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ÚVOD KE „SPRÁVNÉ“ INTERPRETACI EVROPSKÉHO PRÁVA

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Abstract in original language

Interpretace mezinárodního a evropského práva je velice komplexní a rozvětvenou problematikou. Evropské a jeho interpretace má mnoho společného s výkladem vnitrostátního a mezinárodního práva, ze kterých čerpá. Stále je to ale samostatný systém s mnoha jedinečnými výkladovými metodami.

Key words in original language

Interpretace práva, mezinárodní právo, právo EU, Soudní Dvůr Evropské Unie

Abstract

Interpretation of international and European law is very complex and widespread problematics. European law and its interpretation has much in common with the interpretation of national and international law, from which it draws. Still it's a standalone system with many unique methods of interpretation.

Key words

The interpretation of law, International law, Law of The EU, The Court of Justice of the EU

1. ÚVOD

Ke správnému pochopení a aplikaci evropského práva přirozeně patří znalost o interpretačních pravidlech, procesech a metodách. Ať mezinárodní tak evropské právo mají mnoho společného s vnitrostátním právem, i když jejich hlavní prameny a samotná tvorba stojí na odlišných základech.

V tomto příspěvku se autor zabývá základními pravidly a metodami interpretace, rozdíly mezi těmito metodami v národním kontinentálním právu, mezinárodním právu a především v právu EU, kterému je věnována podstatná část příspěvku. Od teoretického pozadí přes specifika mezinárodního práva po analýzu stěžejních interpretačních metod evropského práva se autor snaží o zkrácený přehled této problematiky a uvádí množství literatury a především judikatury Soudního Dvora Evropské Unie pro další studium.

Tento příspěvek je vhodný pro teoretický úvod do problematiky interpretace práva pro konferenci Dny Práva 2011 pro sekci intepretace mezinárodního a evropského práva českými soudy.

2. TEORETICKÉ POZADÍ

Interpretace a její správnost je velice abstraktní spojení. Samotný význam slova interpretace popírá jakoukoli uniformitu a stoprocentní shodu. Také nelze hovořit o výjimečně právním pojmu, ale naopak se pojem interpretace užívá i v jiných vědách, zejména společenských.[1] Interpretací se obecně rozumí od širšího pojetí tlumočení po užší podávání výkladu, objasnění či samotný výklad pojmů.[2] Interpretací se detailně zabývá vědní odvětví nazvané hermeneutika.[3] V této práci autor ztotožňuje pojem interpretace s výkladem.

Z hlediska právní teorie jde o duševní proces, kdy subjekt interpretace postihuje skutečnost prostřednictvím objektu interpretace jinými slovy v tomto procesu přiřazuje člověk, který interpretuje, určitým znakům význam.[4] Interpretace je v rámci právní vědy a právní praxe přítomná především v momentu studia právní normy a následné aplikaci. Interpretace nám pomáhá pochopit význam právní normy pro její správné využití v následné praxi. Je zde v prvním případě přítomna složka pasivní a v druhém případně aktivní neboli volní[5] složka aplikační, kdy je třeba správně využít všech poznatků nabytých v procesu výkladu právní normy pro konsekutivní aplikaci na společenskou situaci či právní vztah.[6]

Z hlediska subjektu teorie dělí intepretaci na autentickou (subjektem je orgán normu vydávající), legální (subjekt je k výkladu zmocněn právní normou), oficiální (subjekt interpretuje v rámci nadřízeného vztahu), orgánu právní aplikace (intepretace závazná pro strany konkrétního případu), doktrinální (učebnicový) a konečně výklad doktrinální, který je typický pro soudní rozhodnutí.

Oproti výše uvedenému dělení dle subjektů je dělení dle metod výkladu méně teoretické a více zaměřené na samotný proces hodnocení významu právní normy. Dle metod rozlišujeme výklad

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[1] Boguszak, J. – **Č**apek, J. – Gerloch, A. Teorie práva . Praha: EUROLEX Bohemia, 2001. s. 143.

[2] Holubová Václava a kolektiv, Nový akademický slovník cizích slov A-Ž: ACADEMIA, 2005.

[3] Slovo hermeneutika souvisí s **ř**eckým výrazem „**Hermeneus**“, které ozna**č**ovalo interpreta nebo-li toho, kdo „**č**iní v**ě**ci jasnými“.

[4] Pro detailní komentář HARVÁNEK, J. a kol. Teorie práva. Plzeň Vydavatelství a nakladatelství Aleš Čeněk, 2008 a KNAPP, Viktor. Teorie práva. 1. vyd. Praha : C.H. Beck, 1995, s. 168.

[5] WEYR, Franti**š**ek. Teorie práva. Brno : Orbis, 1936, s. 63

[6] HARVÁNEK, J. a kol., Teorie práva, Plzeň Vydavatelství a nakladatelství Aleš Čeněk, 2008 s. 361.

norem na historický (výklad na základě analýzy všech dosavadních pramenů), jazykový neboli gramatický, logický (na základě právní logiky), teleologický (výklad sledující účel a smysl), systematický (dle postavení pravidla v daném systému norem) a výklad komparativní, který srovnává normy z různých právních systémů.[7]

Samotná věda právní interpretace je velice komplexní a není cílem tohoto článku zabývat se detailně jejími teoretickými základy, ale spíše se věnovat základním odlišnostem a rozdílům v právní interpretaci vnitrostátního práva a práva mezinárodního nebo evropského.

3. SROVNÁNÍ

3.1 SROVNÁNÍ S MEZINÁRODNÍM PRÁVEM

Samotný vztah vnitrostátního a mezinárodního práva je velice zajímavý a v některých místech i nejednoznačný. Některá ustanovení, především ústavního práva některých zemí, nedávají mezinárodnímu právu přímo přednost[8] a snaží se tak o ochranu suverenity svého právního systému.[9] Interpretace vnitrostátního práva je v některých aspektech odlišná od interpretace na poli mezinárodního a evropského práva. Liší se především povahou a metodami.

V rámci srovnání intepretace vnitrostátního a mezinárodního práva sledujeme především odlišnost v povaze samotného systému normotvorby. V národní normotvorbě je autoritou samotný normotvůrce, který působí na subjekty ze superiorní pozice, kdežto v mezinárodním právu jsou tvůrci práva samotné státy, tudíž zde absentuje obdobná hierarchie. Metody výkladu tak především musí být takové, aby vyvodily "přesný smysl z toho co bylo dohodnuto."[10]

Dalším podstatným rozdílem je odlišnost pramenů národního a mezinárodního práva. Klasik české mezinárodně-právní teorie prof. Malenovský rozdělil prameny na základní a podpůrné.[11] Mezi

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[7] Kühn rozděluje srovnávací výklad dále na fakultativní, obligatorní a býklad norem čistě domáího původu. Vice zde: Kühn Z. Srovnávací metoda výkladu práva ve srovnávací perspektivě . InPrávník , 2002, roč . 141, č . 10, str. 1071-1107

[8] A. Cassese, Modern Constitutions and International Law, 192 HR (1985-III), 331

[9] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, (7th rev. ed. 1997), 63–64

[10] Orakhelashvili, A. The Interpretation of Acts and Rules in Public International Law. Oxford: Oxford University Press, 2008. s. 286.

[11] MALENOVSKÝ, Jiří. Mezinárodní právo veřejné : obecná část. 3. opravené a doplňkové vydání Brno : Masarykova univerzita, 2002, s. 101.

základní prameny dle něj patří mezinárodní obyčeje, mezinárodní smlouvy a obecné zásady právní. Do podpůrných pramenů můžeme zařadit soudní rozhodnutí, učení kvalifikovaných znalců neboli právní literatura. Ohledně posledních dvou jmenovaných nepanuje mezi teoretiky ideální shoda a bývají někdy zařazovány spíše do interpretačních nástrojů pro výklad primárních neboli základních pramenů, zejména obyčeje.[12] Soudní rozhodnutí na poli mezinárodního práva dle některých teoretiků slouží k určování přesného významu ustanovení práva, avšak bez ambicí ho změnit.[13]

I přes reference uvedené v předchozím odstavci toto dělení bey pochyby vychází z klasifikace právních pramenů uvedené v článku 38 Statutu Mezinárodního Soudního Dvora.[14]

Pokud se zabýváme detailně právním výkladem smluv, dojdeme k závěru, že interpretace v mezinárodním právu veřejném byla do 60-tých let 20.století značně neunifikovaná a opírala se o především o doktrinální rozdělení na výklad teologický směřující k účelu normy, objektivní výklad, jehož základem je zkoumání smyslu normy a výklad subjektivní, který má za účel zformulovat úmysl tvůrců v případě smlouvy tedy smluvních stran.[15] Toto rozdělení se stalo obsoletním s příchodem nejvýznamnější kodifikace mezinárodního smluvního práva. Touto kodifikací se stala Vídeňská úmluva o smluvním právu (dále jen „Úmluva“). Tvůrci Úmluvy umně a výstižně zformulovali interpretační pravidla v pouhých třech článcích 31 až 33.

Nejpodstatnějším je článek 31 odst. 1, který ustanovuje jako základní pravidla:

a. výklad v dobré víře ve vztahu mezi stranami smlouvy tak také vůči třetím stranám,

b. užití obvyklého významu pojmů tak, aby se výklad co nejvíce přiblížil původní vůli smluvních stran

[12] **Č**EPELKA, **Č**estmír; **Š**TURMA, Pavel. Mezinárodní právo ve**ř**ejné. 1. vyd. Praha : C.H. Beck, 2008, s.105-111

[13] Volně přeloženo autorem z Shaw, Malcolm Nathan (2003). *International law*. Cambridge University Press. p. 841.

[14] Celé znění Statutu dostupné zde: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

[15] Antonio Cassese: International Law, Oxford 2001, 133-135.

c. to vše s přihlédnutím k cíli samotné smlouvy.[1617]

Následující článek 32 uvádí doplňkové prostředky a limitace jejích užívání, které je definováno jako subsidiární.[18] V článku 33 se Úmluva zabývá výkladem vícečetného jazykového znění smlouvy. Pravidlem zde je určena rovnost všech jazykových verzí smlouvy s výjimkou výslovné dohody stran nebo výslovné formulace interpretační přednosti jedné z verzí.[19]

Z výše uvedeného můžeme soudit, že Úmluva považuje jazykový a systematický právní výklad mezinárodních smluv za hlavní interpretační metody s přihlédnutím k teleologickému výkladu. Úmluva znamenala první a do současné doby nejpodstatnější písemnou kodifikaci dřívějších obyčejových pravidel. Velmi podstatné z hlediska vymahatelnosti je právní závaznost Úmluvy na vztahy mezi stranami, a tak se vymyká předešlým kodifikačním pokusům.[20]

3.2 SROVNÁNÍ S PRÁVEM EU

Podstatnou část tohoto článku autor věnuje popisu rozdílností intepretace práva EU od výše zmíněných systémů a především zakotvením interpretačních pravidel v primárním a sekundárním právu. K odkazům na detailnější vysvětlení daných pravidel a výkladových metod autor užívá judikáty ESD, které jsou k danému tématu esenciální.

Evropské právo má jistá specifika, ze kterých vychází i základy interpretace jako je mnoho-národnost této organizace a s tím spojená mnohojazyčnost právních pramenů nebo například částečně vlastní

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[16] **Č**epelka, **Č**. Právo mezinárodních smluv: Vídeňská úmluva o smluvním právu s komentářem. Praha: Karolinum, 1999, s. 56

[17] Text článku 31 odst.1 zní: *„Smlouva musí být vykládána v dobré víře, v souladu s obvyklýmvýznamem, který je dáván výrazům ve smlouvě v jejich celkovésouvislosti, a rovněž s přihlédnutím k předmětu a účelu smlouvy.“*

[18] Text článku 32 zní: „*Doplňkových prostředků výkladu, včetně př.pravných materiálůna smlouvě a okolností, za nichž byla smlouva uzavřena, lze použít buď pro potvrzení významu, který vyplývá z použití článku 31, nebopro určení významu, když výklad provedený podle článku 31: a)buď ponechává význam nejednoznačným nebo nejasným; nebo b) vede k výsledku, který je zřejmě protismyslný nebo nerozumný.”*

[19] Text článku 33 odst.1 zní: *“Byla-li smlouva původně vyhotovena ve dvou nebo vícejazycích, má její text stejnou platnost v každém z těchto jazyků,pokud smlouva nestanoví nebo se strany nedohodnou, že v případěrozdílnosti je rozhodující určitý text.”*

[20] Rozehnalová, Naděžda; Týč, Vladimír. Evropský justiční prostor (v civilních otázkách). 2.nezměn. vyd. Brno : Masarykova univerzita, 2006, s. 381.

terminologie, která vyžaduje specifickou interpretaci a přístup. Evropská Unie jako mezinárodní organizace a její právní systém se odlišuje svou povahou, kdy státy přenesly některé své pravomoci na nadnárodní úroveň a tak se vystavily situacím, kdy i přes svůj nesouhlas musí přijmout právní normu, interpretovat ji či ji aplikovat. Tento fakt vede ke snaze o jednotnost výkladu práva EU a jeho závaznost.[21]

Evropské právo nezapře své kořeny v právu mezinárodním a často na něj odkazuje i judikatura Soudního dvora Evropské Unie (dále jen „ESD"), např. v judikátu *The Queen v Minister of Agriculture*[22] ESD použil interpretační metody mezinárodního práva a odkázal na ustanovení Úmluvy při aplikaci na právní vztahy mezi členskými státy.[23]

Interpretační pravidla v rámci systému jsou také odlišná na základě rozdělení právních předpisů na primární a sekundární právo, kdy primární právo ve formě zakládajících smluv nese jistou ústavně-právní povahu,[24] která jej předurčuje v jisté obecnosti a nekonkrétnosti, která musí být zajištěna jistým a jednotlivým výkladem.[25] Na druhé straně sekundární právo je od primárního odvozeno, je vytvářeno společnými unijními orgány a vyznačuje se větší specifičností. Zde se výklad práva soustřeďuje na unifikaci a harmonizaci pravidel, které ve svém důsledku mohou působit v různých právních systémech členských zemí odlišně.[26]

Při určování interpretačních pravidel hraje důležitou roli judikatura ESD, který, jak bylo uvedeno výše, zajišťuje jednotný výklad norem a dohlíží tak nad jeho správnou aplikací. ESD je také autorem mnoha „evropských" právních pojmů, které pomáhají unifikovat intepretaci některých unikátních pravidel, které právní systém EU nabízí.

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[21] TICHÝ, L. a kol. Evropské právo. 3. vyd. Praha : C.H. Beck, 2006, s. 227

[22] Rozsudek C-432/92, The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd a ostatní.

[23] Na právní vztahy mezi EU a třetími stranami bybylo spše vhodnější použít Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, done at Vienna on 21 March 1986. Více k tomu to tématu TICHÝ, L. a kol. Evropské právo. 3. vyd. Praha : C.H. Beck, 2006, s. 188.

[24] Armin Von Bogdandy, Founding Principles of EU Law: A Theoretical and Doctrinal Sketch, European Law Journal, Vol. 16, No. 2, March 2010, pp. 95–111.

[25] POLLARD, David; ROSS, Malcolm. European Community law : text and materials. London : Butterworth, 1994, s. 218-219.

[26] Empel/van Gerven (eds.), Fifty Years of European Legal Integration, Kluwer, to be published fall 2002, manuscript p.21.

Právo EU podléhá na jednu stranu klasickým interpretačním metodám, které jsou různými způsoby modifikovány pro potřeby systému a několika specifickými metodami a pojmy, kterými se autor zabývá níže v texu. Mezi výkladové metody, známé již z mezinárodního a vnitrostátního práva, které se ovšem odlišují, patří:

1. **Jazykový výklad** zde jako obvykle při výkladu pojmů přichází první. Jazyk je zde s právem spojený stejně jako v domácím či mezinárodním právu (Rozsudek *Meridionale Industria Salumi*),[27] podléhá však jistým specifikům mnohojazyčnosti a specifické terminologii, které se autor věnuje dále v textu.

2. **Systematický výklad**, který je především významný pro systémové rozdělení primárního a sekundárního práva (*Marthe Klensch*).[28] Také je třeba brát v potaz určení pořadí jednotlivých kapitol v zakládajících smlouvách. Především Smlouva o Fungování Evropské Unie řadí své politiky dle důležitosti a konzistenci interpretace smluv a protokolů vztahujících se k jedné instituci (*Albert Wagner*[29]).

3. **Teleologický výklad** přichází typicky společně se systematickým výkladem při nejasnosti výkladu jazykového. V evropském právu je ovšem v jistých případech účel a smysl normy velice těžké specifikovat a interpretovat. Děje se tak především u primárního práva, kde má ESD velké pole působnosti vykládat komunitární pravidla a pojmosloví dle svého uvážení a často tak činí v souladu se zásadou effet utile[30], které se autor věnuje níže v textu.

4. **Historický výklad** je jednou z nejdiverzifikovanějších metod v právu EU a jeho použití je tak velmi omezené. Rozdělení na primární a sekundární prameny práva historický výklad komplikuje. V případě primárního práva je metoda omezena nedokonalou dostupností oficiálních dokumentů a v případě sekundárního práva je limitované použití omezeno samotnou judikaturou ESD, např *Stauder*[31] nebo *Komise vs. Itálie*.[32]

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[27] Zde ESD zařadil mezi obecně uznávané metody interperetace metodu jazykovou a vedle ní i systémovou a teleologickou. Více v Spojený případech 212/80 až 217/80 Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi a ostatní.

[28] Spojené případy 201 a 202/85 Marthe Klensch and others v Secrétaire d'État à l'Agriculture et à la Viticulture.

[29] Rozsudek ESD 101/63 Albert Wagner v Jean Fohrmann and Antoine Krier

[30] Tato zásady bývá někdy definována i jako výkladová metoda, srovnej TICHÝ, L. a kol. Evropské právo. 3. vyd. Praha : C.H. Beck, 2006, s. 230-231.

[31] Zde se se ESD odvolal na připomínkové řízení proběhnuvší předpřijetím předmětného rozhodnutí uvnitř Evropské komise a odkaz na tyto

Mezi další metody výkladu patří metoda **srovnávací** neboli **komparativní** a **výklad logický**. Tyto metody bývají někdy ztotožňovány s metodami předchozími nebo považovány za kombinace těchto metod.[33] Kromě těchto „tradičních" metod má evropské právo další specifika, které je třeba zmínit ve výkladu intepretace. Některé z nich vycházejí z metod popsaných výše, některé je rozšiřují a mění. Velice výstižně se je podařilo shrnout ESD v rozsudku *CILFIT*.[34] Mezi tyto specifika dle autora patří:

5. Specifický výklad pojmů neboli **terminologie**, který je velice typický pro rychle se rozvíjející se právní systémy, jakým je právě ten evropský. ESD se v této roli projevil velice aktivně a je znám velký počet nových právních pojmů, kterým ESD přiřadil tzv. komunitární nebo autonomní výklad. Typickým příkladem je komunitární pojem worker neboli pracovník jako označení pro osoby ekonomicky aktivní - zaměstnané i samostatně výdělečně činné.[35] Dle ESD (*North Kerry Milk Products*) je jednou z možností, jak odstranit rozdíly v jazykovém výkladu jednotlivých právních systémů členských zemí terminologii unifikovat neboli vytvořit pojmy, které bude mít stejný význam v souladu s teorií autonomní interpretace.[36]

6. **Jazykové rozdíly**, které se vymykají pojetí jazykového výkladu, jak jej známe z vnitrostátního prostředí. V EU existuje 23

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p**ř**ipomínkyv samotném od**ů**vodn**ě**ní rozhodnutí. Více v rozsudku ESD 29/69 Erich Stauder vs. City of Ulm – Sozialamt.

[32] Rozsudek 429/85 Commission of the European Communities v Italian Republic: *„Výklad ustanovení směrnice, založený na doslovném znění, nemůžebýt nahrazen výkladem založeným na prohlášení Rady, zaznamenaném v zápisuz jednání, na němž byla směrnice přijata."*

[33] TÝČ, Vladimír. Základy práva Evropské unie pro ekonomy. 5. aktualiz. vyd. Praha : Linde, 2006, s.122, více viz podkapitola č. 11.1.

[34] Rozsudek ESD 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health

[35] Viz nap**ř** . rozsudek ESD 75/63 Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses).

[36] Zajímavý článek na toto téma Tamás Szabados, The Role of Language in Legal Interpretation: The Case Law of the Court of Justice of the European Uniona Discussion Paper. Jean Monnet Centre of Excellence - Eötvös Loránd University – Faculty of Law and Political Sciences, Eötvös Loránd University. Available here: http://jmce.elte.hu/index.php?option=com_content&view=article&id=12:the-role-of-language-in-legal-interpretation-the-case-law-of-the-court-of-justice-of-the-european-union&catid=6:impact-of-eu-law-on-national-legal-languages&Itemid=15

pracovních jazyků.[37] Toto multi-jazykové prostředí je bezpochyby velkým problémem pro interpretaci právních pojmů a pramenů. ESD judikoval stejnou váhu pro všechny jazykové verze (*EMU Tabac*)[38] a pro nejasnost mezi jazykovými verzemi judikoval nutnost porovnat jednotlivé jazykové verze a použití jiných metod výkladu (*Rockfon*)[39] zejména systematické a teleologické (*Bouchereau*)[40](Lubella)[41]. Další řešením je již výše zmíněný autonomní komunitární výklad pojmů, který nepřipouští odchylky.

7. **Effet utile**, maximální účinek[42] neboli cíle a světlo komunitárního systému je specifickým pravidlem komunitárního práva řadící se k teleologickému výkladu. Interpretační nejasnost v primárním právu představuje široké pole působnosti pro judikaturu ESD. Projevy zásady effet utile můžeme sledovat především v třech oblastech a principech[43]:

    a. Autonomie práva EU, která byla formulována trojicí legendárních rozsudků *Van Gend en Loos*[44]*, Costa*[45] *vs*

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[37] Dle Evropské Komise: angličtina, bulharština, čeština, dánština, estonština, finština, francouzština, irština, italština, litevština, lotyština, maďarština, maltština, němčina, nizozemština, polština, portugalština, rumunština, řečtina, slovenština, slovinština, španělština a švédština. http://ec.europa.eu/languages/languages-of-europe/eu-languages_cs.htm

[38] rozsudek ESD C-296/95 The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man inBlack Ltd, John Cunningham

[39] Rozsudek ESD C-449/93 Rockfon A/S v Specialarbejderforbundet i Danmark, C-236/97 Skatteministeriet v Aktieselskabet Forsikrinsselskabet Codan.

[40] Rozsudek ESD 30/77 Régina v Pierre Bouchereau: "odlišné jazykové verze komunitárníhop**ř**edpisu musí být vykládány jednotn**ě**, tudíž v p**ř**ípad**ě** odlišností mezi verzemi musíbýt p**ř**edm**ě**tné nejasné ustanovení vykládáno s ohledem na ú**č**el a obecnousystematiku norem, jichž je sou**č**ástí."

[41] Rozsudek ESD C-64/95 Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v Hauptzollamt Cottbus.

[42] Tý**č** , V. P**ů** sobení práva Evropské unie ve sfé**ř** e **č** eského právního **ř** ádu – úvodní studie. In: Sborník z workshopu konaného na Právnické fakult**ě** MU v Brn**ě** dne 26.9.2006 Evropský kontext vývoje **č** eského práva po roce 2004. Brno: Masarykova univerzita, 2006, s. 25.

[43] Převzato z Sehnálek, D. Effet utile a jeho projevy p**ř** i interpretaci komunitárního práva. In Právník, 2009, ro**č** . 148, **č** . 8, s. 787-789.

[44] Rozsudek ESD 26/62 NV Algemeine Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.

[45] Rozsudek ESD 6/64 Flaminio Costa v E.N.E.L.

Enel a Simmenthal[46], které stojí za komunitárním pojetí nadřazenosti práva EU nad národními právními systémy pravidlem přímé aplikovatelnosti neboli přímého účinku.

b. Přímý účinek, neboli bezprostřední aplikovatelnost, který byl původně vyhrazen pouze pro přímý harmonizační nástroj evropského práva – Nařízení – byl s pomocí zásady effet utile a díky judikátům ESD v čele s *Van Duyn*[47] rozšířen i na směrnice, ovšem v omezené míře a to v případě možnosti jednotlivce dovolat se svých práv proti státu.

c. Nepřímý účinek směrnice je krásným příkladem přeměny základů právního řádu v souladu se zásadou maximálního účinku, kdy ESD v rozsudku *Von Colson*[48] judikoval povinnost členských států, kterým je směrnice adresována přijmout veškerá opatření tak, aby zajistila plnou účinnost směrnice v souladu s účelem, který sleduje a tím tak může omezovat právo členských států na volby prostředků a formy dosažení cíle směrnice.

d. Odpovědnost státu, která byla judikována známým rozsudkem Frankovich,[49] kde ESD zpochybnil plnou účinnost norem komunitárního práva za absence odpovědnosti členského státu za škodu způsobenou jednotlivci při porušení práva EU.

e. Požadavek na jednotný, objektivní a předvídatelný výklad, který je předpokladem úspěšného a celistvého interpretačního systému v rámci evropského práva. I přes některé pochybnosti o příliš prointegračnímu až aktivistickému výkladu ustanovení a někdy až účelovým změnám pravidel jako v případech Van Duyn či Von Colson, je třeba mít na paměti, že systém evropského práva je velice živý a neustále se rozrůstající a zásada effet utile ve spojení s teleologickým přístupem vyjasňuje interpretační linii přísně v pomyslném směru k účelu a efektivnosti norem práva EU.

Užití interpretačních metod má subjektu pomoci zorientovat se v pravidlech a dojít ke správnému smyslu a obsahu právní normy. Při kombinaci několika výkladových metod je pravděpodobné, že různé

[46] 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA.

[47] Rozsudek ESD 41/74 Yvonne van Duyn v Home Office.

[48] Rozsudek ESD 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen.

[49] Rozsudek ESD ve spojeném případu C-6/90 a C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic.

subjekty mohou dojít k různým závěrům. Nicméně je třeba ocenit, že i přes svou dynamičnost a komplexnost jsou pravidla interpretace práva EU dobře čitelná a díky bohaté judikatuře široce aplikovatelná.

4. ZÁVĚR

Autor se v tomto příspěvku pokouší o krátký přehled základů právní interpretace ve srovnání výkladových metod národního, mezinárodního a především evropského práva. Interpretace národních předpisů zde slouží spíše jen jako vodítko pro pochopení složitějších interpretačních metod mezinárodního a evropského práva.

Výklad evropského práva podlého mnoha specifikům. Klasické interpretační metody jako historická, logická nebo jazyková metoda jsou zde doplněny dynamickými metodami a pravidly maximálního účinku neboli effet utile, jazykovými rozdíly či autonomním výkladem za pomocí vlastní právní terminologie unifikované judikaturou Soudního Dvora Evropské Unie, který representuje pro-integrační sílu mezi institucemi Evropské Unie.

I přes možnou účelovost prosazování maximálního účinku a účelu evropského práva v některých rozsudcích nelze soudu upřít snahu o celistvý a progresivní výklad práva v zájmu fungování komunitárního právního řádu.

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APLIKÁCIA PRÁVA EÚ V ROZHODOVACEJ ČINNOSTI SLOVENSKÝCH OKRESNÝCH A KRAJSKÝCH SÚDOV

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Abstract in original language

rozhodovacej činnosti slovenských okresných a krajských súdov. Autor sa venuje predovšetkým priamej použiteľnosti, nadradenosti, priamemu účinku a nepriamemu účinku práva EÚ a poukazuje na súvisiace nedostatky v aktuálnej rozhodovacej praxi týchto súdov.

Key words in original language

aplikácia práva EÚ; slovenské súdy; priama použiteľnosť; nadradenosť; priamy účinok; nepriamy účinok

Abstract

The article deals with specific problems regarding application of EU Law in the judicial practice of Slovak district and regional courts. Author pays particular attention mainly to the direct applicability, supremacy, direct and indirect effect of EU Law and points to the related gaps in actual decisional practice.

Key words

application of EU Law; Slovak courts; direct applicability; supremacy; direct effect; indirect effect

1. ÚVOD

Aplikáciu právneho poriadku Európskej únie (EÚ)[1] v celej šírke aspektov, ktoré to zahŕňa, považujeme za stálu výzvu pre slovenské všeobecné súdy a súčasne oblasť, v ktorej majú značné rezervy. To má podľa nášho názoru príčiny jednak v nedostatočnej príprave v oblasti vzdelávania, najmä u sudcov a súdneho aparátu, ktorí s únio̍vým právom neboli konfrontovaní v rámci vysokoškolského štúdia. Na sudcoch a celom justičnom aparáte je však povinnosť únio̍vé právo aplikovať a ho aj aplikovať správne. To má dosah aj v politickej rovine, pretože bez správnej a jednotnej aplikácie únio̍vého práva nemôže byť dosiahnutý integračný úspech celej únie.[2] S ohľadom na to, že v "bežnej" aplikačnej praxi vyvoláva polemiky pochopiteľne aj

[1] V príspevku označujeme právny poriadok EÚ *promiscue* aj ako únio̍vé právo, aj ako právo EÚ, a to v tom zmysle ako má tento pojem význam po nadobudnutí účinnosti Lisabonskej zmluvy.

[2] Porovnaj Łazowski, 2010, s. 26.

"bežná" hierarchia právnych predpisov,[3] možno bez zveličovania povedať, že recepcia únioného právneho poriadku, ku ktorej došlo k vstupu Slovenskej republiky do Európskej únie v máji 2004 predstavuje ešte náročnejšiu úlohu. Tá znásobuje už i tak komplikované otázky intraprávneho pluralizmu. Łazowski udáva, že otázkami, ktoré ako prvé riešia/riešili sudcovia v členských krajinách pristúpených do Európskej únie otázky aplikácie práva EÚ boli predovšetkým (i) aplikácia daňových predpisov, (ii) "jazykový problém" s prekladmi únioných aktov (a aj judikatúry) a (iii) predvstupová aplikácia, resp. aplikácia vo veciach, v ktorých došlo k vzniku relevantných skutkových okolností pred vstupom do EÚ.[4]

Tento príspevok ponúkne krátky pohľad na vybrané problémy pri aplikácii práva EÚ slovenským okresnými súdmi a krajskými súdmi,[5] pričom pôjde o pohľad skôr empirický než analytický a skôr o pohľad s použitím príkladov *pars pro toto* než o prehľad s komplexným náhľadom, pretože by priestor vymedzený pre tento príspevok dostatočne neumožňuje.

2. APLIKÁCIA ÚNIOVÉHO PRÁVA OKRESNÝMI SÚDMI A KRAJSKÝMI SÚDMI VO VŠEOBECNOSTI

Tento príspevok sa zameriava na aplikačnú prax slovenských okresných a krajských súdov. Tie sú v rámci justičnej sústavy v Slovenskej republiky "nižšími súdmi" a ich vecnú a funkčnú príslušnosť stanovujú vnútroštátne pravidlá. Tak okresné, ako aj krajské súdy sú úniovými súdmi v tom zmysle, že sú povolené k aplikácii práva EÚ. To im vyplýva zo záväzku lojality upraveného v čl. 4 ods. 3 Zmluvy o Európskej únii (ďalej len "ZEÚ"):

"… členské štáty prijmú všetky opatrenia všeobecnej alebo osobitnej povahy, aby zabezpečili plnenie záväzkov vyplývajúcich zo zmlúv alebo z aktov inštitúcií Únie. Členské štáty pomáhajú Únii pri plnení

[3] Napríklad vo vzťahu k otázke, či je možné aplikovať priamo právnu normu vyplývajúcu z ústavy, resp. ústavný princíp, čo riešil Najvyšší súd Slovenskej republiky vo veci Januch c/a Colné riaditeľstvo (Rumana, 2011, s. 229).

[4] Porovnaj Łazowski, 2010, s. 27.

[5] Sústavu týchto súdov tvorí podľa zákona č. 371/2004 Z. z. o sídlach a obvodoch súdov Slovenskej republiky a o zmene zákona č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov v znení neskorších predpisov celkovo 54 okresných súdov a 8 krajských súdov, ktoré sa venujú civilnej a obchodnej agende, agende správneho súdnictva a trestnej agende. Postavenie krajského súdu má aj Špecializovaný trestný súd, ale ním sa vzhľadom na jeho špecifickú agendu nebudeme pre účely nášho príspevku ďalej zaoberať.

jej úloh a neprijmú žiadne opatrenie, ktoré by mohlo ohroziť dosiahnutie cieľov Únie".[6]

Vzájomné vzťahy medzi normami s výlučne vnútroštátnym "rodokmeňom" a normami s rodokmeňom majúcim pôvod v normotvorbe orgánov EÚ alebo súdnych orgánov EÚ majú vertikálny charakter.[7] Existujú stále polemiky, do akej miery je aplikácia práva EÚ aplikáciou *ex officio* a teda do akej miery zaväzuje súdy členských krajín aj bez návrhov jednotlivých účastníkov sporu. Literatúra udáva, že je judikatúra Súdneho dvora sa drží toho, že súdy majú povinnosť aplikovať úniové právo aj bez iniciatívy strán sporu, rovnako ako v porovnateľných situáciách aplikujú bez iniciatívy strán sporu aj vnútroštátne právo.[8] V prípade hospodárskej súťaže a ochrany spotrebiteľa majú ísť súdy ešte ďalej.[9]

Pri riešení úloh okresných a krajských súdov pri aplikácii práva zohráva dôležitú úlohu vecná a funkčná príslušnosť.[10] V závislosti od druhu sporu býva spravidla okresný súd súdom prvej inštancie, pričom v takom prípade krajský súd koná ako odvolací súd, súd druhej inštancie. Z tohto pravidla existujú početné výnimky, napríklad pri rozhodovaní o výkonu rozhodnutia, v exekučných konaniach, konkurzných a reštrukturalizačných konaniach, ale aj napríklad pri rozhodovaní kontumačným rozsudkom a pod., kedy sú konania zásadne jednoinštančné a odvolanie nebýva prípustné. Ďalej existujú situácie, kedy krajský súd koná ako súd prvej inštancie.[11] To má

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[6] Zásadu lojality možno nájsť aj v čl. 86 Zmluvy o založení Európskeho spoločenstva uhlia a ocele a predstavuje rovnakú interpretačnú prizmu ako čl. 4 ods. 3 ZEÚ (porovnaj rozsudok Súdneho dvora zo 16. decembra 1960 vo veci 6/60, Jean Humblet v. Belgicko, Recueil 1960, p. 01125; všetky rozhodnutia Súdneho dvora EÚ citované v tejto práci sú dostupné v databáze Úrad pre publikácie, EUR-lex, 2011). Porovnaj tiež čl. 192 Zmluvy o založení Európskeho spoločenstva pre atómovú energiu.

[7] Porovnaj Káčer, 2011, s. 99-101.

[8] Bobek, 2011, s. 257.

[9] Porovnaj Bobek, 2011, s. 257-266.

[10] Funkčná príslušnosť určuje súd, ktorý určitú vec prejednáva a rozhoduje v inštančnom postupe, t. j. rozhoduje o riadnom alebo mimoriadnom opravnom prostriedku (cf. Mazák, 2007, s. 57).

[11] Podľa § 9 ods. 2 zákona č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov je to (a) v sporoch o vzájomné vyporiadanie dávky poskytnutej neprávom alebo vo vyššej výmere, než patrila, medzi zamestnávateľom a príjemcom tejto dávky podľa právnych predpisov o sociálnom zabezpečení, (b) v sporoch medzi príslušným orgánom nemocenského poistenia a zamestnávateľom o náhradu škody vzniknutej nesprávnym postupom pri vykonávaní nemocenského poistenia, a (c) v sporoch týkajúcich sa cudzieho štátu alebo osôb požívajúcich diplomatické imunity a výsady, ak tieto spory patria do právomoci súdov Slovenskej republiky.

zásadný vplyv pre stanovenie súdu poslednej inštancie, o ktorom hovorí ustanovenie čl. 267 ods. 3 Zmluvy o fungovaní Európskej únie. Otázka súdu poslednej inštancie preto nemusí byť vyriešená paušálnym záverom o tom, že je to práve krajský súd alebo práve len najvyšší súd, pretože ním v závislosti od riešenej veci môže byť tak okresný súd, krajský súd alebo najvyšší súd.

Aplikácia práva je praktickou súčasťou právneho diskurzu a kľúčovú úlohu tu zohráva nájdenie správneho rozhodnutia (regulatívna ekonómia), a nájdenie správneho odôvodnenia tohto rozhodnutia (naratívna ekonómia).[12] Práve druhé uvedené, odôvodnenie súdneho rozhodnutia, predstavuje východisko pre skúmanie otázok týkajúcich sa aplikácie únioového práva. V súčasnosti neexistuje v Slovenskej republike databáza sprístupňujúca rozhodnutia slovenských okresných a krajských súdov v celosti. Zdrojom časti súdnych rozhodnutí okresných súdov a krajských súdov je len verejne prístupná databáza Ministerstva spravodlivosti Slovenskej republiky (ďalej len "MS SR") Jednotný automatizovaný systém právnych informácií (JASPI) dostupná cez bežné užívateľské rozhranie na webovom sídle MS SR.[13] Nevýhodou je, že databáza JASPI obsahuje len vybrané rozhodnutia okresných a krajských súdov (ktoré rozhodnutia neobsahuje uvádzame ďalej), ktoré sú navyše anonymizované. Samotné kritériá selekcie rozhodnutí týkajúcich sa aplikácie únioového práva možno založiť na textových reťazcoch, resp. ich kombináciách, ktoré umožňuje vybrať zo zdrojov rozhodnutí cielený súbor s požadovanými reťazcami.

Literatúra udáva, že základnou oblasťou, v ktorej sa právo EÚ aplikuje je správne právo, pretože je to práve tá oblasť, ktorú únioové právo najviac reguluje a v ktorej začalo svoju pôsobnosť.[14] Vzhľadom na to, že agendu správneho práva vykonávajú slovenské súdy v prvom stupni spravidla krajské súdy (autorovi nie je známy prípad, kedy by v súčasnosti rozhodoval okresný súd v správnom súdnictve ako súd prvého stupňa) a v druhom stupni ako odvolací súd Najvyšší súd (ten v zákonom stanovených prípadoch vykonáva pôsobnosť správneho súdu prvej inštancie). Isté obmedzenie pri riešení problematiky aplikácie práva Únie krajskými súdmi preto predstavuje skutočnosť, že databáza JASPI neobsahuje rozhodnutia krajských súdov v agende správneho súdnictva. Dovoľujeme si však odhadnúť, že základné okruhy únioového práva, ktorými sa krajské súdy zaoberajú vo svojej rozhodovacej činnosti, sú právo hospodárskej súťaže a verejné obstarávanie ako výrazné politiky Európskej únie. Rovnako neobsahuje databáza JASPI rozhodnutia vydané v trestnom konaní. V

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[12] Porovnaj Procházka, 2005, s. 178.

[13] Ministerstvo spravodlivosti Slovenskej republiky. Jednotný automatizovaný systém právnych informácií : JASPI – WEB. 2011. V tejto databáze sú dostupné všetky rozhodnutia okresných a krajských súdov citované v tejto práci.

[14] Porovnaj Bobek, 2011, s. 121-122.

rámci nášho príspevku sme sa preto sledovali len dostupnými rozhodnutiami, ktoré sa týkajú civilných sporov.

3. CITAČNÁ PRAX

Predpokladom pre hodnotenie aplikačnej činnosti slovenských súdov je dôležitá citačná prax úniových právnych aktov a judikatúry. Istý námet ponúka sám Súdny dvor vo svojich rozhodnutiach, neexistuje však záväzné usmernenie.[15] Odkazy na akty EÚ a/alebo judikatúru Súdneho dvora v rozhodovacej činnosti slovenských okresných a krajských súdov nie sú až tak výnimočné (často ide o odkazy na "ustálenú judikatúru"), no pomerne výnimočné sú v tej súvislosti odkazy (i) na konkrétnu judikatúru, z ktorej súdy čerpajú a (ii) na konkrétne ustanovenia úniových aktov, ktoré aplikovali. V rozhodovacej činnosti súdov tradície nejde vôbec o ojedinelý jav, pričom za nedostatočné možno považovať aj odkazovanie na rozhodnutia len so spisovými značkami, bez uvedenia zdroja, kde možno rozhodnutie dohľadať.[16]

Napríklad Krajský súd v Nitre sa v spore týkajúcom sa zmluvy o obstaraní zájazdu zaoberal výkladom smernice Rady č. 90/314/EHS z 13. júna 1990 o balíku cestovných, dovolenkových a výletných služieb, konkrétne vo vzťahu k pojmu "škoda". Dospel k tomuto záveru:

"účelom a cieľom smernice je zabezpečiť ochranu spotrebiteľa, pre ktorého má náhrada škody za vadne poskytnutú dovolenku osobitný význam. Na pozadí takýchto okolností je potrebné vykladať aj pojem škody. V smernici je pojem škody zakotvený len všeobecne, no podľa názoru ESD táto v uvedenom ustanovení priznáva aj náhradu imateriálnej ujmy. Záver judikatúry ESD k čl. 5 smernice je taký, že tento treba vykladať tak, že zaručuje spotrebiteľovi zásadne nárok na náhradu imateriálnej ujmy utrpenej ako následok nesplnenia alebo vadného plnenia povinností ".[17]

Nijako bližšie neuviedol, čo myslí pod "záverom judikatúry ESD" k citovanej smernici. Podľa § 157 ods. 2 Občianskeho súdneho poriadku:

"v odôvodnení rozsudku súd uvedie, čoho sa navrhovateľ (žalobca) domáhal a z akých dôvodov, ako sa vo veci vyjadril odporca (žalovaný), prípadne iný účastník konania, stručne, jasne a výstižne vysvetlí, ktoré skutočnosti považuje za preukázané a ktoré nie, z ktorých dôkazov vychádzal a akými úvahami sa pri hodnotení

[15] Návod je dostupný napríklad v publikácii Kühn, 2006, s. 121-123.

[16] Porovnaj Kühn, 2006, s. 113.

[17] Uznesenie Krajského súdu v Nitre z 20.12.2007, sp. zn. 26Cob/112/2007. Tiež rozsudok Krajského súdu v Nitre z 2.5.2007, sp. zn. 7Co/5/2007.

dôkazov riadil, prečo nevykonal ďalšie navrhnuté dôkazy a ako vec právne posúdil. Súd dbá na to, aby odôvodnenie rozsudku bolo presvedčivé".

Domnievame sa, že v prípade, že súd použije za základ svojho rozhodnutie právne relevantný argument z judikatúry Súdneho dvora len v nekonkrétnej podobe, nebude takéto rozhodnutie spĺňať citované parametre zákonnosti stanovené citovaným ustanovením Občianskeho súdneho poriadku.

Podobne napríklad v dvoch prípadoch[18] sudca Okresného súdu Košice I Ladislav Gábor použil odkazy na úniové právo pre podporenie svojich záverov, ktoré podoprel vnútroštátnym právom nasledovne:

„treba si zvyknúť na to, že záväzkové vzťahy nie je možné vnímať len z pohľadu kreditor a debitor, ale aj z pohľadu, že ide o spotrebiteľa. V jeho prípade princíp zmluvnej slobody musí súd zvlášť citlivo posudzovať a konfrontovať ho s princípom zmluvnej spravodlivosti a s požiadavkou ekvity. Dôkazom tejto politiky Európskej únie je niekoľko smerníc a rozsudkov Európskeho súdneho dvora“.

V rozhodnutí však nijako nekonkretizoval, ktoré smernice mal alebo ktoré rozsudky Súdneho dvora považoval v tomto smere za relevantné. Otázne je, do akej miery bolo potrebné, aby pri "dostatočnosti" vnútroštátneho práva pre vyriešenie veci odkazoval aj na úniové právo, no ak tak urobil, domnievame sa, že tieto odkazy mali byť dostatočne podporené aj po citačnej stránke. Citačnú prax slovenských okresných a krajských súdov si tak dovoľujeme hodnotiť ako nedostatočnú.

Vyskytujú sa však aj pozitívne príklady. Okresný súd Žilina sa v prejednávanej reštrukturalizačnej veci zaoberal s predbežnou otázkou, či v danej veci nešlo o štátnu pomoc. Túto otázku vyriešil kladne, čo podporil aj viacerými odkazmi na judikatúru Súdneho dvora.[19]

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[18] Rozsudky Okresného súdu Košice I z 19.11.2010, sp. zn. 29Cb/183/2008 a z 24.7.2009, sp. zn. 29Cb/271/2006.

[19] Pre rozsiahlosť rozhodnutia uvádzame výňatok: "*podľa ustálenej judikatúry Európskeho súdneho dvora, definícia pomoci je širšia ako definícia dotácie, keďže zahŕňa aj také opatrenia, ktoré v rôznych formách znižujú obvyklé náklady podnikov (napr. vec C-143/99 A.-W. P. GmbH e W. & P. Z. GmbH proti F. F. K. [2001] ECR I-6717, ods. 90). Uplatnenie konkurzného resp. reštrukturalizačného konania na zadlžený podnik nepredstavuje samo osebe štátnu pomoc (napr. vec C-342/96, Španielsko v. Komisia [1999] ECR I-2459, ods. 46), avšak z konania resp. nekonania orgánov verejnej moci v takomto konaní, môže pre takýto podnik predstavovať určitú hospodársku výhodu. V prejednávanej veci môže byť štátna pomoc vyplynúť z odkladu splatnosti pohľadávok veriteľov, ktorí sú orgánmi verejnej správy, keďže týmto je dlžník v stave získať finančné prostriedky do svojej dispozície bez povinnosti platiť z nich úroky z*

4. PRIAMA POUŽITEĽNOSŤ

Priama použiteľnosť sa definuje, v súlade s jej počiatočným vymedzením v rozsudku Súdneho dvora vo veci Simmenthal nasledovne:

"Priama aplikovateľnosť znamená, že ustanovenia komunitárneho práva musia ukázať úplnosť svojich účinkov rovnakým spôsobom vo všetkých členských štátoch, a to od ich vstupu do platnosti a počas celej doby ich platnosti".[20]

Priamo uplatniteľný akt nemusí byť automaticky aj priamo účinný a naopak. Ide o dve odlišné atribúty únioového aktu. Podľa ustanovenia čl. 288 ods. 2 ZFEÚ sú priamo uplatniteľné len nariadenia:

"nariadenie má všeobecnú platnosť. Je záväzné vo svojej celistvosti a je priamo uplatniteľné vo všetkých členských štátoch".

Pojem priamej uplatniteľnosti vo vzťahu k nariadeniam zrejme nespôsobuje nejaké problémy, pretože najviac sa približuje aplikácii práva vyplývajúceho z vnútroštátneho práva. Inak povedané, domnievame sa, že slovenský vnútroštátny sudca bude aplikovať únioové akty spôsobom akým aplikuje zákony a iné vnútroštátne právne predpisy. To podľa nás súvisí s reliktmi socialistickej koncepcie statickej interpretácie práva, ktorá, zjednodušene povedané, stotožnila text zákona s jeho významom, a *vice versa*.[21] Vnútroštátny sudca okresného alebo krajského súdu môže byť v dôsledku svojej každodennej skúsenosti aplikácie práva na dôslednej textovej báze konfrontovaný s požiadavkou interpretovať únioové právo, vzniknuté v úplne inom hodnotovom rámci, iným spôsobom než vnútroštátne právo alebo s uplatnením iných výkladových metód. Dochádza teda k zmene paradigmy vo výbere správneho kvalifikačného kritériá, ktoré je v procese interpretácie funkciou výkladu subsumpčných podmienok obsiahnutých v hypotéze právnej normy.[22] Samostatnosť únioového práva okrem toho predpokladá, že súčasťou tohto právneho poriadku je aj vlastný právny jazyk,[23] právne princípy, inštitúty, či pojmový

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omeškania či iné sankcie spojené s predchádzajúcim nesplnením povinností plynúcich z verejného práva (inak povedané, podstata tkvie v časovej hodnote peňazí)" (uznesenie Okresného súdu Žilina z 22.4.2010, sp. zn. 4R/1/2009).

[20] Body 14, 15 a 17 rozsudku Súdneho dvora z 9. marca 1978 vo veci 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA. Citované podľa Rozsudok "Simmenthal". In: Výber z rozhodnutí Súdneho dvora Európskych spoločenstiev, 2005, č. 4, s. 33.

[21] Porovnaj Kühn, 2009, s. 83.

[22] Porovnaj Procházka, 2005, s. 49.

[23] Csach, 2006, s. 337.

aparát, ktoré môžu byť odlišné od tých, ktoré používajú jednotlivé vnútroštátne poriadky.[24] Súdny dvor k odlíšeniu komunitárneho pojmu od zmyslu pojmu používaného vnútroštátnymi poriadkami uvádza, že

„z potreby jednotného uplatňovania práva Spoločenstva a zásady rovnosti vyplýva, že znenie ustanovenia práva Spoločenstva, ktoré neobsahuje žiadny výslovný odkaz na právo členských štátov s cieľom určiť jeho zmysel a rozsah pôsobnosti, v zásade vyžaduje v celom Spoločenstve autonómny a jednotný výklad, ktorý musí zohľadňovať kontext ustanovenia a cieľ sledovaný príslušnou právnou úpravou“.[25]

Autonómny prístup pri gramatickom výklade predpokladá, že je potrebné pojmom úniového práva prikladať v prvom rade taký význam, aký majú v práve úniovom, nie v niektorom vnútroštátnom právnom poriadku. Príkladom použitia autonómneho prístupu k nejednoznačným pojmom sú napríklad pojmy podnik,[26] či právnická osoba,[27] ktoré by sa napríklad vnútroštátnemu sudcovi nemuseli *prima facie* javiť ako problematické. Okrem toho Súdny dvor vo svojom rozhodnutí CILFIT upozorňuje, že pri výklade komunitárneho práva treba mať túto skutočnosť vždy na pamäti, pretože „výklad komunitárneho práva zahŕňa aj porovnanie jednotlivých jazykových verzií“.[28] Tieto faktory by mal vnútroštátny sudca zohľadňovať pri aplikácii na prvý pohľad "jasných" pojmov vo vnútroštátnych právnych predpisoch a úniových aktoch.

Príklad uplatnenia priamej použiteľnosti možno nájsť napríklad vo veci riešenej Okresným súdom Košice I pod sp. zn. 29Cb/196/2005, v

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[24] Príkladom môže byť definícia „škody“ uvedená v čl. 9 smernice Rady č. 374/85/EHS z 25. júla 1985 o aproximácii zákonov, iných právnych predpisov a správnych opatrení členských štátov o zodpovednosti za chybné výrobky. Na rozdielnosť komunitárnych pojmov upozorňuje už aj komunitárna judikatúra, podľa ktorej „*aj v prípade presnej zhody jazykových verzií, že komunitárne právo používa terminológiu jemu vlastnú. Treba zdôrazniť, že právne pojmy nemajú nevyhnutne rovnaký obsah v komunitárnom práve a v rôznych národných právach*“. Porovnaj bod 19 rozsudku Súdneho dvora z 6.10.1982 vo veci 283/81, Srl CILFIT et Lanificio di Gavardo SpA c/a Ministère de la santé, Recueil 1982, p. 03415.

[25] Rozsudok Súdneho dvora z 21.2.2008 vo veci C-426/05, Tele2 Telecommunication GmbH c/a Telekom-Control-Kommission, Recueil 2008, p. I-00685.

[26] K vymedzeniu pojmu podnik napríklad rozsudok Súdneho dvora z 23. apríla 1991 vo veci C-41/90, Klaus Höfner et Fritz Elser c/a Macrotron GmbH, Recueil 1991, p. I-01979.

[27] Rozsudok Súdneho dvora z 28. októbra 1982 vo veci 135/81, Groupement des agences des voyages c/a Komisia, Recueil 1982, p. 3799.

[28] Pozri bod 18 rozsudku Súdneho dvora z 6.10.1982 vo veci 283/81, Srl CILFIT et Lanificio di Gavardo SpA c/a Ministère de la santé, Recueil 1982, p. 03415.

ktorej sa žalobca (fínska spoločnosť vyrábajúca mobilné telefóny) domáhal prijatia opatrenia podľa ustanovenia čl. 5 ods. 1 nariadenia Rady (ES) č. 1383/2003 z 22. júla 2003, ktoré sa týka colného konania pri tovare podozrivom z porušovania niektorých práv duševného vlastníctva a opatrení, ktoré sa majú prijať pri tovare, u ktorého sa zistilo, že sa takéto práva porušili (ďalej len „nariadenie č. 1383/2003“).[29] Domáhal sa určenia, že tovary (kryty na mobilné telefóny NOKIA) zaistené rozhodnutím Colného úradu Bratislava č. 77546/2005-5242 z 24.10.2005 a rozhodnutím Colného úradu Bratislava č. 77547/2005-5242 z 24.10.2005 sú napodobeninou (falzifikátom) podľa nariadenia Rady (ES) č. 1383/2003 a zákona č. 200/2004 Z. z. Na základe odborného posudku Okresný súd Košice I dospel k záveru, že v prípade zaisteného tovaru ide o pirátsky tovar tak, ako to vymedzuje čl. 2 ods. 1 písm. b) smernice č. 1383/2003, podľa ktorého sa tým rozumie tovar,

"ktorý je kópiou alebo obsahuje kópie vyrobené bez súhlasu držiteľa autorského práva, príslušného práva alebo dizajnového práva bez ohľadu na to, či je registrovaný vo vnútroštátnom práve alebo je registrovaný osobou oprávnenou držiteľom práva v krajine výroby v prípadoch, ak by výroba týchto kópií predstavovala porušenie tohto práva podľa nariadenia Rady (ES) č. 6/2002 z 12. decembra 2001 o priemyselných vzoroch spoločenstva alebo porušenie práva členského štátu, v ktorom sa žiada o colné konanie".

Okresný súd tak priamo aplikoval citované ustanovenie nariadenia č. 1383/2003 vymedzujúce pojem pirátsky tovar a žalobe vyhovel.

Sudca Okresného súdu Košice I Ladislav Gábor v 16 veciach[30] aplikoval ustanovenie čl. 5 ods. 1 nariadenia Európskeho parlamentu a Rady (ES) č. 861/2007 z 11. júla 2007, ktorým sa ustanovuje Európske konanie vo veciach s nízkou hodnotou sporu pri riešení otázky, či nariadiť pojednávanie na prejednanie veci. V odôvodnení týchto rozhodnutí uviedol, že

„pojednávanie nie je potrebné nariaďovať vo veciach s nízkou hodnotou sporu (článok 5 ods. 1 Nariadenia EP a Rady (ES) č. 861/2007 z 11.7.2007, ktorým sa ustanovuje Európske konanie vo veciach s nízkou hodnotou sporu“.

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[29] Rozsudok Okresného súdu Košice I z 24.4.2008, sp. zn. 24.4.2008.

[30] Rozsudky Okresného súdu Košice I z 26.2.2009, sp. zn. 29Cb/120/2008; z 26.2.2009, sp. zn. 29Cb/121/2008; z 26.2.2009, sp. zn. 29Cb/122/2008; z 27.2.2009, sp. zn. 29Cb/123/2008; z 27.2.2009, sp. zn. 29Cb/126/2008; z 27.2.2009, sp. zn. 29Cb/150/2008; z 28.8.2009, sp. zn. 29Cb/186/2008; z 26.2.2009, sp. zn. 29Cb/44/2008; z 26.2.2009, sp. zn. 29Cb/46/2008; z 26.2.2009, sp. zn. 29Cb/49/2008; z 26.2.2009, sp. zn. 29Cb/65/2008; z 31.3.2009, sp. zn. 29Cb/199/2006; z 15.1.2010, sp. zn. 29Cb/118/2009; z 14.1.2011, sp. zn. 29Cb/213/2010; z 14.1.2011, sp. zn. 29Cb/214/2010; a z 18.2.2011, sp. zn. 29Cb/140/2010.

K tomu treba poznamenať dve veci. Po prvé, nenariadiť pojednávanie v týchto veciach súdu umožňovalo, vzhľadom na to, že išlo len o drobné spory, aj ustanovenie § 115a ods. 2 Občianskeho súdneho poriadku, ktoré napokon paralelne v odôvodnení sudca aj odcitoval (tento prípad by sme teda nazvali "paralelná aplikácia", hoci požiadavka nadradenosti únioného práva to *eo ipso* vylučuje). Po druhé, sudcom citované a aplikované nariadenie sa *ratione materiae* nevzťahovalo na vec ním riešenú. Toto nariadenie v čl. 2 ods. 1 vymedzuje svoju vecnú pôsobnosť, okrem iného, na cezhraničné spory.[31] V tomto postupe môžeme vidieť snahu vniesť do veci "trendy" únioný rozmer a podporiť ním záver, ktorý už i tak vyplýva z vnútroštátneho práva. Domnievame sa, že postup by mal byť (v prípade, že sa súd "vecne trafí" do vecného záberu únioného aktu) s ohľadom na nadradenosť únioného práva azda opačný, ak vôbec.

Okresný súd Košice II aplikoval v šiestich prípadoch,[32] v ktorých išlo o spory zo spotrebiteľských zmlúv, ustanovenie čl. 16 ods. 2 nariadenia č. 44/2001, podľa ktorého „druhý účastník zmluvy môže žalovať spotrebiteľa len na súdoch členského štátu, v ktorom má spotrebiteľ bydlisko“. Vo všetkých týchto prípadoch mali žalovaní sídlo v územnom obvode Okresného súdu Košice II a preto súd implicitne vyslovil svoju právomoc. V tomto prípade išlo o bezproblémovú aplikáciu práva EÚ s ohľadom na nadradenosť nariadení EÚ (len ako poznámku si dovoľujeme uviesť, že ani v jednom prípade nevyvstala otázka výkladu pojmu "bydlisko", t. j. či sa tým rozumie bydlisko *de facto* alebo *de iure*).

Bezproblémová aplikácia bola aj v desiatkach vecí rozhodnutých Okresným súdom Žilina v rámci rozhodovania o začatí konkurzného konania a pri vyhlasovaní konkurzu.[33] Vzhľadom na množstvo vecí uvedieme len jeden príklad. Súd spolu s vyhlásením konkurzu uložil správcovi povinnosť bez zbytočného odkladu informovať známych veriteľov dlžníka, ktorí majú zvyčajné miesto pobytu, trvalé bydlisko alebo registrované sídlo v iných členských štátoch Európskej únie ako v Slovenskej republike, spôsobom v zmysle čl. 40 Nariadenia Rady (ES) č. 1346/2000 zo dňa 29. mája 2000 o konkurznom konaní. Súd teda v danej veci aplikoval priamo citované nariadenie, ku ktorému

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[31] Podľa čl. 2 ods. 1 nariadenia Európskeho parlamentu a Rady (ES) č. 861/2007 z 11. júla 2007, ktorým sa ustanovuje Európske konanie vo veciach s nízkou hodnotou sporu "*toto nariadenie sa uplatňuje v občianskych a obchodných veciach pri cezhraničných sporoch …*".

[32] Rozsudky z sp. zn. 14C/150/2008, 4.12.2009; z 1.7.2009, sp. zn. 14C/151/2008, 1.7.2009; z 7.2.2011, sp. zn. 29C/118/2010; z 31.1.2011, sp. zn. 29C 36/2010; z 17.2.2011, sp. zn. 31C 121/2010; a z 9.3.2011, sp. zn. 38Cb/120/2005.

[33] Keďže ide o početné množstvo rozhodnutí ako príklad uvádzame uznesenie Okresného súdu Žilina z 8.12.2008, sp. zn. 1K/11/2008.

súčasne v odôvodnení dodal, že "*má v Slovenskej republike priame účinky v zmysle čl. 249 Zmluvy o založení Európskeho spoločenstva*".

5. APLIKÁCIA SMERNÍC

5.1 PRIAMY ÚČINOK

Priamym účinkom sa rozumie spôsobilosť úniovej normy byť priamo (bezprostredne) aplikovaná na daný prípad vnútroštátnym orgánom aplikácie práva.[34] To závisí od viacerých okolností a určitá norma za nejakých skutkových okolností priamy účinok mať môže a za iných mať nemusí (všetko závisí od konkrétneho skutkového a právneho kontextu sporu).[35] Pokúsime sa uviesť niekoľko rozhodnutí, kde možno badať snahu uplatniť priamy účinok smerníc.

Napríklad vo výroku rozsudku sudkyňa Okresného súdu Košice I Magdaléna Korčáková určila, že "*zmluvná podmienka, ktorej obsahom je oprávnenie dodávateľa uplatniť si zmluvnú pokutu za oneskorené zaplatenie splátky je neprijateľnou zmluvnou podmienkou*".[36] Z hľadiska práva EÚ zdôvodnila svoj záver tým, že smernica (EHS) č. 93/13 o nekalých podmienkach v spotrebiteľských zmluvách (ďalej len "smernica č. 93/13") je prebratá do právneho poriadku Slovenskej republiky, pričom podľa ustanovenia čl. 6 ods. 1 tejto smernice

"členské štáty zabezpečia, aby nekalé podmienky použité v zmluvách uzatvorených so spotrebiteľom zo strany predajcu alebo dodávateľa podľa ich vnútroštátneho práva neboli záväzné pre spotrebiteľa, aby zmluva bola podľa týchto podmienok naďalej záväzná pre strany, ak je jej ďalšia existencia možná bez nekalých podmienok".

Sudkyňa použila odkaz na smernicu len ako podporný argument pre svoje závery, ktoré boli primárne založené na vnútroštátnom práve. Samotný odkaz na smernicu by sa sám o sebe javil ako nedostatočný.

V dvoch veciach sa Okresný súd Košice II zaoberal aplikáciou smerníc v súvislosti s ochranou spotrebiteľov. Sudkyňa Viera Obermanová posúdila ustanovenie všeobecných zmluvných podmienok dodávateľa služby stanovujúce výšku úroku z omeškania 0,5 % denne za neplatné, pre jeho neprijateľnosť, t. j. pre rozpor s § 53 ods. 5 a § 39 Občianskeho zákonníka. Skonštatoval, že na túto okolnosť musel prihliadnuť aj bez návrhu a uviedol, že výška úrokov z omeškania

„prekračuje maximálnu sadzbu pripustenú zákonom a na túto okolnosť bolo treba prihliadať zo strany súdu aj bez návrhu dlžníka -

[34] Bobek, 2011, s. 40.

[35] Bobek, 2011, s. 50.

[36] Rozsudok Okresného súdu Košice I z 30.9.2010, sp. zn. 27Cb/197/2009.

spotrebiteľa a poskytnúť mu ochranu podľa noriem spotrebiteľského práva v širšom slova zmysle (Smernica Rady 93/13/EHS z 5.4.1993, vrátane OZ)“.[37]

Odkaz na citovanú smernicu č. 93/13 ale bližšie súd nekonkretizoval ani bližšie nerozvádzal. V rozhodovacej činnosti Okresného súdu Rožňava sa do 30. marca 2011 vyskytuje 5 rozhodnutí,[38] ktoré majú relevanciu vo vzťahu k aplikácii práva EÚ, pričom všetky sa týkali spotrebiteľského *acquis* a aplikácie smerníc z tejto oblasti. V týchto spotrebiteľských sporoch aplikoval súd ustanovenia smernice č. 93/13 (konkrétne čl. 3 ods. 1 a 2) a v odôvodnení zhodnotil smernice ako „interpretačné pravidlo“ a aplikáciu smerníc ako potrebnú vždy, ak bola zmluva spísaná vopred a spotrebiteľ nemohol mať žiadny vplyv alebo dosah na obsah jednotlivých ustanovení zmluvy.[39] Potrebu "aplikácie smerníc" súd bližšie nezdôvodnil so zreteľom na to, že v horizontálnych vzťahoch smernice nemajú priamy účinok.

5.2 NEPRIAMY ÚČINOK

Nepriamym účinkom únioného práva sa rozumie povinnosť členských štátov EÚ vykladať vnútroštátne právo v súlade s úniovým právom.[40] Táto požiadavka je logickým vyústením nadradenosti únioných právnych noriem nad právnymi normami majúcimi pôvod v normotvorbe vnútroštátnych orgánov. Tento systémový atribút práva EÚ sa aplikuje vždy, bez ohľadu na to, či úniová právna norma má priamy účinok alebo nie.[41] Náznaky nepriameho účinku sa prvýkrát vyskytli v rozsudku Súdneho dvora vo veci Mazzalai:

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[37] Rozsudok Okresného súdu Košice II z 9.3.2010, sp. zn. 15C/144/2010.

[38] Ide o rozsudky z 30.3.2011, sp. zn. 10C/42/2011; z 24.5.2010, sp. zn. 10Cb/1/2010; z 10.2.2009, sp. zn. 4C/126/2009; z 11.3.2010, sp. zn. 4C/31/2010; a z 22.4.2010, sp. zn. 4C/52/2010.

[39] V priamej reči: "*podľa čl. 3 ods. 1 smernice Rady č. 93/13/EHS smernicu je nevyhnutné využívať ako interpretačné pravidlo k ustanoveniam právneho poriadku, upravujúcich režim spotrebiteľských zmlúv. Toto stanovisko je podporené aj rozsudkom Európskeho súdneho dvora z 27.06.2000 v spojených prípadoch C-240/98, C-241/98, C-242/98, C-243/98 a C-244/98, O. G. E. S. proti R. M. Q. U. S. E. S. proti J. M. S. A. P., J. L. C. B., M. B. a E. V. F., v ktorom sa konštatuje, že účinná ochrana spotrebiteľa sa môže dosiahnuť, len ak národný súd prehlási, že má právomoc zhodnotiť neprimerané podmienky z úradnej povinnosti. ... Smernicu je potrebné aplikovať tiež vtedy, keď bola zmluva spísaná vopred a povinný (ako spotrebiteľ) nemohol mať žiadny vplyv alebo dosah na obsah jednotlivých ustanovení zmluvy*".

[40] Bobek, 2011, s. 145.

[41] Porovnaj Kaczorowska, 2010, s. 320.

"v zmysle čl. 177 Súdny dvor má právomoc vyjadriť svoj predbežný názor týkajúci sa interpretácie aktov inštitúcií Spoločenstva, vrátane otázky, či sú priamo uplatniteľné".[42]

Explicitná zmienka o nepriamom účinku sa v rozhodnutiach okresných a krajských súdoch vyskytuje len zriedkavo.[43] Do úvahy prichádza, že nepriamy účinok je používaný súdmi implicitne alebo vôbec. Prikláňame sa skôr k prvej variante.

Napríklad sudca Okresného súdu Košice I Robert Zsiga v troch rozsudkoch uviedol, že smernicu č. 93/13

"je nevyhnutné využívať ako interpretačné pravidlo k ustanoveniam právneho poriadku, upravujúcich režim spotrebiteľských zmlúv. Toto stanovisko je podporené aj rozsudkom Európskeho súdneho dvora z 27.06.2000 v spojených prípadoch C-240/98, C-241/98, C-242/98, C-243/98 a C-244/98, O. G. E. S. proti R. M. Q. U. S. E. S. proti J. M. S. A. P., J. L. C. B., M. B. a E. V. F., v ktorom sa konštatuje, že účinná ochrana spotrebiteľa sa môže dosiahnuť, len ak národný súd prehlási, že má právomoc zhodnotiť neprimerané podmienky z úradnej povinnosti. ... Smernicu je potrebné aplikovať tiež vtedy, keď bola zmluva spísaná vopred a povinný (ako spotrebiteľ) nemohol mať žiadny vplyv alebo dosah na obsah jednotlivých ustanovení zmluvy".[44]

Spomínané "interpretačné pravidlo" chápeme synonymicky v tom zmysle, že je to označenie povinnosti súdu vykonať eurokonformný výklad a priznať nepriamy účinok. Potiaľ možno súhlasiť, že smernica je "interpretačným pravidlom", t. j. ide o aplikáciu smernice v širšom zmysle slova. Pokiaľ však sudca myslel aplikáciu smerníc v užšom slova zmysle na spôsob priameho účinku, mal by sa prirodzene vyporiadať aj s otázkou existencie priameho účinku smernice (v odôvodnení rozhodnutia nebolo napríklad uvedené ani to, o ktoré ustanovenie ide), prípadne s otázkami absencie priameho účinku smerníc v horizontálnych vzťahoch (ako to bolo v tomto prípade).

Napríklad Okresný súd Košice II v spore zo spotrebiteľskej zmluvy v odôvodnení rozhodnutia sa explicitne zmienil o nepriamom účinku smerníc, avšak bez bližšej konkretizácie. Išlo o vec,[45] v ktorej súd v súvislosti s priznaním úrokov z omeškania vo výške 0,08 % denne z

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[42] Bod 7 rozsudku Súdneho dvora z 20. mája 1976 vo veci 111/75, Impresa Costruzioni comm. Quirino Mazzalai v. Ferrovia del Renon, European Court reports 1976, p. 00657.

[43] Napríklad v databáze JASPI sa medzi 1.5.2004 do 30.6.2011 uvádza spojenie "nepriamy účinok" pre všetky slovenské súdy za obdobie len celkovo v 19 rozhodnutiach.

[44] Rozsudky Okresného súdu Košice I z 1.3.2011, sp. zn. 26Cb/219/2009; zo 7.12.2010, sp. zn. 26Cb/225/2009 a z 8.3.2011, sp. zn. 26Cb/254/2009.

[45] Rozsudok Okresného súdu Košice II z 10.11.2010, sp. zn. 41C/78/2010.

dlžnej sumy skúmal primeranosť zmluvného dojednania v časti dohody o sadzbe úrokov z omeškania s ohľadom na jeho súlad s ustanovením § 53 Občianskeho zákonníka a nepriamo s ohľadom na prílohu smernice č. 93/13. Skonštatoval, že

"napriek tomu, že Obchodný zákonník, ktorý je vzhľadom na predmet záväzku potrebné aplikovať na daný skutkový stav, pripúšťa možnosť účastníkov dojednať úrok z omeškania, je potrebné skúmať, či forma zabezpečenia riadneho a včasného splnenia peňažného záväzku s ohľadom na zásadu zmluvnej spravodlivosti, zodpovedá požiadavke primeranosti s ohľadom na obsah ust. § 53 Občianskeho zákonníka, nepriamy účinok smernice č. 93/13/ES o neprimeraných podmienkach v spotrebiteľských zmluvách".[46]

Následne posúdil výšku dojednaného úroku v sadzbe 0,08 % denne z dlžnej sumy ako neprijateľnú a preto neplatnú. Vytknúť možno už len to, že odkaz na smernicu nebol konkrétnejší a to sa týka aj vnútroštátneho právneho predpisu, ktorého výklad mal byť preklenutý nepriamym účinkom.

6. ZÁVER

Z uvedených bodov si dovoľujeme urobiť nasledovné závery o prístupe okresných a krajských súdov k aplikácii únioného práva:

okresné súdy a krajské súdy aplikujú právo EÚ v relatívne početnom množstve, pričom možno za najpočetnejšiu agendu označiť (i) spory zo spotrebiteľských zmlúv (v týchto veciach sa z hľadiska druhu právneho aktu pertraktujú spravidla smernice) a (ii) spory s cudzím prvkom (v týchto veciach sa najviac pertraktujú spravidla nariadenia), ak sa cudzí prvok týka iného členského štátu EÚ,[47]

prístup k aplikácii práva EÚ sa nám javí závislý od konkrétnych osôb sudcov, ktoré únioné právo aplikujú: (i) väčšinou ide na konkrétnych sudcov o tých istých sudcov, čo (ii) potvrdzujú aj často úplne totožné formulácie v odôvodneniach súdnych rozhodnutí, pričom (iii) zrejme dochádza k "distribúcií formulácií" týkajúcich sa aplikácie únioného práva v odôvodneniach rozhodnutí medzi jednotlivými súdmi (napríklad jedna a tá istá konkrétna formulácia sa objavuje často aj v odôvodneniach súdov rôznych súdov), čo môže byť na úkor špecifík jednotlivých skutkových okolností každej jednej veci,

prístup okresných a krajských súdov sa nám v prípadoch, kedy sa rozhodnú aplikovať únioné právo, javí ako povrchný. Máloktoré

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[46] Rozsudok Okresného súdu Košice II z 10.11.2010, sp. zn. 41C/78/2010.

[47] Rozhodnutia v agende správneho a trestného súdnictva neboli predmetom tohto príspevku, pretože to znemožňuje existujúca databáza rozhodnutí JASPI (neobsahuje rozhodnutia krajských súdov vo veciach správneho a trestného súdnictva).

rozhodnutie umožňuje bližšie pochopiť, či súd použil pri smerniciach priamy účinok alebo nepriamy účinok, pričom v prípade priameho účinku nerozlišujú horizontálny/vertikálny účinok. Výnimočne súdy uvedú označenie aplikačnej povinnosti explicitne (t. j. či išlo o priamy alebo nepriamy účinok). Rovnako v prípade priamej použiteľnosti sa neobjavujú otázky týkajúce sa problematiky výkladu úniových aktov.

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INTERPRETATION OF INDIRECT DISCRIMINATION AFTER THE ENACTMENT OF THE CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION

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Abstract in original language

Článek se zabývá otázkou, zda a jak se změnila interpretace zákazu nepřímé diskriminace ve smyslu českého antidiskriminačního zákona po přijetí Lisabonské smlouvy, jejíž součástí je Listiny základních práv Evropské unie. V první části článku je vymezena nepřímá diskriminace, ve druhé části článku jsou rozebírána relevantní ustanovení Listiny EU s ohledem na judikaturu ESD.

Key words in original language

interpretace, nepřímá diskriminace, Charta základních práv Evropské unie, proporcionalita, české soudy, Lisabonská smlouva

Abstract

The article answers the question whether and how the interpretation of prohibition of indirect discrimination, contained in the Czech Anti Discrimination Act, has been changed after the ratification of Lisbon Treaty that includes Charter of Fundamental Rights of the European Union. First part of this article describes the concept of indirect discrimination, the second part analyses the relevant provisions of the European Union`s Charter with regard to the judgments of the ECJ.

Key words

interpretation; indirect discrimination; Charter of the human rights of the European union; proportionality; Czech courts; Lisbon treaty

1. INTRODUCTION

In This article represents part of my work about the interpretation of the indirect discrimination in the Czech republic. The question that has to be answered in this article is simple: how – if ever – the enacment of the Charter of Fundamental Rights of the European Union influenced the interpretation of the indirect discrimination by the Czech courts. First of all, I should define the term indirect discrimination, used in the Anti Discrimination Act, after that, I will describe the relevant provisions of the Charter of Fundamental Rights of the European Union ("European Union`s Charter" hereinafter).

2. DEFINITION OF INDIRECT DISCRIMINATION

The prohibition of the so called indirect discrimination is contained in the Czech Antidiscrimination Act number 198/2009 collection on equal treatment and on legal means of protection against discrimination. The Anti Discrimination Act itself is a result of the

more than five years long implementation of the European Union directives, namely the Council Directive number 2000/78/EC (establishing a general framework for equal treatment in employment and occupation) and the Directive number 2006/54/EC (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation). The Czech Anti Discrimination Act came into force on 1st of September 2009. Two months later the Lisbon treaty (including the Charter of Fundamental Rights of the European Union) came into force as well.

Despite the fact that the Anti Discrimination Act entered into force on 1st of September 2009, more than two years ago, only very few cases of discrimination have been decided before the Czech courts yet. I did a little research: I asked all courts in the Czech republic to tell me the numbers of judgments in which the discrimination under the provisions of the Anti Discrimination Act has been asserted by one of the parties. I also asked the courts to tell me numbers of pending legal proceedings in which one of the parties asserted that he or she has been discriminated. As for the results, all the Czech courts have passed only 4 judgments in so far and started 11 legal proceedings that are currently pending on the courts. Another 2 legal proceedings have been settled out of court.1 Due to these facts my article about the interpretation of the indirect discrimination will be much more theoretical than practical.

2.1 PRIMARY DEFINITION OF INDIRECT DISCRIMINATION

We may recognise two definitions of indirect discrimination, contained both in the EU directives and the Anti Discrimination Act.

According to the general definition contained in section 3 paragraph 1 of the Anti Discrimination Act, the indirect discrimination occurs where an apparently (prima facie) neutral provision, criterion or practice would put one person2 at a particular disadvantage compared

[1] It should be noted here that the electronic database of decisions used by Czech courts does not allow to search for the cases of (direct or indirect) discrimination so many of the courts had to ask the judges whether they had been decided any cases of discrimination under the Czech Anti Discrimination Act or not. So the results of my research are not flawless.

[2] Despite the fact that the Czech legislators used the word „one person“ instead of "persons", the Czech courts will have to compare two social groups not an individual (possible victim of discrimination) with the social group. This conclusion is based on the decisions of the European Court of Justice in which two social groups have been compared, usually by statistical evidence of the disproportionate effect of prima facie neutral provision, criterion or practice on certain social group. See, for example, decision of the European Court of Justice from the 27th June 1990, C-33/89, Maria Kowalska v Freie und Hansestadt Hamburg; decision of the European Court of Justice from the 27th October 1993, C-127/92, Dr. Pamela Mary Enderby v Frenchay Health

with other persons unless that provision, criterion or practice is objectively justified by legitimate aim and the means of achieving that aim are appropriate and necessary.3 This means that the Czech courts should carry out the test of proportionality to decide whether the unequal (or disadvantageous) treatment can be considered as an indirect discrimination or not.4

The Anti Discrimination Act provides protection only to the particular social groups defined on one or more characteristics that distinguish them from the other groups and may serve as grounds for indirect discrimination. Such characteristics (or discrimination grounds) are enumerated in the section 2 paragraph 3 of the Act.5 It should be noted here that the Czech legislators went beyond the EU directives by adding "nationality" as one of the discrimination grounds. However, the legislators failed to add this discrimination ground on the list of discrimination grounds used by the section 133a of the Civil procedure code which means that in the cases of indirect discrimination on the ground of nationality, the court would not be able to shift the burden of proof from the victim of indirect discrimination to the discriminator.6 In the case of indirect

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Authority and Secretary of State for Health; decision of the European Court of Justice from the 23th October 2003, C-4/02 and C-5/02, Hilde Schönheit v. Stadt Frankfurt am Main a Silvia Becker v Land Hessen.

[3] The section 3 paragraph 1 of the Anti Discrimination Act: "Indirect discrimination shall be deemend to be such conduct or omission, when on the ground of any apparently neutral provision, criterion or practice one person is disadvantaged in comparison with other, on the grounds given in Section 2 paragraph 3 of the Act. It shall not be deemed indirect discrimination when this provision, criterion or practice is objectively justified by the legitimate aim and means of achieving that aim are appropriate and necessary."

[4] Boučková, P. et al: Antidiskriminační zákon. Komentář. Prague: C.H.Beck, 2010, p. 156.

[5] The section 2 paragraph 3 of the Anti Discrimination Act prohibits indirect discrimination on a ground of racial or ethnic origin, nationality, sex (including pregnancy, maternity or paternity nad sexual identification), sexual orientation, age, disability, religion, belief or opinions.

[6] The section 133a of the Civil procedure code (Act number 99/1963 Coll.) states that: "If the complainant claims facts before the court from which it can be derived that there has been direct or indirect discrimination by the defendant:

a) based on sex, racial or ethnic origin, religion, belief, opinions, disability, age or sexual orientation in the area of working activities or other paid employment including access thereto, occupation, business or other self-employment including access thereto, membership of employees' or employers' associations and membership of, and involvement in, professional chambers

b) based on racial or ethnic origin in the provision of healthcare and social care, in access to employment and vocational training, access to public

discrimination based on the other grounds than contained in the Anti Discrimination Act the victim should seek legal protection under the relevant provisions of the Czech civil code.7

2.2 SECONDARY DEFINITION OF INDIRECT DISCRIMINATION

The second definition of indirect discrimination, contained in the section 3 paragraph 2 of the Anti Discrimination Act8 is limited to the disabled persons only and may occur in a case that the employer or the provider of public services refuses or fails to take "appropriate measures" to enable a person with a disability to have access to certain employment or use certain services available to the public. The employer or provider are obliged to take appropriate measures unless such measures represent an unreasonable burden to them. The Czech legislators went beyond the directive 2000/78/EC that prohibited such form of indirect discrimination only in the area of employment and working conditions. However, it is difficult to understand why the Czech legislators limited the obligation to take appropriate measures to the public services only. Selling goods publicly as well as providing

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contracts, access to housing, membership of special-interest associations and in the sale of goods in a shop or supply of services, or

c) based on sex in access to goods and services, it shall be the defendant's responsibility to demonstrate that the principle of equal treatment has not been violated."

[7] Section 13 of the Civil code (Act number 40/1964 Coll.):

1. The individual shall be entitled in particular to demand that unlawful violation of his or her personhood be abandoned, that consequences of this violation be removed and that an adequate satisfaction be given to him or her.

2. If the satisfaction under paragraph 1 appears insufficient due to the fact that the individual's dignity or honour has been considerably reduced, the individual shall also have a right to a pecuniary satisfaction of the immaterial detriment.

3. The amount of the satisfaction under paragraph 2 shall be specified by the court with regard to intensity and circumstances of the arisen infringment.

[8] Section 3 paragraph 2 of the Anti Discrimination Act: "Indirect discrimination on grounds of disability shall also mean refusal or failure to take appropriate measures to enable a person with a disability to have access to a certain employment, working activities, career progression or other promotion, to use employment advice, or participate in other vocational training, or to use services available to the public, unless such a measure represents an unreasonable burden."

of education or health care do not fall within the ambit of section 3 paragraph 2 of the Anti Discrimination Act.9

Despite the using of vague term "appropriate measures", the Czech courts may resolve cases of indirect discrimination of disabled persons relatively easy because the section 3 paragraph 3 of the Anti Discrimination Act provides four well-defined criterias to determine whether the appropriate measure demanded by the disabled person represents an unreasonable burden or not.10 Section 3 paragraph 4 of the Act contains the same request as the article 5 of the directive 2000/78/EC so the measures required by the Czech legal regulations do not represent an "unreasonable burden" to the employer or provider of public services and have to be considered as appropriate measures automaticaly.11

It is obvious from the two definitions of indirect discrimination that the prohibition of indirect discrimination must be interpreted

accordingly to the relative conception of equality (because not every case of different treatment can be considered as a discrimination under the Anti Discrimination Act)12 and

accordingly to the material equality (because under the formal equality where the same provision is used to deal with the de iure same social groups there can be no discrimination).

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[9] Boučková, P. et al: Antidiskriminační zákon. Komentář. Prague: C.H.Beck, 2010, p. 167.

[10] Section 3 paragraph 3 of the Anti Discrimination Act: "In determining whether any specific measure represents an unreasonable burden, regard shall be given to: the degree of benefit which the person with a disability has from the implementation of the measure; to the financial tenability of the measure for the natural or legal person intended to implement the measure; to the availability of financial and other assistance for the implementation of the measure and to the capacity of substitute measures to satisfy the needs of the person with the disability."

[11] Section 3 paragraph 4 of the Anti Discrimination Act: "A measure which a natural or legal person is obliged to take in accordance with special provisions shall not be considered to be an unreasonable burden."

[12] According to the judgments of the Czech constitutional court the "right to the equal treatment" must be interpreted accordingly with the relative conception of equality. The absolute conception of equality would lead to severe social problems. See, for example, judgment of the Czech constitutional court from the 7th June 1995, Pl. ÚS 4/95; judgment of the Czech constitutional court from the 11th June 2003, Pl. ÚS 11/02; judgement of the Czech constitutional court from the 16th October 2007, Pl. ÚS 53/04; judgment of the Czech constitutional court from the 22nd January 2008, Pl. ÚS 54/05.

It should be also noted that the prohibition of indirect discrimination aims at achieving the equality of opportunities (because if it aims at achieving the equality of results then it will be unnecessary for the victim of indirect discrimination to prove the disadvantagous effect of the apparently neutral provision. Contrary, it should be sufficient enought to prove the existence of disproportionality between two social groups). The main purpose of the prohibition of indirect discrimination is to guarantee equality of opportunities as it is clear from the second definition of indirect discrimination of disabled person. For example, the employer does not have a duty to choose a disabled person instead of normal one. The employer has a duty to provide only the access to the employment for the disabled person. Thus the overall purpose of the prohibition of inidrect discrimination is to provide equal opportunities.

The Czech legislators made almost verbatim copy of the European Union directives,13 so the definitions of the indirect discrimination in the Anti Discrimination Act are basically the same as the definitions used in the EU directives, including the vague terms that are explained in the decisions of the European Court of Justice. The interpretation of the European Court of Justice has to be accepted by the Czech courts deciding the cases of possible indirect discrimination, including the interpretation of the related terms such as reversed burden of proof or appropriate measures or solution of practical problems such as admissibility of statistics as a proof of evidence. The Czech courts must interpret the prohibition of indirect discrimination, contained in the Anti Discrimination Act, accordingly to the law of the European Union. That is why it is important to consider the effect of the Charter of Fundamental Rights of the European Union on the interpretation of the indirect discrimination.

3. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The main emphasis of this article is focused on the fact that the Charter of Fundamental Rights of the European Union has become legally binding after the ratification of the Lisbon Treaty. Because of the Article 6 of the Treaty of the European Union the Charter is on the same level as the Founding Treaties of the European Union. This solution is quite similar to the position of the Czech Charter of fundamental human rights and freedoms, which is on the same level as

[13] Namely the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Council Directive 200/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services and the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunitites and equal treatment of men and women in matters of employment and occupation.

the Constitution (according to the Article 112 paragraph 1 of the Constitution), but it is not a part of it.14

Despite the fact that the Czech president Vaclav Klaus managed to negotiate an opt-out from the Lisbon treaty, which is sometimes mistaken as an exemption from the whole Charter, the European Union`s Charter is definitely legally binding for the Czech republic and its public bodies (including Czech courts). We may also presume that the Charter will remain legally binding in the near future.15 The reason for this assumption is that the content of the Czech opt-out should be the same as the content of the Protocol number 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. We may conclude that the fundamental rights, contained in the European Union`s Charter, cannot be interpreted in a way which may extend the ability of the European Court of Justice to find the legal regulations of the Czech republic, are inconsistent with the European Union`s Charter.16 Also, accordingly to the Article 2 of the Protocol number 30, where the European Union`s Charter provision refers to national law, it may not be interpreted extensively or in a way that goes beyond the interpretation of the Czech legal regulations.17

The Czech opt-out from the European Union`s Charter does not mean that the Charter cannot be applied by the Czech courts. Neither the Czech nor Polish nor British opt-out represent the complete exclusion from the European Union`s Charter. The opt-out only prevents the courts, namely the European Court of Justice, from extensive interpretation of rights contained in the Charter, namely the rights contained in the Title IV of the Charter.18 Such conclusion can be

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[14] According to the judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, the European Union`s Charter is undoubtly part of the founding Treaties of the European Union.

[15] Pitrová, L. „České záruky" sjednané k Lisabonské smlouvě. Mezinárodní politika [online]. Prague: Ministry of Foreign Affairs of the Czech Republic, released 17th December 2010. Available from:<http://www.mzv.cz/jnp/cz/o_ministerstvu/archivy/z_medii/ceske_zaruky_sjednane_k_lisabonske.html>.

[16] Right to the equality before the law and right not to be discriminated are contained in the Title III of the European Union`s Charter.

[17] Such conclusion is based on the teleological interpretation of the Protocol number 30. The grammatical interpretation of the Article 1 paragraph 2 of the Protocol number 30 is problematic because the wording of this provision indicates that the limitation contained in this provision may be relevant not only for the Title VI of the European Union`s Charter, but also for the other Titles of the Charter.

[18] Bončková, H. „Výjimka" z Listiny základních práv EU: možné interpretace a dopady. *Dny práva – 2010 – Days of Law* [online]. Brno: Masaryk University, 2010, p. 8. Available from:

supported by the decision made by the Czech constitutional court that the Charter does not extent the field of action of the European Union and does not apply directly in the areas of legal regulation in which the Czech republic did not transfer its powers to the European Union. The Charter has two functions: to protect the individual`s rights and to set up limits on the exercise of powers both of the European Union and national authorities.19

4. RELEVANT ARTICLES OF THE CHARTER

Let us move back to the European Union`s Charter and its application related to the prohibition of indirect discrimination. Only several articles are relevant for the interpretation of indirect discrimination, namely articles number 1, 20, 21 and articles number 51 and 52.

4.1 ARTICLE 1

The Article number 1 declares that the: "human dignity is inviolable. It must be respected and protected." According to the Explanations relating to the Charter of Fundamental Rights („Explanations“ hereinafter): "the dignity of human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights." The human dignity is defined by the European Union`s Charter as a basic human right. This is a considerable advancement in the understanding of the human dignity as compared to the United Nation`s Universal Declaration of Human Rights whose Article 1 states that: "all human beings are born free and equal in dignity and rights." The advancement lies in a fact that the the fundamental rights in the European Union are not aimed at the defending one person`s rights only. The emphasis on the human dignity as a basic human right can be considered as a transition from the passive defence of human dignity to its active enforcement in the form of creating the conditions needed to preserve the human dignity in practice. The Universal Declaration of Human Rights declares only formal conditions of the human dignity in the meaning that no human being can be treated as an object of the conduct of another person. The European Union`s Charter declares that the human dignity must be considered as a basic element for exercise all other rights, including the right to be treated equally and the right not to be discriminated. This means that the Article number 1 of the Charter demands providing substantive conditions to exert the basic human right to dignity.

We may conclude that the Article number 1 provides the basis for the interpretation of the other basic human rights contained in the Charter. The Czech courts should emphasize the human dignity especially in

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<http://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/Bonckova_Helena_(4511).pdf >.

[19] Judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, pages 38 and 39.

cases where the courts may presume that there has been indirect discrimination on a ground of age (Article 25 of the Charter) or in cases where the courts may presume that the working conditions of workers (Article 31 of the Charter) or the social security assistance, including housing assistence (Article 34 of the Charter) have a discriminatory effect on some social group. Also the Czech courts should interpret the Article 1 of the Czech Charter of fundamental rights and freedoms in areas (or policies) in which the European Union exercises its exclusive or shared competences accordingly to the Article 1 of the European Union`s Charter.

4.2 ARTICLE 20

The Article 20 of the Charter simply states that: "everyone is equal before the law". Unlike some other international treaties dealing with the protection of basic human rights (i. e. European Convention on Human Rights) the equality is not limited to the other rights contained in the Charter. Someone may conclude from this that the equality before the law under the European Union`s Charter is independent, non-accessory basic human right. However, such conclusion seems wrong.

According to the Explanations the Article 20 corresponds to a general principle of equality before the law that is included in constitutions of all member states and that "...has also been recognised by the European Court of Justice as a basic principle of Community law".20 Thus the Article 20 of the Charter does not contain the "law" but does contain only the "principle", with all the consequences described in the Article 52 paragraph 5 of the Explanations. The right conclusion is that the equality before the law is not an independent, non-accessory basic human right. On the other hand, such principle is still essential for resolving the cases of prima facie indirect discrimination.

For the Czech courts, including the Czech constitutional court, the interpretation of the Article 1 of the Charter of fundamental rights and freedoms, containing the principle of equality before the law, remains the same as it was before the Lisbon treaty has been ratified. According to the Czech constitutional court: "...principle of equality before the law is the essence of the Czech constitutional law. The principle is the fundamental both for the interpretation and the aplication of the law and it must be preserved with caution. This basic postulate is supplemented by the Article 3 paragraph 1 of the Charter of fundamental rights and freedoms...In the form of discriminatory or

[20] See, for example, judgment of the European Court of Justice from the 13th November 1984, case 283/83, A. Racke v Hauptzollamt Mainz; judgment of the European Court of Justice from the 17th April 1997, case 15/95, EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux and judgment of the European Court of Justice from the 13th April 2000, case 292/97, Kjell Karlsson and Others.

anti-discriminatory provisions respectivelly the principle of equality before the law is contained in many legal regulations."21

4.3 ARTICLE 21

The consequent Article 21 of the European Union`s Charter contains the general prohibition of all forms of discrimination. It is important to notice that the list of grounds upon which the discrimination should be based is demonstrative. Thus the Article 21 of the European Union`s Charter provides broader protection agains discrimination than the European Union`s Directives, prohibiting discrimination on specified grounds only (such as sex, race or disability). The protection against discrimination, provided by the Charter, is even broader than the protection provided by the Article 14 of the European Convention on Human Rights, which also prohibits discrimination.22 However, for the Czech courts this should have a little practical effect because of the limited scope of the Charter and also because of the Article 3 paragraph 1 of the Czech Charter of fundamental human rights and freedoms that basically contains the same list of "discriminatory" grounds as the Article 21 of the European Union`s Charter.

4.4 ARTICLES 51 AND 52

For the correct interpretation and aplication of the European Union`s Charter is necessary to evaluate its Articles number 51 and 52 in Title VII of the Charter (such evaluation is required in the Article 6 paragraph 1 of the Treaty on European Union).23 Article 51 defines the scope of the Charter. According to the Article 51 paragraph 1 the provisions of the Charter are addressed to the institutions and bodies of the European Union and to the member states only when they are implementing law of the European Union (i.e. European Union`s Directives). The term "implementation of the EU law" must be interpreted extensively in accordance with the principle of effectivity (effet utile).24 The application of the EU law by the member states,

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[21] Judgment of the Czech constitutional court from the 30th April 2009, II. ÚS 1609/08, pages 4 and 5.

[22] Article 14 of the European Convention on Human Rights declares that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[23] "The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

[24] The principle of effectivity has been defined in the judgments of the European Court of Justice, namely in the case 8/55 Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community; in the case 34/62, Bundesrepublik Deutschland v Commission or in the joint

implementation of the EU directives, including the application of the national law that has been adopted under authority of the European Union (which is the case of the Anti Discrimination Act) must be in accordance with the Charter. It is obvious that the Charter is mainly directed to the institutions of the European Union, not to the institutions of member states.25 We may conclude that the basic human rights contained in the Charter has quasi-accessory character. This means that the citizens of the member states cannot refer to them directly in any situation. They may refer to them only to the extent of European Union`s law. For example, where the Czech legislators went beyond the European Union`s law during the enactment of the Anti Dicrimination Act, the Charter could not be used.26

The most important interpretative article of the Charter is the Article number 52 that narrowly defines the scope and interpretation of the laws and principles, contained in the Charter. Article 52 paragraph 1 set several conditions that have to be fulfilled to limit the exercise of the rights and freedoms recognised by the Charter. For example, the right not to be discriminated indirectly can be limited only by law and only in the case that the essence of the right not to be discriminated is respected. Concurrently such limitation may be made only when it is necessary and when the limitation pursues either objectives of general interest, recognised by the European Union27 or the need to protect the rights and freedoms of others. From the wording of the Article 52 paragraph 1 is obvious that it contains the test of proportionality, that has been developped and used by the European Court of Justice.

According to the Article 52 paragraph 3 during the interpretation of basic human rights contained in the Charter it is necessary to take into account also the relevant provisions of the European Convention on Human Rights so far as they correspond to rights guarranteed by the

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cases C-6/90 and C-9/90, Andrea Francovich v Italy and Danila Bonifaci and others v Italy. See also Tichý, L. et al: Evropské právo. 4th edition. Prague: C.H.Beck, 2011, p. 239-240.

[25] However it does not mean that the Czech authorities does not have to use the European Union`s Charter. According to the extensive interpretation of the term "implementing" the Czech authorities must interpret the provisions of the Czech legal regulations accordingly to the law of the European Union. See Tichý, L. et al: Evropské právo. 4th edition. Prague: C.H.Beck, 2011, p. 138.

[26] It should be noted here that the Czech constitutional court reached the same conclusion in its judgment from the 26th November 2008, Pl. ÚS 19/08, page 38. The Czech constitutional court referred to the judgment of the European Court of Justice from the 13th April 2000, case C-292/97, Kjell Karlsson and others.

[27] According to the Explanations to the European Union`s Charter the "objectives of general interest" are contained in the articles 3 and 4 paragraph 1 of the Treaty on European Union and in the article 35 paragraph 3, article 36 and article 346 of the Treaty on the Functioning of the European Union.

Charter. This means that the judgments of the European Court of Human Rights must be taken into account as well.

Article 52 paragraph 5 discriminates between the laws and principles and sets up rules under which it is possible to refer to the principles. The Articles of the Charter that contain principles can be used for the interpretation purposes only. Such Articles did not contain basic human rights basically. However, from the wording of the Charter and the Explanations it is not always evident whether some Articles contain principles or laws or both (i. e. Art. 23, Art. 33 and Art. 34).

Finally, the Article 52 paragraph 4 states that which the Charter recognises basic human rights as they result from the constitutional traditions common to the member states, those rights shall be interpreted in harmony with those traditions. This provision of the Charter is problematic because that for the correct interpretation of the Charter would be necessary to establish what are those rights. The Explanations refers to the common constitutional traditions in the comments to the Art. 10, Art. 17 par. 1, Art. 20, Art. 37 and Art. 49 par. 3 of the Charter. Under the presumption that all the other provisions of the Charter must be interpreted without regards to the common constitutional traditions, the Czech courts have to consider such traditions during the interpretation of the right to be treated equally before the law (Article 20), but not during the interpretation of the right not to be discriminated (Article 21).

Such conclusion is wrong despite the fact that it seems logical. First of all, the right to be treated equally before the law and the right not to be discriminated are linked together in many constitutions of the member states. It is problematic to separate them in a way that we may conclude that the common constitutional tradition should be taken into account only during the interpretation of the former but not of the later. That is why the Czech courts should take into account the common constitutional traditions in both cases.28 As a supportive argument the Article 2 of the Treaty on the European Union contains the list of common principles (or social values) shared by all of the member states. The list contains inter alia human dignity, equality and non-discrimination.29

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[28] Such presumption may be supported by the judgment of the Czech constitutional court, declaring that: "...in the core of the European civilisation lies values common to all modern human cultures of the world. Such values are human freedom and human dignity; together they form a basis for the self determination of the human being." See judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, page 20.

[29] Article 2 of the Treaty on European Union: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Another problem is the possibility of „mechanical" interpretation of the Article 52 paragraph 4 of the Charter. If we accept that the prohibition of discrimination should be interpreted accordingly to the common constitutional traditions, it is necessary to answer following question: in how many constitutions of the member states the prohibition of discrimination must be guarranteed expressly to consider it as a common constitutional tradition? In all 27 member state`s constitutions? Or it is enought that the prohibition of discrimination is contained in majority of the member state`s constitutions? Or it is sufficient enought that constitutions of some member states expressly prohibit discrimination (which was the situation of the infamous Mangold v Helm case)?30

However, such question is misleading. To answer the question, the Czech courts would have to do a large-scale comparison of the constitutional law of all the member states. Such proceeding would be in accordance with the proceeding of the European Court of Justice. From its judgments we may conclude that the European Court of Justice compares constitutional law of all the member states although in its judgments the court refers to only some constitutions of the member states.31

On the other hand, it is important to notice that all the member states had either to implement the European Union`s law, including necessary changes in their constitutional system or to use the "euroconformal" interpretation of their legal regulations.32

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[30] See judgment of the European Court of Justice from the 22nd December 2005, C-144/04, Werner Mangold v Rüdiger Helm.

[31] See, for example, the judgment of the European Court of Justice from the 14th May 1974, case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission; judgment of the European Court of Justice from the 13th December 1979, case 44/79, Liselotte Hauer v Land Rheinland-Pfalz; judgment of the European Court of Justice from the 18th May 1982, case 155/79, AM & S Europe Limited v Commission.

[32] The Czech Constitutional Court enunciated that: "if there are several possible interpretations of the constitutional law, including the Charter of fundamental rights and freedoms, and if only some of them lead to the fulfillment of the commitment which the Czech republic undertake to fulfill in connection with its membership in the European Union, then it is necessary to choose such interpretation that enables the fulfillment of such commitment, not the interpretation that actually prevents to fulfill such commitment...if there are – under the domestic methodology – several possible interpretations of the Czech constitution, and if only some of them lead to the fulfillment of the commitment which the Czech republic undertake to fulfill in connection with its membership in the European Union, then it is unavoidable to choose an interpretation that support the implementation of the Article 1 paragraph 2 of the Czech constitution." Judgment of the Czech constitutional court from the 3rd May 2006, Pl. ÚS 66/04.

If the member states did not take such steps to make their legal regulations to be in accordance with the requirements of the European Union`s law, they would be held accountable (by the Commission or by the European Court of Justice) for the infringement of the commitments resulting from their membership in the European Union. In that case such state could not be considered as a de facto member state, at least in some area of legal regulation. We may presume that the constitutional traditions of the member states exist – at least in the areas in which the European Union exercises its powers. On the other hand even the euroconformal interpretation has its own limits – namely in the area of the so called "focus point of the constitution" as it is defined by the Czech (or German) constitutional court. Although the constitutional court admitted that it is obliged to use the principle of euroconformal interpretation of the law, such principle does not have a character of implied novelisation of the Czech constitution. The "focus point of the constitution" remained unchanged even after the ratification of the Lisbon treaty.33 The Czech constitutional court also declared that the European Union`s Charter is fully comparable to the Czech Charter of fundamental rights and freedoms as well as to the European Convention on Human Rights. Thus the European Union`s Charter is in accordance not only with the "focus point of the constitution" but also with all of the provisions of the Czech constitutional law.34

5. CONCLUSION

So, how the enacment of the Charter of Fundamental Rights of the European Union influenced the interpretation of the indirect discrimination by the Czech courts?

First of all, we must conclude that the Charter is legally binding document that the Czech courts could not ignore as it is on the same level as the Founding Treaties. The Charter is part of the primary EU law.

The Czech opt-out from the Charter only provides necessary affirmation to the Czech citizens that the courts, including the European Court of Justice, should not interpret basic human rights contained in the Charter extensively. The Czech opt-out is a political document only, not the source of the law. Even in the case that the opt-out will be adopted in the same form as the British or Polish opt-outs, the Czech courts should have to interpret the prohibition of indirect discrimination according to the relevant provisions of the Charter.

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[33] See judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, pages 21 and 22.

[34] Judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, pages 39.

The Charter is fully compatible with the Czech constitutional law, including the Czech Charter of fundamental rights and freedoms as it has been declared by the Czech constitutional court.

The scope of the Charter, defined in the Article 51, is limited. The Czech courts have to take the provisions of the Charter into account only when they will be implementing the EU law. Accordingly to the principle of effectivity (effet utile) the Czech courts will have to interpret the Anti Discrimination Act, including the Section 3, in accordance with the Charter, because of the fact that the whole Anti Discrimination Act can be considered as an implementation of the EU directives. Only in several cases where the Czech legislator went beyond the EU directives the Czech courts does not need to interpret the provisions accordingly to the Charter.

The Czech courts will have to interpret the provisions of the Anti Discrimination Act not only with regard to the principles and basic human rights contained in the Charter, but they will have to interpret such provisions accordingly with the decisions of the European Court of Justice.

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CONSIDERATIONS ON THE FIRST REGISTRATION TAX AND ON THE POLLUTION TAX FOR MOTOR VEHICLES AS STATED BY THE ROMANIAN LAW ACCORDING TO THE RECENT DECISIONS OF THE E.U`S COURT OF JUSTICE AND TO THE E.U`S TREATIES

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Abstract in original language

According to the article 214/2 Romanian Tax Code, as it was amended by the Government Emergency Order No 110/2006, a special tax on motor vehicles had to be paid on the occasion of their first registration in Romania, whether it should have been a temporary or a permanent registration. This tax, named first registration tax was instituted since January 1st 2007 and its effects have occurred in the period near after the Romanian accession to the E.U.

The compatibility of the first registration tax with the stipulations of Art.90 of EC Treaty was verified by the Romanian national Courts, who have constantly established that it was indeed contrary to the EU law on the free movement of goods. The Romanian Courts stated that, in the case of second hand motor vehicles brought into Romania from other EU countries, due to the fact that the first registration tax has been previously paid on the territory of one of these countries, another taxation which would have been imposed by the Romanian national law should have the effect of discouraging the free trade with this type of vehicles.

Since July 1st 2008, the Government has renounced to the first registration tax on the second hand vehicles coming from the EU countries. Trough the Emergency Order No 50/2008 was instituted instead the pollution so named tax. The pollution tax ought to be paid at the first registration of a motor vehicle in Romania. Our legislation does not distinguish between vehicles manufactured in Romania and the ones manufactured abroad. Similarly, it does not distinguish between freshly issued and second-hand vehicles. This first national regulation in this matter has suffered several successive modifications, including the one of diminishing its amount. Thereby, the Government tried to avoid a possible incompatibility of the pollution tax with the EU law.

In resolving the pollution tax problem, the Romanian Law Courts had formulated preliminary questions able to debate upon the compatibility of this tax with EU law. In three recent cases–law: Tatu, Nisipeanu and Ijac v Romania, EUCJ has stated that the pollution tax introduced by the Romanian legislation, applied to vehicles on the occasion of first registration in Romania, was contrary to EU law,

having the effect of discouraging the import and the traffic insertion of second-hand vehicles purchased in other Member States. The EUCJ, also, has established that the Article 110 TFEU ought be interpreted as forbidding to a Member State the establishment of a pollution tax imposed on motor vehicles on the occasion of their first registration in the respective Member State whenever the respective tax should be shaped in such a way that it would impeach the placing in circulation in the respective Member State of second-hand vehicles purchased in other Member States, yet without discouraging the purchase of second-hand vehicles bearing the same manufacturing year and technical condition on the domestic market.

Following these EUCJ judgments, most Romanian Law Courts have decided to refund to applicants the amounts previously paid according to Romanian national rules, because all of these tax variants were contrary to EU law. Until the end of this year, is also expected a decision of the Romanian High Court of Cassation and Justice concerning the interpretation, application and unification of the judicial practice in the matter of refunding pollution tax.

Key words in original language
first registration tax, pollution tax, free movement of goods, EU law, preliminary ruling

1. CONSIDERATIONS ON THE TAXES LEVIED ON MOTOR VEHICLES ON THEIR FIRST REGISTRATION AND ON THEIR LEGISLATIVE EVOLUTION

In State has always had an administrative policy for the registration of motor vehicles, as they represent an economical value and the numerous transactions with vehicles, either used or new, could represent a significant budgetary source. Registration taxes were paid directly in a State's bank account, and the evidence of the payment had to be shown to the Police before the registration and before making the vehicles available for traffic or in the situations of ownership transfer over second-hand motor vehicles, when it were erased from the Police databases as being owned by the seller and registered under the name of the new owner. The value of such taxes was not prohibitive, as taxation on public services is generally admitted as long as it does not infringe fundamental rights.

The Governmental Emergency Order (GEO) nr.110/21.12.2006, modified Romanian Fiscal Code just one day before Romania's Accession to the European Union (EU). This Order levied a new special tax on first registration of second-hand motor vehicles in Romania, which were previously registered in other EU Member States (MSs). The tax had to be paid for motor vehicles, which did not exceed the authorized maximum mass of 3.5 tones. There were also exceptions, such as special equipped vehicles for persons with disabilities, vehicles pertaining to diplomatic missions, consular offices and their members, and other foreign organizations and persons with diplomatic status that work in Romania.

When GEO 110/2006 entered into force, Romania's Government announced that if this tax did not have been levied on the first registration of second-hand vehicles in Romania, the direct consequence would have been facilitating the entrance into Romania of numerous second-hand motor vehicles more than 10 years old, due to their low price. Therefore, the environment would have been affected, as these vehicles are not properly equipped with modern filters to exhaust gas emissions. They would have soon become waste, for which Romania should have found solutions to deposit and recycle.

With all good publicity for this statement of reasons, there have been several public debates regarding the compatibility of this tax with the Treaty on the European Union. In order not to bring upon itself an infringement procedure in the first year as a Member State (MS) of the EU, Romania, through its authorities, had modified the tax and established certain technical criteria, such as the cylinder capacity and the European emissions standards (Euro 1, 2, 3 or 4). These criteria were established to justify environmental protection and to apply the "polluter pays" principle.

Therefore, starting with July 1st, 2008, GEO 50/2008 entered into force and changed the tax on the first registration of motor vehicles in a pollution tax. The statement of reasons, which was annexed to the law project presented before the Parliament, maintained the environmental protection's argumentation. It showed that the enforcement of this legislative project was justified by the purpose of environmental protection, which was to be made through programs and projects to improve air quality and to maintain it in the limits provided by EU law. Also, taking into account the necessity of adopting legal measures in order to comply with EU law and the jurisprudence of the Court of Justice of the European Union (CJEU), GEO 50/2008 established that the funds raised from the tax will be directed to environmental projects, such as the program for renewing the national auto fleet, the national program of environmental improvement through the creation of parks and other green spaces, projects for the replacement of classic heating systems with systems that use solar energy, geothermal energy, wind energy and as well projects that generate electricity from renewable sources: wind, geothermal, solar, biomass, micro-hydroelectric power plants, projects of renewal the forestation of highly damaged or drained fields, projects of re-naturalization of lands which used to belong to the natural patrimony, projects of making bicycle lanes.

The tax provisions laid in GEO 50/2008 envisaged all motor vehicles, either new or second-hand, according to their technical details, such as the cylinder capacity, the pollution standard, the type of filters for the exhaustion of gas emissions, for their first registration in Romania, but it also included some exceptions which were initially laid down in the previous GEO.

Nevertheless, GEO 50/2008 was not considered the perfect formula, as it suffered several changes brought by GEO 208/2008. In order to

lay down the latter GEO, the Government tacked into account the budgetary results developed in the first 10 months of 2008, the conclusions of the analysis of the degree of economical crisis deepening in October 2008 – which shown an important decrease of cars` markets and of the production of suppliers' industry, and also the sustainable measures of the cars` production sector affected by the international financial crisis and the fact that the Romanian Government is preoccupied with implementing measures in order to secure jobs in the Romanian economy (for a job in the cars` industry, four other jobs are created in the suppliers' industry).

The new GEO provided that motor vehicles with a cylinder capacity that does not exceed 2000 cm3 and which are registered for the first time in Romania or in other Member States, starting with December 15, 2008, are exempted from paying the pollution tax according to GEO 50/2008.

GEO 208/2008 entered into force on December 10, 2008 and it was repealed on the next day by GEO 218/2008, which also modified GEO 50/2008. According to GEO 218/2008, Euro 4 vehicles with the cylinder capacity which does not exceed 2000 cm3, and as well as all the Euro 4 vehicles that are registered for the first time in Romania or in other MSs between December 15, 2008 and December 31, 2009, are exempted from the pollution tax enforced by GEO 50/2008. Euro 3 motor vehicles with the cylinder capacity which does not exceed 2000 cm3, as well as Euro 1, 2 and non-Euro motor vehicles that are registered for the first time in Romania are not exempted from the pollution tax.

2. THE SPECIAL TAX FOR FIRST REGISTRATION AND ITS COMPATIBILITY WITH ART 110 TFEU (FORMER ARTICLE 90 EC); THE SOLUTIONS IN THE CASE-LAW

The entering into force of the pollution tax provisions, as they were enforced between January 1st, 2007 and July 1st, 2008, has generated numerous trials between the tax payers and the state, the former seeking for reimbursement of the tax. They mainly argued that the tax was not legal, as it infringes article 90 EC, and the national judge is obliged to apply with priority EU law provisions. The Romanian fiscal authorities insisted that the tax is legal, as a result of the application of internal law – the Fiscal Code. The Romanian courts have established that art. 90 EC and the case - law of the Court of Justice of the European Union (CJEU) are applicable in these disputes.

According to Article 90, no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. In Weigel (2004), CJEU established that the purpose of the EU law, in normal conditions of competition, is the elimination of any type of discrimination that could appear due to the enforcement of internal discriminatory taxes applied to products from another Member State. Therefore, the purpose of this Treaty Article is to forbid fiscal discrimination between imported and local products.

The national courts observed that in Romania the tax is not levied on vehicles of internal production and registered here. The national courts, as well, observed that the provisions of EU law in this subject matter are directly applicable. Taking into consideration that from January 1st, 2007 Romania has become an EU Member State, according to art. 148 of the Romanian Constitution, as a consequence of Romania's accession to the EU, the provisions of the EU treaties, as well as all the other EU law provisions which are binding, shall apply with priority over contrary national laws, in accordance with the accession Treaty (Art. 148(2)). Parliament, President and Government of Romania and the judicial authority guarantee the compliance with the obligations resulting from the accession Treaty. Moreover, the provisions of Law no. 157/2005 on the ratification of the accession of Romania and Bulgaria to the European Union state that the Romanian state shall also apply the provisions of the constitutive treaties of the EU, before the accession.

National courts also looked at CJEU's case-law, in cases such as Costa/Enel and Simmenthal. In Costa/Enel (1964), CJEU established that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question". In the same judgment the Court defines the relation between EU law and national law, showing that EU law is an independent judicial order, which is applied with priority even in front of subsequent national law. Law no. 343/2006 on the Fiscal Code first enforced the Romanian first registration special tax.

In Simmental (1976), CJEU established that the national judge is obliged to directly apply EU law, if it is contrary to national provisions, without waiting their elimination from the legal order.

Considering these arguments, and also taking into account that in Romania, as a MS, there was no tax levied on the vehicles produced and registered or re-registered in the country, while such a tax was levied on vehicles already registered in other MSs and re-registered in Romania after being brought inside its borders, the national courts observed a difference in treatment, which constitutes discrimination in the context of the fiscal judicial system and which is contrary to EC Treaties` provisions. These stipulations prohibit a special registration tax for intra-communitary vehicles acquisitions which are not registered in the receiving state, such a tax being contrary to the free movement of goods – the vehicles from other MSs are directly or indirectly disadvantaged in the competition with similar national products.

Regarding the argument that the tax has a protective nature towards the import of highly damaging vehicles for the environment, the national courts did not admit this justification of the state authorities, as from the legal provisions relating to the tax and from the means of calculating its value result that the tax has purely fiscal nature, no

environmental dimension being in the criteria for establishing its value. The first legislative act introducing such criteria was enforced in 2008 – OUG 50/2008.

In conclusion, the national courts applied directly the EU law, without asking for an interpretation from the CJEU using the preliminary rulings procedure, and decided that the incomes brought to the public budget from the special tax on first registration of motor vehicles had no legal basis between January 1st, 2007 and June 30, 2008, because the provisions relating to this tax are contrary to EU law. The tax also could not have any effects, as those effects would have infringed the fundaments of the European Community. As a consequence, the state has no right in keeping the amount of money collected from taxes between January 1st, 2007 and June 30, 2008 and all the individuals who paid the tax should receive a reimbursement.

3. THE POLLUTION TAX. NATIONAL COURTS` DIFFICULTIES TO ESTIMATE ITS COMPATIBILITY WITH ARTICLE 110 TFUE (FORMER ARTICLE 90 EC). THE THREE JUDGMENTS OF CJEU: C-402/09 TATU, C-263/10 NISIPEANU AND C-336-10 IJAC.

Starting with July 1st, 2008, OUG 50/2008 enforced the pollution tax on the first registration of a vehicle in Romania. By transformation of the first registration tax into a pollution tax, Romania did not solve the disputes relating to the compatibility of the provisions with EU law. Therefore, the trials continued, the individuals trying to obtain the reimbursement of this new named - pollution tax.

According to national law, the special auto pollution tax is paid on the first registration of the motor vehicle in Romania and it was conceived by the state as a transition alternative, due to the fact that, after its accession to the EU and according to the principle of free movement of goods, Romania eliminated from its legal system the legislative acts that restricted the registration of non-Euro, Euro 1 and (starting with January 1st, 2002) Euro 2 motor vehicles.

The Government justified the entry into force of the provisions of GEO 50/2008 regarding the pollution tax by the need for harmonization of national law and EU law relating environmental protection. The other justification was that this tax is an economical and financial mechanism based on the ”polluter pays” principle.

The authorities have shown that the pollution tax is collected from all the individuals who wish to register and to use a motor vehicle, regardless of its origin and age. Therefore, the idea of a discriminatory nature of the tax cannot be sustained. Taking into account the arguments deriving from the environmental protection and the setting of an algorithm to find the amount of the tax depending on exhaust gas emissions, the national courts used the preliminary ruling procedure of the CJEU for the interpretation of the compatibility of the pollution tax with EU law.

On April 7, 2011, CJEU pronounced a preliminary judgement in Case-402/09 of Ioan Tatu v. Romanian State by Finances Ministry and Others, after receiving a preliminary question from Sibiu District Court on June 18, 2009.

The European Court interpreted the question sent by the national court in that it refers only to the initial system of taxation introduced by GEO 50/2008, system which will be compared to the former Article 90 EC - the current Article 110 TFEU, considering that in the main proceedings the appellant paid the pollution tax on October 27, 2008. The interpretation made by the Court envisages the conformity of the system of taxation introduced by OUG 50/2008 in its initial form, applicable between July 1st, 2008 and December 14, 2008, with Article 110 TFEU.

The European Court of Justice decided in case C-402/09 Tatu v. Romania that ”Article 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax levied on motor vehicles on their first registration in that Member State if that tax is arranged in such a way that it discourages the placing in circulation in that Member State of second-hand vehicles purchased in other Member States without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market.”

On July 7, 2011, The Court of Justice of the European Union decided in the case C-263/10 Nisipeanu upon the interpretation of Article 110 TFEU after receiving several preliminary questions sent by the Gorj District Court, which had to respond to a request of a reimbursement of the pollution tax.

In its judgment, the Court reiterated the arguments used in case C-402/09 Tatu, considering that the successive changes brought to GEO 50/2008 by GEO 208/2008, GEO 218/20083, GEO 7/2009 and GEO 117/2009 maintain a taxation system that discourages the registration in Romania of second-hand vehicles bought in other Members States, characterized by a high rate of usage and age, while similar vehicles sold on the national market of second-hand vehicles are not subject to such a taxation system. In these conditions, it discourages the purchase of second-hand vehicles of the same age and condition on the national market.

According to the Court, the competence of the Members States to establish new taxes is not unlimited, the prohibition of applying higher taxes on products from other MSs compared to the taxes applied on national products, as it is encompassed in Article 110 TFEU, must be applied every time when a tax discourages the import of goods bought in other MSs, protecting domestic goods on the national market.

The Court stated that all the modified versions of GEO 50/2008 maintain a taxation system that discourages the registration in Romania of second-hand motor vehicles bought in other Member States, similar to those from the national market of second-hand motor vehicles.

The Court reiterated that the purpose of environmental protection could be realized without putting the national products on a more favorable position, by establishing an annual tax applicable to every registered motor vehicle in Romania.

Therefore, the Court ruled that Article 110 TFEU must be interpreted as that setting of a pollution tax levied only on motor vehicles for their first registration in Romania after the entering into force of GEO 50/2008, even though the tax is not discriminatory, creates a protectionist effect on the market, discouraging the import of second-hand motor vehicles without discouraging the purchase of second-hand vehicles which were already on the national market before the entering into force of OUG 50/2008.

In case law C-336/10 Ijac, CJEU ruled that Article 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax affecting motor vehicles on their first registration in that Member State, if that fiscal measure is so designed as to discourage the putting into service, in that Member State, of second-hand vehicles bought in other Member States, without, however, discouraging the purchase of second-hand vehicles of the same age and condition on the national market.

Regarding the national case-law, the national courts unanimously agreed that, indeed, in such cases, the provisions of EU law are directly applicable, as they have priority in front of the national law according to Article 148 of Romanian Constitution, to law ratifying the accession Treaty to the EU and to case-law of CJEU and principles established in cases: Costa/Enel and Simmenthal.

According to cases - law of the Court, the meaning of a tax with equivalent effect is every pecuniary tax unilaterally imposed on goods due to the fact that they cross the border, no matter its name or means of application. A taxation system which is compatible with Article 90 EC (Article 110 TFUE) must exclude any possibility for the imported products to be subject of higher taxes than similar national products and must not have discriminatory effects under any circumstances. The text of Article 90 EC envisages products made in other MSs and which are subject to internal taxes of any nature, higher than the taxes directly or indirectly applied to similar national products. The Romanian state does not collect the pollution tax levied on similar national products – motor vehicles already registered in Romania after they are sold again.

Analyzing the provisions of GEO 50/2008 with the subsequent changes, it is clear that for a motor vehicle produced in Romania or in other MSs, the state does not collect such a tax if it was previously registered in Romania. On the other hand, such a tax is levied on a motor vehicle produced in Romania or in another MS if that vehicle is registered for the first time in Romania. Being legally organized in this manner, the pollution tax diminishes the introduction on the Romanian market of second-hand vehicles already registered in

another MS, the buyers being fiscally oriented to purchase second-hand vehicles already registered in Romania.

As a consequence of the entering into force of GEO 218/2008, the will of the legislator to influence the choice of consumers became evident: the pollution tax levied on new vehicles, Euro 4, with a cylinder capacity less than 2.000 cm3 (and it is a well-known fact that, in Romania, vehicles with such characteristics are produced on the local market) which are first registered in Romania between December 15, 2008 and December 31, 2009, was eliminated, so that the consumers are directed towards either a new motor vehicle or a second-hand motor vehicle already registered in Romania which have such technical characteristics. In this manner the national production of motor vehicles is protected, such as it appears even in the Statement of reasons of GEO 208/2008 and 218/2008: The Romanian Government is preoccupied with taking measures to preserve jobs in the Romanian economy, and one job in the cars production industry represents four jobs in the supply industry.

Therefore, it was concluded that GEO 50/2008 is contrary to Article 90 EC (Article 110 TFEU), as it is destined to diminish the introduction in Romania of second-hand motor vehicles already registered in another MS, encouraging the sale of second-hand vehicles already registered in Romania and, more recently, of the new motor vehicles produced in Romania. After Romania's accession to the EU, this is inadmissible for imported goods from other Member States, as long as the national fiscal law diminishes or is able to diminish, even potentially, the consumption of imported goods, thus influencing the choice of the consumers (ECJ, the judgment of 7 May 1987, case 193/85, Co-Frutta Srl cooperative).

The Court ruled that the infringement of Article 90 EC can also be made through the creation of a similar difference of treatment, in the judgments of 11 August 1995, Joined Cases C-367/93 la C-377/93, F. G. Roders BV s.a. v. Inspecteur der Invoerrechten en Accijnzen (discrimination between the wines of Luxembourg and the wines made of fruits from other Member States), of 7 May 1987, case 184/85, Commission v. Italy (bananas imported in Italy and fruits cultivated in Italy). Considering these arguments, national courts have admitted the claims of reimbursement made by the pollution tax payers. Because there are no legal provisions to rule a partial reimbursement, the requests had been fully admitted .

4. NO LIMITATIONS IN TIME FOR CJEU JUDGMENTS` EFFECTS

It is important that the state's claim regarding the limitation in time of the effects of the CJEU judgments was rejected, which means that Nisipeanu case, as well as Tatu, will apply retroactively, thus eliminating the legal basis of the collection of the pollution tax between July 1st, 2008 and December 31, 2010.

According to a constant jurisprudence of CJEU, the interpretation that the Court gives to a provision of EU law based on Article 267 TFEU clarifies or defines, where it is necessary, the meaning and the extension of the provision as it is supposed to be understood, or it was supposed to be understood and applied since its entry into force. [Judgment of 27 March 1980, Case 61/79, Denkavit italiana, par. 16; Judgment of 2 February 1988, Case 24/86, Blaizot, par. 27; Judgment of 15 December 1995, Case C-415/93, Bosman, par. 141; Judgment of 5 October 2006 in joined cases C-290/05 (Nadasdi) şi C-333/05 (Nemeth), par. 62].

5. THE INTERVENTION OF HIGH COURT OF CASSATION AND JUSTICE (HCCJ) THROUGH ITS PROCEDURE OF JUDGMENTS IN THE INTEREST OF THE LAW

Until CJEU gave its judgment in the cases regarding the pollution tax, HCCJ did not intervene in the matter through the procedure provided by law for interpreting and applying the provisions of GEO 50/2008, by analyzing their conformity with EU primary law, even though there were national courts that admitted fully reimbursement claims basing their decision on Article 90 EC (Article 110 TFEU) and other national courts had suspended the proceedings until CJEU to give a preliminary ruling judgment.

Through the decision no. 24 from November 14, 2011 HCCJ established that the claim having as object the obligation of public authorities to register of second-hand motor vehicles purchased from another Member State, without previous payment of pollution tax provided by GEO 50/2008 and without completing the procedure provided in art. 7 of the OUG 50/2008, is admissible. HCCJ also ruled that the previous fiscal procedure against the decision of calculation, does not apply to the situation of reimbursement claims of the pollution tax based.

In other words, the eventual procedural incidents which could leave individuals without access to a substantial assessment of their claim according to the CJEU case-law were set aside. HCCJ gave the national courts the possibility to directly judge on the substantial claim, without having to verify if the individual previously contested the act which determines the amount to be paid, based on the fiscal procedure, or if he or she paid the established amount of the tax.

6. CONCLUSIONS

Even if the reason of protecting the environment can be considered justified when a Member State enforces restrictions for a certain category of goods, the manner in which the taxation system was regulated, the manner in which the amount to be paid was calculated, as well the amount itself, which often exceeded half of the vehicle's value, almost reaching it, and the disguised protection of the internal cars production industry have weighted more in the interpretation of conformity of national law with the EU Treaties` stipulations regarding the free movement of goods.

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MOŽNÉ DOPADY NESPLNĚNÍ POVINNOSTI VNITROSTÁTNÍCH SOUDŮ APLIKOVAT PRÁVO EU EX OFFICIO

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Abstract in original language

Podle judikatury Soudního dvora EU mají vnitrostátní orgány povinnost aplikovat právo EU ex officio vždy, když mají obdobnou povinnost aplikovat ex officio vnitrostátní předpisy podle práva vnitrostátního. V některých případech jsou vnitrostátní orgány povinny aplikovat právo EU z moci úřední i nad rámec tohoto pravidla. Jaká situace ale nastane, pokud se strany řízení práva EU nedovolají a soud sám právo EU neaplikuje? Příspěvek si klade za cíl vymezit povinnost vnitrostátní aplikace práva EU ex officio a především nastínit možnosti, které připadají v úvahu v souvislosti s nápravou takto vadných rozhodnutí

Key words in original language

ex officio aplikace práva EU, iura novit curia, procesní právo

Abstract

According to the case-law of the Court of Justice of the EU, national authorities have an obligation to apply EU law ex officio whenever there is a similar obligation to apply national rules ex officio by national law. In some cases, national authorities are obliged to apply EU law ex officio beyond this rule. What situation occurs when the parties to the proceedings do not raise EU law issues on their own and the court itself does not apply EU law either? The article aims to define the obligation to apply EU law ex officio and in particular to outline the possible options available to overcome these defective decisions.

Key words

ex officio application of EU law, iura novit curia, procedural law

1. ÚVODNÍ POZNÁMKY

Právo EU představuje pro vnitrostátního právníka zvláštní fenomén. S ohledem na principy určující vnitrostátní aplikaci práva EU může právo EU sloužit jako východisko ze zdánlivě bezvýchodné situace a překlenout nepříznivé ustanovení vnitrostátního práva. Stejně tak si lze ale představit situaci, kdy unijní právní úprava bude pro účastníka řízení méně výhodná než národní právo; v tom případě bude zřejmě doufat, že protistrana nebude unijním právem argumentovat a soud jej následně neaplikuje.

Co když však nastanou takové okolnosti, kdy předmětem řízení bude právní vztah, na který dopadá právo EU, ale účastníci řízení se unijního práva nedovolají a ani soud sám relevantní unijní

předpis neaplikuje? Odpověď závisí na tom, zda je soud povinen v takovém případě aplikovat právo EU ex officio nebo není. Jedná se o otázku odvislou jak od vnitrostátního práva, tak od judikatury Soudního dvora EU (dále jen "SD").

Nelze samozřejmě vyloučit hypotetický případ, kdy účastník řízení neargumentuje právem EU z důvodu, že o existenci daného unijního předpisu nevěděl a v důsledku toho byl ve sporu neúspěšný, protože ani soud sám unijní právní úpravu nevyhledal a neaplikoval, ačkoliv v daném případě tuto povinnost měl. Neúspěšný účastník řízení se následně s určitým časovým odstupem o existenci unijního předpisu dozví. Existují vůbec v kontextu českého právního řádu prostředky, kterými by bylo možné zvrátit takto nepříznivé rozhodnutí? Cílem tohoto příspěvku je stručně vymezit povinnost vnitrostátních soudů aplikovat právo EU ex officio, nastínit potenciální prostředky obrany proti porušení této povinnosti a především poukázat na problémy, které se s uvedeným pojí.[1]

2. POVINNOST APLIKACE PRÁVA EU EX OFFICIO

Meze zohledňování práva EU z úřední povinnosti jsou odvozeny ze známých principů rovnocennosti a efektivity, které ve své judikatuře stanovil SD s ohledem na vztah práva EU a vnitrostátních procesních předpisů.

Princip rovnocennosti promítnutý do povinnosti zohledňovat právo EU ex officio znamená, že vnitrostátní soud má povinnost vyhledat a aplikovat unijní předpis vždy, kdy má obdobnou povinnost ohledně vnitrostátního práva. Toto je fakticky základní vodítko, formulované SD ve věci Van Schijndel, které se uplatní ve většině případů.[2]

Věc bohužel není jen takto jednoduchá; v problematice povinnosti aplikace práva EU ex officio se částečně odráží někdy těžko čitelné rozlišení použití zásad rovnocennosti a efektivity.[3] To lze ilustrovat na rozhodnutí Peterbroeck, vydané de facto souběžně s

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[1] Příspěvek vychází z českého civilního procesu - stranou je tak ponechána povinnost aplikace práva EU jinými státními orgány než soudy, i otázka (ne)aplikace práva EU a následných možností obrany v rámci řízení trestního a správního.

[2] Rozhodnutí ze dne 14. 12. 1995 ve spojených věcech C-430/93 a C-431/93, Van Schijndel & Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten.

[3] Viz např. Bobek, M.: Why There is no Principle of 'Procedural Autonomy' of the Member States, in: de Witte, B., Micklitz, H. (eds): The European Court of Justice and Autonomy of the Member States, Cambridge: Intersentia, 2011, pp. 305-322, ISBN 978-94-000-0026-1.

rozsudkem Van Schijndel.[4] Zde s ohledem na specifické okolnosti případu převážil princip efektivity a požadavek efektivní ochrany unijního práva.

V případě Peterbroeck se jednalo o specifické okolnosti konkrétního případu. Existují však oblasti, v nichž SD zásadně dovodil povinnost zohlednění práva EU nad rámec zásady rovnocennosti. Prozatím lze mezi tyto oblasti řadit právo hospodářské soutěže a ochrany spotřebitele.[5] V těchto dvou oblastech je dle judikatury SD národní soud povinen ex officio aplikovat unijní právo, přestože tuto povinnost nemá podle vnitrostátního práva ani s ohledem na právo národní. Příkladem může být ex officio aplikace směrnice Rady 93/13/EHS o nekalých smluvních ujednáních za účelem rušení rozhodčích doložek ve spotřebitelských smlouvách.[6] Tento výčet oblastí, kde převládá zásada efektivity, samozřejmě nemusí být konečný a patrně ani není. V úvahu přichází i další oblasti práva EU, které by mohl pravděpodobně SD považovat za "privilegované" jako např. zákaz diskriminace z důvodu státní příslušnosti aj.[7]

Vůdčím principem na poli zohledňování práva EU z úřední povinnosti ale zůstává rovnocennost. V konkrétních řízeních na vnitrostátní úrovni je proto nutné zjistit, kdy je soud podle národního práva aplikovat ex officio vnitrostátní právo i bez návrhu některého z účastníků řízení - jinými slovy, jaký je ve vnitrostátním právu rozsah použití zásady iura novit curia. Tato otázka nemusí mít jednoznačnou odpověď a leckdy bude vyžadovat i určité interpretační úsilí.

Například v Polsku závisí v civilním řízení dosah zásady iura novit curia na rozlišení hmotného a procesního práva a také na stupni řízení. V prvním stupni řízení musí polské soudy zohledňovat z úřední povinnosti jak právo hmotné, tak procesní, ale ve stupni druhém až na některé odchylky jen právo hmotné - procesní chyby soudu prvního stupně jsou až na některé výjimky zhojeny a nelze k nim přihlížet.[8]

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[4] Rozhodnutí ze dne 14. 12. 1995 ve věci C-312/93 Peterbroeck, Van Campenhout & Cie SCS v. Belgium.

[5] Rozhodnutí ze dne 1. 6. 1999 ve věci C-126/97 Eco Swiss China Time Ltd. v. Benetton International NV, rozhodnutí ze dne 26. 10. 2006 ve věci C-168/05 Elisa María Mostaza Claro v. Centro Móvil Milenium SL a další.

[6] Nový, Z.: Spotřebitelské úvěry a rozhodčí řízení, Jurisprudence, Praha: Wolters Kluwer, 2010, roč. 19, č. 7, str. 25, ISSN 1802-3843 a v předchozí poznámce pod čarou uvedené rozhodnutí Mostaza Claro, bod 38.

[7] Bobek, M., Bříza, P., Komárek, K.: Vnitrostátní aplikace práva Evropské unie, Praha: C. H. Beck, 2011, str. 266, ISBN 978-80-7400-377-6.

[8] Ereciński, T.: When must national judges raise european law issues on their own motion?, ERA-Forum, 2010, roč. 11, č. 4, str. 525 - 526.

V českém prostředí nalézá zásada iura novit curia své vyjádření v § 121 občanského soudního řádu (dále jen "OSŘ"), podle nějž "není třeba dokazovat skutečnosti obecně známé nebo známé soudu z jeho činnosti, jakož i právní předpisy uveřejněné nebo oznámené ve Sbírce zákonů České republiky." OSŘ tedy explicitně nehovoří i o předpisech uveřejněných v Úředním věstníku Evropské unie, interpretačně však lze poměrně spolehlivě dovodit, že § 121 OSŘ zahrnuje i unijní předpisy.[9] Uvedené vyplývá z požadavku uplatňování zásady rovnocennosti, formulovaném SD.

Soud musí znát objektivní právo, což zahrnuje vyhledání relevantní právní normy, její interpretaci a aplikaci; právní poznatky by měl soud získávat ze své profesní činnosti, mimo rámec procesu.[10] Platí-li uvedené pro právo české, je nutné tato pravidla vztáhnout i na právo unijní.

Samostatnou otázku představuje problém součinnosti stran, resp. "pomoci" soudu ze strany účastníků řízení. Pokud ve vztahu k českému právu platí, že účastníci řízení nemají povinnost soudu svými návrhy pomáhat (co se týče "poznávání" práva), [11] mělo by s ohledem na zásadu rovnocennosti stejné platit i pro právo EU. Setkat se lze ale i s jinými názory, požadujícími aktivnější roli účastníků řízení, potažmo jejich právních zástupců.[12]

Shrneme-li tedy obecně dopad judikatury SD na otázku povinnosti ex officio aplikace unijního práva ve vnitrostátních právních řádech, dojdeme k závěru, že SD sice určil "klíč" ke stanovení této povinnosti, ovšem v důsledku použití tohoto "klíče" není obsah povinnosti ex officio aplikace práva EU jednotný, neboť spočívá na vnitrostátním právu. V kvalitativně obdobných řízeních tak může dojít k tomu, že ve stejné situaci během řízení v některém z členských států bude mít soud povinnost zohlednit právo EU z úřední povinnosti a v jiném nikoliv. Paradoxně tam, kde se dle SD uplatní namísto principu rovnocennosti ve vztahu k vnitrostátním právním řádům invazivnější zásada efektivity (oblast hospodářské soutěže a spotřebitelského práva), bude povinnost ex officio aplikace unijního práva v celé jurisdikci EU.

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[9] Bobek, M., Bříza, P., Komárek, K., op. cit. č. 7, str. 266.

[10] Winterová, A. a kol.: Civilní právo procesní, Praha: Linde Praha, 2011, str. 226, ISBN 978-80-7201-842-0.

[11] Tamtéž.

[12] Kühn, Z.: Iura novit curia: aplikace starého principu v nových podmínkách, Právní rozhledy, roč. 12, č. 8, str. 299, ISSN 1802-3843.

3. PORUŠENÍ POVINNOSTI APLIKACE PRÁVA EU EX OFFICIO V NEPRAVOMOCNÉM SOUDNÍ ROZHODNUTÍ

Vraťme se nyní k hypotetickému příkladu popsanému v úvodu příspěvku, kdy ani jedna ze stran řízení neargumentuje (řekněme, že z toho důvodu, protože o unijní úpravě neví) právem EU a soud unijní normu neaplikuje. Následně soud vydá rozhodnutí a jedna ze stran, která byla ve sporu neúspěšná, se ve lhůtě pro podání řádného opravného prostředku doví o existenci unijního předpisu, který by za předpokladu jeho aplikace pravděpodobně znamenal úspěch v řízení.

Otázkou, kolem které se vše v tomto případě točí, je samozřejmě koncentrace řízení a možnost argumentace právem EU jako odvolacího důvodu, pokud účastník řízení unijním právem neargumentoval již v prvním stupni. Uvedené lze přiměřeně vztáhnout i na dovolání, pokud účastník řízení argumentuje právem EU poprvé až v dovolacím řízení.

Uvedenou otázkou se SD zabýval již v jednom z prvních citovaných rozhodnutí na téma zohledňování práva EU z úřední povinnosti, ve věci Van Schijndel. V uvedeném procesu žalobci poprvé argumentovali právem EU až v řízení před nizozemským nejvyšším soudem (Hoge Raad). Nizozemské právo přitom v rámci kasačního opravného prostředku před nejvyšším soudem vylučuje možnost vznášení nových argumentů s výjimkou argumentů čistě právních; tedy takových, které nevyžadují další posouzení skutkového stavu.[13] SD v tomto případě došel v duchu zásady rovnocennosti k závěru, že argumentace žalobců právem EU není přípustná. Možnost prvotní argumentace unijním právem v odvolacím či dovolacím/jiném obdobném řízení tak bude spočívat především na národním právu. Související problém, který z hlediska přípustnosti argumentace právem EU během opravného řízení může hrát klíčovou roli, představuje někdy složité rozlišení skutkových a právních poznatků.

Co se týče českého kontextu, možnosti neúspěšné strany sporu z důvodu porušení povinnosti aplikace práva EU ex officio prvostupňovým soudem v civilním řízení nastínil již ve svém článku z roku 2004 Zdeněk Kühn.[14] Nabízí se možnost podání odvolání z důvodu nesprávného právního posouzení věci podle § 205 odst. 2 písm. g) OSŘ. V odvolacím řízení je ovšem třeba respektovat ústavní ochranu proti překvapivému rozhodnutí, formulovanou Ústavním soudem v nálezu IV ÚS 544/98, týkajícím se čistění dámských kalhot. Obdobně lze podat dovolání podle § 241a odst. 2 písm. b) OSŘ, neboť rozhodnutí odvolacího soudu, které nezohlednilo z úřední povinnosti unijní právo, přestože být zohledněno mělo, spočívá na nesprávném právním posouzení věci.

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[13] Rozhodnutí Van Schijndel, op. cit. č. 2, bod 11.

[14] Kühn, Z., op. cit. č. 12, str. 298.

4. PORUŠENÍ POVINNOSTI APLIKACE PRÁVA EU EX OFFICIO V PRAVOMOCNÉM SOUDNÍ ROZHODNUTÍ

Mnohem zajímavější a kontroverznější situace nastává, pokud se neúspěšný účastník sporu o existenci pro něj příznivého unijního předpisu doví až s delším časovým odstupem po uplynutí lhůty k odvolání, aniž by odvolání (byť z jakéhokoliv jiného důvodu) podal. Tím pádem ztrácí možnost odvolacího, ale potenciálně i dovolacího řízení a stojí před překážkou pravomocného rozhodnutí. Hned zpočátku je třeba předeslat, že takováto procesní pozice je pro dotčeného účastníka řízení velmi nepříhodná.

Na problém se lze podívat z úhlu jak unijního, tak vnitrostátního práva. Co se týče mimořádných opravných prostředků (vyjma dovolání), český OSŘ zná obnovu řízení a žalobu pro zmatečnost. Institut žaloby pro zmatečnost čistě teoreticky sice pojmově dopadá na námi zkoumanou situaci, jelikož má sloužit jako nástroj ke "zrušení pravomocných rozhodnutí soudu, která trpí takovými vadami, jež představují porušení základních principů ovládajících řízení před soudem,"[15] ale s ohledem na taxativní výčet důvodů, pro něž je možné žalobu pro zmatečnost podat, tato varianta v podstatě padá. Obnova řízení také nenabízí příliš funkční prostředek nápravy, jelikož řeší nedostatky skutkového charakteru. Opět pouze teoretickou možnost nabízí hypotetická situace, kdy by z judikatury SD vyplynulo, že český soud rozhodl v našem uvažovaném případě chybně. Takové rozhodnutí by mohlo představovat nové rozhodnutí ve smyslu § 228 odst. 1 písm) a OSŘ, které následnou obnovu řízení umožňuje. V tomto případě by ale možná mnohem větším problémem byla otázka, jakým způsobem kauzu k SD přenést. OSŘ tedy příliš funkční nástroje nenabízí.

Institutem, který by za určité konstelace mohl vznést otázku zákonnosti rozhodnutí soudu prvního stupně z pohledu ústavnosti práva na spravedlivý proces, je však zřejmě institut ústavní stížnosti podle § 75 odst. 2 písm a) zákona o Ústavním soudu. Jedná se o výjimku z povinnosti vyčerpání procesních prostředků, které zákon k ochraně stěžovatelova práva poskytuje, před podáním ústavní stížnosti. Zákon o ústavním soudu stanoví pro podání této ústavní stížnosti jednoletou lhůtu ode dne, kdy ke skutečnosti, která je předmětem ústavní stížnosti, došlo. Neopominutelným požadavkem ovšem je, aby takováto stížnost svým významem podstatně přesahovala vlastní zájmy stěžovatele. S ohledem na tento právně neurčitý pojem tak nelze obecně stanovit, kdy je a kdy není možné toto ustanovení použít.[16]

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[15] Bureš, J., Drápal, L., Mazanec, M.: Občanský soudní řád: komentář, Praha: C. H. Beck, 2001, str. 939, ISBN 80-7179-739-1.

[16] Šimíček, V.: Ústavní stížnost, Praha: Linde Praha, 2005, str. 141, ISBN 80-7201-569-9.

Doktrína práva EU k problematice res judicata a obecně k možnosti znovu otevřít pravomocné rozhodnutí inspirovala k četným komentářům a názorům, zejména ve vztahu k možnosti znovuotevření správního rozhodnutí, které předestřel SD v případu Kühne & Heitz.[17] V tomto případě je však nutné důsledně odlišit rozhodnutí správní a rozhodnutí soudní, u nichž je požadavek právní jistoty v podobě nezměnitelnosti rozhodnutí přece jen silnější, než u rozhodnutí správních orgánů. Po rozhodnutí ve věci Lucchini[18] se zdálo, že ani prolomení pravomocných rozhodnutí vnitrostátních soudů nebude pro SD tabu. Navazující judikatura SD ale ukázala, že rozhodnutí Lucchini představovalo specifický případ, který se týkal rozhraničení pravomocí mezi členskými státy a (tehdejším) Společenstvím (jednalo se o státní podpory). Nelze z něj tedy paušálně dovozovat možnost znovuotevření pravomocného soudního rozhodnutí v důsledku kolize s právem EU.

Přistoupíme-li na domněnku, že rozhodnutí, ve kterém národní soud neaplikoval unijní právo, ač tuto povinnost měl, je nezákonné, ale s ohledem na překážku věci rozsouzené nenalézáme možnost rozhodnutí revidovat, přichází následně do úvahy otázka odpovědnosti členského státu za škodu. Ta má opět dvě dimenze - unijní, která spočívá v individuální odpovědnosti státu za škodu způsobenou jednotlivci pro porušení práva EU, stanovenou judikaturou SD, a dimenzi vnitrostátní, danou zákonem č. 82/1998 Sb. o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem. Z pohledu námi zkoumaného případu jsou problematické obě dimenze. Právo EU (resp. judikatura SD) sice zná odpovědnost státu za škodu při činnosti justice, ale ta byla doposud formulována jen ve vztahu ke škodě, která vznikne jednotlivci v důsledku rozhodnutí soudu v poslední instanci.[19] České právo naproti tomu předvídá vyčerpání opravných prostředků a zejména zrušení či změnu dotčeného rozhodnutí. O slučitelnosti takovéto úpravy českého zákona o odpovědnosti za škodu státu s právem EU byla vyjádřena již nejednou pochybnost.[20] Má se za to, že požadavek zrušení nebo změny dotčeného rozhodnutí podle uvedeného zákona de facto brání vymáhání škody v případě porušení unijního práva ze strany nejvýše postavených národních soudů. Pokud by bylo toto volání vyslyšeno a zákon č. 82/1998 Sb. by byl

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[17] Rozhodnutí ze dne 13. 1. 2004 ve věci C-453/00 Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren.

[18] Rozhodnutí ze dne 18. 7. 2007 ve věci C-119/05 Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA.

[19] Rozhodnutí ze dne 30. 9. 2003 ve věci C-224/01 Gerhard Köbler v. Republik Österreich.

[20] Viz např. Bobek, M., Komárek, J., Passer, J.: Vyhnáni z rajské zahrady neodpovědnosti: národní soudy a porušení komunitárního práva, Soudce, č. 9, 2004, str. 2-20, ISSN: 1211-5347.

novelizován, aby vyhovoval právu EU, mohla by se jako "vedlejší efekt" potenciálně otevřít cesta i pro odpovědnost státu za škodu jednotlivci z námi diskutovaného příkladu. V současnosti nabízí teoretickou cestu pouze § 8 odst. 3 citovaného zákona, podle nějž je nutné vyčerpání opravných prostředků "nejde-li o případy zvláštního zřetele hodné." Jedná se zde tedy o obdobný problém, jako v případě diskutované přípustnosti ústavní stížnosti bez předchozího vyčerpání opravných prostředků. Přípustnost jednotlivých právních nástrojů, kterými by se mohl účastník řízení bránit nebo žádat škodu, tak spočívá na neurčitých právních pojmech, které do značné míry brání účinné nápravě.

5. (NE)AKTIVITA ÚČASTNÍKA ŘÍZENÍ A ZÁSADA IURA NOVIT CURIA

Celým předchozím textem prostupuje předpoklad, že rozhodnutí, ve kterém národní soud navzdory své povinnosti neaplikuje právo EU nehledě na to, že účastníci řízení právem EU neargumentují, je vadné. Z tohoto předpokladu vycházely i následné úvahy o možnostech případné revize takového rozhodnutí a o (ne)přípustnosti náhrady škody, způsobené státem.

Dalo by se ovšem namítnout, že účastníka řízení nelze vnímat jako pasivní jednotku, ale jako subjekt, který může řízení aktivně ovlivňovat a dbát o svá práva v duchu římské zásady vigilantibus iura scripta sunt. Pokud se tedy svých práv nedomáhá, alespoň v odvolacím či následně dovolacím řízení, nedostatek v podobě neaplikování unijního předpisu je tímto zhojen. Dochází zde ale k napětí mezi principem iura novit curia a výše citovanou zásadou vigilantibus iura scripta sunt. Přestože totiž dle judikatury SD by mělo být s unijním právem zacházeno stejně jako s právem národním, má unijní právo vůči právu národnímu stále někdy pozici "popelky" a bývá přehlíženo, ať již jsou k tomu důvody jakékoliv. Případ neaplikování unijního práva soudem ovšem představuje kvalitativně stejnou situaci, jako kdyby národní soudce v některém řízení neaplikoval relevantní národní předpis. Vzhledem k tomu, že povědomí o vnitrostátním právu bude u soudců a často jistě i účastníků řízení nesrovnatelně větší než u práva unijního, je zřejmé, že situace kdy by nebyl aplikován vnitrostátní předpis, bude pravděpodobně výjimečná. Lze se ovšem jen dohadovat, v kolika

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APPLICATION OF THE NE BIS IN IDEM PRINCIPLE IN A CRIMINAL PROCEDURE

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Abstract in original language

V rámci Schengenského priestoru môže byť založená právomoc stíhať a trestať osoby podozrivé zo spáchania trestného činu pre viacero štátov. Tento príspevok sa zaoberá postupom orgánov činných v trestnom konaní v takýchto situáciách so zameraním na aplikáciu princípu ne bis in idem v trestnom konaní.

Key words in original language

Princíp ne bis in idem, trestné konanie, Schengenský vykonávací dohovor, prejudiciálne konanie.

Abstract

Within the Schengen area the criminal jurisdiction to investigate and prosecute persons suspected from committing a crime can be established for more States. This article deals with procedure of the criminal prosecution authorities in such situations with main focus on the application of the ne bis in idem principle in the criminal procedure.

Key words

Ne bis in idem principle, Criminal proceedings, Convention Implementing the Schengen Agreement, Preliminary ruling.

INTRODUCTION

The *ne bis in idem* principle is a generally recognized principle of a criminal law which prohibits repeated prosecution of an individual for the same offence.[1] This principle represents one of the fundamental human rights and due to its importance is guaranteed by the constitutions of individual states as well by international treaties.[2] International applicability of this principle results mainly from the fact that that criminal law protects the most important values and principles of every state and is also expression of its sovereignty. As a result sovereign states do not restrict the applicability of their criminal legislation only to

[1] VAN BOCKEL, B. *The ne bis in idem principle in EU law.* Alphen aan den Rijn : Kluwer Law International, 2010. s. 1 – 2.

[2] Examples could be Article 14 (7) of the International convention on Civil and Political rights or the Article 4 of protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

the territory of their own state (territoriality principle), but extend it to the territories of other states, where the crimes were committed by their citizens (personality principle).[3] Taking into account the fact that there is constant movement of people from one country to another, there is a good chance that by a crime committed abroad will fall under the criminal jurisdiction of more states at once. Without the application of the *ne bis in idem* principle a person can be repeatedly accused and punish for the same crime, which could disrupt the proportionality between the crime and punishment, as well as the legal certainty and confidence in the judicial system.

Within the European Union the application of this principle is even more important because the free movement of people is granted as one of the four fundamental freedoms. Also among the people enjoying this freedom are criminals who would be disproportionately restricted in this freedom if they would be subject to multiple criminal prosecutions for the same act in several states. Based on this reason, the Member States of the Schengen area agreed on a regulation of the prosecution of the persons that have been prosecuted for a certain act in one of the Member States.

On 19th June 1990, the Member States of the Schengen area agreed on the Convention Implementing Schengen Agreement (hereinafter "CISA"). Article 54 of CISA regulates the multiple prosecution for the same act. "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." This provision expressly prohibits the accumulation of penalties for the same crime not only within the area of one state but also between the Member States. However, the CISA allows reservation to this article under some circumstances:

(a) Where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the party where the judgment was delivered;

(b) Where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that party;

[3] TOMÁŠEK, M. *Europeizace trestního práva*. Praha : Linde, 2009. s. 159.

(c) Where the acts to which the foreign judgment relates were committed by officials of that party in violation of the duties of their office.

The condition for the application of this reservation is an obligation of the state to reduce any sentence of imprisonment by the time which has already been carried out in respect of the crime.[4] This condition follows the principle of proportionality of punishment, which prevents the penalty to be disproportionate to the offense.

The application of the *ne bis in idem* principle by the Member States' bodies pointed out some uncertainties which required interpretation by the European Court of Justice (nowadays the "Court of Justice" as it will be referred hereinafter). The interpretations' difficulties have dealt mainly with the definition of multiple prosecutions (bis) for the same act (idem).

HÜSEYIN GÖZÜTOK AND KLAUS BRÜGGE

In the joint cases *Gözütok and Brügge* the Court of Justice was dealing with the question of which kinds of decisions prevent further prosecution under the Article 54 of the CISA. In *Gözütok* case, a Turkish citizen Hüseyin Gözütok had run a coffee shop in a Heerlen, a city in Netherlands. During the two inspections the police authorities found illegal drugs. As a result the Dutch public prosecutor initiated criminal proceedings against Mr Gözütok. In respect to the lower gravity of the offence, the public prosecutor offered to Mr Gözütok to pay a fine 3,750 guldens. Mr Gözütok accepted the offer, paid the fine and consequently the prosecutor terminated the criminal proceedings.[5] Later on, the German bank informed the German prosecuting authorities of suspicious movement in Mr Gözütok's bank accounts. Mr Gözütok was arrested in Germany after the German prosecuting authorities had received relevant information on Mr Gözütok's illegal activities. The German court convicted Mr Gözütok and sentenced him to a period of one year and five months imprisonment, suspended on probation. The Appeal Court changed this decision, discontinued the criminal proceedings against Mr Gözütok on the ground that under Article 54 of the CISA the German prosecuting authorities were bound by the definitive discontinuance of the criminal

[4] Article 56 of the CISA.

[5] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraphs 9 – 11.

proceedings in the Netherlands. In a second appeal the court decided to stay the proceedings and refer the matter to the Court of Justice for a preliminary ruling.[6]

The second case concerned Mr Klaus Brügge, a German citizen who was charged by the Belgian prosecution authorities with having intentionally assaulted and wounded Mrs Leliaert in Belgium, which constituted a violation of the Belgian Criminal Code. Mr Brügge faced criminal prosecution in Belgium as well as in Germany. In Belgium the proceedings had a criminal and a civil aspect due to Mrs. Leliaert's working incapacity, resulting from the assault, claiming pecuniary and non-pecuniary damages in amount of approximately 495 Euro.[7] During the proceedings before the Belgian Court, the Public Prosecutor in Germany offered to Mr. Brügge an out-of-court settlement in return for payment of around 500 Euro. Mr. Brügge accepted the settlement and paid.[8] The Belgian District Court referred a question to the Court of Justice.

Because of the similarity of the subject matter of the cases the Court of Justice has decided, after the recommendation of the Advocate General, to join and examine the cases together. The national courts were essentially asking whether the *ne bis in idem* principle laid down in Article 54 of the CISA also applied to decisions by which the Public Prosecutor discontinued criminal proceedings without the involvement of court.[9] The Court of Justice has found that the Article 54 of the CISA and the *ne bis in idem* principle also applies to procedures whereby prosecution is discontinued by the Public Prosecutor in a Member State, without any involvement of a court.[10] In both cases the decision was made by the Public Prosecutor as a criminal prosecuting authority whose power to do so arises

[6] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 14 – 18.

[7] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 19 – 20.

[8] GŘIVNA, T. *Zásada „ne bis in idem" v judikatuře Evropského soudního dvora.* [online]. 12.11.2009 [cit. 2011-09-10]. Institut pro kriminologii a sociální prevenci. Dostupné z: <http://www.ok.cz/iksp/aidp_091112.html>.

[9] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 25,

[10] FENYK, J., SVÁK, J. *Europeizace trestního práva*. Bratislava : Bratislavská vysoká škola práva, 2008. s. 85.

from national legislation.[11] The effects of such a decision are dependent upon the accused's undertaking to perform certain prescribed obligations.[12] The accused who has fulfilled all obligations must be regarded as someone whose case has been 'finally disposed of' for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed.[13]

The Court of Justice further explicitly stated that no provision of the EU law made the application of the *ne bis in idem* principle conditional upon harmonization or approximation of the criminal laws of the Member States. Considering the variety of criminal laws across Europe, the application of this principle presumes the mutual trust of the Member States in their justice systems as well as the mutual recognition of decisions in criminal matters even if the outcome under their own respective laws would be different.[14] According to the Court of Justice the objective of the Article 54 of the CISA, which is to ensure that no one by exercising his/her right to freedom of movement can be prosecuted on the same facts in several states, can be achieved only if it applies to all decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.[15] If Article 54 of the CISA applies only to decisions discontinuing prosecutions which are taken by a court or take the form of a judicial decision, the consequence would be that the *ne bis in idem* principle would be of benefit only to defendants who were guilty of offences which, on account of their seriousness or the penalties attaching to them, preclude the use of a simplified method of disposing of certain criminal cases by a procedure whereby further prosecution is barred.[16]

[11] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 27.

[12] LAGODNYM, O. Nemožnost podání obžaloby v trestní věci v důsledku právní moci rozhodnutí státního zástupce o zastavení trestního stíhání, jež brání dalšímu potrestání za týž skutek. *Trestněprávní revue* 2003, roč. 2, č. 9, s. 282.

[13] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 30.

[14] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 32 – 33.

[15] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 38.

[16] The opinion of Advocate General Dámaso Ruiz – Jarabo Colomer,in Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraphs 107 and 114.

MIRAGLIA

Soon after the decision in the joint cases Gözütok and Brügge a new question, dealing with a nature of the decision of the Public Prosecutor, occurred in connection with Article 54 of the CISA. The Miraglia was the case where *ne bis in idem* principle was found not to apply. This case was about Mr Miraglia who was charged with having organized, with others, the transport of heroin from Netherlands to Italy.[17] Therefore criminal proceedings were initiated against him, one in Italy and the other one in Netherlands. Dutch criminal proceedings were closed without any penalty or sanction having been imposed on Mr Miraglia after the Dutch judicial authorities decided not to prosecute him on the ground that criminal proceedings against him in respect of the same facts had been initiated in Italy.[18] In this case the Dutch judicial authorities applied the *ne bis in idem* principle laid down in Article 54 of the CISA, however, this application and interpretation had been considered as incorrect by the Italian court.[19] Hence, the Italian court referred the question to the Court of Justice whether "Article 54 of the CISA applied when the decision of the first State (Netherlands) consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State (Italy)?"[20]

The Court of Justice applied the teleological approach to the interpretation of Article 54 of the CISA.[21] Therefore, the Court of Justice ruled that a judicial decision not to pursue the prosecution on the sole ground that the criminal proceedings have been initiated in another Member State against the same defendant and in respect to the same acts, while there has been no determination of the merits of the case, cannot be considered as a decision finally disposing of the case within the meaning of Article 54 of the CISA. The Court of Justice added that although the objective of Article 54 of the CISA is to ensure that no one is prosecuted on the same facts in several Member States, applying this provision to a decision to close criminal proceedings, as in this case, would make it more difficult or indeed impossible

[17] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraphs 3 and 4.

[18] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraph 18.

[19] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraph 24.

[20] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraph 27.

[21] TOMÁŠEK, M. *Europeizace trestního práva*. Praha : Linde, 2009. s. 169.

to penalize the unlawful conduct of the defendant.[22] The *ne bis in idem* principle laid down in Article 54 of the CISA does not apply to all decision discontinuing the criminal proceedings and therefore it is necessary to consider the situation case by case.

VAN STRAATEN

The next case Van Straaten was about Mr Straaten who was prosecuted in the Netherlands for importing heroin from Italy into the Netherlands and for the possession of heroin in the Netherlands. However, Mr Straaten has been acquitted by way of a judgment for lack of evidence. This judgment was made by the Netherlands court. In Italy, Mr Van Straaten was prosecuted in respect of the same facts and he was sentenced to a term of imprisonment of 10 years by the judgment in absentia.[23]

So the Court of Justice was faced with the question of whether an acquittal for lack of evidence can be considered as a decision finally disposing person's trial for the purposes of Article 54 of the CISA. The answer of this question was affirmative. The Court of Justice restated the objective of the *ne bis in idem* principle in Article 54 of the CISA and it held that the non-application of this provision to a final decision acquitting the accused for lack of evidence would have the effect of jeopardizing exercise of the right to freedom movement. Moreover, the bringing of criminal proceedings in another Member State in respect of the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations.[24] In respect to the finding in Miraglia case, the Court of Justice added that an acquittal for lack of evidence cannot be treated as a decision which is not based on a determination as to the merits of the case.

GASPARINI

In this case, the Court of Justice was faced with the question whether the *ne bis in idem* principle laid down in Article 54 of the CISA also applies in respect to a decision finally acquitting the accused because prosecution of the offence was time-barred. This question arose in the criminal procedure against the shareholders and directors of the company Minerva. They agreed to import through a port in Portugal refined olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The oil was then transported

[22] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraphs 30 and 33.

[23] Case C – 150/05 Van Straaten [2006] ECR I – 9327, paragraphs 20 and 21.

[24] Case C – 150/05 Van Straaten [2006] ECR I – 9327, paragraphs 58 and 59.

to Spain. The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.[25]

The Portuguese Supreme Court of Justice found that the oil actually originated in Tunisia and Turkey; however the court acquitted the defendants on the ground that their prosecution was time-barred. The criminal proceedings against the defendants had been constituted in Spain for the same criminal acts.[26] The Spanish court in respect to the decision of the Portuguese court referred the question to the Court of Justice for a preliminary ruling.

The Court of Justice held that Article 54 of the CISA does apply to a decision by which the accused is acquitted finally because of the offence is time-barred. In its reasoning the Court of Justice restated the objective of the Article 54 of the CISA according to which no person may be prosecuted for the same acts in several Member State for the same acts as those in respect of which his trial has been already finally disposed of in another Member State provided that the prosecution is time-barred and therefore cannot be longer enforced. Non-application of Article 54 of the CISA to this kind of situation would undermine the implementation of that objective.[27] The Court of Justice added that the *ne bis in idem* principle laid down in Article 54 of the CISA does apply only to persons whose trial has been finally disposed of in a Member State.[28]

TURANSKÝ

The next case regarding the interpretation of Article 54 of the CISA is Turanský concerned a Slovak national Mr Turanský who was suspected of serious robbery under the Austrian Criminal Code. The Austrian authorities initiated the criminal proceedings against Mr Turanský and an arrest warrant had been issue for his arrest. However, according to the information received by the Austrian authorities Mr Turanský in the meantime had returned to Slovakia. Therefore Austrian authorities requested Slovak authorities to open proceedings against Mr Turanský, in accordance with Article 21 of the European Convention on Mutual Assistance in Criminal Matters.[29]

Since the Slovak authorities approved that request, criminal proceedings were reopened, however they were discontinued after

[25] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraph 16.

[26] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraphs 17 and 18.

[27] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraphs 27 and 28.

[28] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraph 37.

[29] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraphs 18 and 19.

the Slovak police decided to terminate it with the reasoning that the act of Mr Turanský does not constitute a crime under the Slovak Criminal Code. Afterward the Austrian court referred the case to the Court of Justice for a preliminary ruling question whether the *ne bis in idem* principle in Article 54 of the CISA applies to a decision made by a police authority at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings which had been instituted.[30]

The Court of Justice held that the decision of the Slovak police does not, under the Slovak law, definitively bar further prosecution at a national level and hence does not preclude new criminal proceedings, in respect of the same acts, in Slovakia.[31] Therefore, this decision does not have *ne bis in idem* effect laid down in Article 54 of the CISA, even if there has been some consideration of the merits of the case. The Court of Justice ruled that a decision in order to be considered as a final disposal for the purposes of Article 54 of the CISA must bring the criminal proceedings to end and definitively bar further prosecution.[32]

VAN ESBROECK

In the Van Esbroeck case, the Court of Justice was faced with the question regarding the interpretation of the "same acts" in the scope of Article 54 of the CISA. This case was about Mr Van Esbroeck, a Belgian national, who had been sentenced by the Norwegian court to five years' imprisonment for illegally importing narcotic drugs. After having served part of his sentence he was released conditionally and moved back to Belgium. Later on, the prosecution was brought against him in Belgium and he was sentenced in respect to the same facts to one years' imprisonment. Mr Van Esbroeck appealed and pleaded infringement of Article 54 of the CISA. The Belgian court then had referred the question to the Court of Justice of what is the relevant criterion for the purposes of the application of the meaning of "the same acts" for the purposes of Article 54 of the CISA.[33]

In respect to this question the Court of Justice stated that the wording of Article 54 of the CISA refers only to the nature of the acts and not to their legal classification. The Court of Justice also pointed out that the application of the *ne bis in idem* principle implies that the states have mutual trust in each other's criminal justice systems. The Court of Justice added that the application of the *ne bis in idem* principle laid down in Article 54 of the CISA is not dependent upon further

[30] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraphs 22 and 30.

[31] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraph 39.

[32] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraph 45.

[33] Case C – 436/04 Van Esbroeck [2006] ECR I – 2333, paragraph 14 - 17.

harmonization or approximation of the criminal laws of the Member States.[34]

Since the legal qualification of the offences is likely to vary from one State to another, the criterion of the identity of the protected legal interest cannot be applied for the purposes of Article 54 of the CISA. The Court of Justice finally held that in those circumstances, the only relevant criterion is "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together."[35] The definitive assessment of such an identity in the specific case belongs to the competent national courts.

KRETZINGER

In this case, the Court of Justice was asked by the German court during the preliminary ruling to interpret the meaning of the notions of "same acts" and "enforcement" of criminal penalties. The issue in the main proceedings was about Mr Kretzinger, who on two occasions transported cigarettes from non-Member States through Greece, Italy and Germany to the United Kingdom. The cigarettes were not presented for customs clearance at any point. Therefore, Mr Kretzinger was twice sentenced in absentia by the judgment of Italian court and he faced up to one year and eight months of suspended custodial sentence and a custodial sentence of two years which was not suspended.[36] Aware of those judgments, the German court sentenced Mr Kretzinger to one year and ten months' imprisonment in respect of the first consignment and one year's imprisonment in respect of the second one. The German court justified this judgment on the ground that two final sentences in Italy had not yet been enforced.[37] Mr Kretzinger appealed against this judgment before the German Supreme Court which referred the question to the Court of Justice.

Firstly, the Court of Justice was asked the similar question of what is the relevant criterion for the purpose of the application of the "same acts" within the meaning of Article 54 of the CISA. Following its opinion in the Van Esbroeck case, the Court of Justice restated that the only relevant criterion is the identical

[34] Case C – 436/04 Van Esbroeck [2006] ECR I – 2333, paragraphs 27 - 30.

[35] Case C – 436/04 Van Esbroeck [2006] ECR I – 2333, paragraph 36.

[36] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 14 - 16.

[37] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraphs 20 and 21.

nature of the material acts.[38] Moreover, in respect to the circumstances in the Kretzinger case, the Court of Justice held that "the acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterized by the fact that the defendant ... had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination ... constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54."[39]

Secondly, the Court of Justice was faced with the question of whether a suspended custodial sentence must be treated as a penalty which has been enforced or is actually in the process of being enforced. The Court of Justice agreed with the Advocate General, the governments which submitted observations and the Commission, when it held that a suspended custodial sentence penalizes the unlawful conduct of the defendant and it constitutes a penalty within the meaning of Article 54 of the CISA. Therefore this "penalty has to be regarded as actually in the process of being enforced as soon as the sentences has become enforceable and during the probation period."[40] On the other hand the Court of Justice held that this does not apply for the situation when the defendant was for a short time taken into police custody or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given[41].

Summarizing the aforementioned case law we can see that the Court of Justice dealt with three main issues by the interpretation Article 54 of the CISA. Firstly, the Court of Justice discussed the nature of the decision discontinuing the prosecution. It discussed the purpose of the ne bis in idem principle and stressed the need for a mutual trust in a legal systems of the Member States. The Court of Justice concluded that any decision, even made by public prosecutor, finally discontinuing the procedure has had an effect in whole Europe. Secondly, the Court of Justice dealt with the meaning of the same act. After considering all the relevant circumstances it

[38] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 29.

[39] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 37.

[40] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 42.

[41] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 46.

preferred the material identity of the act before its legal qualification under a national law. Lastly, the Court of Justice clarified the meaning of the words penalties that has been enforced or is actually in the process of being enforced when it concluded that the penalty has to be regarded as actually in the process of being enforced as soon as the sentences has become enforceable and during the probation period. This interpretation provides very broad protection for the persons who have been charged for an offence from the multiple prosecution in more states and makes the ne bis in idem principle applicable all across the Europe.

LISBON TREATY AND THE NE BIS IN IDEM PRINCIPLE

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union ("the Charter") entered into primary EU law and has become legally binding. The Charter, which was proclaimed as a non-binding document in the end of 2000 in Nice, enshrines certain political, social, and economic rights for the European Union citizens. Article 50 of the Charter provides that no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the EU in accordance with the law. The explanatory memorandum provides that "in accordance with Article 50, the *non bis in idem* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in EU law."[42]

Although Article 50 of the Charter differs from Article 54 of the CISA, it is very similar to Article 4 of protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Charter seems to try to provide a minimum standard similar to the ECHR, as the EU will become a party to the ECHR. While the ECHR requires the application of the *ne bis in idem* principle only within the territory of one state, the Charter is fully transnational in the EU having much broader territorial application. Moreover, the Charter applies also to the European Union organs, which makes its application even broader than CISA.[43] On the other

[42] DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION [online]. 11 October 2000 [cit. 29 November 2011]. . Dostupné z WWW: <http://www.europarl.europa.eu/charter/pdf/04473_en.pdf>.

[43] Article 50 of the Charter of Fundamental Rights of the European Union

hand the substantive applicability seems to be more restrictive than in CISA and questionable in some aspects.

Article 50 of the Charter is quite short and its wording is not always unambiguous. "*Finally acquitted or convicted within the Union"* can mean that the litigious proceeding must take place within the Union, but can also be understood as saying that the proceeding must be in front of the Member State or the Community court. Similarly, the law can refer to *the law* of the Member State as well as to EU law. Moreover, the wording *criminal proceedings for an offence* can be explained as limiting the application of this principle only to the proceedings classified as criminal.[44] Finally the word *offence* itself refers more to the identity of a legal classification of the act than to its factual identity.

According to the Article 51 of the Charter, the provisions of the Charter are addressed to the institutions and bodies of the EU ... and to the Member States only when they are implementing EU law. It could be said that the *ne bis in idem* provision applies "only to those areas of EU law and systems of criminal law of the Member States where the EU has criminal law competence and where national criminal law has implemented EU law."[45] This is, however, a very narrow interpretation that would drastically restrict the effect of the Article 50 of the Charter. It is more likely that the Court of Justice will adopt a broad interpretation of criminal proceedings similar to the concept of criminal charge by the European Court of Human Rights. Although with broad interpretation of criminal proceedings, the Charter applies only to the EU law. Therefore the proceedings not involving EU law or laws implementing EU law probably stay out of the protection from the Charter.

Therefore, it seems that the Charter aims to supplement the CISA in case of *ne bis in idem* principle when the proceeding is in front of the EU organs. In situations where national law which has been implementing the EU law applies, the Charter and the CISA could overlap. In such a situation the one more favorable version to the charged person should apply. While the Charter does not provide the clear definition of the *ne bis in idem* principle, interpretation by the Court of Justice will be important. Presumably the Court of Justice will extend

[44] VAN BOCKEL, B. *The ne bis in idem principle in EU law.* Alphen aan den Rijn : Kluwer Law International, 2010. s. 18.

[45] VAN BOCKEL, B. *The ne bis in idem principle in EU law.* Alphen aan den Rijn : Kluwer Law International, 2010. s. 18.

the current interpretation of the CISA to the Charter and it will adopt the understanding of some expression in Article 50 of the Charter from the European Court of Human Rights due to the similarity of both versions.

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APPLICATION OF INTERNATIONAL COUNTER-TERRORISM MEASURES BY NATIONAL BODIES (COURTS)

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Abstract in original language

Článek pojednává o problematice mezinárodních protiteroristických opatření, konkrétně se pak zaměřuje na aplikaci sankcí (především zmražení majetku) zavedených OSN proti Al Kajdě a Talibanu. Cílem článku je analyzovat, zda v dané problematice hrají nějakou roli vnitrostátní soudy, a pokud ano, jak se s touto problematikou dle národní legislativy vypořádávají či mají vypořádat.

Key words in original language

Mezinárodní sankce, OSN, Al Kajda, Taliban, vnitrostátní soudy.

Abstract

The contribution deals with international counter-terrorsim measures, concretely it is focused on application of the UN sanctions (mainly of assets freeze) against Al-Qaida and the Taliban by member states of the United Nations. The aim of the contribution is to analyze if there is some role of national courts in mentioned international sanctions regime and if so how the courts are or should be dealing with this issue.

Key words

International sanctions; the United Nations; Al-Qaida; the Taliban; national courts.

1. INTRODUCTION

After the determination of international terrorist acts perpetrated by the members of Al-Qaida and the Taliban as *a threat to international peace*, the UN Security Council ("UNSC") has decided what concrete measures would be taken to maintain and restore international peace and security.[1] These measures, namely assets freeze, arms embargo and travel ban, were firstly adopted in *the Resolution 1267 (1999)* and the subsequent resolutions[2] have further developed them, as well as a

[1] Under Art. 39 of the UN Charter the UN Security Council is competent to determine the existence of threat to international peace and security and to decide what measures shall be taken to maintain or restore them.

[2] The UNSC Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1988 (2011) and 1989 (2011). All Resolutions were adopted *under the Chapter VII* what means (in conjunction with Art. 25 of the UN Charter) that all the UN member states have to implement the

procedure of listing and delisting of alleged terrorists and they supporters on the Consolidated List[3]. The aim of the measures has been to affect the concrete individuals - members of terrorist groups or their supporters, concretely to stop them in perpetrating terrorist acts.

This submitted contribution is concentrated on a particular issue of *assets freeze* imposed on individuals listed on *the Consolidated List* administered by *the Al-Qaida and Taliban Committee*[4]. At the outset it demonstrates how is the measure implemented and applied by national bodies in the Czech Republic and further it is analysed *a role of national courts* (not only in the Czech Republic) - if they have any competences in this area and if so, how they are or should be dealing with this issue.

2. APPLICATION OF MEASURES

2.1 APPLICATION BY NATIONAL BODIES

Member states of the UN implement the given UNSC Resolutions including the measures and the Consolidated List by *national acts*.

For demonstration how does this international legal regulation work in practice, for example in *Czech Law* there is one concrete Act, namely *the Act on Carrying Out of International Sanctions*[5], which provides a general framework for application of all international sanctions imposed by the Security Council or the European Union.

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measures to their national legal system and imposed them on the persons and organizations listed on the Consolidated List. The last UNSC Resolutions 1988 (2011) and 1989 (2011) has changed the Al-Qaida and Taliban sanctions regime, split them and now are the measures applied only against Al-Qaida terrorists and their supporters.

[3] The Consolidated List is a list where are stated names of alleged terrorists and their supporters who are listed and sanctioned by the above mentioned measures. See concretely: The List established and maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) with respect to individuals, groups, undertakings and other entities associated with Al-Qaida. The Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Last updated 30 December 2011 [cited 31 December 2011]. Available from: http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml.

[4] The Al-Qaida and Taliban Committee (also known as the 1267 Committee) was established by the Resolution 1267 (1999) as a subsidiary body of the UNSC. It decides e.g. on the listing and delisting of alleged terrorist and their supporters.

[5] Act No. 69/2006 Coll., *on Carrying Out of International Sanctions*, as amended ("Act on Carrying Out of International Sanctions").

In the case of Al-Qaida and the Taliban there is a slightly different position of member states of the European Union (e.g. the Czech Republic) because this organization considered that *these measures [stated in the Resolutions concerning Al-Qaida and the Taliban terrorists and their supporters] fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned*.[6] Thus the EU (Council of the EU) adopted directly effective Regulation which implements the measures as well as the Al-Qaida and Taliban Consolidated List (in Annex of the Regulation) which is updated by amendments of the EU Commission for all EU member states. The EU member states have to establish a national mechanism which could apply the measures on the listed natural and legal persons and have to stipulate the sanctions that could be imposed on perpetrators of the Regulation.

In the Czech Republic there is *Ministry of Finance*[7] as a responsible administrative body for coordination of implementation and application of the measures and for imposition of sanctions on perpetrators of obligations stipulated by the Regulation.[8]

A concrete application of the measures is primarily based on *reporting duty* of both legal and natural persons to the above mentioned administrative body in the case if they are in possession of assets of the listed person or organization.[9] Then the administrative body has to *decide*[10] *on a restriction or a prohibition of disposing of such assets*[11]. There might be *a remonstrance* (a special appeal) against this decision to the Minister of Finance.[12]

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[6] Council Regulation (EC) No 881/2002 of 27 May 2002 *imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban*, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.

[7] More precisely *Financial Analytical Unit of Ministry of Finance* ("FAU").

[8] International Sanctions. Ministry of Finance of the Czech Republic [online]. Last modified 15December 2011 [cited 20 December 2011] Available from: http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/EN_Internat_sanction.html.

[9] Sec. 10 par. 1 of the Act on Carrying Out of International Sanctions.

[10] A usual *time limit* is *30 days*, but this limit might be extended in justified cases. (Sec. 12 par. 2 Act on Carrying Out of International Sanctions).

[11] Sec.12 par. 1 a) of the Act on Carrying Out of International Sanctions.

[12] Sec.12 par. 3 of the Act on Carrying Out of International Sanctions.

2.2 APPLICATION BY NATIONAL COURTS

The listing on the Consolidated List and subsequent imposition of international counter-terrorism measures by the Al-Qaida and Taliban Sanctions Committee on the individuals constitutes *serious restrictions of their particular human rights*. The important fact is that listed persons have no possibility to challenge the listing before independent and impartial competent court on the international level. There is *no court of the United Nations that has competence in dealing with the listing or delisting of individuals*.[13] The only UN body that considers delisting requests is *the Office of the Ombudsperson*.[14] However this body is not comparable to independent and impartial judicial body because its recommendations are not binding for the Al-Qaida and Taliban Committee.[15]

The consequence is that national bodies have to apply measures interfering to human rights of persons *without any discretion* (because UNSC resolutions under the Chapter VII are legally binding for all UN member states and under Art. 103 of the UN Charter the obligations arising from the UN Charter prevail over obligations arising from other international treaties) and with awareness of the fact that the given persons had no possibility to challenge these restrictions effectively.

In this situation the last chance of the listed individuals to have their assets unfrozen is an independent and impartial national court that is competent to decide if there is a violation of individual's rights by a state body (which froze his/her assets). Because of the complicated cases concerning assets freeze, there are cases before the highest judicial instances of the UN member states.

2.2.1 CZECH REPUBLIC

In the Czech Republic there has not been yet any case of challenging the listing and the assets freeze before any Czech court.

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[13] MALENOVSKÝ, J. Mezinárodní právo veřejné: jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému. 5., podst. upr. a dopl. vyd. Brno: Masarykova univerzita, 2008, s. 395.

[14] Par. 21 of the Resolution 1989 (2011).

[15] Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities. The Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Published 13 April 2011 [cited 25 December 2011]. Available from: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/245.

An application against the remonstrance of the Minister of Finance (more precisely *an application on cancellation of the administrative body's decision*) shall be submitted *to an administrative court*.[16] If this administrative court would reject the application, the appellant may submit *a cassation complaint to the Supreme Administrative Court* (on the grounds stipulated in Sec. 103 of the Code of Administrative Justice) and if this Court would reject this complaint, the individual may submit *a constitutional complaint to the Constitutional Court*[17] challenging the assets freeze that e. g. was made under a decision of Ministry of Finance and in accordance with the national legislation but *contrary to his/her right to a fair trial* because he or she has *no effective legal remedy* to challenge the listing or the assets freeze before an independent and impartial judicial body because Ministry of Finance only carried out the decision of the UNSC or more precisely of the EU (EU Council and EU Commission).

There is one important fact in the (Czech) judicial proceedings where is EU Regulation taken into account (applied) - the national court should *suspend the proceedings* and should *request for a preliminary ruling of the Court of Justice of the EU* concerning the (in)validity of the legal act of the EU (because of the violation of human rights).[18] Or the listed individual may submit on the same grounds *an action for annulment of Regulation No 881/2002* to the Court of Justice of the EU, in so far as it concerns him or her.[19]

2.2.2 SWITZERLAND

In contrast to a theoretical situation in the Czech Republic analysed above, in Switzerland there was at least one challenge to the assets freeze and the listing of an individual.[20]

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[16] Sec. 65 par. 1 of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended ("Code of Administrative Justice").

[17] Art. 87 par. 1 d) of the Act. No. 1/1993 Coll., Constitution of the Czech Republic, as amended: *The Constitutional Court has jurisdiction over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms.*

[18] Art. 267 of the Treaty on the Functioning of the European Union.

[19] Such action was submitted by Mr. Y. A. Kadi. See e.g. *Judgment of the Court (Grand Chamber) of 3 September 2008, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P.

[20] The case is now pending before the Grand Chamber of the European Court of Human Rights: *Nada vs. Switzerland* (Application no. 10593/08).

The Swiss Federal Council adopted in 2000 *the Anti-Taliban Order* implementing the measures against listed individuals and organizations. One of the listed individuals was Mr. Nada who complained about it but all his administrative appeals were rejected.[21]

The case was brought before *the Swiss Federal Court*.[22] The application for delisting of Mr. Nada was dismissed. According to the judgment the main reason for dismissal was Art. 103 of the UN Charter where is stated *the prevalence of obligations arising from the UN Charter (and from the Resolutions adopted under the Chapter VII of the UN Charter) over the obligations emerging from other international treaties* (even human rights treaties). Moreover the court held that the UN member *states have no discretion in listing or delisting* of persons or organizations and delisting of Mr. Nada (because of violation of fundamental human rights) by the Switzerland could jeopardize the application of the Al-Qaida and Taliban sanctions.[23]

2.2.3 THE UNITED KINGDOM OF THE GREAT BRITAIN AND THE NORTHERN IRELAND

In the United Kingdom there were some cases concerning the Al-Qaida and Taliban sanctions.

The transposition of the UNSC Resolutions concerning measures against Al-Qaida and the Taliban alleged terrorists and their supporters and the Consolidated List was made into *British Law* by Her Majesty's Treasury Orders - namely by *the Terrorism Order 2006* and *the Al-Qaida and Taliban Order 2006* (in accordance with the (British) United Nations Act 1946 which authorises the making of Orders in Council as are 'necessary or expedient' to give effect to UNSC Resolutions[24]).

The listing and imposition of the sanctions stated in mentioned Orders was challenged by A, K, M, G and HAY before the Supreme Court of

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[21] Exposé des Faits: Nada vs. Switzerland. The European Court of Human Rights [online]. Published 17 March 2009 [cited 30 December 2011]. Available from: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=848716&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

[22] Judgment of the (Swiss) Federal Court of 14 November 2007, case 1A.45/2007/daa.

[23] Judgment of the (Swiss) Federal Court of 14 November 2007, case 1A.45/2007/daa., par. 6.2.

[24] Sec. 1 of the United Nations Act 1946

the United Kingdom.[25] The court held that *the Treasury acts ultra vires* in issuing the Orders because the measures *gravely interfere to the fundamental human rights*, the individuals were listed on the grounds of "*reasonable suspicion*"[26] (that the individual/organization is perpetrator or supporter of terrorist acts)[27] and the listed persons/organizations have *no right of access to a court*.[28]

Even if this judgment seems to be only national matter and have principally no impact on international law, contrary is the case. As we can see in *the Eleventh Report of the Monitoring Team*[29] for the Al-Qaida and Taliban Sanctions Committee, the Monitoring Team has stressed as an important trend, that national courts, concretely the Supreme Court of the United Kingdom as one of that courts, ruled in favour of listed persons because of impossibility of judicial remedy.[30]

3. CONCLUSION

This contribution may be concluded that there is no doubt about the importance of fighting against terrorism and the UN member states and their national bodies are aware of this fact. A complicated issue

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[25] Judgement of the Supreme Court of the United Kingdom, Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v. Mohammed al-Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty's Treasury (Appellant), 27 January 2010 (2010) UKSC 2 ("Judgement of the Supreme Court of the United Kingdom").

[26] "Reasonable suspicion" is a sufficient ground for the listing and subsequent freezing of assets.

[27] Par. 197 of the Judgement of the Supreme Court of the United Kingdom

[28] Par. 185 of the Judgement of the Supreme Court of the United Kingdom.

[29] *The Monitoring Team is composed of independent experts, appointed by the Secretary-General, with expertise in counter-terrorism, financing of terrorism, arms embargoes, travel bans and related legal issues and assists the Committee in evaluating the implementation of the sanctions regime by Member States.* General Information on the Work of the Committee. Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Created 31 January 2007 [20 December 2011]. Available from: http://www.un.org/sc/committees/1267/information.shtml.

[30] Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities. Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Published 13 April 2011 [cited 25 December 2011]. Available from: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/245, par. 31.

seems to be the way of the fighting. The main opponents of the way chosen by the UNSC are courts.

There are various approaches of national courts to the question of their role in the application of international counter-terrorism measures. Some of them have recognized the main role of the UNSC in determining measures that have to be taken to maintain and restore international peace and security, and the violation of human rights of the listed persons do not take into consideration because the obligations arising from Resolutions prevail over the obligations arising from other treaties, even human rights treaties. Some of them have not admitted implicitly that the UNSC is enabled not to adhere to human rights standards and the redline of the judgments is that even during the fight against international terrorism (a threat to international peace and security) there has to be a possibility to challenge the stipulated restrictions before an independent and impartial judicial body (to have effective judicial remedy) to be sure that these strict restrictions are not imposed on innocent persons.

The national courts (as well as the Court of Justice of the EU) have to be considered as very important defenders of human rights in this area. Their judgments evidently represent the main reason why is the UNSC improving the listing and delisting procedure to be more consistent with human rights and consequently to affect less innocent people and organizations.

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EVOLUTIVE INTERPRETATION AND THE MARGIN OF APPRECIATION DOCTRINE - THE VIEW OF NATIONAL COURTS[1]

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Abstract in original language

This working paper might provide more questions than answers because it is concerned with a highly complex issue of interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms. Particularly, it focuses on clash of three interpretational approaches - originalism and evolutive interpretation which might get further mixed up by the margin of appreciation doctrine. All this is analyzed from the perspective of national court asking - how should I interpret the Convention in the instant case? It is a working paper of a part of an article I am preparing on this issue.

Key words in original language

European Convention on Human Rights, European Court of Human Rights, originalism, textualism, evolutive interpretation, subsidiarity principle, margin of appreciation doctrine

Complexity of human rights protection in Europe poses national courts in a position one does not really envy. National judges especially at the highest courts often have to ask themselves: "Should I stick to the original text of the European Convention on Human Rights[2] and its meaning or should I stick to the existing case-law of Strasbourg Court or should I interpret the Convention evolutively and subsume the case under one of the rights and freedoms safeguarded by the Convention although I might be creating a "new" right which the drafters of the Convention never thought of?". There are many more questions we could add to this list, such as: "Does this fall within my margin of appreciation or am I on the verge of violating this party's right?" One last thought could also be: "It is going to be better, if I send this to Luxembourg, I will gain some time and those smart judges of the Court of Justice will tell me what to do, here."

In the following text, I will try to outline the many possibilities national courts and their judges have in their efforts to resolve the hard situations described above. With respect to the subsidiarity principle, the decision of a national judge on interpretation and application of

1 This working paper has been written in the course of implementing a grant project of Student grant competition "Antidiscrimination law and the margin of appreciation doctrine" no. PF_2011_002

2 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention")

the Convention in the case before him has far reaching practical and imminent consequences on the observance of human rights and fundamental freedoms of those involved.

1. EVOLVED VS. ORIGINAL

Basically, when applying the Convention, one might turn to multiple versions of it, depending on the doctrine they espouse. Judges are bound by the law on one hand, but pretty free in the methodology of intepreting it which gives them an enormous power in practice, as I will describe further. Judges generally have an option to choose between "original" Convention and "evolved" Convention. What are the pros and cons of such a choice?

Firstly, let us analyze the probable minority of judges which choose the "original" Convention. More precisely, they turn to the original text of the Convention and its meaning before they do anything else. If I were to paraphrase famous quotation by Justice David Josiah Brewer, who served as an Associate Justice of the United States Supreme Court in the turning point of 19th and 20th century, with respect to the Convention, I might say: "The Convention is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now." [3] I could not have mentioned a better explanation of so-called "originalism" which has a number of supporters. Probably, the most significant of them still are Antonin Scalia and Clarence Thomas, current Associate Justices of the U. S. Supreme Court. Their arguments in favor of originalism are based on the formal nature of law as its purportedly most important feature. They say that law does not change in time. For law to change, it has to be amended by those who have the competence and mainly legitimacy to do so. In their opinion, if the law changed in time, principle of legal certainty would have gone to the dogs. And therefore, in accordance with the theory of originalism, we ought to interpret the text of a law (the Convention, in our case) correspondingly to what the text meant when it was legitimately adopted[4]. In case the law needed changing, originalists argue that the only way to do so is by amending the law.

There is one more strong argument put forward by originalists - they have easy answers to the most controversial issues. Why should there be a right to abortion since the drafters never gave it a thought and the Convention has not been amended in that respect? There simply isn't

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3 see Letsas, G. A Theory of Interpetation of the European Convention on Human Rights. New York, Oxford University Press, 2009. p. 58; and mainly, see case South Carolina v United States 199 US 437, 448 (1905)

4 in detail, see Scalia, A., Gutmann, A. A matter of interpretation: Federal Courts and the law. Princeton: Princeton University Press, 1997 or Scalia, A., Ring, K. Scalia dissents: writings of the Supreme Court's wittiest, most outspoken justice. Washington, D.C.: Regnery Publishing, 2004.

any[5]. Correspondingly, how can there be any environmental rights arising out of the Convention if there is not a word about them in the text of it and Member States as the only subjects who can amend the Convention by means of new protocols have never done so? That is the usual line of argument followed by fans of originalism. They also usually say that every day is a new day and if evolutionists were right, then no one could be sure of what the law in his case is, actually.

To clarify and summarize the position of originalists, there are three pillars they love the most - textualism, formalism and legitimate changes of law. It follows that history also has an important part in the originalistic interpretation. We may go into a lot more detailed analysis of originalism but in my opinion, the information mentioned above is sufficient for the rest of this working paper.

On the other hand, supporters of the evolutive interpretation naturally have the opposite opinion. They claim that the Convention is a "living instrument which…must be interpreted in the light of present-day conditions"[6]. In their view, this position corresponds with the object and purpose of the Convention which must adapt to present standards and not the standards existing in the 50's when the Convention was adopted[7]. In other words, they respond to originalists: Why should we look back to history, if we're protecting human rights, now? Convention as a "dead instrument" would be useless in today's Europe as it might lead to actual violations of what is regarded as human rights today.

Well, what does the European Court of Human Rights respond to both groups of opponents? Leading case in this matter is the case Golder v UK[8]. Golder was the first case where both rivals clashed for the first time. The question was whether there is a right of access to court within the ambit of Article 6 of the Convention which regulates the right to a fair trial. It was the then British judge Sir Gerald Fitzmaurice who carried the flag of originalism against the evolutionist majority in his dissent to the Golder decision. His argument was in line with so-called intentionalist wing of originalists[9] which argues that the drafters

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5 I fully recommend to watch an interview with Justice Scalia on these issues available at the website of University of California here: <http://www.uctv.tv/search-details.aspx?showID=20773>

6 Harris, D., O'Boyle, M., Warbrick, C. et al.: Law of the European Convention on Human Rights, New York: Oxford University Press, 2009. p. 7, see also European Court of Human Rights decision inTyrer v UK, Judgment of 25 April 1978, application no. 5856/72

7 Harris, D. et al.: Law of the European Convention on Human Rights, p. 7

8 Golder v UK, Judgment of 21 February 1975, application no. 4451/70

9 Letsas: A Theory of Interpretation, p. 60 and p. 64, the second wing of originalists is called textualism and it says that the text of the Convention has to be attributed with a meaning it had at the time of its enactment

should have expressly included this particular right in the text of the Convention if they thought that it ought to be safeguarded by it. Nonetheless, although his arguments might seem as persuasive to a reader, majority of the plenum chose to interpret the Convention evolutively and it began the history of evolutive interpretation of the Convention which prevails in its application up to now. The well-known concept of a Convention which "guarantees not rights which are theoretical or illusory but rights that are practical and effective"[10] and a concept of the Convention as a "living instrument"[11] followed. From then on, we may speak of the "fall of originalism" in the interpretation of the Convention.

Why is that? In my opinion, it is simply because law has to accord society and as it changes, so the law has to adapt to it. As far as human rights protection is concerned, values of European society have tremendously changed in unforeseeable ways. And it is not feasible for the Contracting States to say at one point every fortnight: "Hey, haven't the values changed regarding this human right? They have, right? Ok, let's adopt a new protocol." Neglecting these sociological and economic impacts on law would only lead to broadening a gap between reality of life and the law, namely human rights protection. Besides, the text of the Convention is never capable of being applicable to all possible life situations and as such, there cannot be a better subject to make European human rights law complete, than the European Court of Human Rights. Currently, courts generally have to participate on law-making process and its deficiencies, mainly the gaps in written law. European Court of Human Rights is legitimized to "adapt" the law of the Convention in such a manner by the High Contracting Parties of the Convention which fully acknowledge the Court's case-law. Besides, as George Letsas aptly points out, Convention does not say a word about how it should be interpreted[12].

But before I entangle the whole issue a little with one more doctrine, let's get back to national courts, now. After the respective theories have been outlined and actual interpretative direction of the Convention has been pointed out, imagine you are a national judge in one of the countries of Council of Europe and you're dealing with a case where "inhuman and degrading treatment" has been argued. The case concerns an Asian employee who was verbally attacked by his boss by being repeatedly called names one might regard as offensive, another one might think the boss abuses his power to degrade the employee. You might reckon: "How do I objectively establish what is

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10 see Artico v Italy, Judgment of 13 May 1980, application no. 6694/74, para. 33, see also Harris, D. et al.: Law of the European Convention on Human Rights, p. 15 or Jacobs, F. G., White, R., Ovey, C. The European Convention on Human Rights. New York : Oxford Universty Press, 2010, p. 74

11 see Airey v Ireland, Judgment of 9 October 1979, application no. 6289/73

12 Letsas: A Theory of Interpretation, p. 68

inhuman and degrading treatment"? You might try to find an answer in the existing case-law of the Strasbourg Court but what if you do not find an explicit answer? Knowing the subsidiarity principle poses the obligation of protecting human rights on you in the first place, can you adhere to evolutive interpretation and "find a new meaning" of the Convention's text which might even lead to "finding a new human right"? Or should you stick either to the text and the meaning you think it has or the existing case-law only which you follow to the letter? Doesn't the case-law begin to have similar features to originalism, if you simply follow it without even thinking of its possible evolving and future changing? How does it change, then? Is it only European Court of Human Rights who may indicate the direction in evolutive interpretation? If yes, then isn't that too late and doesn't that contradict the subsidiarity principle?

These are all very actual questions that national judges have to answer in practice. No wonder that more and more judges tend to adopt the best interpretational method - common sense. Methodological correctness of finding what is lawful in particular cases gets harder and harder and there is no doubt that judges in current multilevel system of laws get easily lost. And it can get even more complicated with the margin of appreciation doctrine. Let us see what consequences this doctrine may have in the next part of this paper.

2. HOW BIG IS MY MARGIN OF APPRECIATION?

Simply put, that is one more important question which may be raised by a judge of a national court. There are many cases in which the European Court of Human Rights has stated that states enjoy "certain" margin of appreciation[13] in implementation of obligations arising from the Convention. In other cases, so-called "wide"[14] margin of appreciation has been attributed to states, as well as a "narrow"[15] one.

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13 e.g. Sunday Times v the United Kingdom, Judgment of 26 April 1979, application no. 6538/74, para. 62 and many others

14 out of the more recent cases see e.g. Stummer v Austria (Grand Chamber), Judgment of 7 July 2011, application no. 37452/02, paras. 101 and 109 or out of the more historical ones see James and others v the United Kingdom, Judgment of 21 February 1986, application no. 8793/79

15 very interesting case in this regard is the case S. H. and others v Austria, Judgment of 1 April 2010, application no. 57813/00 where wide margin of appreciation was attributed although the actual analysis suggests a very narrow margin, see its para. 69 and Kratochvíl, J. The inflation of the margin of appreciation by the European Court of Human Rights. Netherlands Quarterly of Human Rights, 2011, vol. 29, no. 3, p. 347, regarding the narrow margin of appreciation see also Tebieti Mühafize Cemiyyeti and Israfilov vs Azerbaijan, Judgment of 8 October 2009, application no. 37083/03, para. 67 or United Communist Party of Turkey and Others vs Turkey, Judgment of 30 January 1998, application no. 19392/92, para. 46.

Once again, national judges may get puzzled when after deciding on being evolutionist or originalist, they have to measure whether the law and their future decisions fit within the width of the margin of appreciation states have in specific cases. How to measure that? How does the judge know that he is still observing the human rights protection standard falling within the state's margin of appreciation or that he is actually violating the right?

Furthermore, the margin of appreciation doctrine also has a number of wings of supporters. You can be a progressivist claiming that it is the European Court of Human Rights only, who is responsible for safeguarding unified standards of protecting human rights or you can be conservative and claim that under the principle of subsidiarity, European Court of Human Rights ought to step into the case once the domestic authorities fail to protect human rights at domestic level[16]. Especially judges falling within the first category may cast a danger if they admit: "If I get it wrong, then they will get it right in Strasbourg, I'm sure." Therefore, the theoretical concept which the judge incorporates into his decision as to the margin of appreciation doctrine visibly has far-reaching consequences and in practice, it may lead to a whole lot of new questions. For example, what happens if the width of the margin of appreciation specified in the case-law of the European Court of Human Rights evolves and gets wider or narrower?

3. CONCLUSION

As I have mentioned in the beginning, this working paper was going to raise more questions than answers. With regard to all the theoretical concepts, it is probably not even possible to provide generally applicable solutions. Practical consequences of a judge's choice to decide as an originalist, intentionalist, textualist, evolutionist, progressivist or conservativist may lead to ends we are not even able to imagine, now.

It is worth noting that all judges bring their own values into their decision-making. Judges are not slot machines where you put factual background and you "win" a decision based only on the text of law and nothing else. Honestly, I am a bit scared of such an image of a judge as a robot. On the other hand, supporters of textualism prefer robotic judges, e. g. Antonin Scalia said in one if his interviews that an ideal rule for an honest judge when applying the law (i.e. meaning of

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16 Greer, Steven. The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights. Strasbourg: Council of Europe, 2000. p. 19 et seq.; Letsas: A Theory of interpretation, p. 91; Lavender, Nicholas. The Problem of Margin of Appreciation. European Human Rights Law Review, 1997. no. 4, p. 381; Cossey v. the United Kingdom, Judgment of 27 September 1990, application no. 10843/84 and many other following this judgment

its text when adopted) is "Garbage in, garbage out"[17]. Anyway, legal orientation in the mass of law is slowly reaching the very limit of human abilities. In practice, European judges have to apply domestic law, international law and EU law, all of them connected with tons of doctrines making the work of a judge unbearable.

Eventually, I would like to invite you to share your thoughts on the questions raised in this short working paper which may help me in finding as many answers as possible that I could include in the paper to be published in International and Comparative Law Review. Just like the judges in practice, I do not want end up in front of my computer not knowing what to do.

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17 see interview conducted by Peter Robinson of The Hoover Institution available under this particular link at : < http://fora.tv/2009/02/23/Uncommon_Knowledge_Antonin_Scalia >

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INTERPRETATION AND APPLICATION OF EUROPEAN LAW IN CONSTITUTIONAL COURT OF THE CZECH REPUBLIC CASE LAW

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Abstract in original language
N/A

Key words in original language
Ústavní soud; princip přednosti; aplikace unijního práva.

Abstract
N/A.

Key words
Constitutional Court; Supremacy principle; Application of EU Law.

I. General Role of Constitutional Courts and Introductory Remarks about the Constitutional Court of the Czech Republic

The fact that in the legal environment of the Czech Republic (CR) national, international and European law are present, and it is true also about the European Union (EU) individual states, determines the complexity of the current legal systems. In the legal order, quite naturally, both theoretical and practical questions of mutual relations, preferences or possible conflicts among the above legal systems arise. Under such circumstances, both legal interpretation and use of interpretative overbridging principles have its high importance. The fact that the CR has acceded to the existing EU legal system both enabled to use previous experiences of member states and predetermined possible solutions.

Judicial interpretation has its place among different types of interpretation. Although its role in individual states differs, constitutional judiciary has significant role in the process of legal interpretation. It is important to stress that substantial role of constitutional courts in relation to the EU law was not supposed in the early stages of the European integration. It won its way later on the basis of decision making activity of some constitutional courts. The role of constitutional courts was connected with their role as a guardian of state sovereignty and rule of law state. Generally, the relation between constitutional case law and the Court of Justice of the European Union (ECJ) case law can be characterized as complicated, theoretically difficult and developing in the course of time. After the Lisabon Treaty, role of constitutional courts is strengthening together with national identity concept development.

As far as the real role of constitututional judiciary in individual member states, it depends both on legal regulation and factual position of constitutional courts. There is no uniform approach of constitutional courts towards the EU law issues in the European context. In a very simplified manner, it is possible to speak about three models. The first one is that constitutional courts do not deal with the EU law issues, the second one, they deal with them only in restricted extent, e.g. from the point of view of human rights or constitutionality, and the third one, they review the EU law as quasi constitutional one.

Generally, constitutional courts can review most often conformity of the EU founding treaties or their amendments with constitutional order of the respective country or the constitutionality of both the transfer of national powers to the EU and its extent. They can also comment on the obligation to refer a preliminary question either from the side of constitutional court or ordinary court or express overbridging principles of mutual relation between national law and the EU law.

In order to answer the question which particular issues related to the European law can be adjudicated by the Constitutional Court of the Czech Republic (CC of the CR) and in what extent, it is necessary to come out from the CR Constitution and the Act No. 182/1993 Col., on the Constitutional Court. Under Art. 83 of the Constitution, the CC of the CR is the judicial body responsible for the protection of constitutionality. Generally, the CC of the CR has very broad powers both in the sphere of abstract abd concrete review. The abstract review is the review of norms under Art. 87 par. 1 letter a) and b) of the Constitution. The concrete review covers the review of individual constitutional complaints of natural and legal persons under Art. 87 par. 1 letter d) of the Constitution. Nevertheless, the very essential power in this context is the preventive review of international treaties under Art. 10a and Art. 49, the new power effected before ratification of the reviewed treaties introduced by the amendment of the Constitution 395/2001 Coll., so called „Euro-Amendment“ of the Constitution.

Herein, it is possible to characterise the CC of the CR as belonging to the courts endowed with strong competences; both preventive review of international treaties, abstract review and individual constitutional complaint are available. Generally we can speak about high standard of constitutional review in the CR. Furthermore, the Czech CC belongs to the so-called active courts which can be demonstrated at least by number of adjudicated cases and their relevance. Under Art. 89 par. 2 of the CR Constitution, the Court´s decisions are binding on all organs and institutions.

If this contribution will speak about the CC of the CR case law related to the EU law, it will have in mind such decisions which deals in some way either by the relation between EU law and constitutional law or by the transfer of international obligations following from the accession of the CR into the EU, irrespective of type of proceedings. The following text will follow the CC case law development in

relation to the European law. The full text of all decisions cited below is available in English language at CC of the CR web page www.usoud.cz.

II. The References to the EU Law in the Constitutional Court of the CR Case Law before the Entrance into EU

By way of introduction it is possible to mention briefly that the CC of the CR case law had reacted to community law by means of some references even before the entrance into the EU. For example, in its judgment III. ÚS 31/97 „Abuse of Dominant Position", the CC in connection with interpretation of abuse of dominant position has pronounced that it is not possible to consider as unconstitutional that interpretation which came out from the competition rules regulated by the Treaty Establishing EC. The CC has explained that both this treaty and the EU Treaty come out from the same principles and values on which also the constitutional order of the CR is based.

Further on, in its judgment Pl. ÚS 39/01 „Sugar Quota II", the CC either referred to relevant ECJ case and indicated that „it cannot be overlooked that one of the main motivations for introducing a production quota system for some agricultural and food products was the creation of a framework which is applied in the European Union. Radical intervention by the CC against production quota systems would be a step toward a conception of domestically guaranteed fundamental rights which would not hold up after the CR's entry into the European Union, which is being prepared".

It is possible to state that the CC´s approach can be considered as logical and well-founded when taking into account in its decision-making the forthcoming entrance into the EU and the process of approximation of law in the sphere of competition law and agricultural quotas which was under way. Besides that, the CC of the CR demonstrated its evident interest to deal with the EU law issues in the future.

III. The EU Law in the Constitutional Court of the CR Case Law after the Entrance into the EU

A. Introducing of Particular Issues in Relation to the EU law

After the entrance of the CR into the EU, i. e. after 1 January, 2004, mainly the experts has awaited the reaction of the CC of the CR to some particular questions related to the EU law. It is possible to make examples of some some of these questions:

- What will be the CC of the CR approach to the EU law? Will it be reviewing the EU law? If yes, by which manner and in what extent? What will be the referential criteria for such review?
- On which constitutional basis will the EU law work in national legal order (including questions related to Art. 10 and Art. 10a of the CR Constitution)?

- Can the CC of the CR refer a preliminary question to the ECJ? Is there an ordinary court´s obligation to refer a preliminary question?
- Will be the CC of the CR formulating the interpretative principles in relation to the EU law?
- Is the Lisbon Treaty in conformity with constitutional order of the CR?
- Can the existing CC case law be considered as settled or uniform?

As far as the above questions, at the moment it is possible to state that the CC of the CR has pronounced upon them in several decisions, very often even repeatedly. The CC complied with this task in relatively very short period of time, especially when we take into account the complexity of raised questions. It is appropriate to stress that overall number of CC decisions related to the EU law questions is not very numerous as it follows from the Table 1 specifying the overview of most important CC decisions related to the EU law. In years 2006 – 2010 the CC of the CR has dealt with about ten significant decisions related to the EU law, i. e. in average 2 or 3 decisions a year.

Table I. Overview of most important CC of the CR decisions related to the EU law

„Sugar Quota III“	8 March, 2006	Judgment Pl. ÚS 50/04
„Burden of Proof – Discrimination“	26 April, 2006	Judgment Pl. ÚS 37/04
„European Arrest Warrant“	3 May, 2006	Judgment Pl. ÚS 66/04
„Reimbursement of Medications“	16 January, 2007	Judgment Pl. ÚS 36/05
„Squeeze Out“	27 March, 2008	Judgment Pl. ÚS 56/05
„Lisbon I“	26 November, 2008	Judgment Pl. ÚS 19/08
„Non-Applicability of Contested Provision“	2 December, 2008	Resolution Pl. ÚS 12/08
„Ordinary Court Obligation to Refer	8 January, 2009	Judgment II. ÚS 1009/08

a Preliminary Question“		
„Lisbon II“	3 November, 2009	Judgment Pl. ÚS 29/09
„State Responsibility for Damage Caused by the EU Law Violation“	9 February, 2011	Judgment IV. ÚS 1521/10

The following text based on the CC case law enumerates by transparent manner adjudicated questions and principles expressed in individual decisions. So far, the CC was dealing with different aspects of relation to both the EU law and EU organs. It is rational and logical to deal with individual decisions in chronological order. The reason is that the late decisions both follow up and confirmed the earlier ones. In this connection the principle of binding force of CC decisions is important (see Pl. ÚS 11/02).

B. Individual decisions relating to the EU Law in the Constitutional Court of the CR case law

1.“Sugar Quota Regulation III“, Pl. ÚS 50/04

The judgment Pl. ÚS 50/04 was dealing with the complaint of group of deputies proposing the annulment of some provisions of government regulation laying down the allocation of individual production quotas as a merit. The complainants expressed their conviction that the newly adopted Regulation No. 364/2004 Sb., in particular §§ 3 and 16 thereof, was unconstitutional and substantively discriminatory in relation to certain producers.

Historically, this was the first decision of the CC of the CR dealing with EU law. This decision has attempted to answer the greatest possible number of questions related to community law. Nevertheless, it has brought not only answers but it has also raised some new questions and provoked discussion. Especially the issue of interpretation of Art. 10 and Art. 10a of the Constitution and explanation of quotas implementation by means of government regulation were subject of experts discussion.

From the CC reasoning, it is possible to deduce the acceptance of the aplication precedence principle (but not a doctrine of absolute preference over the all constitutional law), conditional conferral of powers to EU organs and recognition of current level of protection of fundamental rights within Community as comparable with protection provided in the CR. The CC has adjudicated the meritum of the case in light of both principles following from community and national law. Also the possibility of the CC to refer a preliminary question, assessment of criteria resulting from ECJ case law and interpretation of Art. 10 and Art. 10a of the Constitution were elaborated. The

following text will specify some important parts of the above judgment.

Applicational precedence of community law

The CC has started with the question of the degree to which it is authorized to adjudge the constitutional conformity of legal norms tied up with the EU law. It stated that it is not competent to assess the validity of community law norms. Such questions fall within the exclusive competence of the European Court of Justice. Community law norms enjoy applicational precedence over the legal order of Member States of the EU.

Not doctrine of absolute precedence

Then the CC has stressed that even several high courts of older member States (Germany, Italy, Ireland, Denmark) have never entirely acceded to a doctrine of the absolute precedence of community law over the entirety of constitutional law. They retained a certain reserve to interpret principles such as the democratic law-based state and the protection of fundamental rights. Therefore, it should be also the obligation of the CC, the judicial body for the protection of constitutionality of one of the recently acceded Member States, to express its view on these issues.

Transfer of certain powers

The CC has explained that Art. 10a, which was added to the Constitution of the CR by Constitutional Act No. 395/2001 Sb. (the „Euro-Amendment" to the Constitution), constitutes a provision that makes possible the transfer of certain powers of Czech state organs to international organizations or institutions, thus primarily to the European Community and its organs. At the moment, the powers of all relevant national organs are restricted to the extent of the powers that are being exercised by EC organs, regardless of whether they are powers of norm creation or powers of individual decision-making.

Conditional conferral of a part of the CC powers

Nevertheless, in the CC's view, this conferral of a part of its powers is a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the CR, whose sovereignty is founded upon Art. 1 par. 1 of the Constitution of the CR. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the CR, and in a manner which does not threaten the very essence of the substantive law-based state.

Referential framework for the CC, interpretation by means of community law principles

The CC added that although its referential framework has remained, even after 1 May 2004, the norms of the CR's constitutional order, it cannot entirely overlook the impact of community law on the formation, application, and interpretation of national law. In other words, in this field the CC interprets constitutional law taking into account the principles arising from Community law.

Current standard for the protection of fundamental rights

In the CC's view, the current standard for the protection of fundamental rights within the Community cannot give rise to the assumption that this standard is of a lower quality than the protection accorded in the CR, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the CC.

Interpretation of Art. 10a of the Constitution

The CC also has interpreted Art. 10a of the Constitution of the CR and it explained that it operates in two directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the CR

The preliminary question

The CC has dealt with the question as to whether it can be considered a court in the sense of Art. 234 of the EC Treaty, or in which type of proceedings, and although it has not adjudicated this question in detail, it did not excluded such possibility in the future.

2. „European Arrest Warrant", Pl. ÚS 66/04

The group of both senators and deputies sought the annulment of Criminal Law and Criminal Procedure Code provisions which implemented European Arrest Warrant in accordance with Framework Decision on the European Arrest Warrant. According to complainants, the contested provisions enabling the CR to surrender its own citizens to other Member States of the European Union were in contradiction with Art. 14 par. 4 of the Constitution of the CR.

Judgment Pl. ÚS 66/04, so called European Arrest Warrant, came in very short time period after the judgment Pl. ÚS 50/04 and reiterated some of its conclusions. In this judgment, the CC coped especially with the third pillar issues (not more topical at the moment due to abolition of pillar system by the Lisbon Treaty) and with difficult question whether the amendment of Constitution was necessary in order to extradite a citizen to the criminal prosecution in other member state. In this connection, the CC clarified the concept of interpretation in conformity with European integration principles.

Third pillar issues

Generally, it is possible to remark that implementation of the third pillar to legal order was problematic as the Maastricht Treaty disunited system in relation to the implementation of obligations in community and European union law whereas the European Arrest Warrant come under union law. Consequently, the framework agreements did not entail direct effect and the obligation to implement them was not enforceable by the ECJ. Also the CC dissenting opinion pointed to the problematic character of the framework agreements and asserted that the framework agreements were, by their nature, intergovernmental agreements. The problem solving had been seen in

the removal of pillar structure which was finally effected by the Lisbon Treaty.

Interpretation in conformity with the process of European integration

In this case, Art. 14 par. 4 was subject of adjudication. The first sentence of Art. 14 par. 4 of the Charter provides that every citizen has the right to freely enter the Republic. The second sentence provides that no citizen may be forced to leave his homeland. The CC explained that the prohibition on "forcing one to leave his homeland" can be interpreted either broadly or narrowly.

Then the CC continued that from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation enshrined in Art. 10 of the EC Treaty, follows a constitutional principle according to which national legal enactments, including the Constitution, should whenever possible be interpreted in conformity with the process of European integration and the cooperation between European and Member State organs. It follows therefrom that interpretation must be selected which supports the fulfillment of those obligations, not one which would hinder their fulfillment. These conclusions apply as well to the interpretation of Art. 14 par. 4 of the Charter.

3. „Reimbursement of Medications", Pl. ÚS 36/05

The group of senators proposed the annulment of a provision of the Act on Public Health Insurance due to its conflict with Art. 36 par. 1 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter") and with community law (Art. 6 par. 2 of the Directive 89/105/EEC relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems). The complainants claimed that authorized persons were denied the right to judicial protection.

This judgment is another CC of the CR contribution related to the EU law. The review in subject matter was realized firstly from the point of view of Art. 36 of the Charter and then from the point of view of relevant provisons of EU directive. Thus, the CC of the CR came to the same conclusions in both respects.

Interpretation of EU general principles corresponding to fundamental rights

In its Judgment No Pl. US 50/04 the CC explained that Community law could not serve as a referential criterion for its adjudication of the constitutionality of domestic enactments. On the other hand, the European Communities, just the same as is the CR, are law-based communities. The European Communities are constructed on the respect and esteem for the essential attributes of a law-based state. As can be deduced from the jurisprudence of the European Court of Justice, its interpretation of general legal principles corresponding to

the fundamental rights contained in national constitutional catalogues, is quite similar to the CC's approach.

The European Court of Justice has already twice resolved analogous issues concerning the level of reimbursement of cost of medicines by the national health insurance system. Decisions on inclusion in a list, are covered by Art. 6 of the Directive, so that they must be accompanied by the procedural safeguards contained therein. The CC had to take this line of argument into account when interpreting Art. 36 par. 1 or par. 2 of the Charter. Under the existing legal situation, the interested persons also cannot obtain judicial protection. The same deficiencies of which the European Court of Justice were critical in relation to the Directive are also evident in the provisions under review in relation to the Charter of Fundamental Rights and Basic Freedoms.

4. „Squeeze Out", Pl. ÚS 56/05

A group of senators sought the annulment of §183i to §183n of the Commercial Code which regulated the right to buy out securities, (the "buy-out right" or "squeeze-out"). The complainents objected a whole range of legal regulation defects, at the first place the conflict with the legal regulation of the buy-out of securities as contained in the European Parliament and EC Directive 2004/25/EC, so called the "Thirteenth Directive".

The CC of the CR referred to its previous case law and reiterated that it is not competent to review community law as its reference point of view is constitutional law. The non-use of statute that is inconsistent with the EU law is in the jurisdiction of the ordinary courts. Therefore, the CC left aside the part of complaint alleging the conflict with community law.

Constitutional order as a reference point of view, jurisdiction of ordinary courts

Before the CC reviewed the complaint, it had to deal with the part of the petitioner's filing, which is based primarily on an alleged conflict between the regulation of the right to a forced buy-out and the Thirteenth Directive. Here, the CC referred to its previous case law (judgments Pl. ÚS 50/04, Pl. ÚS 36/05) and reiterated that the reference point for review of the constitutionality of statutes under Art. 87 par. 1 letter a) and and Art. 88 par. 2 of the Constitution of the CR is the constitutional order. The CC does not have jurisdiction, in such proceedings, to review whether domestic law is consistent with community law. The community law as directly applicable law. The non-use of a statute that is inconsistent with the law of the Community is in the jurisdiction of the ordinary courts, which, in cases of doubt about the application of the law, have the opportunity, or obligation, to turn to the European Court of Justice with a preliminary issue under Art. 234 of the TEC.

5. „Obligation of Ordinary Court to Refer a Preliminary Question", II. ÚS 1009/08

In its constitutional complaint, the complainant objected that several of its fundamental rights have been violated, in particular, its right to fair process under Art. 36 par. 1 of the Charter. According to the complainant, the violation of its right to fair process also occurred in view of the 9th paragraph of the Preamble to Directive 2001/83/EC, which emphasized the protection of innovative firms from being disadvantaged. This violation consisted in the fact that it was denied the opportunity to be a party to the administrative proceeding on the registration of the medicinal product.

Judgment II. ÚS 1009/08 followed up the previous CC case law in the sphere of the EU law (reference framework of CC review, binding character of community law). Moreover it developed right and obligation of ordinary court to refer a preliminary question. In relation to last instance court, the CC concluded that under certain circumstances, i. e. if the last instance court does nor refer a preliminary question voluntarily, it violates the right to a lawful judge.

The obligation to refer preliminatry question

In consequence of the CR's accession to the EU, Czech courts acquired the entitlement, and in certain circumstances also become subject to the obligation, to address the European Court of Justice („ECJ") with preliminary questions. On the basis of the third sub-paragraph of Article 234 of the Treaty establishing the European Community, a Member State court, against whose decisions there is no judicial remedy under national law, is obliged to refer a preliminary question to the ECJ.

Right to lawful judge

CC hold that although the referral of a preliminary question is a Community law matter, the failure, in conflict with Community law, to make a reference may, in certain circumstances, also entrain a violation of the constitutionally-guaranteed right to one's lawful judge. A violation of the right to one's lawful judge comes about in the case where a Czech court (against whose decision there is no longer any further remedy afforded by sub-constitutional law) applies Community law but fails, in an arbitrary manner, that is, in conflict with the principle of the law-based state (Art. 1 par. 1 of the Constitution of the CR), to refer a preliminary question to the ECJ.

The CC asserted that it deems as arbitrary action such conduct by a court of last instance applying a norm of Community law where that court has entirely omitted to deal with the issue whether it should refer a preliminary question to the ECJ and has not duly substantiated its failure to refer, including the assessment of the exceptions which the ECJ has elaborated in its jurisprudence. In other words, it is a case where the court entirely fails to take into consideration the existence

of the peremptory rule, which is binding on it, contained in Article 234 of the Treaty establishing the European Community.

6. „Non-Applicability of Contested Provision", Pl. ÚS 12/08

The ordinary Court in connection with its decision-making activity claimed in the proceedings before the CC (Art. 95 par. 2 of the Constitution) the annulment of a provision of the Act on the Operation of Radio and Television Broadcasting, on the basis of which the Council for Radio and Television Broadcasting rejected on the merits party´s to proceeding request to be granted a license to digital broadcasting. The contested provision precluded the grant of a license to broadcast radio and television programs to an entrepreneur responsible for a network of electronic communications. According to the petitioner, such a restriction was both in conflict with Art. 26 par. 1 of the Charter enshrining the freedom to engage in commercial or other economic activity and with some provisions of the EU law.

Non-application of contested provision

The CC has explained that it leaves entirely to the discretion of the ordinary court whether it will concern itself with reviewing the conflict with European Community law of the statutory provision which it should apply or will focus on the review of its conflict with the constitutional order of the CR. If it primarily focuses on the review of the conflict with European Community law and asserts, as in this case, that the statutory provision under review is in conflict therewith, it must draw from its conviction the consequences in accord with the Court of Justice's jurisprudence, that is, that the contested provision not be applied.

Ordinary court´s obligation to justify its conclusion related to the EU law

The CC has explained that it is in principle not within the CC's competence to interfere with an ordinary court's considerations as to whether its conclusion on the conflict of the contested provision with European Community law is well-founded or not. It does, however, draw attention to the fact that such conclusion must be duly reasoned, otherwise it could become the subject of review on the part of the CC, in the context of a proceeding on a constitutional complaint, as to whether the court's interpretation of the decisive legal norms is foreseeable and reasonable, whether it corresponds to the settled reasoning of judicial practice, or whether, on the contrary, it is an arbitrary interpretation which lacks meaningful reasoning, whether it diverges from the bounds of the generally (consensually) accepted understanding of the affected legal institutes, alternatively whether it does not represent an extreme or excessive interpretation.

Prohibition to restrict already achieved procedural level of protection

The CC stipulated in its previous case law the requirement that no amendment to the Constitution may be interpreted in a sense in

consequence of which the already achieved procedural level for the protection of fundamental rights and freedoms would be limited (see Judgment No. Pl. ÚS 36/01), which requirement also projects into the limits to the transfer of powers to the European Union on the basis of Art. 10a of the Constitution. Nevertheless, provided in the instant case the Municipal Court did not apply the contested provision, it would not be due to its conflict with a human rights convention, rather due to its conflict with provisions of European Community law, which has an entirely distinguishable character. Moreover, that law operates in the CR legal order on the basis of Art. 10a of the Constitution (see Judgment No. Pl. ÚS 50/04), and not Art. 10, as do human rights conventions, to which the above-cited judgment relates. Thus, one cannot state that according applicational primacy to European Community law, on the basis of the Court of Justice's jurisprudence, would create a procedural disparity that is in no way justified and which would thereby impinge upon the substantive core of the Constitution.

7. „Lisbon I", Pl. ÚS 19/08

A group of senators claimed to review the conformity of the Lisbon Treaty with the Constitution, both as a whole and individual provisions thereof. Here, the CC of the CR has dealt for the first time by preventive review of international treaty. First, the CC has to address procedural questions related to this type of review. Then, judgment Pl. ÚS 19/08 summarized previous case law related to the EU law and dealt with issues raised by complainants. Above all, it is appropriate to stress that the CC interpreted in this judgment assessment related both to the interpretation of transfer of powers including its limits and substantial core of Constitution, as it is cited below. Only marginally it is also possible to remark that even the German Federal Constitutional Court which adjudicated the Lisbon Treaty later on, referred in its decision to that part of the Czech CC decision related to the control of transfer of powers.

Delegation of certain powers of CR bodies and concept of sovereignty

The CC explained that a simple linguistic interpretation of Art. 10a par. 1 of the Constitution permits delegating only "certain powers of bodies of the CR." That indicates that Art. 10a clearly can not be used for an unlimited transfer of sovereignty; in other words, based on Article 10a one can not transfer powers, the transfer of which would affect Art. 1 par. 1 of the Constitution to the effect that it would no longer be possible to speak of the CR as a sovereign state. Thus, the concept of sovereignty, interpreted in the context of Art. 1 par. 1 of the Constitution and Art. 10a of the Constitution, clearly shows that there are certain limits to the transfer of sovereignty, and failure to observe them would affect both Art. 1 par. 1 and Art. 10a of the Constitution.

Substantive core of the Constitution

The point of reference for permissibility of a transfer of powers from the CR to an international organization is, especially, respecting the material core of the Constitution under Art. 9 par. 2 (see Pl. ÚS 19/93). This means, in particular, protection of fundamental human rights and freedoms, as they are enshrined in the Charter of Fundamental Rights and Freedoms, in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, in other international treaties in this field, and in the settled case law of the CC of the CR and the European Court of Human Rights.

Conditional conferral of powers

By the accession of the CR to the EU, on the basis of Art. 10a of the Constitution of the CR, there was a transfer of powers of national bodies to supra-national bodies. At the moment when the Treaty establishing the EC, as amended by revisions and the accession treaty, became binding on the CR, the transfer of the powers of national bodies that, under primary EU law are exercised by EU bodies, to those bodies. The CR lent these powers to EC bodies. This conferral of partial powers is a conditional conferral. (further on see Pl. ÚS 50/04).

8. „Lisbon II“, Pl. ÚS 29/09

Judgment Lisbon II, dealing again with objections to Lisbon Treaty filed by a group of senators, answered some other procedural questions in the proceedings on preventive review of international treaties with constitutional order (e.g. interpretation of *rei iudicatae*, time limit for submitting a petition to open proceedings on the conformity of an international treaty with the constitutional order). As far as review of merits, the CC mainly reiterated its previous case law, especially judgments Pl. ÚS 19/08, Pl. ÚS 50/04 and Pl. ÚS 66/04 (sovereignty of the state, transfer of certain competences of state, functionality of EU institutional framework). The judgment has also clarified some notions in the Lisbon Treaty when adjudicating their conformity with the constutional order.

Sovereignty of the modern state

The CC pointed out that, in a modern democratic state governed by the rule of law, the sovereignty of the state is not an aim in and of itself, that is, in isolation, but is a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands. The CC also concluded that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign’s participation in a manner that is agreed upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.

Table 2: Overview of principles related to the EU law in the Constitutional Court of the CR case law

Applicational precedence of the EU law norms over the legal order of member states	Pl. ÚS 50/04, Pl. ÚS 56/05, Pl. ÚS 12/08
Not doctrine of the absolute precedence of Community law over the entirety of constitutional law; keeping a certain reserve to interpret principles such as the democratic law-based state and the protection of fundamental rights.	Pl. ÚS 50/04
Conditional conferral of powers to the EU organs, not the doctrine of absolute primacy; the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the CR, and in a manner which does not threaten the very essence of the substantive law-based state.	Pl. ÚS 50/04, Pl. ÚS 66/04, Pl. ÚS 19/08, Pl. ÚS 29/09
Constitutional order as a referential criteria for the adjudication of constitutionality for the CC of the CR	Pl. ÚS 50/04, Pl.ÚS 66/04, Pl.ÚS 36/05, Pl.ÚS 37/04, II.ÚS 1009/08
The current standard for the protection of fundamental rights within the EU cannot give rise to the assumption that this standard is of a lower quality than the protection accorded in the CR,	Pl. ÚS 50/04, Pl. ÚS 29/09, Pl. ÚS 19/08

Interpretation in conformity with the principles of European integration and the cooperation between Community and Member State organs, that interpretation must be selected which supports the fulfillment of EU obligations, not one which would hinder their fulfillment.	Pl.ÚS 66/04, Pl.ÚS 56/05, Pl.ÚS 19/08
Interpretation of general legal principles contained in ECJ jurisprudence corresponds to fundamental rights contained in constitutional catalogues	Pl. ÚS 50/04, Pl. ÚS 36/05
CR's allegiance to the European legal culture and to its constitutional traditions	
Right and obligation of ordinary court to refer a preliminary question	II.ÚS 1009/08
Right to lawful judge, possible violation of the constitutionally-guaranteed right to one's lawful judge under specific circumstances and the concept of arbitrariness leading to a violation of the right to one's lawful judge	II.ÚS 1009/08
Ordinary court´s obligation to justify its conclusions related to the EU law	Pl. ÚS 12/08

Conclusion

In conclusion, it is possible to summarize briefly several findings following from the above decision making activity of the CC of the CR towards the EU law. Firstly, it is possible to state that the CC of the CR can be ranged among European courts that approach the European law in active manner. Till now, several important conclusions, assessments and principles related to the EU law were formulated, some of them repeatedly. In principle, with regard both to number of decisions and the extent of adjudicated questions it is possible to speak about development towards settled CC case law in relation to the EU issues, this also with reference to the CC doctrine of binding force of its own decisions (Pl. ÚS 11/02). At the same time, another development, specification, clarification and deepening of CC case law in relation to the EU law can be expecting, also in connection with the interpretation of the Lisbon Treaty. Athough the concept of national constitutional identity was not clearly established by the CC, there is clear tendency towards it. Besides others, it is very important that the CC paid its atention to the questions of interconnection between its EU related case law and constitutional concepts already expressed previously in the CC settled case law (democratic-law based state, protection of fundamental rights, material core of the Constitution, prohibition to restrict already achieved procedural rights, sovereignty of the state).

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APPLICATION OF EU LAW IN THE FIELD OF CONSUMER PROTECTION BY SLOVAK COURTS

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Abstract in original language

V rámci príspevku budem prezentovať výsledky výskumu, ktorý som realizovala na rozsudkoch všeobecných súdov v Slovenskej republike, ktoré sú uverejňované na internetových stránkach Ministerstva spravodlivosti SR, s cieľom reálne popísať základné trendy aplikácie práva EÚ v oblasti ochrany spotrebiteľa. V rámci výskumu som skúmala rozsudky týkajúce sa sporov zo zmlúv, na základe ktorých sú poskytované peňažné prostriedky za úplatu, ako aj právne spory týkajúce sa vymáhania plnení priznaných rozhodcovským rozsudkom od spotrebiteľov.

Key words in original language

spotrebiteľská zmluva, aplikácia práva EÚ, rozhodcovské rozhodnutie,

Abstract

In my paper I will present the results from the research, which I carried out among judgements of Slovak courts which are published on the Ministry of Justice of Slovak republic website, with an aim describe the basic trends of application of the EU law in field of consumer protection. I will focus on judgements concerning the disputes raised form contracts on providing loans and the execution of arbitration decision against consumers.

Key words

Consumer contract, application of EU law, arbtitration decision,

1. INTRODUCTION

The application of European Union law (here and after as "EU law") by ordinary courts is the most important part of realisation of rights of private individuals, which are conferred upon them. This was my primary motivation to examine the practical application of EU law, which I had done among the judgments of Slovak courts. I had focused on a field of the consumer protection, because there are several problems with the application of the EU regulation in this field, which I'm going to present in this article. But firstly I will present the results of the research[1] I had done, in which I had examine

[1] The judiciary decisions included into the research were selecting from the decisions published on the official website of the Ministry of Justice of Slovak republic by the method of searching for some specific terms in the

how the courts decide the cases between a supplier and a consumer concerning financial claims from contracts on providing loans of any kind. I will focus on how the courts interpret directives in argumentation and how they use and understand the key decisions of the Court of Justice of European Union (here and after as "ECJ"). Secondly I will provide some facts about the executions of the arbitrational decisions in the cases of contracts between the supplier and consumer on providing loans. Thirdly I will analyze the impact of the judicial decisions on the situation of consumer protection in the field of providing loans by suppliers other than banks and offer possible solutions on the questions which arise.

2. LEGAL REGULATION OF THE CONSUMER PROTECTION IN SLOVAK REPUBLIC

To assess the decision-making of general courts in Slovak republic is necessary to look closer on the legislation on consumer contracts in the Civil Code[2] as a cross-sectional legislation adopted as an implementation of Council Directive 93/13/EEC[3]. [4] That is why I will compare the legislation in Civil Code and other legislative acts governing consumer contracts to the regulation in the Council Directive 93/13/ECC. The main implementation was introduced by the Act No. 150/2004[5]. Regarding the definition of consumer and supplier in Civil Code, these are essentially identical to the definitions contained in the Directive 93/13/EEC. Directive 93/13/EEC covers also definitions of unfair terms in consumer contracts, and indirectly defines a consumer contract as a contract concluded between consumer and supplier without any further conditions. The Civil Code defines the consumer contract and unfair terms (or "inacceptable conditions"[6] - the term used by the Slovak legislator) differently.[7]

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decisions. In total the amount of decisions was 700 and approximately 1/3 of these decisions concerned cases from contracts on providing loans and executions of arbitral awards. The complete list of the decision is included in my dissertation. Some of the included decisions are not published which I mention when citing them.

[2] Act No. 40/1964 Coll. Civil Code as amended

[3] Council Directive No. 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal L 095, 21/04/1993, P. 0029 - 0034

[4] See also Cirák, J: *Vymožiteľnosť spotrebiteľských práv v kontexte úpravy nekalých klauzúl v spotrebiteľských zmluvách*, In: Vymožiteľnosť práva v Slovenskej republike, Pulished by: Justičná akadémia Slovenskej republiky(Judicial Academy of the Slovak republic), Pezinok, 2009

[5] Amendment act no. 150/2004, which changes and amend Civil Code effective from 1 April 2004

[6] In Slovak language it is "neprijateľné podmienky"

Based on the Act No. 150/2004 *consumer contract* was defined as pecuniary contract concluded in accordance with the Civil Code provided that the consumer cannot individually affect the proposal to the conclusion of the contract. This legislation didn't take into account a possibility to choose an application of Commercial Code[8] on the relation by the parties, because a loan can be granted in accordance to the type of contract under Civil Code and also under Commercial Code even when one party is a consumer. In accordance with the act no. 150/2004 and Directive 93/13/EEC an unfair term can be defined as a contractual term that causes a significant imbalance in rights and obligations of the parties to the detriment of the consumer. According to the Directive 93/13/EEC there is a second part of the definition, that the contractual term is not individually negotiated, but this part of the definition was not initially transposed into the Civil Code definition.

Despite the fact that this definition was not ideal, the problem with application begins when there was another definition introduced by the Act No. 634/1992 Coll.[9] on the consumer protection, as amended (*a lex specialis* to the Civil Code) effective from 25. 11. 2004. This act defined the consumer contract as contract concluded under Civil Code, Commercial Code or any other contract characterised by the fact that is concluded in many cases and the consumer don't affect the content of the contract markedly. As there can be seen, these definition are different and were unified by the change of the Civil Code effective from 1. 1. 2008.[10] Interesting on this situation is that the definition in the consumer protection act was more appropriate to the definition contained in the Directive 93/13/EEC[11]. This problem also emerged in the practical application of legal rules by courts in Slovak republic according to the research.[12]

By the later amendment of Civil Code there were several changes introduced. Firstly the whole list of the unfair terms contained in the annex of the Directive 93/13/EEC was copied into the Civil Code.

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[7] Further in the text I will use unfair terms, because this term is used by the directive.

[8] Act No. 513/1992 Coll. Commercial Code as amended

[9] This Act was replaced by the Act No. 250/2007 Coll. on the consumer protection effective from 1.7.2007

[10] Act No. 568/2007 Coll. which change and amend the Act No. 527/2002 Coll. on voluntary auctions and on amendment of the Act No. 323/1992 Coll. on notaries and notary work as amended

[11] But on the other hand the Directive 93/13/EEC is not mentioned in the annex of the consumer protection act.

[12] There was a great discrepancy between the courts when they apply the definition in order to determine if the particular contract is a consumer contract.

Secondly this amendment implemented also the second part of the definition of the unfair term and defined which term should be considered as individually negotiated with burden of proof on the supplier. Another great change was made by the amendment to the Civil Code effective from 1. 6. 2010[13], which stated that in a consumer contract on proving money for reward the sanction for delay of payment of the consumer cannot exceed the amount set by the regulation[14].

Generally the first problem concerning the contract for providing loans is that it was not clear, if these contracts were consumer contracts or contracts concluded under the Commercial Code. If the contract is concluded under Commercial Code, the parties to the treaty can decide freely on the amount of interests for providing loan, the penalty payment or penalty interest, but this is limited by the provisions of Civil Code for the consumer contracts. Also the limitation period according Commercial Code is four years in comparison to the three years limitation period in the Civil Code. Thirdly if these contracts were consumer contracts, other terms could be assessed whether they are unfair in the sense of the Directive 93/13/EEC or Civil Code regulation, not only if they conflict with the principles of fair trade as a rather different category of rules.

As can be seen from the about explanation, the regulation in Slovak legal order has changed from the year 2004 until now rapidly and all this changes also with the decisions of the ECJ had influenced the decision practise of the courts in Slovak republic. And *vice versa* the case law of the courts and its development influenced the legal regulation in the consumer protection. I will try to explain this during summarising the research results.

3. APPLICATION OF EU LAW IN THE CASES OF CONTRACTS ON PROVIDING LOANS

3.1 GENERAL FRAMEWORK OF THE CONTRACTS ON PROVIDING LOANS

The cases and legal relations based on the contracts on proving loan or credit are very diverse, which is caused by rather diverse subjects which are providing loans. Each of these entities uses its own type of contract, although the conditions are in some way similar. These similar conditions are for instance a choice of Commercial Code as the legal framework for these relationships with those consequences that I mentioned above. Mostly the entities, other than banks, usually contract higher interest rates when providing a loan in comparison to

[13] Act No. 129/2010 Coll. on consumer loans and other loans for consumers and on change and amendment of other laws

[14] Government Regulation No. 87/1995 Coll. by which are specified several provisions of the Civil Code as amended

the interests generally required by banks, higher interests as sanction for delay of payment (for example 0,1 % per day, 0,05 % per day, 0,08 % per day or 20 % per annum, etc.) as set by the legislation in Civil Code and the penalty payment is contracted in addition to the penalty interest either in form of percentage from the loan or like interest of 0,1% per day for a certain period. But in addition these contracts can contain also different types of arrangements for secure that the debtor will return the loan, such as agreement on transfer of the ownership of some property rights, lien agreement, letter for attorney incorporated in contract for lawyer to acknowledge the debt on behalf of the debtor or an arbitration clause.

Generally in 2/3 of the contracts for providing loans the courts decided that these contracts are of consumer character and apply the consumer protection regulation. The courts adjudicate the penalty interests only in the amount set by the legislation in Civil Code and sometimes they lowered the penalty payment or in several cases they lowered also the interests agreed by the parties for providing the loan. In these cases decided in favour for the consumer the courts relatively often cited the provisions of the Directive 93/13/EEC, mentioned the transposition of this directive or used the directive to interpret the provisions of Slovak legislation. In the other 1/3 of the cases the courts considered the relations based on the same contracts as commercial relations and adjudicate to the creditor the interests and penalty payments as concluded in the contracts.

3.2 APPROACH OF THE SLOVAK COURT TO APPLICATION OF THE EU LAW IN CONTRACT FOR PROVIDING LOANS

3.2.1 LEASE CONTRACTS

From the judicial decisions included into the research it is clear that from 2006 the courts realize that there is some EU law, especially the Directive 93/13/EEC which they should apply. In several decisions the court simply stated that this directive was implemented into the legal order of Slovak republic, while there is nothing in the decision, what would indicate how precisely the court apply the Directive or what provision of the Directive did the court use. [15] For example in the decision of District court Brezno[16] concerning a dispute about delay with payment from some kind of lease contract, in which the consumer withdraw from the contract, because the product should be according the contract delivered only after the payment of whole price and because the price was too high for the consumer. The consumer

[15] For example see the judgment of the District Court Žilina from 27. 9. 2007 issued in the proceeding under no. 14C/40/2007 or the judgment of the District Court Čadca from 18. 9. 2007 issued in the proceedings under no. 4C/185/2005

[16] The judgmment of the District Court Brezno from 4. 7. 2007 issued in the proceeding under no. 3C/69/2006

also pays 25% of the price as penalty payment for withdrawal. But the supplier nevertheless sues the consumer alleging that she is obliged to pay the whole price, because the withdrawal from the contract was not valid. In this case the court suggests that it was proven that this contract is not only in a breach of Slovak legal regulation, but also in contrary to the Directive 93/13/EEC. The court points out the objectives of the Directive, particularly that the contracts should be clear, if there is a doubt about the meaning of the provisions of the contract, the court should prioritize the interpretation which is favourable for the consumer and the case was decided in favour for the consumer.

In the years 2008 and 2011 the courts in all cases involving claims arising from lease contracts or contracts about buying goods in instalments applied the consumer contract provisions in Civil Code. In approximately in 2/3 of these decisions the courts show a link between the Slovak regulation and EU law mostly by citation of Directive 93/13/EEC or by pointing out that it was implemented into the Slovak legal order. The interesting part of the decisions is that from some of these decisions is very clear that the court uses the Directive 93/13/EEC to extend the list of unfair terms contained in Civil Code, because the list of unfair terms in Civil Code was not identical with the list contained in the annex to the Directive 93/13/EEC.

Very clear (in the way of application of EU law) is the reasoning of the District court Žilina[17], which considered a contract for lease of a good with possibility to buy the product at the termination of the lease, as a consumer contract on which there is a need to apply the provisions on consumer contracts in Civil Code and Directive 93/13/EEC. The court further notes that in the time of delivering this decision Civil Code comprise an exemplary list of unfair terms in consumer contracts, whose inclusion into the consumer contracts is sanctioned by their nullity. According to the court Directive 93/13/EEC covers a wider list of examples of unfair terms including a requirement that a consumer who has not fulfilled its commitment to pay a debt has an obligation to pay a disproportionately high sum for compensation. The court points at the importance of interpretational importance of the Directive when applying a domestic regulation, which had implemented the directive. According to the court the Directive 93/13/EEC should be applied when the contract was drawn up in advance and the consumer could have no influence or control over the content of the provisions of the contract. After that the court declared the arrangement of the contractual penalty 30% of the price of the product for any breach of contract void, because there was no distinguishing between seriousness of the breach and because this penalty was contracted only when the breach was caused by the consumer. The court decided that the consumer has to pay the unpaid

[17] The judgment of the Distric Court Žilina from 25. 4. 2008 issued in the proceedings under no. 4C/450/2007

rent and interest for late payment in the amount prescribed by the Civil Code.

An example of application of the ECJ decisions by the courts in Slovak republic is a decision of District court Rožňava[18], where the court quoted an article 3(1) of the Directive 93/13/EEC and noted that the directive is necessary to be used as an interpretative rule for the provisions of Slovak legal order about consumer contracts. Subsequently the court stated that in accordance with the ruling of the ECJ in joined cases *Océano Gruppo*[19], effective consumer protection can be achieved only of the national court declares that it has jurisdiction to assess the unfair conditions on its own motion. Jurisdiction of the court to determine on its own motion that the condition in contract is unfair means to create appropriate means to protect consumers against unfair contract terms. The court closed the analyses by stating that the directive should be applied also when the contract was drawn up in advance and the consumer couldn'n have influence or control over the content of the provisions, which is *de facto* widening of the definition which was in the Directive 93/13/EEC but was not transposed into the definition in Civil Code after the amendment Act no. 150/2004.[20]

3.2.2 CREDIT OR LOAN CONTRACTS

From the judgments involved in research published in the years 2006 to 2008 it can be concluded that the courts not always considered a credit agreement as consumer contracts and on the conditions about the amount of interest and sanctions quite often applied provisions contained in the Commercial Code. They treat such agreements rather strictly in relation to contractual arrangements, because a loan agreement is considered under the provision 261 (3d) of the Commercial Code as so-called absolute commercial legal relationship regardless of the nation of the parties. On the other hand, under the provision 23a of the Consumer Protection Act no. 634/1992 contracts should be treated as consumer contracts also when concluded under Commercial Code if the contract is repeatedly using by the supplier and the consumer usually do not substantially affect the content of such contract. This provision of the Consumer Protection Act was in general not used by the courts, but there are some exemptions such as

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[18] The judgment of the Distric Court Rožňava from 11. 3. 2010 issued in the proceedings under no. 4C/31/2010

[19] Joined Cases *Oceáno Grupo Editorial SA v. Roció Murciano Quintero (C-240/98) and Salvat Editores SA v. José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C243/98) a Emilio Viñas Feliú (C-244/98)*, ECR 2000 I-04941

[20] See also for example the judgment of the District Court Piešťany from 26. 10. 2010 issued in the proceeding under no. 4c/145/2009 or the judgment of the District Court Galanta from 10. 2. 2010 issued in the proceeding under no. 17C/131/2009

the decisions of District Court in Žilina[21]. In these decisions the court finds, that although the loan agreement is signed according to provision 497 of the Commercial Code but with regard to the provision 23a of the Consumer Protection Act and Civil Code this agreement is a consumer contract. Interesting on this decision is that the court expressly provides that provisions of Civil Code in force at the time of concluding the contract did not correspond with the provisions of the Directive 93/13/EEC and that the term to pay disproportionately high sum in compensation for any breach of treaty provisions was not listen in the unfair terms in Civil Code. Subsequently, it states that the directives, unlike regulations, are not directly applicable. But on the other hand if the national regulation didn't comprise such unfair term it is appropriate to apply the Directive 93/13/EEC, because according the case law of the ECJ a directive may have direct effect.[22] With a reference to this Directive then the court decided that the claim of the supplier for a penalty interest of 0,03% daily has a nature of unfair term in the consumer contract and decided that this term is void.

In this decision is certainly also interesting that the court had decided to apply the provisions of the Directive 93/13/EEC directly although previously it declare that a directive does not have such characteristic according the EU law. Nevertheless, it can be concluded that the court more likely applied the Directive indirectly, because the Civil Code did not provide an exhaustive list of unfair terms. Therefore, if court had inspired in its deliberations on the Annex to Directive 93/13/EEC with regard to the determination that the contractual arrangement on the amount of penalty interest is an unfair term, it was just an interpretation of national law in accordance with the Directive rather than its direct application. But at least it shows that some judges are not sure about the difference between direct and indirect application of EU law, especially directives, because this is something completely different in comparison to the national legal system.

On the other hand there are also judgments concerning the agreements on providing loans in which the court did not apply any of the consumer protection provisions. Good example are the decisions of Regional Court in Trnava[23] in which the court reviews decisions of

[21] The judgment of the District Court Žilina from 12. 9. 2008 issued in the proceeding under no. 11Cb/281/2007, from 18. 2. 2008 issued in the proceeding under no. 8C/54/2007, from 6. 8. 2008 issued in the proceeding under no. 11Cb/318/2007

[22] The court does not provide any further analyses whether the subject against who will be the directive applied, is State according to the CJ EU case law or even whether there are any other conditions which should be fulfilled and are fulfilled in order to conclude the direct effect of directive between two individuals.

[23] See the judgments of the Regional Court in Trnava from 4. 11. 2008 issued in the proceedings under no. 21Cob/280/2008 and from 18. 11. 2008 issued in the proceedings under no. 21Cob/323/2008

district courts where the courts did not adjudicate to the supplier the penalty payment along with penalty interest, because the parallel adjudication of those sanctions will breach the protection of consumer and such arrangement is an unfair term. These contracts were by the district courts regarded as typical agreement in which the consumer has no real affect on the content of the contract according to the provision 23a of the Consumer Protection Act. In the decision of the Regional Court the issue of whether it is a consumer contract was not addressed, instead the court applied only the provisions of Commercial Code and held that the supplier has right both on the penalty payment and the penalty interest, despite the reasoning of the district courts in the contested decisions.

The similar approach can be seen in decisions in which the court ingnores the consumer character of the particular contract on providing loan, despite the fact that the consumer could not imfluance the content of the contract and is obliged to pay 0,01% penalty interest along with penalty payment in case of failure to return borowed money. This hapened inspite the fact that the court in this decision applied provision 369(1) of the Commercial Code, which expressly state that if the obligation arise under a consumer contract, the penalty interest must not exceed the amount provided by the rules of civil law.[24]

Special category of the agreements on providing loans concluded with the agreements on transfer of ownership of real estate. These contracts grossly disturb the balance between the parties by hypertrophy of the security arrangements desinged exclusively to protect the creditor according to the courts. These contracts include for example a requirement that the debtor must redemonstrate the capability to repay the loan every year or on the demand of creditor while the creditor can at any time decide that the capablility of the debtor is not suficient and can demand from the debtor to pay the debt imediately. Courts in their judgments, in principle, note that the contract is in breach of good fait, creates a significant imbalance between the contracting parties to the detriment of the debtor and they believe it can be assumed that the aim was to acquire a property of the real estate by the creditor, which was temporarily transferred on the creditor by the contract, because the contract also contained an arrangement that the creditor is not obliged to pay the debtor the difference between the price of the real estate and the non-returned part of the loan of the debtor. During the research I did not find a judgmnet, which was decided in favour for

[24] See of instance the judgment of the District Court Kežmarok from 3. 6. 2009 issued in the proceedings under no. 8Cb/22/2009, the judgment of the District Court Ružomberok from 23. 4. 2009 issued in the proceedings under no. 6Cb/25/2009, the judgment of the District Court Zvolen from 19. 8. 2009 issued in the proceedings under no. 8Cb/14/2008

the creditor. Mostly these judgments refer to the Directive 93/13/EEC and sometimes the court cite the provisions of the Directive.[25]

3.2.3 CONTRACT ON CONSUMER LOANS

Rigidly courts treated also loans, which should be provided under a special Consumer Loans Act[26]. This can be demonstrated on the judgment of District Court Brezno[27] concerning a dispute over non-payment of debt based on a loan contract in which it was established that the legal relationship is governed by the Commercial Code. The court applied on this relationship provisions of the Commercial Code, despite the fact that at that time there were special rules for consumer loans in the Consumer Loans Act. On the other hand, it may be argued that at the time of conclusion of the contract and the time when the decision was delivered there was a doubt about the interpretation of the Consumer Loans Act.[28] The court ultimately award the creditor the amount of the debt together with the agreed penalty interest of 0,08% daily from the amount owed.

Similarly, however, decide other courts, for example a Distric court Komárno[29] in the same type of case as above mentioned. In this case the court also cites the provisions of Civil Code containing the consumer protection, but subsequently states that the claiment proved failure of the defendant to fulfill its obligation and decided that the supplier is entitled for payment of the debt together with an agreed amount of penalty interest 0,08% per day. This judgment is interesting also because the debtor's delay occurred before the amedment Act No. 150/2004 become effective and by fact that the supplier submit an action about month and a half before the expiry of four years limitation period according to the Commercial Code, so if the court would apply Civil Code, the claim would be barred by limitation.

In some of the judgments concerning those claims appears an attempt to point at the Directive 93/13/EEC, but it is not easy to find out how

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[25] See the judgment of the Regional Court in Banská Bystrica from 28. 8. 2008 issued in the proceedings under no. 16Co/152/2008, the judgment of the District Court Zvolen from 6. 6. 2008 issued in the proceedings under no.11C/42/2007, the judgment of the High Court of the Slovak republic from 31. 7. 2009 issued in the proceedings under no. 1 M Cdo 1/2009

[26] Act No. 258/2001 Coll. on the consumer loans as amended

[27] The judgment of the Ditrict Court Brezno from 10. 7. 2008 issued in the proceedings under no. 7Cb/144/2007

[28] In the provision 2(1a) of the Act No. 285/2001 Coll. on the consumer loans was not expressly stated that this act should apply also on the credit contracts only on the loans.

[29] The judgment of the Ditrict Court Komárno from 25. 9. 2008 issued in the proceedings under no. 5Cb/150/2008

the court exactly apply the cited provisions of the Directive 93/13/EEC. Completly incomprehensible in this respect is a decision of District court Lučenec[30] in which the court finds that supplier and consumer agreed on application of Commercial Code on their relationship. In the next sentence the court conclude that the legislature of the EU on protection of consumers was transposed into the Slovak legal order and that there is a category of unfair terms, which are prohibit in the consumer contracts. However from further analyses of the court it is realy not clear how the court take into account the directives or the protection of consumers in Slovak legal order, because he decides that the creditor is entitled the contracted interest of 14% per year and the penalty interest of 15% per year. He did not evaluate whether the contract is in compliance with the Consumer Loans Act and the consumer protection in general. Such a decision is not unique, for comparison see also decisions of District court Prešov[31] or Regional Court in Banská Bystrica[32].

4. ARBITRAL DECISIONS IN CONSUMER PROTECTION CASES AND ITS ENFORCEMENT

Without metioning the cases concerning arbitral awards will be this research incomplete. In the consequence of deciding cases by the courts in favour for consumers, the duration of judicial proceedings in Slovak republic and the effort of suppliers to gain an enforceable decision for execution as soon as possible, the companies providing loans included into the contracts with a consumer an arbitration clause. This arrangements caused two main types of cases before courts. The first type are cases for annulment of the arbitration awards, which on the other hand are very rare because of the passivity of the consumers. The second type of proceedings are related to the enforcement of the arbitration decision awarded in the cases of claims from consumer contracts. Becasue of limited scope of this article and very small amount of the judgments about the annulment of the arbotration awards, I will now focus on the enforcement of the arbitral awards in consumer protection cases and the problems, which arise among these cases. The enforcement procedure emerges as the only option for the court to intervene in favour of the consumer when there is an arbitration clause in the contract. Firstly this situation resulted to address a preliminary question to the CJ EU whether there is a possibility for the court in enforcement proceedings to assess unfair terms in consumer contracts, or to decide on the invalidity of the

[30] The judgment of the Ditrict Court Lučenec from 9. 1. 2008 issued in the proceedings under no. 9C/82/2007

[31] The judgment of the District Court Prešov from 16. 1. 2008 issued in the proceeding under no. 14C/10/2006

[32] The judgment of the Regional Court in Banská Bystrica from 28. 8. 2008 issued in the proceeding under no. 16Co/152/2008

arbitration clause and draw the consequences, which would mean the impossibility of execution such a decision.

4.1 SOME REMARKS ON THE CASES OF THE CJ EU

The CJ EU has addressed such issues in several cases, while Slovak courts cite mostly two of them, *Asturcom*[33] and *Pohotovosť*[34], which are very similar issues and the judgment in the case *Pohotovosť* was issued on the basis of questions raised by the Regional Court in Prešov. The case *Asturcom* concerned a contract on providing telecommunication services, which included the arbitration clause. The consumer did not pay several invoices and terminated the contract before the end of the agreed minimum duration of the contract. The arbitrational award ordered the consumer to pay the sum of 669,60 €. The consumer did not appeal against the arbitration award to reach its cancellation, therefore the decision become final and the supplier submit a proposal for execution of the award. Spanish national court thought that the arbitration clause is an unfair term in consumer contract for several reasons, but the national law contains no provision for the assessment of the unfair nature of such clause during the enforcement proceedings. Thefore the court address a question to the ECJ whether the consumer protection under the Directive 93/13/EEC includes the possibility that the court deciding on the enforcement of the arbotration award, which was issued without the participation of consumer, can assess on its own motion the validity of the arbitration clause and subsequently annul the award on the ground that the arbitrational clause is an unfair term and harm the consumer.

The CJ EU in the above mention decision firstly finds that because of the unequal position of the supplier and consumer the Directive 93/13/EEC provides that unfair terms should not be binding on the consumer. This is mandatory provision directed towards the establishment of genuine balance between rights and obligations of the parties, while this aim should be achieved only by positive intervention for other party then the party of the contract.[35] From this it follows that the courts must be able to examine the unfair term *ex officio*. Consequently the court examines the question whether the obligation to ensure real balance means that there is an absolute consumer protection even in the case where the consumer is passive and didn't do anything to protect his or her rights and notwithstanding the fact that the national law in these cases respect the rule of *res iudicata*. After that the ECJ notes the importance of respecting the principle of *res iudicata*. There is no regulation of remedies in this

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[33] Case C-40/08 *Asturcom Telecomunicaciones SL p. Cristine Rodríguezovej Nogueirovej* from 8 October 2009, ECR 2009 I-09579

[34] Case C-76/10 *Pohotovost' s.r.o. v Iveta Korčkovská* from 16 November 2010, Official Journal C 030, 29/01/2011 P. 0012 - 0012

[35] Decision C-40/08 in case *Asturcom*, points 29 and 30

area at EU level it is necessary to apply national legislation which meet the requirements of equivalence and effectivness.

Subsequently, the ECJ analyzis whether the legislation in Spain meets these requrements. It notes that the 2month period for submitting an application for annulment of the arbitration award, which begins by delivering of the award, meet these requrements. Consequently it states that that compliance with the principle of effectiveness in the cicumstances, as in the main proceedings, can not require the court to replace the activity of the defendant who didn't participate in the arbitration or didn't submitt the action of annulment of an arbitration award, which therefore became final.[36] As regard the principle of equivalence, it is on the national court to determine whether, under similar national legislation, is authorised to review the unfair terms on its own motion, as if they were national rules on public policy. The scope for such a review depends on the particular national procedural rules, which can give the national court an opportunity to carry out such an assessment according to the similar remedies of domestic nature. If the court concludes that it has such power, and also that the arbitration clause in consumer contract is an unfair term, then the national court must draw all the consequences with a view to ensure that consumers are not bound by this clause.

That decision is in its conclusion actually quite ambiguous as to what result is to be inferred from a practival standpoint. Simply the ECJ leaves at the national court distretion under national law within set boundaries to decide in particular case. These boundaries are the obligation to examine the unfairness of terms in consumer contracts on their own motion, imperativeness of the provision of the Directive 93/13/EEC laing down that unfair terms are not binding on the consumer, and then that the effectivness requirements regarding the remedy does not automaticly mean that the court must substitute the absolute passivity of the consumer.

The same view took the ECJ in the decision *Pohotovosť*, which was similar as to the stage of the proceeding in which there was a question addressed and in terms of the consumer activity. This case concerned the contract for providing loan and the court considered several arrangements as unfair terms in the consumer contract. Mostly the content of the decision is the same as in the *Astrucom* case, as well as how the ECJ proceeded to resolve this case. The instruction given to the national court are a little bit more specific when it states that in the main proceedings, it appears that according to information provided by the national court national legislation requires to terminate the enforcement of the arbitration award unless the commintement awarded by the arbitration decision is contratry to good morals. So the ECJ give the national court an instruction that if there is a necessary national legislative instrument and the court has information about the legal and factual backround, it can also without

[36] Decision C-40/08 in the case *Asturcom*, point 47

a proposal assess the term in consumer contract even during the enforcement proceeding. When the answer is afermative that the court is obliged to draw all the consequences from the national legislation in order to ensure that the consumer is not bound by an unfair term.

So the main question which I will try to analyze is whether it is thus possible according to the Slovak legislation in enforcement proceedings to review the content of the agreement for providing loans and the arbitration clause and what are the consequences which the enforcement court draw in practice.

4.2 LEGAL REGULATION OF THE ENFORCEMENT OF THE ARBITRATION AWARD IN SLOVAL LEGAL ORDER AND JUDICIAL PRACTICE

During my research I find to types of court decision in execution proceeding. First type is decision on termination of the enforcement proceeding and second is decision by which the court rejects the application of authorisation for the bailiff to conduct the enforcement of the arbitration award which is necessary to conduct the enforcement in the begging. According to Slovak legislation, an arbitration award, which has become final, is after the limitation period for voluntary commitement enforeceable under the regulation for enforcement of the judgments. According to the Rules of Enforcement[37] is the bailiff obliged after receiving the application for enforcement to apply for the authorisation for the particular enforcement of the judgment or arbitration award. According to the provision 44(2) of the Rules of Enforcement the court examines the application for authorisation of the bailiff, the application of the creditor and the title for execution (judgment, arbitration award, ect.).

If the court finds no contradiction between the application for authorisation to levy of execution, the proposal for levy of execution or the title for execution with the law, he issues the authorisation for enforcement within 15 days from recieving a request from the bailiff, otherwise the request is refused by an order against which the appeal si possible. After the order become final the court terminates the enforcement proceeding also by an order even without an application. Under the provision 56(2) of the Rules of Enforcement, the court may permit the suspension of the enforcement where it si expected that the execution will be stopped. According to the provision 57(2) Rules of Enforcement the court may stop the execution when it results from a special legal act, in this case the Arbitrational act even without an application. Under the provision 45 of the Arbitration Act[38] the court may terminate enforcement of the arbitration award either on a proposal or on its own motion, if, among other things, the judgment suffers by procedure error or the arbitrational award contains a

[37] Act No. 233/1995 Coll. on bailiffs and enforcement, as amended

[38] Act No. 224/2002 Coll. Arbitrational Act, as amended

commitment which is impossible to fulfil, illegal or contrary to good morals.

On this bases there are several question which arise in the context of the decision of ECJ and Slovak legal regulation of the arbitrarion and enforcement of the arbotration awards. To resolve the questions let firstly analyse the approach of the Slovak court to the enforcement of the arbitration awards in the cases based on the consumer contracts. As we will see the main conflict is about the scope of examination which is given to the execution court to review the arbitration award according to the provision 45(1c) of the Arbitration Act. What exactly means that the court can terminate the enforcement of the arbitration decision when the commitment set in the decision is impossible in practise is contrary to the law or good morals. As we can see above there is no clear instruction given by the ECJ to the national courts. The ECJ only says that the examination of the consumer contract with the arbitration clause is permitted only if the national law allows it. The annulment of the arbitration award or any other decision of the enforcement court leading to unenforceability of such decision is only possible if the national legal order allows it. On the other hand there is no such obligation arising from the requirement of the effectivity to supplement the passivity of the consumer, the ECJ respect the rule of *res iudicata*, but the court should ensure that the unfair term in consumer contract will not be binding on the consumer, if it is possible according to the national law. Because the boundaries given by the ECJ are so contradictory in the result, that it cannot by stated that the national court should in any case have the competence to refuse the enforcement of the arbitration decision in the case concerning the consumer. Subsequently it cannot be used by the Slovak courts to decide on the meaning of article 45(1c) of the Arbitration Act.

Because of the limited space in this article I will not analyse the other part of the problem concerning the conflict about when the court has a competence to terminate the enforcement of the arbitration decision. The problem is whether there is a possibility not to issue the authorisation or if the court should firstly issue the authorisation and then examines the conditions of the enforcement proceedings. When there is not a competence to examine the arbitration award in the way that the courts do, than it is not important when the competence is applied, it will be illegal in both situations. I will make just one remark on this issue. In practise there is a difference between these situations in the point of view of the consumer, because after the court issue the authorisation, the bailiff should begin the enforcement and in reality can obtain some money from the consumer before the execution will be terminated by the court afterwards. In the situation that the court refuse to issue the authorisation for the enforcement, the consumer wouldn't even know that there is an enforcement procedure against him or her.

4.2.1 WHEN THE COURT FINDS UNFAIR TERMS OTHER THAN THE ARBITRATION CLAUSES IN THE CONSUMER

CONTRACT ARE VOID IN THE ENFORCEMENT PROCEDURE

This issue is discused broadly from the year 2009[39], because around this time courts in Slovak republic observe rapid increasment of the enforcement of the arbotrational decisions, while the commitement awarded by the decision was based on the contract on providing loan for a consumer with more or less the same content. From the contract is evident that the interest for providing the loan is really high, mostly 0,25% daily (what is 91,25% annually). These contracts also contains more unfair terms, which are absolutly void, like there is no possibility for the consumer to pay back borowed money without payment all the contracted interests, there is also an arrangement which means that the Commercial Code applies on the contract and the contracts did not contain an information about annual percentage rate of charge, which means according to the applicable law[40] that the loan should be provided without any interests. But these fact are not taken into account by the arbotrator and the arbitrational decision imposes an obligation on the consumer to pay all the agreed payments including the interests, penalty interest and penalty payments as another sanction for breaking the contract obligaitons. On the bases of these allegations the commitement awarded by the arbitration decision is band by the law. Some of the authors in the discussion[41] claim that the arbitration clause itself is the unfair term which is void. As the result of this situation it is proposed to the court to terminate the enforcement of the arbitration decision is such cases on its own motion, because this is the best way how to protect the consumer.

Generally it is very difficult to gain some judicial decisions issued in the enforcement proceeding, because they are not obligatory published even on the website of the Ministry of Justice of Slovak republic. But from those decisions I have there can be drawn to types of judicial approach as I mention above. They differ on the bases of reasons used in the orders by which the court refuse to issue an authorisation for enforcement to the bailiff. Some courts[42] have an effort to examine the

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[39] Bajánková, J.: *Spotrebiteľ v exekučnom konaní*, In: Vymožiteľnosť práva v Slovenskej republike, Justičná akadémia Slovenskej republiky, Pezinok, 2009, str. 14-15

[40] Act No. 129/2010 Coll. on the consumer loans and other loans for consumers

[41] To the discussion of the admissibility of the arbitration clauses in the consumer contracts see: Drgoncová, J.: *Rozhodcovské súdy a ich právomoc v ochrane spotrebiteľov*, In: Justičná revue, No. 11/2010, p. 1159; Bardač, R: *Ad: rozhodcovské súdy a ich právomoc v ochrane spotrebiteľov*, In: Justičná reuve, No. 6-7/2011, p. 930

[42] For instance see the order of the District Court Rožňava from 25. 2. 2010 issued in the proceeding under no. 10Er/757/2009-12, order of the Regional Court in Trnava from 30. 9. 2010 issued in the proceeding under no. 10CoE/160/2010-31, not published

commitment awarded by the arbitrator even when they find that there are some unfair terms in the consumer contracts and try to separate the sum of loan from the sum of interests based on these unfair terms. The result should be that they will issue the authorisation for the enforcement of the sum of loan but deny the enforcement of the interests. But they cannot separate it only on the basis of the arbitration award and so they invite the claimant/supplier to submit the contract to the court on order to determine the exact sum of the loan interests. In this type of decisions the court did not allege the nullity of the arbitration clause at all.

The claimants mostly refuse to deliver such documents to the court. The argumentation of the claimants/suppliers are that the court is not entitled to examine the contract in the enforcement procedure nor according to the Arbitrational Act or Rules of Enforcement, the scope of the courts competence in the enforcement of the arbitration decision is to examine only of the decision hasn't any evident error regarding the award itself. Firstly they based the allegations of the fact that there exist according to the Arbitration Act a separate action for the review of the arbitration decisions and that the consumer has a right to submit such action. In such proceeding for annulment of the arbitration decision the court has full competence to examine the conditions of the contract and the award, not in the enforcement procedure. It is illogical if the court has greater competence to examine the contract with the arbitration clause as legal basis for the certain relationship, than it has when it decides on the annulment of such arbitration award. That is because the annulment can be sought only for certain reasons expressly listed in the provision 40 of the Arbitration Act. Secondly the Rules of Enforcement require only three documents to be submited to the execution court to issue the authorisation for levy the execution. These documents were delivered and the court does not have the right to require the contract and should issue the authorisation.

The court did not agree with the claimant, because according to its view the court has a right to examine the arbitrational decision in accordance with the above mention provision 45(1) of the Arbitration Act, because the court can terminate the execution of the arbitration award which oblige to the commitment which is impossible in practice, contrary to law or good morals. The court interprets it in a way that if certain provisions of the contract on providing loan are contrary to law and good morals that the award granted by the arbitration decision in accordance with such contract is issued contrary to law and that the court must terminate the enforcement of such a decision. Because the court has the obligation to examine the unfair contract arrangement in consumer contracts on its own motion and to declare them void, as long as the court didn't have the contract, he cannot assess the arrangement in it to decide on this, therefore the court refuse to authorise the bailiff to levy the execution. But on the other hand, the execution court isn't an appellate court because it has not a competence to annul the arbitration decision, but only to deny the enforceability of it. If the applicant will submit all the necessary documents to decide which claim is lawful and which isn't, the court can issue the authorisation for levy the execution.

4.2.2 WHEN THE COURT FINDS THE ARBITRATION CLAUSES AS AN UNFAIR TERMS IN THE CONSUMER CONTRACT ARE VOID IN THE ENFORCEMENT PROCEDURE

In other cases[43] despite the fact that the arbitration clause isn't exclusive the courts finds that this clause in consumer contract is void because it is an unfair term. This clause states that the arbitration court is competent to resolve the case if any of the party to the contract will submit an application to it, but any of the party can choose between the arbitrator and a court. The court states that after the supplier submits the case to the arbitrator the consumer cannot choose to submit a claim to the court, so the consumer is, by the conduct of the supplier, forced to use arbitrator to resolve the dispute. This is in fact contrary to the consumer protection legislation in Civil Code.[44] The courts state that they have the competence to examine the execution title because of the provision 57 of the Rules of Enforcement which set several not only procedural but also material reasons to terminate the enforcement procedure and in connection with this provision the courts stated that the conditions set in the provision 45(1) of the Arbitrational Act are material conditions. Failure to comply with the material conditions results in inadmissibility of execution. The provision 44(2) of the Rules of Enforcement set down an obligation for the enforcement court to examine the compliance of the execution title with the law, which is not only formal process but rather an examination of whether there are any provisions of the law which can preclude the enforcement of such title. That is what the court should do when inquire the compliance of the arbitration award with the provision 45(1) of the Arbitration Act.

The material force of the decision also in arbitration means that there accrue a qualitatively new relationship between the parties in the form of claim adjudicated by the court/arbitrator, which means that the dispute cannot be decided again and the decision is binding between the parties and to all authorities. But in the legal system there are some exemptions from the material force of the decisions. The identification of reasons and scope of these exemptions which affects the material force of the decision is set by the legislature and the court must apply it within its competence. The court that states that it isn't bound by the effect of the material force of the arbitration award when it decides on the annulment of the arbitration decision according to the provision 40 of the Arbitrational Act. Subsequently the provision 45 of the Arbitrational Act gives the court special base for examination of the arbitration award and for such an examination the court must

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[43] The order of the Regional Court in Prešov from 19. 5. 2011 issued in the proceeding under no. 6CoE 60/2011 not published; The order of the Constitutional Court of the Slovak republic from 24. 2. 2011 issued in the proceeding under no. IV US 55/2011-19

[44] The provision 54(1r) of the Civil Code

necessary exclude the consequences of the material force of arbitration decision. The execution court is able in the assessment of the arbitration decision in the light of the reasons listed in the provision 45 of the Arbitration Act to look on this decision as it is not materially binding for it. The consequence of this approach is rather different from that above mention, because when the court denies issuing the authorisation of the bailiff then the case can be decided by the court again and this will not be in breach of the *res iudicata* principle.

5. CONCLUSION

The suppliers from these cases also submitted a complaint to the Constitution court of Slovak republic, alleging that their constitutional rights for fair trial, for property and legitimate expectations were breached by these kinds of decisions. I will not go through the argumentation of the Constitutional court, because of limited scope of this article. Very briefly the Constitutional court decides that the decisions of the courts weren't arbitral, the argumentation of the courts were very good explained, the court decides within its competence when interpreting and applying the relevant provisions of law, its considerations are clear, based on facts, logic and in constitutional point of view are legitimate and acceptable. [45]

But on the other side is this kind of approach of the courts really necessary in the protection of the consumers? Despite the fact that the scope of examination of the arbitration awards can be interpreted very logically and persuasively also rather different and more constraining as I indicate before in the objections of the suppliers, I will now focus on the analyses of the problem from the bigger perspective. From the above mentioned decisions is clear that in the second type the courts deny to issue the authorisation for enforcement of the arbitration decisions even in the part of the claim. This has broad consequences. Even if we admit that the decision of the enforcement court, not appellate court, breaks the material force of the arbitration decision and there is a possibility to enforce at least those claims which are lawful, there are further problems. Firstly there is a doubt how the courts will react on the submissions in the same cases which were decided in arbitration, because as I mentioned before courts don't think in general that the arbitration clause is a void unfair term in consumer contract itself. There is a posibility that the court will reject the claim because of the *res iudicata* principle. Maybe the suppliers

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[45] Compare Slašťan, M.: *Acceptance of Human Rights and Constitutional Values in Reviews of Arbitral Awards by the Courts of the Slovak republic*, In: *Czech (& Central European) Yearbook of Arbitration*, here: http:// ssrn.com/abstract=1796004; The order of the Constitutional Court of the Slovak republic from 27. 5. 2010 issued in the proceedings under no. I. ÚS 202/2010-17, The order of the Constitutional Court of the Slovak republic from 24.11.2010 issued in the proceedings under no. I. ÚS 442/2010-16, The order of the Constitutional Court of the Slovak republic from 3.3.2011 issued in the proceedings under no. IV ÚS 60/2011-13

shouldn't base their claim on the contract but rather on the different basis, like unjust enrichment. But there is a problem with the limitation period because the arbitration and the enforcement proceeding also last some time, so the limitation period can lapse in the meantime, while the supplier realise that the arbitration decision is unenforceable.

From the first part of this article there can be seen that the courts do not proceed uniformly when deciding the disputes based on the consumer contracts. So there are also decisions of the courts where the consumer protection is not ensured similar as in the arbitration decisions. But on the other hand the execution court doesn't deny the enforceability of the judicial decisions which aren't in accordance with the consumer protection legal regulation. The question is why the consumer protection shouldn't by granted to these consumers too. Another problem arises when the lawful claim is already paid to the supplier and the supplier sues only the unlawful interests, should the court treat these executions differently or not.

As we can see this practise of the Slovak courts bring on the light more and more problems. According to my opinion this approach can be justifiable only in the case when it is proportionate to the legitimate aim. The legitimate aim in these cases is not the punishment for the nasty supplier but the protection of the consumer only in extent that he or she won't have to pay the supplier great interest for a loan as prescribed by law. If the practice of the court will cause that the consumer won't be obliged to pay back even borrowed money, that will cause the imbalance in the rights and obligations of the parties to the consumer contract in a particular case that is according to my opinion unacceptable because is disproportionate to the aim.

Is it really necessary to protect the consumer in that way that the court will deny the enforceability to the arbitration award? On the one hand the legitimate objection is that in the arbitration the consumer protection isn't ensured even when the consumer is active and defends himself. The arbitration shouldn't serve as easy way to gain the decision for execution in cases which wouldn't be successful in the proceeding before the court. On the other hand the consumer must firstly have a chance to defend his rights and should have effective remedies available for him. Most of the consumers understand the principle that if they borrow money, they have to pay them back. There are several institutions which can grand the consumer free legal aid. More and more amendments are made to the legislation to create the effective remedies and to ensure that the cost won't hinder the consumer from defending in the case that their rights are infringed. That is why a judicial activity shouldn't replace the activity of the consumers in the judicial proceeding, but rather should the legal order be changed to avoid the situations where the arbitration award doesn't respect the consumer protection legislation.

According to my opinion it isn't right to exclude the arbitration clause from the consumer contract at all, because the arbitration has its eligible place in the modern judicial system. There are several reasons

why is the arbitration good choice for such claims. It is important to realize that the consumers make use of the small loans from the companies which aren't banks, are mostly not able to get the loan from the bank. These consumers have lower income than the banks require and mostly the loans are of small amount because they aren't able at all to pay back big amounts of money from their income. On the other hand these kinds of loans are necessary for these consumers and if there wouldn't be possibility to borrow the money legally, there will be a risk of black market. But when providing the loan for such consumers there is greater risk that in the case of sudden unemployment or disease they won't be able to pay the money back. The suppliers aren't patient and immediately begin to recover the debt. The higher risk connected with these loans is the reason to bigger interests and other sanctions claimed by the suppliers. I won't try to do some quantification of the risk and try to account the right interest. When the courts started to refuse to adjudicate the contracted interest, the suppliers started to include an arbitration clause into the consumer contracts on providing small loans.

According to my opinion is very important to find the way how to preserve the possibility to have the dispute decided by the arbitrator and in the same time ensure the respect of the consumer protection legislation, which I find very important. The consumer must be protected from disproportionately high sanctions for delay with the payment of his debt. In general how to protect the consumer which hasn't legal education in the arbitration. The arbitration should be divided into commercial arbitration and consumer arbitration. Because the relationship between the consumer and the supplier is typical for the economical disparity of the parties, which has a consequence also on the legal representation, the ability to pay costs of the proceeding and also the information that the parties have at the begging of the proceeding to defend their rights. Separate legislation should be adopted to govern the arbitration in disputes between the consumer and the supplier. The arbitration court should be permanent body and the proceedings before them should have strict rules as to a composition, costs of the proceeding, the legal representation of the consumer before the arbitrator by the nongovernmental organisations for their protection or even there should be the accountability of the arbitrator.

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SOME CONSIDERATIONS REGARDING THE SALE OF ANOTHER PERSON'S THING IN THE CONCEPTION OF THE CURRENT ROMANIAN CIVIL CODE

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Abstract in original language

In the old Romanian civil regulation (the Civil Code of 1864) the sale of another person's thing was a non-regulated institution. This is why its existence or validity made the object of certain strong controversies.

The new Romanian Civil Code regulates the sale of another person's thing, both generally in art. 1230 called "The goods belonging to another person" of the 5th book "About the Obligations", the 3rd section "Concluding the Contract" paragraph 4 "The Object of the Contract", and particularly in art. 1683 called "The Sale of Another Person's Goods" of the matter of the selling contract.

Thus, art. 1230 of the Civil Code generally states that, unless the law stipulates otherwise, the goods of a third may make the object of a performance, as the debtor is forced to procure and transmit them to the creditor or, according to the case, to obtain the agreement of the third.

If the obligation is not executed, the debtor is responsible for the caused damage.

At its turn, art. 1683 paragraph 1 of the Civil Code stipulates regarding the selling contract that, when concluding it on a determined individual good, the good belongs to a third, the contract is valid and the seller is forced to provide the transmission of the property right from its holder to the buyer.

As such, the quality of holder of the seller's property right on the respective thing is not a validity requirement of the contract and the seller is only forced to provide the transmission of the property right from the holder to the buyer. This also results from the definition of the selling contract accomplished by art. 1650 paragraph (1) of the Civil Code, according to which "the sale is the contract by means of which the seller transmits or, depending on the case, is forced to transmit the buyer the property of a good in exchange for a price the buyer is forced to pay".

1. PRELIMINARIES

The Romanian Civil Code of 1864 did not regulate the sale of another person's thing1 as a consequence of the fact that it did not take over the stipulations contained in art. 1599 of the French Civil Code, according to which: "the sale of another person's thing is null, it may give place to damage-interests, when the buyer did not know that the thing belonged to another".

2. OPINIONS EXPRESSED IN THE ROMANIAN DOCTRINE AND JURISPRUDENCE

In the absence of a legal regulation regarding this situation, the Romanian doctrine and jurisprudence mainly spotlighted three opinions.

In a first opinion, the sale of another person's thing was considered as null, for the lack of cause "as a determinant psychological reason of the parties' consent, showing that there is no main and immediate purpose of the contract, namely the carrying of the property"2, a correlative obligation of the payment of the price.

It was considered still an absolutely null operation the sale-purchase when the parties knew that the thing belonged to another person, as this is speculative and it has an illegal cause[3].

In another opinion, the sale of another person's thing was considered as annullable, so relatively null, when the parties or at least the buyer was wrong, considering that the sold thing belongs to the buyer. In this case, the annullable feature was based on the error-vice of consent on the essential quality of the buyer[4].

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[1] The sale of another's thing refers to the situation of alienating a determined individual thing. In case of the things of gender or future things, there is not this problem as another person's thing may not be sold and the property is not transmitted when concluding the contract, but when individualizing the work.

See, Francisc Deak, Civil Law Treaty. Special Contracts, Juridical Universe Press, Bucharest, 2001, p. 55;

2 D. Alexandrescu, Theoretical and Practical Explanation of the Romanian Civil Law, volume VIII, Bucharest, 1925, p. 93. Even the judicial practice has sometimes decided in this sense. See, for example, the Supreme Court, civil decision no. 1120/1966 in Decision Collection, 1966, p. 93.

3 Matei B., Cantacuzino, Elements of Civil Law, All Press, Bucharest, 1998, p. 620.

[4] In this case, the seller is wrongly considered by the buyer as being the owner of the respective good. See, Deak Francisc, Civil Law, The Theory of the Special Contracts, Didactic and Pedagogic Press, Bucharest, 1963, p. 14;

In a third opinion, they considered that the sale of another person's thing is valid when the parts know that the thing is not the seller's property and when he forced himself to procure it subsequently to the buyer[5]. In this case, there was the problem of the resolution of the sales contract based on the seller's responsibility for guarantee for eviction to the buyer. At the same time, the buyer may demand the resolution of the contract for the non-execution of the seller's obligation to transfer the property on the sold thing[6].

3. REGULATING THE SALE OF ANOTHER PERSON'S THING IN THE NEW ROMANIAN CIVIL CODE

The new Civil Code accomplishes a both general and particular express regulation.

The general regulation is stipulated by art. 1230 of the Civil Code whose marginal title is: "The Goods Belonging to Another" and that states that, unless the law stipulates otherwise, the goods of a third may make the object of a performance and the debtor is forced to procure and transmit them to the creditor or, depending on the case, to obtain the agreement of the third. If there is no execution of the obligation, the debtor answers for the cause prejudices.

The particular regulation is registered in art. 1683 of the Civil Code called "The Sale of Another Person's Thing".

Thus, according to paragraph 1, of this article, if, when concluding the contract on a determined individual good, this belongs to a third, the contract is valid, and the seller is forced to provide the transmission of the property right from the holder or by the buyer.

As such, in the current regulation, the quality of holder of the property right on the thing that is to be sold is not considered as an essential demand for the contract validity and the seller only has the obligation to provide the transmission of the property right from the titular to the buyer.

The possibility to transmit in future the property right is also considered by the definition of the sales contract.

Thus, art. 1650 paragraph (1) of the Civil Code stipulates that the sale is the contract by means of which the seller transmits or, depending on the case, is forced to transmit to the buyer the property of a good in exchange for a price the buyer is forced to pay.

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[5] R. Codrea, *Consequences of selling another's thing when at least the buyer ignores that the seller is not the owner of the sold good*, I. Lulă, *Discussions Referring to the Controversial Problem of the Juridical Consequences of the Sale of Another's Goods*, in Law no. 3/1999, p. 65-68;

[6] C. Toader, Eviction in Civil Contracts, All Press, Bucharest, 1997, p. 55-58;

We consider that this obligation instituted by the above mentioned article is a result. The way we may accomplish it is stated in art. 1683, paragraph 2 of the Civil Code that stipulates that: "The seller's obligation is considered as being executed, either by gaining the good by it, or by ratifying the sale by the owner, or by any other direct or indirect means that procure to the buyer the property on the good."

According to paragraph (3) of the above-mentioned article, even if it does not result the contrary from the law or from the will of the parties, then the property is carried from the buyer since gaining the good by the seller, or since the ratification of the sales contract by the owner.

If the seller does not provide the transmission of the property right to the buyer, this last one could ask for the resolution of the contract, the return of the price and also, if it is the case, damages-interests.

The new Civil Code also regulates the situation when a co-owner sells the good of the common property, even if, when concluding the contract, he only had a share of the property right on it.

In this case, when a co-owner sells the good, the common property and subsequently, it does not provide the transmission of the property during the entire good by the buyer, and this last one could require – beside damages-interests, at his choice, to be the reduction of the price proportionally with the share – a part it had not gained, or a resolution of the contract if they had not buy if they would have known that the property of the entire good would not be gained.

The way of establishing the damages-interests the seller dues to the buyer, if there is not settled the transmission of the property right on the sold good, is established according to the stipulations of art. 1702 and 1703 of the Civil Code where we refer in art. 1683 paragraph (6) of the Civil Code.

Thus, art. 1702 of the Civil Code, called "Extension of the Damages Interests" show that they contain:

The value of the fruit the buyer was forced to return to the one who defeated him;

The judgement expenditures accomplished by the buyer in the process with the one who defeated him, and also in the process of calling the seller in the guarantee;

The expenditures and concluding and executing the contract by a buyer – the suffered losses and the non-accomplished gains by the buyer because of the eviction.

Also, the seller is kept to return to the buyer, or to make it return by the one who manages all the expenditures for the works accomplished

related with the sold good, either the works are autonomous[7], or they are added, but in this last case, only if they are necessary or useful.

If the seller has known the eviction cause when concluding the contract, his is debt to return to the buyer the expenditures made for its accomplishment and, depending on the case, the raise of the voluptuous works.

If the buyer knew when contracting the contract that the good did not entirely belong to the seller, he may not ask the return of the expenditures regarding the autonomous or voluptuous works, whereas it is considered that he has made these expenditures in order to increase his comfort on its personal risk.

Finally, when the partial eviction does not attract the resolution of the contract, the seller should return to the buyers a part of the price, proportional to the value of the part it was evicted by and, if it is the case, to pay only Debts – interests[8].

4. CONCLUSIONS

The New Civil Code, by regulating the sale of another person's work, are allowed to cut certain controversies expressed across the time in the special literature and practice. At the same time, it consecrates the possibility to dispose more largely of another person's goods.

The new regulation refers to the determined individual good and not the goods of gender.

We consider that the regulation is too succinct and incomplete. Thus, it does not specify the term where the seller should provide the transmission of the property to the buyer, it contains no stipulations validating the fraud sale of another person's goods, and neither the way they register the respective goods in the territorial book.

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[7] According to art. 578 paragraph (1) of the Civil Code, the autonomous works are the buildings, the plantations and other independent works accomplished on an immobile.

[8] For establishing the extension of the damages-interests, we correspondingly apply the stipulations art. 1702 of the Civil Code.

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INTERPRETATION AND APPLICATION OF EUROPEAN SOCIAL SECURITY COORDINATION RULES

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Abstract in original language

Although the form and content of the social security provisions belong to the competences of an individual Member State, the coordination of the national systems is one of the crucial fields of European cooperation, as it is closely associated to the free movement principles. The most important act in this respect is Regulation 1408/71 (now repealed by Regulation 883/2004) and the subsequent modifications and related acts, which are basically aimed to guarantee equal treatment and non discrimination.

Key words in original language

European social security, national social security systems, coordination, interpretation, preliminary questions

1. INDIRECT INTRODUCTION

Each member state has developed a separate social security system based on historical differences, needs and options of each country. Despite a certain similarity and interaction these systems distinct quite a lot. Later the individual states begun to recognize problems, especially with cross-border workers, and tried to solved them somehow. The tried to unify their systems or more precisely establish some common standards and interconnect the existing systems.

The initial coordination was based on bilateral agreements which were soon added or promoted by multilateral ones. The highest level of coordination has reached the European Union. However, full harmonization process will (if ever) take many years more.

The aim of this contribution is to discuss current European social security rules and find out some interpretative and application difficulties which occurs in connection with them. Firstly the European point of view is mentioned. Second part of the text is focused on national (Czech) level.

2. LEGISLATIVE BACKGROUND

Where should be found the legal basis for making coordination rules in the area of social security? As well as for all other regulated areas it is necessary to have a brief look in the Treaties. First of all, Preamble and the Part I of the TFEU[1] establish the basic objectives, values and principles of the EU. Hereinafter, Part II TFEU which prohibits any discrimination on grounds of nationality and establishes the Citizenship of the Union should be regard as essential source as well

as the provision connected with European social policy. But primarily, Part IV TFEU – provisions establishing free movement of persons, services and capital – should be considered as the key one, especially Chapter I - workers, Article 48, which constitutes the legal basis for the Regulations.

Also the Charter of Fundamental Rights of the European Union should be mentioned as a primary source, above all Article 34 - Social security and social assistance.

Secondary law acts has also been adopted. The most important are Regulation 883/2004[2] and Regulation 987/2009.[3] Some Directives are relevant in this area too, e.g. Directive 86/378.[4]

2.1 THE REGULATIONS

Regulation 883/2004 and Regulation 987/2009 has been the current coordination regulation in force since May 2010, which is not long time ago. Thus, which regulation should be relevant for the most of cases? First regulation in this area - Regulation 3[5] - was set up in 1957 as one of the first regulation at all. Then in 1971 the Regulation 3 was replaced by two other regulations – the Regulation 1408/71[6] and the Regulation 574/72.[7] But in few decades also these Regulations demanded for a change.

The purpose of the regulations is to prevent migrants who are employed in more than one country from loosing their social benefits due to another citizenship, residence or failing to reach required period of insurance specified in national law. But, the regulations are limited to the coordination of existing national social systems without further interfere with their substance.

3. APPLICATION AND INTERPRETATION OF THE SOCIAL SECURITY RULES

European social security rules have been given lot of time to be developed quite well. The crucial acts of coordination in this field are regulations, which are as acts of general legal force directly applicable in all Member States. In other words, these provisions are binding to all and must be respected by national authorities and administrations. Even in cases where a national law is in conflict with the regulation, the regulation has priority.

In general, in most cases the European social security rules are respected and applied correctly. However, as we should suppose, there are some problematic situation arising as will be mention later. Sometimes national institutions have either intentionally or not incorrectly interpreted and applied European provisions.

Because of the fact that the current Regulations has not been in force for long period yet, most of cases are ruled under the previous ones. Beside that, it is also possible to pass over so-called Implementing Regulation 987/2009 for its complementary character. Therefore, for

the purpose of this contribution the crucial one is the Regulation 1408/71.

As was already written above, the Regulation 1408/71 was repealed by Regulation 883/2004. What were the main problematic features, which leaded to the change of the act?

"This Regulation has been frequently amended and many judgement of the Court of Justice concerned this Regulation. As a result, the Regulation has became very complicated and this was considered problematic for migrant workers and also for legal aid advisers and judges the Regulation was difficult to apply. This complexity is the more problematic as it may impede the main objective of the Regulation, that is, the promotion of free movement of workers. Some of the main causes of the complexity are:

- the text of the Regulation can not and must not be interpreted without taking the judgements - of the Court of Justice into account

- the case law has grown considerably in length and complexity in the course of time

- the Regulation provides many exemptions to its main rules

- the lack of an explanatory memorandum to the Regulation. This means that all provisions had to be interpreted as they stand, unless the Court has interpreted... Also, the material scope of the Regulation was limited..."[8]

3.1 THE COURT OF JUSTICE

The role of the Court of Justice in social security question has been fundamental. Since the beginning few hundreds cases on the interpretation of the Regulation has been already decided. The majority of them was in favour of foreign workers and their families, which clearly demonstrates its importance in protection of European citizens. The role of the Court is essential when any doubts arise about the scope and extent of the Regulation, its application to individual cases and its interpretation with regard to national laws. The Court decides mostly in preliminary ruling.

The Court of Justice contributed and still contributes to the free movement of persons, apparently in the same extend as the Regulation itself. The Court strongly helped with the drawing up the concept of the new regulations.

In current case law the Court tends to very extensive interpretation, emphasising on the wide use of the Regulation with putting the freedom of movement in the first place. Trying to avoid excessive bureaucracy is also desired.

To mention very briefly some particular cases from recent times it is necessary to divide whole area into smaller parts. To simplify, the

logical structure of the Regulation is used. Many cases on personal or matter extent has been already decided (Borger,[9] Stewart[10]). Several aspects of pension insurance are also brought at the Court, e.g. aggregation of periods and their identification (Barreira Pérez),[11] definition of pension benefits (Noteboom)[12] or different rules for calculation and entitlement in different countries (Tomaszewska).[13] Probably the best known judgements came from the field of health insurance (Kohll[14] as one of the oldest, or Ivanov Elchinov[15]). Another field are family benefits (Schwemmer),[16] unemployment benefits (De Cuyper)[17] and many others.

With no exaggeration it is possible to say that without the Court of Justice, the protection offered by the European provisions would be less efficient, less complete and less satisfactory. The Court is the legal guardian of European citizens who are exercising their right to free movement and residence within Europe.

4. CZECH COURTS

„*The pension system in the Czech republic is to a large extent a continuation of the solution applied before the economic changes of 1989. The basic element of the continuation consists in maintenance the pay-as-you-go solution without the intention of introducing any changes. This remains in contrast with the basic changes in the functioning of the systems in the neighbouring countries, such as Poland or Hungary.*“[18] Nonetheless shortly after the revolution and before the accession to the European Union, the most of the legal acts were replaced with respect to the European law.

All national authorities are bound to apply the European law, which also applies to the Czech social security ones. A special role play administrative courts as a higher form of dispute resolution. Among them The Supreme Administrative Court „*… is the supreme jurisdiction dealing with matters in the jurisdiction of administrative courts. Administrative courts in general provide protection of public subjective rights of natural and legal persons (in procedures dealing with actions against the decisions of administrative authorities), which is supplemented by protection against failure of administrative authorities to act and protection from unlawful interference, instruction and coercion from administrative authorities…*“[19]

With regard to huge jurisdiction of the Supreme Administrative Court,[20] it can be assumed that this institution, as the supreme administrative authority, properly applies the European law. The Supreme Administrative Court is considered as dynamic and creative institution with afford of full and quality reflection of the European law.

„*In the first four years of membership of the Czech Republic in the European Union the Supreme Administrative Court did not have any occasion to request for a preliminary ruling. Although there was an important aspect of the EU law in several cases, its interpretation was*

so apparent that it was not necessary to ask the Court."[21] But since then, nine[22] requests for preliminary ruling has been raised by this Court.

4.1 CASE C-399/09: LANDTOVÁ

The most relevant for the purpose of this contribution - Case C-399/09, Landtová[23] - asked for the interpretation of the Regulation 1408/71. The case can be seen as a culmination of long-time disputes taken by Czech and Slovak pensioners, who worked both in the Czech and the Slovak republic, about their social security benefits after the dissolution of the Federal Czech and Slovak Republic. This case was firstly a dispute between Mr. Landtová and the Czech Social Security Association, then it occurs before the Prague City Court, finally before the Supreme Administrative Court and also the Constitutional Court is engaged. The body of the case consists of the entitlement, insurance period and the amount of the partial retirement pension.

4.1.1 THE PRELIMINARY RULING

In those circumstances, the Supreme Administrative Court decided to request for a preliminary ruling and set two questions. The first one was about the interpretation of the Regulation in the sense that it precludes the application of a national rule, which provides the Czech institution to determine the entitlement, period and amount of the supplement, even though, according to the European law, it is the social security institution of the Slovak Republic which is competent. The second question, in essence, concerned with possible discrimination[24] in the judgements of the Constitutional law, which allows payment of a supplement to old age benefit solely to the Czech citizens residing in the territory of the Czech Republic.

The Court of Justice responded that the provisions of the Regulation do not preclude a national rule, which provides for payment of a supplement to old age benefit where the amount of that benefit, granted pursuant to the bilateral agreement between the Czech Republic and the Slovak Republic,[25] is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. Accordingly, no infringement of the European law was founded.

That is not true for the second question. The Court ruled that the provisions of the Regulation preclude the national rule, which allows the mentioned supplementary payment, but it does not necessarily follow, under the European law, that an individual who satisfies those two requirements should be deprived of such a payment.

Consequently, it is not against the European law if the Czech Republic grants supplementary payments for pensioners, but it should not be distinguished between pensioners with Czech citizenship (direct discrimination) and Czech residence (indirect discrimination) and others, as requires the Czech Constitutional Court. Until the eventual abolition of the possibility to be awarded these benefits, the Czech

Republic should grant them regardless of the citizenship and residence of applicants.

4.1.2 THE CONFLICT OF THE COURTS

The case seems to be the same as many others if it were not for a conflict of the Czech highest courts. This is, from my point of view, the most interesting aspect of the case.

Firstly, a court of the first instance (Prague City Court) annulled the administrative decision and bound the Czech Social Security Association to award Mr. Landtová a supplement to old age benefit, all in accordance with the Constitutional Court judgements. It has to mentioned that the most of these judgements are of the time before accession to the European Union, but the Court adhered to its position also later.[26]

The Czech Social Security Association brought an appeal before the Supreme Administrative Court. The Supreme Administrative Court set aside the judgement and referred it back for further consideration. The City Court adhered to its position, referring again to the judgements of the Constitutional Court, and the Czech Social Security Association brought a further appeal.

The Supreme Administrative Court considered the judgement of the Court of Justice and the fact that the rule was determined by the Constitutional Court for claims arose before the accession to the European Union. For claims arose after the date there is no binding precedent because of their conflict with European law.[27]

Moreover the Court took into account the fact that no such a claim has arose after the accession, more precisely the Czech Social Security Administration has not used the preferential rule, so far no one has been discriminated. In accordance, the applicant in this case, Mr. Landtová, was entitled to a pension after the accession to the European Union, the Supreme Administrative Court ruled that the applicant is not entitled.

Nevertheless, the conflict between the Supreme Administrative Court, as a great supporter of the European law, and the Constitutional Court, which is more abstemious, still persists. It seems that the Court of Justice tried to find a solution that is satisfactory for all. On one side gives agree with the Supreme Administrative Court. On the other hand, leaves the possibility of supplementary payments required by the Constitutional Court, however the Constitutional Court has never wanted to grant them so widely (surely not with regard to the possibilities of the Czech state budget).

Certainly, this is not the end of the story. There should be another chance given to the Constitutional Court to consider its judgements again. And what is perhaps the most important, a substantive political debate should be conducted, followed by new and much more precise legislation.

5. CONCLUSION

For people working in two or more Member States a transparent and coherent interpretation and application of the social security coordination rules is of great interest.

The European social security rules have been developed quite well. The essential acts for the coordination in this field are regulations, which are directly applicable and must be respected by all national authorities. Also the Court of Justice tends to very extensive interpretation, emphasising the free movement of persons.

In general, European social security rules are usually interpreted and applied correctly. However, some unclear situation occurs, e.g. the Czech provisions governing the partial retirement pension and the mentioned conflict between the Czech Constitutional and the European law. The conflict still remains unsolved and we should impatiently expect the outcome.

[1] Treaty on the Functioning of the European Union

[2] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

[3] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

[4] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes

[5] Regulation n° 3 concerning the social security for migrant workers (1957)

[6] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community

[7] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community

[8] EBSCO, European Union, Social Security (supl. 78), web.ebscohost.com, page 25

[9] Case C-516/09: Judgment of the Court of 10 March 2011, Tanja Borger v Tiroler Gebietskrankenkasse.

[10] Case C-503/09: Judgment of the Court of 21 July 2011, Lucy Stewart v Secretary of State for Work and Pensions.

[11] Case C-347/00 : Judgment of the Court of 3 October 2002, Ángel Barreira Pérez v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS).

[12] Case C-101/04 : Judgment of the Court of 20 January 2005, Roger Noteboom v Rijksdienst voor Pensioenen.

[13] Case C-440/09: Judgment of the Court of 3 March 2011, Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu v Stanisława Tomaszewska.

[14] Case C-158/96 : Judgment of the Court of 28 April 1998, Raymond Kohll v Union des caisses de maladie.

[15] Case C-173/09: Judgment of the Court of 5 October 2010, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa.

[16] Case C-16/09: Judgment of the Court of 14 October 2010, Gudrun Schwemmer v Agentur für Arbeit Villingen-Schwenningen.

[17] Case C-406/04. : Judgment of the Courtof 18 July 2006, Gérald De Cuyper v Office national de l'emploi.

[18] Poteraj, J: Pension Systems in 27 EU Countries, 2008, page 130

[19] The Supreme Administrative Court: http://www.nssoud.cz/Obecne-informace/art/557?menu=173

[20] Two hundreds judgemnets connected with the Regulation 1408/71 has been published in the Supreme Court's database since 2005

[21] The Supreme Administrative Court: http://www.nssoud.cz/Proceedings-before-the-Court-of-Justice-of-the-European-Union/art/570?menu=271

[22] Out of fourteen originated in the Czech republic

[23] Case C-399/09: Judgment of the Court of 22 June 2011, Marie Landtová v Česká správa socialního zabezpečení

[24] Which is prohibited under the Treaties and the combined provisions of Articles 3(1) and 10 of Regulation

[25] Agreement between the Czech Republic and the Slovak Republic signed on 29 October 1992 as a measure to regulate matters after the dissolution of the Czech and Slovak Federal Republic

[26] For example Judgements of the Conctitutional Court: II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 301/05

[27] Case 3 Ads 130/2008 : Judgment of the Supreme Administrative Court of 25 August 2011

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INDIRECT EFFECT OF DIRECTIVES IN CASE-LAW OF THE CZECH COURTS

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Abstract in original language

K zajištění dodržování Unijního práva, vyvinul ESD za dobu svého působení několik významných institutů. Jedním z nich je i nepřímý účinek (směrnic) vyžadující, aby národní orgány vykládaly národní právo v souladu s Unijním právem (směrnicemi). Takováto situace představovala mj. pro národní soudy přirozeně novou výzvu a bylo otázkou, jak si s ní poradí. Tento článek se snaží, po stručném představení samotného institutu, zodpovědět otázku, jak si s tímto principem poradily konkrétně soudy České republiky. Uvědomují si tyto vůbec svou povinnost konformní interpretace? A jestliže ano aplikují tento princip také v praxi nebo ho spíše nechávají stranou? Analýza tří rozhodnutí Českých soudů nám jasně ukazuje, že v této oblasti nejsou české soudy rozhodně pozadu.

Key words in original language

Nepřímý účinek; směrnice; Von Colson; národní soudy; interpretace; judikatura; Evropský soudní dvůr; Nejvyšší správní soud.

Abstract

Within the period of its existence, the ECJ has developed several significant institutes, the purpose of which is to ensure keeping the Community/Union law. The indirect effect (of the Directives) represents one of such means. It requires that national authorities interpret national law in accordance with EC/EU law (its directives). Such situation naturally embodied completely a new challenge to (i.a.) the national courts, in the context of which there arose a question of how they would succeed. The aim of this article, after a brief introduction describing the institute itself, is to answer the question of how the Czech courts in particular have dealt up with the principle mentioned above. Do they realize at all their duty of the Euro-conform interpretation? If so, do they follow this duty in their decision-making, or do they rather tend to put it aside? Analyzing three judgments of the Czech courts shows clearly that the courts of the Czech Republic are far from falling behind in this sphere.

Key words

Indirect effect; the directive; Von Colson; national courts; interpretation; case-law; European Court of Justice; The Supreme Administrative Court.

1. INDIRECT EFFECT (OF DIRECTIVES)?

Interpretation of EU law is used to be primarily associated with European Court of Justice[1]. The reason is that this subject is empowered to determine its "correct/right" interpreting. However the truth is that it is necessary for each institution, which wants to apply Union law, to interpret this law, of course including national courts. This challenge must be faced by national courts in the first place because of principle of direct effect, which was stipulated firstly in case Van Gend en Loos[2], or rather, talking about EC directives, in Van Duyn case[3]. However development of EC law has shown that ECJ would "force" national judges to deal with even bigger challenge than represents direct effect of Union law, since in case Von Colson[4] the Court for first time stated existence of principle of indirect effect – in this case concretely in connection with directives[5]. As well as with the direct effect there is a couple of conditions[6] connected with this principle, under the which it could be applied, nevertheless for the purpose of this article it's not necessary to analyzed them. In the context of our theme it is sufficient to explain what this principle means for the national institutions (courts). When looking for simple explanation of the principle, it is enough to say that it represents duty of national authorities to interpret "*…national law rules in accordance with the spirit of non-implemented or inappropriate implemented directive*"[7],[8]. In light of the quotation is purpose of

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[1] Court, ECJ.

[2] Judgment of the European Court of Justice of 5. 2. 1963, c.n. 26/62. *Van Gend en Loos v Netherlands Inland Revenue Administration*.

[3] Judgment of the European Court of Justice of 4. 12. 1974, c.n. 41/74. *van Duyn v Home Office*.

[4] Judgment of the European Court of Justice of 10. 4. 1984, c.n. 14/83. *Von Colson and Kamann v Land Nordhein-Westfalen*.

[5] it is necessary to say that this principle is connected also with other sources of Community/Union law, however it is directive which represents point of interest of this article.

[6] they were stipulated by the ECJ in his decisions e.g. judgment of the European Court of Justice of 8. 10. 1987, c.n. 80/86. *Kolpinghuis Nijmegen BV*.; 13. 11. 1990, c.n. C-106/89. *Marleasing SA v La Comercial Internacional de Alimentacion SA*.; 16. 12. 1993, c.n. C-334/92. *Wagner Miret v Fondo de Garantía Salarial*.; 26. 9. 1996, c.n. C-168/95. *Luciano Arcaro*.; 5. 10. 2004, c.n. C-397/01. *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut Ev*.

[7] Šišková, N. in ŠIŠKOVÁ, N., STEHLÍK, V. *Evropské právo. 1, Ústavní základy Evropské unie*. Praha : Linde, 2007. p. 132.

[8] original definition from Von Colson case, which has been re-phrased by the following case-law of the Court, sounds: "*…obligation arising from a directive to achieve the result envisaged by the directive and their duty under*

analyzed principle obvious, it is de facto again about l'effet utile of EC law, because in words of Paul Craig and Gráinne de Búrca "*The Court thereby sought to ensure that directives would be given some effect despite the absence of proper implementation.*"[9]. In other words the indirect effect could be described as "supplement" of direct effect, because it could be apply even in situations, where DE can't be (e.g. because provision of the directive is not concrete enough). Therefore it is no doubt that IE represents step forward in evolution of (l'effet utile of) Union law, however in connection with its birth and its future there has been an important question – how the national courts will deal with this principle? For its importance this question was chosen as main topic of this article, or more precisely as Czech citizen let me re-phrase it to such question – "Do the Czech courts as well apply the principle of indirect effect of directives?". Whether the courts of the small central Europe country have this principle on their mind or not I will try to find out through the analysis of several judgments of its courts. As a result of such analysis reader should be able to answer question whether the doctrine of indirect effect has remained on theoretical level or has become practical matter. Let's see the first judgment.

2. JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 26. 10. 2006, C.N. 1 AS 28/2006.

At the beginning of the following analysis it is necessary to state one note. It is aim of this article to find out whether Czech courts keep on mind their duty of harmonious interpretation, not to describe in detail following cases. Therefore we will focus right on the question of application of Von Colson principle[10], not to description of merits of the case neither to analysis of applied national law. Nevertheless we can't of course disregard completely the background of the case,

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article 5 of the Treaty (nowadays art. 4, par. 3 TEU*1) *to take all appropriate measures , whether general or particular , to ensure the fulfilment of that obligation , is binding on all the authorities of member states including , for matters within their jurisdiction, the courts . it follows that , in applying the national law and in particular the provisions of a national law specifically introduced in order to implement directive no 76/207 , national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of article 189* (nowadays art. 288, par. 3 TFEU*2)" – judgment of the European Court of Justice of 10. 4. 1984, c.n. 14/83. *Von Colson and Kamann v Land Nordhein-Westfalen*. (par. 26).; *[1] Treaty on European Union, 12010E/TBL, Official Journal C 83 of 30 March 2010, in consolidated version.; *[2] Treaty on the Functioning of the European Union, 12010E/TBL, Official Journal C 83 of 30 March 2010, in consolidated version.

[9] CRAIG, P., DE BÚRCA, G. *EU Law. Text, Cases, and Materials*. 4. ed. Oxford : Oxford University Press, 2008. p. 287.

[10] synonym for indirect effect of directives.

however we will described it just as much as it is necessary to our purpose.

Finally let's start with the case mentioned above – 1 As 28/2006. The Supreme Administrative Court[11] was deciding about legal remedy[12], which was submitted by Industrial Property Office (defendant)[13] against judgment of City Court Praha[14], which decided previous dispute in private person "I.C." (suitor)'s favour by overruling previous decision of IPO (of 3. 12. 2004). What was point of declared dispute? Problem lied in the registration of certain mark (of the third subject) into registry of trademarks. Suitor disagreed with mentioned registration and having used all possible legal remedies situation resulted into point, where IPO submitted the legal remedy mentioned above called „kasační stížnost". Heart of the matter, the reason for primary suit of I.C. was acting of IPO when it was evaluating mark, which was under the registration process, and deciding pleaded marks. Concretely, from the point of view of suitor and consequently also in the opinion of City Court Praha, IPO made a mistake when it performed its evaluation in limited range ignoring several relevant criterions, by witch IPO disrespected settled case-law of ECJ regarding this area (SABEL[15] and Canon[16]). Opinion of IPO was of course opposite declaring that its decision went fully along with case-law of the Court. On the other hand the suitor, in reaction to "kasační stížnost", pointed out the Directive 89/104[17] which approximates the laws of the Member States relating to trademarks, and reminded that "*relevant regulations of national law implementing the Directive must be interpreted in the light of the wording and aim of the Directive*"[18]. Consequently he added that if ECJ in mentioned judgments SABEL and Canon mandatory expressed its opinion how to interpret text of the Directive 89/104, then the Court de facto also mandatory expressed how the relevant national regulations implementing the

[11] the SAC.

[12] concretely we are talking about legal remedy called "kasační stížnost".

[13] IPO.

[14] falls into Regional courts.

[15] Judgment of the European Court of Justice of 11. 11. 1997, c.n. C-251/95. *SABEL BV v Puma AG, Rudolf Dassler Sport*.

[16] Judgment of the European Court of Justice of 29. 9. 1998, c.n. C-39/97. *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*.

[17] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, 31989L0104, Official Journal L 40 of 11 February 1989.

[18] Judgment of the Supreme Administrative Court of 26. 10. 2006, c.n. 1 As 28/2006.

Directive should be interpreted. In such situation the SAC had to decide about legal remedy submitted by IPO. Talking about legal argumentation of the SAC, let's pointed out just that passages regarding indirect effect, ignoring the rest of its considerations.

"Turning point" of the SAC argumentation was statement that for this case had been relevant act n. 441/2003 Coll.[19] in consolidated version not the previous one (n. 137/1995 Coll.). Why is this so important? It is because mentioned act had been drafted for the period following admission of the Czech Republic to the EU, which means that main inspiration for this act had been the Directive 89/104. Talking about national provision (of 441/2003 Coll.) which was applied in the case it is essential to say that explanatory report (to 441/2003 Coll.) directly stated that it has base in transposition of the Directive 89/104. In the light of these facts the SAC observed that "*When applying national law, no matter if prior or following the Directive, the national court, which interprets such law, must do it as much according with the meaning and purpose of the Directive as possible, so result prescribed by the Directive would have been achieved, and consequently art. 249 paragraph three of the Treaty establishing the European Community20 would be fulfilled.*"[21]. In connection with applied national provision (§7 of 441/2003 Coll.) then the SAC added that "*It is therefore obvious that when interpreting §7 of the act of trademarks it is on principle necessary to do it in a such way so that the interpretation would be conform with relevant provisions of the Directive n. 89, particularly with its art. 4, and thus also with the case-law of ECJ, which relate to interpretation of this article.*"[22]. In context of these statements it is evident that the SAC had been fully aware of principle of indirect effect of directives. Consequently it is not surprise that the SAC approved procedure of City Court Praha, which interpreted relevant national provisions in conformity with art. 4 of the Directive 89/104, by which this court clearly proofed that it is not just highest Czech courts that are aware of Von Colson principle[23]. To conclude our analysis remain to say that the SAC's argumentation result of course into rejection of "IPO's legal remedy" ("kasační stížnosti").

[19] it is a Czech Trademark Act.

[20] nowadays art. 288, par. 3 TFEU.

[21] Op. cit. 18.

[22] Op. cit. 18.

[23] of course even more important than the fact that the court was aware of the principle is the fact that the court fulfilled all its duties resulting from it.

3. JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 29. 8. 2007, C.N. 1 AS 3/2007

As a confirmation that previously analyzed decision was not coincidence, but clear proof that Czech courts follow the principle of indirect effect, as well as introduction to the second part of this article I decide to analyze another judgment of the SAC – 1 As 3/2007. Once again we will not solve the background of the case, just follow the SAC's argumentation as regards principle of indirect effect.

In present case the SAC had to solve problem whether certain service provided by company called T.O.C.R. fall under the term "převzaté vysílání" (kind of transmission[24]) or not. Answer to this question should decide which national act regulates such service. The SAC dealt with the problem firstly from the point of view of the national law and stated that for service of T.O.C.R. is decisive whether it is fulfilling characteristic features or not, and at the same time that way of spreading of such service does not matter. To support its argumentation The Supreme Administrative Court decided to visit area of EU law, which represents interesting part of the judgment.

At first the SAC pointed out that Czech law, which regulates pursuing of radio and television broadcasting (act n. 231/2001 Coll.) i.a. implements the Directive 89/552[25] on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (in version of the Directive 97/36[26]). In connection with this Directive it is important to us that ECJ dealt with interpretation of contained term "television broadcasting" in its judgment M. B. v Commissariaat voor de Media[27]. In mentioned case ECJ had solved similar problem as the SAC – whether service provided by M.B. company fall under the term "television broadcasting". Also answer of the Court was similar to the SAC opinion. The ECJ stated that the manner of transmission is not determining element. Important is whether service correspond with features of "television broadcasting" as stated by the Directive 89/552.

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[24] content of the term is not important for our purposes.

[25] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, 31989L0552, Official Journal L 298 of 17 October 1989.

[26] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 31997L0036, Official Journal L 202 of 30 July 1997.

[27] Judgment of the European Court of Justice of 2. 6. 2005, c.n. C-89/04. *Mediakabel BV v Commissariaat voor de Media*.

In the light of relationship between the Directive and the act n. 231/2001, the SAC consequently stated that it is necessary to use Von Colson interpretation. Interesting is the way in which the SAC did it. We could say that the SAC declared the need in two steps. At first the Supreme Administrative Court pointed out that it had repeatedly stated that law acts of Community (EU) and case-law of ECJ serve as appropriate interpretative clue when interpreting Czech law regulations. The SAC added that it stands even in cases which had arise from facts, which prior the entry of Czech republic into EU. Condition, under the which Community law and ECJ's case-law serve as inspiration to (national) interpretation, which need to be fulfilled is that interpreted provision of Czech regulation was adopted in order to harmonize Czech law with Community law and at the same time the Czech lawmaker had not expressed intention to differ from act of Community law (Union law)[28]. As we can see, in this first step the SAC already talks about conform interpretation, however because it adds that such interpretation is suitable also for cases which have base in period which prior entry of Czech into EU, therefore the SAC does not state that there is a duty to perform Von Colson interpretation, but only express that Union law and case-law of ECJ represent just interpretative clue for interpreter and nothing more. However because the case solved by the SAC was connected with period following the entry of the Czech into Union, there was need for the SAC to add second step.

The SAC therefore admitted that situation is noticeable different, when we talk about cases which fall under the period when state is already member of Union. In such moment the Community (Union) law do not serve just as appropriate interpretative clue, but as obligatory interpretative clue, and this stands not just for situations, where the Directives were not implemented correctly into national law. The SAC subsequently pointed out to well know cases of ECJ as Océano Grupo Editorial SA v Roció Murciano Quintero[29], Sabine Von Colson and Elisabeth Kamann v Land Nordhein Westfalen[30],[31]. As we can see, in the second step *the SAC does not talk any more about interpretative clue, but clearly about duty* to perform Von Colson interpretation. In the light of mentioned conclusion it was consequently possible for the SAC to state that verdicts of ECJ from case M.B. v Commissariaat voor de Media are fully applicable in case n. 1 As 3/2007 and support the conclusion of the SAC mentioned

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[28] Judgment of the Supreme Administrative Court of 29. 8. 2007, c.n. 1 As 3/2007.

[29] Judgment of the European Court of Justice of 27. 6. 2000, c.n. C-240/98. *Océano Grupo Editorial SA v Roció Murciano Quintero*.

[30] Judgment of the European Court of Justice of 10. 4. 1984, c.n. 14/83. *Von Colson and Kamann v Land Nordhein-Westfalen*.

[31] Judgment of the Supreme Administrative Court of 29. 8. 2007, c.n. 1 As 3/2007.

above. In other words for final decision of the SAC it's therefore fundamental only the fact, whether service of T.O.C.R. company fulfills the features of the term "převzaté vysílání", which need to be interpreted accordingly with the Directive 89/552 and case-law of ECJ.

The rest of the judgment is therefore logically dedicated to question, whether the service does or doesn't fulfill mentioned features. Because this is not anymore relevant to our theme it's enough to say that the SAC decided in the end that service really does fall under the term. For us is nevertheless much more important that *once again Czech court proofed that respects his duty to perform Von Colson interpretation*. Furthermore, in my point of view, also passage where the SAC talks about cases connected with period which prior the entry of the Czech into EU should be stressed, no matter that in such situation the Union law and ECJ's case-law represent only interpretative clue so we can't talk about duty to perform "conform interpretation". Just the fact that Czech courts also in such cases has taken EC (EU) law and ECJ's case-law into consideration is in my opinion at least notable. Finally there is one more case, one more analyze, in front of us which is as well connected with The Supreme Administration Court – 2 Afs 178/2005.

4. JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 15. 8. 2008, C.N. 5 AZS 24/2008

Heart of the problem in this case was represented by problematic relationship between §16(2) of the act n. 325/1999 in version effect to 31. 8. 2007 (Czech Act on Asylum - CAoA) and §12 of the same act. §16(2) CAoA expressed – "*An application for international protection shall also be rejected as manifestly unfounded if it is apparent from the applicant's procedure that he/she has filed it with the aim to avoid a threatening expulsion, extradition or transfer for criminal prosecution to a foreign country although he/she might have applied for granting of international protection earlier, unless the applicant proves the contrary*". Second mentioned provision - §12 of CAoA includes reasons for granting of asylum. Reason why the SAC needed to solve relationship between §16(2) and §12 CAoA wasn't the fact that he would have never dealt with it before, but the fact that it yet had not had opportunity to solve this relationship after the transposition of the Directive n. 2004/83[32] in connection with expiration of the period for its transposition – these facts create, in the words of the SAC, "qualitatively new situation in Czech asylum

[32] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 32004L0083, Official Journal L 304 of 30 September 2004.

law"[33]. In other words, the SAC had solved mentioned relationship just in context of "old situation".

At the beginning of its argumentation the SAC pointed out its relevant case-law, which prior transposition of the Directive n. 2004/83. It is not necessary to describe individual cases, all we need to say is that in connection with relationship of §16(2) and §12 CAoA the SAC expressed that if conditions stated in §16(2) CAoA are fulfilled then granting of asylum under the §12 CAoA is without any other conditions and in all situations excluded, and that stands even in situations, when applicant for asylum would be threatened by persecution related to asylum relevant reasons[34]. After the SAC repeated this "previous" rule it was necessary to find out whether the fact that the Directive had been implemented and at the same time its implementation period had expired – in light of which Czech courts must interpret Act on Asylum and other relevant national acts accordingly to the text and purpose of the Directive – has any impact to the rule mentioned above, or whether there is no any shift regarding its previous case-law.

Starting its consideration the SAC remembered origin of the duty (i.a. of the Czech courts) to perform Von Colson interpretation – it comes from art. 10a and art. 1(2) of the Czech constitution and through these provisions from the fundamental principles of Community (Union) law[35]. Consequently the SAC added references to important (relevant) judgments of ECJ – Von Colson and Marleasing. It referred as well to its previous case-law i.a. to judgment 1 As 3/2007[36]. Apart of basis of the indirect effect of directives the SAC remembered also some of important restrictions of this principle like e.g. time point since when national authorities have duty to perform Von Colson interpretation. The SAC as well expressed agreement with the ECJ conclusion (see e.g. case Innovative Technology[37]) about order in which direct and indirect effect should be used by courts. Despite that conditions under the which indirect effect of the directives could be used is not theme of this article, let's remembered that by the opinion of the ECJ the national authorities should at first try to interpret national provisions accordingly to EC (EU) law and only if that is not possible than such institution should use (of course also just if required conditions are fulfilled) principle of direct effect. When looking for reason of said rule we can remember words of Sacha Prechal (nowadays judge of

[33] Judgment of the Supreme Administrative Court of 15. 8. 2008, c.n. 5 Azs 24/2008.

[34] Op. cit. 33.

[35] Op. cit. 33.

[36] see chapter 3.

[37] Judgment of the European Court of Justice of 11. 1. 2007, c.n. C-208/05. *Innovative Technology Center GmbH v Bundesagentur für Arbeit*.

ECJ), who expressed that "*Consistent interpretation constitutes, in general, a less drastic incursion into the national legal system then direct effect. […] However, where consistent interpretation will come close to distorting the meaning of national provisions, direct effect may be preferred and will perhaps even be dictated by legal certainty.*"[38]. So as I have stressed, the SAC agreed with this rule, which was important considering that facts, on which its case was built, were dated to 23. 8. 2007, which means after the expiration of transposition period of the Directive 2004/83. Knowing that duty to Von Colson interpretation is "in play" and being aware of mentioned rule the SAC started to analyze provisions of the Directive to find out what is their meaning for the case. Having finished it, the SAC realized that it follows from the relevant provisions of the Directive 2004/83 in connection with related Directive 2005/85[39] that "…*an application for international protection shall also be rejected as manifestly unfounded, if the applicant submit an application "only" with the aim to delay or frustrate execution of previous or potential decision, which would lead to his/her expulsion, however submission of application after the delivery of decision on administrative expulsion, does not a priori exclude granting of asylum or subsidiary protection, if he/she is threatened by persecution for asylum relevant reasons*…"[40]. The word which need to be stressed in quotation is "*only*" because in wording of §16(2) CAoA it could not be found. Consequently comparing mentioned conclusion with the rule expressed in the SAC's previous case-law this court realized that his previous interpretation of §16(2) is not in conformity with Czech's obligation towards the EU.

Before we will continue towards the end of this part of the article I feel need to clarify one thing. Analyses of the Directives performed by the SAC could give incorrect impression that Czech court had interpreted relevant provisions of the Directives by itself instead of asking the ECJ what is correct interpretation of them. Of course that's not true. Reason why it didn't ask ECJ was simple. The SAC had considered mentioned provisions as so called "acte clair" – situation when is no need to ask ECJ for interpretation because answer to such question is generally known[41]. In other words it represents situation

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[38] PRECHAL, S. *Directives in EC law*. 2. ed. Oxford : Oxford University Press, 2006. p. 314.

[39] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 32005L0085, Official Journal L 326 of 13 December 2005.

[40] Judgment of the Supreme Administrative Court of 15. 8. 2008, c.n. 5 Azs 24/2008.

[41] ŠLOSARČÍK, Ivo. Evropský soudní dvůr a předběžná otázka podle čl. 234 SES. *Europeum* [online]. Praha: Institut pro evropskou politiku EUROPEUM, published 6th December 2004 [cit. 2011-10-30]. Accessible at: <http://www.europeum.org/doc/arch_eur/ISlosarcik_team_europe.pdf>.

when the way of interpretation of some provision(s) is so clear and obvious that there is no reason to ask ECJ. Having finished this little note we can finish our analysis of the case 5 Azs 24/2008.

When the SAC realized that it must change its interpretation of §16(2) CAoA to be in conformity with requirements of EC (EU) law, then this court had to find out whether it is actually possible to interpret mentioned provision in Von Colson way. *The SAC in its judgment stated that it is possible* and consequently it also analyzed under what conditions the provision of §16(2) CAoA, interpreted in the light of Von Colson principle, may be applied. Finally the SAC of course dealt up with question whether such conditions are in solved case fulfilled. However that is not anymore part of the judgment which interested us and therefore there is no reason to describe the SAC's consideration in this area.

What should be said in the end of our analysis? What results from description of the case n. 5 Azs 24/2008? At first it is once again the fact that as well as first two cases also this one proofs that Von Colson principle is respected and followed by the Czech courts. However as we can see, the SAC dealt up with indirect effect in this last case in much more detail. It not just pointed out the foundations of duty of national authorities/courts to perform Von Colson interpretation, not only referred to some of (the most) relevant cases of ECJ, but the SAC as well considered time restrictions of indirect effect as well as its relation to the principle of direct effect. To sum up in my point of view this last case proofs not just that the Czech courts do the Von Colson interpretation, but something much more important, that they understand how the indirect effect works and what is its position in Community/Union law.

5. CZECH COURTS AND VON COLSON PRINCIPLE? FEW LAST WORDS.

At the beginning of this article I declared main question – "Do the Czech courts as well apply the principle of indirect effect of directives?" – with intention to find the answer to it in following text. Whether I was really successful is in the end on consideration of each reader, but in my point of view I have proofed that Czech courts really do apply the Von Colson principle. All three analysis showed to us that the Supreme Administration Court (and not just it – see e.g. City Court Praha in first analyzed case, or Decision of the Constitutional Court of 17. 3. 2009, c.n. IV. ÚS 2239/07. (par. 18)) the principle of indirect effect really applies when deciding its cases. Each of introduced judgments was furthermore dealing up with different issue – intellectual property, media, asylum law – the reason for that was to show that application of indirect effect of directives is not common just in connection with one specific area. Another criterion, when I was choosing cases for my analysis, was the date when the judgments were pronounced – 26. 10. 2006, 29. 8. 2007, 15. 8. 2008. As we can see the SAC has been consistent in using indirect effect. To support this fact we can refer also to quite new judgment from 1. 2. 2010 (c.n. 5 Afs 68/2009), where was the Von Colson principle applied as well.

Different issues, different (Czech) courts, different years – yes we could probably find more judgments to support even more the conclusion that the Czech courts respect and apply the Von Colson principle, however in my point of view, if we summarize all mentioned facts, then the foundations of said conclusion look enough solid to me. Finally we shouldn't forget the fact, that the Czech Republic is member of the European Union for just about 7 years, which is quite short time comparing to the membership of some other countries. Therefore it is logical that the case-law of the Czech courts does not contain as much judgments concerning application of the Von Colson principle as we could found e.g. in Germany, Italy etc.. Nevertheless this article proofs, at least I hope, that it is reasonable for the future to expect that the number of such judgments, pronounced by the Czech courts, will definitely rise.

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[42] sorted alphabetically by the (first) author.

[43] sorted by judgment date.

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APPLICATION OF THE EU CONSUMER LAW IN THE CZECH REPUBLIC

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AK Bělohlávek

Abstract in original language

Příspěvek nejprve krátce shrne dosavadní judikaturu SD EU ohledně ochrany spotřebitele, zejména rozhodnutí týkající se rozhodčích a prorogačních doložek. Poté bude rozebrána judikatura českých soudů, která se týká těchto otázek. Následně bude zhodnocen postup českých soudů při aplikaci evropského práva. Následovat bude analýza změn, které přinese novela zákona o rozhodčím řízení a nový občanský zákoník.

Key words in original language

rozhodčí doložka, prorogační doložka, spotřebitelské právo, ochrana spotřebitele, rozhodčí řízení

Abstract

At the beginning, this contribution will shortly summarize current decisions of the ECJ on consumer protection, in particular decisions dealing with arbitration and prorogation clauses. Next, judicature of the Czech courts connected to the abovementioned issues will be analyzed. This part will be followed by evaluation of the Czech courts´ approach when applying European consumer law. This part will be followed by analysis of changes, which will bring the amendment to the Arbitration Act together with the New Civil Code.

Key words

arbitration clause; prorogation clause; consumer law; protection of consumer; arbitration proceedings

In the Czech Republic, the issue of protection of consumers is regulated on national level (by national acts) as well as on European level since the Czech Republic is the member of the EU. This article aims to explore interaction between these two levels of regulation, with its focus on arbitration clauses in consumer contracts. Relevant judgment of both European Court of Justice and Czech courts will be discussed as well. An amendment to the Arbitration Act is currently being processed as well as New Civil Code therefore the article should also answer question whether this amendment would improve current situation in the area of arbitration clauses in consumer contracts

1. TRANSPOSITION OF DIRECTIVE 93/13/EEC OF 5 APRIL 1993 ON UNFAIR TERMS IN CONSUMER CONTRACTS

In This directive presented a big step forward in the consumer protection on the EU level because it was the first document summarizing minimal requirements in this area of law for the whole EU. It was implemented to the Czech law by Act No. 367/2000 Coll.,

on change of the Civil Code, as amended, and some other laws, which implemented three directives on consumer protection[1]. However, the implementation was not very accurate. - this can be observed on the basis of the mere translation of the term "unfair" - it was translated as "nepřiměřený" which means inappropriate instead of "zneužívající".

There are also differences in the definition of the unfair term itself. Under the directive, the unfair term was defined as:

Not being individually negotiated;

In contradiction to the requirement of good faith;

Causing a significant imbalance in the parties´ rights and obligations;

This imbalance is to the detriment of the consumer.

Under the Civil Code, conditions of unfair term are:

In contradiction to the principle of good faith;

Causes a significant imbalance in the parties´ rights and obligations;

This imbalance is to the detriment of the consumer.

Based on simple comparison between definition from the directive and from the Civil Code, it is obvious that condition of individual negotiation is missing in the Czech law.

The directive includes in Annex 1 a list of examples of unfair terms, which were member states, supposed to transpose to their law as well. This list is by no means exhaustive; it serves only as a demonstrative enumeration. When transposing this list of unfair terms, member states were supposed to do so completely without omitting any terms but they could add more terms if they deemed it necessary. Therefore, this list serves as a basis for determining which term is unfair.

Nevertheless, the Czech Republic chose a somewhat creative approach and transposed only 12 instead of 17 examples of unfair terms. Most importantly, the Czech Republic omitted to transpose letter q) of the Annex, which states that "[terms] excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract". As a result, there is no explicit

[1] Beside directive 93/13/EEC, directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises and directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts was implemented by this Act.

provision in the Czech law, which would deem terms requiring consumer to use only arbitration not covered by legal provisions (mostly ad hoc arbitration) unfair.

2. THE MOST IMPORTANT ECJ'S JUDGMENTS REGARDING DIRECTIVE 93/13/EEC

The first ECJ's judgment regarding above-mentioned directive was Oceano Grupo Editorial (connected cases C-240/98 to C-244/98). This case concerned a group of consumers who bought encyclopaedias. The sales contract contained prorogation clause in favour of a court in the seat of a salesperson where none of the consumer actually lived.

In this judgment, the ECJ stated that the aim of directive would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. Effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

In Mostaza Claro case (C-168/05), arbitration proceedings against consumer, Mrs. Mostaza Claro were conducted. However, Mrs. Mostaza Claro did not raise objection of invalidity of the arbitration clause during the course of arbitration proceedings but it raised such objection only during proceedings before court, which was asked to set the award aside. According to the Spanish court, there were no doubts that the arbitration clause, which served as a basis for these proceedings constituted an unfair term in the sense of directive 93/13/EEC but the problem was that this objection had to be raised during the arbitration proceedings, which Mrs. Mostaza Claro did not fulfil.

In this case, the ECJ de facto approved use of arbitration clauses in consumer contracts if the requirements in direction are satisfied. It also stated that the aim of the directive could not be achieved if the court seized of an action for annulment of an arbitration award was unable to determine whether that award was void solely because the consumer did not plead the invalidity of the arbitration agreement in the course of the arbitration proceedings. Therefore, the court can set the award aside even if the consumer did not raise the objection of invalidity of arbitration clause in the arbitration proceedings but only before court.

In Pannon judgment (C-243/08), consumer, Mrs. Györfi, was sued under the prorogation clause, which transferred jurisdiction to the court of seat of the businessperson. In this case, Mrs. Györfi did not even have to raise any objections because the court itself asked the ECJ for preliminary ruling, in particular whether the court has a duty to examine on its own motion its competence.

The ECJ de facto confirmed its previous ruling that the Directive cannot be interpreted as meaning that it is only in the event that the consumer has brought a specific application in relation to it, that an unfair contract term is not binding on that consumer. An unfair

contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand. However, if the consumer is informed about the fact that he did not have to be bound by this term and he expressed his wish to be bound by it then the term would be binding.

However, the ECJ limited court's activism in Asturcom judgment (C-40/08). In this case, arbitration proceedings against consumer, Mrs. Rodriguez Nogueira, were conducted. Mts. Rodriguez Nogueira neither did participate in the arbitration proceedings nor asked the court for annulment of the award therefore the award became final and binding. The ECJ ruled that if consumer is absolutely passive then court does not have to set aside award on its own motion. But the ECJ added that if a court can assess compatibility of an award with public order, it must do so also in case of EU law with similar nature. Since Spanish courts have such obligation under the Spanish law, they also have to assess compatibility of arbitration clause with the directive.

To summarize ECJ's judgments, the national courts, when dealing with arbitration clause (or prorogation clause since its nature is very similar to arbitration clause - both shift jurisdiction from a court, which would be under standard circumstances competent, to other body), has an obligation to examine ex offo whether arbitration clause does not present an unfair term. Fact that the consumer did not raise an objection of invalidity of arbitration clause in arbitration proceedings does not prevent him from raising this objection during proceedings before court.

Should the court come to conclusion that indeed this particular arbitration clause is an unfair term then the consumer cannot be bound by it. However, when the court comes to conclusion that clause presented is an unfair term, informs the consumer about this fact and consumer expresses his will to be bound by this clause then the court cannot decide against consumer's will that such a term is invalid.

In case national court is obliged to examine compatibility of arbitration clause with public order court must also examine its compatibility with directive 93/13/EEC because this directive has similar nature to public order. However, this last possibility is not applicable to the Czech Republic because the Arbitration Act does not give such possibility to courts.

3. CZECH JUDGMENTS REGARDING EXISTENCE OF ARBITRATION CLAUSES IN CONSUMER CONTRACTS

Recently, the Czech Republic has been experiencing problems with arbitration clauses in consumer contracts. Most commonly, consumers were not aware that the contract they signed included an arbitration clause. Another problem is connected with quasi-permanent arbitral bodies – in the Czech Republic, the Arbitration Act recognizes only ad hoc arbitration or arbitration before permanent arbitral institutions. However, recently many quasi-permanent arbitral institutions

occurred which are often connected with one or several business entities. This connection might raise doubts about impartiality and independence of the arbitrators who might even be paid according to the amount adjudicated. It is also not clear whether these institutions can serve as an appointing authority for arbitrators.

The Regional Court in Ostrava in case 33 Cm 13/2009 was deciding about claim arising out of loan contract, which contained an arbitration clause. On basis of this arbitration clause, an arbitration award was rendered, under which the consumer was obliged to pay remaining part of the loan together with contractual fine. The Court referred to directive 93/13EEC and when interpreting Civil Code it used euro-conform interpretation. According to Court's opinion, the directive 93/13/EEC, in particular letter q) of the Annex 1, considers all arbitration clauses as unfair terms and therefore arbitration clause is as unfair term invalid and arbitration award rendered on the basis of this clause is null.

The credit agency appealed and as an appellate court, the High Court in Olomouc was deciding. In its judgment 12 Cmo 13/2010, it came to conclusion that it is not possible to automatically consider all arbitration clauses in consumer contracts as unfair terms. According to Court's opinion, every arbitration clause contained in consumer contract must undertake an individual test, which will assess its compatibility with directive 93/13/EEC.

However, the High Court in Prague, when deciding about different matter (case 2 VSPH 14/2011) agreed with the Regional Court in Ostrava that arbitration clauses in consumer contracts are per se inadmissible, especially when they are concluded in favour of private arbitral institution which was not established in accordance with the Arbitration Act.

Nevertheless, the approach presented by the Regional Court in Ostrava and by the High Court in Prague that all arbitration clauses in consumer contracts are automatically invalid is not sustainable. This is obvious especially in the light of the amendment to the Arbitration Act, which is in process of adoption - this amendment distinguishes between consumer disputes and "normal" disputes (disputes when none of the parties is a consumer). Therefore, it could be assumed that arbitration clauses in consumer contracts are not automatically invalid otherwise this amendment would be pointless. Instead, approach requiring examination of every arbitration clause separately should be adopted.

This approach has indeed already been used by the Municipal Court in Brno which in its judgment 33 C 68/2008-60 assessed compatibility of an arbitration clause with the directive 93/13/EEC, i.e. whether it was individually negotiated etc. The court concluded that the arbitration clause was not individually negotiated and that it caused detriment to the consumer and as such it was invalid. As a result, the arbitral award was set aside.

4. CZECH JUDGMENTS REGARDING QUASI-PERMANENT INSTITUTIONS

As was already mentioned in previous section, there have been problems recently with quasi-permanent arbitral institutions. By this term, an institution which is not a permanent arbitral institution under the Arbitration Act and which usually provides arbitrators with functional background is meant. However, these institutions often appointed arbitrators therefore they acted as permanent arbitral institutions.

Regarding this issue, the Supreme Court in the past expressed an opinion (case 32 Cdo 2282/2008) that it was in accordance with the law if parties agreed that their dispute would be decided by particular arbitrator appointed by private entity which was not a permanent arbitral institution under the Arbitration Act and that the arbitration proceedings would be conducted under the Rulers issued by such private entity.

The High Court in Prague in its decision 12 Cmo 496/2008 embraced contradictory opinion when it concluded that reference to quasi-permanent institution as an appointing authority as well as reference to arbitration rules issued by such institution cause invalidity of the arbitration clause because of circumvention of law. This ruling was even concluded in the collection of the most important judgments adns as such should be followed by other courts. However, some courts did not follow this approach but followed earlier decision of the Supreme Court instead therefore the Supreme Court issued uniting opinion (case 31 Cdo 1945/2010). In this decision, the Supreme Court overruled its earlier decision and confirmed ruling of the High Court in Prague.

To conclude, the current position is that quasi-permanent institutions cannot appoint arbitrators or issue rules for conduct of arbitration proceedings since these activities are reserved only for the permanent arbitral institutions established under the Arbitration Act. Arbitration clauses concluded in contradiction with this approach are invalid under Section 39 of the Civil Code for circumvention of law.

5. AMENDMENT TO THE ARBITRATION ACT

Amendment to the Arbitration Act had already passed through the House of Parliament and had been discussed in the Senate on 7th December 2011. However, the Senate proposed further changes in the amendment therefore the amendment returned to the House of Parliament, which will vote on it again. This amendment focuses mostly on consumer disputes but it brings come changes for all arbitration proceedings. Regarding changes which will affect solely consumer disputes, those are:

Arbitration clause cannot contain name of a particular arbitrator;

Arbitration agreement must be contained in a separate document, otherwise is void;

Trader must provide consumer with explanation about the nature of an arbitration before conclusion of arbitration agreement;

There are stipulated necessary requirements about content of the arbitration agreement such as identification of arbitrator or permanent arbitral institution, manner of commencement and way of conduct of arbitration proceedings, remuneration of arbitrator(s) etc.;

Consumer disputes can be decided only by arbitrator from the list of arbitrators for consumer disputes which is kept by the Ministry of Justice;

Before commencement of arbitration proceedings, an arbitrator is obliged to disclose if in last three years, he rendered or participated in rendition of arbitral award in case where one of the parties was or is involved. The same applies for arbitration proceedings in progress;

Objection regarding lack of competence can be raised any time during proceedings;

Award must always contain reasoning and notice of right to file an application with the court for setting the award aside;

Arbitrators must always follow law on protection of consumer;

Non-compliance with abovementioned requirements establishes a reason for setting the award aside;

When a consumer files an application for the annulment of an award the court must ex offo examine compliance with provisions for consumer disputes;

When a consumer files an application for the annulment of an award the court must ex offo examine existence of reasons for postponement of execution of the award;

Objections regarding lack of competence or competence of arbitrator(s) can be raised during annulment proceedings even if they were not raised during arbitration proceedings;

The Ministry of Justice keeps a list of arbitrators who can serve in consumer disputes. Person can be added to the list upon his proposal if the person has legal capacity, does not have a criminal record, has a university degree in law, paid a fee of 5 000 CZK (approximately €200) and has not been crossed from this list in last five years. An arbitrator can be crossed from the list inter alia in case he severally and repeatedly breached his duties arising out of the Arbitration Act.

The Senate proposed that arbitrators for consumer disputes should undertake an exam, which would ensure that they have a thorough

knowledge of law on consumer protection. Persons who passed bar exam or judiciary exam would not have to undertake this exam. Ministry of Justice as a sponsor of the bill did not agree with this proposal.

There is a very high probability that the amendment will pass in the House of Parliament. However, it is unsure whether Senate's proposal will pass as well.

6. NEW CIVIL CODE

The New Civil Code improves transposition of directive 93/13/EEC but only partly - letter q) of the Annex will be included but there are still several problems. One of them is systematic position of provisions transposing the directive. These provisions in the current version of the New Civil Code will be in a separate section immediately after the section on accessory contracts. However, there is no provision on the connection of these two sections therefore the only possibility is the relation between general and special provisions[2].

Regarding the definition of the unfair term, the New Civil Code brings significant change when it construes this definition as a refutable presumption. This construction is not in accordance with the directive because under the directive these terms are always considered unfair, i.e. under the directive they are defined as irrefutable presumption. There is also one change in the definition itself - the New Civil Code substitutes requirement principle of good faith with the requirement of adequacy. Adequacy is not mentioned in the original definition in the directive therefore it is not clear why this change happened since it did not correct the inaccurate transposition of the directive.

7. CONCLUSION

To conclude, the directive 93/13/EEC was not transposed accurately to the Czech law and it is unclear whether the New Civil Code will improve the situation. However, the definition of unfair term and translation of this term instead still remains inaccurate.

On the other hand, it is very positive that Czech courts are aware of this problem with transposition of the directive as well as of relevant ECJ´s case law and they try to reflect both when interpreting relevant provisions of the Civil Code.

Regarding existing problems with arbitration clauses in consumer disputes, only a few cases where an arbitration award was rendered go before court because consumers are not aware of the consequences of arbitration award or do not know about the possibility to go to the

[2] Pelikánová, Irena (2011): České právo, Evropa a rozhodčí doložky. Bulletin advokacie 10/2011, p. 17 et following.

court to ask for annulment. From these reasons, it is unsure whether the approach of inadmissibility of appointing arbitrators by quasi-permanent institutions will help to tackle these issues - if the consumer did not raise the objection of invalidity of arbitration clause during the arbitration proceedings it cannot be raised during court proceedings. In this matter, the Amendment to the Arbitration Act should improve the situation because it states that in consumer disputes, objection regarding lack of competence of the arbitrator(s) can be raised any time during proceedings as well as only in the court proceedings. It is true that this provision diminishes the efficiency of arbitration but this restriction follows the aim of consumer protection. As a result, arbitration proceedings might be less used in consumer cases.

Other changes under the amendment include an obligation of a businessperson to explain the nature of arbitration. The amendment also requires arbitration agreement to be contained in a separate document. This provision does not really solve a problem when consumers are forced to either sign a contract with arbitration clause or have no contract at all. Under this provision, arbitration agreement will be still signed together with the main contract so the consumers will have to face the same dilemma as now. The solution would be if the arbitration agreement could be concluded only after the dispute occurred - in this case, it would be absolutely independent on the main contract and consumer could freely choose whether he wants to sign it or not.

Currently, it is also common that consumers do not read the contract before they sign it so they are often not aware that there is an arbitration clause. However, even if the arbitration agreement is on the separate sheet of paper it does not ensure that the consumer will read it. It is true that this way he will at least know that there is an arbitration agreement but he can still be forced to sign it even if he does not want to as explained above. The businessperson will have to inform consumer about the nature of arbitration but the amendment does not specify how it should be done. Probably the written form will be used which the consumer will sign so the businessperson can prove that he fulfilled his informational obligation towards consumer. But this does not ensure that the consumer will actually read what he signs and that he will understand the presented text.

One of quite effective ways how to restrict arbitration in consumer disputes could be by the list of arbitrators for consumer disputes. Consumer disputes are generally not very attractive for arbitrators because they usually concern only relatively small amounts of money. Therefore, there might be only a few arbitrators interested in entering the list. This would efficiently limit the consumer disputes solved by arbitration because there simply would not be enough arbitrators. Number of interested arbitrators might be even lower if they needed to pass an exam as suggested by the Senate.

To sum up, the inaccurate transposition of the directive does not have a strong effect on the court´s decisions because they are aware of this

inaccuracy. Existing problems regarding the arbitration clauses in consumer disputes might be at least partly solved by the amendment to the Arbitration act even though it is not clear when it will pass and in which version

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THE IMPORTANCE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982

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Abstract in original langure

The Third United Nations Conference on the Law of the Sea has managed, as a result of complex, sustained and prolonged negotiations, to develop a new Law of the Sea, established into a single convention, called by Tommy T. B. Koh - President of the Third United Nations Conference on the Law of the Sea - ,,A Constitution for the Oceans,,. This article aims are to highlight the significance of this convention which is the most important achievement of the international community after the United Nations Charter, being the first comprehensive treaty dealing with every aspect of the uses of the world's oceans and seas and their resources.

Key words in original language

The Law of the Sea, The third United Nations Conference on the Law of the Sea, The United Nations Convention on the Law of the Sea of 1982, the Agreement regarding the application of the 9th Part of the United Nations Convention on the Law of the Sea of 1982, sea spaces, resources.

1. GENERAL CONSIDERATIONS.

The existence of certain unsuspected resources in the world seas and oceans and the real possibilities to cover an important part of the food and energy requirements of humanity in an exhausting context, in a not too long lapse of time, of the terrestrial resources[1] have made the interest for the world ocean to continuously increase[2]. All these have justified the emphasizing of all the states' concerns for capitalizing these luxuries and in the last decades we have developed not only the sea researches, but it also appeared a real industry of extracting and processing the minerals of the deepness of seas and oceans, of the continental platforms of states or of the areas outside the limits of their national jurisdiction. But this new use of the sea spaces has raised numerous technical, economical and juridical problems that have determined the necessity for an ensemble regulation of all the activities in the sea space. Thus, under UN's auspices, starting from

[1]Some experts estimate that, for the quantities of fossil fuels exploited every year, the nature „had worked" for over a million years. **(M. T. Snarr, D. N. Snarr**, ***Introducing global issues***, Lynne Rienner Publishers, London, 2005, p. 293).

[2]**D. Mazilu,** ***Sea Law – Concepts and Institutions Consecrated by the Montego-Bay Convention***, Lumina Lex Press, Bucharest, 2002, p. 13.

1958, they have organized several conferences considering the sea problems but that represented only the first steps of the long and often hard way crossed to the reinforcement of the administrating and governing system of the world seas and oceans. Even if the importance of the conventions adopted after these conferences cannot be neglected, still the elaboration of several conventions, in different fields of the ocean space, a space reclaiming a unique and ensemble regulation, has made the adopted regulations not to have the expected efficiency. Thus, in 1973, they convoked the third Conference of the United Nations Organisation on the Law of the Sea with an extremely difficult mission, namely the one to elaborate a convention that should regulate and reflect the finding of certain solutions that are mutually beneficial for all the problems raised by the sea spaces across time.

2. THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA– MANDATE AND SHORT HISTORY.

The third United Nations Conference on the Law of the Sea has started its works in 1973, having the mandate to elaborate a unique, complete convention, starting from the premise that different problems of the sea spaces are interdependent and they should be regulated in ensemble[3]. This Conference, unique by its importance, by complexity, by the involvements of the debated subjects, by the number of participants, by time and by the procedural innovations has ignored all the normative traditions and has introduced in frame of the international relations an original process of elaborating juridical norms that had an important political-economical nature. Its development has illustrated the changes interfered in the international life and it has certainly influenced the future of the international society[4]. The conference, where more than 150 states participated, developed its works between 1973-1982, in frame of 11 sessions, by means of certain committees and negotiation groups[5]. Considering the complexity of the problems that were to be approached, the first two sessions of the Conference were entirely consecrated to the organisational problems[6]. In frame of the first session of the

[3]**S. Peterson**, ***The common heritage of mankind?*** in Environment, vol. 22, issue 1, Jan/Feb 1980, p. 7 - ***www. ebscohost.com.***

[4]**J. P. Levy**, ***La Conference des Nations Unies sur le droit de la mer***, Editions A. Pedone, Paris, 1983, p. 24 – 25;

[5]The combined actions, during the development of the Conference, between the classic multilateral negotiations and the different formulas of negotiations on groups in order to prepare the official texts have determined its consideration as representing an "experimental international workshop" able to inspire in the future other diplomatic conferences convoked in order to adopt the multilateral treaties. (**J. P. Levy**, ***La Conference des Nations Unies…***, p. 13).

[6]**S. Peterson,** op. cit., p. 8. The negotiations proved to be difficult, complicated, due to a strong competition between the national interests and the group ones. (**S. Jayakumar**, ***UNCLOS- two decades on***, Singapore Year Book of International Law, Singapore, vol. 9, 2005, p. 3 - ***www.proquest.com***).

Conference developed in New –York (December 3rd -15th 1973), they elected the Conference Office, they constituted a part of the working organs and they inaugurated the works regarding the procedure rules. At the second session developed in Caracas (June 20th–August 29th 1974) they launched basic debates[7]. Starting with the third session that developed in Geneva (March 17th – May 9th 1975), the works consisted of debating the texts submitted to the negotiations[8], so that the works of the fourth and fifth sessions (1976) ended with a unique text reviewed by the negotiations. They obtained important progresses in certain fields and in others, such as the exploration and the exploitation of the resources of the submarine territories beyond the limits of the national jurisdictions they got into a deadlock[9]. This was generated by the dissensions appeared between the groups of interests existent in frame of the Conference regarding the constitution, the role and the functions of the mechanisms that were to be created for the administration and the management of these spaces, and also due to the way the exploration and the exploitation of this space were thought[10]. Mainly, the 7th and 8th sessions were based on the new aspects regarding the capitalizing manner of the resources of the Area, among which the combating of the tendency of their unilateral capitalization. Wanting to end these tendencies, they called the principle according to which these spaces were not declared as a common patrimony of the humanity by the Resolution of the UNO General Assembly of 1970. After the debates in frame of the ninth session (1980), they disposed the review of the negotiated text that, at the end of the works, was presented as a project of the Convention on the Sea Law, being given to the advertisement together with an explanatory memory of the Conference president.

But this Convention project was also reviewed in frame of the tenth session of the Conference (1981), an occasion when they decided to include in this text the stipulations regarding the International Authority for the Sea and Ocean Bottom and the ones regarding the International Court for the Sea Law. Also, in frame of the same session, they also reanalysed the final clauses of the Convention project, but also other problems.

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[7]Since the session in Caracas, they have seen the fact that the negations would be very difficult because they could not offer practical solutions to any of the litigious problems between the developing states and the industrialized ones. (**T.O. Elias**, ***New horizons in International Law***, Martinius Nijhoff Publishers, Dordrecht, 1992, p.66).

[8]**J. P. Levy**, ***La Conference des Nations Unies …***, p. 62.

[9]***Law of the Sea Conference Convenes in May*** in American Bar Association Journal, vol. 63, Issue 5, May 1977, p. 720 ***- www. ebscohost.com.***

[10]**S. Peterson**, op. cit., p. 11.

At the same time, because Reagan administration took back its delegation, the Conference works were interrupted[11]. The works of the 11th session of the Conference developed in New-York, between March 8th – April 30th 1982, and they were based on the problems of the treatment that had to be granted to the pioneer investors in the international areas of submarine territories, in the lapse of time between signing and validating the Convention, as it is declared the last session consecrated to formulating and adopting decisions.

Despite the efforts laid in order to get to an agreement also regarding the juridical system of the international area of the submarine territories, an agreement that was accomplished in most of the situations, the participants to the debates decided that they achieved the conditions in order to be submitted for approving both the Convention project[12], and the projects of the negotiated resolutions.

Finally, the Conference adopted the following documents:

The United Nations Convention on the Law of the Sea,

The 1st Resolution of the United Nations regarding the settlement of the Preparing Commission of the International Authority of the Submarine Territories and of the International Court for the Law of the Sea,

The 2nd Resolution of the United Nations regarding the preparing investments and the preliminary activities regarding the poly-metallic nodules,

The 3rd Resolution regarding the territories whose peoples have not passed yet to a complete independence or to an autonomy system acknowledged by United Nations,

The 4th Resolution regarding the movements of national release.

The negotiations of the 1982 Convention represented an attempt to redefine the Law of the Sea, they wanted to adjust the past inequities

[11]As it results from the stipulation transmitted by the American state secretary, Alexannder M. Haing jr., the step back of the American negotiators was made in order to be sure that the negotiations would not end during that session, without the occurrence of a political review given by the American government that considered the stipulations regarding the juridical system of the international area of the submarine territories in contraction with the interests of USA. (**V. Ciuvăţ,** The ***Law of the Sea – Evolution and Consecration***, Universitaria Press, Craiova, 2001, p. 115).

[12]***The United Nations Convention on the Law of the Sea: a chronology***, United Nations Chronicle, New-York, vol.32, Issue 1, Mar. 1995, p. 11 - ***www.proquest.com.***

and to offer a future system of the world oceans and seas released from the domination of only one state or of a group of interests[13].

The United Nations Convention on the Law of the Sea of 1982 – significations. The third United Nations Conference on the Law of the Sea managed, after certain complex negotiations, to elaborate a new sea law, consecrated in only one convention[14]. Considering the importance of the United Nations Convention on the Law of the Sea of 1982, the President of the Conference, Tommy T. B. Koh, named it "The Constitution of the Oceans" and the United Nations General Secretary of that time, Javier Perez de Quéllar stated that, by adopting this Convention, the international law was irrevocably transformed[15].

The United Nations Convention of the Law of the Sea of 1982 regulates all the sea spaces, establishing the specific basic juridical frame, starting with the sovereignty areas and going on with the jurisdiction, the use of the sovereign rights of the states and also their obligations[16].

Among the particularities of this international normative process, we mention the fact that, beside a series of well-known and largely accepted practices and habits, they instituted new sea spaces: the exclusive economical area and the international area of the submarine territories and they formulate new principles and norms that should govern the new sea spaces.

At the same time, another distinctive aspect of the United Nations Convention on the Law of the Sea of 1982 consists of creating two new international institutions, namely: the International Authority of the Submarine Territories[17] and the International Court for the Law of the Sea[18].

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[13]**S. Peterson**, op. cit., p. 11.

[14]**M. Popescu**, ***The Law of the Sea: Areas of National Jurisdiction***, Artprint Press, Bucharest, 2000, p. 38;41. **D. R. Rothwell**, ***Building on the strengths and addressing the challenges: the role of Law of the Sea institutions***, Ocean Development & International Law, vol. 35, Issue 2, Apr-Iun 2004, p. 131.

[15]**D. Popescu, M. Popescu**, ***The Law of the Sea. International Treaties and Conventions***, Artprint Press, Bucharest, 2000, p. 20.

[16]**B. Boutros Ghali**, ***A dream becomes a reality: Sea Law Convention enters into force***, United Nations Chronicle, New-York, vol.32, Issue 1, Mar. 1995, p. 8.

[17]The International Authority of the Submarine Territories represents the organisation by means of which the parties organise and control the activities developed in the international area of the submarine territories in order to administrate and manage its resources. Constituted according to the model of the traditional intergovernmental organisations, actually, the Authority has

Currently, the United Nations Convention on the Law of the Sea of 1982 is acknowledged as a reference juridical frame for any international regulations able to define rights, obligations and responsibilities regarding the sea and ocean space[19].

The text of the Convention containing 320 articles and 9 annexes[20] was adopted by the Conference on April 30th, 1982[21] and it

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the vocation to behave as a supra-state because by report with other international organisations it is invested by the constitutive document with an authentic territorial competence on certain large spaces, and the Authority exerts, in these spaces, prerogatives in the name of the entire humanity. Thus, from this viewpoint, it seems incontestably that the new Convention of 1982 supplies the sketch of a new supra-state juridical order. (**D. Vignes**, ***La participation d'entités non-étatiques a la Convention des Nations Unies sur le droit de la mer*** in, Perspectives du droit de la mer a l'issue de la 3-e Conference des Nations Unies, Editions A. Pedone, Paris, 1984, p. 164).

[18]The International Court for the Sea Law was created in order to constitute, for the activities entering under the incidence of the Convention of 1982, a permanent organ of specialized internationalized jurisdiction and it was actually settled on August 1st, 1996. The headquarters of the International Court was settled in Hamburg, Germany. The status of the International Court is contained in the 6th Annexe at the Convention of 1982. In frame of the International Court, there is also the Chamber for regulating the controversies referring to the submarine territories, and also other special chambers whose constitutions and competences are stipulated by the Convention of 1982 and the 6th Annexe of its. The competence of the International Court is both contentious and consultative. Its competence lies all over the controversies and the requirements submitted to it according to the Convention of 1982, and also on all the stipulated problems, especially in any other agreement conferring competence to the International Court. ***(www.itlos.org).***

[19]See, for example, the Agreement of 1995 for the application of the stipulations of the United Nations Convention on the Law of the Sea of December 10th, 1982 referring to the conservation and the management of the fish stocks whose displacements are accomplished both inside and outside the exclusive economical areas (relative stocks) and of the stocks of big migrating fish.

[20]The Convention of 1982 seems incontestably to represent a real monument of the contemporary international law not only due to its impressive sizes, but also due to the exceptional duration, and also due to the importance with no precedent of the Conference that elaborated it. (**J. P. Levy**, ***La Conference des Nations Unies …***, p. 13).

[21]The Convention was adopted by 130 votes pro, 4 against (Israel, Turkey, USA, Venezuela) and 17 abstentions (among which England, R. F. Germany, Belgium, Holland, Italy, Spain, USSR, other states of the Eastern and Western Europe). (**M. C. Wood**, ***International Seabed Authority: The first four years,*** p. 179 - ***www.mpil.de***/shared/data/pdf). We mention that Romania signed the text of the Convention on April 30th, 1982. (**P. Leitner**, ***A bad treaty returns***, World Affairs, vol. 160, issue 3, winter 1998, p. 135).

was open to be signed on December 10th, 1982, in Montego - Bay, in Jamaica[22].

Before December 9th, 1984, the Convention was signed by 159 states, but in order to be validated, it stipulated a number of 60 ratifications and considering that – certain developed capitalist countries expressed reserves, some of them even very serious (there were states that did not sign the final text of the Convention of 1982 or did not ratify it), to certain stipulations written in the final text, especially to the stipulations of the 9th Part referring to the sea and ocean bottom and their subsoil beyond the limits of the national jurisdiction and to their resources[23], and also to any suggestion able to improve it, in order to create certain larger bases of its acceptance – the accomplishment of this essential requirement was accomplished only in 1993, so that, on November 16th, 1994, the United Nations Convention on the Law of the Sea became valid[24]. The validation of the Convention of 1982 was possible only after adopting on July 28th, 1994, in New -York, the Agreement regarding the application of the 9th Part of the United Nations Convention on the Law of the Sea of 1982, bringing substantial changes to the juridical system of the submarine territories

[22]The Final Document of the Convention was signed on December 10th, 1982, by 117 states and entities.

[23]The problems of the international area of the submarine territories, considered – the angular stone – of the negotiations of the third UNO Conference on the Sea Law continued also after adopting the Convention, to represent a real apple of Discordia and to generate tensions in the international relations. The adversity of the strongly industrialized states to the way they had established the juridical system regarding the exploration and the exploitation of this Area (in the interest of the entire humanity) as expressed by the refuse of many of them to sign and ratify the Convention, a fact that could endanger the entire normative ensemble of a colossal importance for the entire humanity. The transformations interfered in the international society at the end of the'80s, that marked the end of the cold war and the disappearance of the world bipolarization and they created the conditions necessary for aligning all the states to the principles of the market economy, but also the fear that the validation of the Convention, without being ratified by the industrialized states, would have made impossible the practical application of both the entire institutional edifice and the system of exploration and exploitation established for the Area, were able to determine an ample process of renegotiation of the 11th Part referring to the system of the submarine territories, beyond the limits of the national jurisdiction, of the United Nations Convention on the Law of the Sea.(**Şt. Moţăţăianu**, ***International Submarine Territories – an apple of Discordia or a chance of peace and of the sustainable economical development***, Scientific Communications Sessions Volume, with international participation, ECO-TREND, organized by the Faculty of Economical Sciences, "Constantin Brâncuşi" University of Targu-Jiu, 2004, p. 509-511).

[24]***United Nation Convention on the Law of the Sea: a chronology***, p. 10.

placed beyond the limits of the national jurisdictions established by the Convention of 1982[25].

The Agreement of 1994 marks the moment of ending some long efforts in order to universalize the participation to the United Nations Convention on the Law of the Sea of 1982, having a special contribution in the sense of concretizing the legal and institutional frame of the international sea order, an order that should consider the juridical consecration of the fact that the resources of the international areas of the submarine territories constitute the common patrimony of the humanity and that it should be useful for the wealth of all the peoples.

The validation of the United Nations Convention on the Law of the Sea of Montego -Bay on November 16th,1994, as a consequence of adopting the Agreement of 1994, determined, beside the institution of a juridical system specific to the submarine territories, for the International Authority for the Sea and Ocean Bottom – the resistance piece of this new system – to be born among the other international organisations, by having the certainty that almost all the states and especially the big industrial powers would guarantee its existence.

The United Nations Convention on the Law of the Sea of 1992 marked a new stage in the evolution of coding and progressive development of the international law, and the Convention represents the most important accomplishment of the international community after the United Nations Organization Charter, being the first containing treaty that takes care of every aspect of the uses and of the resources of the seas and oceans[26].

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A EUROPEAN UNION WITH TWO SPEEDS AND NEW TYPE OF EUROPEAN LAW

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Abstract in original language

Europa unită nu este decât un concept politic, din care populaţia nu a reuşit să înţeleagă mare lucru, şi nici nu a reuşit să identifice până la capăt toate aspectele care ar da consistenţă acesteia.

Situaţia economică a ultimilor ani, în care datoria publică a forţat statele să îşi recalibreze paşii a adus cu sine şi o posibilă redimensionare a proiectului European. Texul nostru încearcă să identifice ceea ce ar putea rămâne în urma acestei operaţiuni: credinţa noastră este legată doar de principiile dreptului şi unele valori.

Key words in original language

Uniunea Europeană (UE), datorie publică, redimensionarea UE, valori şi principii ale dreptului.

Abstract

United Europe is only a political concept and the population didn't understand all the ideas and the dimensions of this important process. The economic situation of last years, with an increasing public debt, forced European states to find a new logic and a new settlement of EU project. In this case, our text tries to identify which are the main things able to resist to these new treaties negotiations: in our opinion, it will remain only values and law principles.

Key words

European Union (EU), public debt, new dimension of EU, values and law principles.

1. People try every day to open a computer and enter on internet, or, maybe, to switch on the television or the radio. It is a normal situation for modern societies, because, after hundreds of years of hard-working, finally, the comfort is almost settled in a good part of contemporary world – however, in Europe, Northern America and Australia, and in a good part of Asia – but less in Africa.

A perfect day must have information – every day we can have surprises – at 8 A.M. in September 11 it was a famous moment who changed our lives; an earthquake in Japan or near Indonesia and whole world felt that nature is again stronger than human achievement.

2. On this big group of populations who need every day some news to well-function, there is a group with some specific attitudes – because of their studies and their social role: law faculty graduates.

They are, in fact, not only persons involved in society's march for perfection – in this case we must note politicians and political sciences graduates as mainly persons who believe that they have this power to change the world – but they are that specialist in real work of things and people, able to understand not only the correct way of working, but also the possibilities to not well function.

Thus, a lawyer is able:

a) To see and to create rules for a positive functioning of every social system. In this case, his role is basic to the peaceful role, when he will contribute to new possibilities to improve the economic (mainly) settlements;
b) To see where people don't respect the rules and to fight in legal procedure for their rights and obligations. In this case, lawyers are the first persons who feel the human nature for every kind of regulation, and where is the limit of social support to state legislation (mainly, to the public law).

In this equation, lawyers must analyze every day their role in the society, because, no doubt, their role is bigger than other professions want to recognize, and, in the same time, their power in society is able to produce frighten: on legal procedures a non-specialist is "lost is labyrinth, and there is not Thezeus and the Ariadne's wire" to protect them – here, only lawyer are able to walk and to obtain profit.

3. This power is important in daily work, but, we must note, of course, that society don't have too much trust in legal practitioners, because this feeling of frightening is something who dig every day at the prestige of legal science and lawyers.

In this case, we can talk about a moral crisis not for human society, but also inside legal practitioners, because they watch soon when the social trust disappears and sometimes they must find internal powers to continue the legal work as its official social purposes: helping the people and cleaning the society[1].

Describing this situation, an American law teacher wrote[2]:

"The legal profession sometimes behaves as if it is waiting for a knight in shining armor to rescue it from the evils of professional advertising, the forces of the marketplace, and the other afflictions we identify as the sources of our problems. But the practice of law is not a fairytale, and there is no knight in shining armor coming to the rescue. There are only we, its members.

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[1] From the famous legal definition: "Honeste vivere, neminem laedere, suum cuique tribure". Mainly the last part of the sentences describes this social role of noble profession.

[2] W. Bennett: The lawyer's myth: reviving ideals in the legal profession, The University of Chicago Press, 2001, ISBN 0-226-04255-3, 254 pages.

If the legal profession is going to save itself, we are the people who must do it. We are the wounded king, and our profession is the wounded kingdom. But we are also Parcival. Parcival *c'est moi!* It is we who must take up the long and difficult quest that will lead us to ask the essential question. And a good way to begin our part of that quest is to understand where we have come so far and where the dragons are. Like the Fisher King, whose fishing is a metaphor for his soul-searching in the realm of his own unconscious, we will need to do some fishing as well into our professional past and the landscape of our own unconscious[3]."

Hard words about legal practitioners!

4. Being social people by excellence, lawyers must be careful to every political change, because it can bring new changes for an important law and the whole consequences are huge[4].

Here, politics play an important role. It create new countries, new public regulations and the lawyer is forced to admit that he must analyze them, trying to solve and to create new habits for their clients.

One of the most important political entities created in 20th century was European Union. An artificial construction – is obvious, but with a strong propaganda machine back, able to make it a "strong new state". A lot of people believe in this project, but economy doesn't like this and its voice is stronger.

However, EU create a lot of regulations, and legal practitioners are forced to read them, learn them and apply them – sometimes, the political pressure for these laws is stronger than to the national law appliance.

But, in the same time, European Union was a concept with a lot of opposing people, able to demonstrate that this political idea is not good for national states, and – more than that, for national economies. In fact, history proved that in every world region there are sometimes few ideas for a deep political integration, with a lot of consequences for small states and with a different allonge – more power, more influence: a hegemonic power or an empire, because imperial dreams are connected with the state dimension[5] (we cannot imagine

[3] W. Bennett: The lawyer's …, pg. 12

[4] Only one small example: the legal status of married person, when his / her husband / wife died was influenced in Romania by the love of state ruler (on 1944) for his wife, because he knew that he will be killed by communists. With few weeks before arrested, he changed the heritage law in this area, and his regulation survive until 1 October 2011.

[5] After 1990 the scientific debates about empires disappear, but, after 2003, when USA adopt a different behavior in international relations, a lot of books start again to describe the imperial paradigm of history – related to the neo-liberalism and its purposes.

Lichtenstein or Monaco trying to create an empire, but we can imagine – one day or tomorrow – Nigeria or other state to be an empire (with the 21st century characteristics).

5. Lawyers are in the middle of social and political game – this is obvious. But, in the same time, they are forced to learn every day and for this they read books and scientific articles, but, in the same time, to have a correct image of the future, they are used and forced to watch daily news[6].

In Europe, since 1955 (when Warsaw pact was created) the integrationist debates become stronger, because military problems were solved by American presence, but the economy was not on good position in global competition.

After 1990, military problems almost disappeared and economy receives the strongest voice. On this case, the speed of transport and speed of internet create a different world – everyone has access to almost any information, and almost everyone can develop his skills.

But after 1990 European Union integration started to be stronger, and the public speech work only in this direction – only to have a larger and united Europe, no matter the cost. Wikipedia[7] – famous internet library describe the European project after 2000 in this way:

"The euro is the new currency for many Europeans. 11 September 2001 becomes synonymous with the 'War on Terror' after hijacked airliners are flown into buildings in New York and Washington. EU countries begin to work much more closely together to fight crime. The political divisions between east and west Europe are finally declared healed when no fewer than 10 new countries join the EU in 2004. Many people think that it is time for Europe to have a constitution but what sort of constitution is by no means easy to agree, so the debate on the future of Europe rages on.

6. The 27 EU countries sign the Treaty of Lisbon, which amends the previous Treaties. It is designed to make the EU more democratic, efficient and transparent, and thereby able to tackle global challenges such as climate change, security and sustainable development."

The cost of this famous integration was something very deep: a huge public debt for every state from EU, with some particularities.

Looking to the World Factbook[8], we can see this information:

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[6] Emil Balan, Institutii administrative / Administrative institutions, Bucharest, C.H. Beck, 2008, p. 41.

[7] http://en.wikipedia.org/wiki/History_of_the_European_Union

[8] https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html, consulted on 1 December 2011.

External debt: 16.08 trillion dollars (at 30 June 2011)

GDP: 16.07 trillion dollars

Thus, we have European Union with minus ….

7. Why this phenomenon?

In our opinion, this situation appears because politicians must be voted very often. In fact, every 4 or 5 years they must be winners in national elections. For this, they must offer not only promises, but also the rights – mainly, social rights – for populations. Without these rights, their possibility to earn money, influence (and the pride is something natural for politicians) and traces for the history.

Rights are always good to be received – but someone must pay for it – for sure, in this comfort society there is very simple to imagine yourself being a successful politician for 20 years or more – and 20 years means minimum 5 elections!

5 elections minimum means also 5 electoral campaigns and a lot of public meetings, where a lot of speech must be considered – thousands of people will listen and they'll vote only if it will be something substantial – the social rights are perfect for elections, being able to offer a safety position on the party.

O.K., but who must pay for these 20 years or more? State can offer the rights, after a Parliament vote, but the real economy must pay, because every social right must be paid by someone – and here, there only one solution: to increase the tax average. For sure, for the rich person there is also a single solution: to refugee to the fiscal paradises, where national state control is less, and politicians are not able to rich their position.

Apparently, everyone is satisfied: state offers social rights to the citizens, politicians are elected for 20 years or more, rich persons can hide their money … only the health of the economy become worse and one day the Truth Day appear: public debt is finally recognized as over passing the limits of strong economy, menacing with a great collapse social services[9] (first, of course) and of the welfares state. On that moment is appear in public speech only one word: reduction (austerity for national budget).

Of course, politicians are not responsible; their duty was for more than 50 years only to assure the social progress …

Inside EU the comfort society was killed almost since 2007, when global financial crisis (bank operation crisis) forced states to

[9] This is the argument for every new left wing attack during the economic crisis. Irony of fate or irony of morality?

recognize: we spent more than we can afforded, and the public deficit must be covered – because, without this operation, it will start a huge protest campaign against governments, in the name of democracy, because population is not used to accept social sacrifices.

But on this equation it was revealed something bad: all European states from Euro zone had a big deficit, more than 60% admitted – and here we must include UK, despite their currency position.

8. In the same time, 2007 brought not only a big crisis, but also an important European treaty, which is able to deep the political and administrative integration of member states: August 2007 brought crisis, December brought a treaty which can be considered – on the same time – first EU answer against the crisis: "United we stand"!

We shall present here the main disposition of Preamble who speaks about the purposes[10] of this treaty:

"…….. RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

……. DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

[10] Big letters underline and enforce this idea.

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy

…….. RESOLVED to continue the process of creating an ever closer union among the peoples of Europe,

……IN VIEW of further steps to be taken in order to advance European integration,

HAVE DECIDED to establish a European Union".

The first article of the Lisbon Treaty continues these ideas:

"By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union" on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community."

9. However, big disparities between states and the big public deficit were impossible to be ignored, and in 2011 the daily news was like here:

Článek I. a) "Are we already in a two-speed Europe?[11]
Is a "euromark" the solution to the euro-crisis? The idea of creating a second European currency is floated in *De Standaard* by Belgian economist Peter De Keyzer. The new euro, which would be added to the old one, would bring together Germany, the Netherlands, Finland and "other 'strong' countries whose budget deficit is below 3%, whose national debt is below 80% of GDP [...] and whose long-term interest rates are close to Germany's," explains Peter De Keyzer. "Germany would then have a strong currency and a credible fiscal policy. The southern countries would have a heavily weakened currency, economic growth and a breather to clean up their financial act. No-one would be required to devalue or lose face, the euro would be saved and we'd have a strong European currency. Unfortunately, however,

[11] http://www.presseurop.eu/en/content/article/239021-are-we-already-two-speed-europe, 26 April 2010!

not everyone would come away a winner, there'd be a key loser, too: namely Europe and the European idea."”

b) ”Sarkozy pushes for 'two-speed' Europe[12]

With France's borrowing costs on the up and with its prized triple-A rating under threat, French leader Nicolas Sarkozy is publicly advocating a fast-lane Europe for 'core' euro-countries.

"In the end, clearly, there will be two European gears: one gear towards more integration in the euro zone and a gear that is more confederal in the European Union," Sarkozy said Tuesday (8 November) during a discussion with students at Strasbourg University.

Key to his argument was that as the EU will one day take on the Balkan countries, deeper economic integration at 32, 33 or 34 member states will be "impossible."”

c) “The two speed Europe solution was planned in 1994”[13]

d) “Two-speed Europe, or two Europes?[14]

The European Union is, in a sense, made up not of two but of multiple speeds. Think only of the 25 members of the Schengen passport-free travel zone (excluding Britain but including some non-EU members), or of the 25 states seeking to create a common patent (including Britain, but excluding Italy and Spain).

If the euro zone survives the crisis—and the meltdown of Italy’s bonds in the markets suggests that is becoming ever more difficult—it will plainly require deep reform of the EU’s treaties. Done properly, by keeping the euro open to countries that want to join (like Poland) and deepening the single market for those that do not (like Britain), the creation of a more flexible EU of variable geometry could ease many of the existing tensions. Further enlargement need no longer be so neuralgic; further integration need no longer be imposed on those who do not want it.”

10. On the 1 December 2011 French president Sarkozy had an important speech on Toulon[15]. Few ideas must be included here,

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[12] http://euobserver.com/18/114236, 10 November 2011

[13] http://www.parker-joseph.com/pjcjournal/2011/11/19/the-two-speed-europe-solution-was-planned-in-1994, 19 November 2011.

[14] http://www.economist.com/blogs/charlemagne/2011/11/future-eu, 10 November 2011.

[15] http://www.elysee.fr/president/les-actualites/discours/2011/discours-du-president-de-la-republique-a-toulon.12553.html

because France is one of the most important voices inside EU and for EU:

"La crise est d'abord un révélateur de nos faiblesses. Mais pour peu que nous sachions en tirer les leçons, les crises nous indiquent aussi la voie à suivre pour reconstruire et elles donnent à la politique une responsabilité et un champ d'action au fond sans précédent depuis la deuxième guerre mondiale parce qu'il faut tout imaginer, tout réinventer.

L'Allemagne et la France unies, c'est l'Europe toute entière qui est unie et forte. La France et l'Allemagne désunie, c'est l'Europe toute entière qui est désunie et qui est affaiblie. Je recevrai lundi prochain à Paris la chancelière Merkel et ensemble nous ferons des propositions pour garantir l'avenir de l'Europe.

La France et l'Allemagne ont fait le choix de la convergence. Je ne reviendrai jamais sur ce choix.

L'Europe n'est plus un choix. Elle est une nécessité. Mais la crise a révélé ses faiblesses et ses contradictions. L'Europe doit être repensée. Elle doit être refondée. Il y a urgence. Le monde n'attendra pas l'Europe. Si l'Europe ne change pas assez vite, l'Histoire s'écrira sans elle.

C'est la conviction de la France et de l'Allemagne.

L'Europe a besoin de plus de solidarité. Mais plus de solidarité exige plus de discipline.

C'est le premier principe de la refondation de l'Europe. La refondation de l'Europe, ce n'est pas la marche vers plus de supranationalité. Ce n'est pas la réouverture des vieilles querelles entre les partisans de l'Europe des nations et de l'Europe fédérale.

L'Europe se refondera en tirant pragmatiquement les leçons de la crise. La crise a poussé les Chefs d'États et de gouvernements à assumer des responsabilités croissantes parce qu'au fond eux seuls disposaient de la légitimité démocratique qui leur permettait de décider. C'est par l'intergouvernemental que passera l'intégration européenne parce que l'Europe va devoir faire des choix stratégiques, des choix politiques.

Au sein de la zone Euro, il nous faut décider maintenant aller sans crainte vers davantage de décisions prises à la majorité qualifiée.

L'Europe ouverte à tous les vents, l'Europe qui ne se protège par contre les dumpings, l'Europe qui ouvre ses marchés sans exiger la réciprocité de la part de ses concurrents, l'Europe qui laisse entrer des produits de pays qui ne respectent pas les règles sociales ou environnementales, ça ne peut plus durer. L'Europe doit négocier pieds à pieds la défense de ses intérêts commerciaux.

L'Europe qui fait appliquer à l'intérieur le principe de la libre circulation et qui ne contrôle pas ses frontières extérieures, ça ne peut plus durer. Schengen doit être repensé.

L'Europe qui tolère le dumping social et le dumping fiscal entre ses États membres, l'Europe qui supporte que les subventions qu'elle verse à certains de ses membres pour les aider à combler leur retard sur les autres puissent servir à baisser leurs charges et leurs impôts pour faire aux autres une concurrence déloyale, ça ne peut plus durer.

L'Europe ne peut pas laisser ses groupes industriels à la merci de tous les prédateurs du monde, parce qu'elle leur interdit de se regrouper au nom d'une fausse conception de la concurrence, L'Europe ne peut plus ignorer la nécessité absolue d'une politique industrielle, pour soutenir nos filières et nos exportations.

L'Europe doit défendre sa politique agricole commune car dans un monde de ressources rares, la sécurité alimentaire est un élément essentiel de l'indépendance.

L'Europe va devoir faire des choix cruciaux dans les semaines qui viennent. Ces choix ne peuvent plus être ceux des années 80."[16]

11. Big politics is made by big states, and smaller one must resist for these actions and to accept watching their shoes.

For sure, this speech announces a new text for European treaties, and, of course, it fixes the limits of modifications.

So, for sure, in next year we'll see a new kind of European law. On this idea there is another one just coming: what kind of EU law, what it will be kept and what it will be throw out? Where are the limits of national parliament acceptance, because this process – create by France and Germany will be solved in only two ways:

a) everyone will accept, and EU will be radical transformed or
b) some states will not accept, and EU will be broken in different entities.

Both solutions must be fulfilled by the law science and legal practitioners.

Main question: what it can be solved?

For sure, not the same legal kind of integration on public law and public administration: maybe a double speed Europe, one deep integrated and one less, or it will be renounced to almost all European common administrative procedures.

[16] In European legal system is important to know French language, because of the legal traditions and legal history of the continent.

This solution is easy to be understood: to change something now on European public law means to have a deeper integration (impossible, because of the languages and the national force of economies) or to change into few levels of integration. To every level will be different procedures, but it will something that still exists: values and public law principles

Private law has a simple evolution – here, the globalization cannot create problems: the harmonization on commercial law is something clear for everyone and it will continue to deep. Internet helps now firms to communicate faster and a lot of commercial practices start to be universal or triple-continental: Europe, America (North and South, in this order) and Asia (partially).

However, the main aspect of European law is the European values (the same French president speaks about them) and the European law principles: good administration, non-discrimination, equality in front of the law and to the public administration, right to defense on the court of justice, etc.

In this case, we can replace not only whole EU law with these words: values and principles, but we can add here another one: moral. And, somehow, the economy makes us to remember that sufferance is eternal and only the human naivety is deeper: without a correct proportion between rights and obligations, our world will collapse – and we didn't create something to replace it!

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PRÁVO NA MAJETOK Z POHĽADU EURÓPSKEJ A VNÚTROŠTÁTNEJ LEGISLATÍVY A JUDIKATÚRY

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Abstract in original language

Článok sa zaoberá analýzou európskej právnej úpravy vlastníckych práv. Poukazuje a následne v kontexte príslušnej judikatúry analyzuje základné princípy vzťahujúce sa na uplatňovanie vlastníckych práv. Venuje sa ústavnoprávnemu základu práva na majetok v SR a princípom ústavnej ochrany majetku. Tieto sú doložené aj príslušnou judikatúrou. Vnútroštátnu úpravu a judikatúru týkajúcu sa vlastníckych práv porovnáva s európskou úpravou i judikatúrou.

Key words in original language

Právo na majetok, obsah pojmu majetok, princíp pokojného užívania, oprávnené zásahy štátu, pravidlá vyvlastnenia.

Abstract

The article deals with analysis of European regulation of property rights. Points and then in the context of relevant case law analyzing the basic principles relating to the application of property rights. He is Constitutional and fundamental rights to property in the Slovak Republic and the constitutional principle of protection of property. These are accompanied by the relevant case law. National rules and case law on property rights compared with European legislation and case law.

Key words

The right to property, the concept of property, the principle of peaceful enjoyment, authorized to state intervention, expropriation rules.

1. PRÁVO NA MAJETOK

Právo vlastniť majetok (vlastnícke právo) predstavuje jedno zo základných ľudských práv. Ide o komplex parciálnych oprávnení, ktoré sú ľudskej spoločnosti známe od jej prvopočiatkov. Ako také totiž súvisia s každodenným životom, s uspokojovaním základných životných a existenčných potrieb a tak v podstate s existenciou samotnej ľudskej spoločnosti. Rovnako tak možno do prvopočiatkov existencie ľudskej spoločnosti zaradiť aj prvé snahy o ochranu tohto práva. Prirodzene, úroveň, forma, rozsah a jednotlivé nástroje tejto ochrany sa menili v závislosti od konkrétneho obdobia, v závislosti od vyspelosti civilizácie a jej usporiadania. V každom prípade je potrebné mať na zreteli fakt, že zdroje smerujúce k uspokojovaniu životných potrieb majú obmedzenú povahu. Aj z toho dôvodu je nevyhnutné vymedziť to, čo môže byť predmetom vlastníckych vzťahov a tiež

charakterizovať vzťah, ktorý existuje medzi vecou (predmetom vlastníckych vzťahov) a osobou oprávnenou na jej užívanie a používanie. Takéto vymedzenie predstavuje základ pre všetky úvahy týkajúce sa ochrany vlastníckych práv a obdobných práv. Táto otázka má nepochybne nadnárodný resp. európsky rozmer a teda ju nemožno vzťahovať výhradne k jednotlivým právnym poriadkom ako takým. Napriek tomu práve v nich je možné nachádzať základnú úpravu vlastníckych práv, úpravu princípov ich užívania, úpravu oprávnených zásahov do nich a taktiež aj úpravu dostupných možností ochrany vlastníckych práv ako aj čiastkových oprávnení, ktoré zahŕňajú. Popri vnútroštátnych normatívnych pravidlách uplatňovaných v tejto oblasti je však potrebné mať na zreteli aj nadnárodnú resp. európsku úpravu vlastníckych práv (ich obsahu) a tiež úpravu možností ochrany týchto oprávnení.

2. EURÓPSKA ÚPRAVA A JUDIKATÚRA V OTÁZKACH VLASTÍCKYCH PRÁV

Vlastnícke právo je typickým ekonomickým resp. hospodárskym právom. Ako také sa prvýkrát objavuje v 18. storočí v ústavnoprávnej úprave Spojených štátov amerických, ktorá deklarovala jeho ochranu. Už v tomto dokumente (1791) bol zakotvený princíp, že obmedzenie vlastníckych práv je síce možné, no výhradne na základe zákonnej úpravy. Tiež sa zakotvila možnosť odňatia vlastníctva z dôvodu verejného záujmu a za primeranú náhradu.

Ustanovenia o ochrane vlastníckych práv sa postupne rozširovali aj do právnych úprav ďalších krajín sveta. Právnemu zakotveniu tohto inštitútu sa však pozornosť venovala nie len na národnej úrovni, ale aj na úrovni nadnárodnej. Veľmi významný dokument OSN – Všeobecná deklarácia ľudských práv v čl. 17 zakotvila právo každého vlastniť majetok samostatne alebo spoločne s inými. Vyslovil sa tiež zákaz svojvoľného pozbavenia majetku. Možnosti realizácie ochrany vlastníckych práv sa však podrobnejšie neupravili. Efektívny mechanizmus ochrany vlastníckych práv bol vytvorený až päť rokov neskôr na úrovni Rady Európy. Išlo však o veľmi komplikovanú otázku, ktorá bola veľmi dlho diskutovaná, pripomienkovaná a následne opätovne riešená. Aj z toho dôvodu sa úprava vlastníckych práv a ich ochrany nezakotvila v samotnom Dohovore o ochrane ľudských práv a slobôd, ale až v 1. Protokole k tomuto Dohovoru. Tento bol podpísaný 20. marca 1952 v Paríži a účinný sa stal po predpísanom počte ratifikácii 18. mája 1954. Postupne k tejto úprave pristupovali aj ďalšie členské štáty (popri pôvodných signatárskych). Nezávislosť si v tomto smere i doposiaľ zachovalo Švajčiarsko a Monako.

Na základe vyššie uvedeného 1. Protokolu k Dohovoru bola do jeho textu včlenená úprava vlastníckych práv. Podľa nej má:[1]

[1] Čl. 1 Dodatkového protokolu k Dohovoru o ochrane základných ľudských práv

každá fyzická i právnická osoba právo pokojne užívať svoj majetok,

nikto nesmie byť majetku pozbavený s výnimkou prípadov odôvodnených verejným záujmom, ak sú súčasne splnené zákonné podmienky a zásady medzinárodného práva,

štáty však smú prijať a aplikovať takú úpravu, ktorú považujú za nevyhnutnú s cieľom úpravy užívania majetku v súlade s všeobecným záujmom tak, aby zaistili platenie daní, poplatkov a iných pokút do národných rozpočtov.

Z pohľadu tohto znenia možno za kľúčové považovať vymedzenie niektorých pojmov. Ide hlavne o pojem „majetok“, jeho existencia a s ním sa spájajúce legitímne očakávania. V súvislosti s majetkom ako takým sa taktiež zaviedli základné pravidlá (princípy) jeho užívania a pravidlá pre oprávnené zásahy do neho.

2.1 POJEM MAJETOK

Každému je dané právo pokojne užívať svoj majetok. Pri interpretovaní a vykladaní pojmu „majetok“ je v tomto prípade potrebné postupovať autonómne a nezávisle od národnej legislatívy a národného práva jednotlivých členských štátov. Vzhľadom na tento fakt ani ESĽP nemôže rozhodovať o tom, či vlastnícke právo existuje podľa národného práva a národnej úpravy. Jeho rozhodnutia sa vzťahujú na existenciu vlastníckych práv v intenciách Dohovoru. Podľa tohto je však možné pojem „majetok“ vykladať skutočne veľmi široko. Je pod neho možné zaradiť celý rad práv, ktoré často národné, vnútroštátne úpravy ani nepoznajú resp. ich neupravujú. V žiadnom prípade nie je možné obmedziť chápanie majetku v zmysle Dohovoru na majetok hnuteľný a nehnuteľný. Ustanovenie čl. 1 sa totiž rovnako vzťahuje na práva a iné hodnoty nehmotnej povahy. Typicky ide o dobrú povesť, dávky sociálnej podpory a tiež napríklad aj nárok na dôchodok. K takýmto záverom dospel ESĽP vo svojej bohatej judikatúre týkajúcej sa práva na majetok. Napríklad vo veci Tre Traktörer Aktiebolag (TTA) vs. Švédsko bolo spoločnosti TTA odmietnuté vydanie licencií na predaj alkoholických nápojov v ich reštauračnom zariadení. Keďže poskytnutie licencie bolo základným predpokladom riadneho a prosperujúceho chodu podniku, jej neudelenie malo na podnik negatívny dopad. Zhoršila sa nie len povesť podniku, poklesol počet zákazníkov a automaticky aj tržby. V tejto veci ESĽP judikoval, že ekonomický záujem, ktorý s udeleným licencie súvisí je súčasťou práva na majetok v zmysle čl. 1 Protokolu.

Pod pojem majetok v zmysle Protokolu je možné začleniť nie len aktuálne, aj budúce, reálne očakávané a dosiahnuteľné príjmy.[2] Rovnako sa pod tento pojem dá zaradiť aj intelektuálne (duševné)

[2] Rozsudok vo veci Batelaan and Huiges vs. Netherlands, č. 10438/83, rozhodnutie Komisie z 3. októbra

vlastníctvo a oblasť ochranných známok.[3] Pod pojem „majetok" v zmysle čl. 1 je možné zaradiť aj obchodné podiely, akcie obchodných spoločností podnikajúcich podľa národného práva.[4] Ide totiž o práva, ktoré na jednej strane poskytujú právo podieľať sa na výnosoch spoločnosti (právo, ktoré má ekonomickú povahu) a na druhej strane obsahuje aj zodpovedajúce práva ako napr. právo hlasovať v orgánoch spoločnosti, právo zúčastňovať sa podľa miery podielu na riadení spoločnosti. V každom prípade teda ide o majetkové práva a táto povaha im bola priznaná aj judikatúrou ESĽP.

Za majetok je možné považovať tiež všetko, čo je predmetom vlastníckych práv podľa vnútroštátnej, národnej legislatívy, ktorá upravuje reštitúcie konfiškovaných majetkov v období predošlého režimu. Táto úprava však musela vstúpiť do platnosti až po ratifikácii Dohovoru zo strany zmluvného štátu a za splnenia tejto podmienky sa aj reštitučné nároky považujú za majetkové práva. Zmluvné štáty nie sú však povinné reštituovať majetok, ktorý bol na ne prevedený ešte pred ratifikáciou. Taktiež nevymedzuje rozsah a ani podmienky reštitúcií a navracania majetku. V tomto smere je štátom daná určitá miera úvahy v otázke vylúčenia istých skupín obyvateľstva, ktorým je právo na reštituovanie majetku priznané. Osoby, ktoré však priamo národná legislatíva vylučuje z reštitučných nárokov sa nemôžu následne dovolávať ochrany svojich legitímnych očakávaní ako majetkových práv v zmysle čl. 1 Protokolu.[5] Taktiež ESĽP judikoval, že pod pojem majetok je možné zaradiť aj právo na dobrú povesť advokátov, notárov alebo aj lekárov.[6]

2.2 EXISTENCIA MAJETKU

Na to, aby ESĽP mohol kladne rozhodnúť vo veci nároku sťažovateľa, je potrebné, aby sa táto osoba domáhala ochrany takého majetkového (vlastníckeho) práva, ktoré už existuje. Majetok alebo vlastníctvo teda musia už v konkrétnom prípade existovať v momente sťažovaného porušenia práva. Na preukazovanie existencie majetku je však povinný sám sťažovateľ. Podľa Dohovoru má ESĽP dané oprávnenie chrániť majetkové práva (teda práva už existujúce) a nie garantovať ich budúce získanie (získanie v budúcnosti).[7] Rovnako tak aj majetkové nároky, konkrétne nároky mzdové je možné zaradiť pod

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[3] Rozsudok vo veci Melnychuk vs. Ukraine, č. 28743/03, ECHR 2005-IX

[4] Rozsudok vo veci Iatridis vs. Grécko, z 25. marca 1999.

[5] Rozhodnutie vo veci Kopecký vs. Slovakia, č. 44912/98, § 35(b), ESĽP 2004 - IX

[6] Rozhodnutie vo veci H. vs. Belgicko, z 30. novembra 1987

Rozhodnutie vo veci Karni vs. Švédsko, z 8. marca 1988

[7] Rozhodnutie vo veci Marckx vs. Belgium, 13 jún 1979, § 50, Series A č. 31

pojem „majetok“ v zmysle Dohovoru iba v prípade, že už sú splatné, že nárok na ne už vnikol (teda už boli riadne a plne odpracované). Veľmi dôležité je napríklad to, že spod pojmu majetok v zmysle Dohovoru sú tiež vylúčené dedičské práva bez ohľadu na to, či sa dedí na základe zákona alebo na základe závetu. Judikatúra v tomto smere je veľmi bohatá a presne špecifikuje konkrétne nároky, ktoré je pod právo na majetok možné začleniť a ktoré nie. Určité zhrnutie tejto koncepcie chápania majetku je vidieť v rozhodnutí vo veci Slivenko a ďalší vs. Lotyšsko. Podľa tohto rozhodnutia ESĽP sa za majetok považuje existujúci nárok alebo pohľadávka vrátane nároku, pri ktorom sťažovateľ vie preukázať legitímne očakávanie jeho vzniku a získania v budúcnosti. Majetkom nie je nárok, ktorý je už premlčaný a ani nárok, ktorý je istým spôsobom podmienený do budúcna.

Sťažovateľ sa za normálnych okolností môže domáhať výhradne ochrany už existujúcich práv. Výnimkou z tohto pravidla sú legitímne očakávania. Tieto sa zakladajú na platných a účinných právnych aktoch a na odôvodnenej dôvere v ne. Vo vzťahu k predmetu očakávania musí byť preukázaná vysoká pravdepodobnosť vzniku nároku v budúcnosti. Nepostačuje iba možnosť vzniku alebo nádej, že nárok v budúcnosti vznikne.

2.3 ZÁKLADNÉ PRINCÍPY UŽÍVANIA MAJETKU

Vymedzenie pojmu „majetok“ v zmysle čl. 1 Protokolu k Dohovoru možno pre oprávnenia tohto charakteru považovať za kľúčové. Popri tom však ESĽP, ktorý dozoruje dodržiavanie ustanovení z Dohovoru vyvodil z čl. 1 tri základné pravidlá, princípy, v súlade s ktorými sa musí užívanie majetku realizovať. Stalo sa tak v prípade Sprorrong a Lönnroth vs. Švédsko v roku 1982.

V úvodnej vete predmetného čl. 1 je obsiahnutý všeobecný a zásadný princíp pokojného užívania majetku, na ktorý má právo každá fyzická i právnická osoba. Nasledujúca veta je vyjadrením druhého princípu, podľa ktorého je možné odňatie vlastníctva. Samozrejme, odňatie vlastníctva sa musí obmedziť výhradne na nevyhnutné prípady a musia byť zároveň splnené podmienky, ktoré toto ustanovenie predpokladá. V poslednej vete je upravený tretí princíp, podľa ktorého môžu členské štáty kontrolovať užívanie majetku a regulovať zaťaženie daňami, poplatkami a pokutami pri užívaní majetku. Týmito oprávneniami tak štáty získali rozsiahly priestor na voľné uváženie pri uskutočňovaní svojej sociálnej a hospodárskej politiky, ktorou môžu zasahovať do práva na majetok. Samozrejme, konkrétne závažné zásahy musia byť v každom prípade upravené právnymi predpismi so silou zákona. V žiadnom prípade nemôže ísť o akékoľvek vnútroštátne úpravy, čo je vyjadrené aj v tretej vete vyššie citovaného čl.1 Protokolu. Môže ísť len o také zásahy, ktoré sú v súlade s verejným záujmom a musia smerovať k zabezpečovaniu fungovania štátu. Hoci bola daná zmluvným štátom možnosť vnútroštátne upraviť určité otázky týkajúce sa majetku a majetkových práv, zostala taktiež zachovaná aj možnosť (a zároveň aj úloha) ESĽP posudzovať zákonnosť zásahov do tohto práva. Súd síce nemôže nahradiť vlastným úsudkom posúdenie veci vnútroštátnymi orgánmi, no má

možnosť vyšetriť skutočnosti, na ktoré sa v konkrétnom prípade vnútroštátne orgány budú dovolávať.

Pri aplikácii týchto pravidiel, teda pri zisťovaní, či došlo alebo nedošlo k porušeniu čl. 1 Protokolu je dôležité to, že ESĽP postupuje pri skúmaní ich dodržania v opačnom poradí. Prvé zakotvené pravidlo je vyjadrením generálnej klauzuly, podľa ktorej má každý právo na vlastnenie a pokojné užívanie svojho majetku. Druhé a aj tretie uvedené pravidlo predstavuje výnimku z tejto klauzuly. Ide o výnimku, pri ktorej dochádza k obmedzeniu a k zásahom do práva pokojného užívania majetku. Za splnenia podmienok, ktoré sú uvedené v tomto ustanovení a ktoré sú v národnej zákonnej úprave konkretizované, pôjde o zásahy a obmedzenia legálne. Podané sťažnosti sú preto preskúmavané v prvom rade z hľadiska dodržania pravidiel uvedených v treťom a druhom bode (princípe). Ak nie sú dodržané uvedené podmienky pre takýto zásah resp. ak sa ich naplnenie a dodržanie nedá konštatovať, potom je možné uvažovať o narušení prvého pravidla, teda generálnej klauzuly.

Zásahy, ktoré narúšajú vlastnícke práva a ich pokojné užívanie podliehajú podstatne vyšším nárokom ako opatrenia, ktoré regulujú užívanie majetku. Vo vzťahu k rušivým zásahom je potrebné vždy skúmať hlavne ich flexibilitu, dĺžku trvania, určenie majetku, poskytnutie náhrady a tiež aj rovnováhu medzi záujmami jednotlivca a spoločnosti. Veľmi dôležitá je možnosť preskúmania daného prípadu a situácie. Vzhľadom na povahu týchto kritérií je potrebné uviesť, že sťažovatelia majú právo dovolávať sa ochrany svojich vlastníckych práv v množstve rôznych situácií, v množstve rôznych prípadov. Takýchto prípadov môže byť vzhľadom na konkrétne okolnosti veľmi veľa. Preto sa dá povedať, že toto pravidlo je určitou sumarizáciou, zhrnutím prípadov, kedy k porušeniam práv na pokojné užívanie majetku došlo (v dôsledku činnosti či nečinnosti štátu). V tejto súvislosti ESĽP napríklad judikoval, že súdne konania, ktoré trvajú niekoľko desaťročí, ak zabraňujú v riadnom užívaní vlastníctva, majú povahu porušenia práva na pokojné užívanie majetku v zmysle prvého princípu. Rovnako tak je nevhodná aj intervencia zákonodarcu do súdneho konania, ktoré už prebieha o týchto otázkach.[8]

Pre posledné obdobia je typické, že sa stále viac a viac objavujú prípady, kedy ESĽP judikuje neoprávnený zásah do práva na pokojné užívanie majetku či už samostatne, alebo na základe zhodnotenia ďalších dvoch kritérií. Obmedzenie vlastníckych práv a vyvlastnenie je viazané na splnenie uvádzaných podmienok, ktoré musia byť následne konkretizované aj v národných úpravách. Existencia verejného záujmu a splnenie vnútroštátnych zásad ako aj pravidiel medzinárodného práva sú v tomto prípade posudzované veľmi prísne a striktne. Rovnako takto zásadne pristúpil ESĽP aj k výkladu primeranosti protihodnoty v prípadoch vyvlastnenia.

[8] Rozhodnutie vo veci Erkner and Hofauer vs. Austria, 23 apríl 1987, Series A č. 117

3. SLOVENSKÁ ÚPRAVA A JUDIKATÚRA V OTÁZKACH VLASTNÍCKYCH PRÁV

Vlastnícke právo je v našich podmienkach jedným z kľúčových inštitútov súkromného práva. Vzhľadom na svoju povahu je nevyhnutné na zabezpečenie funkčnosti ekonomického a trhového mechanizmu u nás. Od prijatia Deklarácie práv človeka a Dohovoru o ochrane ľudských práv a slobôd predstavuje neodmysliteľnú a neoddeliteľnú súčasť ústavnoprávnej ochrany v demokratických štátoch a spoločnostiach.[9]

Všetky formy vlastníctva boli v našich podmienkach zrovnoprávnené a tiež je im poskytovaná aj rovnaká formy ochrany.[10] Ústavnoprávny základ je obsiahnutý v čl. 20 Ústavy Slovenskej republiky (zákon č. 460/1992 Zb. v znení neskorších právnych predpisov, ďalej len „Ústava SR"). Pojem aj obsah vlastníckych práv jednak vyplývajú priamo z tohto ustanovenia, no niekoľkokrát tiež boli predmetom rozhodovacej činnosti Ústavného súdu SR. Z jednotlivých judikátov možno konštatovať, že sa zhodujú alebo viac menej približujú trendu, ktorý v otázkach ochrany vlastníckych práv nastúpil ESĽP.

Predmetom vlastníckych práv tak, ako sú garantované v čl. 20 Ústavy SR sú nie len hnuteľné a nehnuteľné veci, no pod tento pojem je možné zaradiť aj iné práva majetkového charakteru. Sám Ústavný súd SR konštatoval, že nejde len o veci, ale môže ísť aj o práva a iné majetkové hodnoty.[11] V tomto rozhodnutí je jednoznačne viditeľný príklon k veľmi širokému výkladu pojmu majetok tak, ako ho vykladá aj ESĽP.

Vo vzťahu k predmetom vlastníckeho práva je dôležitá aj konkretizácia vlastníckych práv jednotlivcov. Každý má predovšetkým právo na ovládanie predmetov vlastníckeho práva a tiež mu patria všetky čiastkové oprávnenia vychádzajúce z rímsko-právnej teórie vlastníckych práv (právo vec držať, nakladať s ňou podľa svojho uváženia, právo vec užívať, požívať z nej plody a úžitky).[12] Každému vo vzťahu k svojmu majetku patrí právo na nezávislé a samostatné ovládanie predmetov vlastníckych práv.

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[9] Svák, J., Cibuľka, L.: Ústavné právo SR. Prvé vydanie. Žilina: Poradca Podnikateľa, BVŠP, 2006, s.87 a nasl.

[10] Zrovnoprávnenie všetkých foriem vlastníctva priniesol ústavný zákon č. 100/1990 Zb.

[11] Rozhodnutie Ústavného súdu SR č. II. ÚS 19/97

[12] Rozhodnutie Ústavného súdu SR č. II. ÚS 8/97

Ochrana vlastníckych práv, ktorá je vyjadrená v čl. 20 Ústavy SR sa zakladá na troch kľúčových princípoch. Ide o ústavný princíp:[13]

rovnosti vlastníckych práv,

nedotknuteľnosti vlastníckeho práva a

záväznosti vlastníctva.

Rovnosť vlastníckych práv zahŕňa jednak právo každého na získanie majetku a tiež skutočnosť, že všetky vlastnícke práva majú rovnaký obsah. Skutočnosť, že každý má právo získať majetok však nemožno interpretovať tak, že štát by mal povinnosť vytvárať možnosti získania majetku voči jednotlivcom. Úlohou štátu je vytvoriť voľný priestor na to, aby jednotlivci mohli majetok nadobudnúť. Pre minulé režimy bolo typické, že dedenie sa považovalo za amorálny spôsob získavania majetku bez vlastného pričinenia a práce. Dôsledkom takéhoto a samozrejme nesprávneho vnímania vlastníckych práv je fakt, že možnosť získavania majetku formou dedenia je ústavne zakotvená a garantovaná. Je však potrebné uviesť, že všetky formy zákonného získania majetku požívajú ústavnoprávnu ochranu. Porušením pravidla prístupu k získaniu majetku nie je ani skutočnosť, že určité predmety môžu byť výhradne vo vlastníctve štátu (prírodné zdroje, liečivé prírodné vody, nerastné bohatstvo, vodné toky) alebo určitých právnických osôb, ktoré sídlia v Slovenskej republike. S cieľom ochrany tých najdôležitejších hodnôt je toto pravidlo zakotvené priamo ústavnoprávne. Obsah vlastníckych práv tvorí súbor práv a povinností vo vzťahu k nim. V prípade, že určité veci môžu byť rovnako vo vlastníctve rôznych subjektov (napr. fyzických osôb, právnických osôb či štátu), všetky tieto subjekty majú vo vzťahu k svojim veciam rovnaký rozsah práv a povinností a to bez ohľadu na povahu a charakter vlastníka.[14]

Nedotknuteľnosť vlastníctva je základným princípom, v súlade s ktorým sú vlastnícke práva užívané. Jeho obsahom je že nikoho nemožno proti jeho vôli pozbaviť majetku. Vo svojej podstate ide o obdobu druhého princípu zakotveného v čl. 1 Protokolu k Dohovoru. Aj v tomto prípade je možný zásah do vlastníckych práv výhradne po splnení určitých podmienok. Vlastnenie ako zásadný zásah do vlastníckeho práva je možné iba v určitom rozsahu. Týmto rozsahom je rozsah nevyhnutný na dosiahnutie účelu vyvlastnenia. Samotné vyvlastnenie musí byť zdôvodnené verejným záujmom. Tieto by sa mali priamo nachádzať v zákonných dôvodoch, ktoré umožňujú vyvlastnenie. Nemusia byť vyjadrené priamo, no v tom prípade je potrebné, aby vyplývali z povahy, zmyslu a podstaty

[13] Svák, J., Cibuľka, L.: Ústavné právo SR. Prvé vydanie. Žilina: Poradca Podnikateľa, BVŠP, 2006, s.88 a nasl

[14] Rozhodnutie Ústavného súdu SR č. PL ÚS 38/95

daného zákona.[15] Vyvlastnenie pritom nemôže byť realizované zákonom priamo, ale iba na základe zákona a postupom, ktorý upravuje. Vyvlastnenie je možné v každom prípade iba za primeranú náhradu. Táto by mala zohľadniť aj mieru zásahu do vlastníckych práv, ktorú je ešte možné od vlastníka spravodlivo žiadať. Vychádzať by mala z trhovej hodnoty a mala by zohľadniť pohyb cien, aby protihodnotu bolo možné v danom čase a na danom mieste považovať za spravodlivú.[16] Takto je vidieť jednak skutočnosť, že vyvlastnenie podlieha zákonným podmienkam, no orientuje sa aj na dôsledné naplnenie zásad, ktorými je naše právo ovládané.

Záväznosť vlastníckeho práva je typická predovšetkým tým, že vlastníctvo nie je len právom, ale zároveň sa s ním spájajú aj určité povinnosti. Popri oprávneniach, ktoré v sebe zahŕňa tiež predstavuje pre vlastníka povinnosť nezneužívať vlastníctvo na ujmu práv iných. Vlastnícke právo zaväzuje hlavne nepoškodzovať zdravie iných, prírodu, kultúrne pamiatky a ani životné prostredie nad mieru, ktorá je stanovená v právnych predpisoch.

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[15] Rozhodnutie Ústavného súdu SR č. PL ÚS 26/00

[16] Rozhodnutie Ústavného súdu SR č. PL ÚS 37/95

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APLIKACE ENVIRONMENTÁLNÍHO PRÁVA EU ČESKÝMI SOUDY

VOJTĚCH VOMÁČKA

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Abstract in original language

Příspěvek zkoumá, v jakém rozsahu české soudy, zvláště Nejvyšší správní soud, aplikují unijní legislativu v oblasti práva životního prostředí, a to se zaměřením na rozličné principy vycházející z judikatury Soudního dvora EU. Oblastí zájmu je tak doktrína přímého účinku a souladné interpretace, rovněž jsou zmíněny další podstatné aspekty aplikace unijního environmentálního práva – odpovědnost státu, vliv souběžného řízení před Komisí a praxe národních soudů v předkládání předběžných otázek Soudnímu dvoru.

Key words in original language

aplikace environmentálního práva EU, přímý účinek, souladný výklad, řízení pro porušení povinnosti

Abstract

The main focus of the article is to explore the extent to which in the field of EU environmental law Czech national courts, particularly The Supreme Administrative Court, apply in practice the various principles developed by the Court of Justice of the European Union designed to improve the implementation of EU law. The cases where the direct effect doctrine or the doctrine of consistent interpretation of EU environmental law have been raised in relation to EU environmental legislation are analyzed. Several other aspects such as state liability, impact of parallel infringement proceeding by the European Commission or the practice of national courts concerning submissions of questions to the ECJ are discussed as well.

Key words

application of EU environmental law, direct effect, consistent interpretation, consistent interpretation

1. ÚVOD

In Rozbor základních principů vnitrostátního působení unijního práva a obecnější příklady z české soudní a správní praxe poskytuje letošní společná publikace Bobka, Břízy a Komárka[1]. Tento příspěvek pouze podává stručný přehled případů, ve kterých bylo českými soudy[2]

[1] Bobek, M., Bříza, P., Komárek, J. Vnitrostátní aplikace práva Evropské unie. Vydání 1. Praha : C. H. Beck, 2011, 633 s.

[2] Zejména Nejvyšším správním soudem.

aplikováno environmentální právo EU (dále rovněž "PŽP EU"[3]), tedy zejména posouzen soulad vnitrostátní a unijní právní úpravy, přímo aplikováno unijní právo či argumentačně využity judikatorní závěry Soudního dvora Evropské unie.

2. APLIKACE ENVIRONMENTÁLNÍHO PRÁVA EU

Prvně je třeba nastínit a pro další přehlednost blíže vymezit, v jakých zásadních oblastech může aplikace unijního environmentálního práva probíhat. Zde se projevují specifika PŽP, jeho tvorby a implementace. Smolek[4] trefně rozlišuje mezi dvěma základními prvky implementační fáze procesu realizace nadnárodní environmentální normy, legislativní implementací a praktickou aplikací. Dodává, že *„(v) této souvislosti se někdy také výstižně, i když poněkud nepřesně, hovoří o dvou rovinách implementace nadnárodních norem, a sice o rovině legislativní a administrativní.“* Za prosazování práva v užším smyslu lze chápat administrativní rovinu implementace práva, tedy praktickou aplikaci unijních právních norem členským státem, na prosazování práva v širším pojetí, jehož nástroje jsou předmětem této práce, je však obtížné nahlížet podobně zjednodušujícím prismatem, případně jej vymezit jako určitou část jiného procesu. Proto také Smolek po odlišení definice Kružíkové[5] od implementace definuje pojem prosazování jako *„systém opatření, nástrojů a metod, zaměřených na dosažení zamýšleného účinku právních norem, zahrnující kontrolu naplňování požadavků v nich obsažených a mechanismy reakce na případná zjištění jejich nesplnění či porušení“*[6]. Implementaci a prosazování chápe jako subprocesy realizace právních norem, které probíhají paralelně. Jeho univerzálně platnou definici, která počítá s proměnlivostí a rozmanitým prostředím mezinárodních norem v oblasti práva životního prostředí i mechanismů jejich prosazování, lze modifikovat pro oblast unijního práva tak, že prosazování PŽP EU představuje souhrn nástrojů k zajištění realizace právních norem

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[3] Třebaže unijní environmentální normy netvoří systematické práva životního prostředí, ale jedná se spíše o množinu norem v oblasti ochrany životního prostředí, zkratka "EP EU" nebo jí podobné by mohly být pro čtenáře matoucí.

[4] Smolek, M. *Implementace a prosazování norem mezinárodního práva a práva Evropských společenství v oblasti ochrany životního prostředí.* Doktorská disertační práce. Univerzita Karlova v Praze, Právnická fakulta, Katedra práva životního prostředí. 2004. str. 19.

[5] Kružíková definuje prosazování jako *„systém opatření, nástrojů a metod, zaměřených na dosažení zamýšleného účinku právních norem“* in Kružíková, E. *Ekologická politika a právo životního prostředí v Evropské unii.* Praha. 1997. str. 94.

[6] Smolek, M. *Implementace a prosazování norem mezinárodního práva a práva Evropských společenství v oblasti ochrany životního prostředí.* Doktorská disertační práce. Univerzita Karlova v Praze, Právnická fakulta, Katedra práva životního prostředí. 2004. str. 22.

probíhajících po vstupu právních předpisů PŽP EU v platnost – a to ve vzájemné interakci s jejich implementací, nezávisle na ní, případně zcela samostatně tam, kde není implementace třeba. Zároveň platí, že právní normy obsažené v těchto předpisech musí být nejprve obecně závazné, aby mohly být prosazovány, na druhou stranu lze prosazování chápat i v tom smyslu, že prosazováno je i to právo, které dosud nenabylo účinnosti – a jde tedy o postup vedoucí k řádné implementaci unijního práva, a to ve smyslu, který užívá Blombergová[7], tedy jako cesty k zajištění *plné* implementace unijního práva[8]. Podobně jako lze vnímat institut implementační pomoci, je možné vidět prosazování práva v kontextu s přípravou a pomocí prosazování, tedy alternativními nástroji, které se uplatní i v situaci, kdy je teprve v budoucnu prosazované právo připravováno a vytvářeno, a tedy fakticky není co prosazovat.

Soudní dvůr ve svých rozhodnutích uplatňuje několik implementačních, resp. aplikačních doktrín, z nichž některé jsou obecné a další specifické ve vztahu k PŽP EU. Aplikaci PŽP EU vnitrostátními soudy je tak možno zkoumat zejména ve vztahu k následujícím oblastem:

1) Doktrína přímého účinku

Zde půjde o případy, kdy vnitrostátní soud konstatoval, že jsou či nejsou splněny podmínky přímé aplikovatelnosti normy PŽP EU, případně kdy posoudil jako přímo aplikovatelná ustanovení mezinárodních environmentálních smluv uzavřených Unií (viz například případ *Pêcheurs de l'Étang de Berre*). Důležité jsou případy, v nichž se uplatní přímý účinek principů ochrany životního prostředí upravených SFEU. V případu *Fratelli Costanzo* Soudní dvůr dospěl k plošnému uplatnění přímého účinku, tedy že všechny vnitrostátní správní orgány, včetně místních a regionálních orgánů, jsou povinny platit přímo účinná ustanovení unijního práva. Do této oblasti spadá také užití tzv. *Waddenzee / Kraaijveld* doktríny, podle níž je národní soud povinen zkoumat, zda vnitrostátní správní či legislativní orgán nepřekročil meze volného uvážení stanovené směrnicí. Dále do této oblasti můžeme zařadit aplikaci tzv. interenvironmentální doktríny, kdy se podle Soudního dvora musí členské státy během lhůty pro provedení směrnice zdržet přijímání takových opatření, které by mohly vážně ohrozit cíl směrnice. Doktrína přímého účinku se může projevit i v negativním směru, pokud národní soud konstatuje nemožnost horizontálního přímého účinku, případně přímého účinku vůči třetím osobám (což může mít výrazný dopad v oblasti

[7] Blomberg, A. *European Influence on National Environmental Law Enforcement: Towards an Integrated Approach*. Review of European Administrative Law. vol. 1, nr. 2, Europa Law Publishing. 2008. str. 39

[8] Kromě toho je podle Blombergové zajištění efektivního a účinného prosazování práva životního prostředí v členských státech zásadní pro zajištění rovných podmínek v rámci Unie. Tamtéž, str. 40

odpovědnosti za škodu na životním prostředí) nebo obráceného přímého účinku. Nelze opomenout ani možnost nepřímého horizontálního přímého účinku směrnice a potenciální dopad na třetí osoby, kupříkladu držitele různých povolení či licencí (viz rozsudek ve věci 201/02 *Wells* [2004], s. I- 723)

2) Souladná interpretace PŽP EU

Zde je možné zkoumat, zda existují případy, kdy vnitrostátní soudy používají doktrínu souladného výkladu PŽP EU (viz *Marleasing* [1990], s. I-4135 a *Pfeiffer* [2004], s. I-8835. Ta je však do jisté míry omezena a uplatní *jak je to jen možné*, tedy nikoliv *contra legem* a s ohledem na princip právní jistoty viz (*Arcaro* [1996], s. I-4705) zejména v oblasti trestního práva.

3) Nadřazenost práva EU

Sem spadají případy, kdy vnitrostátní soud dospěl k závěru, že se místo ustanovení vnitrostátních právních předpisů užije nadřazených ustanovení PŽP EU

4) Odpovědnosti státu

Sem spadají zejména případy odpovědnosti státu z důvodu neprovedení směrnice PŽP EU (*Francovich* [1991], s. I-5357 *Brasserie du Pecheur* [1996], s. I-1029)

5) Aplikace PŽP EU z vlastního podnětu

Případy, kdy národní soud zkoumá soulad vnitrostátní právní úpravy s úpravou unijní, případně aplikuje PŽP, aniž by tento požadavek byl vznesen stranami sporu (viz *Kraaijeveld* [1996], s. I-5403)

6) Vliv řízení před Komisí

Sem je možno zařadit případy, kdy existence současně vedeného řízení před Komisí významný dopad na paralelně vedené řízení před vnitrostátním soudem (zejména v procesní rovině, v podobě zastavení řízení nebo přiznání odkladného účinku).

7) Vnitrostátní procesní pravidla

Co se procesního zajištění PŽP, je tradičně členským státům ponechávána značná míra autonomie, nicméně tomu tak není vždy. Unijní právo ve vztahu k právním řádům členských států zhusta neobsahuje komplexní úpravu, stanoví především hmotněprávní základy, a jejich institucionální a procesní realizaci ponechává na právních řádech členských států. Výchozím principem v těchto oblastech je pak procesní autonomie členských států při realizaci unijního práva na vnitrostátní úrovni (srov. např. rozsudek Soudního dvora ze dne 16. 12. 1976, Rewe-Zentralfinanz eG et Rewe-Zentral AG proti Landwirtschaftskammer für das Saarland, 33/76, Recueil, s. 1989, bod 6, rozsudek ze dne 12. 2. 2008, Willy Kempter KG proti

Hauptzollamt Hamburg-Jonas, C-2/06, zatím nepublikováno, zejm. body 45 a 57 či rozsudek ze dne 13. 3. 2007, Unibet (London) Ltd a Unibet (International) Ltd proti Justitiekanslern, C-432/05, Sb. rozh., s. I-2271, zejm. body 39 - 44; viz též rozsudek NSS ze dne 19. 7. 2006, čj. 3 Azs 259/2005 - 42, č. 977/2006 Sb. NSS, nebo rozsudek NSS ze dne 30. 7. 2009, č. j. 7 As 7/2009 - 88). Z principu procesní autonomie obecně vyplývá, že není-li určitá procesní otázka výslovně upravena právem Společenství, zůstává její řešení v pravomoci členských států, resp. Jejich právních řádů. Může dojít k situaci, kdy národní soud shledá vnitrostátní procesní úpravu rozpornou s požadavky a principy PŽP EU.

8) Národní zásady ochrany životního prostředí

Zásadní principy PŽP EU vycházejí z národních principů ochrany životního prostředí, podobně jako nástroje prosazovaní PŽP EU v některých směrech staví na nástrojích národních. Vzhledem k nutnému výběru modelového nebo kompromisního systému může docházet ke střetům s odlišnými národními principy ochrany životního prostředí a rovněž tak zásadami mimo environmentální oblast (ochrana vlastnictví, svobodné podnikání, prevence, proporcionalita apod.).

9) Kontrola "ústavnosti" PŽP EU

Sem je možno zařadit mimořádné případy, kdy národní soud posoudí ustanovení PŽP jako rozporné s primárním unijním právem, případně s vnitrostátním ústavním právem.

10) Položení předběžné otázky

Národní soudy se musí zabývat tím, zda předložit předběžnou otázku Soudnímu dvoru, často se dokonce jedná o požadavek jedné ze stran. Argumentace soudu je podstatná, ať už předběžná otázka položena je či nikoliv. Zajímavé z pohledu aplikace PŽP je rovněž postup po vydání rozhodnutí Soudního dvora.

3. JUDIKATURA NEJVYŠŠÍHO SPRÁVNÍHO SOUDU

S ohledem na výše uvedené třeba uvést, že judikatura NSS ve vztahu k PŽP EU zdaleka nezasahuje do všech vymezených oblastí. Nicméně aplikace PŽP v případech před NSS není ani žádným výjimečným úkazem. Protože je relevantní judikatura NSS výrazně ovlivněna typologií projednávaných kasačních stížností a návrhů na rušení opatření obecné povahy, nečlenil jsem dále rozebíraná rozhodnutí podle výše vymezených kategorií, ale s ohledem na povahu řešených případů.

4. AARHUSKÁ ÚMLUVA A SMĚRNICE EIA

Již v roce 2006 (rozsudek ze dne 18. 7. 2006, č. j. 1 Ao 1/2006 – 74) ve věci návrhu na zrušení opatření obecné povahy (změny Územního plánu sídelního útvaru hl. m. Prahy) se NSS vyjádřil k pozici

Aarhuské úmluvy v kontextu unijního (komunitárního) práva. Vyšel z imperativu souladného výkladu vnitrostátního práva s mezinárodně právními závazky (čl. 1 odst. 2 a čl. 10 Ústavy) s tím, že je-li pořizování nebo změnu územně plánovací dokumentace možné podle vnitrostátního práva vnímat vícero způsoby, pak přednost má dostat ten výklad, který naplňuje požadavky Aarhuské úmluvy. Dospěl k závěru, že *"(k)e stejného výsledku lze dojít na půdorysu práva Evropských společenství (práva komunitárního): rozhodnutím Rady č. 2005/370/ES ze dne 17. února 2005 přistoupilo také Evropské společenství k Úmluvě o přístupu k informacím, účasti veřejnosti na rozhodování a přístupu k právní ochraně v záležitostech životního prostředí (Úřední věstník Evropské unie ze dne 17. 5. 2005, L 124/1). Úmluva se tak stala součástí práva komunitárního, a to v režimu tzv. smíšených smluv. Jedná se o smlouvy, kde existuje dělená pravomoc mezi Evropská společenství a členské státy a kde se signatáři příslušné mezinárodní úmluvy stávají jak Společenství, tak členské státy. Problematika informace a spoluúčasti veřejnosti na rozhodování ve věcech ochrany životního prostředí v kontextu územního plánování spadá do pravomoci Společenství (srov. článek 174 a článek 175 odst. 2 písm. a) Smlouvy o založení Evropského společenství a četnou legislativu v této oblasti, mimo jiné též Směrnici Evropského parlamentu a Rady 2003/4/ES ze dne 28. ledna 2003 o přístupu veřejnosti k informacím o životním prostředí, Zvláštní vydání Úředního věstníku EU, kap. 15, sv. 07, str. 375). Skutečnost, že se Úmluva stala součástí práva komunitárního jí propůjčuje systémové vlastnosti práva komunitárního, tedy především, za splnění příslušných podmínek předepsaných komunitárním právem, přednost a přímý účinek (srov. z boha té judikatury Soudního dvora Evropských společenství k této otázce např. spojené věci 21 až 24/72, International Fruit Company NV and others v Produktschap voor Groenten en Fruit [1972] ECR 1219; věc C-149/96, Portugalsko v. Rada [1999] ECR I-8395 či věc C-93/02 P, Biret International SA v Rada [2003] ECR I-10497). Nicméně i kdyby ustanovení Úmluvy přímého účinku v právních řádech členských států schopná nebyla, orgány členských států mají stále povinnost souladného výkladu, tj. povinnost vykládat vlastní právní úpravu v souladu s mezinárodně právním závazkem Evropského společenství (viz např. věc C-53/96, Hermès [1998] ECR I-3603, bod 35 a té ž spojené věci C-300/98 a C-392/98, Parfums Christian Dior SA [2000] ECR I-11307, body 47 - 48). Lze tedy uzavřít, že meritorně stejné řešení, tedy povinnost vyložit vnitrostátní právní úpravu tak, aby byl umožněn soudní přezkum územního plánu či jeho změny, vyžaduje též komunitární právo a členství České republiky v Evropské unii."* Tento závěr NSS následně ve své rozhodovací činnosti několikrát potvrdil, např. v

V rozsudku ze dne 14. 6. 2007, č. j. 1 As 39/2006 – 55, dospěl NSS k závěru, že ustanovení směrnice EIA týkající se práva na soudní ochranu nesplňují požadavky na přímou aplikovatelnost, když se v souladu s judikaturou Soudního dvora[9] jedná o otázku tzv. acte clair

[9] S výslovným odkazem na rozsudek ze dne 6. 10. 1982 ve věci 238/81 Srl CILFIT a Lanificio di Tabardo SpA proti Ministerstvu

(naprosto zjevný a jasný výklad unijního práva bez dalšího), a to právě s ohledem na znění Aarhuské úmluvy. [10] Podání předběžné otázky tak není na místě. Podle NSS *"k provedení této směrnice je třeba přijetí dalšího právního předpisu členskými státy Evropských společenství, který určí příslušnou fázi přezkumu."* Úvahy o široké možnosti uvážení členských států ve výběru fáze přezkumu podpořil NSS anglickým, německým, francouzským, slovenským a polským zněním směrnice se závěrem, že *"předpisy práva Společenství nevyžadují samostatný soudní přezkum rozhodnutí, aktů a nečinností (např. i předmětného stanoviska žalovaného), ale postačuje jejich přezkoumání v pozdější fá zi (tj. v rámci přezkumu konečného rozhodnutí), pokud jsou zároveň splněny podmínky spravedlnosti, nestrannosti, včasnosti a finanční dostupnosti takového přezkumu. K tomu soud dodává, že právě na základě uvedených ustanovení práva Společenství musí být žalobcům z řad dotčené veřejnosti vyhovováno k jejich návrhům na přiznání odkladného účinku správní žaloby tak, aby nemohlo docházet k situacím, kdy v době rozhodování o správní žalobě již byl povolený záměr nevratně realizován (typicky provedení stavby). Pokud by návrhu na přiznání odkladného účinku vyhovováno nebylo, došlo by k porušení čl. 9 odst. 4 Aarhuské úmluvy a čl. 10a směrnice 85/337/EHS, neboť poskytovaná soudní ochrana by nebyla včasná a spravedlivá."* Totožnou argumentaci NSS zvolil o pár dní později, v rozsudku ze dne 26. 6. 2007, č. j. 4 As 70/2006 – 72. Navíc konstatoval, že ve věci A. Verholen a další v. Sociale Verzekeringsbank Amsterdam, Recue il s. I-3757, z něhož stěžovatelka dovozovala právo na přezkoumání stanoviska k posouzení vlivů na životní prostředí, rozhodoval Soudní dvůr o zcela jiných otázkách. NSS tak ohledně přezkumu stanoviska EIA uzavřel, že *"(z)ávěr soudu je zcela v souladu s právem Společenství a mezinárodními závazky ČR, což ostatně potvrzuje i obdobná právní úprava soudního přezkumu procedury EI A v jiných členských státech EU, které mají shodné závazky jako Česká republika."* Závěry NSS podpořil i Ústavní soud, když odmítl navazující ústavní stížnost spojenou s návrhem na předložení věci Soudnímu dvoru (usnesení ze dne 24. 7. 2008, sp. zn. III. ÚS 2738/07). Odkázal mimo jiné na svůj nález ze dne 12. 10. 2001, sp. zn. Pl. ÚS 24/2000, ohledně výkladu směrnice EIA perspektivou Aarhuské úmluvy pak na rozsudek NSS ze dne 29. 8. 2007, č. j. 1 As 13/2007 - 63, publ. pod č. 1461/2008 Sb. NSS, který opakuje závěry zmíněné výše s odkazem na již zmíněná

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zdravotnictví, Recueil s. 3415 a ohledně přímého účinku na rozsudek ze dne 4. 12. 1974 ve věci 41/74, Yvonne Van Duyn proti Ministerstvu vnitra, Recueil s. 1337.

[10] Shodou okolností v rozsudku v rozsudku ze stejného dne, č. j. 2 As 59/2005 - 134, se NSS zabýval otázkou samostatné přezkoumatelnosti stanoviska vydaného podle § 10 zákona EIA a konstatoval, že toto stanovisko představuje pouze odborný podklad pro vydání následných rozhodnutí, která přezkoumatelná v rámci správního soudnictví jsou.

rozhodnutí.[11] K povaze Aarhuské úmluvy jako součásti unijního práva dodává: *"Na závěru o souladu vnitrostátní právní úpravy s Úmluvo u v řešeném případě nic nemění ani povaha Aarhuské úmluvy, která je rovněž s míše no u smlouvou ve smyslu čl. 300 Smlouvy ES, která byla Společenstvím ratifikována rozhodnutím Rady ze dne 17. února 2005 č. 2005/370/ES (Úř. věst. L 124/1 ze d ne 17. 5. 2005) a která podle čl. 300 odst. 7 Smlouvy ES je závazná jakožto pramen práva ES i pro členské státy. Jestliže je, jak Nejvyšší správní soud výše dovodil, česká úprava v souladu s Aarhuskou úmluvo u jako u takovou, pak není patrné, v čem by se měl tento závěr lišit s ohledem na skutečnost, o jaký typ smlouvy (výlučný, smíšený či jiný) se jedná."* NSS neopomenul zmínit ani odůvodněné stanovisko Komise vydané (tehdy) dle čl. 226 SES ze dne 27. 6. 2007, č. j. 2006/2271, (2007)2927, jehož obsahem je sdělení České republice, že porušila své závazky vyplývající z členství v ES tím, že nedostatečně implementovala čl. 10a směrnice EIA.[12] Podle NSS k problematické situaci, kterou vymezila Komise ve svém stanovisku v řešeném případě nedošlo, neboť stěžovatel měl zajištěno právo účastnit se

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[11] Obdobně rozsudek NSS ze dne 28. 6. 2007, č. j. 5 As 53/2006 – 46, (a to včetně vývoje před Ústavním soudem), kde NSS citoval z již uvedeného rozsudku ze dne 14. 6. 2006, č. j. 2 As 59/2005 - 136. Obdobně dále i rozsudek ze dne 22. 2. 2008, č. j. 6 As 52/2006 – 155 (rovněž neúspěšně u Ústavního soudu) a rozsudek ze dne 9. 1. 2008, č. j. 3 As 48 2006 – 52. Podobně pak rozsudek ze dne 23. 10. 2008, č. j. 3 As 36/2008 – 57 ve věci, v níž se stěžovatel domáhal přezkumu závěru zjišťovacího řízení, v němž správní orgán konstatoval, že záměr podléhá posouzení podle zákona EIA a uložil stěžovateli doplnění dokumentace.

[12] Ve stanovisku Komise uvádí, že vnitrostátní právní úprava v České republice obsahuje několik prvků, které sice samy o sobě nejsou v rozporu s požadavky směrnice, jejich vzájemnou kombinací však dochází k situacím, které v rozporu s požadavky směrnice jsou. Těmito prvky jsou: (i) oddělení procedury posuzování vlivů na životní prostředí a správního řízení o povolení záměru, (ii) stanovisko k posouzení vlivu na životní prostředí podle § 10 zákona EIA není soudně přezkoumatelné samostatně, nýbrž až v rámci soudního přezkumu správního rozhodnutí o žádosti o povolení záměru a (iii) ne všechny osob y z řad dotčené veřejnosti mají právo účastnit se správního řízení o žádosti o povolení záměru. V důsledku podle Komise většina dotčené veřejnosti, která má možnost vyjádřit své připomínky a stanoviska v řízení o posuzování vlivů, a to v některých případech včetně nevládních organizací, které splňují požadavky uvedené v čl. 1 odst. 2 směrnice EIA, nebude mít možnost dosáhnout soudního přezkumu zákonnosti jakýchkoli rozhodnutí, aktů nebo nečinnosti učiněných během řízení o posuzování vlivů. Takováto legislativní konstrukce tedy není v souladu s ustanovením čl. 10a odst. 1, 2 a 3 směrnice EIA.“

správního řízení a následně i právo podat správní žalobu proti správnímu rozhodnutí, a dosáhnout tak přezkoumání napadeného stanoviska žalovaného k posouzení vlivu na životní prostředí.

Rozsudkem ze dne 30. 7. 2009, č. j. 7 As 7/2009 - 88, zrušil NSS rozsudek krajského soudu z důvodu nepřezkoumatelnosti pro nedostatek důvodů (krajský soud se nezabýval námitkou ohledně uplatnění Aarhuské úmluvy). NSS upozornil na skutečnost, že Nejvyšší soud Slovenské republiky se zabýval otázkou výkladu čl. 9 odst. 3 Aarhuské úmluvy[13] položil Soudnímu dvoru předběžné otázky ohledně přímého účinku čl. 9 Aarhuské úmluvy, zvláště jeho odstavci 3.[14]

V rozsudku ze dne 19. 1. 2010, č. j. 1 As 91/2009 – 83, k námitce stěžovatelů, že do rozhodnutí orgánu ochrany přírody ze dne 25. 9. 2006 měly být převzaty podmínky stanoviska EIA ze dne 15. 11. 1996 s odvoláním na ustanovení § 10 zákona EIA, NSS vyšel z premisy, že

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[13] Ve věci sp. zn. 5 Sžp 41/2009, předběžné otázky předloženy usnesením ze dne 22. 6. 2009.

[14] Soudní dvůr v rozsudku ve věci *Lesoochranárske zoskupenie VLK* (C-240/09), dospěl k závěru ustanovení čl. 9 odst. 3 Aarhuské úmluvy neobsahuje žádnou jasnou a přesnou povinnost, která by mohla přímo upravovat právní situaci jednotlivců. Vzhledem k tomu, že pouze osoby z řad veřejnosti splňující kritéria, pokud jsou nějaká stanovena ve vnitrostátním právu, mají práva stanovená v uvedeném čl. 9 odst. 3, závisí provedení a účinky tohoto ustanovení na vydání pozdějšího aktu: *„Je tedy na předkládajícím soudu, aby vyložil procesní právo upravující podmínky, které je nutno splnit pro účely podání správního opravného prostředku nebo žaloby, způsobem, který v co největším možném rozsahu zohlední cíle čl. 9 odst. 3 Aarhuské úmluvy, jakož i cíl účinné soudní ochrany práv poskytnutých právem Unie, aby taková organizace na ochranu životního prostředí, jako je zoskupenie VLK, mohla soudně napadnout rozhodnutí vydané v rámci správního řízení, které by mohlo být v rozporu s právem Unie v oblasti životního prostředí.“* Rozhodnutí v této věci se stalo součástí argumentačního rejstříku NSS - když rozsudkem ze dne 25. 5. 2011, 3 Ao 3/2011 – 41, NSS odmítl návrh na zrušení opatření obecné povahy – změny č. 4 územního plánu sídelního útvaru Libkova Voda jako podaný osobou zjevně k tomu neoprávněnou, odkazoval i na toto rozhodnutí Soudního dvora. Navrhovatel byl občanským sdružením založeným dle zákona č. 83/1990 Sb. s celostátní působností a jako takový podle NSS neměl oprávnění podat návrh na zrušení opatření obecné povahy – územního plánu obce či jeho změny. NSS dodal, že takové právo nelze dovodit ani z komunitárních předpisů či z Aarhuské úmluvy, podle níž je napadený územní plán koncepcí ve smyslu čl. 7. Právo na přístup k soudu, dle čl. 9 odst. 3 Úmluvy však nemá přímý účinek (odkaz na rozsudek ve věci *Lesoochranárske zoskupenie)*

zákon EIA by měl být od 1. 5. 2004 vykládán v souladu s právem Evropské unie. Stanovisko EIA, i když bylo vydáno podle zákona č. 244/1992 Sb., by proto mělo být závazným podkladem (podle § 10 zákona č. 100/2001 Sb.) pro rozhodnutí správního orgánu. NSS přitom vyšel z výkladu článku 8 směrnice EIA, podle něhož výsledky jednání a informace shromážděné podle článků 5, 6 a 7 (kam spadají rovněž stanoviska dotčených orgánů k posouzení vlivů) musí být brány v úvahu v povolovacím řízení. Po vstupu do Evropské unie dne 1. 5. 2004 nelze podle NSS připustit, aby *"přechodná ustanovení národního zákona (§ 24 zákona č. 100/2001 Sb.) zbavovala členský stát závazků vyplývajících z citované směrnice, tj. i z povinnosti zohlednit stanovisko EIA ve všech následných správních řízeních."*[15]

V rozsudku ze dne 20. 5. 2010, č. j. 8 Ao 2/2010 – 644, publ. pod č. 4/2010 Sb. NSS, se NSS vypořádal v řízení o návrhu na zrušení opatření obecné povahy č. 8/2009 - Zásady územního rozvoje Hlavního města Prahy, schváleného usnesením zastupitelstva Hlavního města Prahy ze dne 17. 12. 2008, č. 32/59, s námitkami stěžovatelů, podle kterých vyhodnocení vlivů ZÚR na životní prostředí bylo provedeno v rozporu s právními předpisy (mimo jiné i směrnice SEA ohledně povinnosti posoudit kumulativní a synergické vlivy s ohledem na jednotlivé složky životního prostředí, zde kumulativní a synergické vlivy SOKP a letiště Praha – Ruzyně[16]). Za tím účelem NSS rozsáhle odkazoval na judikaturu Soudního dvora a citoval z ní ohledně výkladu čl. 4 a 6 směrnice o stanovištích (rozsudek ze dne 13. 1. 2005, Società Italiana Dragaggi SpA a další proti Ministero delle Infrastrutture e dei Trasporti a Regione Autonoma Friuli Venezia Giulia, C-117/03, Sbírka rozhodnutí 2005, S. I-00167. *"Jeví se tedy, že pokud se jedná o lokality vhodné jako lokality významné pro Společenství uvedené na státních seznamech předaných Komisi, mezi kterými mohou být uvedeny zejména lokality, které jsou místem výskytu prioritních přírodních stanovišť nebo prioritních druhů, členské státy jsou podle směrnice povinny přijmout vhodná ochranná opatření k ochraně uvedeného ekologického zájmu"*). NSS citoval i závěry rozsudku ze dne 14. 9. 2006, Bund Naturschutz in Bayern eV a další proti Freistaat Bayern, C-244/05, Sbírka rozhodnutí 2006, S. I-08445 (dále jen „Bund Naturschutz"), v němž Soudní dvůr uzavřel, že *„členské státy musí přijmout v souladu s ustanoveními vnitrostátního práva veškerá opatření, která jsou nezbytná pro zamezení zásahů, které mohou vážně ohrozit ekologické charakteristiky lokalit, které jsou uvedeny na státním seznamu předloženém Komisi"*.[17] Podle NSS je tak v souladu se závěry

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[15] Ministerstvo životního prostředí argumentovalo, že podle přechodných ustanovení zákona EIA se posouzení zahájená před účinností tohoto zákona dokončí podle zákona č. 244/1992 Sb.

[16] Tuto námitku shledal NSS důvodnou.

[17] Srovnej např. s rozsudkem NSS ze dne 30. 1. 2009, č. j. 8 As 21/2008 – 153, v němž se jednalo o přezkum rozhodnutí o udělení licence (tedy neenvironmentální agendu) a NSS se zde vyjádřil k míře

Soudního dvora způsob ochrany předvídaný směrnicí o stanovištích poskytován pouze evropsky významným lokalitám zařazeným na tzv. evropský seznam. Členské státy jsou povinny přijmout opatření uvedená ve směrnici o stanovištích ve vztahu k lokalitám, které byly formálně schváleny Komisí. Lokality, jejichž zařazení na tzv. evropský seznam je navrženo, však musí být také vhodně chráněny, a to již od okamžiku, kdy figurují na tzv. národním seznamu.[18] Díky výkladu opřenému o výše uvedená rozhodnutí Soudního dvora pak NSS dospěl k závěru, že nebyl povinen obrátit se na Soudní dvůr s předběžnou otázkou. V tomto rozsudku NSS rovněž opakoval svůj konstantní výklad (nedostatku) přímého účinku Aarhuské úmluvy a směrnice EIA s doplněním o vztah ke směrnici SEA: *"To platí tím spíše, že směrnice Evropského parlamentu a Rady č. 2001/42/ES, o posuzování vlivů některých plánů a programů na životní prostředí (dále jen „SEA směrnice“), na rozdíl od směrnice č. 85/337/EHS, požadavek na soudní kontrolu procesu posuzování vlivů koncepcí na životní prostředí vůbec neobsahuje."*

Lze srovnat i s usnesením NSS ze dne 21. 2011, č. j. 8 Ao 7/2010 – 65. V této věci se totiž navrhovatelé domáhali zrušení nařízení Jihomoravského kraje (změna přílohy č. 2 nařízení Jihomoravského kraje č. 384/2004, kterou tvoří Program ke zlepšení kvality ovzduší).

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uvážení členských států ohledně procesní úpravy při realizaci unijního práva: *"Právo Společenství však ve vztahu k právním řádům členských států zhusta neobsahuje komplexní úpravu, stanoví především hmotněprávní základy, a jejich institucionální a procesní realizaci ponechává na právních řádech členských států. Výchozím principem v těchto oblastech je pak procesní autonomie členských států při realizaci práva Společenství na vnitrostátní úrovni (srov. např. rozsudek Soudního dvora ze dne 16. 12. 1976, Rewe-Zentralfinanz eG et Rewe-Zentral AG proti Landwirtschaftskammer für das Saarland, 33/76, Recueil, s. 1989, bod 6, nejnověji např. rozsudek ze dne 12. 2. 2008, Willy Kempter KG proti Hauptzollamt Hamburg-Jonas, C-2/06, zatím nepublikováno, zejm. body 45 a 57 či rozsudek ze dne 13. 3. 2007, Unibet (London) Ltd a Unibet (International) Ltd proti Justitiekanslern, C-432/05, Sb. rozh., s. I-2271, zejm. body 39 - 44; viz též rozsudek NSS ze dne 19. 7. 2006, čj. 3 Azs 259/2005 - 42, č. 977/2006 Sb. NSS). Z principu procesní autonomie obecně vyplývá, že není-li určitá procesní otázka výslovně upravena právem Společenství, zůstává její řešení v pravomoci členských států, resp. Jejich právních řádů."* Právě rozhodnutí ve věci Freistaat Bayern tento princip částečně oslabuje a promítá účel unijní úpravy i do vnitrostátního procesního práva, viz zejména odst. 39: *„Z výše uvedeného vyplývá, že fyzické či právnické osoby přímo dotčené rizikem překročení výstražných prahových hodnot nebo mezních hodnot musí mít možnost od příslušných orgánů požadovat, případně s pomocí příslušných soudů, aby byl vypracován akční plán, jestliže takové riziko existuje.“*

[18] Zde NSS poukázal i na stanovisko generální advokátky Kokott ve výše uvedené věci C-117/03.

Z unijní úpravy poukázali na čl. 7 a 8 směrnice Rady 96/62/ES z 27. 9. 1996, o posuzování a řízení kvality vnějšího ovzduší, a rozsudek Evropského soudního dvora (ESD) č. C-237/07 z 25. 7. 2008, v němž soud deklaroval právo fyzických a právnických osob přímo dotčených špatnou kvalitou ovzduší požadovat zpracování plánů a programů ke zlepšení kvality ovzduší včetně možnosti domáhat se tohoto práva u národních soudů. Důvody návrhu rozdělili do tří okruhů: rozpor s § 10a a násl. zákona EIA, rozpor s § 10d odst. 3 téhož zákona a rozpor s § 7 odst. 6 zákona o ochraně ovzduší. NSS konstatoval, že se v daném případě je výslovně stanovena forma příslušného právního aktu (opatření obecné povahy), není tu tedy prostor pro jiné soudní hodnocení povahy takového aktu. NSS však shledal návrh nepřípustným, neboť nebylo napadeno opatření obecné povahy. Odkazy navrhovatelů na komunitární (unijní) právní úpravu a judikaturu pak seznal nepřípadnými. Uzavřel, že *"(k)romě tzv. „jiných prostředků“, jimiž se lze domáhat zajištění kvality ovzduší (např. samostatným posouzením při schvalování územně plánovací dokumentace apod.), je v České republice zaručena i dostatečná soudní ochrana, a to v podobě přezkumu Ústavního soudu a pokud by dospěl k závěru, že se nejedná o právní předpis, pak případně i přezkumu ve správním soudnictví. Není tu tedy rozpor s požadavky komunitární právní úpravy (čl. 7 a násl. Směrnice Rady č. 96/62/ES)."*

Ve věci přezkumu návštěvního řádu Národního parku Šumava vydaného ve formě opatření obecné povahy (rozsudek ze dne 13. 10. 2010, č. j. 6 Ao 5/2010 – 43), dospěl NSS s odkazem na rozsudek Soudního dvora ze dne 15. 10 2009 ve věci C - 263/08 (Djurgården-Lilla Värtans Miljöskyddsförening) k závěru, že čl. 10a směrnice EIA lze přiznat za určité situace přímý účinek. Vyšel přitom z následující úvahy: *„cílem čl. 10a směrnice o posuzování vlivů (...) je zajistit tzv. dotčené veřejnosti přístup k soudnímu přezkumu ve věcech spadajících do působnosti cit. směrnice a tento cíl je z uvedeného článku jasně seznatelný. Při jeho naplnění je členským státům však ponechán prostor pro úvahu, jak cíle dosáhnout, mimo jiné tím, že stanoví příslušnou fázi, v níž bude soudní přezkum umožněn (druhý pododstavec čl. 10a cit. směrnice). Ve věci nyní projednávané před Nejvyšším správním soudem se však jedná (...) o jediné správní řízení, jehož výsledek - návštěvní řád vyhrazující místa k provozování vodních sportů - může být podroben soudnímu přezkumu v jediném typu soudního řízení. Je tedy zřejmé, že v této věci se uvážení svěřené České republice, resp. jejímu zákonodárci nemohlo vůbec uplatnit; je-li možno vést pouze jediné soudní řízení, není prostor pro určení fáze, v níž lze návštěvní řád soudně přezkoumat. V takovém případě je třeba naplnit cíl daného ustanovení a umožnit dotčené veřejnosti přístup k soudu (...) Nejvyšší správní soud tedy posoudil otázku aktivní legitimace navrhovatelů v probíhajícím řízení podle § 101a s. ř. s. ve spojení s čl. 10a směrnice, jeho prvním a třetím pododstavcem. Vycházel při tom též z definice pojmu dotčená veřejnost v čl. 1 odst. 2 směrnice a zohlednil i výklad, který podal Soudní dvůr ve věci C-263/08, Djurgarden-Lilla Värtans Miljöskyddsförening.“*

Podle NSS sice článek 10a směrnice EIA ponechává na vnitrostátním zákonodárci, aby určil podmínky, které mohou být požadovány k

tomu, aby nevládní organizace podporující ochranu životního prostředí jakožto sdružení mohla mít právo dosáhnout přezkum za výše uvedených podmínek, musí vnitrostátní pravidla takto stanovená jednak zajistit široký přístup k právní ochraně, a jednak zajistit ustanovením směrnice EIA týkajícím se práva dosáhnout přezkoumání soudem jejich užitečný účinek. Nesmí tedy hrozit, že tato vnitrostátní pravidla zbaví plné účinnosti ustanovení práva Společenství, která stanoví, že ti, kdo mají dostatečný zájem napadnout záměr, a ti, do jejichž práva je zasaženo, mezi něž patří sdružení na ochranu životního prostředí, musí mít možnost aktivní legitimace v řízeních před příslušnými soudy.

V určitém směru doplněním tohoto rozhodnutí je pak rozsudek ze dne 22. 7. 2011, č. j. 7 As 26/2011 - 175. V něm NSS reflektoval nejnovější vývoj judikatury Soudního dvora k posuzování vlivů na životní prostředí: *"Nelze však dovozovat, že občanská sdružení hájící veřejný zájem v podobě ochrany životního prostředí mají odlišná procesní práva než ostatní účastníci. Soud proto do jisté míry přezkoumává i hmotněprávní podmínky správního úkonu a rozpor i s hmotněprávní úpravou. Jistou výjimku představuje ust. § 23 odst. 10 zákona o posuzování vlivů (...) Stěžovatel by se tedy mohl domáhat přezkumu rozhodnutí i v ryze hmotněprávní rovině v případě, že by jeho žalobní legitimace byla odvozena od tohoto ustanovení, případně od přímo aplikovatelného čl. 10a směrnice Rady 85/337/EHS ze dne 27. 6. 1985, o posuzování vlivů některých veřejných a soukromých záměrů na životní prostředí, ve znění směrnice Evropského parlamentu a Rady 2003/35/ES ze dne 26. 5. 2003 (viz např. rozsudek Nejvyššího správního soudu ze dne 13. 10. 2010, č. j. 6 Ao 5/2010 – 43, www.nssoud.cz, a rozsudek Soudního dvora Evropské unie ze dne 12. 5. 2011, C-115/09, Trianel Kohlekraftwerk Lünen)."*

5. PŘEPRAVA ODPADŮ

Relativně samostatnou skupinu věcí posuzovaných Nejvyšším správním soudem s prvkem aplikace unijního práva tvoří případy z oblasti přepravy odpadů.

Usnesením ze dne 30. 6. 2010, č. j. 5 As 49/2009 – 186, zastavil NSS řízení v případě přeshraniční přepravy odpadů ze Spolkové republiky Německo do České republiky. Původní námitka byla vznesena z důvodu nesprávné klasifikace operace využití, resp. odstranění odpadu dle přílohy 3 a 4 zákona č. 185/2001 Sb., o odpadech v oznámení o přeshraniční přepravě odpadů. Na základě kasační stížnosti žalobce se Nejvyšší správní soud usnesením ze dne 8. 7. 2009, č. j. 5 As 49/2009 - 138, obrátil na Soudní dvůr po analýze jeho judikatury s předběžnými otázkami ohledně výkladu čl. 2 písm. i) a k) nařízení Rady (EHS) č. 259/93 ze dne 1. února 1993 o dozoru nad přepravou odpadů v rámci Evropského společenství, do něj a z něj a o její kontrole ve spojení s čl. 1 písm. e) a f) směrnice Rady 75/442/EHS ze dne 15. července 1975 o odpadech a bodem D10 Přílohy IIA a R1 přílohy IIB téže směrnice. Protože však vzal žalobce kasační stížnost zpět, nezbylo Nejvyššímu správnímu soudu než řízení zastavit. Zároveň odpadl důvod, pro nějž se NSS původně obracel na Soudní

dvůr, proto vzal svou žádost o rozhodnutí Soudního dvora o zmiňovaných předběžných otázkách zpět.

V rozsudku ze dne 9. 2. 2011, č. j. 1 As 110/2010 – 151, se zabýval NSS případem, kdy žalobkyně jakožto dopravce dovezla ve dnech 5., 6., 18. a 19. října 2006 do České republiky 4 kamiony odpadu o úhrnné hmotnosti 85 tun ze Spolkové republiky Německo, a to bez jakéhokoliv povolení. Byla jí uložena pokuta za porušení § 54 odst. 2 zákona o odpadech. Bránila se, že skutková podstata § 66 odst. 4 písm. g) zákona o odpadech je naplněna jen tehdy, když dojde k porušení nejen zákona o odpadech, ale i evropského právního předpisu. NSS odkázal na rozsudek Soudního dvora EU ze dne 21. 6. 2007 ve věci trestního stíhání proti společnosti Omni Metal Service (C-259/05, Sb. rozh. s. I-4945), zabýval se výkladem pojmů „odstraňování odpadu" a „využití odpadu"[19]. Dále se NSS zabýval smyslem nařízení Rady č. 259/93 a k výkladu deliktní odpovědnosti provedeným žalobkyní dospěl k závěru, že *"(p)ovinnosti stanovené nařízením nemohou být uloženy rovněž národní legislativou (srov. věc Variola cit. v bodě [43] shora, body 10 a 11). Je proto zásadně vyloučeno, aby určité jednání porušilo povinnost stanovenou nařízením a současně i obsahově shodnou povinnost uloženou českým zákonem. Nesmyslný by byl rovněž takový výklad, který by založení deliktní odpovědnosti vázal na porušení povinnosti stanovené právními předpisy EU a současně na porušení obsahově odlišné povinnosti uložené českým zákonem. Deliktní odpovědnost by při tomto výkladu vznikla teprve porušením dvou různých povinností. To je absurdní a značně by snížilo možnost vymáhat povinnosti uložené nařízením Evropských společenství. Členské státy jsou přitom povinny účinně prosazovat právo EU [srov. k tomu též nález sp. zn. Pl. ÚS 66/04 ze dne 3. 5. 2006 (N 93/41 SbNU 195; 434/2006 Sb.) ve věci Evropského zatýkacího rozkazu, bod 81]."* NSS se proto přiklonil k výkladu založenému na systémovém argumentu, který reflektuje vztah mezi právem EU a právem vnitrostátním. Správního deliktu dle § 66 odst. 4 písm. g) zákona o odpadech se tak podle něj lze dopustit jak porušením povinnosti stanovené právními předpisy EU upravujícími dozor nad přepravou odpadů, tak pouze porušením povinnosti stanovené zákonem o odpadech pro přeshraniční přepravu odpadu.

V rozsudku ze dne 23. 2. 2011, č. j. 7 As 6/2011 – 63, posuzoval NSS povahu výpalků z destilace lihovin. Vyšel z eurokonformního výkladu směrnice Rady (ES) č. 75/442/EHS o odpadech a judikatury Soudního dvora (rozsudky Soudního dvora ve věcech C-129/96 Inter-Envirnnement Wallonie, Sb.rozh. s. I-7411, bod 26; C-1/03 Van de Walle a další, Sb.rozh. s. I-7613, bod 42; C-252/05 Thames Water Utilities, Sb.rozh. s. I-3883, bod 24; C-195/05 Komise proti Itálii, Sb.

[19] NSS odkázal na usnesení Soudního dvora ze dne 27. 2. 2003 ve věci Oliehandel Koeweit BV a další, C-307/00 až C-311/00, Recueil, rozsudek ze dne 27. 2. 2002 ve věci Abfall Service AG - ASA, C-6/00, Recueil s. I-1961s. I-1821 a rozsudek ze dne 3. 4. 2003 ve věci SITA EcoService Nederland BV, C-116/01, Recueil s. I-2969.

rozh.I-11699, bod 34, a mnoho dalších). Dovodil, že se v posuzovaném případě jedná o otázku acte éclairé, a proto sám předběžnou otázku Soudnímu dvoru nepředložil. Dospěl k názoru, že *"(s)kutečnost, že výpalky z výroby lihu jsou podřaditelné například pod kód Q1 přílohy č. 1 zákona o odpadech, tedy není rozhodující. Je potřeba posoudit chování stěžovatelky a její případný úmysl se výpalků zbavit."* Výraz "zbavit se" pak vyložil ve světle nejenom základního cíle směrnice o odpadech (podle jejího třetího bodu odůvodnění „ochrana lidského zdraví a životního prostředí před škodlivými vlivy sběru, přepravy, zpracování, skladování a ukládání odpadů"), ale i ve světle čl. 174 odst. 2 Smlouvy o založení Evropského společenství (čl. 191 odst. 1 SFEU), který stanovil, že „(p)olitika Společenství v oblasti životního prostředí je zaměřena na vysokou úroveň ochrany, přičemž přihlíží k rozdílné situaci v jednotlivých regionech Společenství. Je založena na zásadách obezřetnosti a prevence [...]".

Ohledně výkladu nařízení Rady (EHS) č. 259/93 lze zmínit také rozsudek NSS ze dne 31. 10. 2008, č. j. 2 As 44/2007 - 212, publ. pod č.1768/2009 Sb. NSS, v němž NSS dospěl k závěru, že v této věci není nutné předběžnou otázku podat, neboť rozhodovací praxe Soudního dvora ve věci stanovení hranice, kdy je spalování odpadu možné považovat za operaci využití nebo odstranění pro účely přeshraniční přepravy odpadů, je poměrně bohatá a kritéria vyslovená Soudním dvorem lze aplikovat i na posuzovaný případ. Ohledně námitky stěžovatelek týkající se oprávněnosti žalovaného vznést námitku proti plánované přepravě odpadů určených k využití NSS odkázal rovněž na judikaturu Soudního dvora (kritérium výhřevnosti odpadu). Dospěl k názoru, že kritéria stanovená v § 23 odst. 1 zákona o odpadech nejsou v rozporu s komunitárním právem, neboť upřesňují pojem „energetické využívání odpadů", a proto není možné je nezohlednit. Shrnul, že *"pokud by bylo rozhodnutí žalovaného o námitce oprávněné, nejednalo by se s ohledem na výše uvedená ustanovení SES o rozhodnutí, jež by bylo v rozporu s komunitárním právem, neboť by se jednalo o jeho samotnou aplikaci. Odpad je sice možné vnímat jako specifický druh „zboží", nicméně i při přepravě odpadů určených k využití je nutné (v závislosti na zařazení odpadu) dodržovat podmínky stanovené právem Společenství i právem národním."*

K aplikaci unijního práva v oblasti přepravy odpadů lze zmínit také rozsudek NSS ze dne 26. 3. 2009, č. j. 5 As 24/2008 - 92.

6. OCHRANA VEŘEJNÉHO ZDRAVÍ

Do oblasti ochrany veřejného zdraví jsem zařadil další judikaturu NSS s "evropským" rozměrem, byť se ne vždy jedná o rozhodnutí směřující k ochraně veřejného zdraví v užším smyslu, ani o rozhodnutí ve věcech ochrany životního prostředí. Přesto se mnohdy jedná o rozhodnutí zajímavá a z pohledu aplikace unijního práva přínosná (pro účely tohoto příspěvku budiž tedy tato kategorie kategorií sběrnou).

V rozsudku ze dne 29. 6. 2011, č. j. 9 As 7/2011 – 70, se tak NSS zabýval výkladem nařízení Rady (EHS) č. 2204/90, které stanoví povinnost používat kasein a kaseináty při výrobě sýrů na základě předchozího povolení, a prováděcího a nařízení Komise (ES) č. 1547/2006.[20] Podle stěžovatelky se sice jednalo o předpisy unijního existující a přímo závazné v rozhodné době, avšak zákon ani jiný právní předpis nestanovil, který orgán je k vydání takového povolení příslušný a jaké náležitosti má splňovat žádost o vydání tohoto povolení. NSS připomněl bezprostřední použitelnost nařízení v tom smyslu, že ke své aplikovatelnosti ve vnitrostátním právu na rozdíl od směrnic nevyžadují přenesení svého obsahu do vnitrostátního transpozičního aktu (v případě navazujících vnitrostátních předpisů se tak nejedná o opatření transpoziční či transformační, ale o opatření konkretizační či doplňující vydávaná na základě přímého požadavku nařízení či obecně čl. 4 EU), a k výjimečné přípustnosti přenesení obsahu nařízení odkázal na rozsudek Soudního dvora ze dne 28. 3. 1985, Komise proti Itálii, 272/83. Ohledně požadavků na obsah a formu implementačních opatření NSS odkázal na rozsudek Soudního dvora ze dne 20. 6. 2002, Mulligan, C-313/99 a z hlediska vnitrostátní právní úpravy na Metodické pokyny pro zajišťování prací při plnění legislativních závazků vyplývajících z členství ČR v EU a Legislativní pravidla vlády. Námitku stěžovatelky shledal NSS důvodnou se závěrem, že až do června 2006 nebyla potřebná prováděcí opatření obsažena ani v právní úpravě na komunitární/unijní úrovni, ani ve vnitrostátní právní úpravě.

V rozsudku ze dne 16. 11. 2010, č. j. 5 As 69/2009 - 86, se NSS potýkal s výkladem směrnice Evropského parlamentu a Rady 2001/95/ES ze dne 3. prosince 2001, o obecné bezpečnosti výrobků. Tímto unijním právním předpisem je velmi zjednodušeně stanoveno, že výrobek, který nesplňuje kritéria bezpečného výrobku, je výrobkem nebezpečným. Odpovídá- li výrobek technické normě, považuje se za bezpečný. V předmětné věci se jednalo o posouzení povahy zapalovačů, které byly dovezeny do Evropské unie a uvedeny na trh v některých členských zemích EU, kde je žalobce rovněž nakoupil a dodal na trh v České republice. NSS ve své argumentaci rozsáhle odkázal na judikaturu Soudního dvora ohledně volného pohybu zboží zaručeného v rámci společného trhu - a taky možností, podmínek pro jeho omezení (opatření s rovnocenným účinkem) a výjimek z obecného pravidla - tzv. důvodů obecného zájmu uvedených v čl. 36 SFEU, mezi něž patří mj. ochrana veřejného pořádku, veřejné bezpečnosti a ochrana zdraví, jednak tzv. kategorických požadavků stanovených judikaturou Soudního dvora, mezi něž patří též ochrana spotřebitele. NSS dále upozornil na odlišnou situaci, je-li příslušná oblast harmonizována sekundárním právem EU - vnitrostátní právní

[20] Rozsáhlý výklad k unijnímu právu provedl NSS v jiné věci týkající se uvádění potravinářských výrobků do oběhu (rozsudek ze dne 23. 7. 2010, č. j. 2 As 55/2010 – 167). Protože šlo především o značení výrobku ("čerstvé máslo") a nikoliv o složení výrobku, uvádím toto rozhodnutí pouze v poznámce.

předpisy pak musejí být posouzeny především s ohledem na ustanovení tohoto harmonizačního předpisu, a nikoliv na ustanovení článků 34 a 36 SFEU. NSS svůj výklad ukončil závěrem, že nařízení vlády č. 198/2007 Sb. není v rozporu se systematikou směrnice o obecné bezpečnosti výrobků, jak tvrdil krajský soud, ani se systematikou zákona o obecné bezpečnosti výrobků, který tuto směrnici transponuje.

V rozsudku ze dne 21. 9. 2011, č. j. 2 Ans 9/2011 – 336, NSS neshledal důvod pro předložení předběžné otázky Soudnímu dvoru, jednak proto, že považuje svůj setrvalý právní názor ve věci samé za souladný s unijním právem, aniž by v této otázce vyvstaly jakékoli pochybnosti ohledně výkladu unijního práva ve smyslu čl. 267 SFEU; jednak proto, že nyní vůbec nepřezkoumával nepřípustné kasační námitky žalovaného mířící do údajně nesprávného posouzení těchto věcných právních otázek, nýbrž pouze námitku zásadního procesního pochybení městského soudu, jež jediná byla přípustná ve smyslu § 104 odst. 3 písm. a) s. ř. s. V tomto případě žalobce požádal společnost ČEZ, a. s., o informaci s odkazem na ustanovení § 17 odst. 1 atomového zákona a jeho žádost byla odmítnuta s odkazem na skutečnost, že požadoval dokumenty, které navíc podléhaly obchodnímu tajemství. Důvodem předložení této předběžné otázky měla být podle žalovaného skutečnost, že § 1 zákona o svobodném přístupu k informacím vymezuje, že účelem zákona je provedení Směrnice Evropského parlamentu a Rady č. 2003/98/ES ze dne 17. listopadu 2003 o opakovaném použití informací veřejného sektoru. Podle žalovaného by proto bylo namístě položit Soudnímu dvoru předběžnou otázku, zda může být provedením této směrnice zákon, který by nařizoval poskytování informací i obchodním společnostem s majetkovou účastí státu, jejichž účelem je pouze podnikání a jež nebyly zákonem výslovně zmocněny k rozhodování o právech, právem chráněných zájmech a povinnostech ve smyslu § 2 zákona o svobodném přístupu k informacím a nesplňují znaky veřejnoprávního subjektu ve smyslu této směrnice.

Z dalších zajímavých rozhodnutí z pohledu aplikace unijního environmentálního práva lze zmínitit např. rozsudek NSS ze dne 30. 4. 2010, č. j. 5 As 89/2008 – 78 (výklad Směrnice Evropského parlamentu a Rady 2001/80/ES ze dne 23. října 2001 o omezení emisí některých znečišťujících látek do ovzduší z velkých spalovacích zařízení, jednalo se o chválení Plánu snižování emisí na zvláště velký spalovací zdroj znečišťování ovzduší Energotrans, a. s. – elektrárna Mělník I), nebo rozsudek ze dne 18. června 2009, č. j. 8 As 33/2009 – 56 (odstřel špačka a výklad směrnice Rady 79/409/EHS, ze dne 2. 4. 1979, o ochraně volně žijících ptáků), případně rozsudek NSS ze dne 27. 5. 2011, č. j. 5 As 49/2010 - 82 (vypouštění odpadních vod, výklad Směrnice Rady 91/271/EHS ze dne 21. 5. 1991, o čištění městských odpadních vod) či z části i rozsudek NSS ze dne 26. 8. 2010, č. j. As 17/2010 – 294 (zařazení do seznamu výrobců elektrozařízení).

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NEW VISION OF THE EU PATENT PROTECTION: PATENTS WILL BE CHEAP, BUT NOT AVAILABLE IN NATIONAL LANGUAGES

VLADIMÍR TYČ

1. INTRODUCTORY REMARKS

The traditional European patent system based on the European Patent Convention (Munich 1978) making possible to obtain protection through the unique European patent in chosen European coutries, is now facing difficulties. The reason is the compulsory validation of granted European patents in all chosen countries, including the translation into the official language of each country. The costs of those translations are so enormous, that the patent protection in Europe becomes too expensive and implicates an obstacle to the technological development in the EU. This is the main reason why the EU tries to establish a specific EU protection on the basis of a unique EU patent, which would be cheap and effective. The new EU patent system is supposed to operate within the current European Patent Convention as its special segment.

The way to achieve this goal is to reduce considerably translation costs eliminating the compulsory translation of granted patents into languages of all EU Member States. This may become a problem, since the patent description, constituting the main part of the patent document, specifies the extent of the patent protection. If not available in the language of the EU Member State of protection, it would be difficult to require any person (enterprise) in such state to refrain from using the patented invention or the patented method.1

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1 Let us remind new EU competencies brought by the Lisbon Treaty. New Art. 118 of the Treaty on the Functioning of the EU stipulates:

In the context of the establishment and functioning of the internal market, the European Parliament

and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures

for the creation of European intellectual property rights to provide uniform protection of intellectual

property rights throughout the Union and for the setting up of centralised Union-wide authorisation,

coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations

All legal duties and obligations of individuals imposed by the law must be available in the national language. This is obvious for legal rules. Let us examine now translation requirements for EU law as such and for international treaties.

2. EU LAW

Regulation 1/58 imposes compulsory official publication of all EEC (now EU) legal regulations in official language versions of all Member States. However, it does not determine legal consequences of the absence of a particular language version. We can find the solution in the ECJ judgment Skoma-Lux (C-161/06). A regulation not yet published in the official language of a particular Member State is nonetheless valid and effective for that State, but cannot be applied against an individual of that State. This judgment proceeds from former ECJ case law.

In the judgment in Case C-98/78 Racke the Court stated, that an act adopted by a Community institution, such as the regulation at issue in the main proceedings, cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the Official Journal of the European Union.

The Court has held that the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies (see also, to that effect, Case C-370/96 Covita , Case C-228/99 Silos and Case C-108/01 Consorzio del Prosciutto di Parma and Salumificio S. Rita.2

The principles of legal certainty and equality of citizens are safeguarded, inter alia, by the formal requirement of proper publication of legislation in the official language of the person to whom it applies (see Case C-209/96 United Kingdom v Commission and Case C-108/01 Consorzio del Prosciutto di Parma and Salumificio S. Rita).3

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establish language arrangements for the European intellectual property rights. The Council shall act

unanimously after consulting the European Parliament.

2 Paragraphs 37 and 38 of the judgment Skoma-Lux C-161/06.

3 Acknowledgment of the referring court shared by the author. Paragraph 21 of the same judgment.

Conclusions of the Court: The principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies. Observing fundamental principles of that kind is not contrary to the principle of effectiveness of Community law since the latter principle cannot apply to rules which are not yet enforceable against individuals.4

The message of the ECJ case law seems to be clear: An individual cannot be affected for the breach of its legal duty which has not been laid down in a manner making it available to him, it means in his language.

3. INTERNATIONAL TREATIES

A similar solution has been adopted in most countries for international treaties: Provisions of an international treaty can be applicable to an individual only after the official publication of the translated text. Art. 10 of the Czech Constitution provides: Promulgated international treaties binding on the Czech Republic and approved by the Parliament, become constituting parts of the Czech legal order (i.e. are binding on individuals).

What means "promulgated"? The sense of that term is determined by the Act on the Collection of Laws and International Treaties (Official Journal). Promulgation means the official publication of the treaty in one of the original languages (authentic text) and also in the Czech language as its official translation. It seems necessary to remind that authentic text of a treaty is only the language version in which the treaty has been signed. Czech translation is official, but not authentic. Individuals may rely on the Czech text, but in the case of a discrepancy between the authentic text and the official Czech translation the authentic text prevails. Anyway for Czech individuals it is guaranteed that the official Czech translation provided by the State is always available.

We now can conclude that the availability of the official text in the national language is guaranteed for EU law and international treaties.

4. EU PATENT

EU patent is not an EU regulation nor an international treaty. It is an administrative act, i.e. a public law act, granting the patent to an individual, but having general effect (erga omnes). This document provides a public law protection to the owner of the patent. Consequently, it is prohibited to any unauthorized person to use the

4 Paragraph 1 of the Summary of the Judgment Skoma-Lux 161/06.

patented invention for the production of protected products. The "patented invention" means the technical solution described in the patent.

Legal implications of the granted patent are the following ones: It is prohibited, without the consent of the patent owner, to use the patented invention as it is described in the patent specification. This is a legal obligation to refrain from a certain conduct. This prohibited conduct must be described and the description must available in the way understandable to the addressee. This is the reason for which so far European (EPO) patents must be translated into languages of States where the protection is claimed. This is the core of the problem: those multiple translations guarantee the legal security, but are too expensive.

The solution envisaged by the EU5 is based on Art. 14 para. 6 of the European Patent Convention: The whole description of the patented invention will be available in the language of filing (English, French or German) and the claims6 will be translated into two other official EPO languages. No further translations will be required.7

For the transitional period, which is intended to take 12 years, following rules have been proposed:

During a transitional period , a request for unitary effect shall be submitted together with the following:

(a) where the language of the proceedings (the application) is French or German, a full translation

of the specification of the European patent into English; or

(b) where the language of the proceedings is English, a full translation of the

specification of the European patent into any official language of the

participating Member States that is an official language of the Union (i.e. the language of the applicant).

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5 Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, doc. COM(2011) 216 final, 2011/0094 (CNS), 13.4.2011

6 Claims are the decisive part of the patent description, that relatively briefly defines the substance of the invention, i.e. what is really new and consequently protected.

7 Art. 3 of the draft regulation mentioned in note 5.

This will ensure that the whole patent specification will always be available in English.8

It means that an EU patent protected in the Czech Republic will not be available in the Czech language. Is that acceptable? A granted patent imposes to all other potential users a negative obligation to respect the patent, i.e. to refrain from using the patented invention for the production of their own products. They are legally forced to refrain from a behaviour not specified in their own language. There are two basic consequences of this strange situation:

1. The users (producers) will be obliged to translate themselves the description of a granted patent into their language. There is no guarantee that their translation will be correct.

2. In the case of a dispute, the owner of the patent will have to provide the translation of the patent into the language of the defendant, otherwise he would not be able to claim his patent rights. It is logical, but a bit late. If the defendant had the access to the text of the patent in its language before, probably he would respect it.

In both cases the translation into the other language would be made on the private law basis.

The envisaged solution to impose solely the English, French or German versions to users of all EU countries is very problematic. A compromise solution could be to translate into official languages of all countries of protection not the whole specification of the patented invention, but only the patent claims of each granted patent effective in the EU. Patent claims contain the description of the protected solution and are relatively brief. The costs of the translation of claims into all EU languages would not cause catastrophic costs for applicants and in the same time would ensure a sufficient degree of legal certainty. Unfortunately, this solution has been rejected by the EU Council and some Member States.

The comments made by some Czech lawyers and other experts are very sceptical. Some say, that the general knowledge of the English, French or German languages is not sufficient for the understanding of a highly technical text using a very special terminology. The violator of patent rights could act in good faith without any knowledge about the exact extent of rights that he is in fact violating. Any person must have the access to the contents of the patent specification that he is supposed to respect.9 The access to the text available only in a foreign language is therefore not sufficient.

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8 Ibid., Art. 6

9 Sources of mentioned remarks: http://euractiv.cz/podnikani-a-zamestnanost/clanek/schudny-kompromis-nad-evropskymi-patenty-je-mozna-na-svete-008093 and http://euractiv.cz/podnikani-a-

Apparently, this is a conflict between economic interests of applicants and the legal certainty of others. The draft regulation is aware of this problem, but the envisaged solution is far to be satisfactory. In the case of a dispute relating to a European patent with unitary effect, the patent

proprietor should provide at the request and the choice of an alleged infringer, a full

translation of the patent into an official language of the participating Member State in

which either the alleged infringement took place or in which the alleged infringer is

domiciled.10 It means that the "violator" will learn about the extent of rights that he has inadvertently violated only after having been sued by the patent owner. This is unacceptable.

The solution proposed by the EU does not take into account that the efforts to make the patent protection in the EU cheaper must not affect the legal certainty of enterprises. The comparison of costs of the patent protection in the EU and the USA does not make sense.11 The USA are one country with one language, while the EU is a community of 27 countries with 23 different languages. Consequently, the EU unitary patent can never be as cheap as the US patent, since languages of different member countries must be respected, otherwise the patent protection based exclusively on three leading languages is very doubtful and would lead to conflicts emerging from lack of understanding the extent of protected rights.

As a final appropriate compromise solution, we repeat again, is that the translation of the whole patent specification into languages of all countries of protection is dispensable, but the patent claims must be available in all languages.

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zamestnanost/clanek/prekladat-ci-neprekladat-patenty-tot-otazka-006362, cited November 15, 2011

10 Art. 4 of the draft regulation mentioned in note 5.

11 It has been calculated that the patent effective in the whole EU is now five times more expensive that the patent protecting the invention in the USA.

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Interpretace a aplikace mezinárodního a evropského práva vnitrostátními soudy

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