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QUALIFICATION OF COMPUTER GAMES IN COPYRIGHT LAW

Summary

The aim of the paper is to discuss different options for qualification of computer games into appropriate category of copyright. The qualification is essential due to considerable differences between various protection regimes which emphasizes practical aspect of the issue. Difficulty in classification of computer games results from their specific structure which consists of software (computer programme) and audiovisual presentations. Some of the possible options include qualification of computer games as software or audiovisual work but other solutions are also taken into account such as: unnamed work, multimedia work or a completely new category of work. Due to the absence of Polish jurisdiction in this matter and insufficient research body it was necessary for the author to reach for foreign experiences and doctrine.

Key words: *copyright law, computer games, multimedia works*

Introduction

Back in 1981 a single computer game *Pacman* generated over a billion of dollars of revenue¹. In 2014 the market of computer games in Poland, according to a survey conducted by PwC, amounted to nearly 1,5 billion PLN; it is forecasted that by 2019 it will grow to 2 billion PLN.² The Polish computer games sector consists of 150 businesses and 6000 employees,³ and Polish games are among very few products made in Poland to be found on the shelves of retail outlets all over the globe. It can be assumed, that in the turnover there is a large number of contracts

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¹ T. M.S. Hemnes, *The adaptation of copyright law to video games*, *University of Pennsylvania Law Review* Vol. 131, No. 1 (Nov., 1982), p. 171.

² M. Gawrychowski, *Kowalski mocno trzyma się komputera*, *Puls Biznesu* (02 July 2015), p. 6.

³ M. Gawrychowski, *Polskie gry okrzepły*, *Puls Biznesu* (30 September 2015), p. 4.

relating to computer games, and it is just a matter of time when lawsuits with respect to them will commence. Moreover, the existing uncertainty with respect to the scope of protection of computer games hinders development of this sector in Poland.

The difficulty of classifying computer games into appropriate category results from their peculiar structure. On one hand computer games are based on a computer programme which is the *engine* of the game, on the other, the key role is played by audiovisual presentations displayed to the gamer in the course of the game. What is more, the multi-layer structure of games and multiplicity of creative inputs inclines some representatives of the doctrine to classify them as multimedia works⁴. Due to the absence of Polish judicature on the topic and scarce body of research it was necessary to reach for foreign experiences and doctrine.

The paper attempts at classifying computer games into appropriate copyright category. Correct classification is vital due to considerable differences between particular protection regimes such as: permissible use, copyright holder, author's moral rights, fields of exploitation or co-authors rights. The paper also touches upon the issues of individuality and originality prerequisite with respect to computer games as well as objective scope of protection.

1. The notion of computer game

There is no legal definition of a computer game. The dictionary of Polish language defines it as: 'a game played on the computer screen'⁵. A game, in turn, is defined as: 'a parlour entertainment conducted in accordance with certain rules'⁶. Thus, it may be assumed that computer games are different from other kinds of games (such as board games or card games) because they rely on software, which assures their functioning on a computer⁷. Computer games unlike computer programmes, which serve utilitarian aim, have educational and amusing character. Audiovisual images are displayed in real time as the result of

⁴ If it is not possible to classify them into any existing category, D. Flisak, *Utwór multimedialny w prawie autorskim*, Wolters Kluwer SA, Warszawa 2008, pp. 135-144.

⁵ The Polish Language Dictionary PWN, sjp.pwn.pl (as of 28 March 2015).

⁶ *Ibidem*.

⁷ Also: I. Matusiak, *Gra komputerowa jako przedmiot prawa autorskiego*, Wolters Kluwer SA, Warszawa 2013, p. 43.

commands issued by the player. There are many kinds of computer games, this fact however, does not influence their copyright protection in any way. What is only emphasized, is that the genre of the game may impact creative freedom of the process of its development⁸.

2. Computer game as a work of authorship

Pursuant to Article 1 of the Act on copyright and related laws⁹ in order for a creation of intellect to become a work of authorship the following premises must be fulfilled: it must be the manifestation of creative activity of a human being (originality prerequisite) of individual nature and it must be established. A computer game, undoubtedly is a creation of a human being even though it takes a number of computer programmes to develop. The computer programmes are nothing more than tools in the hands of the creator and as such do not impact the rights of a copyright holder contrary to works generated by computer¹⁰.

The individuality and originality prerequisite should be considered in a similar manner as other types of work. The characteristics determining individuality of a work can be found in the context of differences with respect to other similar works, in accordance with the individuality prerequisite in an objectified manner¹¹. The originality prerequisite, on the other hand, will be fulfilled when a subjectively new creation of intellect is born¹². On top of that I. Matusiak claims that individuality prerequisite can be found in differences between the way of expression of computer games, taking into consideration the category (e.g. strategic game, simulation game) to which a given game belongs. The main differences for that matter would be the presentation of visual and aural effects¹³. Furthermore, one can look for signs of creative activity in the way of combining individual creative outputs. Due to a large number of

⁸ Ibidem, p. 52.

⁹ Act of 4 February 1994 on copyright and related laws, Journal of laws 1994 No 24 item. 83. Currently in force in consolidated text published in Journal of laws 2006 No 90 item 631 as amended.

¹⁰ See: J. Barta, R. Markiewicz, *Prawo autorskie*, Wolters Kluwer SA, Warszawa 2010, p. 71.

¹¹ D. Flisak, *Prawo autorskie i prawa pokrewne. Komentarz*, D. Flisak (ed.), Wolters Kluwer SA, Warszawa 2014, art. 1, nb. 7.

¹² J. Barta, R. Markiewicz, *Prawo autorskie i prawa pokrewne. Komentarz*, J. Barta, R. Markiewicz (ed.) Wolters Kluwer SA, Warszawa 2011, art. 1, nb. 8.

¹³ I. Matusiak, *op. cit.*, pp. 176-189.

many kinds of creative outputs (visual representations, images, music, written word) and multiplicity of possibilities of their combinations, fulfilling the individuality prerequisite by a computer game understood as a whole should be fairly easy. It can be assumed that vast majority of computer games are works of authorship. It should also be noted that integrity and inseparability of constituents of a game is justified by the statement that computer games can be considered as a whole, not just a set of individual constituents¹⁴.

3. Possible protection variants

The analysis of multimedia works presented above showed that it is necessary to determine such a protection regime that would be appropriate for a very unique creation of human intellect whose process of development is complicated and takes an army of representatives of different walks of life, producers, editors etc. This unique creation is, of course, a computer game.

It must be emphasized that for each respective creative output different regulations may be applied¹⁵. There are some categories of works, however, which require an extraordinary regime; in these cases the copyright to the programme as a whole must be determined. It is especially important in determination of rights that can be attributed to the entities taking part in the process of development of computer games and with respect to the issue of permissible use. J. Barta and R. Markiewicz propose that in case of computers games the following may apply:

- general legal provisions of copyright or
- provisions applying to a category of work of the biggest similarity to a computer game (be it a computer programme or audiovisual work) or
- jointly all provisions for various categories of works that are included in a given computer game or
- apart from general provisions also detailed regulations concerning an element of a work inextricably linked to a game e.g. software¹⁶.

¹⁴ Ibidem.

¹⁵ J. Barta, R. Markiewicz, *Prawo autorskie*, p. 302.

¹⁶ Ibidem, p. 301.

Polish judicature is rather poor when it comes to court decisions with respect to computer games, therefore the experiences of other countries will be cited therein. In Germany, for example the EU law was harmonized by the Software Directive¹⁷ and Directive 2001/29¹⁸ and it is based on legislation in force similar as in Poland. The American judicature, despite major differences between *civil* and *common law*, was the first to adjudicate in precedent cases. It also offers the most extensive material whose elaboration helps to understand the reasoning of courts in such cases.

4. Classification of computer games in American judicature

In the USA computer games can be classified into two categories: audiovisual works or computer programmes protected as literary works. It is recognised that for respective constituents of computer games separate provisions of copyright law may be applied and that these constituents may be protected separately; this was already proved by the very first court decisions with respect to computer games back in 1980s¹⁹.

The more recent outlook of American courts on the matter in question is reflected in the decision issued in 2012 regarding a famous computer game *Tetris*, in the case *Tetris Holding, LLC v. Xio Interactive, Inc*²⁰. The defendant had created a clone of *Tetris*, copying almost all of its audiovisual representations generated by the game which make up graphic user interface. However, the code of the game had not been copied. Xio explained that only such elements of the game were copied which were not covered by the copyright i.e. rules, functions and

¹⁷ Council Directive of 14 May 1991 on the legal protection of computer programmes, replaced by *Directive 2009/24/EC of the European Parliament and of the Council* of 23 April 2009, Official Journal of EU of 5 May 2009, L 111/16.

¹⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal of EU L 167/10 of 22 June 2001.

¹⁹ Among other cases: *M. Kramer Manufacturing Co., Inc. v. H. Andrews* F.2d 421 (4th Cir. 1986) and *Midway Manufacturing Co. v. Strohon* 564 F. Supp. 741 (N.D. Ill. 1983). More in: J. M. Neclerio, M. C. Mousley, *Copyright Law Implications in Video Games and Virtual Worlds*, [in:] R.A. Dannenberg (ed.) *Computer games and virtual worlds: A new frontier in Intellectual Property Law*, American Bar Association, Chicago 2010, p. 58.

²⁰ Decision on *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012).

expressions indispensable for the interface for a game of this kind. Their arguments invoking the doctrines of merger and *scènes à faire* did not convince the court²¹ who observed that audiovisual representations generated by the game Tetris and its clone are indistinguishable for an average user. In order to develop a game based on the same concept as Tetris, Xio could have created its visual representations in several different ways each one consistently different from its original. As the consequence, the court ruled infringement of copyright and stated that graphic user interface of the game is subject to protection under copyright in the same manner as audiovisual works²² and such an interpretation must be considered predominant all over the United States.

5. Classification of computer games in German judicature

German judicature emphasizes differences in the protection of the programming layer and audiovisual layer of representations²³. The first layer is subject to protection pursuant to regulations relevant for computer programmes. While representations of a game on the screen may be protected as a film work which is the German equivalent to Polish audiovisual work (*Filmwerk*, §2 subparagraph 1 point 6 *Urheberrechtsgesetz*²⁴). Furthermore, the category *Laufbild* (moving pictures) is also taken into account pursuant to §95 *UrhG*. It is a very important classification in German law, it refers to a work similar to audiovisual work but with lesser requirements with respect to fulfilment of the creativity prerequisite and narrower scope of protection. As regards a single frame of a computer game it may be covered by protection under *Lichtbildwerk* i.e. photographic work²⁵. Another option

²¹In accordance with doctrines *merger* and *scènes à faire*²¹ elements of computer games are not protected in case of ideas which are too tightly merged with the form of expression or due to the fact that a given idea may only be presented in one way (*scènes à faire* – an obligatory scene). It results from the fact that copyright does not protect ideas and thoughts because their monopolisation would mean unjustified intervention in competitiveness and would hinder innovativeness.

²² See: A. Nowicka, *Prawnoautorska i patentowa ochrona programów komputerowych*, Dom Wydawniczy ABC, Warszawa 1995, p. 28.

²³ U. Loewenheim [in:] *Urheberrecht. Kommentar*, G. Schrickler (ed.), C.H. Beck, Munich 1999, p. 1083.

²⁴ Gesetz über Urheberrecht und verwandte Schutzrechte of 9 September 1965 as amended; gesetze-im-internet.de/urhg/; as of 28 March 2016.

²⁵ §2 item 2 point 5 *UrhG*.

is *Lichtbild*²⁶ which refers to photographs of more technical nature²⁷. German literature also emphasizes difficulties in separating software and audiovisual layers and considerable differences in their respective protection²⁸.

Initially, German judicature rejected the possibility of classification of computer games as film works. In cases of *Donkey Kong Junior I* and *Parodius* it was being argued that such protection only applies to a sequence of moving pictures which is uniform and unchanged.²⁹ Whereas in a computer game the changeability of presented visualisations is indispensable for maintaining interactivity; these visualisations are generated on the screen individually for each player as the result of their activity.

With time the initial approach changed (decisions with respect to *Puckman*, *Donkey Kong Junior III* and *Amiga-Club*). The new starting point for copyright protection became exclusively visual representations regardless of the fact whether they are just a reproduction of a previously made sequence of picture or these pictures are generated by a computer programme³⁰. Moreover, the number of possible sequences which can be displayed to the player is limited by the creators of the game. Thus, it can be assumed that in German law computer games have dual nature; they may be treated as either film work or a computer programme depending on the layer of the work under evaluation.

6. Computer game as an unnamed work

American and German doctrine and judicature by focusing on separate creative outputs in computer games do not offer a uniform answer to the question regarding the status of a game a whole. As the

²⁶ §72 UrhG.

²⁷ U. Loewenheim, *op. Cit.*, p.1083.

²⁸ W. Bullinger, Ch. Czychowski, *Digitale Inhalte: Werk und/oder Software? - Ein Gedankenspiel am Beispiel von Computerspielen*, GRUR 2011, C.H. Beck, Munich 2011, pp. 19-21.

²⁹ OLG Frankfurt am Mein, GRUR 1983, C.H. Beck, Munich 1983, pp. 757-758 on *Donkey Kong Junior I* and OLG Frankfurt am Mein, GRUR Int 1991, C.H. Beck, Munich 1991, pp. 171-172, on *Parodius*.

³⁰ OLG Hamburg, GRUR 1983, C.H. Beck, Munich 1983, pp. 436-437, on *Puckman*; OLG Hamburg, GRUR 1990, C.H. Beck, Munich 1990, pp. 127-128 on *Super Mario III*. Line of judicature continued by OLG Köln, GRUR 1992, C.H. Beck, Munich 1992, pp. 312- 313 on *Amiga-Club*.

consequence, it is necessary to analyse possible classification in the Polish copyright law.

One of the supporters of classification of multimedia works, including computer games as unnamed works is D. Flisak³¹. Such qualification means that computer games are not assigned to any category of work listed in Article 1 of the Act on copyright and related laws. It is possible because Polish copyright law includes an open catalogue of works which assumes protection for all established works created by a human being which are a manifestation of creative activity of individual nature. The benefit of such a solution is that extensive multiplicity and variety of multimedia works could be covered by copyright protection in the most optimal way³².

Exclusion of computer games understood as a complete entirety from special protection regimes reserved for audiovisual works and computer programmes, could have far-reaching consequences. Resignation from the regime of audiovisual works would be contrary to the interests of producers of computer games as it rejects the specificity of computer game development process which is very similar to the process of creation of multimedia works. On the other hand, allowing for permissible personal use to be excluded in case of computer programmes (Article 77 of the Act on copyright and related laws), because of the ease of dissemination of computer games by their users due to their digital character, would generate considerable losses for their producers because production of games would become practically unprofitable. Certainly, such a solution would find advocates among many users of computer games. Although copyright ought not to focus only on the interests of creators, trying to satisfy the users' interests here would be unreasonable. Therefore, such classification does not take into account specifics of computer games and for this reason it must be rejected.

7. A computer game as a computer program

A computer program is undoubtedly a basis for a computer game and its integral component. I. Matusiak points out that in technical terms a program is a dominant game element. However, it is not true for

³¹ If they cannot be assigned to one of the existing categories. D. Flisak, *Utwór multimedialny w prawie autorskim*, Wolters Kluwer SA, Warszawa 2008, pp. 135-144.

³² *Ibidem*, p. 142.

a game user who comes in contact with audiovisual layer. Besides, the whole work cannot be qualified only on the basis of its part.

One should also take into account that computer programs are protected in accordance with Article 74 paragraph 1 of the Act on copyright and related rights, as literary works and are included in works expressed in text, mathematical symbols, pictures and graphics, what actually means that only code elements are protected. Therefore, in accordance with provisions concerning special protection regime of computer programs, only a part of a code describing game visual presentations and enabling a code operation would have been protected, but not just the visual, graphic presentations³³.

Graphical user interfaces are visual presentations generated by a program, enabling an interaction with a program user (the so-called *look&feel*)³⁴. It should be noticed that computer games visual layer could have been recognized as a type of a graphical user interface. Against the qualification considered, is the judgement of the Court of Justice of the European Union (TSUE) in case C-393/09³⁵, where it was found that graphical user interfaces are not a form of expression of a computer program and do not use the special protection regime.

The Court of Appeals in Paris also considered the classification of computer games as programs, in case *Sesam v. Cryo*³⁶. It was rejected due to classification of computer games as multimedia works. However, it does not prevent from employing a special regime provided for computer programs directly to a game software layer³⁷.

8. A computer game as audiovisual work

J. Barta and R. Markiewicz define audiovisual works as works which constitute series of images causing impression of movement³⁸. It is quite easy to notice that generated images in computer games meet this

³³ Similarly: S. Fina, *Der Schutz von Computerprogrammen (Software) im österreichischen Urheberrecht* [in:] *Urheberrecht in der digitalen Wirtschaft*, pod red. Markus Fallenböck, Vienna 2005, p. 192. See: Z. Okoń [in:] *Prawo Internetu*, P. Podrecki (ed.), Warszawa 2007, pp. 434-435.

³⁴ A. Nowicka, *op. cit.*, p. 28.

³⁵ The Judgement of TSUE of 22 December 2010 in case C-393/09, curia.europa.eu (access 28 March 2016).

³⁶ droit-technologie.org (access 28 March 2016).

³⁷ J. Barta, R. Markiewicz, *Prawo autorskie*, p. 302.

³⁸ *Ibidem*, p. 193.

definition. Moreover, according to Article 1 paragraph 2 subparagraph 9 of the Act on copyright and related laws audiovisual works, including films, are subject to copyright, hence it is an open category. It is questionable whether one could use this term referring to the whole multimedia work, ipso facto computer games.

J. Błeszyński claims that the most essential criterion distinguishing multimedia works is the application of filmic technique or audiovisual convention while creating multimedia works. It means creation of work based on a script, including action and plot expressed via video and audio carriers.³⁹ Most of computer games would comply with the criteria. In turn, A. Wojciechowska assigns computer games to a group of audiovisual works, due to the movement criterion, which may also include images secondary set in motion – by a player by means of a computer program⁴⁰. Supporters of qualifying games as audiovisual works emphasise similarities in the construction of these works, manifesting itself in a deep integration of individual components⁴¹.

One should also consider the nature of audiovisual works regime, regulated in Articles 69 – 73 the Act on copyright and related laws. Regulations with Article 69 (mentioning audiovisual work co-authors) and Article 70 of the Act on copyright and related laws are particularly significant. As far as Article 70 paragraph 1 is concerned, there is the presumption that a producer of an audiovisual work by force of a contract to create the work or contract to use an existing work, acquires exclusive copyright to exploit the works within an audiovisual work as a whole. This issue is addressed to some extent in a model of computer games creation, where individuals of various professions are involved, as well as subcontractors, and the creation process itself is organised and supervised by a producer.

Nonetheless, computer games qualification as audiovisual works should be rejected, due to practical reasons. It does not take into account the relevance of a computer program, being the 'engine' of a game in a creation and development process. Such classification, as in a case of unnamed works, would allow for non-special use of computer program

³⁹J. Błeszyński, *Konstrukcja praw do utworu zależnego*, [in:] Krzysztof Lewandowski (ed.), *Utwór audiowizualny. Zakres pojęcia i ochrony prawnej*, WSUS, Poznań 2011, pp. 35–47.

⁴⁰A. Wojciechowska, *Autorskie prawa osobiste twórców dzieła audiowizualnego*, Zakamycze, Kraków 1999, p. 67.

⁴¹I. Matusiak, op. cit., pp. 209-217.

regime, including regulations concerning exclusions of permitted personal use or decompile.

I. Matusiak shares a similar opinion, but due to other reasons – he claims that because of games interactivity 'a participant's role is dominant over visual sphere'.⁴² The author of the paper does not subscribe to this point of view. As it was pointed out, images displayed on the monitor screen meet the criterion of 'images series causing impression of movement'. The interactivity of computer games has its boundaries precisely in an audiovisual layer developed earlier by creators, hence it cannot be 'dominated' by a player.

Similarly to the programming part, there is a possibility of applying a special audiovisual works regime for a graphical layer of computer games. Moreover, this point of view is shared by already described case law and American and German doctrine, as well as by the representatives of Polish doctrine.⁴³

9. A computer game as a comprehensive multimedia work

Bearing in mind what was said above, it seems clear that none of the proposed solutions of computer games qualifications as a whole is relevant. However, the classification as unnamed works would have been a financial failure of their creators, inter alia, due to regulations concerning permitted use.

Therefore, following the Italian judgement of the Supreme Court of 3 September 2007 it seems to be the only right solution.⁴⁴ It denotes that computer games are fundamentally different from computer programs, as they are more complex, and a program is used only to play a game content. They also cannot be compared to media, which include movable images. Hence, the Court found that comprehensive multimedia works, called hybrid, *sui generis* works⁴⁵ constitute computer games. The questions that need to be answered here are: what regulations should be applied, considering current law? Are there any legal changes necessary?

⁴² Ibidem, p. 217.

⁴³ See: J. Barta, R. Markiewicz, *Prawo autorskie*, p. 302. A. Nowicka, *op. cit.*, p. 28, 127, 206. Similarly: D. Flisak, *Utwór multimedialny...*, p. 144 and 185.

⁴⁴ The judgement of the Italian Supreme Court of 3 September 2007, No. 33768, IIC 2009, No. 1, pp. 107-114.

⁴⁵ J. Barta, R. Markiewicz, *Prawo autorskie*, p. 302.

The solution is proposed by J. Barta and R. Markiewicz, however, as they admit themselves, it is 'unclear'⁴⁶. If computer games are neither a program, nor audiovisual work, to evaluate a subject to whom the copyrights belong, in case of employee works, a general regulation of Article 12 of the Act on copyright and related laws can be applied. It is more beneficial for employees, co-founders, as in case *lex specialis* of Article 74 paragraph 3 of the Act on copyright and related laws there is a primary acquisition to the employer. Consequently, the mentioned authors reject the application of regulation of Article 72 paragraph 2¹ of the Act on copyright and related laws. Moreover, they allow for provisions regulating prohibition of any use, and decompile prohibition to the programming part. It is due to admissibility of the same application of regulations concerning the protection of audiovisual works and computer programs to computer games, in a case of well-founded objective of the regulations⁴⁷. It is a proper solution, though in case of a court process more likely is the application of adequate *lex specialis* to separate works parts; only when it would be impossible to achieve it, the use of a functional interpretation, while defining possible law regimes as more adequate ones, will be applied.

Yet another solution is the inclusion of computer games into a directory of works mentioned in the Act on copyright and related and application of a special regime or a category of multimedia works, or *stricte* computer games. This solution has both its supporters and opponents⁴⁸. The apprehension concerning that the subsequent Act on copyright and related laws amendments could cause the excessive directory extension of intellectual property protected by copyright law, is unjustified. This way, copyright law may react to changes resulting from technological development. It would also be a clearer solution than the one proposed above. However, the solution is unnecessary when computer games are substantially similar in structure and in the way of creation to existing categories. It would be contrary to the legislator's intention⁴⁹. Also in a foreign legislative systems computer games are not particularly isolated. Finally, it seems, that it would be a rare situation to raise the necessity to employ provisions to a game as a whole – and in

⁴⁶ Ibidem.

⁴⁷ Ibidem, p. 303.

⁴⁸ Against such solution: D. Flisak, *Utwór multimedialny...*, pp. 139-141. For: I. Matusiak, op. cit., p. 309-314.

⁴⁹ D. Flisak, *Utwór multimedialny...*, p. 140.

these cases the interpretation described by J. Barta and R. Markiewicz can be successfully applied.

Conclusions

Due to the diversity of creative efforts, in a vast majority of cases computer games may be classified as a work. The American judicature may help in defining the subject scope of computer games protection, particularly in distinguishing a protected way of expression from unprotected concept. Moreover, the analysis of German and American judiciary clearly indicates the necessity to employ adequate copyright regimes to the individual parts of the work. Hence, the computer program regime should be used to a programming layer, and to visual images generated by a game – an audiovisual work regime should be applied. In case of necessary qualification of a computer game as a whole, the most convincing is the view of J. Barta and R. Markiewicz who recognise them as comprehensive multimedia works. In such situation, to computer games, as a whole, selected provisions concerning specific computer programs or audiovisual works should be applied, based on a functional interpretation. Accepting the above position, it should be assumed that interference of legislator and development of a new category of work is unnecessary.

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- [10.] The judgement of TSUE (Court of Justice of the European Union) of 22 December 2010 in case C-393/09, curia.europa.eu, access 28.03.2016.