interest from delay that is statutory and that is agreed in a contract. Interest from delay agreed in a contract has priority over the statutory interest, while in case of absence of agreement on interest from delay is applied the interest from delay regulated by law.

The above-mentioned statement is supported even by the court practice, since it states in its resolution: „Parties of a commercial obligation relationship can agree on interest rate from delay for cases of debtor's delay with fulfilment of financial obligation that has priority over statutory regulation“<sup>12</sup>.

Interests from delay are exclusively of financial character that can be concluded not only from the legal wording of the mentioned provision of Section 369 Sub-section 1, discussing on the essence of interests from delay, in which the law-maker expressly states that the debtor is obliged to pay interests from delay, but also that payment of interests from delay is to be paid only when fulfilment of financial obligation is in delay<sup>13</sup>.

In respect of the fact that the interests from the delay are the specific consequences of the debtor's delay to fulfil financial obligation, the recent Commer-

---

<sup>11</sup> Also.

<sup>12</sup> See Resolution of the Supreme Court of the Slovak Republic, File No. 4 Obdo/11/2003.

<sup>13</sup> Compare See J. Bejček, K. Eliáš, P. Raban, a kol.: *Course on Commercial Law. Commercial Obligations*, 4th edition. Prague: C.H.Beck, 2007, p. 94, ISBN 978-80-7179-781-4.

cial Code refers to interests from delay in provision of Section 369 Sub-section 1, where: *„if the debtor is in delay with the fulfilment of his financial obligation or of its part, the creditor who fulfilled his statutory and contractual obligations, incurs the right to request interest from delay in respect of the non-paid amount, of which amount is agreed in contract without the need of special reminders.* It results from the above-cited provision that the claim for the fulfilment of interests from delay incur neither in case of creditor's delay, nor in case of debtor's delay in respect of fulfilment of non-financial obligation.

Wording of par. 1 of provision of Section 369 was introduced to our legal order by Act No. 9/2013 Coll. that modified and amended the Commercial Code. This provision came into effect from Feb. 1, 2013. It is the substantial last amendment of the Commercial Code.

In par. 1 of this provision, opposite to the original wording of the legal regulation, it is stated that the right of the creditor who fulfilled his statutory and contractual obligations, to request interest from delay from the non-paid sum, without the need of special reminders. In the last legal regulation there is no reminder addressed to debtor. It is a new concept by which the law-makers emphasises that the creditor can claim payment of interest for delay, there is no need to call and/or remind the debtor in advance, and it is possible to lodge the claim for interest from delay directly.

Upon amendment of the Commercial Code, i.e. Act No. 9/2013 Coll. calculation of the amount of statutory interest from delay has also been modified. Provisions of Section 369 Sub-section par. 2 states *„If the amount of interest from delay has not been agreed, the debtor is obliged to pay interest from delay at a rate specified by the government of the Slovak Republic upon a regulation.“*

The mentioned amendment entirely modified the method of defining the amount of statutory interest from delay. Although, in this case distinction must be made, whether these are relationships exclusively between enterprising subjects or relationships arising from consumer contracts and the debtor is the consumer. In such case the provision of Section 369 Sub-section 3 is applied, according to which *„If obligation incurred from consumer contract and the debtor is the consumer, interest from delay can be agreed max. to the amount specified by regulations of the civil law.“*

Consequently it means that the Commercial Code even in present, again contains its own legal regulation of the definition of the amount of statutory interest from delay, according to the Regulation of the Government of the Slovak Republic. This calculation is based on a similar basis, as it was in the previous legal regulation, i.e. that the actual rate of statutory interest, according to the provision of Section from delay Sub-section 1 of the Governmental Regulation of the Slovak Republic No. 21/2013, results from the basic interest rate of the



European Central Bank. The rate of statutory interest from delay is specified for commercial law relationships as basic interest rate of the European Central Bank increased by 9 percentage points.

Legal regulation that was valid before the Commercial Code valid from Feb. 01, 2013, at calculation of the amount of statutory interest from delay referred to regulations of the civil code. Upon the introduction of such legal regulation in respect of the calculation of the amount of statutory interest from delay unification of civil law and commercial law regulation occurred, in respect of the calculation method of statutory interest from delay. We suppose that upon unification of these legal regulation, at least in this respect, gradual removal of splitting of legal regulations occurs, that is present from 1991, i.e. from the time when the Commercial Code was adopted that has been the subject of several criticism. It was arguable that the subject regulation relating the calculation of the amount of interest from delay has its connection with the legislative intention relating the proposal of the new Civil Code, in which possible unification of commercial law and civil law regulation of the law of obligation is mentioned<sup>14</sup>.

Although introduction of the actual legal regulation in respect of statutory interest from delay (Act No. 9/2013 Coll.) resulted in repeated deviation from the already unified legal regulation, at least in this legal sphere.

One can argue that the legal regulation of calculating statutory interests from delay according to the regulations of the civil law seemed to be inconvenient for commercial and legal relationships. It was also necessary to implement the Directive of the European Parliament and of the Committee 2011/7/EU from Feb. 16, 2011 on Combat against Late Payments in Commercial Transactions. The transposition deadline for implementation was defined for March 16, 2013. We must state that the subject directive was accepted as revision of the existing directive of the European Parliament and Council 2000/35/EU from June 29, 2000<sup>15</sup>.

As it has been mentioned before, regulations of the civil law relating calculation of interests from delay refer to the Governmental Regulations of the Slovak Republic No. 87/1995 Coll. by which some provisions of the Civil Code are executed. Modifications have been made even in this legal regulation. The modifications effect the calculation method of statutory interest from delay. In the previous legal regulation it was specified by the governmental regulation that the amount of interest from delay is higher by 8 percentage points as the basic interest rate of the European Central Bank valid as of the first day of delay with fulfilment of financial debt. Although according to the valid legal regulation the

---

<sup>14</sup> Legislative intention of the Civil Code – accessible at <http://www.justice.gov.sk/h.aspx?pg=159&htm=http://www.justice.gov.sk/pi/2009/legzamObZ.pdf>

<sup>15</sup> See Explanatory Report No. 9/2013 Coll. accessible at <http://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=4185>



amount of statutory interests from delay in civil-legal relationships is decreased by three percentage points. According to the provision of Section 3 of the Regulation of Government No. 87/1995 Coll. invalid wording with effect from Feb. 1, 2013 *„the amount of interest from delay is higher than the basic interest rate of the European Central Bank valid as of the first day of delay with fulfilment of financial debt“*.

Consequently, the amount of statutory interest from delay has been decreased in the civil law and increased in the commercial law. The amount of statutory interest from delay in civil law is lower than in the commercial law by four percentage points. It is due to the necessity of transposition of the European Parliament and Council Directive No. 2011/7/EU and due to the fact that in business relationships a certain professionalism of subjects entering into these relationships is assumed, while in case of civil law relationships these are the relationships between citizens, in which case no professionalism is expected.

The above-mentioned relate with the provision of Section 369 Sub-section 3, when the consumer enters into the relationship with the entrepreneur. In this case it is assumed that the enterprising entity has more experience and skills in the commercial field than the consumer and due to this the legal regulation of statutory interest from delay is more moderate, i.e. according to the civil law. The above-mentioned relate with the already mentioned principle of liability for delay, i.e. on subjective or objective basis.

From the point of view of the calculation of statutory interest from delay the temporary provisions of Section 3 of the governmental regulation is important that specifies the rate of statutory interest from delay for commercial law relationships, according to which *„if obligation incurred before the first of February 2013, the amount of interest from delay is regulated by the provisions of the civil code valid as of Jan. 31, 2013, even for the period of delay after Jan. 31, 2013.“*

From the above-mentioned it results that for the correct calculation of statutory interest from delay one has to inspect the moment when commercial law obligation relationship was created. Not the date of issue of the accounting document (e.g. invoice), but the moment of the creation of this relationship (e.g. date of signing of the contract that establishes obligation relationship) is essential.

### **3. Legal Regulation of Liability for the Delay of Debtor in the Light of Re-codification of Private Law – De Lege Ferenda Considerations**

The role of each codification is mainly the systematic classification of rules in a given field of social relationships, unification of the approach to law and reform of the legal status. Thus the new codification represents a parting with

the past, declining from the previous legal regulation. Within this concept the codification has even a strong political meaning<sup>16</sup>.

Almost all the countries of the “Visegrad 4” are going through the process of either codification or re-codification of the private law. In some countries this re-codification has already been finished (Czech Republic, Hungary), in other countries it is in process and despite of efforts has not been finished (Poland, Slovak Republic). In all of the mentioned countries the members of the re-codification committees inclined to the so-called monistic conception of private law, i.e. dualism was removed and the position of the Civil Code – as *lex generalis* of private law – was strengthened.

The Slovak Republic is not an exception, where despite of several possible conceptions, that came into consideration, it was determined that reform of the private law should be processed in the dimensions of monistic conception, probably after the model of the Czech Republic, where one basic codex of private law was adopted, i.e. the Commercial Code (No. 89/2012 Coll., became effective on Jan. 1, 2014) that cancelled the Commercial Code valid up to that time. New statutory regulations has also been adopted, e.g. one of the most important ones for the field of commercial law is the Act on Commercial Corporations (No. 90/2012 Coll., became effective on Jan. 1, 2014).

In our territory re-codification of private law has its historical roots in the period of the Czechoslovak State. Even if re-codification of the private law was in attenuation during a long time, in 2006 the issue of a more active progress in these re-codification efforts was again initiated. For this purpose at the end of 2006 the Ministry of Justice of the Slovak Republic established a re-codification committee, of which goal was to – in harmony with the Government Policy Statement and Plan of Legislative Task for years 2006–2010 execute the specified task, i.e. to re-codify private law and develop a new Civil Code<sup>17</sup>.

Consequently, in a relatively short time horizon, the basic proposal of legislative intention has been processed that should represent the primary starting points for creating basic institutions and standards of the main private-law codex. After the submission of the proposal of legislative intention a repeated attenuation occurred in the field of re-codification efforts, while this situation still persists.

Within the re-codification of private law it is necessary to solve mainly the relation of the Civil Code and the Commercial Code, as two basic pillars of the private law in Slovakia. This need stems mainly from the fact that a lot of insti-

---

<sup>16</sup> J. Dvořák, *Codification of the Civil Law in the Czech Republic (yesterday, today and tomorrow)* In: D. OŠtrožovičová, *Legal-comparative Aspects of the Sales Agreement in respect of Recodification Processes* In: J. Suchoža, J. Husár, *Law – Business – Economy II. Collection of Scientific Works*. Prague: Leges, 2012, p. 147. ISBN: 978-80-87576-33-5.

<sup>17</sup> J. Bíroščáková, *Legislative framework of private law codification*. *Bulletin of the Slovak Advocacy Year XV.*, No. 4/2009, p. 2.

tutions mainly of the law of obligation, is solved dually. In case that the intention is to solve re-codification of the private law on the basis of monistic conception, it is primarily necessary to solve the issue of the removal of recent dualism. It is mainly those institutes as forfeiture, sanction, and securing institutes, contracts (mainly sales contract and contract for works that are included in the Commercial Code and in the Civil Code, as well that is confusing) and last but not least, the institute of debtor's or creditor's delay that is the basic orientation of our work. The legal practice, but also the theory, sense that the Civil Code, but also the Commercial Code do not meet in the form, in which they are now, the recent requirements. Mainly the Civil Code fails to be a general and internally summarized basis of private law regulation that would be compatible with the legal regulation of the European Union, mainly in the field of European private law. These aspects are to be kept in mind during the re-codification of private law.

The model of the new Civil Code that was proposed in the legislative intention, counts with the creation of a new systematics, with re-definition and completion of original institutes and with the creation of new institutes, but also of new private law principles that shall be explicitly introduced in the contents of the Civil Code<sup>18</sup>.

According to the legislative intention for the codification of private law the far-reaching change should affect mainly obligation relationships that should be in future arranged uniformly, including commercial and consumer obligations. The change shall affect inception, change and termination of obligation, process of concluding contracts as securing obligations and the liability itself<sup>19</sup>.

Concerning the institute of debtor's delay, we should start from the recent approved understanding that the debtor is in delay if fails to fulfil his debt properly and timely.

If it is the case of delay with fulfilment of financial debt, the creditor has the right for interest from delay, eventually fee from the delay. The max. amount of these sanction interests and fees from delay are specified by governmental regulations of the Slovak Republic. The proposed new Slovak legal regulation is oriented on unification of the amount of interest from delay in civil law and commercial law relationships, with certain modification that in commercial law relationship the agreement on the amount of interest from delay shall be favored. Thus, it is proposed that the interest from delay specified by a legal regulation should be applied even to commercial law relationships, unless the contract specifies otherwise. In this work we repeatedly emphasise that the legal regulation in respect

---

<sup>18</sup> J. Lazar, *Proposal of legislative intention for codification of private law, Materials from Professional Conference*, Ministry of Justice of the Slovak Republic, Bratislava: EUROKODEX, Poradca podnikateľa, spol. s r. o., 2008, p. 27.

<sup>19</sup> Legislative intention of the Civil Code accessible at <http://www.justice.gov.sk/>

of the calculation of interest from delay (in commercial law and civil law) was once unified. It was a legal status when the interest even in commercial law relationships was judged uniformly, according to the regulations of the civil law. Consequently, repeated differentiation of legal regulations occurred and on the contrary, re-codification of private law is leading to unification. We call this legal situation and its development not only confusing, but also contra-productive.

For reasons of ensuring consumer protection, pursuant to the legislative proposal, it is appropriate and at the same time desirable to define the max. amount of interest from delay, with respect even to the provisions of Directive 93/13 EU on Unfair Terms in Consumer Contracts and to the provisions of Directive 2000/35 EC on Delayed Payments in Commercial Transactions. Inadequate amount of interest from delay, or other sanction relating non-fulfilment of obligation by consumer can be considered as inadequate condition in consumer contract that would be invalid. In the act that principle should be anchored that the agreed interest from delay as result of contractual freedom, should have priority over the statutory arrangement that would be cogent only in case of missing expressed arrangement and in case of consumer protection.

The issue of systematic classification of the institute of debtor's delay and unification of this institute into one private law codex persists. As it was mentioned in the first part of this work, the difference is not only in the systematic classification of this institute, but even in the definition of the debtor's delay itself.

Within the re-codification of private law in the Czech Republic and the introduction of the monistic conception, unification of the institutes of the law of obligation regulated by the Commercial and Civil Code occurred. In many cases the commercial law took over these institutes due to their more precise definition. Ultimately, in the theory of commercial and civil law even such opinions emerged that the Commercial Code was in 1991 adopted as a codex that should not only regulated commercial law relationships, but also as a codex that is to amend, and/or make the regulation in the Civil Code more precise and remove discrepancies of this legal regulation.

Due to this reason it would be appropriate to use commercial law regulation for the certain obligation relationships with eventual modifications leading to its improvement and removal of discrepancies, that is suggested not only by the legal theory, but mainly by the practice.

#### **4. Conclusion**

The goal of our work was to demonstrate the legal regulation of liability for debtor's delay in the light of *de lege lata*, and *de lege ferenda* considerations. Without the introduction of the recent status of the legal institution of this insti-

tution it was not possible to understand the issue of re-codification of the private law in Slovakia that affects mainly obligation relationships that are double-regulated, in the commercial and in the civil code, as well. Besides the dualism, the splitting of legal regulation into several normative acts causes problems in application. Part of the issue is regulated in the Civil Code, part of the issue in the Commercial Code and part in separate legal regulations.

## **ODPOWIEDZIALNOŚĆ ZA ZWŁOKĘ DŁUŻNIKA – DE LEGE LATA I DE LEGE FERENDA**

### **Streszczenie**

Celem pracy jest przedstawienie rozważań de lege lata i de lege ferenda w kwestii regulacji prawnej odpowiedzialności za zwłokę dłużnika. Bez wprowadzenia regulacji prawnej tej instytucji niemożliwe było zrozumienie potrzeby rekodyfikacji prawa prywatnego w Słowacji, odnoszącej się głównie do stosunków obligacyjnych podwójnie regulowanych – zarówno w kodeksie cywilnym, jak i w kodeksie handlowym. Problemem jest nie tylko dualizm regulacji, lecz również rozmieszczenie regulacji prawnych w kilku aktach normatywnych, co powoduje problemy w praktyce ich stosowania. Część omawianej problematyki jest bowiem uregulowana w kodeksie cywilnym, część w kodeksie handlowym, a pozostała w innych przepisach prawnych.

*Słowa kluczowe:* odpowiedzialność za zwłokę, dłużnik, zobowiązanie

*Key words:* Liability for delay, debtor's, obligations