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SOME THOUGHTS ABOUT THE DISCRETIONARY POWER REGARDING THE NATIONAL AND THE EUROPEAN LAW

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ABSTRACT: *Difficulty or possibility; freedom or compulsion? How can we determine the operation of the discretionary power - is it an intellectual process in the legal system or just arbitrariness?*
The aim of this essay is to survey all dimensions of the discretionary power to get its real intended purpose because there are some variances between its theory and the legal practice. We mean, we have to see how it gets its right form and function.
The second part of this essay focuses on the dimensions of tax law. The legal practice reflects that the tax law is in one unit with the discretion and the tax law can be that branch which can reach all citizens around us. In the following we are trying to underline the way we can define the atmosphere of our legal practice.

KEYWORDS*: discretionary power; human judgment; legal practice; tax law; offshore activity; harmonization*
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1. GENERAL THEORETICAL CONSIDERATIONS ABOUT THE DISCRETIONARY POWER

We have to start from the situations demanding the existence of the discretion: this problem is as old as laws. However, jurisprudence realized that it seems to be impossible to develop a casuistic legal system. Jurists also tried to avoid arbitrariness. To quote *Montesquieu:* „the judge needs to be the mouth of the legislative power" - it proves that striving after the regulation. In the continental law, judges did not have real power, the rule of law pushed them into the background. In spite of the regulation, jurisprudence had to realize that judges are not passive characters in the legal practice; they often need to be

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creative because the variety of the legal cases demands their activity. There are some situations that could not have been brought under regulation and they recognized the fact that insistence on rules can be more unfair than departing from the laws.

Jurists established that judges are not allowed to be legislatives and this principle lives so far – but we have to ask: do the judges have real opportunity for legislation? In a certain way, the answer is yes and subjects have to accept it.

When judgments are proceeded in legal practice, other lawyers observe them as well – in this case these judgments are well-known, so they succeed just like laws. In this practical kind of way it can be legislation of judges, but it is just a functional or a material kind of legislation, so it differs from the formal legislation.

The doubt about the judicial discretion is the same: judges are not empowered to legislate; they do not have any legal opportunity for this in a constitutional state. On the contrary, judges are restricted by the laws and all of the democratic states demand this principle. However, this can be solved by the empowering laws – these can be the base of the discretionary power.

If we try to define discretion, the theory leads us to its practice, the definition demands analyzing its procedure:

- according to *Canor's* definition, the discretionary power is guaranteed when there are more lawful solutions for a legal problem and the judge has to choose among these lawful solutions – but this choice cannot be subjective, unfounded and arbitrary.
- *Barak* provides another definition, but the main elements are the same: the discretionary power is a kind of authority to choose among available lawful opportunities.

We have to establish that the discretionary power does not mean command: the statement of facts points out the direction and the legality always sets limit to the decision. To make the right choice the judge cannot be arbitrary, he has to reveal the situation and observe the interpretational methods.

Well, whose is the authority? Is it embodied by laws, by jurists or by legal practice? Do laws determine the method, does the judge reveal the case and can legal practice show the right direction? How far can we describe it as freedom or as restriction?

2. FOR WHOM AND BY WHAT IS THIS POSSIBILITY PROVIDED?

We associate it first with the judges, but the possibility of discretion is provided in other segments – not just in the administration of justice. The discretionary power is guaranteed in the public administration as well.

Considering the mass of empowering laws, it would be a great challenge to consider all the laws providing discretionary power so we decided to stress some of them from the Hungarian legal system to prove its diversity.

Segments and instruments with the right of discretion:

- The Civil Code, for example in declaring deceases;
- Civil Action;
- Protection of data and information;
- Tax law; in the Act on the Rules of Taxation
- National development;

- Public health;
- Constitutional Court;
- The public prosecutor in criminal procedure;
- The administrative proceeding, for people in charge as well;
- For the authority in supervision of contest;
- Human rights.

Further, we shall detail some instruments of these segments and focus on their discretional procedure.

3. THE SHAPE OF DISCRETION IN LEGAL PRACTICE

As we mentioned previously, we have to start from the legal practice of discretion to get its real situation and look over what kind of divergences there are in the various segments.

First of all, we shall focus on the judges according to the definition of *Canor and Barak:*

When the judge is evaluating the wide choice of lawful solutions, he has to use the interpretational methods to select the available opportunities. On the other hand, we have to establish that these methods do not lead him to a conclusive and irrefutable judgment – the judge is obliged to consider the interpretational methods, but there is no obligation on how to choose among the certain consequences. These methods provide a kind of selection, but the judge needs to make the conclusive and undisputable judgment as far as possible. We can say he is the lord of choosing because the discretion is part of the whole deliberation during the activity while the judge finds the most suitable general rule for the special case. The real obligation is to justify his judgment by the actual law and order, so there are only resources for deliberation.

According to *Péter Kántás,* we present some types of the discretionary power – as far as possible to make types at all: (Kántás, 2001)

- Discretion with evidences

It is the most settled type of discretion. The concept itself and the statement of facts are unambiguous, so the sphere of discretion is limited because the judge has to be harmonized with the rules just like an order. In spite of rules, the discretion cannot be avoidable: the judge and other legal instruments have to appreciate and analyze all the proofs and after all they can make a comparison among them. This is not a mechanical process, in fact it needs certain verification, the discretionary power has to be demanded during the appreciating.

- The compulsory discretion

In the following type there is a command by the legislative power, but it cannot be used because it is defective and imperfect. The legal practice has to surmount this inadequacy and correct it by the discretionary power. Although the correction cannot be formally legitimate, the discretion is able to insure the legal continuity. Besides, the decisions have to be justified and reasonable as well.

- Discretion with authorization

This type contains the real discretion, we can say in this case the legal instruments have the opportunity for consideration especially – however can we describe it as subjective authority, even as arbitrariness?

The legislative power definitely allows discretion for judges, for public prosecutors and for other instruments in the public administration. There are some variations to declare it: the rule specifies alternatives or empowers them to make a perfect and legal decision according to the certain case, they can exercise equity as well. We can say expediency precedes the regulation itself.

In spite of expediency, discretion does not mean arbitrary freedom – premises point out the right direction so the judge has to stay within narrow bounds. For example; illegality happens inside an instrument and the management has to decide to start a disciplinary procedure or other arrangements – the point of view is expediency.

On the other hand, equity is a kind of positive discrimination because it provides advantages depending on the conditions. It seems to be a kind of discretional activity because the judge has to decide about contents and quantities of advantages, so deliberation itself is the same.

Further on, we shall focus on other segments of the discretionary practice.

4. SOME QUESTIONS ABOUT THE PUBLIC PROSECUTOR'S DISCRETIONARY POWER

Continuously, the administration of justice has another stressed part, namely the public prosecutor. In the continental law there is a continuous search of simplification. So we can say the discretionary power is guaranteed for the public prosecutors focused on the criminal responsibility (besides criminal courts). In connection with alternative proceedings, diversions provide the central role for the public prosecutor.

To quote *Erika Róth:* „The key person of the criminal justice is the public prosecutor who has a role in the continental criminal procedure from the start of investigation to the end of the execution of court decisions. He has to act in the interest of justice. After closing the investigation stage of the process he decides about the output of the criminal procedure. He can conduct prosecution before the courts or decide on alternatives to prosecution. This choice is one – if not the most important – element of his discretionary power." (Róth, 2006)

„From a criminological point of view the prosecution service is regarded as a part of the criminal justice system as a whole. A system under pressure to deal with high numbers of cases in which the prosecution level is increasingly becoming the decisive (de-) criminalisation stage. An organizational-sociological point of view is integral to this; investigating how the prosecution services manage to deal with the high number of cases and proceedings in terms of reducing their workload by means of simplified methods and proceedings.

In principle there are three possible ways of dealing with the increased number of criminal proceedings:

1. In accordance with the principle of legality all cases are prosecuted by the prosecution service and brought to charge in front of a criminal court where a judge deals with all cases in an oral hearing. For this scenario prosecution service and court personnel will have to be considerably increased. In a time of restricted resources this option has not proved popular.
2. Decriminalization of substantive law: in this case the threat of a criminal sanction is removed for less serious breaches of the law. Other minor offences, especially

traffic offences, are defined as „administrative" offences and a reaction ensues by administrative proceedings and fines. Alternatively or in addition minor offences in the „classic" field are decriminalized. This path does not appear to be politically viable; if at all, the current trend tends to favor increased criminalization.

3. Discretion used by the police or prosecution service and simplified criminal procedure rules. The flood of criminal proceedings is mastered by procedural short cuts and simplifications. In this case the prosecution service often plays the central role and becomes the „judge before the judge". This option is the most frequently used." (Wade & Jehle, 2008)

5. CONNECTION TO THE FUNDAMENTAL PRINCIPLES OF THE ADMINISTRATION OF JUSTICE

We would not like to specify all of the fundamental principles, we just except the connections to discretion. In this theme the discretionary power does not appear expressly but we think discretion takes inner and latent part of the fundamental principles.

Independence of judges:

Discretion takes part in independence of judges – if the judge observes his margins so his judgment is rational and conclusive, independence verifies his decision, we can say it provides a kind of extra-protection for him. On the other hand, if the decision is not reasonable, there are legal remedy forums, but in this legal remedy part of the proceeding has to be guaranteed independence as well, so the revision can confute neither the judicial independence nor the institutional independence.

Publicity in front of the Court:

During the procedures the acting judge or judges have to decide about publicity. Some cases really demand closure and trust, especially the criminal proceedings. Judges have to consider the interests of victims and they have to refuse transparency sometimes – it is another aspect of the discretionary power connecting with protection of victims.

6. DISCRETIONARY POWER IN THE PUBLIC ADMINISTRATION

The discretionary power is one of the most important parts of our work as a science, but it can be interesting to examine it through the structure of the administrative law. The administrative law itself seems to be the most general territory of the law and order because of the fact that every citizen can meet it several times during his life day by day. So - in our opinion – the main reason of our activity that we need to examine the arising circumstances in the territory of the administrative law. The legal practice reflects that the administrative law is in one unit with the discretion and the administrative law can be that branch which can reach every citizen around us. We can claim that the administrative law is the basement of nowadays' states or societies. In the following we are trying to stress the analysis of the way in which we can define the atmosphere of our legal practice.

Law provides some methods in connection with the public administration:

- It regulates the purviews and claims margins but the operation itself is not restricted, in this case the legal instruments have more freedom of course. Their

activities are determined just in some ways, they have to choose among the available legal options, so they can practice discretion.

- The operation itself is regulated so the public administration is regulated too from all aspects as well. Their actions are legally determined, the substance of the law is exact and determined, these rules must be prevailed.

According to *Zoltán Magyary*, the regulation has to adjust to the spheres of the public administration so the demand for regulation is not the same in them, it has to be accordingly wider or limited.

The discretionary power is essential because of the specialties of this kind of sphere, the abstract regulation can be provided with discretion only. *Attila Rácz* identified that the legal restriction in the public administration must be in balance with the discretion. The special question is where the limits of the legal regulation are.

There are some typical variations of the discretionary power in the public administration:

a.) The legal instrument has to choose among the suitable legal alternatives determined by the legislative power so all options are legal too. Circumstances have to be considered and determined by the law as well. The difficulty of this method is the correct interpretation, it cannot be excluded because of the specialties of the public administration proceedings, but it can be facilitated by required circumstances by the law.

b.) Numerical standards and intervals are fixed by the law and the legal instruments have to observe them, they can differ on no account.

c.) Indefinite legal concepts are determined, so it provides extensive decisional opportunities – for example public interest or economic interest. This method is doubtful because the content of these indefinite legal concepts are not explained if it is possible at all. De lege ferenda is expected to limit it by required circumstances and facilitate it by guidelines.

As the public administration covers all sorts of activities of the state and the government, the discretionary power appears in all of these segments. It follows that discretionary power has to be guaranteed in each levels – we mean, an administrator and a manager can practice discretion as well by this distribution, so their discretionary power does not depend on the level of their rank.

The requirement is the same: the correct practice of discretionary power needs requisites and guarantees because the legal instruments have to be supported by certain legal conditions.

As a consequence everybody can sense the influence of this experience through the administrative law, so this can be the first impression that the citizens can make opinion from. We feel we need to pay more attention for this territory.

7. THE SUPERVISION OF CONTEST AND THE CASE OF COFFEE-CARTEL:

It hardly needs to proof that discretion exists in legal practice: We would like to reveal a famous legal case from supervision of contest in Hungary.

The case of Coffee-Cartel:

The hearing of this case lasted so long and it was completed by the Supreme Court. The court has to be decided about the activity of companies taking part in the coffee trade: could their activity realize limiting coffee-merchandising?

According to the statement of facts, the merchant companies seemed to make informal price rising, used the same communication, the same marketing systems and selling systems so the companies seemed to use the same business operation one after the other.

In this commercial atmosphere the real question appeared: were these behaviors intentional activities or the special circumstances of that period made the companies to operate with the same trading system with the same methods?

As the court revealed the facts: the result was the price of the raw coffee - which is the basic material of the commercial coffee producing - had greatly risen The real reason of this price increase was unknown but the explanation could be in connection with the growing conditions. So the coffee producing and merchandising companies needed to follow those trends one after the other.

The court made the following decision: it was an unlawful commercial behavior and the companies had to pay a lot of money because of these activities.

The companies appealed to a higher tribunal so the Supreme Court got the case. The question itself was the previously mentioned and more procedural mistakes had arisen too. The Supreme Court considered the statement of facts and needed to get more opinions from different experts. In spite of the previous judgment the Supreme Court made a facing decision. During the consideration and examination of the statement of facts the explanation of the Supreme Court was the following: the examination of the commercial activities and processes the business behavior seemed to be rational and legal because there was a huge price increase by the coffee growing firms. So the coffee producer and merchandising companies had to follow this tendency during this period. These marketing conditions made the companies use the same method without an illegal cartel or the cartel itself could not be proved directly and perfectly.

The concrete result of this case became advantageous for the companies, they succeeded to prove that their commercial activities were not unlawful and illegal.

8. LIMITS OF JUDICIAL DISCRETION

Influences: the aim of this part of the essay is to survey the doubts according the discretionary power. In a democracy the judges are not elected by the citizens and they do not have to give account to the legislative power. Because of the previous there has always been a kind of distrust from the citizens connecting with discretion so far. Are these doubts reasonable at all? Is the existence of fair-discretion just an illusion or are these doubts unfounded?

Discretionary power and society: (Canor, 2008)

At first, the discretionary power is affected by the society itself. There can be a kind of gap between the social needs and the law, but this distance cannot be irresolvable. The practice of the discretionary power is not an abstract, theoretical occurrence, it must be a part of the legal practice. It would not be rational to deny these non-legal elements because discretion must exist in its real function, it cannot serve legality if it exist separately.

In accordance with the previous statement, these kinds of non-legal elements work as ingredients of the discretionary function, the discretionary decision must be related to the interests of the society.

Discretionary power and politics: (Canor, 2008)

As we can see, these can be the most disputed circumstances, we can say it means the center of the public interest. The bases of this doubt are the political relations which vary continuously.

Canor says, it is unfounded to suppose the politics determine the decisions of the judges – according to the fundamental principles as well. We must accept that some social circumstances influence their judgments but these circumstances indicate public interests in connection with the actual cases.

The activity of the judges does not function without supervision because there are legal control proceedings to set legal limitations. All of the democratic states require some guarantees of the fair-discretion, for example the obligation to the reason of judgments, the right to appeal to a higher tribunal or the principle of transparency. This statement leads us to analyze the real limitation of the judicial discretion.

In accordance with the supposition that the judicial discretion cannot be subjective and arbitrary we have to ask a critical question: how can the judicial discretion be limited if it works especially when there are not any suitable laws to the certain case?

In accordance with *Canor* there are three kinds of limits in general:

- the general normative law and order;
- the institutional relations of judges and
- interrelation to other institutions.

Specializing these categories there are some factors in interaction with the judicial discretion - for example the legal practice of the court, doctrine of interpretational methods, ideology, the system of judicial proceeding, the connection to other judicial instruments, democracy, legal culture and so on, it is impossible to make a taxative list about these factors.

9. THE POWER IN EXCESS – DOES IT MEAN MISUSE?

The discretional activity must be confirmed by logical and moral arguments in accordance with the scale of values of the society. The practical experience and individual opinions cannot be excluded because they are essential to the human judgment. It is sure that judges do not appreciate different circumstances to the same extent and there are not any absolute truths. It is an obligation to support the judgment by the right principles and arguments in accordance with the requirement of objectivity so judges have to be well up in the social constituents.

As a consequence, judicial discretion does not mean misuse in general because marginal cases cannot be eliminated from the legal practice. The society itself has to accept the verification of judgments. As the scale of values cannot be standard, irrefutable judgments seem to be theoretical occurrences.

10. IMPLEMENTATION OF THE EUROPEAN LAW

As the discretional activity needs to be verifiable, it proves to be an obvious way to implement the European law. The national reflects the European law, there is a necessary circulation in legal practice to generate a harmonizing system. The discretionary power means the human aspect of jurisdiction so it can exist as the most effective way to implement the European achievement. The European law prevails over the national law and this process appears in legal practice and in judicial decisions connecting with the discretionary power. The discretional activity can be an important part of so the European as the national law in certain cases, in certain conditions. Correctly using the discretionary power itself can be a kind of tool of law-improving considering the European aquis and structure.

11. FINAL CONCLUSIONS

After revealing more aspects and presenting theoretical and pragmatic dimensions about the discretionary power we have to draw some conclusions.

We should focus on the connection between the legislative and the judicial power because these authorities are able to perform their intended purpose only in unity. The legislative and the judicial power realize a recurrence: the legislative power creates laws in general and the judges adapt it to the individual legal cases. During the proceeding, the judges are confronted with the unregulated situations earlier than the legislative power and these cases could not be finished without judicial discretion (Canor, 2008).

As the discretionary power needs to be a component of the legality, it can function only by detailed regulations fairly. As a consequence it needs to be brought to perfection instead of its disregard. In a democratical law and order the fundamental legal standards need to be confirmed by the judicial discretion.

We have to accept that the discretionary power exists as a human activity and the human judgment cannot be appreciated without doubts - but from another aspect, doubts prove to be the one way to bring to perfection the existing legal regulation.

12. THE DISCRETIONARY POWER IN TAX LAW FOCUSING ON THE HUNGARIAN LEGAL SYSTEM

The taxation law empowers the tax administration directly to practice discretion in special cases. Considering these special circumstances the taxpayer can be exempted from the strict laws.

A delicate balance often needs to be struck between the legitimate needs of revenue authorities and the equally legitimate interests and rights of taxpayers. On the one hand, the executive and administration need to have sufficient capacity to apply the law; on the other, there is a need to maintain the principle of the rule of law that it is the elected legislature, and not the executive or tax administration, that establishes tax burdens.[1]

There are two main sources regulating the Hungarian taxing system: the Act XCII of 2003 on the Rules of Taxation and its background law, namely the Act CXL of 2004 on the General Rules of Administration Proceedings and Services. Rights and obligations are

[1] http://www.ibfd.org/IBFD-Products/Delicate-Balance-Tax-Discretion-and-Rule-Law downloaded: 27.02.2014.

determined by these rules for so the tax administration as the taxpayers. The tax administration needs to consider the Act XCII of 2003 on the Rules of Taxation primary and when it does not contain special regulation the legal instruments are obligated to consider the Act CXL of 2004 on the General Rules of Administration Proceedings and Services.

Principles of the Act XCII of 2003 on the rules of taxation

- the principle of cooperation;
- the principle of practicing discretion;
- the right for using the native language;
- the right for making statements;
- the right for recognition;
- the equity during the proceeding.

The equity of the tax administration[2]

The law declares in a principle that the tax administration needs to function fairly and when the determined legal conditions exist the administration is obligated to practice equity (Szakács, 2011). It is a general principle and the tax administration needs to consider this during the whole proceeding.

We can interpret the equity in two meanings: it is a general procedural standard as a fair authority and on the other hand it can be a special decision in the different cases that relieve the tax burdens.

In the Hungarian tax structure the equity of the tax administration exists on two territories:

1. determining particular sanctions and
2. authorizing special allowances of payment.

The main conditions of the equity

- the taxpayer is not delinquent in his debit;
- his financial difficulties are temporary;
- he is able to fulfill the tax burdens for a long term.

The result of this proceeding is the following: the tax administration decreases the tax debit or ensures repayment assistance. It is important to stress that the tax administration is not authorized to remit the tax debit so the taxpayer is obligated to fulfill with allowances of payment. On the other hand, the taxpayer has to confirm that these conditions empower him to utilize these allowances of payment.

13. THE DISCRETIONARY POWER OF THE TAX ADMINISTRATION

There are two requisites in connection with the discretionary power:

1. the tax administration needs to consider the assigned proceeding and
2. keeps the determined legal limits.

[2] the Act XCII of 2003 on the Rules of Taxation 1. § (2), Taxpayers and the tax authority shall exercise their rights and fulfill their obligations in compliance with the provisions of this Act and other acts. If vested by law with discretionary powers, the tax authority shall exercise such right as consistent with the purpose of authorization and within the framework of law.
1.§ (6) The tax authority shall act equitably and reasonably, and if the conditions set out in this and in other acts are fulfilled, it shall abate tax debts or authorize some form of payment allowance.

The decision is illegitimate when it does not suit to the certain laws or the balanced facts are not real.[3]

The discretionary power seems to be a restricted part of the equity. It means that the tax administration needs to use its discretionary power in concrete cases when allowances of payment are allowed. As a consequence the tax administration can use its discretionary power in different cases of the equity.

The Act XCII of 2003 on the rules of taxation regulates several territories of the tax law, namely the tax administration as an authority, the different ways of taxation, the rights and obligations of the tax administration, the rules of controlling and the sanctions in case of defaulting.

14. THE PAYMENT ALLOWANCES

The „allowances of payment" itself counts a complex concept. The allowances of payment provide a possibility for the taxpayer in connection with the complete fulfillment, in these cases the taxpayer is allowed to solve the temporary financial difficulties and for a long term he can fulfil the tax burdens according to the law.

There are three types of the allowances of payment:

1. the tax administration decreases the tax debit;
2. the taxpayer is allowed to fulfill the tax debit in details;
3. the taxpayer gets respite.

The repayment assistance means the fulfillment in details and the respite in unit.

The main condition of the decreasing is the fact that the complete fulfillment would risk the subsistence of the taxpayer and his family.

These possibilities are open for private individuals and for business organizations as well. The tax administration needs to reveal the arising of the certain debit. Analyzing the origin of the debit the responsibility itself can be a kind of human or can be a kind of economic factor. On the human stream the certain reason can be human properties and activities for example:

- individual performance;
- omission;
- tax evasion;
- graduation;
- talent;
- deception;
- deceit and so on.

On the economic stream the tax administration needs to examine the economic specifications and the business capacities of the certain regions because these conditions can vary according to the location (capital, city, village, east, west, firm, company). It is important to know and to take in consideration the activities of the certain firm or company. There can be activities where the volume of the possibilities becomes narrow and restricts continuously. A transparent example can be the building industry: some years ago before the economic crisis more than 20.000 new houses and flats were built in a year. Considering the 2013 year this number decreased to a bit more than 5.000. Knowing these

facts the intensity of the business activities, possibilities and conditions have got worse and worse in Hungary. So we can see a lot of companies which are part of the building industry collecting huge debits towards the state.

During the discretionary proceeding, the tax administration needs to examine the circumstances of the taxpayer from several directions, the most important fact can be the arising of the tax debt. It can be essential to analyze the tendency that the debt itself is progressive or regressive. The tax administration needs to create a decision using its discretionary power considering the influence of the decision for the taxpayer's plans, operations for the future. It can be important how the taxpayer can guarantee the fulfillment and what the taxpayer can offer as an assurance. Considering the discretionary power the operations of the tax administration can be different in the case of a private individual and in the case of a business organization. Examining a private individual's circumstances the main direction can be the social and familiar possibilities and position. It is important to know:

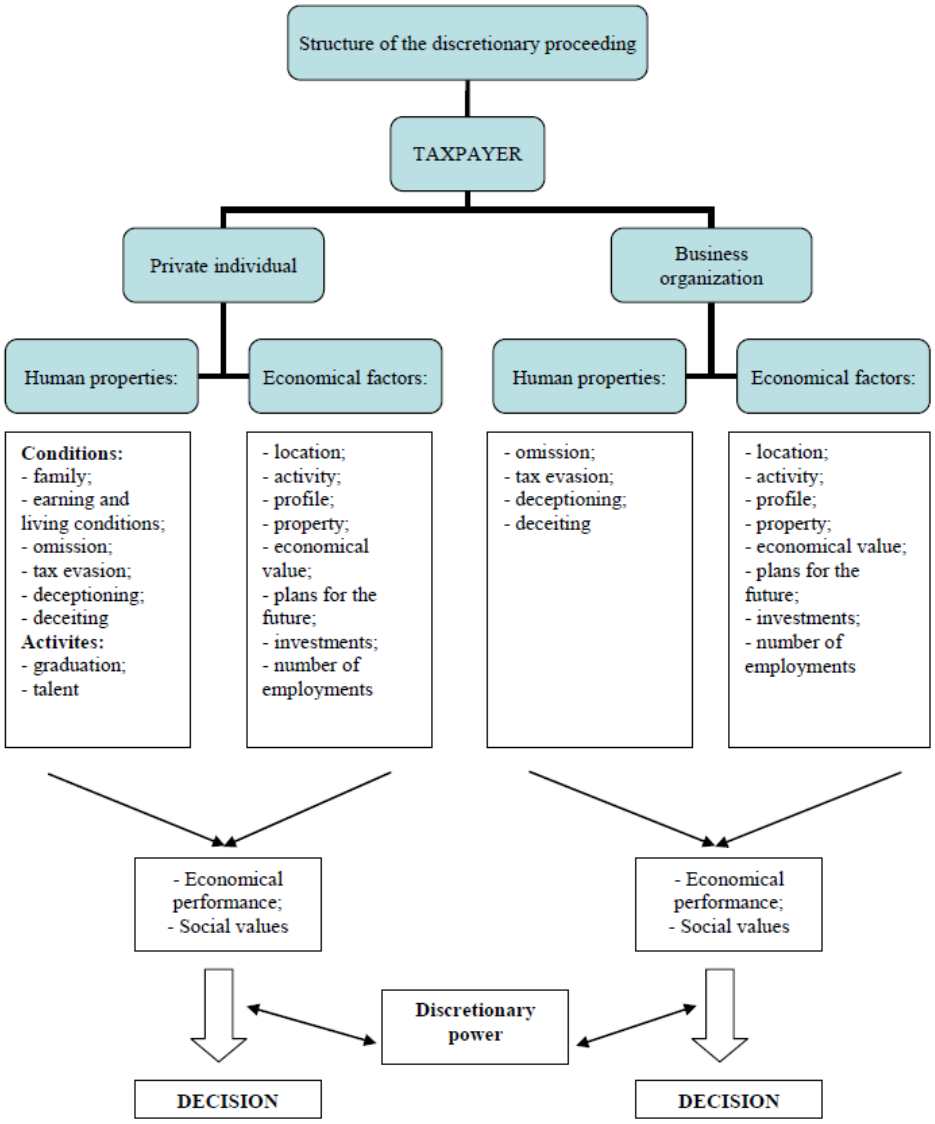
- how many members the family has got;
- how many children the family has got;
- if there are unemployed people in the family;
- if there are any retired people in the family;
- earning and living conditions;
- graduations and so on.

In spite of this point of view, when examining a business organization the main concern can be the economic value itself for example:

- property of the company;
- the number of the staff;
- the location (village, city, capital);
- the profile of the company (agriculture, industrial, trading);
- plans, investments for the future and so on.

The tax administration makes a decision within 30 days in connection with the proceeding which can consist of certain conditions that guarantee the payment partly or completely. The taxpayer can appeal to a higher authority according to the laws.

Previously we tried to underline the responsibility of the tax administration in connection with the discretionary power. The taxing structure serves our society itself. The economic performance, the economic atmosphere and the taxing activity are in a strict connection, the influence of this relation can be outstanding to the whole society so than the social values, capacities to the families. Families mean the smallest part of our society so the society itself is based on families. The tax administration needs to treat these methods circumspectly during the proceeding. So the tax administration, as well as the taxpayers, is responsible for a well-balanced situation and atmosphere on the territory of taxing.



(The illustration is edited by the authors)

15. THE SPECIAL RELATION OF THE EUROPEAN AND THE HUNGARIAN LEGAL SYSTEM

As Hungary is a member of the European Union, the discretionary power cannot function without limitation. There is an attempt in the Community to harmonize the legal

systems of the member states so Hungary needs to adjust to this tendency. The European Commission declared in the Grad case[4] that the guideline can be applied directly with certain conditions. The certain legal source needs to be clear, exact and peremptory to the direct application so the member state and the administration are not allowed to use their discretionary power at all. This regulation means a kind of exception from the discretionary power and the discretional activity in the European Union. (Erdõs, et al., 2013)

16. TAX AVOIDANCE, TAX EVASION AND THE OFFSHORE ACTIVITY

In the following, the essay focuses on some critical territories of tax law in connection with the discretionary power, namely the tax avoidance, tax evasion and the offshore activity: (Erdõs, 2012)

It is a fact that the taxpayers keep trying to deal with the tax burdens as a private individual and as a member of a business organization as well. During the economic activity the taxpayers are operating with the tax planning to save the expenses. There are several methods of tax planning and these methods develop continuously. The strict laws and the high tax burdens prompt the taxpayers to use every methods of tax saving that cannot always be legitimate. There are not any standard categories, the legitimate activities can turn into the illegitimate sphere according to the laws.

The tax avoidance is a legitimate instrument in general, it is a type of the tax planning. Although this activity means misuse of rights, it is not also injuria (Deák, 2005).

In spite of this, the tax evasion is an illegitimate, prohibited category and this activity can be criminal as well.

So the tax avoidance as the tax evasion have the same function: the taxpayers try to keep off the disagreeable tax laws and they strive after the most favorable conditions.

The offshore business organizations function abroad instead of the country of founding. The income of the offshore business organizations comes from abroad as well but they operate with the more favorable tax laws existing in the country of founding so the business organization can achieve more and more profit this way.

There are two types of the offshore activity:

1. a certain country allows to found offshore business organizations so the offshore activity can be a legitimate instrument of the tax planning. In the European Union it is a prohibited legal regulation because of the unfavorable economic issues, Hungary had to give up the offshore-allowed legal regulation of course.
2. a certain business organization uses the legal regulation of a country where the offshore activity exists functionally so it can reach more profit.

17. SUMMARY- CONCLUSIONS

It is a fact that it is impossible to define exact and constant categories in the territory of tax law because so the several taxing activities as the legal regulation change, it can seem to be a kind of circulation. The significant responsibility of the state and the government is transparent on the territory of tax law because the legislature has to be

[4] C-9/70 case, Grad v. Finanzamnt Transtein [1970.] ECR 825.

continuously updated, analyze the economic issues and make effective reactions to maintain the legality. As an authority the tax administration has to use the discretionary power to point the exact deadline between the legitimate and the injuria of the different taxing activities. On the other hand the taxpayers have to pay attention to the actual legal regulation to prevent the illegitimate taxing activity in connection with the tax planning. We can make the final conclusion according to this necessary circulation: tomorrow may be illegitimate what today is considered as legitimate so it seems to be theoretical to determine standard values as in the economic politics so on the territory of tax law (Szilovics, 2012) (Szilovics, 2014).

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