Aktuálne problémy európskeho práva

Contemporary Issues of European Law

Sekcia európskeho práva
European Law Session

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OBSAH / CONTENT

THE EXISTING EUROPEAN TORT LAW

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Abstract: The so-called europeanization of private law is in progress. The lively debate if and how to proceed in the field of private law has been going on for a long time. While the European Civil Code is still only a project and the discussion concentrated on contract law, it is certainly worth mentioning the existing European tort law. The present *acqius communautaire* is a complex system, comprising of national laws, EU law and international conventions. In the field of tort law, various actions have been conducted, however, the general principles and comprehensive harmonization are still missing - the very good example of which is the environmental liability. The main legislative instrument adopted in the area of environment at EU level is the 2004 Environmental Liability Directive. The aim of this Directive is to prevent and remedy the site contamination and loss of biodiversity. It does not however apply to damages suffered by private parties. In the absence of the Treaty rules and the existing piecemeal harmonization, the jurisprudence of the Court of Justice has become the main source law of the European tort law. The general principles created in Francovich and Brasserie cases paved the way for the individual tort liability. On the other hand the efforts and achievements of the private codification groups also determine the scope of the present EU tort law.

Key words: tort, European private law, europeanisation, environmental directive, harmonisation

1 INTRODUCTION

The so-called europeanization of private law is still in progress. There is a lively debate among academics in EU about how, if at all, the private laws of the Member States should be harmonized. Views range from no harmonization at all, soft law methods, step by step case law developments, to a fully binding European Civil Code. While the European Civil Code is still only a project and the discussion concentrated on contract law, it is certainly worth mentioning the existing European tort law. Here the various historical and cultural backgrounds lead to striking differences when it comes to deciding on liability.

2 THE ACTUAL STATUS QUO OF EXISTING EU TORT LAW

The present *acquis communautaire* is a complex system, comprising of national laws, EU law and international conventions. The European tort law has grown and expanded over recent decades, however, the general principles and comprehensive harmonization are still missing. The legislation of the EU has regulated tort liability only selectively. This leads to injustice as often the cases which ought to be treated similarly are resolved quite differently - the very good example of which is the environmental liability.

The main legislative instrument adopted in the area of environment at EU level is the 2004 Environmental Liability Directive.[1] It establishes the framework of environmental liability to prevent and remedy environmental damage. It is based on the "3P" (polluter pays principle) and concentrates on the prevention and restoration of the contaminated sites and loss of biodiversity.[2] The directive provides only for the environmental damage, excluding from the scope of application "traditional damage" such as damage to person and property.[3] It does not give private parties the right to compensation for damage or imminent threat of damage resulting from environmental harm and points the national tort law as applicable. Natural and legal persons who are affected by the environmental damage have the right to submit to the competent authority any observations relating to instances of environmental damage. They may also request the competent authority to take

[1] Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, 56-75.
[2] Art. 1
[3] Art. 2

action.[4] The aim of this Directive is to prevent and remedy the site contamination and loss of biodiversity. It does not apply to damages suffered by private parties. However, it is a so-called minimum directive ensuring only a minimum level of protection. Therefore, member states can adopt more stringent provisions, which applies to tort law remedies as well.[5]

The ideas on the harmonization of European Tort Law also vary drastically. On the one hand there is a vision of a codification of European Tort Law as part of a European civil code. But on the other side is the idea that harmonization should – and can be, done only to the extent necessary for a functioning of the internal market. Specifically in the area of tort law, a number of rules can be found in tort law directives. Examples of directives include the Product Liability Directive and the Directive on Unfair Commercial Practices. Liability can also be based on the violation of the Treaty provisions. Article 340 of the TFUE explicitly regulates the liability of Community Institutions for damage caused by the breach of Union Law. Also, the Court of Justice case law has a more substantial impact in the area of extra-contractual liability than in the area of contracts. Tort liability is considered by the Court as the crucial remedy for individuals to enforce their rights both before the EU and the national courts. For the first time the ECJ enabled a direct claim to be made against a defaulting Member State in the famous Francovich case. In this 1991 judgement, the ECJ acknowledged liability of the Member States towards individuals for violation of Union law as being inherent in the system of the Treaty and being necessary for the effectiveness of Community of law.

Finally, the work of private groups of scholars should be mentioned. In 2005 the European Group on Tort Law presented "Principles of European Tort Law" (PETL).[6] It was followed by the draft of "Non-contractual Liability Arising out of Damage Caused to Another" presented by the Study Group on a European Civil Code.[7] The members of these groups are the strong supporters of the idea of unification of European Private Law and their goal is a European Civil Code. The above mentioned proposals are not legally binding.

3 CONCLUSION

There are two observations which may further question the desirability and feasibility of the harmonization of tort law. Firstly, harmonization of tort law is not as much desired as in case of contracts for proper functioning of internal market. Secondly, the general harmonization of European tort law is obviously not on the political agenda. The developments in this area remain patchy, with the main source being the case –law. In the absence of the Treaty rules and the existing piecemeal harmonization, the jurisprudence of the Court of Justice has become the main source law of the European tort law. The general principles created in Francovich and Brasserie cases together with the achievements of the private codification groups paved the way for the individual tort liability. However, the example of environmental directive shows that there is still a lot of work to be done towards effectiveness of the common provisions in the national perspective.

Bibliography:

KOZIOL, H., SCHULZE, R. (eds.), Tort Law of the European Community, SpringerWienNewYork, 2008, 689 pages. ISBN 978-3-211-77585-1

TWIGG-FLESNER, CH. (ed.): European Union Private Law. Cambridge University Press, 2010. 350 pages. ISBN 978-0-521-73615-2

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[4] Art. 12
[5] Art. 16
[6] European Group on Tort Law, Principles of European Tort Law, Text and Commentary, Vienna 2005, see: www.egtl.org
[7] Non-contractual Liability Arising out of Damage Caused to Another, see: www.sgecc.net

THE EUROPEAN STABILITY MECHANISM (ESM) IS IN ACCORDANCE WITH EUROPEAN AND CONSTITUTIONAL LAW

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Abstract: The struggle over Euro-stabilization involves not just the German Federal Constitutional Court, with regards to the rejected interim measures on 12.09.2012 and the hearing on June 11 and 12, 2013 in Karlsruhe, but also the European Court of Justice (ECJ), which ruled on 27.11.2012 that the European Stability Mechanism (ESM) is in accordance with European Law. The article informs about simplified revision procedures under Article 48 para 1 TEU to adopt Art.136 para 3 TFEU and corresponding decision of German Constitutional Court. The ESM is an international treaty of the Euro Member-Countries and as such not part of EU law. For his interpretation of the ECJ is generally not responsible. The Member States of ESM settled no contradiction with the establishment of the ESM in regarding to European Law. The new Article 136 paragraph 3 of the TFEU does not derogate the exclusive competence of EU. (TFEU Article 3 para 1 lit.) The budget finance of the Member States whose currency is the Euro is not affected. The prohibition of monetary financing of the budget (Article 123 TFEU), which concerns only the European Central Bank and national central banks, does not violate the ESM.

Key words: ESM, CJEU, German Constitutional Court, Reservation, Simplified revision procedures Article 48 para 1 TEU, Art. 136 para 3 TFEU,

1 INITIAL SITUATION

The worldwide economic crisis laid bare the structural problems in the euro area – too-high national debt and the poor competitiveness of several European countries – as mercilessly as it did the fundamental deficiencies in the construction of the monetary union.

The European Stability Mechanism (ESM) of 02.02.2012 was put into effect in October 2012 and supersedes the mechanisms of stabilization for the euro area that were created at the outbreak of the crisis, namely the European Financial Stabilization Mechanism (EFSM) and the European Financial Stability Facility (EFSF). Whereas the EFSF was a terminable single-purpose entity, the ESM was established as an international financial institution (IFI).

As early as December 17, 2010, the European Council reached agreement on provisions for external financial help for those European member states in need. Art.3 of the ESM treaty describes the ESM's aim to mobilize financial capital and provide ESM members, members who have grave financial problems or are threatened by such problems, with stability assistance – under strict restrictions appropriate to the chosen financial instruments – if this assistance is indispensable to both the financial stability of the euro zone generally and its individual member states specifically. To this end, the ESM is entitled to gather funds by issuing financial instruments, or by concluding financial or other agreements or understandings with ESM members, financial institutions or other third parties.

Initially, on December 16, 2010, the European Council had agreed, in the form of Article 1 of Resolution 2011/99 **(2),** that, in accordance Art.48 Paragraph 6 Subparagraph 2 of the Treaty on European Union (TEU), a third paragraph should be appended to Article 136 of the Treaty on the Functioning of the European Union (TFEU):

> "(3) The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

On March 17, 2011, the German parliament accepted the proposal by the CDU/CSU and FDP parties to supplement Art.136 of the Treaty upon consensus of the German Bundestag and Bundesrat**.** On March 25, 2011, the European Council voted in the (final) draft of a prospective Art.136 Paragraph 3.

The ruling of the ECJ will be subsequently discussed with particular regard to the Federal Constitutional Court ruling to be made in fall 2013 and considering the June 2013 hearing on the constitutionality of the ESM. Because the Federal Constitutional Court itself monitors every step of European integration, it must reach a decision formally and in accordance with the jurisdiction of the ECJ. Individual aspects should be made clear here, in particular the distinctive features of the Art. 48 EUV simplified treaty modification procedure and with due regard to the "reservations" of the federal government in the case of ratification.

2 INTERIM MEASURES AGAINST THE ESM IN THE GERMAN FEDERAL CONSTITUTIONAL COURT

Before the German Constitutional Court, the plaintiffs, with their petition for the enactment of an interim measure, essentially sought to forbid the Federal President from either executing those laws classified by the Bundestag and Bundesrat on June 29, 2012 as protective measures to address state debts in the eurozone or from ratifying the accompanying international treaties until a decision had been reached in the present case.

Thus, Art.136 Paragraph 3 of the Treaty on the Functioning of the European Union is seen as having not just a clarifying importance, but a constitutional impact as well. Through it, the so-called "Bailout Ban" (Art.125 of the Treaty) was largely invalidated, thereby eradicating an invaluable requirement for the protection of the parliamentary freedom of choice in matters of domestic budget. Moreover, this alteration of the Treaty on the Functioning of the European Union could be seen as having been unjustly enacted through the simplified procedures of Art.48 Paragraph 6 of the Treaty on European Union.

With the trial of 12.9.2012, Reference Number 2 BvR 1390/12, The German Constitutional Court delivered their ruling:

The petition for the enactment of an interim measure is rejected with the stipulation that the ratification of the Treaty Establishing the European Stability Mechanism (Bundestagsdrucksache 17/9045, Page 6 et seqq.) may only go forward if it is likewise guaranteed, under international law, that:

1. the provision of Article 8 Paragraph 5 Sentence 1 of the Treaty Establishing the European Stability Mechanism will limit all payment liabilities of the Federal Republic of Germany to the amounts detailed Attachment 2 of this treaty, so that no provision of this treaty can be enacted that will be bring about higher payment liabilities without the agreement of the German representative;

2. the provisions of Article 32 Paragraph 5, Article 34 and Article 35 Paragraph 1 of the Treaty Establishing the European Stability Mechanism will not be at odds with the general governance of the Bundestag and Bundesrat.

Thus the Constitutional Court authorized the euro-bailout fund with some "caveats", it negotiated a ruling to that end on the 11th and 12th of June, 2013.

3 27.12.2012 RULING OF THE GERMAN CONSTITUTIONAL COURT BY ORDER FOR REFERENCE

In an April 13, 2012 High Court lawsuit, Irish representative Thomas Pringle argued that decision 2011/99 of the Council of Europe was not legitimately enacted through the simplified procedures of Art.48 Paragraph 6 of the Treaty on European Union, since it contained a change to the responsibilities of the Union in breach of Subparagraph 3 of this provision, and that it was incompatible both with the regulations of the currency union put forth in the TEU and the TFEU and with the general principles of European Union law.

Furthermore, Ireland would assume a number of responsibilities in the case of ratification, approval, or adoption of the Treaty Establishing the ESM, responsibilities that would run contrary to those regulations of the TEU and the TFEU that deal with economic and monetary policy, and would immediately intercede in on the Union's exclusive responsibility to handle monetary policy. With the establishment of the ESM, the member states whose currency is the euro would have created an autonomous and permanent institution to circumvent the financial and monetary policy-related prohibitions and restrictions of the TFEU. Moreover, through the ESM Treaty, the institutions of the Union would obtain new responsibilities and assignments that could be incompatible with their established functions as they were laid out in the Treaty on European Union and in the Treaty on the Functioning of the European Union. Finally, the ESM Treaty was alleged to be irreconcilable with

both the principle of legal compliance and the general principle of effective and judicial legal protection.

During the appeal, after the High Court had passed the lawsuit of Representative Pringle in its entirety, the Supreme Court decided to stay the proceedings and submit the following questions regarding preliminary rulings to the European Court of Justice, et al.:

I. Considering the usage of the simplified procedures of Art.48 Paragraph 6 of the TEU, and particularly with regards to the question of if the proposed modification to Art. 136 of the TFEU -- an expansion of the Union's powers as described in the Treaties – would assign responsibilities, considering the content of the proposed change, that might not be in compliance with the Treaties or the general legal principles of the Union, is Resolution 2011/199 valid?

II. With respect to Art.2 and Art.3 of the TEU, as well as the provisions of Part Three, Title VIII, of the TFEU, in particular Art.119 to Art.123 and Art.125 to Art.127, the jurisdiction of the Union over monetary politics and the conclusion of international understandings which fall within the scope of Art.3 Paragraph 2 of the TFEU, and the responsibility of the Union to coordinate financial policies as lay out in Art.2 Paragraph 3 and Part 3, Title VIII of the TFEU, is a member state whose currency is the Euro entitled to negotiate and ratify an international agreement like the ESM Treaty?

In the end, the European Court of Justice determined that the change to Article 136 of the TFEU was legally put into effect and that member states whose currency is the Euro may conclude and ratify the ESM Treaty.

4 SIMPLIFIED TREATY MODIFICATION PROCEDURES AS PER ARTICLE 48 PARAGRAPH 6 TFEU

Both the German Constitutional Court and the European Court of Justice had to decide if the inserted Art.136 Paragraph 3 of the TFEU could be accepted only through the standard modification process of Art.48 Paragraphs 2-5 TFEU or through the simplified process of Art.48 Paragraph 6 TFEU as well. The standard modification process is essential in the expansion or reduction of the Union's responsibilities and competencies in the process of so-called formal treaty modification. The admission of Art.136 Paragraph 3 TFEU was enacted through the simplified modification procedure, however, and therefore below the procedural requirements of the standard modification procedure.

This is, however, only possible for Part 3 of the TFEU through approved decision of the Council of Europe, and even then only if the introduction of the paragraph adheres to the implementation and enforcement of the contractually established objectives (and the pursuit thereof) of the previously accepted responsibilities.

In both processes, it was contested that the responsibilities of the Union would be expanded with Art.136 Paragraph 3 TFEU or that the standard treaty modification process of Art.48 Paragraph 2 – 5 TEU must be referred to.

Insofar as the German Constitutional Court concerned itself with the decision against the simplified treaty modification process as a potential Violation of Art.38 Paragraph 2 S 2 GG, it determined over the course of a permissibility check that the claimant was lacking a substantiated demonstration of the alleged injury to fundamental rights, and that the law of the EU does not provide the parliaments of its member states with a say in the selection of a treaty modification process. It took a different approach in not examining formal legitimacy like the ECJ. At most, a possible injury to the rights of the German Bundestag would be taken into consideration if a convention procedure had been enacted in place of a standard treaty modification procedure.

The ECJ went one step further. It indicated that it was not entitled to a substantial review, rather just a formal review of a decision of the European Council within the scope of Art.48 Paragraph 6 TEU. Its power extends only to a formal examination of the legality of the procedure.

According the Art.267 Paragraph 1 TFEU, the review of the validity of primary law does not fall within the jurisdiction of the ECJ. However, the enforcement of adherence to procedural law rests on the Court, because this adherence to the law during the construction and application of treaties is ensured through Art.19 Subparagraph 1 TEU to review the validity of a decision of the European Council based on Art.48 Paragraph 6 TFEU. The ECJ tests if the procedural rules provided in Art.48 Paragraph 6 TEU are followed and if the modifications decided upon only extend up to Part 3 of the Treaty on the Functioning of the European Union. The ECJ confirms that the disputed modification both formally and textually concerns only internal policy areas of the Union, and that the decision itself does not cause inadmissible expansion of the Union's jurisdiction or assign additional responsibilities to EU organs. The insertion of Paragraph 3 in Art.136 TFEU

confirms only the right of members to draw up understandings of voluntary financial assistance among themselves, insofar as the obligation stands in accordance with Union law.

The ECJ further explained that the Decision 2011/99 fulfills the requirements laid out in Art.48 Paragraph 6 and Paragraph 1 TEU, according to which a change to the TFEU is enacted according to the simplified modification procedure, because it extends only to the clause of Part 3 of the TFEU.

Paragraph 3 of Article 136 TFEU assigns the Union no new responsibility; it creates no legal basis on which the Union might undertake an action that would not have been possible before the implementation of the change to the TFEU.

The international ESM treaty does not compromise the jurisdiction EU in the monetary politics of the eurozone, rather it moves into the realm of economic policy. In cases of extreme financial need of member states, the now-lawful stability mechanism ensures that the ESM will be financed through deposited capital or the issuance of financial instruments. These are solely economic policies: not measures of monetary policy, which serve primarily to guarantee price stability.

Although it was alleged on the side of the claimants that the insertion of Art.136 Paragraph 3 TFEU would encroach on economic policies, policies that are in the exclusive jurisdiction of the EU according to Art.123 TFEU and Art.125 TFEU, it was then clarified that the ESM was not an instrument for the coordination of economic policy. Economic policy serves to prevent the potential damages of a debt crisis. Financial aid like the ESM helps to overcome debt crises.

5 RESERVATION AFTER THE PROVISIONS OF THE GERMAN CONSTITUTIONAL COURT

The German Constitutional Court stayed true to its decision, even as it then became necessary to actively ensure that the financial liability of Germany would remain limited to the agreed-up 190 Billion Euros. The ratification of the permanent ESM and of the European fiscal pact through the Federal President could only be granted under certain restrictions. In September 2012, Germany was the last country to have not yet signed the ESM treaty. The Constitutional Court generally agreed with the position of the federal government: that Art.136 Paragraph 3 TFEU did not necessitate a realignment of the currency union nor eradicate the prohibition, set out in Art.125 TFEU, on encroaching on the jurisdiction of member states, but rather that it contained merely a clarification. The stability assistance of the member states through the treaties of international law was seen as a measure of monetary law, for which the European Union would be responsible under Art. 3 Paragraph 3 Letter c TFEU. In granted financial assistance, it was about economic policy procedures, for which the member states were thought to be responsible.

In this respect, Art.136 Paragraph 3 TFEU again clarified the legal position. The complaint that a Convention method would have needed to have been used was misguided because no expansion of responsibility for the European Union is included in Art.136 Paragraph 3 TFEU. To consider here is federal government's approach to the problem, the "reservation" as a unilateral declaration.

Immediately after the ruling on 12.09.2012, the plaintiffs felt invigorated. Never before had the Constitutional Court agreed to approve an international treaty only with certain reservations. The ruling was delivered:

"The Federal Republic of Germany must express that it does not wish to be bound by the ESM Treaty, provided its alleged reservations are proved to be unfounded."

Thus, the German government was at least resigned to safeguard under international law their constitutionally viable position, if need be with the withholding of ratification of the treaty. By 19.09.2012 it came about that serious "reservations" were calling the efficacy of the ESM into question.

Reservations about signing an international treaty naturally exclude a complete commitment. It was ruled out that these "reservations" could be solved by falling back on the Vienna Convention, because not all 17 states in the Eurozone are members thereof.

With Germany's unilateral declaration, which hoped to preclude or change the legal effects of the implementation of individual treaty mandates, a German commitment to the ESM Treaty could have been impossible.

The constitutional interpretation of the ESM Treaty wished for by the German Constitutional Court required a solution, however, with which the "reservations" could be redefined in a statement from the Constitutional Court. The Bundestag decided on a resolution to submit a statement of

interpretation on 19.09.2012 to the state secretaries of those states affected by the ESM Treaty, which would then ultimately produce international commitment.

Section 1 of the Bundestag statement relates virtually word-for-word the terms of the German Constitutional Court and is stated to be an "Interpretive Declaration."

Germany's unilateral declaration was countersigned by all treaty partners through their representatives on 27.09.2012 in Brussels and constituted the crucial foundation for the binding of the ESM Treaty. In its legal nature, the declaration is a binding contractual declaration in accordance with the Vienna Convention on the Law of Treaties, a declaration to be drawn upon in interpreting the Treaty and which is not a caveat or "reservation."

The Constitutional Court's declaration included the statement that the simplified treaty modification procedure was permissible (Art.48 Paragraph 2 to Paragraph 5 TEU). During the provisional ordinance proceedings, a summary review takes place, from which it could be assumed that the plaintiffs would lose their case in the main courts as well. The constitution prohibits the transmission of "Competence-Competence" to the European Union or related establishments. The approval of an international treaty and the accompanying domestic legislation must be created so to allow European integration to continue according to the "principle of conferral", without the EU or its related establishments having the opportunity to earn the power of "Competence-Competence" or otherwise harm the identity of the constitution.

The budgetary legislator remains true to his decisions on revenue and spending, and free of the heteronomy on the side of the institutions and member states of the European Union.

With the admission of Art.136 Paragraph 3 TFEU into Union law, the stability-centric mindset of the monetary union will not be given up. As concerns this particular clause, crucial elements of the stability architecture remain untouched. The independence of the European Central Bank, its ultimate purpose of pricing stability (cf. Art.127, 130 TFEU) and the prohibition on monetary domestic financing (Art.123 TFEU) will not be disturbed. If anything, the implementation of Art.136 Paragraph 3 TFEU, in the establishment of a lasting mechanism for the distribution of financial assistance, corroborates the will of the European Union and its member states to strictly limit the duties of the European Central Bank to its lawfully defined jurisdiction.

In any case, as an internal arrangement between member states of the European Union, the ESM Treaty must be seen as compliant with Union law.

6 CRUCIAL BASIS FOR THE ECJ DECISION

The essential statements of the ECJ, in their tense relation to the decision of the German Constitutional Court, are reproduced below.

a) The ESM is a treaty in accordance with the international law of the euro-states, and as such is not a part of Union Law. The ECJ is in no way responsible for its implementation and is not required to decide if compatibility exists between national regulations and Union Law. However, is does provide outlines for the implementation of Union Law to all national courts, so that in their decisions they can more aptly align the provisions of the ESM Treaty with Union law. The ruling therefore does not involve the ESM Treaty's legitimacy within Union Law as such, but rather the compatibility of member states' ESM obligations with the primary obligations of the Union treaties, whose extend is interpreted by the ECJ (Art.19 EUV).

b) The treaty-ratifying states did not require any duties contrary to European Law with their establishment of the ESM. The ESM hinges of the member state's ability to conclude agreements like ESM amongst themselves, because this treaty, like the Decision 2011/199/EU, is compatible with Union Law. A general restriction on member states' capacity to act would result in any case as a consequence of the Principle of Cooperation (Art.4 Paragraph 3 TFEU), which obliges member states to refrain from any action that endangers the realization of EU objectives. It is impossible for obligations of international treaties that encroach on areas exclusive to Union jurisdiction to be approved.

As per Art.3 Paragraph 2 of the TFEU, the EU possesses the exclusive responsibility for conducting international agreements. No shared regulations of the EU will be impaired through the takeover of the emergency functions of the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (ESFM).

The jurisdiction of the Union will not be impaired by the operations of the ESM. The Union does not now possess exclusive jurisdiction over the provision of financial assistance. The scope of Art.122 Paragraph 2 TFEU is objectively quite limited. The ECJ stresses the point that Art.122 TFEU does not offer any indication that the Union is exclusively responsible for the granting of financial

assistance to a member state. Member states are at liberty to establish a stability mechanism because the Union Treaties do not lay out any particular obligation for the Union to institute a permanent stability mechanism.

Under the specific requirements of Art.122 Paragraph 2 TFEU, a member state may be granted selective financial assistance, whereby the powers of the Council here described remain undisturbed. The Union is not impaired by the ESM in its obligation to the defense of the mutual interest.

c) The exclusive jurisdiction of the EU in the realm of monetary policy for member states whose currency is the Euro (Art.3 Paragraph 3 lit. c TFEU) will furthermore not be impaired by the new Art.136 Paragraph 3 TFEU. The ESM aims to stabilize the eurozone as a whole, whereas the assurance of price stabilization is the primary aim of EU monetary policy. The supervision of the financial need of Euro states with acute or pressing financial problems is necessary in order to maintain the financial stability of the euro area or its member states. Even an indirect effect on the stability of the euro as a result of the actions of the ESM would not qualify as a measure of monetary policy.

d) The ESM is not an instrument of coordination for the economic policy of member states; rather it amounts to the reconciliation of the ESM's actions with the "No-Bailout Clause" (Art.125 TFEU) and with the coordination measures affected by the Union. The requirements tied up with the stability assistance lay out in Art.13 Paragraph 3 Subparagraph 2 of the ESM Treaty reflect the Union treaties' designated measures for the management of economic policy. It is combination of macroeconomic conditionality and economic coordination. Simultaneously, the obligation of member states to manage economic policy is mirrored in the Council (Art.2 Paragraph 3, Art. 5, and Art.121 Paragraph 2 TFEU). Furthermore, the Council is entitled, in accordance with Art.126 Paragraphs 7 and 8 TFEU, to give recommendations to a member state with an excessive deficit. And finally the European Commission monitors the coherence of the imposed ESM requirements with the EU measures of economic policy management (Art.3 Paragraph 4 ESM Treaty).

e) The prohibition on monetary state budget financing (Art.123 TFEU), which only affects the national and the European Central banks, does not harm the ESM. Immediate financial assistance granted between member states or through the ESM is not included.

f) The Union and its member states are not responsible for the commitments of other member states and do not advocate for them. This standard prohibits both the Union and its member states from submitting applications for financial assistance on behalf of other member states. If Art.125 TFEU were to prohibit all financial assistance of the Union or its member states, Art.122 TFEU would have needed to clarify that it was an exception to Art.125. The ECJ thereby takes the wording of Art.125 TFEU, as it deviates from Art.123 TFEU, into account: as it compares to the ban on assistance, the Art.123 TFEU ban on the granting of overdraft or other credit facilities is seen as being more narrowly defined; it follows that seen in reverse, the Art.125 TFEU ban on assuming state commitments, in contrast to the Art.123 TFEU ban on offering credit facilities, does not extend to any form of financial support for a member state whatsoever.

7 CONCLUSION

The ESM is appropriate for Europe. The ECJ's cannot be negated by the German Constitutional Court. In this respect, the Constitutional Court's freedom of decision-making is realistically narrow. The Court will certainly maintain its "Yes, But" line of argument in the realm of European integration, pointing out as necessary the most powerful rights of codetermination and control. While the acquisition of government bonds through the European Central Bank – which is no German government body – empowers the critics, the ECB is liable only to the laws of the European Union. So it is quite unclear if the discretionary competence of the Constitution Court can be taken for granted, or if it must, and not for the first time, lay this legal issue before the exclusive jurisdiction of the ECJ. If no plan emerges, the Constitutional Court will most likely need to drop the suit in accordance with the ECJ's ruling – the ECJ has positioned itself clearly. Considering the European Treaties, the ECB is not under the control of the National Constitutional Court, per se. It seems difficult to demonstrate if an overstepping of jurisdiction is even unconstitutional. Even this interpretation of European law can be compatible with the constitution, because, upon closer observation, the authority of the ECB is legitimate, and in the purchase of individual euro states' bonds there can be no "erupting legal act."

Thus it no exaggeration to say that the EU finds itself on the way to becoming a community of liability, or that a clearer distribution of competencies – or possibly a new allocation of powers between the Union and its member states – must follow. The Union must be able to ensure the security of its member states' fiscal policy. To that end, it needs not only a clear jurisdiction, but democratic legitimacy as well. The expected decision of the German Constitutional Court is a central building block in the discussion over the continued existence of the Union, a Union that requires clearer legislative powers and must only supersede national law under decided circumstances.

Bibliography:

Website of the German Federal Ministry of Finance, gathered on 06.02.2013:
http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Stabilisierung_des_Euro/Finanzhilfemechanismen/2012-01-27-esm.html
Decision 2011/199/EU of the European Council on 25 March, 2011, on the modification of Article 136 of the Treaty on the Functioning of the European Union concerning a stability mechanism for member states whose currency is the euro, Abl. L 91/1.
BTDrucks 17/4880; BTPlenprot Nr. 17/96, P. 11015 C
Law regarding the decision of the European Council on 25 March, 2011, on the modification of Article 136 of the Treaty on the Functioning of the European Union concerning a stability mechanism for member states whose currency is the euro, from 13.09.2012 BGBl. II P. 1006 (Nr. 28); Page 978 et seqq., valid on 19.09.2012
German Constitutional Court, 2 BvR 1390/12 from 12.9.2012, Paragraph-Nr. (1 - 319), available at: http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012.html
German Constitutional Court, Statement Number 29/2013 from 19. April 2013, available at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-029
Ruling 339/2012 of the Irish Supreme Court v. 31.7.2012 - Thomas Pringle v The Government of Ireland, Ireland and the Attorney General, available at:
http://www.courts.ie/judgments.nsf/09859e7a3f34669680256ef3004a27de/e44922f2b6dbed2f80257a4c00570284?OpenDocument; Request for a preliminary ruling of the Supreme Court (Irland), submitted on 3. August 2012 - Thomas Pringle/Irish Government, Irland and the Attorney General, Cause C-370/12
Talmon, Stefan in F.A.Z. on 19.09.2012, available online at:
http://www.faz.net/aktuell/politik/staat-und-recht/euro-krise-unter-vorbehalt-11895967.html
German Bundestag, Print Item 17/10767 on 25.09.2012, with Germany's declaration as Item 1, available online at: http://dipbt.bundestag.de/dip21/btd/17/107/1710767.pdf
Stabilisierungsmechanismusgesetz - StabMechG from 22. 5. 2010, BGBl I, 627, last modified by Art. 1 Second ÄndG v. 23.5.2012, BGBl I 1166, for the performance requirement of financial assistance through the EFSF on a national level cf. law for the adoption of assurances with regards to a European Stability Mechanism
Act (EU) Nr. 407/2010 of the Council v. 11 May, 2010, for the introduction of a European financial stability mechanism, Abl. L 118/1.

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PRECAUTIONARY PRINCIPLE: RELIABILITY BEYOND THE LAW

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Abstract: The precautionary principle – that had been first defined at international level in the Rio de Janeiro declaration of 1992 and survives in the Maastricht Treaty and in that of Amsterdam – regards mainly the Protection of the Environment. The precautionary principle has then been used and applied to health issues of mankind, cattle and of plants. The jurisprudence at EU level has had the chance to take collective risks into account (e.g. ESB, transgenic corn, cosmetics, antibiotics, preservatives and feed). While a less and less fatalistic society like ours is ready to tackle safety and security issues on several levels, there remains juridical uncertainty about the government's liability when implementing wrong measures. A judgment on said level of liability strongly depends on how governments handle the proportion between possible risks and adopted measures, not to mention, how they go about finding an effective combination between what advantages should be sacrificed and the desired level of protection. To guide a government's choice of optimum between those elements, science comes into play. Therefore, faults in accuracy may leave significant gaps in the empirical method. The judge will have to reach his/her own reasonable and balanced decision from a combination of collective interests and collective health of mankind, cattle and plants. The precautionary principle shall be applied not only in presence of an uncertain risk vs. an uncertain benefit, but also in situations where an uncertain risk and a definite advantage apply. While science and collective action continue their quest for more safety and security, there is still great room for improvement on the legislative level and that of the jurisprudence.

Key words: the precautionary principle in international agreements, origin and provenance, international agreements, marrakech treaty 1994, agreement on the world trade organisation, the precautionary principle in eu law and practice, ce regulation 178/20022, the french example, eu jurisprudence as to collective risks, rio de janeiro declaration on biodiversity, 2002 biodiversity convention and cartagena protocol on biosafety, sps agreement within the marrakech treaty of 1994, helsinki convention on utilization of rivers and lakes 1992, danube river protection convention 1994, stockholm convention on persistent organic pollutants 2001, food safety and consumers' safeguard, environment, food and feed

1 INTRODUCTION

The precautionary principle in environment-related topics has been discussed countless times and might, therefore, seem to deserve a lesser attention compared to other subjects. An ongoing deficiency in a proper definition of the subject matter does not, however, escape the careful eye and mind. There is, in fact, a returning doubt on how to define the precautionary principle both in general and specific terms.

A principle is a universal rule, theorized by the human mind, by reason, reaching and generalizing solutions through abstraction. Again, a principle is a type of commonly accepted or universal law which has general features and is subsidiary in its functionality. It can, therefore counterweight the gaps left behind by the formal sources of law. In other words, a principle is what reason has recognized and later established by the legislator as foundation to its very provisions on which it rests its basic assumptions.

A general principle of law – in the classics – represents the highest level of legal reasoning because it disregards the fact that what is to be found is the guideline that points to what is right. That implies that the solution satisfying the needs of basic reasoning, allow us to establish that a non-written rule will adjust itself to those *specific* rules to solve a case that is not foreseen by the laws. Therefore it is safe to say that the solution is not so much a consequentiality following legal provisions, instead, it actually embodies the foundations on which it rests.

Among environmental law, three basic principles have come to be the guiding hand:

a) preservation of biological diversity for the sake of its intrinsic value;

b) dialectic method in assessing biological biodiversity preservation, meaning, adopting measures to establish the prevention and precautionary principle.

c) each person's or entity's liability in prevention or in compensating harm caused to biological diversity.

The precautionary principle redirects to prevention, harm compensation, preservation of biodiversity, health and – especially – refers to all types of legal liabilities to which all levels of government need to foresee when dealing with aspects of precaution. Biodiversity is everyone's heritage, and such legacy is comprised of environment preservation and that of species or plant varieties that don't carry economic value, yet. The risk of causing harm to this balance is very high and crucial, unlike other goods, species or elements that suffer none or little harm or can easily remain unharmed.

Through the precautionary principle, when an endangering or hazardous activity is being carried out, therefore threatening health or/and the environment, measures need to be taken *even if* the causal relation - which is deemed necessary for liabilities to be charged – is not corroborated scientifically in any way.

The community at large is obliged to set up any precautionary initiative in order to hinder irreparable harm. Therefore, before adopting new technologies, processes, actions or substances, the community has an obligation to verify all remaining and other possible alternatives, including that of taking no action at all. This principle is gaining momentum: biological diversity preservation is definitely the most urgent issue that mankind has to face and solve in order to set guarantee sustainability and this matter shall know no further procrastination.

Biodiversity has been defined as the biotic element of nature; the unbreakable bonding between abiotic and biotic comprehensive of its complexities, its daunting realities, its mysteries and obscurities.[1] More than twenty years ago, entomologist Eduard Wilson was well-known for his essential message stating "biodiversity means wealth". The community misconceived the message or the warning, turning it into an economical opportunity to pursue, rendering biodiversity as any other marketable good.

On the Sdvolbard islands – an area approximately 1000 kms from the Norht Pole - Dr.Cary Fowler, Director of the Crop Diversity Trust (an independent organization dealing with food varieties collaborating with FAO) drilled a cave in the mountain in order to preserve – virtually, forever – more than 4.5milion varieties. This facility also hosts approximately 1400 genetically relevant and endangered seeds, collected throughout more than 100 countries. This project is Dr.Fowler's commitment to biodiversity protection. [2]

Even though this initiative may actually feel reassuring in some way, it shall be recalled that in principle this is not a solution to the main problem or, to the ongoing erosion of sustainability: that is, preserving countless types of seeds in only one site suggests a safeguard measure rather than a precautionary measure.

Therefore, in this dramatic scenario, a real call for action on precautionary measures able to avoid harm to the environment and to biodiversity is really the only way forward, or better said, the only rope that keeps us connected to our present and past. The limits of application of the precautionary principle, however, require a static analysis of its legal definition: how it originated, evolved and how it will be understood and implied in the future.

Having said this, I shall try to convey an abstract principle as that of precaution, to a more tangible concept: for starters, the very term "precaution" must be analyzed and it is unanimously recognized that "precaution" stems from the general legal sphere and later has been used in environmental affairs. The fact that a principle carries mainly universal features can lead to a lack of applicability, therefore requiring an *ad hoc* legislation to see it "come to life". This is not unknown to

[1] MARTINEZ E., *Biodiversidad Suma Total de Vida, Colecion Banreservas,* Santo Domingo, 1977, 25; MARINI L.-PALAZZANI L. *Il principio di precauzione tra filosofia, biodiritto e biopolitica*, Milano, 2008; LUCCHINI L., *Le principe de précaucion en droit international de l'environnement:ombres plus que lumières*, Ann. Francais de droit international, 1999, CNRS, Paris, 723; PRIEUR M., *Le principe de précaucion*, www.legiscomparé.fr/site-web/IMG/ 2-Prieur.pdf.; LEBEN C: -VERHOEVEN M*., Le principe de précaucion- Aspects de droit international et communautaire*, Panthéon-.Assas, Paris II, Paris 2002

[2] According to official data, there are more than 200k types of wheat, 47k of sorghum, 30k of corn and 15k of peanuts

most legislations where the constitution being the founding charter of a sovereignty, necessarily implies including its principles in an actual conversion: applicable laws.[3]

In order to correctly interpret and apply provisions that are inspired by general principles – as the precautionary principle – one must acknowledge its basic meaning and, subsequently, its substantial meaning and then its boundaries or limits.

In refraining from drawing a preemptive conclusion, one can say that the precautionary principles' limits, its legal framework, the liabilities within and around it derived from its exercise, are all confirmed within. With this in mind, I would like to quote what Zeledon has so attentively made his conclusion through the study of the subject: "damages for civil liability is not enough [and] it must be made unquestionable that harmful crops must be avoided". Although this very concise statement echoes in all of us as remarking a doubtless principle, the aspects of liability for environmental damages is not so effortlessly verifiable in the law as we know it. In a commonly used legal perspective, if a liability is acknowledged, by logic a liability for a related harm is out of the question. In fact, this reasoning is derived by standard elements of legal principles:

a) a fact or an action
b) fault or malice
c) harm or a factual, potential detriment, and
d) causality between the above

In the "standard" framework of liabilities, the abovementioned elements must be present, even if they are hard to pinpoint because the victim suffering any harm is not an individual but the entire community. Therefore, calculation for a certainty of indemnification becomes extremely hard to estimate. And if it can be assessed, it would only regard very few cases indeed. On the other hand, if those elements cannot be ascertained, no liability can be established because no offender can be charged.

Non biodegradable waste (organic or plastic-based) or chemical residues dumped in lakes, seas and rivers certainly does not solve the problem, for starters, because it takes unreasonable time for these elements to defragment and be absorbed by nature. Moreover, most of the times these condemnable actions could not be significantly be punished because of a lack of specific regulation.

2 THE PRECAUTIONARY PRINCIPLE'S ORIGIN

It is well-known that the principle's origins date back to the German culture of the Seventies when acid rain destroyed an enormous part of the Black Forest – (*Schwarzwald*). A German philosopher[4] and another German sociologist[5] publicly condemned the perpetrators – those who generated the acids that rise to the clouds and eventually return in precipitation – and called for a collective action: more community-initiative driven activities, informative seminars and campaigns. Sometime later, they also pushed jurists to draft the foundations for what nowadays is known for liability in case of harm to the environment.

Jonas, the philosopher, tries to pinpoint and isolate this "new" kind of liability that, of course, did not coincide with other known types of liabilities of the legal world. But the basic process for creating a framework for such liability posed no big trouble: given an industrial, agricultural or any activity (subjective) or facts (objective action), these can be easily connected to a person or an entity. The rest is obvious: a legally meant liability only exists if the action can be connected to an activity or to a faulty action and as such, they exist only after they have been put into action.

[3] article L.200-1 of the French Rural Code requires that the implied principles shall be applied abiding the laws that regulate its practical contents.

[4] JONAS H., *Technology and Responsibility: The New Role for Ethics*, in 40 Social Research, 31 (1973); ID:, *The Concept of Responsibility: An Inquiry into the Foundations of our Age*, in H.T. Engelhardt, D. CALLAHAN (eds)., *Knowledge, Value, and Belief, Hastings on Hudson*, NY, 1977, 1; JONAS H., *Il Principio di responsabilita*. *Un'etica per la civilta' tecnologia*, Torino, 1900; PELLEGRINO (a cura di) *Hans Jonas: natura e responsabilita*, Lecce, 1995.

[5] BECK U., *Risikogesellschaft, Auf dem Weg in eine änderne Moderne*, 1986, Munich.

Again, Jonas, tries to identify a moral liability instead: the law needs to find criteria through which it can impose restrictions or highlight tolerance but mostly contain the ever growing and powerful flow and stream of technology in light of the harm it *could* cause.[6]

That is when Jonas speaks *inter alia* about topics such as nutrition, natures' exploitation and highlights processes that have already taken place, compared to those that are in place to enact caution for the latter: "*the best side of courage and – in any case – some order in the issue of liability*".

The *Verantwortungsprinzip* idealized by Jonas does not foresee traditional (legal) liability because that only addresses activities in progress or have been already carried out. His principle mostly touches the public sphere: the community at large, comprehensive of local or national government. They are all bound to find more or less efficient techniques that could help the now and in a provisional fashion. In brief, the German philosopher has shed light in stressing that we should care more about the aftermaths rather than satisfying each and every one of our desires. In other words, we should not allow fear to lead us away from good and precautionary actions which may indeed make us feel closer to the factual realization of a sustainable future.

Beck, who was a sociologist and an economist, believed that the global community should reconsider the powers it holds within, and reorganize them guided by their conscience. The empirical or scientific rationality that is firmly set on the belief that it can objectively evaluate a risk, should go hand in hand with a social rationality so that *"scientific rationality without social rationality would be void; but the social rationality without the scientific rationality would be blind".*

The goal of the antithesis between nature and society includes environmental issues and the daunting nature's catastrophes also constitute social problems that surface well before science can evaluate them. Beck states that scientific rationality should not be the decisive decisional tool in the process of description and findings of a risk, because in lack of social rationality, the power of legal and political intervention may not be completely efficient or even adequate to the circumstance. In his point of view, contemporary societies are *risk prone societies* and the very idea of progress is doubtful and questioned: the precautionary principle should be in the spotlight of today if only it didn't interfere so greatly with commerce and production.

From a political point of view, these social and philosophical streams of thought come to be, as said before, in the Seventies, during a precise action plan called *Vorsorgeprinzip* meant to try to solve the environmental problems through massive planning through which the government was called in to take action by issuing administrative bills to ensure satisfactory measures to tackle environmental crisis and favor the environment at large.

The *Bundesimmisionsschutzgesetz* and the *Bundesnaturschutzgesetz* respectively dated 1974 and 1976 embed the *Versorgungsprinzip* which sets out the guidelines and inspiring principles for policy makers and enforcement entities, in the fight against unregulated polluting. In 1984 during the an air quality panel's presentation, the German executive power presented a report to its Parliament in which various scenarios were represented and explained. The main objective of this report was to remind the present players in the industry of what kind of liability was lying ahead for the future generation's wellbeing and its sustainability. It was also emphasized that one of the major causes for future disruption of nature's stability was, among others, deforestation and any activity thereto related. In that paper, the *Vorsorge* principle was greatly articulated, in the sense that it embeds the moral encouragement and factual pursuit to put all known measures in place, that can avoid harm to the environment by encouraging a systematic action plan to find, report causes for harm to nature. Even if the word and concept within has stemmed from philosophy and sociology in Germany, the pressure put onto the related topics of environmental care and preservations unlocked international conventions such as that of the North Sea (in Bremen, Germany) of 1984 and in London, in 1987.

3 THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL AGREEMENTS

The first international agreement in which the precautionary principle was welcomed, is the Rio de Janeiro Biodiversity Declaration (1992)[7]; the International Convention on Climate Change

[6] MUMFORD L. *Technic and Civilization*, NY, 1934; ELLUL J., *La technique ou l'enjeu du siecle*, Paris, 1954

[7] The principie 15 of the Declaracion provides that "in order to Project the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where

(1992) and the Convention on Biodiversity (2002) and its Protocol, the latter, known as the Cartagena Protocol.

The principle was, unfortunately, used and implied as a conditionality, lacked in mandatory strength or meaning. However, the inclusion of this principle within these environment-related agreements was still a rather positive achievement.

In the SPS Treaty of Marakesch (1994) which envisaged food and feed safety, the international legislator listed which were to be considered the health measures that can be used in order to guarantee health for humans and animals and wellbeing of plants, resting on scientific principles that any legislator may use to build relatively effective policies for better understanding and serving the purpose of keeping the environment protected.

International standards decided by international laws are the founding criteria for health protection of mankind, animals and plants: only a recognized scientific discovery could allow a limitation of said standards. These restricting measures are admitted if proportionate to the harm suffered by the environment and should be temporary.

This restrictive interpretation of the principle, by the SPS Agreement has been restated in the dispute between the EU and the USA over bovine meat filled with hormones: both the *Panel* and the *Appellate Body* have, in some way, recognized the importance of certain procedures of risk evaluation, admitting the relevance of the precautionary principle and of it being fit enough for international law's attention. At least, the principle has gained visibility and an established role as legal international custom.

The Cartagena Protocol can be seen as the first international agreement aiming at calibrating the transnational transportation of GMOs in which, the precautionary principle is emphatically stated.

This Protocol treats transgenic differently: those that are meant for use in the environment and those going directly to the end consumer. As for the first, the exporting country needs to inform the importing country the intention of sending transgenic goods, offering detailed information about the product. As for those products meant for the end consumer, it shall suffice to notify the exportation through the Protocol's portal on the Web that the outgoing products *may* contain transgenic elements.

There are also a few more international Conventions that have favorably welcomed the insertion of the precautionary principle. Just to mention some: the North Sea Convention (Helsinki 1992); the Helsinki Convention of utilization of rivers and lakes (1992); the Atlantic Convention on North and east (1992); the Danube river Convention (1994); the Convention for the fight against deforestation in areas with severe drought (1994); the UN fish stock agreement (1995); Stockholm Convention on persistent organic pollutants (2001); the convention on marine protection and development of the North East Pacific coast (2002); the Montreal protocol for sustainability and urban water (2000); the ASEAN Agreement on transboundary haze pollution (2002); the African Convention on natural resources, the environment and development (2003).

None of these international conventions adopt "clear" or standardized definitions when it comes to the precautionary principle. What is sure, is that the more conventions and agreements carry the basic traits of, and give recognition to the precautionary principle, the better the overall impact of its founding elements can influence conventions and measures thereof.

In the clear view of Zeledon, while emphasizing the importance of agrarian law, stated how important the union for agrarian law is and how "it constitutes a rather new safe harbor for the needs of an agriculture that is free from contaminants, not polluting and is developing in harmony with nature's resources, using but not abusing of the goods given to us by nature".

Especially, with regard to the precautionary principle I strongly agree with Zeledon [8]when he states that with balance in society, in economy and in the environment, agrarian law can resume its role and prestige within the legal system, allowing it to pursue its goals of protecting nature and mankind.

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there are traits of serious or irreversible damage, lack of full scientific certainty, shall not be used as a reason for postponing cost-effective measures to prevente environmental degradation".

[8] ZELEDON ZELEDON R., *Derecho agrario. Nuevas dimensiones*, San José, Costa Rica, Investigaciones Juridicas, 2008

4 THE ACCEPTANCE OF THE PRECAUTIONARY PRINCIPLE IN THE EU LAW

If in Europe the environment and its protection are considered without any doubt the sector of intervention of the law where the principle of precaution is most important then, approximately in the year 2000 this type of priority has also been used fro the food and feed sector.

On January 13th, 2000 the EU Commission has adopted the white book on food safety to promote safety for the EU consumers on food through the establishment of laws of international level. The white book proposes an action plan similar to those measures that have been used for food safety. Moreover, on 7-9 December 2000, the EU Commission has adopted a Communication on the precautionary principle to share all the means by which the principle of precaution can be adopted, statuing that the principle is not only applicable to the environment but also to the human health to the zoo and phitosanitary fields.

In this document some elements that constitute the principle of precaution come together: the Commission finds many similarities with the prevention principle, however, differing from the latter, the precautionary principle can be applied only when there is no scientific certainty for risk for the environment which would be the consequence of a fact or of an activity. The prevention principle foresees that the authorities are obliged to safeguard and adopt measures relating to the goods and people within their jurisdiction in order to ensure that normal conditions persist without risks and don't determine "transnational harm".

This kind of commitment of safeguarding is constituted by minimum standards of behavior and diligence that are internationally recognized. The precautionary principle does not require authorities "to act or to do" but to follow criteria of diligent administration and to take preemptive measures before facts occur and in case there is doubt for risks. The precautionary principle may also apply restrictive measures even when these may seem too far ahead than what the actual reality seems to present.

The institutions of the Community and the governmental authorities of EU member states may adopt measures when scientific data show the existence of legitimate doubt of the existence of negative consequences on the environment caused by a hazardous event or by the circulation of a certain food or feed.

In its Communication, the Commission also adds that by adopting these measures, the authorities need to agree upon a proportionality criteria between measures and harmful and negative consequences that may result from an ineptitude of those institutions and entities who are legally liable. Actually, the prevention principle is well established in international law an the legal systems of the member states of the EU whereas the precautionary principle, given its more recent introduction in the international legal framework, still follows its formative path envisioning a soon to come complete legal recognition.

In the precautionary principle, unlike the prevention principle, the authorities do not adopt measures because of mandatory provisions but because precaution seems the only way to gain advantage on facts that may harm the environment and the people if not addressed in time.

In the event that an activity may be deemed harmful, authorities can adopt limiting measures to certain industrial behavior, even if by posing limitations they may fall in error. In the communication of February 2, 2000 the EU Commission declared that the principle of precaution is not mentioned in the treaty of Rome which, instead only is quoted in relation to the protection of the environment.

The application scope of the precautionary principle should be deemed as much broader because it should be used in each case where scientific evaluation states a minimum doubt on risks to mankind, animals and plants. This could be incompatible with the high level of protection that the EU has chosen (higher scientific data rather than mere doubt).

The EU Commission highlights the importance of the fact that the institutions, in lack of scientific proof of the existence of the relation between the cause and effect, they shouldn't use it to justify a lack of action and even if the scientific opinion that has rendered, is supported by only a few of the scientific community it must be taken in to consideration. Moreover, for the applicability of the principle, the Commission foresees 5 standards that, if not abided by, could imply illegitimate usage of the precautionary principle:

a) the first criteria is proportion between measures that have to be adopted and the level of protection that derives from having ascertained the risk through scientific data before adopting or using the measure: through this criteria, a full limitation may result proportionate in case of a high risk that apparently is not even temporary. In any case, it should be kept in mind that a balance must

be found between preserving the right to innovate (and calculated collateral) and determining risks for the environment and for health.

b) the second criteria establishes that there shall be no discrimination for those whom limitations are set upon through the precautionary principle's measures.

c) the third criteria takes into consideration the verification of the coherence of the measures that need to be compared to those that have been adopted in similar approaches.

d) the fourth criteria is based on first evaluating the advantages of the costs and the actions and of the lack of action analyzing the efficiency, the social economical impact in relation to the measure that is about to be adopted.

e) the fifth criteria is that of obliging the institutions of the member states to self assess a measure in order to optimize its adoption in the future and to contribute to its scientific background in relation to the risk to which the measure pertains.

The adopted measures should be provisional while if there is no strong scientific data and the risk considered is too elevated to be imposed upon society, scientific investigation cannot stop and the measures adopted need to be revised with respect to the scientific knowledge available.

The possibility to invert the burden of proof for whom is interested in not adopting a measure that is fully or not entirely limiting, should not be foreseen as a general principle when considering the uncertainty of the risk.

Refraining from attaching importance of general principle to this kind of obligation, this possibility needs to be taken into consideration: when a measure is adopted with precaution while more and other scientific date will arise to allow those who have economical interests in production or in commerce or in implementing a procedure, to finance a project, on a voluntary base.

The EU Treaty has introduced the principle of precaution within those that constitute the legal framework of the Community and of the protection of the environment (art.174-2 Maastricht and 130 Amsterdam).

Also, notably, the precautionary principle has had important development when its founding fathers had to decide whether to keep the principle in the environmental area or, to also extend to the protection of health.

This "extension" has been recognized through a decision of the 1st instance Court in decision of 16/07/1998 (c.199/96) and confirmed by the EU Court of Justice in the decision 4/07/2000 (C-352/98 P) in a case involving cosmetics. In a nutshell, these decisions addressed consumers' health by stating that the protection of consumers' health needs to be protected from risks even when the environment is not at stake and subsequently the institutions may adopt protective measures without having to expect that the risks need to be scientifically confirmed.

When considering Community law (art. 130 Amsterdam and art. 174 Maastricht CE) it is safe to say that more than one points of view are being considered with regards to the extension of the principle to other sectors like that of health.

On one hand, the fact that the precautionary principle is included in the EU chart, automatically this foresees inclusion in the health protection area; on the other hand, the possibility is foreseen that the member states of the EU applied their safeguard clause, meaning the possibility ot adopt provisional measures when these are likely to be adopted in specific situations.

In other words, what has to be stressed is that, the precautionary principle has entered the EU Constitutions not only to lead the EU institutions in this area, but also to help them in the evaluation process of risks with regards to the proportion of the adopted measures. The judges of the EU member states may decide differently from EU institutions when scientific uncertainties arise.

These short notes explain how Community law before Reg. 178/2002 the EU Court of Justice had the chance to render a decision in relation to the measures of precaution the Commission had taken when the first case of BSE arised (ruling 05/05/1998 180/98). In that occasion the EU Court of Justice stated that "*it must be admitted that, when there are uncertainties with regards to the existence or the effects to the risk of people's health, the authorities* may *adopt measures for protection without needing scientific confirmation or approval".*

In Reg.178/2002 the European legislator introduced for the first time in a bill the definition of the precautionary principle even if in that text no clear-cut definition is rendered or a conceptualization is given, but only a description of the measures the authorities need to adopt in case of risks.

Art. 7 of the Regulation qualifies the precautionary principle as a non-binding provision: "*in the situation of scientific uncertainty, provisional measures may be adopted to manage the risks".*

The inclusion of the precautionary principle in such relevant documents finally upgrades the general level of influence and appreciation of the principle leaping from a mere sociological level to a more formal and legal level. Therefore, every time there is a new risk, before taking the measure, it is necessary to analyze the interests really at stake.

5 REGULATION (CE) 178/2002

The European legislator has defined the precautionary principle in art. 7 of the Reg 178/2002 in regard to the principle and the general requirements of food legislation.[9] Therefore, this is the only definition of the precautionary principle in EU law. In the provision the regulation seems to fall into contradiction between the mere description of the principle and its binding nature, meaning that the measures of precaution may and do not *have to* be adopted, hence this provision seems to be in contrast with the spirit of the EU Treaty which, in art.174, when mentioning the EU policy for the environment, declared that it has to lean on the precautionary principle.

In this scenario we must verify if there actually are specific binding conducts to be held by the Community authorities that can be brought back to this provision. Actually and up to now, there aren't any specific provisions and the political awareness for the environment and biodiversity is the only lead to the precautionary principle.

6 THE FRENCH EXAMPLE

In France the precautionary principle has triggered a lot of attention and has many followers among which the legislator who introduced laws directly refer to the principle. Art. L.200-1 of the Rural Code pertaining the protection of the environment and, currently codified under art. L.100-1 of the Environmental Code foresees that any measure enacted in favor of the environment shall be inspired by the precautionary principle.

The precautionary principle in France has been upgraded to Constitutional level in art. 5 of the Constitution dated 01/03/2005. The public authority has to safeguard the precautionary principle and by exercising its powers, it needs to verify the procedure for the adoption of provisional measures and whether they are proportionate to the existing harm. In other words, it is once more confirmed that, also in the French system, the precautionary principle is enacted when the risk has not yet been ascertained and the adoption of measures is only in the hands of the authorities that rarely are in the capacity to adopt measures, verify and corroborate suspicions especially because the habits of the citizens alone, that are not always eco-friendly, are not very popular.

Moreover, authorities will adopt measures for application of this principle, treating risks on a case to case basis because for every kind of risks it is necessary to consider the specific interests of what is at risk.

In France the qualification of the precautionary principle and its legal resonance have initiated several arguments between people of the law and economists. To this extent we must mention Olivier Godard and Lorence Boy. The latter defines the precautionary principle as an evaluative criteria of an uncertain risks but a possible risk, in order to favor prevention of a severe and inevitable danger through the adoption of revisable and proportionate measures. Godard's vision is a typically political point of view that can be defined only by the Parliament. Unlike Godard, Boy's view differs and supports the legal feature of the principle in consideration of the fact that the law is not only a mandatory system of rules: along with mandatory rules also voluntary behaviors exist and can be enacted by any entity or citizen keeping in mind while in consideration of the ability to activate a natural principle in favor of a sustainable environment just like contractual situations which actually are not any less mandatory than the law.

By mentioning the ruling Rossi (1995) and Greenpeace (1998) Boy underlines the legal value of the principle. In France, the precautionary principle has been "admitted" to the legal framework through law Barnier N.95-101 of February 2, 1995 regarding the strengthening of the protection of

[9] SADELEER, *Le statut juridique du principe de précaution en droit communautaire*, in Cahier de droit européen, 2000, 91;DOUMA, The EU and the Precautionary Principle, in Review of European and Community International Environment Law, 200, 152; PARDO LEAL, *La aplicación del principio de precaución del Derecho del medio ambiente al Derecho Alimentario*, in Alimentaria, n. 301, 1999, 19; PALLARO, *Il principio di precauzione tra mercato interno e commercio internazionale: una análisis del suo ruolo e del suo contenuto nell'ordinamento comunitario*, in Dir. Comm. Internaz. 2002, 15

the environment; it has then been codified in art. L.100-1 of the Environmental Code, as mentioned above, and was finally also included in art. 5 of the Constitution dated March 1, 2005.

In light of these legal premises an administrative judge in France therefore ahs the power to invoke these provisions. In reality, by observing jurisprudence it looks like the constitutional principle and the precautionary one has not yet ben applied and the judge has displayed great difficulty in building upon this principle as legal principle of determination and basic orientation.

This is indeed a difficult path for the precautionary principle and also a very slow one, because they evident lack of consistency of opinions among policy makers in the environmental sector.

Therefore, the French administrative becomes one of the main actors in the politics of risk and acts also as a referee between the measures the authority has adopted and the compromised economical interests somehow bound to those measures. Even more so, the entire field where the precautionary principle lies is extremely delicate because the measures adoptable by the administration could limit individual liberties, freedoms, ownership and therefore the judge of the Conseil d'Etat is deemed extremely valuable. Even the Supreme French court seems to be interested in the subject of precaution to the point that many high-level judges have been discussing whether or not to develop a specialized section of that very court in order to address questions and matters of liabilities in this field and to also address "social safety"[10].

7 CONCLUSION

After these considerations we have to recognize that although the precautionary principle came into the limelight in the '70 , in fact, as it has been backed up[11], is part of the big myths and is old like the world because it is the expression of the popular wisdom, which in the face of danger or of risk prefers to choose the precaution and not the impudence which could have irreparable consequences.

Originated as a determined criterion of prudence, and afterwards identified as a principle without legal effect, finally this is acknowledged in the legislation of the EU and of France.

It is also to notice that if the precautionary principle first of all spread in the field of the environment easily was extended to health issues of mankind, cattle and of plants.

It seems that only trough a lengthy but constant development of the precautionary principle, EU jeurisprudence has taken "collective risks" into account (e.g. ESB, transgenic corn, cosmetics, antibiotics, preservatives and feed).

While a less and less fatalistic society like ours actual is ready to tack safety and security issues on several levels, juridical uncertainty remains about the government's liability when implementing wrong measures.

A judgment on said level of liability strongly depends on how governments handle the proportion between possible risks and adopted measures, not to mewntion, how they go about finding an effective combination between what advantages should be sacrificed and the desired level of protection.

To guide a government's choice of optimum between those elements, science comes into play. Therefore, faults in accuracy may leave significant gaps in the empirical method. The judge will have to reach own reasonable and balanced decision from a combination of collective interests and collective health of mankind, cattle and plants.

The precautionary principle shall be applied not only in presence of an uncertain risk vs. an uncertain benefit, but also in situations where an uncertain risk and a definite advantage apply. While science and collective action continue their quest for more safety and security, there is still great room for improvement on the legislative level and that of the cases law.

[10] FRISON-ROCHE M.A., *Droit et Patrimoine* n.124, March 2004, p.88 which, when speaking about risks, affirms that if the law needs to manage risks, a more abstract concept of the law's objectives must be adopted. That means not only mere risks will be addressed but these risks will be elevated or treated as a legal category.

[11] PRIEUR, *Le principe de précaucion*, already cited

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ACTION FOR ANNULMENT – SUFFICIENT MEASURE AGAINST ABUSE?[1]

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Abstract: The aim of this paper is to find out if the action for annulment under Article 263 of the Treaty on Functioning of the European Union gives sufficient safeguards against abuse in the context of inspections performed under Regulation 1/2003. This analysis is based on rules and practice given in recent case-law of the Court of Justice of the European Union, particularly in Nexans, Prysmian and Deutsche Bahn cases. The extent of judicial review is scrutinised vis-à-vis requirements based on case-law of the European Court for Human Rights.

Key words: European Union, European law, action for annulment, General Court, inspection, competition law, Convention for the Protection of Human Rights and Fundamental Freedoms, Charter of Fundamental Rights of the European Union, European Court for Human Rights, safeguards against abuse

1 INTRODUCTION

By the Charter of Fundamental Rights of the European Union (hereinafter "Charter") the European Union presents its own catalogue of human rights and freedoms. However, this catalogue is not totally genuine and is derived from the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention") and constitutional traditions common to the Member States. This link to older catalogues is stressed in the interpretation provision of Article 52 of the Charter. Thus the case-law of the European Court of Human Rights (hereinafter "ECtHR") is a relevant source for interpretation of the Treaties and the Charter under the provision of Article 52(3) of the Charter as well as it shall be directly taken into account as soon as the Convention becomes binding for the EU. After becoming a party to the Convention the EU will be bound by the Convention not only in interpretation of the EU law but also the EU legal order will face scrutiny of its compliance with the Convention.

The right of the individual to be protected against actions of public authorities (*status negativus*) shall be guaranteed *per se*, so there shall not be given reasons why not to interfere with them.

One of the basic rights of this group is the right for protection of privacy and protection of inviolability of home (Article 7 of the Charter[2], Article 8 of the Convention[3]). Since the formulation of Article 7 of the Charter and Article 8(1) of the Convention are identical, it is clear that the interpretation shall be the same and case-law of the ECtHR in this issue is applicable. Further more, the EU legal order and practice of its institution shall, in case of interference of such right, withstand the scrutiny of Article 8(2) of the Convention. This test will be analysed in this paper on the example of inspections in competition matters.

On-the-spot investigations (inspections, dawn raids) are nowadays indispensable tools in the portfolio of investigation power of competition authorities. This power is very efficient in order to seize documents and get information of the undertaking regarding anticompetitive behaviour that the undertaking would not be normally willing to provide, and furthermore, it is also not obliged to

[1] Preparation of this paper was supported by the grant VEGA No 1/0895/11.

[2] Everyone has the right to respect for his or her private and family life, home and communications.

[3] Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

provide it because of the right to not self-incriminate. On the other hand,an inspection is rather "uncomfortable" intrusion of the private sphere of undertaking and therefore violation of the principle of "inviolability of the home" became common objection against inspections carried out by competition authorities. It is not the aim of this article to analyse differences, if there are any, between rights of natural persons and legal persons (undertakings) under the human rights conventions and charters and for the purposes of this paper the right of "inviolability of the home" shall be deemed having the same content regarding natural persons as well as legal persons.

Therefore inspections can be considered intrusion in the home and that is why three conditions of legality of interference with the right to the protection of the private sphere by the public body shall be met: it must be based on the law, it must have a lawful purpose and there must be protection against abuse.

The right to carry out inspections is based on Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 EC and 82 EC (OJ 2003 L 1, p. 1) (hereinafter "Regulation 1/2003") that provides rules regarding authorisations for an inspection, issuing decisions ordering undertaking to submit to an inspection, as well as rights of inspectors during the inspection. The basic and only aim of the inspections is to find evidence of violating of competition rules in order to enable the competition authority to limit and prosecute such undertakings' activities. Protection of competition as one of the policies ensuring proper functioning of the economy is considered a lawful purpose for interference with the individual's rights as it was clearly stated in *COLAS* case[4]. Whereas the fulfilment of the first two conditions for legal intrusion into privacy by the public authority via an inspection carried out by the European Commission (hereinafter "Commission") seem to be satisfied, fulfilment of the third condition (protection against abuse) depends upon applying the principles of non-arbitrariness and proportionality.[5]

The aim of this paper is to find out if the action for annulment under Article 263 of the Treaty on Functioning of the European Union (hereinafter "TFEU") gives sufficient safeguards against abuse in context of inspections performed under Regulation 1/2003.

2 ACTION FOR ANNULMENT

2.1 General observations

The action for annulment is the only measure that can be filed with the European Court of Justice by natural and legal persons in order to avoid interference with individual's right and freedoms by the EU institution. The other type of action designed also to protect individual's rights – proceeding for failure to act – does not seem to be suitable as an effective measure against interference into individual's rights or freedoms. Furthermore, the action for damages cannot be used as a tool for protection but merely for recovering damages caused by such interference.

Under Article 263 (4) TFEU any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and regulatory act of direct concern to them that does not entail implementing measures. The interference into individual's rights regarding protection of privacy and home will be usually done by an "act" according to the first part of the sentence than by "a regulatory act".

Article 263 TFEU does not define the term "act" as well as does not limit actionable types of acts for the case of proceeding initiated by a natural person or a legal person. Article 263(1) TFEU gives rather complex enumeration of such acts:

- legislative acts
- acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions
- acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties
- acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

[4] *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III

[5] F. Arbault, E. Sakkers „Cartels" [in:] J. Faull, A. Nikpay, (eds.), *Faull & Nikpay, The EC Law on Competition*, 2nd edition, New York 2007 , p. 894.

The only act mentioned in the TFEU that can be addressed to natural or legal person, other than recommendation or opinion, is decision. This does not preclude from filing action against whatever measure notwithstanding how it is labelled. The case-law, however, on the one hand explained the notion "decision" or "act" in broader way, on the other hand some classes of decisions or acts were excluded from judicial review.

The action for annulment is available against all acts adopted by the institutions, whatever their nature or form, which are intended to produce binding legal effects capable of affecting the interests of the applicant or its legal position. The evaluation of the admissibility of an action for annulment is, therefore, based on objective criteria relating to the substance of the contested measures.[6] Thus the notion "decision" can also include measures that are not labelled as a decision but have a legal binding effect and are addressed to an individual. A special form of such a measure is a "tacit decision", i.e. physical acts or behaviour of employees of the institution within the institution's powers that is intended to change legal status of an individual or producing other legal effects.[7] The condition of producing a legal binding effect is crucial and therefore a written expression of opinion by a Community institution does not constitute a decision that would be likely the subject of an action for annulment, since it is neither likely nor intended to produce legal effects.[8]

On the other hand, there could be a group of measures that even labelled as decisions are not actionable. Only those acts and decisions that (1) produce a legal effect as to applicant's interests, (2) change applicant's legal status or (3) significantly change legal situation thereof, can be subject of an action for annulment. Thus when the adoption of an act or decision involves several phases, in the principle, only the act that finally lays down the position of the institution is challengeable by an action for annulment. Therefore intermediate measures, purpose of which is to "pave a path" to the final decision, are excluded from the judicial review[9]. Furthermore, because of the lack to produce a binding effect also following acts are excluded from judicial review: confirmatory acts and acts of pure performance, simple recommendations and opinions and, in principle , internal instructions[10].

2.2 Challengeable "decisions" in antitrust matters

During the investigation of antitrust infringements (violation of Article 101 or 102 TFEU) several types of acts can occur. It is clear, that proceedings under Regulation 1/2003 involve several phases.

First, intermediate measures during the investigation are not subject to judicial review. Neither the preliminary observations made by the Commission during the initiation of proceedings for a declaration of infringement of the competition rules, nor preliminary observations included in statement of objections could be considered decisions against which an action for annulment is available.[11] Under the case-law, refusal to give addressees of statement of objections access to all the documents forming part of their case is not likely to produce legal effects which could affect the interests of these companies, before any intervention of a decision finding an infringement of the TFEU, even one of the fundamental principles of Union law is the right for the defence in any proceedings which might lead to penalties. If such a refusal to grant access constitutes a violation of rights of defence, it shall entail in unlawfulness of the whole procedure and therefore the Commission shall repeat the procedure or drop the sanction. [12] Thus the addressee of the final decision has very few possibilities to protect its procedural rights during the investigation and proceeding earlier than after adopting the final decision in the case.

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[6] See e.g. case C-314/11 P *Commission v Planet* [2012], par. 94-95

[7] See e.g. joined cases T-125/03 and T-253/03 A*kzo Nobel Chemicals and Akros Chemicals v Commission* [2007] ECR II 3523, par. 55

[8] See e.g. case 133/79 *Sucrimex v Commission* [1980] ECR 1299

[9] See e.g. joined cases T-32/89 and T-39/89 *Marcopoulos v Court of Justice* [1990] ECR II 281, par. 21, Order of 5 July 2001, case T-55/01 R A*SAHI VET v Commission* [2001] ECR II 1933, par. 61-62 , 67.

[10] See e.g. case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I – 7795, par. 54-55 , 58 , 61.

[11] See e.g. T-36/92 *SFEI v Commission* [1992] ECR II -2479

[12] Joined Cases T-10/92 , T-11/92, T-12/92 and T-15/92 *Cimenteries CBR vCommission* [1992] II - 2667, par. 28 , 42, 47-48.

On the other hand, an undertaking can even object some of "procedural" intermediate measures and decisions, in order to protect its rights, e.g. privacy. The action can be raised against the decision ordering to provide information under Article 18 of Regulation 1/2003[13] . Furthermore, the action for annulment is also available in case that the Commission includes into its documentation documents that allegedly bear information- or content of communication between the undertaking and an external lawyer (legal professional privilege). This type of decision can be issued in written form or can occur *via facti* by physical acts of Commission's inspectors ("tacit decision").[14]

Finally, the decision ordering undertakings or other persons to submit to the inspection performed in their premises can be challenged at Court of Justice of the European Union under Article 20(8) and 21(3) of Regulation 1/2003[15]. Furthermore, in cases T-135/09 Nexans France SAS, Nexans SA v European Commission[16] and T-140/09 Prysmian SpA, Prysmian Cavi e Sistemi Energia Srl v European Commission[17] the General Court dealt, *inter alia*, with the question if performance, requests or orders of inspectors during the inspection can be subjects to action for annulment. [18]

2.3 Nexans and Prysmian case – legal and factual background and question in issue

By Decision C (2009) 92/1 of 9 January 2009, the Commission ordered Nexans and all companies directly or indirectly controlled by it, to submit to an inspection in accordance with Article 20(4) of Regulation 1/2003 During the inspection in the question the inspectors of the Commission inter alia examined the content of the computer hard drive used by one of the employees of the inspected company and recovered a number of files, documents and emails, in their opinion relevant to the investigation, which had been deleted during the investigation and copied two sets of emails onto two data-recording devices ("the DRDs") and also copied a set of emails found in another employee's computer onto two DRDs. Those four DRDs were placed in envelopes which were sealed and then signed by one of the applicants' representatives. The inspectors decided to take those envelopes back to the offices of the Commission in Brussels and informed the inspected company that they would notify them of the date on which the inspection would be continued. The inspected companies stated that they would prefer any inspection of the employee's hard drive to take place at the premises of Nexans France, rather than in the Commission's offices. After the return of the inspectors to the premises of the inspected company they opened the sealed cupboard containing the DRD found in the office of the former of the employees and his computer, inspected the DRD at the premises of the inspected company, printed and kept two documents extracted from the DRD and returned it to the inspected company's representatives. Consequently they made three copy-images of the hard drive of the employee's computer on three DRDs, gave one of the three DRDs to the inspected company's representatives at their request and placed the other two in sealed envelopes which they took back to Brussels, after taking formal note of the fact that the applicants disputed the legitimacy of that procedure. The inspectors stated that the sealed envelopes would only be opened in the Commission premises in the presence of the inspected company's representatives. After all, the envelopes sealed at the premises of Nexans France and containing the DRDs were opened in the Commission's offices in the presence of Nexans' lawyers. The documents contained on those DRDs were examined and the inspectors printed out those which they considered relevant for the purposes of the investigation. A second paper copy of those documents and a list of them were given to Nexans' lawyers. The office in which the documents

[13] See Article 18(3) of Regulation 1/2003.

[14] Joined cases T-125/03 and T-253/03 Akzo Nobel Chemicals and Akros Chemicals v Commission [2007] ECR II-3523, par. 46-49 , 55

[15] The power of the Court of Justice of the European Union is exlusive, no other court is allowed to review Commission' decision on inspection.

[16] Case T-135/09. Nexans France SAS and Nexans SA v European Commission [2012].

[17] Case T-140/09. Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v European Commission [2012].

[18] Nexans case and Prysmian case are identical regarding reasoning so the legal positions and arguments analysed in this paper referring to the judgement in Nexans case will not be repeated regarding the Prysmian case.

and the DRDs were examined was sealed at the end of each working day, in the presence of the inspected companies' lawyers, and opened again the following day, also in their presence.

The decision addressed to companies of Prysmian group (decision C(2009) 92/2 of 9 January 2009) was almost identical to Commission's inspection decision in the Nexans case regarding subject-matter of the inspection and also regarding reasoning in this part. During the inspection in Prysmian's premises the inspectors also decided to extract an image-copy of the hard drive of the computers of three employees in order to examine them in the premises of the Commission in Brussels. Also in this case legitimacy of this approach was challenged by the inspected companies referring that Article 20 of Regulation 1/2003 shall be applicable merely in the undertaking's premises. The undertaking considered extraction of the copy-image of the whole suspect's disk contrary to the "principle of proportionality" because the materials acquired during the inspection shall be pertinent to the object of the inspection. However, the inspectors informed inspected companies' representatives that the opposition to such extraction will be considered act of "non-collaboration" and made envisaged copies. Finally the media contenting copy-images were sealed in envelopes and taken to Brussels. The inspector invited representatives of the inspected company to the premises of the Commission where the copy-images were examined. The envelopes with the media containing copy-images were re-opened only in the presence of the representatives of the inspected companies and at the end of the day they were sealed again. These operations lasted three day and finally the media containing copy-images were deleted.

In their actions both Nexans and Prysmian companies asked, inter alia, annulment of Commission' inspection decisions because of their vagueness and extent product and geographical scope and also asked for declaration unlawfulness of the Commission's decision to remove copies of certain computer files and of the hard drive of the inspected companies' employee computer for review at its offices in Brussels later.

Under legal provisions dealing with making copies during inspections [Art. 20(2) of Regulation 1/2003] Commission inspectors have, inter alia, the right to examine the books and other records related to the business, irrespective of the medium on which they are stored and to take or obtain in any form copies of or extracts from such books or records.

Although the legal provisions explicitly do not empower inspectors to take away copies of documents and information other than those falling within the scope of the inspection defined in inspection decision or authorisation, the practice of the Commission shows that inspectors are used to take away whole copies of companies' hard drives out from the premises of the inspected undertaking. It is clear that such image-copies contain electronic documents that fall out of the scope of the inspection as well as might contain electronic data of non-business nature, e.g. private documents or communication of the employees of the inspected company.

The Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 revised on 18 March 2013 (hereinafter "explanatory note") maintained procedure of taking away copies of electronic data. The explanatory note is neither a legal binding document nor published in the Official Journal and not only summarises powers of inspectors under the legal provisions but also explains what the Commission believes to be empowered to do. The most controversial part of the explanatory note is a group of provisions dealing with IT forensics and the duty to cooperate during the inspection of electronic data. In paragraph 14 of the explanatory note the Commission explains its powers regarding taking away copies of the entire hard drives as follows: "If the selection of the relevant documents for the investigation is not finished during the inspection on the undertaking's premises, the copy of the data still to be searched is secured by placing it in a sealed envelope and the undertaking will be provided with a duplicate. The Commission commits to return the sealed envelope to the undertaking or to invite the undertaking to attend the opening of the sealed envelope at the Commission premises and assist in the continued selection process."

From the practice of the Commission it is also clear that both rely on legality of "envelope procedure", similar to that was confirmed in legal professional privilege (LLP) issues by the Court in *AM&S*[19] and *Akzo Nobel*[20] cases. The rationale of this procedure seems to be that when the competition authority takes away documents in a sealed envelope it creates a presumption that

[19] Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575

[20] Joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2007] ECR II-3523

such documents are not in full possession of the competition authority, hence the competition authority do not interfere with the LLP or fall out of the scope of the inspection.

The inspected companies claimed by action for annulment to annul Commission's decision to remove copies of certain computer files and of the hard drive computer for review at its offices in Brussels later.

The applicants claimed that such action is admissible since the contested acts have brought about a significant change in their legal position and have seriously and irreversibly affected their fundamental rights – their right to privacy and the rights of the defence and since no provision was made for them in the inspection decision, those acts cannot constitute implementing measures. According to applicants those acts are therefore similar to requests for information made under Article 18(3) of Regulation 1/2003, a provision which expressly provides that those measures are challengeable. Furthermore, they argued that the decision to take copies of several computer files produced legal effects, since those storage media contained data such as emails, addresses and so on, which were of a personal nature and protected by the right to privacy and the confidentiality of correspondence.[21]

2.3 Decision of the General Court in Nexans and Prysmian cases

The General Court refused admissibility of action for annulment against "acts" of inspectors during the inspection. The General Court ruled that "the copying of each document and the asking of each question during an inspection are not to be regarded as acts separable from the decision under which the inspection was ordered but as measures implementing that decision".[22] The basic rationale was that the contested acts are intermediate measures designed solely to pave the way for the adoption by the Commission of a final decision under Article [101](1) [TFEU]. Pursuant to those acts, the Commission copied certain computer files which had been found during the inspection and obtained explanations on specific documents also found during the inspection in order to check the actual existence and scope of a factual and legal situation regarding which it already had information – namely, the suspected cartel – with a view to preparing, if necessary, a final decision on that situation.[23] Since taking copies or extracts from a business record, whatever its medium, of the undertaking concerned by an inspection is included in powers of inspectors in Article 20 of Regulation 1/2003, the inspection decision itself provided that the undertaking was to authorise the inspectors to copy those business records. Furthermore, any inspection ordered under Article 20(4) of Regulation 1/2003 implies that a selection of documents will be examined and, depending on the case, copied, and that a selection of questions will be put to the employees or representatives of the undertakings concerned relating to the subject-matter and purpose of the inspection. The court stressed that it is pursuant to the decision ordering the inspection, rather than pursuant to another distinct act adopted during the inspection, that those undertakings are required to allow the Commission to copy the documents at issue.[24] Another argument for the conclusion that requiring information and copying documents during the inspection is not required by a separate decision was seen by the court in the comparison of Article 18(3) and Article 20(2)(c) and (e) of Regulation 1/2003: although Article 18(3) provides that the requests for information addressed to undertakings under that provision may be the subject of an independent review, it is silent as regards the explanations requested during inspections and the copying of documents during inspections, and also compared to Article 18(1) and Article 18(3) that enable to require all necessary information, pursuant to Article 20(2)(e), during the inspection the Commission may request only explanations of facts or documents relating to the subject-matter and purpose of the inspection.

After refusing to annul contested "decisions" of the Commission, the General Court suggested three situations when inspectors' actions during inspection can be challenged: (1) action for annulment of the final decision on competition infringement, (2) action for annulment of the procedural decision ordering to submit certain documents or information and (3) for the Commission for non-contractual liability if taking away documents causes harm to inspected company or another person. Furthermore, if the applicant had opposed actions of the Commission and the Commission

[21] Other argumets are not so relevantnt for the purposes of this paper.
[22] Judgement *Nexans*, par. 125.
[23] Judgement *Nexans*, par. 119.
[24] Judgement *Nexans*, par. 121.

had imposed a sanction fur such a behaviour, the actions of the Commission could be challenged by an action for annulment raised against the decision imposing the fine.

3 PROTECTION AGAINST ABUSE

3.1 Exemptions for interference into individual's rights under the Convention

Neither the Convention nor the case-law of the ECtHR gives general procedural rules regarding permitted invasions into individual privacy, home or correspondence and always, case-by-case scrutinises whether the conditions under Article 8(2) of the Convention are met.

The judgement in COLAS case[25] is usually considered a landmark case and always quoted by lawyers claiming illegality of inspection in competition matters, particularly when the national legislation do not require previous authorisation or warrant for inspection. Although it is usually claimed that this judgement require ex ante judicial control, in fact, the ECtHR says nothing clear about this question. First, the ECtHR confirmed that inspection in competition matters meet first two criteria for the exemption under Article 8(2) of the Convention (interference is done in accordance with and follow the legitimate aim). The second element of necessity in democratic society – safeguards against abuse – remained in question. So the important ruling is, that "relevant legislation and practice should […] have afforded adequate and effective safeguards against abuse".[26] This conclusion envisaged that the ECtHR will in every case of interference of that kind scrutiny safeguards against abuse contained either in legislation (if the national body does not follow procedural requirements, the inspection cannot be deemed in accordance to the law) or in practice in particular case. Furthermore, it must be stressed that it is necessary that the safeguards are effective. The safeguards against abuse or arbitrariness shall be based on clear, detailed rules on the subject.[27]

The ECtHR concluded that in COLAS case the criterion of effective safeguards against abuse was not fulfilled and named circumstances of the case without naming crucial circumstance or giving any conditions *pro futuro*: the relevant authorities had very wide powers which gave them exclusive competence to determine the expediency, number, length and scale of inspections, the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present, and also the ECtHR had regard to the manner of proceeding.

Although the case-law of the ECtHR later admitted that there is not necessary fulfilling criterion of safeguard against abuse and arbitrariness and that the absence of a prior judicial warrant may be counterbalanced by the availability of an *ex post factum* judicial review, the ECtHR stressed that there must be "effective access, *a posteriori,* to a court to have both the lawfulness of, and justification for, the search warrant reviewed"[28]. Furthermore, in the case of no prior judicial warrant, the ECtHR saw a violation of the applicant's right to respect for her home in no possibility to obtain an effective judicial review *a posteriori* of either the decision to order the search or the manner in which it was conducted. It must be also added that the possibility to challenge the interference (both, order and performance) must be effective, i.e. seeking for remedy solely in the proceedings on the merits many years afterwards cannot be deemed as a safeguard against abuse and arbitrariness[29].

3.2 Taking away of image-copies and ECtHR perspective - Bernh Larsen Holding case

Dealing with legality of taking image-copies of whole hard drives of an inspected company, the recent judgement of the ECtHR in Bernh Larsen Holding case (Bernh Larsen Holding AS and Others v. Norway, no. 24117/08, 14 March 2013) shall be mentioned. This judgement could be relevant from two points of view: first, it deals with conformity of taking away a copy of a whole disk from the premises of the inspected company; secondly, the facts and legal basis is very similar to those in, Nexans and Prysmian.

The applicant companies complained under Article 8 of the ECHR about a demand by the tax authorities that they make available for inspection at the tax office a backup copy of a computer

[25] *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III
[26] *Société Colas Est and Others v. France*, § 48.
[27] *Sorvisto v. Finland*, no. 19348/04, 13 January 2009, § 118.
[28] *Heino v. Finland*, no. 56720/09, 15 February 2011, § 45.
[29] E.g. *Société Colas Est and Others v. France*

server used jointly by three companies, in the context of a tax audit at Bernh Larsen Holding. The similarities with competition case were following: there was no explicit provision empowering inspectors to take away a copy of whole disks[30], the copy of the disk contained also documents out of scope of the tax audit, the tax authorities used the "envelope procedure".

First, the ECtHR fond that unless existence of any explicit provision, the rationale of provisions of Norwegian tax law allows to consider such actions of tax inspectors as "in accordance with the law" in the sense of Article 8 of the ECHR.

Secondly, the ECtHR assessed the "envelope procedure" as a sufficient safeguard in order to maintain proportionality of interference into the private sphere. On the one hand, the interference was particularly far-reaching in that the backup tape contained copies of all existing documents on the server, including, as was undisputed, large quantities of material that was not relevant for tax assessment purposes, *inter alia,* private correspondence and other documents belonging to employees and persons working for the companies. On the other hand, the ECtHR recalled the various limitations to the effect that section 4-10 (1) of the Tax Assessment Act did not confer on the tax authorities an unfettered discretion, notably with regard to such matters as the nature of the documents that they were entitled to inspect, the object of requiring access to archives and of authorising the taking of a backup tape. These limitations and safeguards were, in particularly following: a right to complain, the backup copy was placed in a sealed envelope that was deposited at the tax office pending a decision on the complaint, the right of the tax subject to be present when the seal is broken, except where that would cause considerable delay; the duty of those responsible for the audit to draw up a report; the right of the tax subject to receive a copy of the report and the duty of the authorities to return irrelevant documents as soon as possible, after the review had been completed, the copy would either be deleted or destroyed and all traces of the contents would be deleted from the tax authorities' computers and storage devices and the authorities would not be authorised to withhold documents from the material that had been taken away unless the tax subject accepted the measure.[31]

Nevertheless, following prerequisites for taking copies of whole storage media that include also data out of scope of the investigation are crucial from the point of view of the ECtHR to be legal under Article 8(2) ECHR: the possibility to take a copy of whole storage media shall be clearly expectable from the legislation, the access to data other than within the scope of investigation shall be procedurally and technically limited, effective safeguards against abuse and judicial control shall be provided, all data out of the scope of the investigation shall be destroyed as soon as it is not necessary to hold the whole copy of the storage medium. Concerning requirements laid down by the ECtHR, the judicial control shall be effective and immediate, i.e. the court shall have to order not to use the copy in issue or to destroy it already in the early stage of investigation.

3.3 Effective judicial remedy

As well as under the Convention and the case-law of the ECtHR, under Article 47 of the Charter "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal […]". The first question is "what tribunal?". The powers of tribunal can shape availability and effectiveness of a remedy.

There is an exclusive power of the Court of Justice of the European Union to review decisions ordering to submit information or to submit to the inspection under Regulation 1/2003. Although previous judicial authorisation of inspection by the national court is admitted, the powers of national court are limited to test whether the measure is not disproportionate to the aim and

[30] Under section 4-10 (1) of the Tax Assessment Act (*ligningsloven*) of 13 June 1980 authorised the tax authorities to order a taxpayer: "(a) To present, hand out or dispatch its books of account, vouchers, contracts, correspondence, governing board minutes, accountancy minutes and other documents of significance with respect to the tax assessment of the taxpayer and the audit thereof. … (b) To grant access for on-site inspection, survey, review of the companies' archives, estimation etc. of property, constructions, devices with accessories, counting of livestock, stock of goods and raw materials, etc." Under section 4-10 (3) of the Tax Assesment Act, when required by the tax authorities, the taxpayer had a duty to attend an investigation as described in section 4-10 (1), to provide necessary guidance and assistance and to give access to office and business premises.

[31] Moreover, it was stressed that the disputed measure had in part been made necessary by the applicant companies' own choice to opt for "mixed archives" on a shared server, making the task of separation of user areas and identification of documents more difficult for the tax authorities.

arbitrate.[32] However, regarding decision ordering to submit to inspection, it seems not to be so important whether the inspection is *ex ante* authorised by national court and *ex post facto* immediately reviewed by the Court of Justice of the European Union or merely *ex post facto* reviewed by the Court of Justice of the European Union, in order to fulfil the requirement of safeguard against abuse or arbitrariness. Hence, these two situations seem to be equal from the ECtHR case-law point of view. By this kind of review, inspections that are *prima facie* unreasonable, ungrounded or utterly arbitrate can be declared illegal as well as procedural failures in adopting such decision can be declared. This kind of review cannot be deemed remedy against abuse during performance of the inspection, even legally and properly ordered.

Hence taking into account the "performance safeguard" test, i.e. if the performance of the inspection could be reviewed by independent tribunal in a fair trial, neither TFEU nor Regulation 1/2003 name specific action or procedure at the Court of Justice of the European Union. Moreover the General Court affirmed that the action for annulment is not available for challenging acts implementing the decision of the Commission. Hence there is no other relevant type of action to challenge acts of EU institutions and the power of the Court of Justice of the European Union is exclusive in reviewing acts of EU institution,s there is no direct remedy for the case of abuse of powers or arbitrariness during the performance of inspection.

The General Court suggested following possible remedies in case of abuse: an action against decision imposing a fine imposed because of opposition of orders, to challenge the final decision, to claim for damages, to wait for issuing a separate decision requesting information.

The action against the decision imposing a fine for opposing the inspection cannot be deemed effective safeguard, because it is not safeguard at all. The inspected undertaking would be in a very vulnerable situation when opposing order during inspection in belief that the order is illegal. An individual shall be effectively protected against illegal invasion into his rights and therefore in a democratic society an individual cannot be left to use self-defence with obscure outcome of his or her assessment.

The action for annulment challenging the final decision cannot be considered immediate effective measure because of the substantial timespan between the inspection and issuing the final decision in matter. Moreover, the inspected subject need not be necessarily addressee of the final decision. Furthermore, the results of illegal acts can last for the whole time of the investigation, e.g. withholding documents.

Raising action for annulment of a separate decision to produce information or documents is also not probable, because like in Nexans and Prysmian cases such a request was refused to be consideried a separate decision and included this request into pure implementation of decision ordering submit to inspection.

Finally, by invasion into privacy, home or correspondence direct material harm usually do not occur so claim for material damages is not available. Although the Court of Justice of the European Union confirms also claims compensation for immaterial harm, this court always analyses impacts of interference into individuals rights and consequences. Therefore, by the action for damages purely actual harm can be compensated and the Court of Justice of the European Union does no award any kind of satisfaction for being purely unlawfully bothered by the public body.

It must be stressed that purely arbitrate or abusive interference into individual's rights constitutes a harm (immaterial) that is not linked to claim for damages.

Hence, none of the possible remedies suggested by the General Court can be considered effective and immediate remedies against abuse during the performance of an inspection. Since the action for annulment is currently the only judicial remedy under the TFEU that can be used by natural or legal person against actions of EU institution, it is not comprehensive enough to be a universal remedy against abuse.

3.4 Non-judicial safeguards against abuse

Since inspected companies in *Deutsche Bahn* case[33] claimed illegality of inspection performed without previous judicial authorisation, the General Court was obliged to analyse if there are sufficient safeguards against abuse to countervail previous court's assent. The General Court

[32] Case C-94/00 *Roquette Frères SA proti Directeur général de la concurrence, de la consommation a de la répression des fraudes*, [2002] ECR I-09011.

[33] Joined cases T-289/11, T-290/11 a T-521/11 *Deutsche Bahn and others v Commission*, judgement of 6 September 2013.

found five groups of safeguards: (1) giving reasons for the decision ordering to submit to the inspection, (2) limitations imposed to the Commission, (3) the Commission is not empowered to use force, (4) involvement of national bodies and (5) existence a posteriori legal remedies.[34]

The first category of safeguards (reasons of the decisions) avoids the Commission to order and perform utterly arbitrate inspection as well as enables an *a posteriori court* review of that decision. The content of grounds of the decision was well-established by the case-law[35]

The General Courts named four groups of limitations imposed to the Commission:

(1) non-business documents are excluded from the inspection;

(2) inspected undertakings are allowed to ask for legal assistance and to protect communication with an external lawyer;

(3) despite having the duty of active cooperation, the inspected undertaking cannot be ordered to provide information that would constitute allowing its participation in infringement;

(4) Explanatory note describes the methodology of performance of the inspection and therefore are useful source of information to the inspected undertaking to understand extent of its duty to cooperate.

Although the Court named several safeguards, not all of them are safeguards aimed to protect privacy, home and correspondence, since the right to not self-incriminate and protection of communication with an external lawyer are more elements of right for a fair trial that protection of privacy, home and correspondence. Concerning the Explanatory note, it must be noted that the Commission did not even publish explanatory notes in the Official Journal in order to express its will to bind itself with these rules. Furthermore it may be challenged if the extend of some Commission's rights mentioned in Explanatory notes is not broader that legal provision under Regulation 1/2003, particularly regarding taking electronic copies.

The third category of safeguards (not using force) was explained by the court as four categories of "sub-safeguards", however only the first one (the inspectors have not the right to use force to enter into premises or rooms and to withdraw any documents and they are not allowed to perform search without a consent of the manager of the undertaking) is genuinely linked with this issue. The other "sub-safeguards" are: the right of representatives of the undertaking to ask to write down all their objections and objected events in the protocol, the right to be allowed to analyse the decision ordering to submit to the inspection, particularly together with lawyers, and sanctions cannot be used as an oppressing instrument, but only in an extreme situation of opposition to the inspection.

The fourth category of safeguards named by the General Court is rather peculiar. The court sees safeguards in the duty of national body to provide assistance during the inspection and the possibility of judicial review of actions of such national body, as well as in relying on the knowledge of e.g. police force in exact powers of the Commission. This approach is purely formalistic and cannot be deemed as effective safeguard. Moreover, the officers of the national competition body are in practice hardly able to prevent misconduct of Commission's inspectors. Although there is a possible proceeding on *ex ante* authorisation of an inspection, as well as possible *ex post* judicial review of actions of national bodies, this review cannot prevent misconduct during the inspection as well as replace a scrutiny of acts of Commission's inspectors during the inspections.

Although the General Court firstly named the fifth safeguard as an *a posteriori* legal remedy, it actually named three possible judicial remedies. In the first place it mentioned the review of the decision ordering to submit to the inspection.The second "sub-safeguard" is connected with this action: the plaintiff can ask for suspension of operation or execution of decision ordering to submit to inspection. The third judicial measure mentioned by the General Court is action for damages caused by the inspection. However, none of the aforementioned remedies aimed to scrutiny the performance of the inspection itself and they are merely connected with legality of ordering the inspection or possible harm caused by the inspection. Therefore none of these judicial measures represents an effective tool to control performance of inspectors immediately.

Insofar subject-matter of *Deutsche Bahn* case itself, the General Court reviewed three consecutive decisions ordering to submit to the inspection. The General Court actually scrutinised the performance of the first inspection but purely in the context if this inspection served to acquire

[34] *Deutsche Bahn,* par. 74.

[35] See e.g. Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 26, and *Roquette Frères*, paragraphs 55, 61 and 9981, 83 and 99)

grounds for the next two inspections, so this scrutiny served merely as evaluation of validity of two subsequent decisions.

4 CONCLUSION

As it was explained, under the current practice the action for annulment cannot be used to review the performance of inspection ordered by the Commission in competition matters. Therefore there still remains a gap in the extent and coherence of thew protection of the private sphere and the freedom of an individual. This gap in the application of the action for annulment as a measure against abuse could be, however, filled in different ways. The author will suggest some of them:

First, it is obvious that the gap in powers can be filled by adding another type of action for protection against misconduct of an institution other that the act in narrower sense. This kind of judicial remedy is common in a lot of member states, as well as in Slovakia. However, this scenario is not very probable because it needs a general consent of twenty-eight member states.

Secondly, the Court of Justice of the European Union will abandon its previous practice and also the act of execution of the decision will be reviewed as an act under article 263 TFEU (similar to a decision). Since deviation from its previous judicature could undermine legitimacy of the previous case law, the court will hardly follow this path.

Thirdly, the court will prudently scrutiny if the act of inspectors falls within the powers invested by the decision ordering inspection. In this assessment the legality, proportionality and non-arbitrariness shall be tested. If the act passes the test, it can be deemed as pure performance of decision and therefore the action will be rejected. If the decision does not pass the test, it cannot be deemed as performance of the decision and therefore as a subject of separate scrutiny can be annulled. This scenario could be on one hand consistent with previous case-law and on the other hand provides effective and immediate remedy against abuse.

Despite being in the first place aimed to protect individual's rights, the review of the performance of the inspection could be beneficial for the Commission. Even the judicial scrutiny could slow down the proceeding as a whole, it could, on the other hand, "clear the decks" from dubious evidence. This could, in extreme situations, lead to dropping the case in very early stages of the proceeding, if there is no legal evidence left.

Bibliography:

Faull J., Nikpay A (eds.), *The EC Law on Competitio*n, 2nd edition, New York 2007.
Ritter L., Braun W. D., Rawlinson F., *EEC Competition Law. A Practitioner's Guide*, Deventer, Boston, 1991.
Whish R., *Competition Law.* 6th Edition, Oxford 2008.
Craig,P. – de Búrca, G.: *EU LAW, Text, Cases, and Materials.* Fifth Edition. 2011, New York, Oxford University Press

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THE SOVEREIGN DEBT CRISIS IN EUROZONE AND LIMITS OF EU LAW

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Abstract: The aim of the contribution will be to show, that the EU and Eurozone have a limited powers when dealing with the sovereign debt crisis. When trying to halt its impact on the credibility of euro, the Member States of the EU and Eurozone had to deal not only with crisis of unprecedented scope but also with questions how to save single currency while respecting no-bail out clause, EU budgetary constraints and distribution of competences between EU and the Member States. This contribution will analyze how the EU, Eurozone and their Members tackled these issues. It will start by addressing the relevant crisis instrument, such as bilateral loans to Greece, EFSF, EFSM, ESM and assess their compatibility with Treaty provisions, in particular the no bail-out clause and Article 122 TFEU. The creation of rescue mechanisms will be linked with the Treaty change and focus will be laid on their judiciary approval in case Pringle. Subsequently, the limits of EU law will be demonstrated on efforts to bring extensive Treaty change, their failure and adoption of Fiscal Compact as another non-EU solution. In the end it will outline the current discussions on future of Economic and Monetary Union.

Key words: The Sovereign Debt Crisis, No bail-out clause, EFSF, EFSM, ESM, Treaty change, Case Pringle, Fiscal Compact, Economic and Monetary Union

1 INTRODUCTION

Despite serious difficulties with the ratification process of the Lisbon Treaty, in the end of 2009 the major focus of EU lawyers was the approaching entry into force of this reform document and subsequent implementation thereof. As the fatigue from eight years lasting reform process was obvious, no one even thought of possible future changes of EU primary law. However the modest satisfaction related to successful accomplishment of the reform process was about to be overshadowed by the sudden impact of the sovereign debt crisis. As it spread over the Eurozone, it became apparent, that the EU had to react in order to calm down the markets. In addition to various intergovernmental and EU measures, the EU reached a political consensus on limited Treaty change only one year after the entry into force of the Lisbon Treaty, in December 2010. And this was not the end, the discussion about Treaty change was the main issue at the meeting of the European Council in December 2011 and these reflections still continue in 2013.

Based on these developments this contribution will demonstrate, that the sovereign debt crisis has showed limits of EU law. As the EU law did not provide instruments to tackle the crisis, the Member States had to adopt the whole set of intergovernmental measures and commence discussions about possible Treaty change. The contribution will first examine the EU reaction to the developments in Greece in 2010 and subsequent establishment of EU and intergovernmental instruments, whose aim was to safeguard the financial stability of Eurozone. Subsequently it will focus on permanent mechanism established to this aim and related limited Treaty change. The analyze will continue with efforts to bring about more extensive Treaty changes by reinforcing the fiscal discipline of Member States, the unsuccessful European Council from December 2011 to this respect and resulting Fiscal Compact. The concluding part will be dedicated to ongoing discussions on the future of Economic and Monetary Union, which are closely related to more extensive Treaty change possibly on the agenda after 2014 EP elections.

2 BILATERAL LOANS AND ESTABLISHMENT OF CRISIS INSTRUMENTS

In the beginning of 2010 the situation in Greece became a hot topic for all relevant EU formations. The Council of the European Union, the European Council and the Eurozone tried to assure the markets by issuing a set of strong statements, which however had little effect and it became apparent, that adoption of more tangible measures was inevitable. In May 2010 it was the first time, the decision-makers had to face the limits of EU law.

2.1 No-bail out clause and bilateral loans

First and foremost the EU decision-makers when deciding on possible assistance to Greece had to respect the no-bail out clause, Article 125 of the Treaty on Functioning of the EU (TFEU), pursuant to which the EU and the Member States are not liable for commitments of other Member States. This provision was inserted into the primary law by the Maastricht Treaty and by 2010 it was neither applied nor interpreted by the EU Courts. The EU decision-makers had to respect it when deciding on the assistance provided to Greece. The crucial question to be dealt with was whether any kind of assistance provided to the Member State in difficulties was prohibited by Article 125 of the TFEU. In order to resolve it, the decision-makers had to go back to the preparation process of the Maastricht Treaty, when Article 125 was drafted. During the travaux-préparatoires of the Maastricht Treaty the monetary committee emphasized the importance of this provision by referring to the pressure put by the markets on the Member State departing from sustainable budgetary management.[1] This interpretation based on travaux-préparatoires of the Maastricht Treaty was later in October 2012 upheld by the Court of Justice, which confirmed that the prohibition set out in Article ensures, that the Member State entering into debt obligations remains subject to market conditions and accordingly the markets may exercise on them pressure necessitating budgetary discipline.[2] The Court added, that Article 125 does not prohibit that kind of financial assistance under which the Member State remains liable for its commitments and the conditions of financial assistance ensure pursuance of sound budgetary policies.[3]

Despite not knowing whether this kind of interpretation would be later confirmed by the Court, the decision-makers pursued correct track already on 2 May 2010. They decided to provide bilateral loans to Greece amounting to EUR 80 billion, which were provided in the form of loan facility agreements and pooled centrally by the European Commission. The statement of the Eurogroup from 2 May 2010 makes clear that the assistance is provided subject to strict conditionality.[4] Under the provided loans Greece would be obliged to pay back the assistance and its responsibility for public debt would not be affected.[5] These two elements – strict conditionality of the assistance and its market conditions clearly indicate, that the no-bail out clause enshrined in Article 125 TFEU was respected. The EU decision-makers were able to fit the assistance provided to Greece within the frames and limits of EU law and there were expectations that these measures would calm down the markets. It became however soon apparent, that in order to stabilize the situation much more had to be done.

2.2 Creation of crisis instruments and limits of Article 122 TFEU

Using the language of conclusions of the Council of the EU from 9-10 May 2010 the situation on the markets remained fragile and there was an imminent threat of spillover effect. That is why the finance ministers wearing both their EU and intergovernmental hats had to react swiftly. When trying to allocate money from EU budget as a form of assistance to the Member States in difficulties, they had to face the limits of EU law again, this time it was Article 122 TFEU. Second paragraph of this provision enables the Council to grant financial assistance to the Member State "seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". The problem with this provision was uncertain response to the question, whether the difficulties that some Eurozone Members had to face were caused by external elements beyond their control, or the difficulties were consequences of unsound budgetary policy and the use of Article 122 paragraph 2 TFEU is out of question.[6] In the end of the day the Council came to the conclusion that the global financial crisis was an external element, which have had a negative impact on budgets of the Member States, hence the Article 122 second paragraph was used as a legal basis for a Regulation 407/2010. However there were suggestions that the use of this legal

[1] UNGERER, H. A Concise History of European Monetary Integration: From Epu to Emu, p. 214.
[2] C-370/10, Pringle, para 135.
[3] Ibid, para 137.
[4] See Eurogroup statement from 2 May 2010 available at: http://www.consilium.europa.eu/uedocs/cmsUpload/100502-%20Eurogroup_statement-sn02492.en10.pdf
[5] MIDDLTETTON, Not bailing out ... legal aspects of the 2010 sovereign debt crisis, p. 430.
[6] DE WITTE, The European Treaty Amendment for the Creation of a Financial Stability Mechanism, p. 6.

basis was not correct.[7] The smell of uncertainty remained in the air and it was exactly this part of controversy that prompted the Member States to reach a political consensus on limited Treaty amendment later in 2010,[8] which will be discussed in subsequent parts of this contribution. In any case the adoption of Regulation 407/2010 meant creation of new crisis instrument – European financial stabilization mechanism (EFSM).

Creation of EFSM was however limited by another element related to EU law – budgetary rules. In fact the money available from EU budget under this instrument amounted to 60 billion euro. This sum was certainly high, however from the perspective of market expectations insufficient. This was the reason why the Eurozone ministers meeting in the Council adopted a decision to establish an intergovernmental instrument in the form of special purpose vehicle – European Financial Stability Facility (EFSF), which may grant assistance up to EUR 440 billion, later expanded to EUR 780 bilion. EFSF was acting as a public company under Luxembourg law and its duration was limited until 30 June 2013.

Both EFSM and EFSF were evaluated by the commentators as a transitional and legally risky solution.[9] The legal uncertainty was related exactly to above mentioned limits of EU law – no-bail out clause and Article 122 of the TFEU as a legal basis for EU assistance. In addition to that the markets perceived both EFSF and EFSM as instruments which were necessary in order to span a transitional period before an instrument of permanent nature is established.

3 LIMITED TREATY CHANGE AND EUROPEAN STABILITY MECHANISM

The European Council meeting in March 2010 created the Task Force chaired by president of the European Council Herman van Rompuy. The role of the Task force was to explore the measures aimed at improving the crisis resolution framework and budgetary discipline.[10] The idea of permanent crisis instrument arose during the discussions within the Task Force and resulted in its recommendations in final report. The Task Force considered as necessary creation of permanent mechanism, which should safeguard financial stability of Eurozone.[11] The European Council endorsed this idea and decided to establish intergovernmental and permanent mechanism as suggested by the Task Force.[12] However the limits of EU law arose again and this time it appeared that the price to be paid was the Treaty change. The initiative came from Germany, which had in mind the firepower of its Constitutional Court in Karlsruhe. In particular Germany feared, that its Constitutional Court might declare future permanent mechanism as violating the no-bail out clause and principles of sound budgetary policies. In addition to that, the concerns were related also to disputable legal basis of Article 122 TFEU.[13] Henceforth, the main purpose of Treaty change was to ensure, that establishment of rescue mechanism is not contrary to any other provision of the Treaty, in particular Article 125 TFEU. This aim was accomplished by creation of a new provision – Article 136 para 3 pursuant to which "*The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality*."

Looking at this Treaty amendment from the perspective of limits of EU law, the most striking element is the purpose of this Treaty amendment. Usually, the Treaty amendment entails also conferral of competences from the Member States on EU. The change of Article 136 TFEU has exactly opposite nature. It does not extend the EU competences, but rather confirms competences of the Member States whose currency is euro, to establish rescue mechanism. As already explained

[7] CRAIG, P. Lisbon Treaty, p. 466.
[8] DE WITTE, The European Treaty Amendment for the Creation of a Financial Stability Mechanism, p. 6.
[9] LOUIS, J. V., The unexpected revision of the Lisbon Treaty and the establishment of a European stability mechanism, p. 285.
[10] See Conclusions of the European Council from 25. – 26. March 2010 available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/113591.pdf
[11] The report of the Task Force is available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf
[12] See conclusions of the European Council from 28. – 29. October 2010 available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf
[13] DE WITTE, The European Treaty Amendment for the Creation of a Financial Stability Mechanism, p. 6.

above, this unusual nature of Treaty amendment is consequence of concerns of some Member States, in particular Germany on compatibility of rescue mechanism with no bail-out clause. The limits of EU law with respect to Treaty amendment should be therefore not identified in relation with lack of competences, but rather with respect to lack of unambiguity of Treaty provisions, in particular explicit compatibility of rescue package with no-bail out clause.

Reaching the political agreement on Treaty change that paves the way to permanent stability mechanism, the Eurozone Member States could proceed with construction of the mechanism itself. At the time of formal adoption of Treaty amendment the European Council endorsed the main features of future European Stability Mechanism (ESM).[14] The first ESM Treaty was hence signed in July 2011. However following the negative developments in the summer 2011 the Heads of of Eurozone Member States decided to adopt stronger instrument by enhancing the financial capacity as well as the amount of available tools. The new ESM Treaty was signed on 2. February 2012 and entered into force for all contracting Parties except for Spain on 27. September 2012.

The ESM Treaty establishes international organization with legal personality. Pursuant to Article 1 of the ESM Treaty, the purpose of ESM is "*to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States*." The ESM Treaty provides also for governing structure, which consists of Board of Governors and a Board of Directors, as well as a Managing Director. In order to pursue its goals, the ESM has a subscribed capital of EUR 700 billion.

Despite being purely intergovernmental instrument of Eurozone Member States, the ESM is closely intertwined with EU institutions and EU law in general. First and foremost its main aim is to safeguard stability of Eurozone and thereby to protect the currency euro, which is introduced and regulated by EU law. Secondly it contains reference to decision of the European Council amending Article 136 of the TFEU, which serves as interpretative legal basis confirming legality of permanent stability mechanism with no bail-out clause. Thirdly, ESM Treaty entrusts certain administrative and coordinating tasks to European Commission and European Central Bank, the fact that was attacked and assessed by the Court of Justice (more on this will be provided in subsequent chapter). In spite of this apparent link with EU law, the lack of EU competence to create safeguard mechanism entailed the necessity to create the rescue mechanism by means of intergovernmental instrument. The decision raises one imminent question.

When preparing the permanent mechanism the EU Member States had in principle two options – either to create and intergovernmental instrument, or to revise the Treaties and to create a new legal basis enabling creation of permanent stability mechanism and hence erase this limit of EU law. They decided for the first option. The question that provokes this decision is why they decided to use intergovernmental track instead of creating a new legal basis for legislative act in the Treaties, The question is more imminent given the decision to amend the Treaties, but not by means of creating a substantive legislative legal basis, but only interpretative one for enabling creation of intergovernmental mechanism.

The reply to this question must be found in the nature of the change entailed by the potential creation of new legislative legal basis. The creation of new legislative basis would entail the transfer of competence to create rescue mechanism from Member States to the EU. This means that although the Treaty change would be limited in extent, the element of transfer of competences would necessitate ordinary revision procedure and national ratifications. In the end of 2010, approximately one year after the entry into force of the Lisbon Treaty this notion was not feasible. Following the painful ratification of the Lisbon Treaty many Member States signaled the need of referendum for future Treaty changes entailing the transfer of competences. It was apparent, that the Member States were too prudent to enter into uncertain process of full-fledged ratification and they chose simplified revision procedure instead. Even this procedure, established for less burdensome Treaty changes appeared to be as time-consuming as regular Treaty change. The decision of the European Council adopted in March 2011 entered into force in May 2013 The national ratification process took more than two years, even more than ratification of Lisbon Treaty.

[14] See conclusions of the European Council from 24. – 25. March 2011 available

4 JUDICIARY ENDORSEMENT - CASE PRINGLE

When creating any new more complex system within the EU or closely related to the EU, it is reasonable to expect judicial challenge on its compatibility with EU law. This was also the case of the ESM Treaty and limited Treaty change, legality of whose was attacked before Irish courts. The Irish Supreme Court raised a request for preliminary ruling asking for clarification with respect to validity of decision of the European Council amending Article 136 TFEU and compatibility of ESM Treaty with EU law.

4.1 No bail-out clause before Court of Justice

The most important issue to be tackled was the compatibility of the ESM Treaty with no bail-out clause. The Court analyzed several aspects of this provision and its compatibility with the ESM. First it concluded that the purpose of Article 125 TFEU was not to prohibit any assistance since Article 122 TFEU provides for granting assistance in certain cases.[15] Secondly it emphasized stricter wording of Article 123, which prohibits "*overdraft facilities or any other type of credit facility*".[16] In the Courts view the difference in the wording enables the conclusion that certain type of assistance is allowed under Article 125.[17] The Court then used combination of teleological and historical method of interpretation. While trying to find an objective of Article 125 the Court looked into the preparatory work of the Maastricht Treaty. According to the Court the preparatory work indicates, that the purpose of no bail-out clause was to ensure, that the Member States pursue responsible fiscal management and remain under the market rules when creating budgetary commitments.[18] The Court accordingly concluded, that Article 125 prohibits any financial assistance resulting in diminishment of responsible fiscal policies. The Court then applied these conclusions to the ESM Treaty. It held, that assistance provided from ESM did not amount to assuming or guaranteeing debt of the recipient state.[19] The Court also emphasized strict conditionality element, whose purpose is to ensure, that the recipient state complies with EU rules designed to coordinate economic policies, which aim at attainment of sound fiscal management. Lastly, the Court held with respect to the so-called revised increased capital call enshrined in Article 25 para 2 of the ESM Treaty, that under this provision the defaulting ESM Member remains to be bound by its obligations and the other ESM Members do not act as guarantors of debt.[20]

The decision of the Court in Pringle showed that the limits of EU law, in this case Article 125 TFEU are certainly not designed in such a way as to deepen the sovereign debt crisis. The negative outcome of the proceedings would certainly undermine legality not only of the ESM, but also of other crisis instruments, which have similar philosophy as the ESM. The result of the Court proceedings was therefore expected, the question rather was which arguments will use the Court in order to save the legality of the ESM.[21] Despite the critical comments as to the feasibility of the assistance provided from ESM under the market conditions, one can only agree with the Courts´ conclusions. It is hard to imagine that the authors of the Treaties constructed certain rules in a way to be capable to undermine the fundaments of European integration. The Treaty rules are certainly strict and they provide for several sanctions against the Member States, e. g. as a part of infringement procedure or excessive deficit procedure, but they are certainly not constructed in a way that would provoke serious financial difficulty of a Member State or even of the Eurozone as a whole. One must therefore qualify the reasoning of the Court as realistic, but still within the confines of EU law.

4.2 EU competence and involvement of EU institutions

The Court had to deal also with the question whether the Eurozone Member States by concluding the ESM Treaty encroached upon the EU exclusive competence in the domain of monetary policy. The Court concluded that this was not the case, since the subject-matter of the ESM Treaty was not covering the area of EU monetary policy, under which the Court perceives the activities aimed at maintaining the price stability.[22] The Court distinguished these activities from the

[15] C-370/10, Pringle, para 131.
[16] Ibid, para 132.
[17] Ibid.
[18] Ibid, para 135.
[19] Ibid, paras 138 – 141.
[20] Ibid paras 144 – 145.
[21] CRAIG, P. Lisbon Treaty, p. 473.
[22] C-370/10, Pringle, para 95.

purpose of ESM, which is to provide financial assistance to its Members in difficulties.[23] This conclusion was criticised by some as legal formalism, because the stability of Eurozone is in their view precondition for price stability.[24] It is to be noted that when dealing with this question the Court had to examine the Treaty provisions on monetary policy – Articles 127 – 133 TFEU. Pursuant to Article 127 TFEU the primary objective of the European System of Central Banks shall be to maintain the price stability. The instruments to pursue this goal are enumerated in paragraph 2 of this provision and they include defining and implementing the monetary policy of the EU, conducting foreign-exchange operations, holding and managing the official foreign reserves of the Member States and promoting the smooth operation of payment systems. Trying to intertwine these goals and instruments with the main purpose of ESM - safeguarding the financial stability of Eurozone as a whole is possible, however the link is too indirect in order to claim that ESM is interfering into monetary policy. Hence the judgement of the Court seems to be grounded on solid basis.

With respect to the involvement of EU institutions in ESM the Court examined, whether this is compatible with Article 13 TEU. Here the position of the Court was even more comfortable than in preceding cases, as it could refer to its previous case-law allowing for involvement of EU institutions into Member States´ action, provided that they are performing coordinating or administrative tasks, which do not essentially alter the powers conferred on those institutions. Without any surprise the Court stated, that this case-law is applicable also to ESM as the nature of EU institutions involvement corresponds to parameters set by the Court before.

Although expected as mandatory exercise, the judicial endorsement of ESM and implicitly of previous mechanisms necessitated careful preparations and legally feasible position. As almost every important change within or closely related to EU legal system will be sooner or later tested by the EU Courts, the authors of rescue package had to prepare not only the most important political argument – necessity to rescue stability of Eurozone but also the legal arguments defendable before the Courts. This was well done. The biggest challenge was probably the compatibility with no bail-out clause. This provision had to be carefully examined so that the intended assistance would fall under its remits. Since no judicial interpretation of this provision was given for 20 years, the only interpretative tool was the preparatory work of the Maastricht Treaty, which was accepted by the Court. Given also the strict conditionality element, the position of the Court was more comfortable with respect to final judgement.

With respect to EU competences the Court had to face opposite problems than the Member States in the process of creation of rescue instruments. Whilst the role of the Court was to examine whether the Member States did not encroach upon the EU competence by establishing ESM, the concern of the Member States was the lack of EU competence and necessity to create the rescue mechanism outside the EU powers. As already stated, the involvement of EU institutions was based on previous case-law of the Court of Justice and it seems that the model used in ESM Treaty was used also in the Fiscal Compact as will be shown in next part of this contribution.

5 THE FISCAL COMPACT – ANOTHER INTERGOVERNMENTAL SOLUTION

So far this contribution was focusing mainly on crisis instruments, that is to say instruments to be used when the Member State is already in serious difficulties. It is however obvious that focusing only on resolving consequences and not causes of the sovereign debt crisis was untenable. The EU therefore came with the whole series of measures aimed at reinforcing the fiscal discipline of the Member States, the most apparent being the so-called six-pack and two-pack. However by the end of 2011 it became apparent that the Treaty change will become the subject matter of the discussions in the EU. In October 2011 the Eurozone asked the President of the European Council to prepare report focusing on deepening of fiscal discipline in Eurozone, which was submitted to the December European Council in 2011. The report contained several proposals for changes of primary law.[25] In order to reinforce the budgetary discipline of Eurozone Members the report envisaged introduction of balanced budget rule into Protocol 12, or alternatively amendments to excessive deficit procedure by reinforcing the automaticity, stronger role for EU institutions in supervising the fiscal discipline of Eurozone Members, changes in Eurozone governance and in longer perspective moving towards common debt issuance. The consensus on Treaty change has

[23] Ibid, para 96.
[24] CRAIG, P. Lisbon Treaty, p. 479.
[25] Text of the report is avaliable at: http://blogs.ft.com/brusselsblog/files/2011/12/INTERIM-REPORT-FINAL-6-12-.pdf

not been however achieved because of UK veto and the remaining EU Member States except for the Czech Republic had to revert to another intergovernmental solution – Fiscal Compact, which has been signed on 2 March 2012.

Probably the most important element of Fiscal Compact is the balance budget rule, enshrined in its Article 3. This rule is "*deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices"*. The balanced budget rule must be transposed into national legal orders preferably at constitutional level. The Fiscal Compact obliges the contracting parties to put in place correction mechanism established pursuant to common principles proposed by European Commission. In order to enable effective control over to implementation of Fiscal Compact the Treaty contains clause enabling the jurisdiction of Court of Justice of the EU on the basis of Article 273 TFEU.

It has been argued that much of what has been done by Fiscal Compact could have been achieved by means of EU secondary law.[26] This is true with respect to most of the provisions of Fiscal Compact with exception of balanced budget rule. Indeed, the President of the European Council suggested in his report to amend Protocol 12 by introducing the obligation to reach and maintain balanced budget, which should be transposed into national legal orders on constitutional and equivalent level.[27] The proposals enshrined in the report were even more ambitious, but they were finally not reflected in the Fiscal Compact e. g. the intrusiveness of EU institutions into national budgets was not introduced.

The Fiscal Compact can be analyzed from the point of view of limits of EU law in several aspects, probably the most important being lack of stricter budgetary rules and enforcement of EU institutions vis-à-vis the Member States.[28] The proposals to remedy these defects came as a follow-up to sovereign debt crisis which was primarily caused by excessive spending and lack of budgetary responsibility. Had the EU sufficient tools to prevent these defects early enough, the outbreak of the sovereign debt crisis and establishment of crisis instruments would be unlikely.

The European Council in December 2011 failed to transpose the ambitious proposals into the EU primary law, however this does not mean that these proposals were abandoned. Indeed they became basis for further debate on future of Economic and Monetary Union, which will be analyzed in next part of this contribution.

6 FUTURE OF ECONOMIC AND MONETARY UNION

Despite the fail of December 2011 European Council the political leaders of EU and member States continued to analyze future Treaty change, whose aim would be to ensure stability and prosperity. The departing point for this is the Report of the President of the European Council from June 2012, which outlined the main visions and challenges.[29] According to the report the architecture of Economic and Monetary Union should be based on four building blocks – financial fiscal economic and democratic, with Treaty change being necessary with heterogeneous intensity in some of them.

In the first pillar – the financial building block should deal mainly with the single European banking supervision, a common deposit insurance and resolution framework. Here everything can be achieved by means of secondary regulation, which was confirmed also by the President of the European Commission.[30] In fact the Commission has already tabled several proposals (Single Supervisory Mechanism and Single Resolution Mechanism), some of which have been adopted by the EU legislators.[31]

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[26] CRAIG, P. Lisbon Treaty, p. 487.

[27] See report reffered to in footnote 27, para 10.

[28] On compatibility of Fiscal Compact with EU law see BUCHTA, T. Zmluva o stabilite, koordinácii a správe v hospodárskej a menovej únii ako nástroj a prejav užšej medzivládnej spolupráce medzi členskými štátmi EÚ.

[29] The report is available at: http://ec.europa.eu/economy_finance/focuson/crisis/documents/131201_en.pdf

[30] See statement of the President of the European Commission available at: http://www.eubusiness.com/news-eu/finance-public-debt.hft/

[31] See information of the European Commission available at: http://ec.europa.eu/internal_market/finances/banking-union/index_en.htm

The second building block – fiscal would however certainly necessitate certain Treaty change. It can be perceived to certain extent as a revival of proposals submitted to the European Council in December 2011. Hence the proposals line interventions into national budgets, issuance of common debt or treasury office, which would require Treaty change, are not completely new. With respect to common debt issuance we are coming back to no bail-out clause, whose compatibility with this idea would have to be considered thoroughly.[32]

The third building block is aimed at sustainable economic growth, employment and social cohesion. The report proposes stronger economic integration, which would prevent unsustainable national policies. As the most important policy examples the report mentions labor mobility and tax coordination. In both of these areas the EU has already some limited powers and adopted certain common rules as for example Directive 96/71/EC concerning the posting of workers in the framework of the provision of services or Directive 2005/36/EC on the recognition of professional qualifications. However it is obvious that the report must be interpreted in light of regulation of sensitive areas like social or tax policy, with respect to which it is possible to find some suggestions in the Euro Plus Pact. This document refers to sustainability of national social systems, their adaptation to demographic situation, diminishing labor costs etc. Both social and tax policy remains predominantly in the competence of the Member States, it is therefore apparent that any further legal steps leading in the direction set in Euro Plus Pact would necessitate Treaty change.

The fourth building block has a transversal nature. As the decisions concerning national budgets and crucial economic policies usually entail intensive public debate, it is important to ensure their strong democratic accountability. In light of this the building block aims at strong involvement of both the European Parliament and national parliaments. Although stronger democratic accountability of the EU was one of the most important focuses of the Lisbon Treaty, still much can be done in order to reinforce the democratic dimension of decision-making processes in the EU and Eurozone. Some authors suggest creation of similar relation between EP and ECB as between US Congress and FED, involvement of EP into Article 121 TFEU (adoption of broad guidelines of economic policies) or involvement of EP into the excessive deficit procedure set out in Article 126 TFEU.[33]

The above outlined changes do not mean that everything in these building blocks must be undertaken by means of Treaty change. However this report cumulating with the proposals for Treaty change on December 2011 clearly shows, that the current system of economic governance in the EU and Eurozone is not up to date and requires some changes.

The European Council in December 2012 decided that the process of completing of EMU will be based on existing EU institutional and legal framework. This decision is certainly motivated by certain fatigue of a long ratification of the Lisbon Treaty and fears of possible complications during national ratification procedure. However the agenda of amending EU primary law may appear again after the EP election in 2014.

7 CONCLUSION

The sovereign debt crisis revealed that the Treaties are not construed in a way to ensure efficient safeguarding of stability of the common currency. The most important instruments safeguarding the financial stability of Eurozone were not adopted pursuant to the Treaties, but as intergovernmental measures. Interestingly enough, the legality of creation of euro rescue mechanism by intergovernmental means was confirmed by Treaty change made through simplified revision procedure. The limits of EU powers to deal with causes, but above all with the consequences of the sovereign debt crisis are being perceived and result in current discussions on future of Economic and Monetary Union. There are several possible avenues and probably the year 2014 will determine whether the Treaty change will be a feasible option.

[32] See statement of the Director of the Legal Service of the Euroepan Commission according to whom „A number of future initiatives, such as those on a banking union or European bonds for example, would be impossible to implement unless the European Treaties were first amended." Available at:
http://ec.europa.eu/transparency/regdoc/rep/10061/2012/EN/10061-2012-2007-EN-F-0.Pdf

[33] CLERC, O. La gouvernance économique de l´Únion européenne Recherches sur l´integration par la differenciation, p. 591 – 599.

Bibliography:

BUCHTA, T.: Zmluva o stabilite, koordinácii a správe v hospodárskej a menovej únii ako nástroj a prejav užšej medzivládnej spolupráce medzi členskými štátmi EÚ. In: ŠPAČEK, M. (edit.): Slovenská ročenka medzinárodného práva 2010-2011 = Slovak yearbook of international law 2010-2011, ročník III., Bratislava, Slovenská spoločnosť pre medzinárodné právo pri Slovenskej akadémii vied, 2012. p. 146 – 161. ISBN 978-80-969540-8-7.

CLERC, O. La gouvernance économique de l´Únion européenne Recherches sur l´integration par la differenciation, Brussels, Bruylant, 2012, 773 pages. ISBN 978-2-8027-3672-1

CRAIG, P.: The Lisbon Treaty Law, Politics, and Treaty Reform. Oxford, Oxford University Press, 2013. 529 pages. ISBN 978-0-19-959501-3.

DE WITTE, B.: The European Treaty Amendment for the Creation of a Financial Stability Mechanism. In: European Policy Analysis, Issue June 2011. Available at: http://www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf

LOUIS J. V..: The unexpected revision of the Lisbon Treaty and the establishment of a European stability mechanism. In: ASHIAGBOR – COUNTOURIS – LIANOS (edit.): The European Union after the Treaty of Lisbon, Cambridge, Cambridge University Press, 2012, p. 284 - 320. ISBN 978-1-107-60324-0

MIDDLETON, T.: Not bailing out ... legal aspects of the 2010 sovereign debt crisis. In: JACQUÉ J. P. et al (edit.): A Man for All Treaties Liber Amicorum en l´honneur de Jean-Claude Piris, Brussels, Bruylant, 2012, p. 421 – 439. ISBN 978-2-8027-3507-6

UNGERER, H.: A Concise History of European Monetary Integration: From Epu to Emu, Westport, Quorum Books, 1997. 338 pages. ISBN 0-89930-981-X

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HUMAN RIGHTS OF MUSLIM WOMEN IN THE LIGHT OF ISLAM AND EU LAW

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Abstract: Millions of Muslim women live in the EU, many of them educated by their families in the traditional Muslim way. Conflicts occur by different points of view onto equality of gender by Koran on one side, and Human or Fundmental rights on the other side. Member states of the EU are oblidged to protect the Human Rights of their citizens. The conflict between the Fundamental Right of equality and of religious freedom in view of Sure 4, Verse 34 has to be solved.

Key words: Human rights, equality, European Convention on Human Rights, EU-Charter of FundamentaL Rights, Muslim Women, Koran

1 INTRODUCTION

Millions of Muslim women live in the EU. Many of them came in the course of labor migration since the sixties of the 20th century, mainly to Germany, Austria, BeNeLux, Denmark and Sweden. A number of them had arrived at France, England, Portugal and the Netherlands even earlier because of connections with colonial times.

Due to publications of women affected[1] the European publicity pays special attention to serious violations of rights such as forced marriages and also honor killings. Affected or victims are Muslim women. Muslim men, usually close family members, are responsible.

These illegal acts illustrate violations of recognized human rights. Honor killings violate the fundamental right to life, but also forced marriages violate basic human rights, namely the right to freedom of voluntary marriage, as specified in

- the UN Declaration of Human Rights of 1948 – Article 16.2
- the International Covenant on Civil and Political Rights
  1966 - Article. 23.3
- the Convention on Elimination of all forms of women discrimination of 1977 (Article 16.1, lit. b) of the 1977 women
- European Convention on Human Rights - Article 12
- Constitution of the Federal Republic of Germany (Article 6.1)

It also shows an uneven relation in regard of the equality of gender. That is why violations of further human rights, such as equality of men and women, prohibition of discrimination, freedom of expression of one's opinion must also be taken into consideration. Phenomena such as Islamic arbitration in EU countries[2], leading partly to a parallel judicial system already in some regions, violate the fundamental right of equality before the law. The list is intended to be exemplary here and not a final one.

The injuries, in the majority of cases, are committed by people from the inner circle of the victims, usually by members of the family, and consequently by individuals. Though the formulated fundamental and human rights are primarily state and government addressed which, according to Article 51 ff, actually applies to the Charter of Fundamental Rights of the EU, it is a recognized legal opinion that fundamental and human rights violations can also be committed by individuals.[3]

[1] In Germany: Serap Cileli, „Your Honor – Our Misery", Munich 2008, Necla Kelek, „Die fremde Braut (The Strange Bride", Köln 2003., in France Leyla, "Zur Ehe gezwungen (Forced to Marriage)", German issue, Augsburg 2005

[2] s. for Germany: Joachim Wagner, "Richrer ohne Gesetz (Judge without Law)", p. 51 ff., Berlin 2011

[3] Quote insertion

Nevertheless, the state is obliged to protect human rights in any case, even if they are violated by individuals.

I do not want to go into details at this point. Further, I will not go here into the fact that "The Islam" basically does not exist, but it is formed by a variety of faith directions with partially very significant differences, which are vividly illustrated by tensions between Sunnis and Shiites which are recognizable in Europe, too. For that matter, I refer to my previous publications.[4] [5]

Violators of the above mentioned human rights plead religious freedom for their justification. Especially with regard to suppression of daughters, to forced marriages, as well as to honor killings, the term of "honor" plays a key role. The fundamental importance of ”The Honor”[6] is amongst traditional Muslim people of unimaginable high rank. This high rank has derived from traditional religious beliefs and is supported by those, although nobody really can say whether the importance of the honor, especially for men, has it's origin in the Islam or in traditions even older than the Islam. Faithful believers, however, always bring it into a a straight connection to the Islam. That is why those believers claim that these traditional religious notions also are under protection of human rights and, therefore, are supposed to be protected by the human right of religious freedom. As this traditional behaviour and conduct includes violations of the rights of freedom, of equalitzy ,of protection of family for example. it consequentially leads to emphasizing religious freedom and to repudiating other human rights. This is a quite remarkable phenomenon, because protection is requested under reference to the human rights declarations of the so called “western world” which propagate religious freedom, whereas in the Declaration of Human Rights in Islam “religion” is excluded in the context of equality.

Here in Europe, so far, it turns out to be a very one sided affair, when Muslims refer to Human Rights. Human rights are applicable that far as protection of the religion of Islam is guaranteed. Human rights are repudiated as applicable law, if from an Islamic point of view the right interferes with Sharia. Under this aspect, it is very instructive to compare the Cairo Declaration of Human Rights in Islam of 1990[7] to the Universal Declaration of Human Rights. The decisive difference is that the Declaration of Human Rights in Islam acknowledges only those rights which are in accordance with Sharia. In regard of equality of gender, Art. 5 and Art. 6 are in clear contradiction to the Universal Declaration of Human Rights. In Art. 5 is pointed out that each restriction of the freedom of marriage is prohibited; but this is only valid in view of “race”, “color of skin” and “nationality”. Religion is not listed up, so that men and women can be subjected to restrictions of marriage due to membership to other religions.[8] The Cairo declaration does not support equality of men and women, but lifts up superiority of men to an eminent rank.[9]

The basic issue of the Cairo Declaration of Human Rights is that rights, and human rights, too, are only to be applied in accordance with the Sharia which is of highest rank. That makes it necessary for better comprehending to take a look at the Sharia, the Islamic Law.

2 ISLAMIC LAW

2.1 Jurisprudence in Islam

According to Muslim understanding, Islamic law is based on the order set by God. The term Sharia (Arabic: shar'a) is used in a normative sense exactly for this order set by God.[10] In constitutions of most Islamic countries, such as Egypt, Bahrain, Yemen, Kuwait, Lebanon, Sudan, Syria and the United Arab Emirates, the Sharia is explicitly mentioned as a "source of law-making". Other countries, namely Saudi Arabia, Oman, Pakistan and Afghanistan go even further: the Sharia is equated with the legal order there.[11]

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[4] A. Busch, Eine Frage der Ehre, Neue Justiz, 2010, pg. 21 ff

[5] A. Busch, Islam und Recht, Neue Justiz, 2011, pg. 102 ff

[6] In Turkish: Namus (i.e. The Great Honor of very high rank)

[7] Cairo Declaration of Human Rights in Islam, signed on Aug., the 5th 1990 and accepted by the 57 members of the Organisation of the Islam Conference; this declaration is not binding for the member-states in the sense of International Law. It is based on the London Declaration of Human Rights in Islam of Sept. 19th, 1981.

[8] Art. 5 of the Cairo Declaration of Human Rights

[9] Art. 6 of the Cairo Declaration of Human Rights

[10] s. Islam-Lexikon, Beck-Verlag, 5. Edition Munchen 2008 under „Scharia“

[11] s. Islam-Lexikon, aaO, under the key word of the corresponding state

Nevertheless, Sharia is not meant to be a codified law book. Islam is a comprehensive way of life, and the Koran its guidance for it. The normative elements of Koran in their whole are called Sharia. The Koran itself contains instructions on how people are to behave towards God, towards their environment (human being, animal, nature) and to themselves.[12]

However, there is a striking difference between religiously oriented and secular legal systems. Religion contains a reference to the Beyond, the Hereafter. This view can also be transferred to religiously oriented legal systems. The violation of religious conduct standards is sanctioned in the afterlife, in the Beyond, whereas the breach of general secular laws will be sanctioned in this world, in the "Here and Now". Islamic texts, however, are written in a way that references to the religious order on one side and the secular order on the other side are mixed together, so that sanctions for offenders, for example, can be combined in this world and in the Hereafter.

2.2 The sources of law in Islam

With the exception of Turkey as the only country having a Muslim population that has declared a separation of religion and state as a constitutional principle since 1923,[13] Sharia represents – to a certain degree differing from country to country - the basis of legal order in all other countries with Muslim population. Thus, the specific question as regards legal sources of human rights in Islam arises.

a. The Koran

The Koran as "holy script" of Muslims is not only of special, but of outstanding importance for all believers of this religion.. This can only be understood by knowing its history of origin and the distinctions with other religious scriptures. Considering only the three great monotheistic religions, the Jewish religion is based on the Old Testament of the Bible, a Aollection of writings from different sources which have been collected over a period of about 1800 years. Base of the Christian faith is, beside the Old Testament, the New Testament of the Bible. The latter consists of 27 scriptures which were created in the period between 50 AD and 110 or even 130 AD.[14] In the 4th century, the Catholic Church agreed on the fact that those selected scriptures constitute the New Testament. Even Catholic Bible scholars of Vatican currently confirm that none of the Gospels was written by that disciple of Jesus whose name it bears. None of the real authors knew Jesus. The letters of Paul, however, are authentic,[15] but neither he had known Jesus personally. As a matter of fact, Jesus spoke Aramaic, in spite of that the scriptures were written in Greek.

For all Muslims the Koran is the true word of God. The complete contents of the "Holy Book" have been transmitted to Prophet Muhammad by the angel Gabriel during a period of about twenty-three years.[16] The first revelation came to Prophet Muhammad by the Angel Gabriel in the month of Ramadan in the Cave of Hira in 610.

In the Koran it is definitely said: "Your companion (Muhammad) does not err and has not been deceived, not speaking from own urge. It (the Koran) is nothing but a revelation revealed." [17] „It (the Koran) is not a fictional story, but a confirmation of what had happened before, being an explanation of all things and a guidance and a mercy (...)"[18]

The word "Koran" originates from the Arabic word qara'a and means "presented" or "recited".

Today's official version of the Koran is the same everywhere in the world; it is in old Arabic language and has not changed over time. In the course of the lifetime of Prophet Muhammad each chapter was written down by several companions, many of them learned the Koran by heart. The first Caliph, Abu Bakr, read all the manuscripts that had emerged during the lifetime of the Prophet collecting and writing them out. This method of collection and re-writing was subjected to a double ensuring testing method, namely the comparison with the original manuscripts and with the texts

[12] Murad Hofmann, Koran, p. 78
[13] Indication of the date
[14] Cebuj/Dobek/Rudnik, The Bibel, The key to holy script, Munchen 2009, p. 352
[15] Cebuj/Dobek/Rudnik, aaO, p. 492
[16] Ramadan Said, Islamic Law, Theory und Praxis, p.38, Stuttgart 1980
[17] Max Henning, The Koran, The translation of the Koran, Istanbul 2003, Sure 53, verse 2-4
[18] ibid, Sure 12, verse 111

memorized by the companions of the Prophet. This ensured each provision had been verbatim reproduced.[19]

The Koran says: "This is a book, there is no doubt about it, it being a guidance for the righteous."[20] Thus, for Muslims the Koran, as the word of God, is the embodiment of unlimited legislative power, and the origin of legality and any legal liability.[21]

Koran consists of 114 Suras[22] which are further divided into verses[23]. Apart from the first Sura Fatiha, the Suras are arranged by their length, starting with the longest one, al 'Baqara and ending with the shortest one. Some Koran verses are formulated so that everyone can understand the meaning of the verse, but some of them are ambiguous and unclear, the meaning of which is acquired only through the interpretation. But there are also verses which meaning knows nobody but God himself.

Since the 9th century Muslims argue about how the Koran is to be interpreted, whether as the eternal Word of God, or as a historical event. The text of the Koran represents both.[24] That is why it is often a point of a question while interpreting the Koran, whether a verse was revealed in the course of time of the Prophet, and as such has lost its validity for the present time, or whether the verse has an unlimited validity; a fundamental point of dispute between traditionalists and modernizers of Islam on the other side.

When it comes to translating the Koran, Islamic scholars agree that the matter here is merely an attempt of explaining or interpreting the Koran by translation.[25]A verbatim transmittance of a work into another language is simply impossible, since there are some words or terms in any language that are not known in another language an they have to be circumscribed. Therefore, the translations differ from author to author which also leads to misunderstanding of the Koran.

Since the Koran is primarily a book of religious guidance, it is not directly applicable as a manual for a legal system. Describing the Koran as a call to the true faith means that it aims at both, mind and heart of people. That is why it would be wrong to regard it as a collection of legal regulations. Nevertheless, there is a significant number of such regulations relating to specific areas. So especially in the sphere of family law, there are approximately seventy instructions, in civil law further seventy, in criminal law there are thirty, as regards case law and procedural regulations they are counted up to thirteen, constitutional law ten, the law of international relations finds twenty-five provisions mentioned, and economic and financial order ten ones.[26] These regulations do not contain precise elements and therefore are not of the definite standards that are suitable for direct legal application by legal subsumption or evaluation. They give room for interpretation, and some guidelines in which partially legal terms are partially unclear appear to be applicable to several legal spheres, and they are applied as a matter of fact.

Holy scriptures are of supernatural origin, not of determined truth and binding authority. In this sense, the Koran is solely understood by Muslims as the only Holy Scripture that exists in the world. The Old and the New Testament, nowadays, are even by Jews and Christians treated not as "direct, verbal message of God",[27] but as an inspired and wise thesis of God. This represents the striking difference to the Koran. Inspiration comes to people without knowing the origin of thought or incident; revelation lets God to be recognized as source. That is why Muslim recognition of the Koran as the own word of God is the base of Faith. The one who does not believe in it is not a Muslim. Just as God became flesh and blood in the person of Jesus[28], God became word in the Koran, from the perspective of Muslims.[29] The word of God is God himself.

This background makes the credence of Muslims towards the Koran, and conduct rules derived from it ultimately represent more than just a moral order, quite understandable.

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[19] Ramadan Said, Islamic Law, p. 38f
[20] Max Henning, The Koran, Sure 2, verse 2
[21] Ramadan Said, ebenda, p. 40
[22] Sure = extract
[23] Arab. = Ayen
[24] Hoffmann Murad, Islam, Munich (Diederichs), 2. Aufl.,2001, p. 26.
[25] Schmitt Cäcilia/Abu Rabi Ibrahim M., Islamic theology of 21th century, Stuttgart (Basic edition) 2007, p. 20.
[26] So Ramadan Said, 1980, p. 40
[27] So Murrad Hofmann, Koran, p.12
[28] sog. „incarnation"
[29] sog. „inliberation"

b. *Sunna*

Together with the Koran, the "Sunna" is the scripture of the utmost importance in Islam. In addition to the Koran, it includes the sayings of Muhammad as well as reports on his actions and tacit approvals that were gathered in the so-called "Hadith collections".

Under "Hadith", the collection of concise examples is understood. These are mostly answers to questions of Muhammad's followers. So, the terms "Sunna" and "Hadith" are largely synonymous.

"Sunna" is an Arabic term which literally means "practice". It was used by Prophet Muhammad as a generic term for all the things he had said, done or approved. Actually, the whole way of life is called Sunna. In the Koran is said: "You who believe, obey Allah and his messengers (…)!"[30] In another place is said: "Those who obey the Prophet obey Allah."[31] That it why the Prophet is entitled to explain what is written in Koran, is comes clear from the Koran: (...) "And we revealed to you the Koran so that you explain to people what had been sent down to them, so that they bethink."[32] Thus, the lawful validity of Sunna is derived from Koran.

The role of the Sunna in relation to the Koran becomes apparent from its function. It explains the decrees of the Koran and its judgments in detail, it allows exceptions to general rules from which a similar case is released in analogy to a judgment, or further decrees or judgments are derived from.[33]

The life of the Prophet Muhammad represents the model of a sincere life for all Muslims. This is regarded as fact derived from the Koran: "In Allah's Messenger you have an excellent example for everyone (...)."[34] It comes from an authentic Hadith that Prophet Muhammad used to say: "(...) It is your responsibility to follow my Sunna(…)."[35]

In his lifetime, Prophet Muhammad encouraged his companions not to write down his comments in detail in order to avoid the risk of confusion with the Koran. This fact has not diminished the meaning of the Sunna, but the later the records are the much more difficult they appear. The sources of Sunna were the reports[36] by the numerous companions of Prophet Muhammad, where the proof of the credibility of each tradition was the most complicated part of gathering task.[37]

After the Prophet's death, a considerable number of traditions existed. That is why there was always a danger some Hadiths were invented. To minimize the risk of adding non-authentic Hadiths inot the collection, scholars began to examine the truth of the Hadith in order to protect the authority of the Sunna by the following methods: [38] A Hadith consists of two components, namely the content of the Hadith itself, and the chain of names of those men and women who had conveyed the content. The chain begins at the narrator and it leads to teachers and companions of the Prophet, up to Prophet Muhammad himself. In order to check the true character of a Hadith, Islamic scholars have developed two methods. On the one hand, the chain has been investigated. The chain has to lead back continuously to Prophet Muhammad. Each person mentioned in the chain must be of an extraordinary character, of high mental power and of good repute. On the other hand, the content had to be investigated whether it agrees with Islamic principles, and matches a situation or a historic event, which had led to another Hadith already.

The result of all these efforts is the classification of a Hadith in regard of its accordance to the degree of authenticity. The most important categories are: Sahih = authentic, Hasan = good (right)

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[30] Koran,2003, Sure 8, verse 20

[31] Ibid., Sure 4., verse 80

[32] Ibid., Sure 16., verse 44

[33] Schaich Suhaib Hassan, Introduction in the Sunna, referenced from: http://www.al-islaam.de/swf/sun0008.swf (25.07.2007) .

[34] Koran, 2003, Sure 33, verse 21.

[35] Enna-Wawi Muhiddin, Izbor Hadisa iz Rijadu-S-Salihina (Choice of Hadithen from Rijadu-S-Salihina) Zagreb 1995, p. 44.

[36] Sog. Hadithe, s.above; The reports of the companions are named „Hadiths". Hadith means narration or report, in other words report about the Sunna of Muhammad.

[37] Ramadan Said, 1980, p.41.

[38] Höfler Eva-Maria, The status of the woman in Islam: her position in the Islamic family, Graz 2005, p. 4.

and Da'if = weak. The first two categories are acknowledged binding legal sources, the last one is not.[39]

c.) *The essence of Islamic law*

The essence of Islamic law, derived from Koran and Sunna, is characterized by the following features:

1. All regulations are fundamental and of general nature

Many Koran verses begin with "Oh, Mankind" (for example Sura 49, verse 13), that highlights general character.

2. Everything is allowed that is not clearly forbidden.

Islamic scholars referenced to Sura 45, verse 13: "He has done for you everything servant, what is in heaven and earth".

3. What is forbidden is allowed, if it is required by an urgent need.

Sura 2, verse 173: "But the one who is forced without desire and without measure to stand, there is no sin for him".

4. In Islam everything is useful regardless of the origin, may be accepted unless it is contrary to the provisions of Koran and Sunna.

This rule can be found in the following Hadith: "The believer is always in search of wisdom, wherever he may find it; it's up to him to attain it".[40]

d) *Idschtihaad, the secondary source of law*

In contrast to Koran and Sunna which are, according to the above mentioned points of view, also called primary legal sources, the Idschithaad is regarded as secondary source of law.

Its legitimacy is derived of course from the Sunna, from a Hadith of Muhad Ibn Jabal who was appointed by the Prophet to become the judge of Yemen. The Prophet asked Muhad: "What do you base your judgment on?" Muhad: "On the book of God." The Prophet: "And if you find nothing there?" Muhad: "Then on the Sunna of God's". The Prophet: "And if there is nothing respective there?" Muhad: "Then I will do my best to do my own judgment". Then the Prophet replied: "Praise be to God who has guided the Entitled of his Prophet, so that it pleases his Prophet".[41]

Three conditions were developed to allow an independent opinion about a problem:

1. There may be no solution in Koran or Sunna;
2. It must be consistent with the principles of Koran and Sunna (So-called Koran and Sunna-compliant interpretation);
3. The opinion must be clear and understandable.

Nevertheless, the recognition of Idschithaad as a secondary source of law is not indisputable by Islamic scholars. According to a Hadith, the Prophet himself had accepted an advice from his companions, saying at that: "Give me your advice, for without revelation I am a person like you".[42]

The principle of Idschithaad is expressed in a "Fatwa", a legal opinion. A Fatwa is accepted as binding for the experts themselves, and for those who coincide with the appraiser. Thus, the recognition of a Fatwa also depends on the authority of the expert. [43]

The following is distinguished

Idschithaad Qijas – inference by analogy Principles from particular facts of the matter are transferred by compatible issues

Idschithaad Islaahi - decision in the light of the general (or public) welfare after Malekish law school[44]

Idschithaad Dschema'j - collective Idschithaat according to a Hadith of the Prophet: "My community will not be in error".[45]

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[40] see Ramadan Said, Islamic Law, p. 64

[41] see. Ramadan Said, ibid, p. 67.

[42] Ramadan Said, ibid, p. 79

[43] A world wide known Fatwa was spoken by Ayatollah Khomeini against the Pakistan author Salman Rushdi; it underlines its importance, especially due to the scholars reputation of highest rank

[44] According to Imam Malik, the founder of Law School

3 COMPARSION: HUMAN RIGHTS OF WOMEN ACCORDING TO UNIVERSIALLY ACCEPTED DEFINITIONS AND HUMAN RIGHTS OF WOMEN IN THE LEIGHT OF ISLAM

Muslim ethnic groups rely on justifying the preference of men before women by the Islam and traditional guidelines supported by it. Honor killings of women[46], forced marriages, difficult access to education for girls are tried to be legitimized. This is a challenge for a comparison of whether and to which extent the Islam is compatible with human rights principles, or whether it stands in opposition to such.

In front of the background that amongst Muslim people there are many who see their traditional principles covered by the human right of religious freedom, although many an aspect stands in contradiction to further competing human rights, for example the human right of equality in regard of gender.

Verification is to be done in front of the background, whether Muslims in the EU can live accepting the human rights, especially here according to the principle of equality between men and women, also according to the principles of their faith, by weighing up against each other the competing fundamental right of equality on one side and the fundamental right of religious freedom on the other side.[47]

Therefore, the legal sources of Islam and EU sources of law are to be compared to each other with regard to the question whether the Islam allows an interpretation that goes together with the internationally acknowledged human rights, here the human right of equality, as applied in the EU by the EU-Charter of Fundamental Rights, here, for example, Article 20 ECFR[48] limited to equality of men and women, also within the meaning of Article 1 of UDHR[49] and also, as to the prohibition of discrimination of women stipulated by Article 2 of UDHR and Article 14 of ECFR.

3.1 Equality of people within the meaning of Article 1 of UDHR.

In Art.1.of the UDHR is stated that all human beings are free and equal in dignity and rights.

Human rights include a variety of definite topics and affect virtually all spheres of coexistence of people and politics. Unifying element for all human rights is respect before human dignity. Even in countries where in the field of jurisdiction of the ECJ[50] equality is not explicitly determined by the Constitution, this basic principle is applied; the ECJ so far speaks of common constitutional traditions.[51]

Since all human beings are born free and equal in dignity and rights, equality applies without distinction for both sexes, thus, for a man and a woman. The principle of equality in the sense of human rights grants a subjective-public right on equality in the sense of an enforceable and secured claim to the individual.

3.2 Equality of people within the meaning of Islam

In order to loosen tension between religious rules, on the one hand, and human rights, on the other hand, it is to ask here in regard to the upcoming situation of Muslim women in the EU, whether and to what extent the principle of equality of human beings and, above all, the equality of the genders finds its reflection in Islam.

Koran stands against.

Sure 4, verse 34 says:

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[45] s. Höfler, Eva Maria, p. 2

[46] see current process of the district court Hagen/germany about murder of the daughter because of west-oriented way of life, Beginning of the process: 15.03.2013

[47] „Practical concordance“, Praktische Konkordanz, Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl. 1999, Margin-No.: 72

[48] ECFR = Charta of the Fundemental Rights of the European Union 2000/C 364/01 dd. 18.12.2000

[49] UDHR = Universal Declaration of Human Rights, UNO-Resolution 217A(III) dd. 01.12.1948

[50] ECJ = European Court of Justice

[51] See with further examples Tettinger/Stern, Europäische Grundrechtecharta, Art. 52, margin-no: 65ff

„The men are made responsible for the women with a consideration of how Allah has provided one of them with more benefits than the other, and because they spend their assets for women".[52]

In the translation of the Center for Islamic Women's Studies it states:

"Men are for women because Allah had honored each other and because they spend out their property. That is why loyal women obey".[53]

This rule given in Koran and being understood by Muslims as a revelation of God is consistently used by defending lawyers as an interpretation of Koran in the patriarchal sense. Like from the latter one, but also from the first translation and other translations[54], an obviously clear predominance of a man over a woman has to be concluded as well as it influences legislation in regard of personal status, marriage and inheritance law, and procedural law for Islamic states. This interpretation of the Koran is in evident contradiction to Article 1 of the UDHR.

Schools of Islam have so far not taken into consideration human rights formulated, also as the revelation in Sura 4, verse 34 is more complex.

The continuation of the verse (Sura 34) is read as follows:

"Those, however, if you experience rebellion from the women, ysou shall first talk to them, being warned, then you may desert them in bed and you may beat them!"[55]

This represents a significant primacy of man over the woman, causing a breach of the fundamental principle of equality. Thus, there is a common perception that violence against women through this verse is morally and legally legitimate, at least to a limited extent, that is, if no serious injuries or bone fractures occur.

Back to the admissibility of forced and arranged marriages relying on this revelation, and being complemented by Sura 2, verse 221, which is read as follows*: "Do not marry your daughters to gentiles before they become believers; it is true that a believing slave is better than a gentile, so you like him."*[56]

Last verse implies, that the daughters getting married can express their tacitly possible consensus for marriage, which is seen only as a private contract required, but the addressee of the Sura are the fathers, so that the right of choice is granted to them. Rights and also responsibilities from Sura 4, verse 34 are entrusted to a husband chosen by a father or a family.

Back to cases of honor killings, the offenders try to justify themselves as victims of offences onto the honor of men. Thereby, the outcry of daughters against their father's selection of the spouse is perceived as violation of Sura 2, verse 221. Fathers feel their daughters' refusal to agree to an arranged marriage as a massive attack on their honour, and, going along with that, a loss of their reputation in society, if they have failed. The violations are perceived that strong that revenge is unavoidable, and this can even lead to the daughter's death. Additionally, other male family members feel called to speak to recover their father's and the entire family's honor. These attitudes are tried to be justified by religious grounds, namely by the fact that the selection right of the father serves to secure the Muslim faith, and prevents their daughters from a marriage with a non-Muslim man. This could influence the woman to bring up children in a non-Muslim faith which appears to be unacceptable.

Sura 2, verse 282

[52] So Max Henning, Translation of Koran, Istanbul 2003

[53] Center of Islamic Women Study, A sole word and its significant effect, p. 1

[54] Synopsis with four various translations for German and English at www.koransuren.de

[55] The Authorized English Translation of the Quaran (Koran), www.universalunity.net, Translation of Koran, sure 4, vers 34; see also www.koransuren.de

[56] Sure 2, verse 221 in German translation of Henning, Max, Translation of Koran, Istanbul 2003

The principle of inequality becomes also obvious in the verse of the above mentioned Sura. If a woman brings a proceeding to court, she is treated only half as much of probative value to such a man.

The handling of this principle leads also to a significant violation of equality, due to the fact this provision actually makes the woman's access to court, especially a promising litigation difficult, if not impossible. The strict separation of genders in Islam is to consider. The result is that men and women have separate contacts to others. If a woman tries to claim in court by legal means, especially against a man, the chances for successful evidence are a priori very poor, due the said rules. Thus, a male plaintiff presenting a male witness has far better chances on a favourable decision, because due to the gender separation in the Islamic society men have much more contacts to men than to women, whereas women have only contacts to women. So women always have to present two female witnesses. Additionally to be said, that evidence is only given by two women, if their statements are identical. Slight differences in the subjective perception or description of the facts lead to the result that evidence is not provided. Thus, women have a worse procedural outcome and are therefore in a disadvantaged position, which contradicts the principle of equality.

The above examples show that Koran quotes prove unequal treatment between men and women. Other examples of polygamy, restriction of property rights of women, limited political participation (woman as head of state?) could be quoted from Koran as well.

However, the equality of people is expressed as a general message of Islam in a Hadith. Thus, Muhammad said:

"All people are equal, equal as the teeth of the comb. There is no assertion of primacy of Arabs against the non-Arabs or white people against black ones."[57]

The conclusion makes that there could be supposed to be no difference in Islam, if a person is born a man or a woman, or what nation or race he belongs to. Consequently, the interpretation of Islamic principles within the meaning of Article 1 of UDHR would be conceivable.

This interpretation would contradict the principle of supremacy of a male, and thus do not preclude a Koran interpretation compliant with human rights.

The above mentioned principles of Idschithaad suggest that the solution of primary legal sources in accordance with the ranking are to be found in Koran, then Sunna and only then in Idschithaad.

Thus, Koran is considered the highest source of law being of preference.

It is questionable, however, whether the Koran Suras mentioned must be interpreted literally or in spirit and purpose of the rule (i.e, teleological), in the light of the time of its creation (historical), and in the light of the entire context.

Islam was revealed to the Prophet in the 7th century. Muhammad lived in a society where women's rights did not exist. Women were property of men and could be bought; a man could have as many women as he wanted. Without going into details at this point, it cannot be refuted that at the end of the 18th century, as human rights were formulated for the first time, they were regarded as human rights of men[58]. Equality between men and women in the Christian culture was unthinkable, yet, even in that time. [59] In Muhammad's society rights of women were explicitly mentioned for the first time by the revelation of the Koran. Consequently, that meant an elementary progress in terms of women's rights at the time and in the region where the Koran gained importance.

The text of Sura 4 under the headline "The Women" was in a certain way ahead of its time. It has improved the situation of women in those days in a significant way by pulling regulations granting them explicitly rights, especially for inheritance, they had not had until then,

The above mentioned Hadith documents also the Prophet's own interpretation of the Koran, according to which the Islam is the religion of the unity, and thus in the sense of a spiritual moral level, as unity of God with mankind. He also comes to equality among people. After all, those who have the same relation to God are equal to each other as well. This is inferred by the implication of the Hadith in which is said: "Only the righteous deserve the privilege of God."[60] Thus, all righteous are treated equally.

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[57] So by Shaheen Sardar, Gender and Human Rights in Islam and International Law, p.50
[58] Kälin, Walter / Künzli, Jörg, Universal protection of Human Rights, p. 356, Basel 2005
[59] Olympes de Gouges
[60] Sharhen Sadar Ali, ebena

The Koran is the guidance, and the entire Sura 4, verse 34 of which was explicitly cited, is entitled "The Women". Women as a whole and also as individuals are mentioned, especially Mother Mary (Maryam), the Virgin, who is not only mentioned in a number of verses from the Koran, but one Sura even carries her name as a heading.[61] Hence in the Koran, as the main source of Islam, the woman is of central importance.

In this context, traditional Islamic scholars refer regularly to the equivalence between men and women, but overlooking or denying the fact that equality means more and goes beyond equivalence, namely that women have their own rights, and exercising these rights of women must be ensured, as it is provided in Article 3 of the Covenant on Civil and Political Rights, which stipulates: *"State Parties undertake to ensure the equal rights of men and women by enforcement of all (in the present Covenant) fixed civil and political rights."*

Solidarity among human rights activists lies in the sense that the right to equality contains more than the prohibition of discrimination, namely the duty of the state to allow women the implementation of their rights at least at the same extent as men.

The recognition of this legal position must be a goal of a modern, human rights respecting Koran interpretation. Ziba Mir-Hosseini, as a modernizer of Islam, and also Islamic feminists work at this interpretation.[62] The work is complicated by the fact that there is no general doctrine of religion in Islam but a variety of preachers, partly individual, partly organized in Muslim religious associations distributing different, but often very traditional interpretations, in some cases originating from even pre-Islamic times. Islam is interpreted in a way to strengthen traditions and to substantiate the appropriate interpretation.

Thus, even regional traditions that do not have their origin in Islam are established. The religious traditions of Yesides, a religious community in Kurdish regions, can be given here as an example. Also, they want to understand the subordinate role of women to men and to religion, and restrict women rights in a way that is comparable to traditional Muslims attitudes, such as prohibition of marriage with non-believers. But they do not base their religious orientation on Islam.

Under the premise that Prophet Mohammed was an innovator in his time, a refreshing interpretation of Islam from today's perspective in the sense of recognized human rights is not only possible, but necessary.

According to my personal opinion, there is a coming up obligation for the EU and its member states to protect an equivalent concordance between all fundamental or human rights and, thereby, also to protect the freedom of Islamic religion and its worship by granting an education in human rights to children organized and controlled by public schools or, at least, by public authorities, to enable children to interpret their religion in accordance to the given human rights by themselves and not by interpretation rules predicted by uncontrolled private persons or associations. Human rights have crossed mental, political and religious borders and they are, as pointed out, of highest rank. Religions contain conduct rules how to behave properly in a moral sense. Before human rights were formulated, they stood in the position, human rights take in, nowadays. In spite of its supranational importance and the direct influence on people, knowledge about it is not communicated scheduled and systematically, whereas education in Christian religion is given regularly. It may be a long run, but the only way to solve the mentioned conflicts.

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[61] Sure 19 (Maria / Maryam)

[62] Ziba Mir-Husseini, The Constructioin of Gender in Islamic Legal Thought and Strategies for Reform,
London/Leiden 2003

QUALITY SCHEMES FOR AGRICULTURAL PRODUCTS AND FOODSTUFFS IN THE EUROPEAN UNION – VICTIMS OF THEIR OWN SUCCESS?

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Abstract: To the most important quality schemes for agricultural products and foodstuffs in the European Union belong protected designations of origin (PDOs), protected geographical indications (PGIs), traditional specialties guaranteed (TSGs) and organic farming. The article shows the crucial features of quality schemes which are currently in force in the European Union and the genesis of the subject systems, in particular those which are regulated by the Regulation (EU) No 1151/2012. Quality schemes concerning PDOs and PGIs, are called the best working schemes in the EU. However, facilitations in obtaining the protection in EU and especially increasing numbers of protection can, paradoxically, cause the depreciation of quality schemes in EU. They will be treated rather as a mean of promotion but not as a designation of quality. It can be the case when good legal regulation can distort the system existing in EU.

Key words: UE, quality schemes, protected designations of origin, protected geographical indications, traditional specialities guaranteed, organic farming.

1 INTRODUCTION

It cannot be doubted that the quality of agricultural products and foodstuffs is becoming an increasingly important criterion for buying preferences in respect of those products. In the era of globalisation and universal access to goods, one may notice more and more determined attempts to return to the roots being the source of diversity accounting for the abundant culture of a given country.[1] Legal measures put an increasing emphasis on the development of quality policies in terms of food. It is possible to indicate the following EU quality schemes: geographical indications, organic farming, traditional specialities guaranteed. The above mentioned schemes are sometimes referred to as the specific EU quality schemes.[2] "Geographical indications" include both the "protected designation of origins" (PDOs) and the "protected geographical indications" (PGIs).[3] In the context of food, geographical indications are used for products, characteristics or reputation of which originate from their geographical origin. Currently, the most important legal acts concerning the quality schemes for agricultural products and foodstuffs include the Regulation of the European Parliament and of the Council (EU) No 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs[4] as well as the Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products.[5]

The Regulations No 1151/2012 and No 834/2007 are not the only legal acts to promote the quality of agricultural products. In accordance with the Regulation No 1151/2012, the quality policy measures for agricultural products were set up in the following legal acts: the Council Regulation (EEC) No 1601/91 of 10 June 1991 laying down general rules on the definition, description and presentation of aromatised wines, aromatised wine-based drinks and product cocktails; the Council

[1] GRĘBOWIEC, M., Rola produktów tradycyjnych i regionalnych w podejmowaniu decyzji nabywczych przez konsumentów na rynku dóbr żywnościowych w Polsce, p. 30.

[2] Green Paper on agricultural product quality: product standards, farming requirements and quality schemes, COM (2008) 641, October 2008.

[3] The examples of PDOs and PGIs are "Oravský korbáčik", "Parmigiano Reggiano" or "Podkarpacki miód spadziowy".

[4] OJ L 343, 14.12.2012, p. 1–29.

[5] OJ L 189, 20.7.2007, p. 1–23. This regulation repealed the Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs.

Directive No 2001/110/EC of 20 December 2001 relating to honey; the Council Regulation (EC) No 247/2006 of 30 January 2006 laying down specific measures for agriculture in the outermost regions of the European Union[6]; the Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products and the Regulation of the European Parliament and Council Regulation (EC) No 110/2008 of 15 January 2008 on the definition, description, presentation, labelling and protection of geographical indications of spirit drinks. Among these acts, the Regulations No 1234/2007 and No 110/2008 deserve special attention. The latter two regulations are important because the sales volume of wines and spirit drinks bearing a geographical indication is steadily increasing. According to the Regulation No 110/2008, when a given quality, reputation or other characteristic of a spirit drink is essentially attributable to its geographical origin, geographical indications providing information on the origin of the spirit drinks from a given territory of a country or a region or locality on that territory must be registered. The decision on the registration of geographical indications for a given spirit drink is made by the European Commission.

Quality schemes for agricultural products and foodstuffs constitute a legal conceptual framework. The subject matter is governed by the Regulation No 1151/2012. Therefore, the topical issue of this article will focus on the quality schemes set up by the said Regulation. In order to better understand and evaluate the binding legal regulations at the EU level, their original legal background is worth elaborating upon.

2 LEGAL BACKGROUND AND DEVELOPMENT OF LEGISLATION CONCERNING QUALITY SCHEMES

The Paris Convention for the Protection of Industrial Property of 1883 is the first legal act enforced at the international level for the protection of geographical indications.[7] It is worth noting that the Paris Convention is in force to this day. In addition to the aforementioned Convention one may enumerate the following internationally significant legal acts: the Madrid Agreement of 1891 for the Repression of False or Deceptive Indications of Source on Goods or the Lisbon Agreement of 1958 for the Protection of Appellations of Origin and their International Registration. However, the latter two legal acts did not play a significant role due to a relatively small number of signatories. Currently, one of the most important legal acts governing at the international level the protection of geographical indications is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) signed in 1994. TRIPS is one of the addenda to the Marrakesh Agreement that gave rise to the World Trade Organization. It bears noting that the TRIPS Agreement sets minimum standards of protection that must be observed by all the signatories of the agreement.[8]

The European Union countries paid attention also to the issues of protection of geographical indications. This was manifested in the development of the Common Agricultural Policy (CAP). The purpose of the CAP was to restore the self-sufficiency in terms of food of the European countries. This aspiration resulted from the experience of food shortages that occurred in many European countries in the post-war period. One of the main objectives of the CAP was therefore to increase agricultural productivity. At the same time, the CAP was to provide farmers with a fair remuneration for their products. However, over time, the increase in agricultural productivity caused the production surplus. In consequence, agricultural producers could not obtain proper returns on their food production output. Therefore, one of the objectives of the CAP reforms in the early 1990s was to balance the agricultural markets and improve the competitiveness of the EU agriculture.[9] There was also an emphasis on quality policy for agricultural products.

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[6] Regulation No 247/2006 of 30 January 2006 was replaced by the Regulation of the European Parliament and the Council (EU) No 228/2013 of 13 March 2013 laying down specific measures for agriculture in the outermost regions of the European Union and repealing Council Regulation (EC) No 247/2006, OJ L 78, 20.3.2013, p. 23–40.

[7] Paris Convention for the Protection of Industrial Property of 20 March 1883, Dz.U.1975, Nr 9, poz. 51.

[8] Taking into consideration the fact that the WTO counts 159 members (as of 2 March 2013), it should be emphasised that the scope of the impact of TRIPS is huge.

[9] JURCEWICZ, A., Wspólna Polityka Rolna Unii Europejskiej (in:) Prawo rolne, P. Czechowski (Ed.), p. 101.

The reform of the CAP was also driven by the result of the Uruguay Round (GATT) negotiations that took place in the years 1986 - 1994. The European Community committed itself to reducing barriers in the international trade. At the same time the so-called Mac Sharry reform, initiated in the early 1990s, was to balance the agricultural markets, improve the competitiveness of the Community agriculture and intensify the farming methods in accordance with the requirements of environmental protection standards.[10]

It is also worth referring to the judgement of the European Court of Justice in the Cassis de Dijon case.[11] This judgement put forward the principle of mutual recognition of standards. According to the above mentioned principle, a product that was lawfully produced and marketed in one Member State should be authorized in other Member States, unless the importing country invokes the so-called necessary requirements, for example, the protection of public health, fairness in business practices and consumer protection.[12] The judgement in the Cassis de Dijon case influenced the development of the Community legislation on geographical indications. In 1980, in the Communication on the consequences of the judgement in Cassis de Dijon case, the European Commission indicated a course of action that was to lead to the abolition of restrictions on the flow of goods between Member States.[13]

The reform of the European food law and the creation of the European consumer law were also important stimuli for the development of legislation establishing quality schemes.[14] The treaties founding the European Community in their original wording did not include any provisions governing consumer protection or protection of public health. Food was treated primarily as a commodity to be traded. The consequence of such an approach was the lack of the EU provisions governing particularly the legal framework for organic or traditional products. Therefore, respective member states instituted laws governing the production and marketing of such products. However, in respective countries, the legal regulations governing this matter were varied to the extent that resulted in hindrance to the flow of food among the Member States. Impediments to the food trade particularly affected the broadly understood organic and traditional products.

The development of the EU legislation in the field of the quality of agricultural products and foodstuffs began in the 1990s. This is when the quality policy for agricultural products was based on the following EU quality schemes: PDO, PGI, organic farming and TSG.

The Regulation No 2092/91 on organic production of agricultural products and labelling of agricultural products and foodstuffs was the first EU act governing organic production.[15] It was replaced by the currently binding Council Regulation (EC) No 834/2007.

Almost concurrently with the provisions governing organic production, the regulations at the EU level were developed to protect the broadly understood geographical indications. In 1992 the Council Regulation (EEC) No 2082/92 of 14 July 1992 on certificates of specific character for agricultural products and foodstuffs entered into force. The said Regulation established the European system for PDOs and PGIs and certificates of specific character for agricultural products and foodstuffs. The preamble of the act indicated that in the context of the reorientation of the Common Agricultural Policy, the diversification of agricultural production should be encouraged. Therefore, the promotion of specific products may provide the rural economy with substantial benefits - especially in less-favoured or remote areas - both by improving the incomes of farmers as well as by encouraging the rural residents to stay or settle down in those areas. At the same, the above mentioned regulation was associated with the formation of the internal market. In addition to the desire to help producers of the least developed areas, the legislature intended to remove barriers to the flow of goods among the Member States. The Regulation No 2082/92 was replaced by the Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed and the Council Regulation (EC) No 510/2006 of 20

[10] JURCEWICZ, A., Wspólna Polityka Rolna Unii Europejskiej (in:) Prawo rolne, P. Czechowski (Ed.), p. 102.
[11] ECJ judgement of 20th February 1979 in case 120/78.
[12] ORTINO, F., Basic Legal Instruments for the Liberalisation of Trade. A Comparative Analysis of EC and WTO Law; p. 392.
[13] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), OJ 1980, C 256/2.
[14] CAŁKA, E., Geograficzne oznaczenia pochodzenia. Studium z prawa wspólnotowego i polskiego, p. 74.
[15] OJ L 198, 22.7.1991.

March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. Instead of "certificate of specific character", the Regulation No 509/2006 introduced the term "traditional speciality guaranteed".

However, the adoption of those legal acts did not complete the development process of legislation on the subject matter. Therefore, the conference in Brussels on "Food Quality Certification – Adding Value to Farm Produce" took place already in 2007. In the following year, the European Commission published the Green Paper on agricultural product quality as a summary of the meeting and reported postulates.[16] The document was widely discussed.[17] Then, in 2009, the European Commission issued the Communication on agricultural product quality policy.[18] It outlined the current status and defined the problems and challenges to be faced by the quality policy of the Community, inter alia in terms of indications and traditional specialities.

In the above mentioned documents, stakeholders indicated the following positive aspects of the existing quality schemes: achieving higher prices, decrease in designation abuse, improved reputation and recognition of products in the market, better trading conditions in the international context, increase in consumer confidence and trust, stability of partnerships, improving market access and gaining new opportunities in trade. At the same time, some of the stakeholders indicated that they did not observe any positive impact of designations on their businesses. Nevertheless, none of the producers reported any negative effects resulting from participation in the scheme.[19] Finally, in 2010, the European Commission issued the communication in which it announced the so-called Quality Package. The Quality Package included a draft regulation on agricultural product quality schemes, a draft regulation amending the Regulation No 1234/2007, guidelines for certification schemes for agricultural products and foodstuffs and guidelines on food labelling with PDOs and PGIs. Consequently, the Regulations No 509/2006 and No 510/2006 were replaced by the currently binding Regulation No 1151/2012.

3 KEY ASSUMPTIONS OF QUALITY SCHEMES GOVERNED UNDER REGULATION NO 1151/2012

The objectives of enforcement of the Regulation No 1151/2012 are worth being studied. According to the preamble of the said Regulation, the producers will be able to continue to produce a diverse range of high quality products only if they receive a fair remuneration for their work. To this end, they need to have the ability to inform buyers and consumers about the characteristics of their products on the basis of fair competition. Therefore, the producers should also be able to properly label their products placed on the market. Implementation of the quality schemes for producers that will reward them for the effort put into the production of a variety of high-quality products may be beneficial to the economy of rural areas. The provisions of the Regulation are to support in particular the development of areas of less-favoured development conditions, mountainous areas and outermost regions, where the agricultural sector significantly contributes to the economy and the production costs are high. In this way, quality schemes can contribute to the rural areas development policy, to the policy of income support and to the market policy under the Common Agricultural Policy (CAP). The schemes can also complement the above-mentioned policies. They can particularly support the areas where the agricultural sector is of significant economic importance, especially the areas of less-favoured development conditions.

The provisions of the Regulation No 1151/2012 - as before the provisions of the Regulations No 509/2006 and No 510/2006 - provide for the designations of origin and geographical indications that are recorded only at the EU level. But with effect from the date of submitting the application for registration at the EU level, Member States may grant a temporary protection at the national level which will have no effect on the international or intra-EU trade. Registration of indications at the EU level provides for a uniform protection throughout the entire European Union. According to the preamble of the Regulation No 1151/2012, the registration procedure at the EU level should allow every natural or legal person having a legitimate interest and coming from a Member State other than the Member State in which the application is submitted or from a third-party country, to exercise their rights by filing an opposition. Applications for registration of designations under the quality

[16] COM (2008) 641.
[17] COM (2010) 738.
[18] COM (2009) 234.
[19] Agricultural Product Quality Policy: Impact Assessment. Part B, Geographical Indications, Brussels 2009, Version: 08-4-09.

schemes covered by the Regulation No 1151/2012 may be submitted exclusively by the groups working with products the name of which is to be registered. Applications for registration must be submitted in a relevant Member State. In the course of the application assessment procedure, a Member State initiates a national objection procedure that provides for an adequate publication of the application form and a period of time during which any natural or legal person having a legitimate interest and a registered seat or place of residence within the Member State's territory may file an objection to the application. If after having considered all filed objections, a Member State's position is that the requirements of this Regulation are met, it may issue a positive decision and transfer the application dossier to the European Commission. The Commission examines each application form to verify whether it is justified and meets the requirements of a given scheme. Examination of the application dossier should not take longer than six months. When this time limit is exceeded, the Commission will notify the applicant in writing of the reasons for the failure to meet this deadline. At least once a month, the Commission will publish the list of names, in respect of which the application form for registration has been submitted, along with the date of submission. In the case of applications submitted in respect of PDOs and PGIs, if after having examined the application form the Commission considers that the requirements have been met, it will publish a uniform document and the reference to the publication of the product specifications in the *Official Journal of the European Union*. Whereas, in the case of application forms submitted under the traditional specialities guaranteed schemes, the Commission will publish the specifications.

The provisions of the Regulation No 1151/2012 govern the procedure for opposition to a submitted application form. The notice of opposition may be submitted to the Commission within three months following the date of publication in the *Official Journal of the European Union* by bodies of the Member State or a third-party country, or any natural or legal person having a legitimate interest and a registered seat within the territory of a third country. Any natural or legal person having a legitimate interest and a registered seat or place of residence within the territory of a Member State other than the Member State from which the application is submitted, may submit a notice of opposition in the Member State in which it resides. The notice of opposition should contain a statement that the proposal may violate the conditions laid down in the Regulation No 1151/2012. The Commission will immediately transmit the notice of opposition to a body or entity that has submitted an application form. Within two months of receipt of an acceptable substantiated statement of opposition, the Commission will call on the body or person filing an opposition as well as on the body or entity submitting an application form to engage in appropriate consultations within a reasonable period of time, which must not be in excess of three months. A body or person filing the opposition and the body or entity that submitted an application form will start such consultations without undue delay. They mutually provide each other with the relevant information in order to determine whether the application form for registration complies with the conditions of the Regulation No 1151/2012. In the absence of an agreement, the information will also be sent to the Commission. If on the basis of information obtained by the Commission during examination of the application dossier the Commission considers that the registration requirements are not met, it will apply implementing acts to reject the application form. If the Commission does not receive a notice of opposition or a substantiated and acceptable statement of opposition, it will accept implementing acts to register the name.

To facilitate the process of informing the public opinion about the names that are protected under the provisions of the Regulation No 1151/2012, the names are entered into the register of PDOs and PGIs. In accordance with the provisions of the said Regulation, those names are entered into the register as protected geographical indications, unless they will be clearly determined in international agreements as designations of origin. Similarly, in order to register TSG they should be entered into a register at the EU level. The entry into the register should also keep consumers and entities involved in the trade informed. Location of the registers at the EU level is a consequence of the fact that the protection of these schemes is extended throughout the entire EU. The entry is made by the European Commission. It should be emphasized that the application forms for registration may also come from countries that are not the EU members. However, the most important is that all these applications are evaluated according to the uniform criteria specified in the provisions of the Regulation No 1151/2012.

The provisions of the Regulation provide for the "designation of origin" to be the name that defines a product:

a) originating from a particular place, region or, in exceptional cases, country,

b) the quality or characteristics of which are essentially or exclusively due to a particular geographical environment consisting of natural and human factors, and
c) all stages of production of which take place in a defined geographical area.

However, "geographical indication " is a name that defines a product:
a) originating from a particular place, region or country,
b) the given quality, reputation or other characteristic of which is mainly attributable to its geographical origin, and
c) at least one stage of production of which takes place in a defined geographical area.

On the other hand, a name is eligible for registration as a traditional speciality guaranteed if it describes a specific product or a foodstuff that:
a) was obtained using the method of production, processing or composition corresponding to the traditional practice for that product or foodstuff, or
b) was produced from raw materials or ingredients that are traditionally used. The term " traditional " means proven to be used in the domestic market within the time period necessary to allow the transmission from generation to generation. This period should not be shorter than or equal to 30 years. Moreover, in order for a name to be registered as a traditional speciality guaranteed it must be traditionally used for a specific product or indicate a traditional or specific nature of the product. In accordance with the provisions of the Regulation No 1151/2012, a system of traditional specialities guaranteed is established in order to protect traditional production methods and recipes by means of supporting the producers of traditional products in bringing these products to the market and informing consumers about the characteristics of traditional recipes and products that constitute an added value.

As compared to the previous provisions, the new provisions of the Regulation 1151/2012 have shortened among others the time for submission of opposition to registration applications from 6 to 3 months. At first, the shortening of this period seems to be an accurate response to the increasingly rapid processes in the trade. On the other hand, the consequence of the three-month period may be that the interested producers will learn too late of the application submitted and therefore they will not have the time to take appropriate steps. In consequence, the producers may incur losses generated from the protection granted to a given designation.[20]

A significant amendment to the Regulation No 1151/2012 arises from the new principle that registration of a name of an agricultural product or a foodstuff as a traditional speciality guaranteed is possible only with the so-called name reservation. This means that only the products corresponding to the registered specification will be able to make use of the protected name.

It should be noted that the provisions of the said Regulation clearly define and strengthen the role of groups. In accordance with the Regulation No 1151/2012, a group is any association, irrespective of its legal form, assembling primarily producers or processors, the activity of which is related to the same product. Among others, groups have the right to: participate in activities aimed at providing a guarantee of quality, reputation and authenticity of the products of a given group in the market by means of monitoring the use of names in trade, to take measures intended to provide adequate legal protection for a PDO or a PGI and intellectual property rights that are directly related to them, to prepare information and publicity measures the goal of which is to provide consumers with knowledge about the characteristics of the products constituting their added value. Groups play the key role in the process of applying for registration of designations of origin, geographical indications and traditional specialities guaranteed as well as in the process of introducing changes in specifications and applications for deletion of an entry from the register. It should be noted that a single person can also constitute a group. In order to be considered as a group, such a person has to fulfil two conditions under the provisions of the Regulation No 1151/2012: they must be the only producer who wishes to apply for registration and the defined geographical area (in reference to the PDOs and PGIs) needs to have characteristics significantly different from those of neighbouring areas or the characteristics of the product must be different from those of the products produced in neighbouring areas.

Applications for registration of designations under quality schemes established by the provisions of the Regulation may be submitted exclusively by the groups working with products the name of which is to be registered. In the case of PDOs and PGIs indicating the cross-border geographical area or in the case of Traditional Specialities Guaranteed, several groups from different Member States or third-party countries may submit a joint application for registration.

[20] DÉVÉNYI P., The New Proposal on Agricultural Product Quality Schemes, p. 165.

The European legislator noted that the added value of geographical indications and traditional specialities guaranteed is based on the trust of consumers. The credibility of the value added depends on the existence of an effective system of verification and control. Therefore, the quality schemes established by the provisions of the Regulation No 1151/2012 are included in the monitoring system that provides for official controls in accordance with the principles laid down in the Regulation (EC) No 882/2004 of the European Parliament and the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare.[21] The monitoring system should include a system of controls carried out at all stages of production, processing and distribution.

It is worth noting that in the case of trademarks, the quality of goods may but does not have to be an important factor associated with the goods. However, the quality schemes established by the Regulation No 1151/2012, the added value resulting from the geographical origin, the production method or tradition are fundamental factors. This clearly distinguishes between the quality schemes and the trademark systems.

In the context of quality assurance, the fundamental legal act in terms of organic production is now the Regulation No 834/2007. According to this act, the organic production is an overall system of farm management and food production that combines the most favourable environmental practices, a high level of biodiversity, preservation of natural resources, application of high animal welfare standards and a production method complying with the requirements of some consumers who prefer products manufactured with the use of natural substances and natural processes. Under the provisions of the Regulation, on the one hand, the organic production method provides the commodities to a specific market that is shaped by the demand for organic products, on the other hand, it is a public interest activity because it contributes to the protection of the environment, animal welfare and rural development. What's more, the provisions of the said regulation set out common objectives and principles in all stages of production, preparation and distribution of organic products and their control as well as in the application of indications referring to the organic production in labelling and advertising. The provisions of the Regulation No 834/2007 set out, inter alia, the principles for the organic production process. In addition, the principles of labelling of organic products were also laid down. Those principles are common to all the EU Member States.

4 ATTEMPT TO ASSESS THE QUALITY SCHEMES

The Quality Schemes established in the provisions of the Regulation No 1151/2012 are generally open to anyone who meets the relevant conditions. At the same time there is no need to pay fees as it is in the case of the trademark registration. Especially in the case of TSG, the most important is to decide to join the scheme and of course to be consistent with a given type of production method. However, the literature points out that the openness of the quality schemes established by the Regulation No 1151/2012 may be the weakness. In fact, the schemes under consideration make sense only if they are trustworthy.[22] In the case of trademarks, it is the producer or a group of producers, taking care of the product image. However, in the case of an open system, for example a system for registration of PGI, it is more difficult to find a single entity responsible for maintaining a positive image of the product. In such cases, the participants of the quality schemes will look for support of the national authorities or will seek the assistance of the European Commission - especially for the co-ordination of activities in several countries. At the same time, according to Article 34 of the Regulation No 1151/2012, the Member States are to carry out controls to ensure compliance with the related provisions.

This does not change the fact that apart from organic farming the PGIs and PDOs are particularly referred to as the best working schemes.[23] It is proven even by the relatively minor amendments made to the Regulation No 1151/2012 in relation to the Regulations No 509/2006 and No 510/2006. Furthermore, the popularity of the schemes under consideration is shown by the number of applications for registration. Already on 15th February 2011, "Piacentinu Ennese" - the name of an Italian sheep's cheese - became the thousandth designation registered in the EU system of quality labelling.[24]

[21] OJ L 165, 30.4.2004.
[22] DÉVÉNYI P., The New Proposal on Agricultural Product Quality Schemes, p. 160.
[23] Ibidem.
[24] http://ec.europa.eu/news/agriculture/110215_pl.htm; date of access: 19th September 2013.

The success of quality schemes is also proven by the figures presenting the value of the percentage share of products with geographical indications. In 2010, the estimated value of the products (wine, spirit drinks, aromatised wines, agricultural products and foodstuffs) with geographical indications sold in the EU stood at Euro 54.3 billion. More than a half of the value of sales revenue goes to wine (56%) and about one third goes to agricultural products and foodstuffs. In addition, the studies show the increase in the sales of products bearing geographical indications. In the case of agricultural products and foodstuffs, the value of sales in the years 2005 - 2010 increased by 19 %.[25] When it comes to the market share of traditional products, it is worth to mention the differences among respective Member States. For example, in 2010, the percentage share of such products was 14.5 % in France and only 2.3 % in the Czech Republic. When it comes to the market value of agricultural products and foodstuffs or goods bearing a geographical indication in 2010, it amounted to Euro 15.8 billion. The major percentage shares in this amount are represented by the sales volume of cheese (39%), meat (20 %) and beer (15 %). In consequence, in the years 2005 - 2010 the sales volume of such products in the European Union increased by 20%. It is worth noting that two thirds of products bore designations registered before 2005 while one third of products bore geographical indications registered after 2005.

In addition to the quality schemes provided by the EU regulations, the private certification schemes are worth mentioning. The European Commission issued the Communication on this matter – the EU Guidelines on best practices for voluntary certification schemes for agricultural products and foodstuffs[26]. In 2010, there were over 440 different schemes in the European Union.[27] Certification schemes for agricultural products and foodstuffs are to provide a guarantee (by means of certification procedures) that the specific features and characteristics of a given product as well as the method and its production process are consistent with the specification. Certification schemes operate at different stages of the food supply chain (before or after leaving the farm, along the entire supply chain or along its given section, in all or only in one segment of the market, etc.). These schemes are used in business-to-business relations (B2B) or business-to-consumer relationships (B2C). These schemes may take advantage of a logo sign, however many of them, especially at the level of B2B, do not use them. Private certification schemes are not necessary to demonstrate compliance with legal requirements. In accordance with the guidelines of the Commission, joining private certification schemes in the agricultural and food sectors must remain voluntary. In Poland, among such schemes for honouring high-quality products one may find the „Jakość Tradycja" certificate and "Poznaj Dobrą Żywność" quality designation. This latter designation can be applied to 515 products.[28] The designation "Poznaj Dobrą Żynwość" can be awarded to products with outstanding quality characteristics, due to their composition, microbiological and sensory characteristics, nutrient content and functional methods of processing and preservation. The applicant should document the distinctive quality of the manufactured products. The agricultural and food products have to of course comply with certain health, sanitary, veterinary or fitosanitary conditions stipulated in separate provisions.

The growing sales volume of organic products is also significant. For example, in 2005-2009, in France, the sales volume of such types of products increased by over 18% per annum, while in Germany, in 2000-2008, the sales volume of organic products increased by 14% per annum. As a result, it is estimated that in 2008, about 197 000 businesses were involved in the production of organic products.[29] Thus, at the same time, a significant increase in the sales volume of organic products is noticeable.

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[25] Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication (GI), TENDER N° AGRI–2011–EVAL–04, Final Report, October 2012.

[26] 2010/C 341/04.

[27] Inventory of certification schemes for agricultural products and foodstuffs marketed in the EU Member States, Study conducted by Areté for DG AGRI, http://ec.europa.eu/agriculture/quality/certification/index_en.htm; date of access: 20th September 2013,

[28] www.minrol.gov.pl/pol/Jakosc-zywnosci/Poznaj-Dobra-Zywnosc/Program-PDZ-Wyroznieni-Znakiem/; date of access: 20th September 2013,

[29] An analysis of the EU organic sector, European Commission Directorate-General for Agriculture and Rural Development, June 2010.

5 CONCLUSION

On the one hand, it is plausible to state that quality schemes for agricultural products and foodstuffs turn out to be success, at least when it comes to the number of registered designations by the European Commission. In addition, the percentage share of sales volume of such products in the global food sales volume undoubtedly increases. This raises the question of whether it is possible to notice any disadvantages of the legal arrangements at issue in reference to the entire system. Paradoxically, it seems that the outstaying issue may consist in an increasing number of products protected by these schemes. One may observe the development of a specific industry of products bearing the PDOs, PGIs and TSGs. This is evidenced by the figures for sales volume of such products. Such products gain increasing popularity among consumers. However, an increasing number of such products in the near future may lead to a depreciation of the quality schemes at issue. The geographical indication is more and more likely to become the exclusive measures of promoting goods rather than to indicate the quality. In this way the quality scheme designations may lose one of its main functions, i.e. promoting the quality of products originating from the under-developed regions.

A rigorous adherence to the pre-conditions for such designations may especially prevent the process of their depreciation. Thanks to this, the protection for such designations will be granted only if they have actually fulfilled the requirements of the EU regulations. It also appears that the shortening of the period from six to three months in which oppositions may be filed against the application for registration could result in the fact that the concerned entities will simply not learn about the application form that has been submitted. This seemingly insignificant change in practice may result in adverse consequences.

The constant increase in the market share of organic and traditional products can cause those consumers to simply get bored with this kind of designations. The plurality of different types of certification schemes may cause the fact the certified products will lose their unique character. It seems that instead of supporting the under-developed areas (which was one of the objectives of this legislation), in the future one may observe the development of the production of such products on an almost industrial scale. Quality schemes for agricultural products and foodstuffs might become victims of their own success. It will be a peculiar paradox that despite the fairly well-judged legal solutions, quality schemes might be disrupted.

Bibliography:

Agricultural Product Quality Policy: Impact Assessment. Part B, Geographical Indications, Brussels 2009, Version: 08-4-09.

CAŁKA, E., Geograficzne oznaczenia pochodzenia. Studium z prawa wspólnotowego i polskiego, Oficyna Wolters Kluwer Business, Warszawa 2008. 363 pages. ISBN 978-83-7601-355-8.

Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), OJ 1980, C 256/2.

Communication from the Commision to the European Parliament, the Council, the European Economic and Social Committee of the Regions on agricultural product quality policy, Brussels, 28.5.2009, COM(2009) 234.

DÉVÉNYI P., The New Proposal on Agricultural Product Quality Schemes, European Food and Feed Law Review 3/2011, p. 159 – 166.

Green Paper on agricultural product quality: product standards, farming requirements and quality schemes, COM(2008) 641, October 2008.

GRĘBOWIEC, M.: Rola produktów tradycyjnych i regionalnych w podejmowaniu decyzji nabywczych przez konsumentów na rynku dóbr żywnościowych w Polsce, In: Zeszyty Naukowe Szkoły Głównej Gospodarstwa Wiejskiego w Warszawie. PROBLEMY ROLNICTWA ŚWIATOWEGO, Tom 10 (XXV) 2010, z. 2, p. 22 – 32.

Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards marketing standards, Brussels, 10.12.2010, COM(2010) 738 final,

JURCEWICZ, A.: Wspólna Polityka Rolna Unii Europejskiej. In: Prawo rolne, P. Czechowski (ed.), Wydawnictwo LexisNexis, Warszawa 2011. ISBN 978-83-7620-666-0.

ORTINO F.: Basic Legal Instruments for the Liberalisation of Trade. A Comparative Analysis of EC and WTO Law; Hart Publishing, Portland 2004. 502 pages. ISBN 1-84113-425-2.

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MENLIVÉ ROZHRANIE SPOLOČNEJ BEZPEČNOSTI A INDIVIDUÁLNEJ SLOBODY

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Abstract: The contribution is concerning the question, at what range are the individual rights adjoined by New Media Age and its social interactions. Specifically it is focused to a balancing test between individual and collective safety towards an efford to remain a personal freedom and the right to privacy.

Abstrakt: Príspevok pojednáva o otázke, do akej miery informačná doba a jej sociálne interakcie narúšajú osobnostné práva, pričom osobitne skúma, akým pomerom dochádza k vyvažovaniu potrieb individuálnej a kolektívnej bezpečnosti voči snahe o zachovanie sféry osobnej slobody a práva na súkromie.

Key words: right to privacy, indivudal and collective safety, data protection, balancing test

Kľúčové slová: právo na súkromie, individuálna a kolektívna bezpečnosť, ochrana osobných údajov, test proporcionality.

1 ÚVOD

„(...) jedna z mojich hier má názov Krehká rovnováha; žijeme naozaj v krehkej rovnováhe so svetom okolo seba, s inými ľuďmi, so svojim svedomím. Keď sa raz rovnováha naruší, môže prísť ku katastrofe.“ [1]

Športové podujatia nesú v sebe nadčasové posolstvo. Sú vyjadrením rovnosti a priateľstva, harmónie ducha a tela, fair play, ale aj myšlienky, že boj o športovú trofej je mierovým zápasom, v ktorom má každý šancu vyhrať.

Garancie takéhoto podujatia absolútne zlyhali, keď 11 izraelských športovcov zabili palestínski teroristi 5. septembra 1972 na Olympijských hrách v Mníchove, ale aj na Bostonskom maratóne 15. apríla 2013, kde následkom teroristického bombového útoku došlo k zabitiu 3 ľudí a zraneniu najmenej 183 ďalších, tentokrát nielen športovcov, ale aj divákov a iných ľudí v blízkosti cieľa maratónu.

V komentári k udalostiam v Bostone sa okrem mnohých ďalších vyjadril aj prof. Richard Posner, slovutný sudca Odvolacieho súdu 7. obvodu Spojených štátov amerických, aktuálne pôsobiaci na univerzite v Chicago Law School, ktorý v prvom rade uviedol, že sa podľa jeho názoru v súčasnosti právo na súkromie preceňuje. Reagoval tak na starostu mesta Bloomberga, ktorý po bombových útokoch v Bostone zdôrazňoval potrebu zmeniť interpretáciu ústavy, aby sa zabezpečila účinnejšia ochrana a razantnejšia odpoveď na teroristické útoky. V podstate tým vyjadril podporu zhovievavejšiemu postoju k priemyselným kamerám, ktoré hrali kľúčovú úlohu pri vypátraní teroristických útočníkov. Zjednodušene povedané, myšlienkou je postavenie priority bezpečnosti proti právu na súkromie. Hoci nie v zhode s potrebou reinterpretácie ústavy, súhlasil s postojom Bloomberga aj prof. Posner, podľa ktorého Najvyšší súd USA je v najväčšej možnej miere citlivý na potreby bezpečnosti, no nepochybne bude aj naďalej vyrovnávať napätie medzi právom na súkromie a bezpečnosťou, aby zohľadnil nárast hrozieb pre životy Američanov.[2]

Po druhé, to, čo pregnantne popísal Posner ako *tendenciu zdôrazňovania spoločenskej hodnoty súkromia*, má vážny dopad na pomeriavanie hodnôt, ktorému sú v posledných rokoch

[1] Edward Albee v knihe rozhovorov: Jurík, Ľ.: Americké dialógy. 1. vydanie. Bratislava: Tatran, š.p. 1993, ISBN 80-222-0451-X, s. 22

[2] Read more: Posner, R.: Privacy is overrated, NYDailyNews, published 28 April 2013, [cit. 10/10/2013], available: <http://www.nydailynews.com/opinion/privacy-overrated-article-1.1328656#ixzz2UrRLGhUM>

vystavované nielen USA ale aj celá Európa. Snahu ukryť svoje súkromie pred ostatnými hodnotí ako eufemisticky zastrešenú právom na súkromie.[3] A doplnili by sme to; ako priam bezhraničné prerastanie významu práva jednotlivca na súkromie, no v ambivalencii postupného vlastného odhaľovania súkromia a straty intimity.

Do tretice Posner vytvára paralelu obrazovky, ktorá sa nachádza vo vnútri domovov -v každej miestnosti, monitorovaná bezpečnostným pracovníkom (na spôsob „Veľký brat ťa sleduje"), s národom v Orwellovskom zmysle, ktorý žije v Airstrip One, provincii amerického super štátu- Oceánie (de facto Anglicka)-ktorá je totalitnou diktatúrou sovietskeho typu. (Zhodou okolností Anglicko má dnes jednoznačne viac priemyselných kamier, ako ktorákoľvek iná krajina, približne 4 milióny).

Nesporne priemyselné kamery bývajú pravidelne umiestňované vo veľkom meste na hlavných uliciach, kde je súkromie beztak limitované viditeľnosťou a počuteľnosťou pre iných.[4]

2 PRIEMYSELNÉ KAMERY V LEGISLATÍVNOM A PRAKTICKOM RÁMCI.

Vznik a existencia prvých priemyselných kamier sa spája s monitorovaním testovacích štartov rakiet v nacistickom Nemecku v roku 1942. Technickým zdokonaľovaním máme v súčasnosti k dispozícii nielen väčšie množstvo druhov kamerových systémov ale aj nárast počtu nimi monitorovaných objektov.

Sú to napríklad bezpečnostné kamery, ktoré nás sledujú pri nakupovaní, v podzemných garážach, kamery pri vstupe do „pubu" spolu s vhodným softvérom, ktoré dokážu medzi návštevníkmi identifikovať známych tzv. „troublemakerov", ďalej tie, ktoré rozpoznávajú ŠPZ vozidiel, ale aj kamerové sledovanie cez iné zariadenia, ktoré akceptujeme dobrovoľne, no časom sa z nich stáva neželané bremeno. Ide najmä o notebooky, telefóny, tablety, herné konzoly, internet, videoservery či virálne videá.

V Spojených štátoch amerických nedávno prebehla diskusia o zavádzaní kamier so softvérom na rozpoznanie tvárí[5], ktoré používajú prevažne policajné jednotky vo viacerých štátoch. Policajtom umožňujú i. a. odfotiť človeka mobilným telefónom a okamžite zistiť jeho identitu a prípadný záznam v registri trestov či iné osobné informácie z rôznych prístupných databáz. Veľmi turbulentnou kauzou práva na súkromie je tzv. Street view, ktorá bola pod týmto názvom technológie v roku 2007 určená na monitoring osídlených častí sveta. Išlo o sledovanie v asi 12 krajinách, ktorého predmetom bol zber e-mailov, hesiel, fotografií a ďalších osobných údajov.[6] S tým súvisel aj systém vytvárajúci mapovanie čoraz väčšieho počtu štátov prostredníctvom tzv. google maps, ktorý pri získavaní záznamov či fotografií preberá aj obrázky, ktoré zachytávajú osoby na verejných priestranstvách a ich podobizne, čím sa umožňuje, aby sa ocitli na internete. Rovnako je týmto spôsobom možné nasnímať aj pohľad do obydlia a súkromných priestorov. Potenciálne tak dochádza k zásahu do práva na súkromie, ako aj za týchto okolností k neoprávnenému nakladaniu s osobnými údajmi. Najväčší rozruch spôsobili mapy v Taliansku, kde zachytili istého vysoko postaveného politika, ako vychádza z verejného domu.[7] V početných sporoch, do ktorých sa Google

[3] ibidem
[4] Ibidem.
[5] Autor neuvedený: Technológia rozpoznania tváre, online, zverejnené 9.marca 2011, [cit. 9.10.2013], dostupné:
<http://server.sk/zaujimavosti/technologie/technologia-rozpoznania-tvare/>
[6] Judgment of the Federal Supreme Court on Google Street View: Decisions on the processing of personal data, published aug. 2013, [cit. 3.9. 2013], available:
<http://www.edoeb.admin.ch/datenschutz/00683/00690/00694/01109/index.html?lang=en>;
k tomu porovnaj A version of this article in printed on 11 September, 2013, on page B1 of the New York edition with the headline: Court Says Privacy Case Can Proceed Vs. Google., [cit. 11.9.2013], available online: <http://www.nytimes.com/2013/09/11/technology/court-says-privacy-case-can-proceed-vs-google.html?hp&_r=3&>
[7] auor neznámy: Pohľad do zákulisia Google StreetView, online, zverejnené 1.novembra 2012, [cit. 8.10.2013], dostupné:
<http://www.wesolyaniolek.com/pohlad-do-zakulisia-google-streetview/>, pozri aj i.a. Streitfeld, D.: Court Says Privacy Can Proceed vs. Google, New York Times, published 10 September 2013, [cit. 10.10.201]3, available:

vďaka tejto technológii dostal, používal argument, že WIFI komunikačné kanály umožňovali načítanie týchto dát, čím boli z pohľadu spoločnosti verejne dostupné.

Napokon aj v sporoch, v ktorých Google s touto technológiou neuspel, boli sankcie peňažného charakteru zanedbateľne nízke oproti pravidelne vysokým ziskom spoločnosti.

V kontexte zásahov do súkromia prostredníctvom sledovania, či skôr špionáže, nemožno opomenúť aj nedávny médiami pertraktovaný prípad Snowdenovho svedectva, podľa ktorého existuje tajný protiteroristický program PRISM, ktorý údajne umožňuje americkej Národnej agentúre pre bezpečnosť a Federálnemu úradu pre vyšetrovanie získavať texty, fotografie či videozáznamy z e-mailov, chatov, komunikácií na sociálnych sieťach či z telefonických hovorov po celom svete.[8]

Prípadov zásahu do práva na súkromie prostredníctvom kamerových systémov máme na domácej pôde i blízko za hranicami celý rad. Nie je to tak dávno, čo v médiách rezonovala kauza istého novinára z Českej republiky, ktorý si pred vandalmi **chránil majetok vlastným kamerovým systémom,** avšak kamerový záznam, na základe ktorého boli páchatelia zadržaní a obžalovaní následne súd nepripustil ako dôkaz pred súdom a páchateľov oslobodil. Poškodený novinár bol nakoniec sankcionovaný Úradom na ochranu osobných údajov ČR za neohlásenú inštaláciu kamery a neoprávnené zhromažďovanie osobných údajov.[9] Na podklade analogického prípadu došlo zo strany Nejvyššího správního soudu ČR dokonca k podaniu prejudiciálnej otázky na Súdny dvor Európskej únie.[10]

Aké zázemie má teda novodobá technológia v legislatívnom rámci vnútroštátneho práva?

Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky (ďalej len „Ústava") garantuje v čl. 16 ods. 1 nedotknuteľnosť osoby a jej súkromia, v čl. 19 ods. 2 zakotvuje právo každého na ochranu pred neoprávneným zasahovaním do súkromného a rodinného života a v ods. 3 cit. článku tiež právo každého na ochranu pred neoprávneným zhromažďovaním, zverejňovaním alebo iným zneužívaním údajov o svojej osobe. Následne článok 22 ods. 1 zaručuje ochranu osobných údajov a k základným ľudským právam a slobodám Ústava v neposlednom rade počíta aj čl. 21, ktorý je venovaný nedotknuteľnosti obydlia, eo ipso zákazu vstupu bez súhlasu toho, kto v ňom býva.

Otázka monitorovania priestorov je upravená a fortiori v § 10 ods. 7 zákona č. 428/2002 Z. z. o ochrane osobných údajov v znení neskorších predpisov (ďalej len „zákon č. 428/2002 Z. z."), podľa ktorého „Priestor prístupný verejnosti možno monitorovať pomocou videozáznamu alebo audiozáznamu len na účely verejného poriadku a bezpečnosti, odhaľovania kriminality alebo narušenia bezpečnosti štátu, a to len vtedy, ak priestor je zreteľne označený ako monitorovaný. Označenie monitorovaného priestoru sa nevyžaduje, ak tak ustanovuje osobitný zákon. Vyhotovený záznam možno využiť len na účely trestného konania alebo konania o priestupkoch, ak osobitný zákon neustanovuje inak."

To znamená, že ak je aj vlastník záznamu niekto iný, ako príslušný orgán ktorý monitorovanie priestoru nariadil, nemôže poskytnúť tento záznam nikomu, len orgánom činným v trestnom konaní alebo podľa toho, ako to výslovne ustanovuje osobitný zákon.

Ak však podľa § 13 ods. 7 tohto zákona záznam nie je využitý na účely trestného konania alebo konania o priestupkoch, ten kto vyhotovil je povinný ho zlikvidovať v lehote siedmich dní.

Bez ohľadu na to, kto si zadováži a mieni použiť kamerový systém (väčšinou ide o subjekty, ktoré vykonávajú obchodnú činnosť, obce či správcov bytových družstiev), musí konať v súlade s reguláciou podľa zákona č. 428/2002 Z.z. Tieto subjekty, ktoré kamerové systémy z rôznych dôvodov využívajú na monitorovanie verejne prístupných miest majú postavenie prevádzkovateľa informačného systému v zmysle § 4 ods. 2 zákona č. 428/2002 Z.z. Dozor pri ochrane súkromia

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<http://www.nytimes.com/2013/09/11/technology/court-says-privacy-case-can-proceed-vs-google.html?hp&_r=1&>

[8] Super veľký brat? Fakty a mýty o tajnom programe PRISM, aktuálne.cz, online, uverejnené 11. júna 2013, [cit. 9.10.2013], dostupné:
<http://aktualne.atlas.sk/supervelky-brat-fakty-a-myty-o-tajnom-programe-prism/zahranicie/amerika/>

[9] Horváth, E.: Používanie kamerových systémov, najčastejšie otázky, najprávo.sk, online, zverejnené 18.júna 2012, [cit. 9.10.2013], dostupné:
<http://www.najpravo.sk/clanky/pouzivanie-kamerovych-systemov-najcastejsie-otazky.html?print=1>

[10] Nejvyšší správní soud: Nejvyší správní soud položil předběžnou otázku Soudnímu dvoru Evropské unie, uverejnené online 22.4.2013, [cit. 10.10.2013], dostupné:
http://www.nssoud.cz/Nejvyssi-spravni-soud-polozil-predbeznou-otazku-Soudnimu-dvoru-Evropske-unie/art/956

fyzických osôb nad takýmito prevádzkovateľmi, s výnimkou spravodajských služieb, vykonáva Úrad na ochranu osobných údajov SR, ktorý vykonáva aj osobitnú registráciu týchto subjektov a môže za rôzne porušenia uvedeného zákona ukladať aj pokutu.

V týchto prípadoch je **monitorovaný priestor potrebné zreteľne označiť** (napr. nápisom „Priestor je monitorovaný kamerovým systémom“, resp. piktogramom), aby už na prvý pohľad bolo zrejmé, že ide o priestor monitorovaný prostredníctvom kamier. Za predpokladu, že zo záznamu nevyplýva páchanie trestnej ani priestupkovej činnosti, je záznam potrebné zlikvidovať, a to najneskôr v lehote 7 dní odo dňa nasledujúceho po dni, v ktorom bol záznam vyhotovený. Osoby, ktoré sú oprávnené záznamy prezerať, vyhodnocovať, prípadne s nimi inak nakladať, t. j. spracúvať, je prevádzkovateľ povinný poučiť (§ 17 zákona zákona č. 428/2002 Z.z.)

Okrem toho sme v súčasnosti konfrontovaní aj s monitorovaním priestorov v nákupných strediskách (ide o časť budovy, ktorá je vyhradená na obchodnú činnosť, nejde o tie časti, ktoré nie sú bežne určené pre verejnosť, napr. skladovacie priestory), kde účelom takéhoto monitorovania môže byť ochrana prevádzkovateľa pred páchaním trestnej činnosti, ako napríklad identifikácia osôb – páchateľov krádeží. Aj na takéto konanie sa vzťahujú príslušné ustanovenia zákona č. 428/2002 Z.z. a platí, že ak sú v priestore nákupného strediska umiestnené aj skúšobné kabínky, potom je prevádzkovateľ kamerových systémov **povinný zabezpečiť súkromie** zákazníkov.

Všeobecnejšiu právnu úpravu nachádzame ďalej v **§ 12 zákona č. 40/1964 Zb. Občianskeho zákonníka v platnom znení**, ktorý ustanovuje, že obrazové snímky, obrazové a zvukové záznamy týkajúce sa fyzickej osoby alebo jej prejavov osobnej povahy sa smú vyhotoviť alebo použiť len s jej privolením.

V rámci určitej systematiky je treba tiež uviesť, že v trestnom práve má použitie kamerového systému povahu tzv. ITP, t. j. informačno- technického prostriedku, ktoré môžu používať iba Policajný zbor, Slovenská informačná služba, Vojenské spravodajstvo, Zbor väzenskej a justičnej stráže a Colná správa v rozsahu podľa osobitných predpisov, ktorými sú jednotlivé osobitné zákony.

Štáty sa napriek členstvu v Európskej únii v obsahu právnej úpravy kamerových systémov ešte v mnohých ohľadoch líšia. „V oficiálnom dokumente Európskej únie o CCTV z roku 2009 sa napríklad píše, že krajiny by mali v oblasti kamerových systémov zosúladiť legislatívu a hlavne jej uplatňovanie v praxi. Pri prieskume napríklad zistili veľké rozdiely už len v označovaní miest, ktoré sú snímané kamerami (80 percent v Nórsku oproti len 20 percentám v Maďarsku či Rakúsku).“[11]

3 VEREJNÉ A SÚKROMNÉ.

Je otázne, ako veľmi je vzdialená inštalácia kamier na verejnom priestranstve ulíc v Bostone od podobnej prevencie v bytovom dome, v ktorom s umiestnením kamery nesúhlasí čo len jeden z nájomcov či vlastníkov. Ide o vektor úvah, ako ďaleko je možné posunúť nielen pomyseľné, ale aj celkom reálne hranice súkromia v rámci bytového domu. Či sú nimi dvere bytu alebo je ich súčasťou aj chodba, foyer či vstupná hala, eventuálne recepcia v bytových domoch, kde ju vlastník prevádzkuje. Potom je zaujímavé zistiť, či ide o pult, za ktorým sedí osoba príslušná sledovať dianie v dome, alebo je tu inštalovaná kamera, ktorá vykoná o pohybe v dome záznam.

Krajský súd v Brne v jednom takom prípade vyhovel žalobe, ktorá smerovala proti rozhodnutiu o umiestnení kamery na prízemí bytového domu pri vchode tak, aby snímala osoby, ktoré do domu vstupujú a z domu odchádzajú, čím mali byť identifikované, majetok lepšie chránený a malo by tak byť zamedzené, aby došlo k vykrádaniu poštových schránok.

Súd právoplatne rozhodol, že zo strany žalovaných došlo umiestnením kamery pri vstupe do domu proti vôli žalobcu k neoprávnenému zásahu do jeho práva na súkromie ako osobnostného práva v zmysle § 11 zákona č. 40/1964 Sb. Občanský zákoník v platnom znení, ďalej len OZčr a rovnako aj k neoprávnenému zásahu do práva žalobcu na ochranu pred neschváleným získavaním a zhromažďovaním obrazových záznamov podľa § 12 ods. 1 OZčr. Nakoľko nebola

[11]Čupka, M.: Kamery okolo nás. Strach z 15 minút neželanej slávy, Pravda.sk, online, uverejnené 1. decembra 2012, [cit. 10.10.2013], dostupné:
<http://www.google.sk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDAQFjAA&url=http%3A%2F%2Fspravy.pravda.sk%2Fdomace%2Fclanok%2F252075-kamery-okolo-nas-strach-z-15-minut-nezelanej-slavy%2F&ei=G8xWUu6jApKM4gSzqYCQDw&usg=AFQjCNF-TkGCsWjseZL6254gNZszFlCeMA&sig2=bgaXcfAqdD6MYfevS-7gbw&bvm=bv.53760139,d.bGE>;
k tomu pozri tiež Podnět Rady vlády pro lidská práva k využívání kamerových a jiných sledovacích systémů, online, dátum neuvedený, [cit. 6.10.2013], dostupné:
<http://www.vlada.cz/assets/ppov/rlp/aktuality/Podnet-Rady-ke-sledovacim-systemum.pdf>

daná žiadna zákonná licencia na uvedený zásah a na inštaláciu kamerového systému je potrebný súhlas všetkých obyvateľov bytového domu, súd podľa § 13 ods. 1 OZčr zakázal získavanie a zhromažďovanie záznamov z kamerového systému a žalovaným nariadil jeho demontáž.[12]

Problém sa však v tomto i podobných prípadoch koncentruje predovšetkým na zadováženie súhlasu s monitorovaním, pretože iným spôsobom sa posudzujú kauzy, v ktorých sa sledovaním cíti byť subjekt dotknutý, a preto nesúhlasí so snímaním priestorov, ktoré má vo vlastníctve alebo na ne uplatňuje iné príbuzné práva. V zmysle citovanej zákonnej úpravy by nielenže bolo potrebné pred ich inštaláciou zadovážiť súhlas všetkých potenciálne dotknutých osôb, ale aj umiestniť viditeľné označenie o monitorovaní priestoru. V prípade unisono súhlasu všetkých do úvahy prichádzajúcich obyvateľov bytového domu by potom zrejme len sťažka obstálo tvrdenie, že sa monitorovanie dotklo práv návštevníkov alebo iných osôb, ktoré sa v bytovom dome ocitli bez právneho vzťahu k bytu, ktorý sa v ňom nachádza. Samozrejme za predpokladu, že monitorovanie tohto priestoru mohli predvídať, k čomu slúži práve zreteľné označenie. Táto povinnosť vytvára priestor aj na označovanie bez spojenia s aktívnym systémom, teda ide len o montáž nefunkčných atrapových zariadení. Tie však logicky nezakladajú žiadne reálne porušenia páva a ich význam sa pohybuje na teritóriu rýdzo preventívnych bezpečnostných opatrení.

Ak siahneme po judikatúre Európskeho súdu pre ľudské práva (ďalej len „ESĽP“) nájdeme viacero vysvetlení pre to, čo sa za domov považuje, a to napriek tomu, že pojem domov má vo všeobecnosti autonómny význam a podľa textácie Európskeho dohovoru o ochrane ľudských práv[13] ho možno vymedziť len s veľkými ťažkosťami. V zásade platí, že ide o priestor, ktorý je fyzicky definovanou oblasťou, kde sa rozvíja súkromný a rodinný život. Akokoľvek neosobne by sme prima facie posudzovali napríklad hotelovú izbu, v prípade bezdomovca, ktorému za nocľah v nej zaplatili miestne úrady, sa počas jeho pobytu domovom stala.[14] Súdu nejde však o rozšírenie práva na domov prostredníctvom práva nadobudnúť alebo vlastniť nehnuteľnosť, ale situovať ochranu na rešpekt k domovu bez možnosti rušiť právo na jeho užívanie. Zvlášť ide o zamedzenie zásahu príslušných orgánov zhabaním, kontrolou alebo tajným sledovaním.[15]

V rozsudku ***Friedl v. Rakúsko***[16] považovala Komisia za podstatné, že vyhotovenie fotografií a následná evidencia vo vyšetrovacom spise, zasiahli do práva na súkromie, a to bez ohľadu na záujmy súkromného alebo verejného charakteru, ktoré stáli za získanými snímkami. [17]Súd viackrát konštatoval, že len samotná skutočnosť, že sa jednotlivec nachádza vo verejnej sfére alebo sú údaje o ňom v širšom prístupné na verejných doménach neznamená automatické vyňatie z aplikácie článku 8 Dohovoru. Súd pripúšťa, že tu prichádzajú do úvahy viaceré faktory k posúdeniu, či došlo k zásahu do práva na súkromie. Rozumné očakávania jednotlivca pokiaľ ide o možné zásahy do jeho súkromia sú iste podstatnými skutočnosťami, avšak nie výlučnými. Podobne to platí v prípade poskytnutých informácií samotným dotknutým subjektom (právo na informačné sebaurčenie)[18] V rovnakom rozsahu to platí aj na e-maily a internet používaný na pracovisku, ktoré sú súčasťou súkromnoprávnej autonómie, avšak len za podmienky, že zamestnanec nebol upovedomený zo strany zamestnávateľa o možnom monitorovaní jeho prejavov.[19]

Spod ochrany súkromia nesmú byť napokon vylúčené ani osoby, proti ktorým je vedené trestné konanie.[20]

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[12] Ryška, M: Big Brother v bytovém domě, Jinéprávo.cz, online, zverejnené 18. januára 2010, [cit. 8.10.2013], dostupné: <http://jinepravo.blogspot.sk/2010/01/michal-ryska-big-brother-v-bytovem-dome.html>

[13]Dohovor o ľudských právach a základných slobodách, podpísaný 4. novembra 1950 v Ríme, ďalej len „Dohovor“

[14]*O´Rourke v. Spojené kráľovstvo*, rozhodnutie o prijateľnosti z 26.-2001, č.sť. 39022/97

[15]Haris, D.J. et al.: Law of the European Convention on Human Rights. Second ed., Oxford: Oxford University Press. 2009, ISBN 978-0-40-690594-9, p. 380.

[16]*Friedl v. Rakúsko*, 26.1.1995, č. sť. 15225/89

[17]k tomu porovnaj prípad *X. v. Spojené kráľovstvo*, 9702/82 alebo *Murray v. UK*, ods. 84, 85, týkajúce sa zhromažďovania informácií, odtlačkov prstov a fotografií políciou, ako aj *Chare née Jullien v. Francúzsko*, č. sť.14461/88, týkajúci sa získavania a uchovávania lekárskych záznamov, alebo DNA v prípade *S a Marper v. Spojené kráľovstvo*, 4.12.2008, č. sť. 30562/04 and 30566/04)

[18]*Lupker v. Holandsko*, 18385/91 z 7.12.1992

[19] *Coplan v. UK*, z 3.4.2007, č. sť. 62617/00, ods. 42

[20] *Sciacca v. Taliansko*, z 11.01.2005, č. sť. 50774/99, ods. 29

Možno mať teda za ustálené v judikatúre ESĽP, že pokiaľ je zámerom získavania informácií ochrana verejného záujmu, či je ním už právo na informácie vo verejnom záujme alebo ochrana kolektívnej bezpečnosti, budú zásahy do práva na rešpektovanie súkromného života hodnotené Súdom oveľa voľnejšie, ako tomu bude v prípade hodnotenia prostriedkov k účelovému vyhľadávaniu informácií a detailov zo súkromného života. Z tohto dôvodu aj kontrola výkonu verejnej funkcie, ktorej úlohou je napríklad **zachovanie bezpečnosti a poriadku na verejných priestranstvách, implikuje aj povinnosť strpieť snímanie obrazových záznamov z uskutočneného zásahu**.[21] Z uvedeného nálezu je zároveň zrejmé, že právomoci verejných činiteľov, zvlášť vykonávané na verejnosti a v kontakte s verejnosťou, môžu, ba priam majú podliehať režimu kontroly, pričom toto oprávnenie patrí k výkonu práva na informácie. Takémuto právnemu režimu prirodzene nepodliehajú otázky spadajúce do rozsahu základného práva na súkromie fyzickej osoby. Treba tiež starostlivo diferencovať, či uskutočnené útoky do sféry osobnostných práv boli skutočne smerované proti jednotlivým fyzickým osobám, alebo proti štátnemu orgánu, ktorého sú tieto osoby reprezentantom. „Vzhľadom na uvedené odlišnosti štátneho orgánu a fyzických osôb, z ktorých sa tento orgán skladá, možno vysloviť názor, že ak určitý zásah smeruje proti istému orgánu štátu, nemožno z toho bez ďalšieho vyvodiť záver, že tento zásah dopadá do osobných a osobnostných práv fyzických osôb, z ktorých sa určitý štátny orgán skladá, neznamená to, že dotknutým je zároveň tento orgán.[22] Potreba získavania a uchovávania informácií nie je vo všeobecnosti sporná, pokiaľ je vykonávaná pod záštitou policajného vyšetrovania alebo garantovania bezpečnosti a pokiaľ vychádza jednoznačne z legitímnych cieľov a je v demokratickej spoločnosti nevyhnutná.[23]

Okrem toho, nevyhnutnosť a procedurálne garancie požívajú v rámci spôsobov ochrany národnej bezpečnosti pomerne široký priestor pre voľnú úvahu štátov (**margin of appreciation)**[24] Otázka, kedy v takýchto prípadoch dochádza k zásahu do práva na súkromie, bola zodpovedaná v už v skoršej judikatúre Komisie, ktorá v rozsudku **Hilton v. Spojené kráľovstvo** potvrdila, že bezpečnostná kontrola per se nezasahuje oblasť súkromného života, ibaže sú predmetom kontroly informácie, ktoré do súkromného života patria.[25] Išlo o striktne individualizované dokazovanie zásahu, ktorý vyvolával priamy zásah do práva na súkromie.

Judikatúra evolutívnym vývojom však prešla k všeobecnejším predpokladom a tak najmä prostredníctvom stáleho súdu ustálila, že v rámci dokazovania, či je jednotlivec subjektom sledovania, bude vždy rozhodovať princíp „rozumnej pravdepodobnosti“. (**reasonable likelihood**) Práve ten totiž indikuje, že sa na dotknutý subjekt uplatňujú takéto opatrenia alebo že patrí do kategórie osôb, ktoré sú pravdepodobne sledované. Pokiaľ sa v tejto kategórii ocitne, potom už nie je potrebné dokazovať, či sledovanie zasiahlo alebo môže zasahovať atribúty súkromnej sféry.[26]

Okrem toho Súd ustálil, že verejné informácie spadajú do rozsahu súkromného života, pokiaľ sú systematicky zbierané a uchovávané vo zväzkoch príslušných orgánov, zvlášť ale vtedy, ak sa týkajú vzdialenej minulosti alebo sú nepravdivé, či schopné výraznou mierou narušiť dobrú povesť fyzickej osoby.[27] Rozsudok odkazuje na fakt, že Článok 8 v tomto ambite vychádza z Dohovoru Rady Európy o ochrane údajov, ktorej účelom je ochrana práv jednotlivca na pozadí automatického spracovania údajov, ktorého sa ho dotýkajú a nesú označenie „informácia, ktorá sa vzťahuje k identifikovanej alebo identifikovateľnej osobe.“[28]

K rozumnému predpokladu existencie sledovania konkrétneho subjektu výraznou mierou prispieva pritom aj podstata činnosti per se, ako tomu bolo napríklad v prípade Vanessy Redgrave,

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[21] k tomu pozri viac nález ÚS SR z 5. januára 2001, sp. Zn. II ÚS 44/00-133: „Podľa právneho názoru ústavného súdu za súčasť základného práva na súkromie a ani za prejav osobnej povahy (v zmysle § 11 Občianskeho zákonníka) nemožno u verejného činiteľa – zamestnanca mestskej polície považovať výkon jeho zákonom upravenej služobnej právomoci na verejnosti. (...) ide o diametrálne odlišné otázky verejnej, a nie súkromnej sféry, ktoré nemožno v žiadnom prípade považovať za súčasť ich základného práva na súkromie."

[22] rozsudok Najvyššieho súdu Slovenskej republiky z 27. marca 2001, sp. zn. M Cdo 46/2000

[23] *Leander v. Švédsko*, 26.3.1987, č. sť. 9248/81, ods. 49

[24] Ibidem, ods. 59

[25] *Hilton v. Spojené kráľovstvo*, 6.7.1988, č. sť. 12015/86

[26] k tomu porovnaj *Halford v. Spojené kráľovstvo* z 25.6.997, č. sťažnosti 20605/92

[27] *Rotaru v. Rumunsko*, 4.5.2000, č. sť. 28341/95 ods. 43-44

[28] Dohovor Rady Európy o ochrane údajov, nadobudol platnosť 1.10. 1985

ktorá našla odpočúvacie zariadenie, ktoré podľa jej tvrdení umiestnila vláda.[29] Podozrenie podporoval fakt, že bola sťažovateľka známa tak z kontroverzných politických káuz, ako aj príslušnosťou k revolučnej strane, pričom existoval záujem na jej sledovaní v minulosti.

Ďalším dôležitým kritériom, ktoré berie Súd do úvahy, je **legálnosť** zásahu. Premisou súdnej praxe sú v tomto zmysle zákonné kritériá, ktoré odkazujú na prítomnosť a obsah právnych noriem vo vnútroštátnom práve, ktoré sú dostupné a garantujú, že budú príslušné opatrenia rozumne predvídateľné a chránené proti arbitrárnosti. Otázka predvídateľnosti je podľa doktríny mienená z pohľadu všeobecných záruk predvídateľnosti práva, čo však automaticky neznamená, že bude jednotlivec poznať vopred i.a. kontrolné postupy špeciálnych zložiek, pretože by to mohlo ohroziť tajné kontroly týkajúce sa záujmov národnej bezpečnosti. Musí byť ale vopred zadefinované, aké kategórie ľudí budú monitorované, v akom časovom limite, akými procedurálnymi mechanizmami, ako budú ďalej použité získané údaje, ako budú chránené pri komunikovaní dát tretím osobám, ako aj podmienky, za ktorých záznamy môžu alebo musia byť zničené.[30]

Judikatúra ESĽP sa najmä zameriava na skúmanie primeranosti a efektívnosti záruk proti zneužitiu informačných prostriedkov.[31]

Na druhej strane nie je vylúčené, že záznam v nejakej podobe pretrvá aj neskôr, niekedy navzdor tomu alebo bez toho, aby boli prijaté predpisy o povinnosti zničiť ho.[32]

Vyvoláva to asociáciu na recentný prípad Maxa Mosleyho, ex-prezidenta Medzinárodnej automobilovej federácie (FIA), ktorý bol v rámci videonahrávky nasnímaný pri sexuálnych sadomasochistických orgiách so simuláciou s nacistickým obsahom. Súd bol i.a. nútený konštatovať, že ani stiahnutie stopáže videa a zabránenie oficiálnemu neskoršiemu šíreniu po tom, ako sa záznam objavil na verejných doménach by bolo takpovediac ničotné, alebo prázdne gesto.[33]

Ak by sme uskutočnili fikciu, v ktorej by sa prípad sledovania priemyselnými kamerami odohral za totožných skutkových okolností namiesto Bostonu napríklad v Londýne, kde by sa osoby, ktoré sa cítia dotknuté potenciálnym sledovaním domáhali svojich práv pred ESĽP, je viac než pravdepodobné, že by tento súd porušenie práva na súkromie nekonštatoval. Vzhľadom k relevantnej judikatúre možno vyvodiť, že by mu pre argumentáciu poslúžil v prvom rade rozsah voľnej úvahy štátu v oblasti verejnej bezpečnosti ako aj princíp rozumnej pravdepodobnosti, ktorý nahráva predvídateľnosti zvýšených bezpečnostných opatrení na akcii hromadnej účasti väčšieho počtu osôb. Preto potenciálny zásah by bol z dôvodov spočívajúcich vo verejnom záujme zrejme uskutočnený ako primeraný. Ťažiskom úvah by však malo byť, že predmetné kamery by boli umiestnené na verejnom priestranstve a sledovali by neindividualizované subjekty. Legálnosť zásahu by musela nachádzať oporu v platnej legislatíve, pričom jeho legitimita by zrejme vychádzala z potreby bezpečnosti, ochrany verejného poriadku a preventívneho pôsobenia, ktoré ide v línii s potenciálnym zvyšovaním očakávaných dôsledkov trestu alebo odhalenia.

4 ZÁVER

Aby sme odťažili problematiku práva na súkromie, spomíname na záver cenu Veľkého brata, ktorá sa udeľuje od roku 1998 (**Big Brother Awards**) a je každoročným výsledkom súťaže, v ktorej sú vyberané subjekty, narúšajúce súkromie ľudí v najväčšej miere. Hoci takéto ocenenie má v sebe podtón humoru a nevážnosti, týka sa naopak najvýraznejších zásahov prostredníctvom nových technológií, teda napríklad čipov, počítačov alebo kamerových systémov. Cieľom je šírenie informácií na verejnosti a apelovanie na efektívnejšie metódy ochrany práva na súkromie.[34]

Žijeme v časoch, v ktorých nám inteligentné systémy ponúkajú čoraz väčšiu systematizáciu a zjednodušenia procesov zbierania, triedenia a využitia dát v boji nielen s teroristickou činnosťou,

[29] *Redgrave v. UK*, 1.9.1993, č. sť. 20271/92

[30] Reid, K.: A Practitioner´s Guide to the European Convention on Human Rights. Third ed. 2008. London: Sweet & Maxwell Ltd., ISBN 978-1747-031204, p. 563

[31] K tomu pozri *Huvig v. Francúzsko*, rozsudok z 24.4.1990, č. sť. 11105/84, ods. 32; *Kruslin v. Francúzsko*, 24.4.1990, č. sť. 11801/85, mutatis mutandis aj *Amann v. Švajčiarsko*, 16.2.2000, č. sť. 27798/95, v ktorom došlo k porušeniu povinností spojených s uschovaním a zničením záznamov o odpočúvaní

[32] *Hewitt a Harman v. Spojené kráľovstvo*, 9.9.1993, č. sť. 20317/92

[33] *Mosley v. UK*, 10.5.2011, č. sť. 48009/08, ods. 34-35

[34] Ceny pro velkého bratra, wikipedia., stránka naposledy edit. 13.7.2013, [cit. 5.9.2013], dostupné online: <http://cs.wikipedia.org/wiki/Ceny_pro_Velk%C3%A9ho_bratra>

organizovaným zločinom, ale aj páchaním akejkoľvek trestnej činnosti. Na miestach, ktoré boli ešte nedávno baštami bezpečnosti a istoty, sa objavujú inštalácie technických zariadení, ktoré vychádzajú z predpokladu, že sme čoraz zraniteľnejší a nebezpečenstvo ohrozenia je tu prítomné v každej chvíli. S ním ipso facto aj potenciál zásahu do osobnostných atribútov. Pretože je len s veľkými ťažkosťami možné vymedziť hranice práv, ktoré majú silne subjektívny rodokmeň, posúvajú sa jeho limity do sféry úplnej anonymity. Tá vychádza z predpokladu, že len jednotlivec disponuje právom na tzv. informačné sebaurčenie, preto nik mimo neho nemôže zasahovať do rozhodovacej autonómie, aké údaje o sebe táto osoba sprístupní. Pod záštitou tejto kompetencie sú potom za osobné údaje často zahrňované fotografie, fakty, činnosti, ktoré sú celkom ľahko videné a počuté prostredníctvom iných priestorov, či už reálnej alebo virtuálnej proveniencie. Je pochopiteľne vecou spadajúcou do ambitu súkromného života, s kým, kde a prečo niekto nadväzuje kontakty, ak nejde o verejného činiteľa alebo osobu verejne známu v príslušnom režime prípustného zásahu do ich súkromia. Ak sa ale aktivity neobmedzujú len na zmyslové vnímanie zúčastnených osôb a vstupujú do tejto zóny aj ďalšie osoby, potom zo súkromnej sféry nastáva dobrovoľný presun na verejné pôsobisko, na ktoré platí vstupné s potenciálnym rizikom, že bude osoba videná a počutá pred širším okruhom osôb.

Podobne je to aj s inými aktivitami súkromného života, ktoré prenikajú na verejnosť a nesporne to platí aj a minori ad maius aj o zverejnení údajov o výkone profesie, ktorá je funkciou v rámci orgánu verejnej moci.[35]

Priemyselné kamery majú v súčasnosti dlhé zástupy odporcov. Tí väčšinou argumentujú faktom, že nezabraňujú terorizmu alebo iným kriminálnym útokom ale len napomáhajú odhaleniu páchateľov. Podobne tiež neposlúžili ako prevencia pred útokmi na Bostonskom maratóne, zato však zrejme odradili pred mnohými teroristickými činmi, a to predovšetkým spôsobom zvyšovania očakávaných dôsledkov trestu alebo odhalenia.

Pochopiteľne občianski aktivisti sa rovnako obávajú aj prenikania do súkromia napríklad prostredníctvom snímania počítačových zložiek alebo iných ukladaných dát. Málokedy však pripustia, že každý systém je dvojkoľajný a tak ako môže byť využitý pre dobro, môže byť aj zneužitý. Podobne nemusí táto ambícia korešpondovať s úspešným výsledkom na jeho konci, ako to dokazuje inštalácia nefunkčných bezpečnostných kamier v Moskve.[36] Napriek tomu nemožno na výsledky, no predovšetkým benefity zariadení technickej povahy rezignovať; treba ich len zo všetkých aspektov rozumne vymedziť.

Použitá literatúra:

Edward Albee v knihe rozhovorov: Jurík, Ľ.: Americké dialógy. 1. vydanie. Bratislava: Tatran, š.p. 1993, ISBN 80-222-0451-X, s. 22

Haris, D.J. et al.: Law of the European Convention on Human Rights. Second ed., Oxford: Oxford University Press. 2009, ISBN 978-0-40-690594-9, p. 380.

Reid, K.: A Practitioner´s Guide to the European Convention on Human Rights. Third ed. 2008. London: Sweet & Maxwell Ltd., ISBN 978-1747-031204, p. 563

Posner, R.: Privacy is overrated, NYDailyNews, published 28 April 2013, [cit. 10/10/2013], available: <http://www.nydailynews.com/opinion/privacy-overrated-article-1.1328656#ixzz2UrRLGhUM>

Autor neuvedený: Technológia rozpoznania tváre, online, zverejnené 9.marca 2011, [cit. 9.10.2013], dostupné:
<http://server.sk/zaujimavosti/technologie/technologia-rozpoznania-tvare/>

[35]Autor neuvedený: Čižnár tají zoznam prokurátorov. My sme ich našli na internete, HN, uverejnené 8. októbra 2013, [cit. 10.10.2013], dostupné:
<http://www.google.sk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDMQqQIwAA&url=http%3A%2F%2Fhn.hnonline.sk%2Fekonomika-a-firmy-117%2Fciznar-taji-zoznam-prokuratorov-my-sme-si-ich-nasli-na-internete-584970&ei=ItdWUsiOIoW44AT6xYH4AQ&usg=AFQjCNE6-eKuNAk37HHgKPBLPtc9lKMpQw&sig2=Q-fAClbmfsq3Iq3ZJfV6sQ&bvm=bv.53760139,d.bGE>

[36]Autor neznámy: Skandál v Moskvě: policie dostávala z drahých kamer zfalšovaný záznam, online, uverejnené 13. januára 2010, [cit. 10.10.2013], dostupné:
<http://www.lidovky.cz/skandal-v-moskve-policie-dostavala-z-drahych-kamer-zfalsovany-zaznam-12g-/zpravy-svet.aspx?c=A100113_105926_ln_zahranici_mtr>

Judgment of the Federal Supreme Court on Google Street View: Decisions on the processing of personal data, published aug. 2013, [cit. 3.9. 2013], available:
<http://www.edoeb.admin.ch/datenschutz/00683/00690/00694/01109/index.html?lang=en>
A version of this article in printed on 11 September, 2013, on page B1 of the New York edition with the headline: Court Says Privacy Case Can Proceed Vs. Google., [cit. 11.9.2013], available online: <http://www.nytimes.com/2013/09/11/technology/court-says-privacy-case-can-proceed-vs-google.html?hp&_r=3&>
autor neznámy: Pohľad do zákulisia Google StreetView, online, zverejnené 1.novembra 2012, [cit. 8.10.2013], dostupné:
<http://www.wesolyaniolek.com/pohlad-do-zakulisia-google-streetview/>
Streitfeld, D.: Court Says Privacy Can Proceed vs. Google, New York Times, published 10 September 2013, [cit. 10.10.201]3, available:
<http://www.nytimes.com/2013/09/11/technology/court-says-privacy-case-can-proceed-vs-google.html?hp&_r=1&>

Ryška, M: Big Brother v bytovém domě, Jinéprávo.cz, online, zverejnené 18. januára 2010, [cit. 8.10.2013], dostupné:
<http://jinepravo.blogspot.sk/2010/01/michal-ryska-big-brother-v-bytovem-dome.html>
Čupka, M.: Kamery okolo nás. Strach z 15 minút neželanej slávy, Pravda.sk, online, uverejnené 1. decembra 2012, [cit. 10.10.2013], dostupné:
<http://www.google.sk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDAQFjAA&url=http%3A%2F%2Fspravy.pravda.sk%2Fdomace%2Fclanok%2F252075-kamery-okolo-nas-strach-z-15-minut-nezelanej-slavy%2F&ei=G8xWUu6jApKM4gSzqYCQDw&usg=AFQjCNF-TkGCsWjseZL6254gNZszFlCeMA&sig2=bgaXcfAqdD6MYfevS-7gbw&bvm=bv.53760139,d.bGE>;
Podnět Rady vlády pro lidská práva k využívání kamerových a jiných sledovacích systémů, online, dátum neuvedený, [cit. 6.10.2013], dostupné:
<http://www.vlada.cz/assets/ppov/rlp/aktuality/Podnet-Rady-ke-sledovacim-systemum.pdf>
Super veľký brat? Fakty a mýty o tajnom programe PRISM, aktuálne.cz, online, uverejnené 11. júna 2013, [cit. 9.10.2013], dostupné:
<http://aktualne.atlas.sk/supervelky-brat-fakty-a-myty-o-tajnom-programe prism/zahranicie/amerika/>
Horváth, E.: Používanie kamerových systémov, najčastejšie otázky, najprávo.sk, online, zverejnené 18.júna 2012, [cit. 9.10.2013], dostupné:
<http://www.najpravo.sk/clanky/pouzivanie-kamerovych-systemov-najcastejsie-otazky.html?print=1>
Nejvyšší správní soud: Nejvyší správní soud položil předběžnou otázku Soudnímu dvoru Evropské unie, uverejnené online 22.4.2013, [cit. 10.10.2013], dostupné:
http://www.nssoud.cz/Nejvyssi-spravni-soud-polozil-predbeznou-otazku-Soudnimu-dvoru-Evropske-unie/art/956
Ceny pro velkého bratra, wikipedia., stránka naposledy edit. 13.7.2013, [cit. 5.9.2013], dostupné online: <http://cs.wikipedia.org/wiki/Ceny_pro_Velk%C3%A9ho_bratra>
Autor neuvedený: Čižnár tají zoznam prokurátorov. My sme ich našli na internete, HN, uverejnené 8. októbra 2013, [cit. 10.10.2013], dostupné:
<http://www.google.sk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDMQqQIwAA&url=http%3A%2F%2Fhn.hnonline.sk%2Fekonomika-a-firmy-117%2Fciznar-taji-zoznam-prokuratorov-my-sme-si-ich-nasli-na-internete-584970&ei=ItdWUsiOIoW44AT6xYH4AQ&usg=AFQjCNE6-eKuNAk37HHgKPBLPtc9lKMpQw&sig2=Q-fAClbmfsq3Iq3ZJfV6sQ&bvm=bv.53760139,d.bGE>
Autor neznámy: Skandál v Moskvě: policie dostávala z drahých kamer zfalšovaný záznam, online, uverejnené 13. januára 2010, [cit. 10.10.2013], dostupné:
<http://www.lidovky.cz/skandal-v-moskve-policie-dostavala-z-drahych-kamer-zfalsovany-zaznam-12g-/zpravy-svet.aspx?c=A100113_105926_ln_zahranici_mtr>

Dohovor Rady Európy o ochrane údajov, nadobudol platnosť 1.10. 1985
Dohovor o ľudských právach a základných slobodách, podpísaný 4. novembra 1950 v Ríme, ďalej len „Dohovor“

Redgrave v. UK, 1.9.1993, č. sť. 20271/92

Amann v. Švajčiarsko, 16.2.2000, č. sť. 27798/95, v ktorom došlo k porušeniu povinností spojených s uschovaním a zničením záznamov o odpočúvaní
Hewitt a Harman v. Spojené kráľovstvo, 9.9.1993, č. sť. 20317/92
Mosley v. UK, 10.5.2011, č. sť. 48009/08, ods. 34-35
Coplan v. UK, z 3.4.2007, č. sť. 62617/00, ods. 42
Sciacca v. Taliansko, z 11.01.2005, č. sť. 50774/99, ods. 29
Leander v. Švédsko, 26.3.1987, č. sť. 9248/81, ods. 49
Hilton v. Spojené kráľovstvo, 6.7.1988, č. sť. 12015/86
Halford v. Spojené kráľovstvo z 25.6.997, č. sťažnosti 20605/92
Rotaru v. Rumunsko, 4.5.2000, č. sť. 28341/95 ods. 43-44
Huvig v. Francúzsko, rozsudok z 24.4.1990, č. sť. 11105/84, ods. 32;
Kruslin v. Francúzsko, 24.4.1990, č. sť. 11801/85
O´Rourke v. Spojené kráľovstvo, rozhodnutie o prijateľnosti z 26.-2001, č.sť. 39022/97
Friedl v. Rakúsko, 26.1.1995, č. sť. 15225/89
X. v. Spojené kráľovstvo, 9702/82
Murray v. UK, ods. 84, 85, týkajúce sa zhromažďovania informácií, odtlačkov prstov a fotografií políciou
Chare née Jullien v. Francúzsko, č. sť.14461/88, týkajúci sa získavania a uchovávania lekárskych záznamov
S a Marper v. Spojené kráľovstvo, 4.12.2008, č. sť. 30562/04 and 30566/04)
Lupker v. Holandsko, 18385/91 z 7.12.1992

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DOES THE EUROPEAN UNION (EU) ASPIRE TO A UNITED STATES OF EUROPE?

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Abstract: The debate over the movement toward ever closer union has shaped, and continues to shape, Europe's efforts to achieve greater political and economic integration. Europe's steps towards a more integrated structure may be seen as the best answer to those who lament the decline of national sovereignty. This Article describes the topic if the European Union (EU) aspire to a United States of Europe in times of the euro crisis.

Key words: Crisis, Euro, Integration, United States of Europe

1 INTRODUCTION

The intensified discussion about the "United States of Europe" in recent times has several reasons. It is seen as an important part in the deepening of the European integration process. Steps towards political unification are seen as vital in order to save the Euro currency as the crisis management in Europe was not considered as successful and credible enough. The G-20, as the expression of world's leading economic nations, need to adapt the global governance to new challenges. Europe has to unify politically in order to have influence on the decision-making processes on world economy and world politics affairs. Issues like the failure of the European Constitution, Europe's economic policies towards fiscal coordination and federalism or the slow progress towards a deeper European integration have a negative effect on Europe and the Euro.

2 THE EURO CRISIS AND THE UNITED STATES OF EUROPE

There are two questions which must be answered: has there been progress toward "United States of Europe"[1] since the introduction of the euro (has the integration in Europe deepened over the years)? And, has the euro helped in the integration process toward "United States of Europe"? Both questions can be denied, since there was no real progress toward "United States of Europe" in these years. The current economic crisis[2] is going to jeopardize the progress made in the past years and decades. The disputes on how to save the euro and solve the crisis[3] could endanger the political cohesion of the European Union as the sovereignty, independence and freedom of action of individual states seems to be threatened. Initially it has been argued, by the supporters of the euro[4] currency, that this is the coronation of European integration and will not only accelerate the process of economic integration, but also help to speed up the process of political unity. However, the brunt of the political integration should lie on a rapid European coordination and integration of economic policies and in the inclusion of additional community tasks. Soon, it came to a crucial change in the assessment of the role of the euro. The euro has been declared as the engine of the unification process, an instrument, in order to deepen the European integration. This exaggeration of the euro has had fatal consequences. The euro was styled as a symbol - it symbolized the values of European unity. There arose expectations that the Euro could not hit. The division of the European Union into Euro countries and other EU members has brought additional problems. These problems led to a split in the euro zone creditor and euro zone debtor countries, in countries with AAA ratings and other contries. Now it's about damage limitation in the euro area and who shall bring new impetus for the European integration process. But what has been really performed since the introduction of the euro in the European integration project? Significant steps toward deepening of

[1] FUNTA, R., NEBESKÝ, Š., JURIŠ, F. *Európske právo*, p. 45
[2] FUNTA, R. Gl*obal financial crisis, financial instability, future of the financial system and the EU law*, pp. 1-7
[3] STIGLITZ, J. E. The *Current Economic Crisis and Lessons for Economic Theory,* pp. 281-296
[4] PAULIČKOVÁ, A. *Euro: Advantageous for Slovakia?*, pp. 49-54

the EU integration[5] process have not occured. Neither in labour market policy and social policy, nor in economic and finance policy have been significant steps forward European integration. Also in areas like migration and asylum, development, security, defense, foreign policy, consumer protection, health, justice, research and development we can not speak about real progress in coordination, cooperation and integration. The road toward "United States of Europe" is not being consistent. The overcoming of the euro crisis induces additional resources and political capacities out from the task to promote cohesion, structural alignment, coherence and convergence in Europe.[6] On the one hand, there is a growing awareness in parts of the political community and even more in the private sector that the euro can only be strengthened by a faster political integration. At the same time, however, the parts of the political community constantly undertake steps that counteract the goal of a united Europe. Only after agreement between the two leading economic powers (Germany[7] and France) we came to further political coordination. This leads not only to a partial paralysis of the key EU decision-making bodies, but also to a slowdown of the decision-making processes itself. High transaction costs hinder not only the euro crisis management, but also the implementation of medium and long-term strategies for Europe by the European institutions. However, some policy documents of the EU, such as the "Europe 2020", defined as a "Programme for smart, sustainable and inclusive growth in Europe", represent only a list of wishes, but not strategies in the sense of a concerted action program. In the "Europe 2020" strategy we might find some steps towards convergence and promotion of competitiveness, but this is unfortunately not linked with the short-, medium-, and long term action level in Europe. The "United States of Europe" is thus a subject of discussion, particularly because it is necessary to speed up the decision-making processes in Europe and to reduce transaction costs.

3 THE PROSPECTS OF A EUROPEAN POLITICAL UNION AND THE CRISIS MANAGEMENT IN EUROPE

The current situation is complicated and the steps towards a European political union are too timid. This is resulting in priorities and recommendations in order to deepen the European integration process and to rescure the euro.

3.1 The failure of the European Constitution

The failure of the European Constitution[8] has had a serious consequence for the European integration, and the direction and effectiveness of the European economic and monetary policy. The rejection of Europe's Constitution[9] was seen as a painful end to a constitutional process. On the other hand, its adoption would be seen as an important step in the deepening process of European integration. The Economic and Monetary Union in any EU country would have got a major support. Moreover, the Constitution[10] is an instrument for the clarification of responsibilities and functions. One of the advantage of the Constitution would be, that it was aimed to reduce the transaction costs associated to any move in European integration while at the same time to provide flexibility and accelaration of the decision-making processes. The Constitution is, therefore, an important economic instrument. Concerning the European Constitution, the aim was to replace the Treaties of the EU with a single text: the Constitution for Europe. The Treaty of Lisbon[11] amends the previous EU and EC treaties, without replacing them. Currently, it is not clear when and how the European constitutional debate will be reopened. In particular, the provisions laid down in the European Constitution on enhanced cooperation in the EU would have been the way for a closer economic cooperation between the EU countries toward the integration process. The failure of the European Constitution showed us how divergent are the interests of Europe and that there is no real consensus on the deepening of European integration. As the euro area include countries with

[5] HUFELD, U., VON ARNAULD, A. E. *Systematischer Kommentar zu den Lissabon-Begleitgesetzen,* p. 25
[6] FUNTA, R. *Economic Law and Economic Crisis. Where do we go from here? Economic, Legal and Political dimension,* pp. 65-70
[7] FUNTA, R. *The EU decline? Future prospect through investment strategy,* p.60
[8] BORCHARDT, K. D. *Die Rechtlichen Grundlagen der Europäischen Union*, p. 49
[9] SVOBODA, P. *Úvod do Evropskeho prava*, p. 8
[10] "Constitution should be seen as a form of activity, an intercultural dialogue ... " TULLY, J. *Strange Multiplicity*, p. 30
[11] FIALA, P., PITROVÁ, M. *Evropská unie*, pp. 198-202

diverse income levels and economic structures, the gap between the euro area countries is on increase.

3.2 The lack of a coherent European Economic Policy

The lack of a coherent economic policy in Europe is serious and is burdening the consolidation of the Euro project. A look at the US politics shows, what it should be understand under coherence and how this can be achieved. President Obama, like his predecessor President Bush Jr. and President Clinton took particular attention on a flexible and coordinated application of instruments of fiscal policy, monetary policy, structural policy and trade policy. All the steps were aimed on the application of effective instruments in other policy areas (armament, environment, social policy, health policy, etc.), in order to preserve the consistency of economic policy. This means, that the instruments of economic policy may not be employed too late and inconsistently. Despite the agreed debt brake, steps towards solving debt problem in Europe can take very different turns and create further uncertainty, as there is still a modest growth in the euro area countries(if any). Many European countries face grave macroeconomic imbalances, fiscal deficits and a need to exit from a huge implicit debt which is even more worrisome. This will constitute far greater imbalance in euro area, if - involving the implicit debt – the structural debt problem will not be solved.

3.3 The systematic overburdening of the European Central Bank

The allegation is that the failure of the policy in the euro area countries is forcing the European Central Bank (ECB) to measures to overturn long-term independence and effectiveness of the institution. Thus, its original scope, ensuring that the money supply remains stable (in order to avoid inflation) and price stability are pushed more into the background. The ECB, due to the political failure of the European nation-states, has become an institution that is handling in order to compensate the mismanagement of European economic policy. There is also the allegation that deficiencies concerning the Eurosystem and the system failure of the ECB cause additional uncertainty on the markets. Although since the Maastricht Treaty the ECB has as the primary objective to maintain price stability, it has been not defined what price stability means. A change came in 1998, where the Governing Council of the ECB provided a definition of price stability as follows: "a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%".[12] But what is expected from the ECB? As laid down in Art. 282 (2) TFEU, the primary objective of the ESCB shall be to maintain price stability.[13] The ECB has to keep stable the external value of the currency against the dollar and other internationally significant currencies. The ECB is avoiding a credit crunch in the euro area, by providing liquidity in unprecedented volume and over a longer period than usual. The ECB task is to contribute to the financial stability and to solve the debt crisis[14], especially through buying government bonds on the secondary market. The ECB has, obviously already 3 weeks before the Barcelona Council meeting on May 2012, started to regain its autonomy vis-à-vis politics and be more emphasised about its traditional role to fight inflation. Opposition to the idea of further purchases of government bonds by the ECB, reduction of the the interest rates below 1% and further emergency liquidity assistance has increased. The ball is returned to the Euro-governments to address the measures to stimulate growth and debt consolidation simultaneously. The Barcelona meeting symbolized, by the choice of location for the Council meeting, that the ECB sees Spain as the main tasks in the euro zone. Spain represents a country with a huge unemployment (particularly youth unemployment) rate.. The problem can be seen in inadequate regulation and supervision of financial institutions and markets in the EU as well as the lack of a common fiscal policy. The consequence of these defects is resulting in the systemic financial market risk and sovereign debt risk. The common monetary policy must be therefore supplemented by a common fiscal policy and by a coordinated financial and banking regulation. This happend due to the fact that there is no early warning system which would make it possible to set off an alarm, to provide a detailed diagnosis followed by the planning, and implementation of the response. In addition, the decisions come mostly late and have only a short-term effect. There is also a third problem. A reform of the ECB system is, in the current situation, hardly to implement,

[12] RANDZIO-PLATH, CH. *A New Political Culture in The EU – Democratic Accountability of the ECB*, p. 6
[13] SIMAN, M., SLAŠŤAN, M. *Primárne právo Európskej Únie*, p. 870
[14] PAULIČKOVÁ, A., PAULÍČEK, R. *Nová éra krízy,* p. 223

because any reform approach is interpreted as an attempt to politically influence the ECB. In particular, the new task of the ECB as a "lender of last resort"[15] for governments and banks leads to controversy. This task of the ECB as a "lender of last resort" is often described as a source of moral hazard. Without political union, Europe will learn to live with even more contradictory impulses. All attempts to rescue the euro (ECB as "lender of last resort" for governments and banks; euro crisis fund in sufficient amounts to impress markets) are therefore based on a model of the deepened European political integration.

3.4 The deadlock in the deepening of European integration

If we take a look on the five core integral components of the"United States of Europe" as proposed by Guy Verhofstadt, we can clearly see how the deadlock in the European integration process impacts all major policy areas. All five policy areas (social and economic policy, science and technology policy, legal and security policy, foreign and defense policy)[16], in terms of the project "United States of Europe", are showing an urgent need for action. Apart from general statements and symbolic actions in all these areas of European integration there was no substantial progress. What does this have to do with the euro? All these factors play a role in the evaluation of currency on foreign exchange markets and the choice of currency by the public and private sectors. And whats more, with the deepening of the crisis, the investors react more strongly to bad news than to good news. Even if the external value of the euro is stable, the euro area inner crises jeopardise the internal cohesion of the EU and the euro area (so called euro paradox). It's only a matter of time when it to comes to implosion. The deadlock in the deepening of European integration[17] can be made clear with regard to the five dimensions of economic globalization. The techno-globalization, the financial-globalization, the globalization of trade, the globalization on the labor market and the globalization of value chains require from the EU a more pro-active shaping in globalization of the world economy. The dynamics of the EU area and ultimately the future role of the euro will certainly depend from this capacity to shape the globalisation agenda.

3.5 The absence of a sustainable anti-crisis strategy in the euro area

A forward-looking and well-planned mechanism for crisis management in the euro zone is not in sight, although there is a lot of experience from the past. Surprisingly, the anti-crisis strategy in Europe is ignoring all the lessons which have emerged from the past crisis management. We can mention the experience with many financial and economic crises in Latin America, Asia and Eastern and Central Europe[18] (although these lessons have little to do with the content of the crisis management as with the implementation of reforms in a particular political context). There are several principles to be implemented. First, it is important that the gravity and dimension of the crisis are examined (with the need for a radical departure from the failed policy). Second, in order to overcome the crisis, a new crisis management leader is needed. But there is a crucial question of who will take the lead in Europe. Will it be the European Commission and other EU actors in Brussels or the new duo Merkhollande? Third, important policy areas are to be tackled (the focus on key areas of fiscal, structural and growth policy is crucial at the level of nation-states as well as at the level of the EU). Fourth, an understanding of the political economy makes clear that new governments are supposed to implement comprehensive anti-crisis programs that are consistent and credible. Fifth, it is important to limit the power and economic spheres of interest of the old elites. Sixth, a real transparency throughout the process of crisis management is necessary.Seventh, the successful implementation of reforms and anti-crisis strategies needs the international assistance (e.g. through the IMF). Eight, crisis management programs must have enough resources in order to be credible and effective. Ninth, fiscal reforms are to be focused more on spending cuts than on tax increases, but both have to be selective.

[15] DE GRAUWE, P. *The European Central Bank: Lender of Last Resort in the Government Bond Markets?,* pp. 2-13
[16] VERHOFSTADT, G. *Die Vereinigten Staaten von Europa*, pp. 71-74
[17] KARAS, V., KRÁLIK, A. *Európske právo*, pp. 15-43
[18] ŠTIBLAR, F. *The global crisis and the western Balkans*, pp. 23-46

4 CONCLUDING REMARKS

Politicians and academics are discussing the project "United States of Europe". There are several reasons behind it: firstly, in order to deepen integration in the European Union, the most important policies, such as the fiscal policy, structural policy and labor market policy, have to be organized collectively. Furthermore, there is a need to save the euro and the European Economic and Monetary Union. Through more political union the cornerstones of economic and monetary Union will be strengthened. Thirdly, a political European Union is seen as a prerequisite for a stronger role in the world economy and in world politics. Until the current problems will not be solved, Europe is „turining away from power ... into a self-contained world of laws and rules and translational negotiation and cooperation ... Meanwhile the United States remains mired in history ...“ [19].

Bibliography

BORCHARDT, K. D. Die Rechtlichen Grundlagen der Europäischen Union. Heidelberg: C. F. Müller, 2010

FIALA, P., PITROVÁ, M. Evropská unie. Brno: Centrum pro studium demokracie a kultury, 2009

FUNTA, R., NEBESKÝ, Š., JURIŠ, F. Európske právo. Brno: Tribun EU, 2012

FUNTA, R. The EU decline? Future prospect through investment strategy. In. Aktuálne otázky svetovej ekonomiky a politiky, Bratislava: EUBA a Taipei Representative Office, 2012

FUNTA, R. Economic Law and Economic Crisis. Where do we go from here? Economic, Legal and Political dimension, In. DANUBE: Law and Economics Review, 2011, Issue 1

FUNTA, R. Global financial crisis, financial instability, future of the financial system and the EU law. In. Europe's Post-Crisis Stability – An Interdisciplinary Approach, Berlin: European Academy, 2011

DE GRAUWE, P. The European Central Bank: Lender of Last Resort in the Government Bond Markets?, CESifo Working Paper 3569, 2011

HUFELD, U., VON ARNAULD, A. E. Systematischer Kommentar zu den Lissabon-Begleitgesetzen. Baden Baden: Nomos, 2011

KARAS, V., KRÁLIK, A. Európske právo. Bratislava: Iura Edition, 2004

KAGAN, R. Of paradise and power: America and Europe in the new world order. New York: Knopf, 2003

PAULIČKOVÁ, A. Euro: Advantageous for Slovakia?. In. DANUBE: Law and Economics Review, 2012, Issue 2

PAULIČKOVÁ, A., PAULÍČEK, R. Nová éra krízy, In. Mezinárodní vědecká conference: Hradecké ekonomické dny. Ekonomický rozvoj a management regionů, Univerzita Hradec Králové, 2012

RANDZIO-PLATH, Ch. A New Political Culture in The EU – Democratic Accountability of the ECB. Bonn: Center for European Integration Studies Rheinische Friedrich-Wilhelms-Universität, 2000

SIMAN, M., SLAŠŤAN, M. Primárne právo Európskej Únie. Bratislava: Euroiuris, 2010

STIGLITZ, J. E. The Current Economic Crisis and Lessons for Economic Theory. [2009] Eastern Economic Journal, 35 (3), pp. 281-296

SVOBODA, P. Úvod do Evropskeho prava. Praha: C. H. Beck, 2010

ŠTIBLAR, F. The global crisis and the western Balkans, In. DANUBE: Law and Economics Review, 2011, Issue 1

TULLY, J. Strange Multiplicity. Cambridge University Press, Cambridge, 1995

VERHOFSTADT, G. Die Vereinigten Staaten von Europa, Eupen: Grenz Echo Verlag, 2006

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[19] KAGAN, R. *Of paradise and power:America and Europe in the new world order*, p. 3

TEST „STEJNĚ EFEKTIVNÍHO SOUTĚŽITELE“ V EVROPSKÉM SOUTĚŽNÍM PRÁVU

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Abstract: The contribution deals with the “equally efficient competitor” test used for the assessment of abuse of dominance under Art. 102 of the Treaty on the functioning of the European Union in recent European courts case law. Especially, the application of the test in the area of the below-cost prices and margin squeeze cases will be described. Moreover, the use of the test in Czech court practice will be briefly mentioned.

Abstrakt: Tento příspěvek se zabývá testem „stejně efektivního soutěžitele“, který se stal v souvislosti s prosazováním více ekonomického přístupu jednou ze základních metod pro posuzování zneužití dominantního postavení ve smyslu čl. 102 Smlouvy o fungování EU. Článek mapuje aplikaci tohoto testu v nedávné rozhodovací praxi evropských soudů a zmiňuje také jeden případ z českého prostředí. Na závěr jsou shrnuty výhody a nevýhody testu stejně efektivního soutěžitele, a to také ve srovnání s alternativní metodou – testu „přiměřeně efektivního soutěžitele“.

Key words: Equally efficient competitor test, abuse of a dominant position, predatory pricing, margin squeeze

Kľúčové slová: Test stejně efektivního soutěžitele, zneužití dominantního postavení, test přiměřeně efektivního soutěžitele, predátorské ceny, stlačení marží, věrnostní rabaty.

1 ÚVOD

V posledních letech se v evropském soutěžním právu prosazuje tzv. více ekonomický přístup, který boří zažité postupy při posuzování možného porušení antitrustových pravidel. Prosazování ekonomičtějšího přístupu je zřejmě nejmasivnější v oblasti posuzování spojení soutěžitelů a v oblasti zneužití dominantního postavení (zakázané čl. 102 Smlouvy o fungování EU, dříve čl. 82 Smlouvy o ES). V tomto článku se zaměříme na oblast zneužití dominantního postavení, konkrétně na vylučovací formy zneužití (tj. např. predátorské cenové praktiky, nabízení věrnostních rabatů, stlačování marží, odmítnutí dodávek atd.), které jsou ve středu zájmu Evropské komise, coby soutěžního orgánu na úrovni Evropské unie. Cílem ekonomického přístupu při posuzování protizákonných praktik dominantních soutěžitelů je bojovat jen proti takovému jednání dominantních podniků, v jehož důsledku lze identifikovat újmu způsobenou soutěži nebo spotřebitelům. S prosazováním více ekonomického přístupu dochází k upouštění od klasických postupů, kdy byly některé praktiky považovány za zakázané *per se,* bez toho, aby byl zkoumán opravdový účinek daného jednání na hospodářskou soutěž a společenský blahobyt a zvažovány možné pozitivní efekty takového jednání. Do popředí se proto dostal přístup orientovaný na efekt („effect-based approach“), který má nahradit přístup založený na formě jednání podniku („form-based approach“), jako hlavního kritéria pro posouzení jeho protizákonnosti. Vůdčími principy ekonomického přístupu jsou proto spotřebitelský blahobyt související s ochranou soutěže jako takové a ekonomická efektivnost.[1]

Snahy Evropské komise (dále jen „Komise“) o revizi přístupu ke zneužití dominantního postavení, prosazení ekonomických principů a přiznání vyšší váhy ekonomické analýze se začaly projevovat již v roce 2005, kdy byl přijat ucelený diskusní materiál o ekonomickém přístupu k tehdejšímu čl. 82 Smlouvy o ES[2] a zpráva Ekonomické poradní skupiny pro soutěžní politiku

[1] Více např. HILDEBRAND, D. The Role of Economic Analysis in the EC Competition Rules. s. 362 – 363.

[2] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (“Diskusní materiál”).

o ekonomickém přístupu k čl. 82[3]. Zásadním dokumentem v oblasti ekonomického posuzování zneužití dominance jsou *„Pokyny k prioritám Komise v oblasti prosazování práva při používání článku 82 Smlouvy o ES na zneužívající chování dominantních podniků vylučující ostatní soutěžitele"* (dále jen „Pokyny Komise")[4], které Komise přijala v roce 2008. Jejich cílem je zakotvení ekonomických principů v soutěžním právu a poskytnutí návodu k interpretaci a aplikaci ustanovení čl. 82 Smlouvy o ES (nyní 102 Smlouvy o fungování EU).

Zavedení ekonomického přístupu znamená rozšíření používání ekonomických analýz a různých sofistikovaných kvantitativních ekonometrických testů při zkoumání možného porušení čl. 102 Smlouvy o fungování EU. Ekonomické analýzy jsou používány rovněž při stanovení relevantního trhu, na základě kterého je pak možné posoudit, zda daný podnik na tomto trhu vůbec má dominantní postavení, které by mohl zneužít. Jedná se o strukturální přístup k posouzení tržní síly soutěžitele (resp. jeho dominantního postavení), který v současné době u většiny evropských soutěžních úřadů převažuje. Existují ovšem i přístupy založené na přímém určování tržní síly, bez nutnosti vymezení relevantního trhu.[5]

Základními obecnými testy, které jsou v současnosti ve vztahu ke zneužití dominantního postavení používány, jsou „test ekonomického smyslu", se kterým úzce souvisí „test obětování zisku", dále „test spotřebitelského blahobytu" a konečně test stejně efektivního soutěžitele, jež je hlavním předmětem tohoto článku.

Test ekonomického smyslu je založen na posouzení skutečnosti, zda má jednání dominantního podniku nějaký ekonomický smysl (například vývoj, zvýšení efektivnosti, atd.), nebo je jeho jediným cílem poškodit soutěž a posílit tak své postavení na trhu. Vychází se přitom z předpokladu, že jediným možným záměrem dlouhodobějšího obětování zisku je snaha podniku vyloučit nebo alespoň omezit hospodářskou soutěž na trhu. V rámci testu spotřebitelského blahobytu se zkoumá, zda byla posuzovaným jednáním způsobena újma spotřebitelům. Újma soutěžitelů je pak v podstatě považována za újmu způsobenou hospodářské soutěži jako takové. Pomocí tohoto testu se posuzuje, zda převažují pozitivní nebo negativní efekty, které má jednání dominantního podniku na spotřebitele.[6]

2 CHARAKTERISTIKA TESTU STEJNĚ EFEKTIVNÍHO SOUTĚŽITELE

Test stejně efektivního soutěžitele („as efficient competitor test") je obecně založen na předpokladu, že jednání dominantního podniku je protisoutěžní tehdy, pokud pravděpodobně dokáže vyloučit z trhu takové soutěžitele, jež jsou v porovnání s ním stejně (případně i více) efektivní, tedy mají na stejném relevantním trhu stejné nebo nižší náklady. Naopak vyloučení méně výkonných soutěžitelů není považováno za nežádoucí, protože efektivní soutěž by měla směřovat právě k tomu, aby uspěli ti silnější, resp. výkonnější hráči na trhu. V rámci testu stejně efektivního soutěžitele se tak porovnávají náklady dominantního podniku na dotčený produkt či službu s jeho cenou. Pokud cena dominantního podniku není dostatečná k pokrytí nákladů, má se za to, že praktika je protisoutěžní, neboť ani soutěžitel se stejnými náklady by nebyl schopen cenám dominanta konkurovat. Velkou výhodou tohoto testu je posílení právní jistoty, neboť dominantní podnik si sám může poměřením svých cen a nákladů posoudit, zda je jeho cenová politika v souladu s pravidly hospodářské soutěže či nikoliv. Při aplikaci testu stejně efektivního soutěžitele je podstatné zvolit vhodné náklady, které budou v daném případě porovnávány s cenou. Volbu nákladů je třeba provést se zohledněním toho, o jakou praktiku se jedná a zejména toho, jaká jsou specifika daného relevantního trhu a nabízeného produktu.

Test stejně efektivního soutěžitele pochází ze soutěžní praxe USA. Ministerstvo spravedlnosti USA („Department of Justice", dále jen „DOJ") jej definuje ve své metodice, která se zabývá monopolním jednáním podle části 2 Shermanova zákona a jeho posuzováním.[7]

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[3] Report by the EAGCP „An economic approach to Article 82" („Zpráva o ekonomickém přístupu ke čl. 82")

[4] *European Commission > Competition* [online]. 2011 [cit. 2013-04-10]. Art 82 Review. Dostupné z: <http://ec.europa.eu/competition/antitrust/art82/index.html>.

[5] Viz např. Kaplow, Louis. *Why (Ever) Define Markets?* Harvard Law Review, Forthcoming; Harvard Law and Economics Discussion Paper No. 666; Harvard Public Law Working Paper No. 11-08. Dostupné z: http://ssrn.com/abstract=1750302.

[6] Viz např. *OECD* [online]. 2006 [cit. 2013-05-03]. Policy Brief June 2006. Dostupné z: <http://www.oecd.org/dataoecd/10/27/37082099.pdf>.

[7] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the

V Pokynech Komise uvádí test stejně efektivního soutěžitele jako základní ukazatel protisoutěžního charakteru cenových vylučovacích praktik dominantních podniků. Jako vhodné náklady pro porovnání s prodejními cenami uvádí Komise jednak průměrné eliminovatelné náklady nebo dlouhodobé průměrné přírůstkové náklady. V praxi je však často poměrně obtížné spolehlivě zjistit, jakých hodnot příslušné náklady dominantního podniku dosahují. Je totiž třeba zvažovat, zda zohlednit také fixní a utopené náklady, které je však velmi obtížné kvantifikovat. Pokud Komise dospěje k závěru, že stejně efektivní soutěžitel může účinně soutěžit s cenovým chováním dominantního podniku (tedy v případě, kdy jsou specifické náklady na produkt či službu dominantního podniku vyšší než jeho cena) pak je v zásadě na místě vyvodit závěr, že cenové chování dominantního podniku pravděpodobně nemá nepříznivý dopad na hospodářskou soutěž.[8]

3 AKTUÁLNÍ EVROPSKÁ PRAXE

V nedávné době vydal Soudní dvůr EU rozhodnutí o dvou předběžných otázkách ve věcech TeliaSonera[9] a Post Danmark[10], které se obě týkaly výkladu čl. 102 Smlouvy o fungování EU ve vztahu k vylučovacím praktikám, a to jednak v případě tzv. stlačení marží a dále v případě cenové diskriminace. V obou rozhodnutích bylo potvrzeno použití testu stejně efektivního soutěžitele, coby základní myšlenky pro posouzení protisoutěžní povahy cenových praktik podniků v dominantním postavení.

Pokud se zmiňujeme o recentní rozhodovací praxi Soudního dvora EU v oblasti zneužití dominantního postavení, je nezbytné zmínit také jeho rozhodnutí z roku 2012 ve věci Tomra[11], ve kterém bylo naopak uplatnění testu stejně efektivního soutěžitele jednoznačně popřeno.

3.1 Test stejně efektivního soutěžitele a stlačení marží - případ TeliaSonera

Nejprve zmíníme rozsudek Soudního dvora z roku 2011 ve věci TeliaSonera, který se týká způsobu posuzování praktiky „stlačení marží“ („margin squeeze“)[12]. Jedná se o rozsudek, ve kterém Soudní dvůr odpovídal švédskému soudu celkově na 10 otázek týkajících se podmínek pro shledání stlačení marží jako protisoutěžní praktiky ve smyslu čl. 102 Smlouvy o fungování EU. Soudní dvůr zde vycházel ze závěrů přijatých ve svém rozhodnutí ve věci Deutsche Telecom[13] z roku 2010, ve kterém byla definována základní pravidla pro posouzení zneužívající povahy této praktiky.

Skutkově se jde o to, že společnost TeliaSonera, jako historický švédský operátor pevné telefonní sítě, dříve držitel výlučných práv, vlastní účastnické vedení, jež spojuje jednotlivé domácnosti ve Švédsku s nejbližší místní telekomunikační ústřednou. Společnost TeliaSonera tak nabízela ostatním operátorům přístup k účastnickému vedení, a to dvěma způsoby – jednak v souladu s povinnostmi, které jí ukládal Evropský parlament a jednak nabízela vstupní produkt pro ADSL spojení, jenž umožňoval operátorům poskytovat jejich služby širokopásmového připojení přímo koncovým uživatelům. Vedle toho TeliaSonera sama poskytovala služby širokopásmového připojení přímo koncovým uživatelům.

Soudní dvůr se v tomto případě podrobně zabýval protisoutěžní povahou stlačení marží a podmínkami, za kterých se jedná o porušení čl. 102 Smlouvy o fungování EU. Vyšel z testu stejně efektivního soutěžitele, na základě kterého je možné prokázat, zda má praktika stlačení marží

Sherman Act (2008). Dostupné z: http://www.justice.gov/atr/public/reports/236681.htm (dále jen metodika „DOJ”).

[8]Viz odst. 23 – 27 Pokynů k prioritám Komise v oblasti prosazování práva při používání článku 82 Smlouvy o ES na zneužívající chování dominantních podniků vylučující ostatní soutěžitele (2009/C 45/02) (dále jen „Pokyny Komise”)

[9]Rozsudek Soudního dvora EU ze dne 17. 2. 2011 ve věci C-52/09, *TeliaSonera Sverige AB.* (dále jen „rozsudek TeliaSonera“)

[10] Rozsudek Soudního dvora EU ze dne 27. 3. 2012 ve věci C-209/10, *Post Danmark A/S* (dále jen „rozsudek Post Danmark“)

[11] Rozsudek Soudního dvora EU ze dne 19. 4. 2012 ve věci C-549/10 P, *Tomra Systems ASA a další proti Evropské komisi* (dále jen „rozsudek Tomra“).

[12]Této praktiky se může dopustit vertikálně integrovaný podnik s dominantním postavením na předřazeném trhu, na kterém dodává nezbytné vstupy svým konkurentům, s nimiž zároveň soutěží na následném trhu. (Více např. NIELS, G., JENKINS, H,, KAVANAGH, J. Economics for Competition Lawyers. s. 239)

[13]Rozsudek Soudního dvora EU ve věci *C-280/08 P* [2010] ECR I-0000, *Deutsche Telekom AG v. Komise*.

alespoň potenciální protisoutěžní účinek. Klíčové bylo porovnání velkoobchodní a maloobchodní ceny sledovaného dominantního podniku. Protisoutěžní povaha stlačování marží by v daném případě byla prokázána tehdy, pokud by byla marže (tj. maloobchodní cena za služby poskytované koncovým uživatelům minus velkoobchodní cena za vstupní produkty ADSL) záporná, neboť by neumožňovala stejně výkonnému soutěžiteli, jako je společnost TeliaSonera, účastnit se na soutěži o poskytování uvedených služeb koncovým uživatelům. V takovém případě by totiž soutěžitelé, přesto že by byli stejně efektivní jako TeliaSonera, mohli na maloobchodním trhu působit pouze se ztrátou nebo s uměle sníženou mírou ziskovosti.[14] Soudní dvůr dále upozornil, že pokud by dominantní podnik nebyl schopen nabízet své maloobchodní služby jinak než se ztrátou (přičemž se zkoumá situace, zda by byl podnik ztrátový na maloobchodním trhu, pokud by musel hradit své vlastní velkoobchodní ceny), znamenalo by to, že soutěžitelé, kteří by na základě jeho jednání mohli být vyloučeni z trhu, nelze považovat za méně výkonné než podnik v dominantním postavení, a že tedy dochází k narušení hospodářské soutěže, jež může vést k vyloučení těchto soutěžitelů z trhu. Pokud by však výše marže zůstala kladná, bylo by třeba pro konstatování zneužití dominance prokázat, že stlačení marže z nějakých důvodů – např. snížení ziskovosti – může přinejmenším ztížit dotčeným operátorům výkon jejich činnosti na maloobchodním trhu.[15]

Soudní dvůr dále zdůraznil, že založení zkoumání protisoutěžní povahy stlačení marží na principu stejně efektivního soutěžitele je v souladu se zásadou právní jistoty, neboť soutěžitelé s dominantním postavením znají své ceny a náklady a mohou si tak sami posoudit – v souladu se svou zvláštní odpovědností, kterou jim jejich postavení přináší - legalitu svého jednání.[16]

Soudní dvůr se již konkrétně nezabýval tím, jaké náklady dominantního soutěžitele na prodej na maloobchodním trhu mají být srovnávány s jeho maržemi. Ve svých Pokynech Komise v souvislosti s posuzování praktiky stlačování marže doporučuje, aby jako nákladové měřítko pro provedení cenově nákladového testu byly použity dlouhodobé průměrné přírůstkové náklady („LRAIC“) dominantního podniku na produkty na následném trhu.[17] Jedná se o průměr veškerých nákladů, které podnik vynaloží na produkci konkrétního výstupu, tedy celkové náklady, jež jsou vynaloženy na přírůstek o jednu službu (mezní přírůstek). Pokud jsou tyto náklady vyšší než cena nabízená dominantním podnikem na tomto trhu, je možné z toho vyvodit, že stejně efektivní soutěžitel by na daném trhu nemohl být ziskový. Na rozdíl od dominantního podniku by totiž nemohl využít své výhody plynoucí z dominantní pozice na předřazeném trhu.

V rozsudku TeliaSonera tedy Soudní dvůr založil naplnění protisoutěžní povahy stlačování marží na aplikaci testu stejně efektivního soutěžitele. Je třeba však uvést, že vedle testu stejně efektivního soutěžitele bývá v souvislosti s posuzováním stlačování marží zmiňován také test „přiměřeně efektivního soutěžitele“. Základní myšlenka tohoto testu je založena na tom, že marže mezi cenou účtovanou konkurentům na navazujícím trhu za přístup a cenou, kterou provozovatel sítě účtuje na navazujícím trhu, nestačí k tomu, aby umožnila přiměřeně výkonnému poskytovateli služeb na navazujícím trhu získat normální zisk. Tento test tedy marži (resp. rozdíl mezi maloobchodní a velkoobchodní cenou) poměřuje s náklady skutečných nebo případně hypotetických soutěžitelů působících na tomtéž maloobchodním trhu. Cílem je posoudit, zda by přiměřeně efektivní soutěžitel mohl na daném trhu působit bez toho, aby utrpěl ztráty. Problémem je ovšem určení, jaký je „normální“ zisk takového přiměřeně efektivního soutěžitele na daném trhu. Výhodou tohoto testu je, že dokáže lépe zohlednit případné výhody ostatních soutěžitelů oproti dominantnímu podniku. Test přiměřeně efektivního soutěžitele je tak více výhodný pro tyto ostatní soutěžitele, zatímco test stejně efektivního soutěžitele je výhodnější pro samotný dominantní podnik, případně pro spotřebitele, pokud mohou profitovat na nízkých cenách nabízených dominantním podnikem.[18] Nevýhodou je naopak nutnost poměřování nákladů dominantního podniku s ostatními soutěžiteli, což je jednak náročné na získání spolehlivých dat a dále to vede k určité právní nejistotě, neboť dominantní podnik sám nemůže odhadnout, zda jeho cenová politika bude shledána jako protisoutěžní.

Komise ani následně soudy prozatím upřednostňují pro účely posouzení protisoutěžní povahy stlačování marží test stejně efektivního soutěžitele, a to zejména kvůli právní jistotě

[14]Viz rozsudek TeliaSonera, odst. 32.
[15]Tamtéž, odst. 73 – 74.
[16]Tamtéž odst. 43 – 44.
[17]Viz Pokyny Komise.
[18]ŠAMÁNEK, J., BROUČEK, M. Aplikace doktríny stlačování marží Soudním dvorem EU: případ Deutsche Telekom. Antitrust. Revue soutěžního práva. 2011, č. 2, str. 50 – 57.

dominantního podniku a také kvůli myšlence, že soutěžní právo nemá chránit méně efektivní soutěžitele před vyloučením z trhu. V případě TeliaSonera však nebylo vyloučeno, že by v určitých případech mohly být posuzovány místo nákladů dominantního podniku náklady ostatních konkurentů. Nelze tak uzavřít, že by test přiměřeně efektivního soutěžitele nemohl být nikdy použit.

3.2 Pojetí testu stejně efektivního soutěžitele v případu Post Danmark

V souvislosti s uplatňováním podnákladových cen byl test stejně efektivního soutěžitele vysvětlen v rozsudku Post Danmark, ve kterém Soudní dvůr rozhodoval o předběžné otázce dánského Nejvyššího soudu. Po skutkové stránce šlo o to, že společnost Post Danmark podle dánského soutěžního úřadu zneužila své dominantní postavení na trhu distribuce neadresných zásilek v Dánsku. Konkurenční společností společnosti Post Danmark byla v rozhodném období společnost Forbruger-Kontakt, jejímiž významnými zákazníky byly do roku 1994 skupiny SuperBest, Spar a Coop, tedy velké maloobchodní řetězce. Společnost Post Danmark s těmito společnostmi uzavřela na konci roku 1993 smlouvy, na základě nichž jí byla svěřena distribuce jejich neadresných zásilek. Dánský soud potvrdil rozhodnutí dánského soutěžního úřadu v tom smyslu, že zneužití dominantního postavení společnosti Post Danmark spočívalo v tom, že vůči bývalým zákazníkům společnosti Forbruger-Kontakt uplatňovala odlišné ceny než vůči svým stávajícím zákazníkům, aniž by rozdíly ve slevách a cenách mohla odůvodnit na základě svých nákladů. Cena účtovaná skupině Coop neumožňovala společnosti Post Danmark pokrýt její celkové průměrné náklady (ATC), avšak dovolovala jí si pokrýt své průměrné přírůstkové náklady (AAC)[19]. Pro prokázání zneužití dominantního postavení podle dánského soudu již nebylo třeba zkoumat úmysl dominantního podniku vyloučit svého konkurenta.

V rámci předběžné otázky se dánský Nejvyšší soud Soudního dvora dotázal, zda je třeba vykládat čl. 82 Smlouvy o ES v tom smyslu, že selektivní snížení ceny ze strany poštovního podniku v dominantním postavení, který má povinnost poskytovat všeobecné služby, na úroveň nižší než jsou jeho ATC, avšak vyšší, než kolik činí jeho AAC, představuje zneužití dominantního postavení spočívající ve vyloučení konkurenta, pokud se prokáže, že ceny nejsou na této úrovni stanoveny za účelem tohoto vyloučení.[20]

Soudní dvůr nejprve ve svém rozsudku zdůraznil, že při posuzování možného zneužití dominantního postavení je třeba rozlišovat jednak protisoutěžní vyloučení z trhu, které představuje narušení hospodářské soutěže, a vedle toho „pouze“ vyloučení z trhu, jež není považováno za nebezpečné pro soutěž.[21] Taková je ostatně hlavní myšlenka více ekonomického přístupu, který preferuje ochranu soutěže jako takové a blahobytu spotřebitelů před ochranou jednotlivých soutěžitelů.

V odůvodnění rozhodnutí vycházel Soudní dvůr z logiky testu stejně efektivního soutěžitele, ze kterého vyplývá, že dominantní podnik nemůže používat praktiky, jež mají za následek vyloučení takových jeho konkurentů, kteří jsou stejně výkonní jako on sám, a posílení jeho dominantního postavení uplatňováním jiných prostředků než těch, spadajících do hospodářské soutěže na základě výkonnosti. Samotná skutečnost, že podnik v dominantním postavení uplatňuje cenovou diskriminaci (tj. že účtuje různé ceny různým zákazníkům, případně různým kategoriím zákazníků v případě výrobků nebo služeb, u nichž jsou náklady stejné, nebo naopak uplatňuje jednotné ceny vůči zákazníkům, u nichž se náklady nabídky liší) však neznamená, že se jedná o zneužití dominantního postavení spočívající ve vyloučení konkurenta.[22]

Soudní dvůr vycházel při svých úvahách nad cenově-nákladovým testem aplikovaným dánským soutěžním úřadem z tzv. „AKZO pravidel“,[23] které zaprvé stanovují, že ceny dominantního podniku, které nepokryjí průměrné variabilní náklady (AVC) na dané zboží či službu, automaticky znamenají zneužití dominantního postavení a jsou *per se* zakázány, tzn., že protisoutěžní záměr soutěžitele se v tomto případě předpokládá. Za druhé platí, že pokud jsou ceny pod úrovní ATC,

[19] Průměrné přírůstkové náklady (AAC) v sobě zahrnují fixní náklady (FC – náklady, které se s objemem výstupu nemění a vznikají tak i v případě, kdy nedochází k produkci další jednotky) vzniklé v průběhu uplatňování sledované cenové strategie a variabilní náklady (AVC - náklady, které se mění s objemem výstupu).

[20] Viz rozsudek Post Danmark, odst. 3 – 18.

[21] Tamtéž, odst. 22.

[22] Tamtéž, odst. 30.

[23] Viz rozsudek Soudního dvora EU ze dne 3. 7. 1991 ve věci C-62/86, *AKZO Chemie BV v Komise*.

avšak nad úrovní AVC, představují zneužití v případě, že jsou součástí plánu eliminovat jiného soutěžitele z trhu.[24]

Na rozdíl od AVC použitých v „AKZO pravidlech", reflektoval dánský soutěžní úřad při svém cenově nákladovém testu AAC[25], které považoval za více odpovídající, neboť v sobě zahrnují jak variabilní, tak také fixní náklady připadající na činnost distribuce neadresných zásilek a dále také společné variabilní náklady, 75 % přičitatelných společných logistických nákladů a 25% nepřičitatelných společných nákladů.

Na základě aplikace testu stejně efektivního soutěžitele dospěl Soudní dvůr k závěru, že pokud dominantní podnik stanoví ceny na úrovni, které dlouhodobě pokrývají podstatnou část nákladů na uvedení daného výrobku na trh nebo poskytnutí dotčené služby, znamená to, že stejně výkonný soutěžitel by v zásadě měl možnost takovým cenám konkurovat bez toho, aby se vystavoval dlouhodobě neudržitelným ztrátám. Nelze proto konstatovat, že samotná skutečnost, že ceny společnosti Post Danmark uplatňované vůči skupině Coop jsou nižší než ATC, avšak vyšší než AAC připadající na předmětnou činnost, představuje zneužití dominantního postavení spočívající ve vyloučení konkurenta. Za účelem posouzení možných protisoutěžních účinků takové praktiky je třeba dále zkoumat, zda tato cenová politika, bez nějakého objektivního odůvodnění – vedla ke skutečnému nebo pravděpodobnému vyloučení konkurenta a v důsledku toho byla na úkor zájmů spotřebitelů.

V tomto rozhodnutí tedy Soudní dvůr opět potvrdil použití testu stejně efektivního soutěžitele pro posouzení cenových vylučovacích praktik, přičemž vyšel ze svých předchozích rozsudků ve věcech TeliaSonera a Deutsche Telecom, podle kterých je třeba činit rozdíl mezi vyloučením soutěžitele na základě průběhu hospodářské soutěže a mezi protisoutěžním vyloučením.

3.3 Přístup ke zneužití dominance v případu Tomra

Za podstatné považujeme zmínit také rozhodnutí Soudního dvora z roku 2012 ve věci Tomra, ve kterém se zaměříme na posouzení protisoutěžní povahy věrnostních rabatů. Na rozdíl od dvou uvedených rozhodnutí o předběžné otázce, jež byla jednoznačně postavena na ekonomickém přístupu, je rozsudek Tomra založený na myšlence, že praktika spočívající v poskytování věrnostních rabatů je za určitých okolností zakázána *per se*. Soudní dvůr zde podpořil názor Komise uvedený v jejím rozhodnutí z roku 2006[26], že není třeba porovnávat náklady sledovaného dominantního podniku s jeho cenami. Jinými slovy zde byl test stejně efektivního soutěžitele zcela ignorován.

Komise ve svém rozhodnutí dospěla k závěru, že společnost Tomra zneužila své dominantní postavení tím, že zavedla vylučovací strategii na německém, rakouském, nizozemském, norském a švédském trhu automatických přístrojů pro výkup nápojových obalů, a to prostřednictvím výhradních dohod, individualizovaných množstevních slev a režimů individualizovaných retroaktivních slev (věrnostních rabatů).

V souvislosti s posouzením věrnostních rabatů Soudní dvůr uvedl, že pro konstatování porušení čl. 102 Smlouvy o fungování EU postačí prokázat, že zneužívající jednání podniku v dominantním postavení směřuje k omezení hospodářské soutěže. Podnik zneužívá své dominantní postavení, pokud „*uplatňuje, aniž by svým zákazníkům stanovoval formální povinnost – ať již na základě dohod uzavřených s těmito zákazníky, nebo jednostranně – režim věrnostních slev, tzn. slev vázaných na podmínku, že zákazník, nezávisle na objemu nákupů, jenž může být značný nebo minimální, pokrývá své potřeby výlučně nebo z významné části u podniku v dominantním postavení*". Pro posouzení protisoutěžní povahy věrnostních slev je tak podle Soudního dvora rozhodné, zda tato praktika může bránit tomu, aby se zákazníci dominantního podniku zásobovali u konkurenčních výrobků. Naopak soud nepřisvědčil názoru stěžovatelů, že by bylo nutné pro protisoutěžní povahu věrnostních slev nutno prokázat účtování „záporných" cen, tedy poměřovat náklady a ceny dominantního podniku.[27]

[24] ROTH, P.; ROSE, V. Bellamy & Child European community law of competition. s. 957-958.

[25] Přírůstkové náklady byly definovány jako náklady, které by měly v krátkodobém nebo střednědobém horizontu (3 až 5 let) vymizet, kdyby společnost Post Danmark přestala vykonávat činnost distribuce neadresných zásilek.

[26] Rozhodnutí Komise ze dne 29. 3. 2006 ve věci COM (2006)734.

[27] Rozsudek Tomra, odst. 70 až 74.

V případě Tomra tedy, ač Soudní dvůr uvedl, že protisoutěžní praktiku je třeba zkoumat v celkovém ekonomickém kontextu, nebyl test stejně efektivního soutěžitele uplatněn, naopak byl potvrzen zákaz některých věrnostních rabatů *per se*.

Omluvou pro odklon od ekonomického přístupu zde do určité míry může být skutečnost, že rozhodnutí Komise v této věci bylo vydáno ještě před přijetím Pokynů Komise, obsahujících návod pro zkoumání věrnostních rabatů z pohledu více ekonomického přístupu. Na druhou stranu je třeba uvést, že již v této době se ekonomický přístup postupně prosazoval, o čemž svědčí např. publikace diskuzního materiálu v roce 2005 o ekonomickém přístupu k tehdejšímu čl. 82 Smlouvy o ES. Proto je diskutabilní, zda již v roce 2006 nemohla Komise zohlednit cenově nákladový test, dnes již ve srovnatelných případech zcela běžně prováděný. Lze tak uzavřít, že rozhodnutí ve věci Tomra bezpochyby značně narušilo důvěru ve vůdčí roli ekonomického přístupu při posuzování zneužití dominantního postavení.

Na druhou stranu je třeba uvést, že v současné době již Komise test stejně efektivního soutěžitele k rabatům používá, o čemž svědčí např. případ Intel.[28] Konkrétně Komise v tomto případu zjišťovala, jakou cenu by museli stejně efektivní soutěžitelé jako Intel nabízet, aby nahradili výrobcům počítačů ztrátu rabatu poskytovaného podnikem Intel. Postupovala tak v souladu s pravidly stanovenými v Pokynech Komise pro posuzování protisoutěžní povahy rabatů. Jako podklad pro rozhodnutí tak použila cenově nákladový test, v rámci kterého poměřovala „efektivní cenu" (tedy cenu po odečtení rabatu) s AAC vynaloženými Intelem. Komise dospěla k tomu, že stejně výkonní soutěžitelé jako Intel, nebyli schopni konkurovat ceně po slevách nabízených Intelem, protože takto nízké cena byly podnákladové i pro samotný dominantní podnik.

3.4 Český případ – Student agency

Test stejně efektivního soutěžitele byl pro posouzení možného zneužití dominantního postavení použit také českým Úřadem pro ochranu hospodářské soutěže (dále jen „Úřad") v rozhodnutí ve věci Student agency[29]. Úřad dospěl k závěru, že společnost Student agency zneužila svého dominantního postavení ve smyslu § 11 odst. 1 písm. e) zákona č. 143/1991 Sb., o ochraně hospodářské soutěže a o změně některých zákonů (zákon o ochraně hospodářské soutěže) tím, že v reakci na zahájení poskytování služeb veřejné linkové osobní autobusové dopravy na lince Praha – Brno a zpět konkurenčním dopravcem – společností ASIANA, spol. s.r.o. stanovila své ceny jízdenek na nepřiměření nízké úrovni (50 Kč v období 2. 10. 2007 – 1. 1. 2008 a 95 Kč v období od 2. 1. do 1. 3. 2008). Rozhodnutí Úřadu bylo následně zrušeno Krajským soudem v Brně[30] (dále jen „krajský soud") z důvodu nedostatečného zdůvodnění vymezení relevantního trhu. Krajský soud nicméně potvrdil úvahy Úřadu týkající se samotného posouzení protisoutěžní povahy jednání společnosti Student agency ve formě predátorských cen. Tento rozsudek byl sice zrušen Nejvyšším správním soudem[31], ovšem z důvodu nesprávného posouzení otázky vymezení relevantního trhu.

V rámci posuzování cenové politiky společnosti Student agency Úřad srovnával „efektivní cenu" společnosti Student agency s jejími průměrnými náklady na jednoho přepravovaného cestujícího. Jako interval pro posouzení výsledků hospodaření zvolil měsíční interval, neboť vzhledem ke změnám výše a rozsahu uplatňovaných cen společností Student agency v průběhu sledovaného období to nejlépe vypovídalo o důsledcích jejího jednání. Úřad dospěl k tomu, že posuzovaná společnost v období od října 2007 do února 2008 účtovala takovou cenu za jednosměrnou kreditovou jízdenku, která nepokrývala ani celkové náklady připadající na jedno průměrně obsazené sedadlo, avšak – v případě ceny ve výši 50 Kč - ani průměrné variabilní náklady. Vzhledem k tomu, že Úřad měl za prokázaný úmysl společnosti Student agency eliminovat společnost Asiana, u ostatních cen stačilo, že nepokrývaly celkové průměrné náklady. Byly zde tedy aplikovány tzv. Akzo pravidla zmíněná výše. Uvedená praktika dominantního podniku tak uzavírala trh jakémukoli konkurentovi stejně efektivnímu jako dominantní podnik.

Krajský soud přezkoumal rozhodnutí Úřadu ve světle aktuální evropské judikatury (odkazoval mimo jiné i na rozsudek Soudního dvora ve věci Post Danmark) a potvrdil tak závěry Úřadu o naplnění skutkové podstaty predátorských cen. Lze tak uzavřít, že i v české soudní praxi jsou již přezkoumávány ekonomické metody jako důkazy prokazující protisoutěžní povahu určitého jednání.

[28] Rozhodnutí Komise ze dne 13. 5. 2009 ve věci COMP/37.990

[29] Rozhodnutí Úřadu ze dne 18. 2. 2011, čj. R169/2010/HS-2676/2011/310-PGA.

[30] Viz rozsudek Krajského soudu v Brně ze dne 9. 11. 2012, čj. 62Af 27/2011 - 409.

[31] Viz rozsudek Nejvyššího správního soudu ze dne 30. 9. 2013, čj. 2 Afs 82/2012 – 134.

4 ZÁVĚREM

Předmětem tohoto článku bylo nastínit použití testu stejně efektivního soutěžitele při posuzování zneužití dominantního postavení, a to zejména v evropské ale i v české praxi. Na myšlence tohoto testu je založen přístup Komise k vylučovacím cenovým praktikám vyjádřený v Pokynech Komise. Stejně tak evropské soudy v převažující části své rozhodovací praxe posuzují protisoutěžní povahu vylučovacích praktik dominantů optikou testu stejně efektivního soutěžitele.

Na závěr je na místě zhodnotit aplikaci testu stejně efektivního soutěžitele a shrnout jeho výhody a nevýhody. Výhodou je nepochybně zajištění právní jistoty dominantního podniku, neboť tento test kalkuluje s vlastními náklady a cenami dominantního podniku, které vzájemně porovnává. Vzhledem k tomu, že tyto údaje jsou dominantnímu podniku známé, může tak snadno sám počítat s tím, jaká jeho praktika bude vést, alespoň potenciálně, k vyloučení jeho konkurentů.

Obecně je problémem při provádění ekonomických analýz získání spolehlivých dat, na kterých jsou analýzy založeny a nejinak je tomu i u testu stejně efektivního soutěžitele. Pro jeho provedení je klíčové porovnání specificky vybraných nákladů dominantního podniku s jeho cenami, často však může být obtížné výši nákladů v požadovaném formátu od dominantního podniku získat. Stejně tak může být zavádějící i samotný výběr typu nákladů, který je s ohledem na specifika daného relevantního trhu nejvhodnější pro porovnání s cenami za produkt či službu. Autoři se přiklánějí k názoru Komise vyjádřenému v jejích Pokynech, že nejpřiléhavější bude ve většině případů použít LRAIC jako vhodné nákladové měřítko.

Nevýhodou může být také skutečnost, že test stejně efektivního soutěžitele jde obtížně aplikovat mimo cenový kontext.

Praktické problémy v souvislosti s aplikací tohoto testu mohou nastat v případech, kdy stávající dominantní podnik čelí soutěži ze strany nově vstupujících soutěžitelů, kteří však ještě nedosahují tak vysokých úspor z rozsahu, a z toho důvodu ještě nedosahují takové výkonnosti jako stávající dominantní podnik. Jde tedy o „ještě ne tak efektivní soutěžitele“ („not yet as efficient“). Je ovšem těžké rozlišit takovéto soutěžitele od soutěžitelů, jež jsou a budou méně efektivní a není tak účelné je ve smyslu práva hospodářské soutěže chránit před vyloučením z trhu. Tento problém se může projevit např. na trzích, kde probíhá liberalizace, na němž dosud působí podnik, který měl státní monopol a je zde pravděpodobné, že nově vstupující soutěžitelé budou dosahovat stejných výhod plynoucích z rozsahu výroby a bude se tak zvyšovat jejich efektivnost (výkonnost) v průběhu času. V takových případech pak může být nepřiléhavé poměřovat efektivnost nových soutěžitelů s efektivností stávajícího dominantního podniku.[32]

Vzhledem k tomuto problému se může jako vhodnější jevit použití testu „přiměřeně efektivního soutěžitele“, který lépe zohledňuje situaci na daném trhu. V některých případech je totiž na místě poskytnout ochranu také takovým soutěžitelům, kteří sice nedosahují takové efektivnosti jako dominantní podnik, avšak je možné je považovat za přiměřeně efektivní. Úskalí tohoto testu je ovšem problém, jak určit „přiměřenou efektivnost“ a dále v právní nejistotě dominantních podniků, kteří nemají šanci dopředu odhadnout, jestli bude jejich jednání shledáno protisoutěžní. Na druhou stranu výsledek takového posouzení může být v některých případech spravedlivější a více odrážet ekonomickou realitu. Postoj autorů k použití tohoto testu je však spíše skeptický, neboť právní nejistota ke které by vedl, by nepřiměřeně omezovala dominantní podniky v jejich jednání a mohla vyvolat vyšší množství, často neoprávněných stížností na zneužití dominantního postavení. Tento test je navíc sporný z pohledu přístupu USA, kde klíčová není ochrana soutěže jako samostatného statku, ale ochrana blahobytu, přičemž aplikace tohoto testu by mohla vést v určitých případech k omezení a trestání efektivnějšího dominanta.

Co se týče evropské soutěžní praxe – tedy rozhodování Komise a následně evropských soudů, lze i nadále očekávat, že v souvislosti s uplatňováním více ekonomického přístupu, bude i test stejně efektivního soutěžitele při posuzování cenových protisoutěžních praktik dominantních podniků, široce používán.

Použitá literatúra:

HILDEBRAND, D. The Role of Economic Analysis in the EC Competition Rules. Alphen aan den Rijn : Kluwer Law International, 2010. 596 s. ISBN 978-90-411-2513-2.

[32] Viz Metodika DOJ.

ROTH, P.; ROSE, V. Bellamy & Child European community law of competition. 6th ed. Oxford : Oxford University Press, 2008. 1679 s. ISBN 978-0-19-928651-5.
NIELS, G., JENKINS, H,, KAVANAGH, J. Economics for Competition Lawyers. Oxford : Oxford University Press, 2011. 640 s. ISBN 978-0-19-958851-0.
Kaplow, Louis. *Why (Ever) Define Markets?* Harvard Law Review, Forthcoming; Harvard Law and Economics Discussion Paper No. 666; Harvard Public Law Working Paper No. 11-08. Dostupné z: http://ssrn.com/abstract=1750302.
ŠAMÁNEK, J., BROUČEK, M. Aplikace doktríny stlačování marží Soudním dvorem EU: případ Deutsche Telekom. Antitrust. Revue soutěžního práva. 2011, č. 2, str. 50 – 57.
European Commission > *Competition* [online]. 2011 [cit. 2013-04-10]. Art 82 Review. Dostupné z: <http://ec.europa.eu/competition/antitrust/art82/index.html>.
OECD [online]. 2006 [cit. 2013-05-03]. Policy Brief June 2006. Dostupné z: <http://www.oecd.org/dataoecd/10/27/37082099.pdf>.
U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008). Dostupné z: http://www.justice.gov/atr/public/reports/236681.htm
Pokyny k prioritám Komise v oblasti prosazování práva při používání článku 82 Smlouvy o ES na zneužívající chování dominantních podniků vylučující ostatní soutěžitele (2009/C 45/02)
Rozsudek Soudního dvora EU ze dne 17. 2. 2011 ve věci C-52/09, *TeliaSonera Sverige AB.*
Rozsudek Soudního dvora EU ze dne 19. 4. 2012 ve věci C-549/10 P, Tomra Systems ASA a další proti Evropské komisi.
Rozsudek Soudního dvora EU ve věci ***C-280/08 P*** [2010] **ECR** I-0000 ve věci *Deutsche Telekom AG v. Komise*.
Rozhodnutí Komise ze dne 29. 3. 2006 ve věci COM (2006)734
Rozhodnutí Komise ze dne 13. 5. 2009 ve věci COMP/37.990
Rozhodnutí Úřadu ze dne 18. 2. 2011, čj. R169/2010/HS-2676/2011/310-PGA.
Rozsudek Krajského soudu v Brně ze dne 9. 11. 2012, čj. 62Af 27/2011 - 409.
Rozsudek Nejvyššího správního soudu ze dne 30. 9. 2013, čj. 2 Afs 82/2012 – 134.
Viz rozsudek Soudního dvora EU ze dne 3. 7. 1991 ve věci C-62/86, *AKZO Chemie BV v Komise*.

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Abstract: The concept of european public sphere functions in european nomenclature since the Convention on the future of the EU , which is regarded as the watershed in the creation of public space. According to J. Habermas in european community, a community inhomogeneous both culturally and lingually, the law is the only common ground. One can speak about participation of individuals in a wider and narrow sense. The first , perceived as individual actions that influence the Union directly, the other one is characterized by political participation only. Political participation shall be understood as willing participation of the individuals which results in election of the governments and political actions. Realization of such activity on the european level are granted by citizens rights, which provide the individual with the mechanisms allowing to influent the political system of EU. Those mechanisms can also be called political rights. The participation of citizens in Union's democratic life is bound by the European Parliament.

Key words: citizenship, Citizen's initiative

The public sphere is where people communicate mutually in scope of matters of their interest, including – like the public opinion – control of institutionalized forms of civic and political activities. The notion of the European public sphere has been functioning in the European nomenclature since the Convention of the Future of European Union, regarded as a breakthrough in the construction of this space. The father of the concept of the public sphere is believed to be J. Habermas, who also started a new direction of research on the European integration, defined as "deliberative supranationalism". In principle the concept assumes that the prerequisite for taking a good decision is not adopting it through vote, but as a result of a pressure-free debate. In theory law addressees are also its authors, as the objective is to legitimize results regarding citizens through public communication[1]. Habermas's solution rests on the model of a society harassing political institutions. Strong civil society is indispensable to debate matters that must be taken into consideration by decision-makers. In case of EU the main problem in creating the public sphere is lack of cultural identity, no real sense of community. According to Habermas in a society we have in the Union, i.e. a society that is not homogenous in terms of culture and language, the only common ground is the law. In his opinion only a discourse regulated by the law, based on openness of all discussion subjects and objects, assuming equality of rights of all participants and free of compulsion guarantees appropriate civil legitimization. It is worth underlining here that the problem of communication within the Union's society has already been observed by the European Commission, who in February 2006 presented the White Paper on the European Communication Policy (Com(2006)35). The document clearly shows that the Commission is aware of the existing "communication gap", which promotes democracy deficiency within the Union. The Paper's main objective was to "present propositions of progressive course of action and summoning main participants to contribute in the search for answer to the question how to cooperate best to fill this communication gap". One of the instruments the Commission had undertaken to include citizens in the discussion on the Union was "Plan D for democracy, dialog and debate" (Com(2005)494), implemented before the White Paper was published.

An individual's participation in the Union can be regarded in a broader and narrower perspective. The first perspective means manifestations of all and any activities of an individual that influence the Union's direct shape, the latter one is distinguished by perceiving participation solely as political participation. Such activity at the European level is carried out through political civil

[1] Eriksen E.O, The Question of Deliberative Supranationalism in the EU, Arena Working Paper 4/1999, p.5.

rights, which arm an individual with mechanisms of influencing the legal and political system of EU. Indirect participation of the Union's citizens in the EU political life, though it is defective to a large extent, is a link on the way of transforming from the Union of countries to the Union of citizens.

Indirect democracy

At present the UE's political rights are exercised within indirect democracy, for the basis of the Union's functioning is representative democracy. This is the assumption of the Treaty of Lisbon. The citizens' participation in the Union's democratic life is related first of all to the European Parliament. As soon as in the Roquette ruling the Tribunal decided that EP is the only institution which "though in a limited extent, at the community level is a reflection of the democracy principle, according to which people participate in exercising power through the instrument of representative assembly"[2].

Voting rights in European Parliament elections constitute the main political right being the manifestation of "the people's" participation in exercising power. Members of the Parliament are elected in direct general election. The present system assumes that the number of mandates is "assigned" to each country, which in fact confirms the non-existence of European *demos.* At the same time it is commonly known that it is difficult to create a system that would simultaneously assume fair representation of citizens and countries[3]. This is also the reason why the German Federal Constitutional Court in its ruling regarding the Treaty of Lisbon does not recognize the European Parliament as an institution able to provide the European legislation and politicians with sufficient democratic legitimacy and accepts it only as an additional or complementary source of democratic legitimacy.

As for today a uniform electoral procedure in all countries has not been achieved, however such an option was provided for in the Treaty of Lisbon. National legislation indicates clearly who has the right to vote and who does not. As the Court of Justice remarks: "Countries have a large freedom in setting requirements regarding the right of vote"[4]. The Court has clearly indicated that in case there are no Union regulations regarding the right of vote and candidacy to the European Parliament, the court is to indicate the national legal order and to define procedural rules with the aim to protect individual rights derived from the Union law. The Court has also stressed that such rules cannot be less beneficial than those derived from national legal orders (the principle of equivalence) and in practice cannot make the right granted by the community law impossible or excessively difficult to exercise (the principle of effectiveness)[5]. This means that countries may grant this right to its own citizens as well as to non-Union citizens residing on its territory. It might be considered as yet another argument for the departing from perceiving an individual through its nationality[6] in favour of seeing it as *demos*[7].

Direct democracy

The Lisbon Treaty introduced to the European constitutional law one of the greatest innovations in terms of mechanisms of participative democracy, unprecedented until then at the supranational level[8]. The primary law introduces the right of each citizen to participate in the

[2] Case 138/79 SA Rouquette Freres v. Council, ECR.1980, p..333.

[3] Gerkrath J., Representation of Citizens by teh EP, European Constitutional Law Review, 1/2005, p.76.

[4] Case C-145/04 Kindgom of Spein v. United Kindgom of Great Britain and Northern Ireland ECR. 2006, p. I-07917.

[5] Case C- 300/04 M.G. Eman i O.B. Sevinger v. College van burgermeester en wethouders van Den Haag, ECR. 2006, p.I-8055 see also case C-443/03 Leffler, ECR 2003.,p. I-9611.

[6] In year 2004 the group of polish deputy applied to The Polish Constitutional Tribunal claiming that polish regulation on voting rights to EP(regulation from 23 January 2004) was contradictory to Polish Constitution, because that regulation imposed the right to vote to non-polish citizens. In theirs opinion it was against Polish Constitution. Of course the Constitutional Tribunal didn't consent to this request.

[7] Weiler J.H.H, Union Citizenship, Jean Monnet Working Paper 9/03.

[8] Rytel-Warzocha A. European citizens' initiative, Gdańskie Studia Prawnicze, Tom XXIV,2010, p.425-436.

democratic life and the postulate is realized by means of the so-called European people's initiative[9]. The idea of introducing the people's initiative to the Union's systems has been present since 1996 and for nearly twenty years a solution that would "give European democracy a new dimension and also extend the scope of social discussions regarding European policy, which should contribute to the creation of the real European public space" was searched for.

At present the initiative took form of the right to address the European Commission with the proposal that it formulates a bill. Such bill must "fall within" the Commissions rights and, what is the most important, must be supported by at least one million citizens from different member countries. Such requirements are very difficult to meet and made some authors point out that the idea may be uniquely of ideological nature. However as soon as on 16 February 2011 the European Parliament and Council adopted a common Ordinance on civic initiative[10], providing grounds for action. Still, factual solutions in this scope will have to be waited for.

One manifestation of direct democracy are referendums, which should constitute the core of civic society under construction. In case of the European Union no referendum of all-Union nature has been introduced yet, so in principle only national referendums[11] determine to some extent direct democracy at the Union's level in European integration matters and are a reflection of public mood in this regard. Such referendums are carried out as part of national procedures and do not play the role of a Union's social integrator, on the contrary, emphasize its diversity[12]. F. Chenevel takes the stand that national referendums regarding European matters in the form they take now are encumbered with numerous flaws. Firstly, referendums require the citizens to decide for or against in matters of a very complicated nature, and as studies show when the vote regards a "multipack", votes against prevail. Secondly, they are a manifestation of discrimination within EU citizenship, as they do not grant equal rights to everyone: not all citizens have the possibility to express their stand by way of referendum, and even when they do and referendums are carried out at different points of time, only citizens of countries voting as first have a truly decisive vote. In Chenevel's opinion a referendum should be an expression of citizenship and not a process happening in an isolation inside countries. The recent historical events, such as the failure of the referendum on Constitutional Treaty in France and Holland or rejection of the Treaty of Lisbon in Ireland by way of referendum show that decisions of parts of European community influence the fate of all. The problem recently returned together with the Greek crisis and the idea of prime minister Papandreu to carry out a referendum on solutions for the Greek crisis proposed by Brussels. The reaction of Europe's political elites to this idea became the basis for a critique issued by J. Habermas, who believes that concentration of power at Brussels's level combined with its disrespectful attitude towards citizens will lead the Union to no good, as it is a perfect example of how communication should not look like at the Union's level.

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[9] The citizens' initiative is the institution of law, which is not very common on the national constitutional level. This instrument is present in Italy, Austria, Poland and obviously Switzerland.
[10] Regulation of European Parliament and of the Council on the Citizens' initiative of 16 February 2011.
[11] About 40 national referendums concerning European subjects have been proceeded since 1972.
[12] Chenevel F., „Caminante, no hay camino, se hace camino al. andor"-EU Citizenship, Direct Democracy and Treaty Ratifictaion, ELJ VOL.13/5, Sep. 2007. p.656-657.

THE ROLE OF THE EU IN THE 'TRADE AND ENVIRONMENT' DEBATE – TRANSATLANTIC DIVERGENCE?

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Abstract: The paper examines how the EU shapes the 'Trade and Environment' debate and makes efforts to inc lude environmental issues in the international trade law. The EU has been a principal '*demandeur*' of environmental policy in trade discussions, and recently, the EU's main objective is to set up a multilateral legal framework which promotes the liberalization, but includes minimum environmental standards and enables the Members to restrict imports which do not meet those requirements. The EU's efforts led to numerous conflicts within the WTO which can be interpreted at least in two ways. First, the inherent conflict can be understood in terms of the policy behind the regulation, therefore it is an 'ideological conflict' between the free trade concept and the environmental thinking. Second, it is also a typical conflict of rules and appears in contradictions between the WTO law and the EU environmental measures. The paper shows that there is actually significant divergence regarding these conflicts between the position of the EU as well as US and examines these questions in the case of the ongoing negotiations on a transatlantic free trade and investment partnership agreement.

Key words: Trade and Environment, International Trade Law, EU Common Commercial Policy, Transatlantic Free Trade and Investment Partnership

1 INTRODUCTION

Since the beginning of the end of the 80s, the 'Trade and Environment' debate[1] is in centre of attention of the world trade lawyers. The importance of the subject can be explained partly by the fact that the two areas represent an 'ideological conflict' between the free trade concept and the environmental thinking, which underpin the policy behind the international regulation. In this context, two facts regarding the relationship of the trade to the environment should be taken into consideration. First, a globalizing economic system increases general incentives for engaging in international trade.[2] The growth-oriented policies are leading without doubt to environmental impacts in terms of conventional pollution, as well as in overbuilding, forest and species depletion etc. In other words, the international trade law, which are representing within the World Trade Organization (WTO) with the single purpose of increasing trade flows, is unlikely to have a neutral effect on the world's environment. Second, it is fact that there is a natural tendency for trading countries to try the effectiveness of their own environmental regulation, as well as to influence the environmental behavior of others, [3] by resorting to trade measures, including import bans and other restrictive measures. The unilateral trade instruments in question are harshly criticized mostly by the developing countries, which are seeing in these measures nothing else but 'green protectionism'[4] of the developed nations. Both facts are major issue also today and are inherent elements of the debate as well.

The European Union (EU) is involved into this debate from the very outset, and for the last two decades, it has a very strong commitment to introduce significant reform with the aim of

[1] This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences. See for 'Trade and Environment' debate, Araya, M. – Figueres, J.M. – Salazar-Xirinachs, J.M. Trade and Environment in the World Trade Organization, p. 156.; Santarius, T. – Dalkmann, H. – Steigenberger, M. – Vogelpohl, K.: Balancing Trade and Environment: An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance, p. 18.

[2] Dillon, S. International Trade and Economic Law and the European Union, p. 120

[3] Ibid.

[4] Dagne, T. W. The Debate on Environmentally Motivated Unilateral Trade Measures in the World Trade Organization: The Way Forward, p. 441.

providing wider accommodation for environmental measures within the world trade law. Besides it is notably that the EU's focus is put not separately on the environmental aspects, but it attempts to include these interests in conformity with other societal concerns, like the social policy or human rights. It is obvious that in contrast to the stance of the European Union, the WTO is based on a simpler quality nowadays, which is reflecting only on the economic and trade policy concerns and its mainstream components, e.g. trade liberalization.

This paper gives a short overview of the EU position in this debate (Chapter 2), and the question is also put into a recent context, namely the negotiation on the Transatlantic Free Trade and Investment Partnership with the United States (Chapter 3). The paper is closed with the concluding remarks (Chapter 4).

2 EU'S POSITION IN THE TRADE AND ENVIRONMENT DEBATE

In Europe the active environmental protection began in the 1960s, but the Rome Treaty establishing the European Economic Community (EEC) of 1957 did not contain any explicit provision to the Community's competence in this policy field. Although thanks to the wide interpretation of the European Court of Justice, the internal market competences helped to lay down also environmental measures (e.g. product related provisions); at international level the EEC had no complete competence to act. It has responsibilities for commercial matters, but exact extent and nature of environmental competence were constantly disputed by the Member States.[5] Contrary to that, from the 1970s However, regional environmental conventions in Europe provided for EEC signature gradually more. At a global level, the first important convention to provide for the EEC's accession was the 1979 Convention on Long-range Transboundary Air Pollution, and EEC had asked to have a clause inserted into the convention according to which "regional economic integration organizations" could also accede to it.[6] After that, In the 1980s the EEC is an active participant of the environmental negotiations at global level. Striking examples are the amendment to the CITES and the Montreal Protocol. The latter is expressly notable, because that was the first international environmental negotiation, in which the EEC and the US confronted each other. The compromise on the protocol showed the success of the EEC which found a common language for all members of the Community. The joint EEC position primarily established the protocol in which the United States did not fully impose its position, but had to accept considerable concessions.[7] The obvious conclusion of this event was that the negotiating positions of the Members States were essentially improved by the fact that they could act together. In the 1990 there was no small wonder that EEC intensively participated in the Uruguay Round and attempted at influencing the Trade and Environment debate. During these negotiations the priority of the EU was the possible reconciliation of the world trade law with the multilateral environmental agreements, containing various trade measures, import and export bans, licensing procedures etc. (e.g. CITES). Later, within the current Doha negotiations the EU, as a main objective, is trying globalize the environmental standards through particular international agreements as well as its broader effort is to make more 'green' the international trade regime with 'creative' interpretation of the existing trade rules, and with inclusion of new, specific trade rules with environmental relevancy.

At least two factors can be emphasized which are helping to easily understand the exceptional stance of the European Union to the 'Trade and Environment' issues. First, Europe has had always a stronger commitment to social and to environmental concerns, in comparison, *eg.* to the United State. As commentators highlight more literally, the idea of Adam Smith in Wealth of Nations regarding the concept of the 'invisible hand' has never gained great importance in Europe.[8] In the European Union, Governments – comparing with US – are seen as charged not only to promote liberty, but also to reduce inequalities in society. This attitude has led to far-reaching interventions also in the environmental area.

Secondly, in contrast to other countries, the environmental awareness in the European Union has a strong basis in the founding treaties. The objectives and principles of the Trade Policy of the EU (Common Commercial Policy) before the Treaty of Lisbon were laid down in a homogeneous, consistent and relatively closed structure. This consistency was based primarily, as a leading principle, on the liberalization, which allowed the legal and political framework of the Common

[5] Krämer, L. The Roots of Divergence: A European Perspective, p. 57.
[6] Krämer, L., op. cit. p. 58.
[7] Ibid.
[8] Krämer, L., op. cit. p. 67.

Commercial Policy to develop according to the own logic in line with its free trade commitments to the international economic law and the legal order of WTO. However, the expansion of the external policy horizon of the European Communities and the introduction of new policy areas led to conflicts of objectives more frequently, causing tensions between the CCP and other external policy areas. Later, thanks to the Treaty of Lisbon, the Common Commercial Policy has become an integral part of the Union's external action. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have made it clear that the EU has to ensure consistency between the different areas of its external action and pursue and implement the general principles and objectives in the whole field of the EU external relations.[9]

Consequently the CCP is founded on a two-level structure of principles and objectives which encompasses not only inner principles like as the liberalization but also the peripheral principles outside the trade policy including the sustainable development as well. In terms of Article 205 TFEU, the Union's action on the international stage – including the Common Commercial Policy – has to be based on principles, guided by the objectives and conducted in line with the general provisions of the Treaty.[10] In other words, the internal principles of Common Commercial Policy driven by the free trade concerns are not isolated anymore and as a result of the concept of uniform foreign relations introduced by the Treaty of Lisbon, also the general principles and objectives must be taken into consideration. These general principles and objectives are laid down in Article 21 TEU, [11] which includes approaches *e.g.* to the human rights, solidarity, freedom and equitable (fair) trade, principles of international law, and the most important from the current perspective is that the sustainability and the protection of the environment are incorporated too. Article 21 paragraph 2 subparagraph f) emphasizes that the EU, working for a high degree of cooperation in international relations, helps develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

This language of the principle does not explain the extent of the term "sustainable development", but it is clear that the sustainable development in this formulation puts the emphasis on the environmental aspects. In this regard it should be highlighted the importance of the ambitious sustainable development strategy of the EU which was launched by the Member States at the Gothenburg Summit in 2001. The strategy was complementary to the Lisbon Strategy of economic and social renewal, adding a new, environmental dimension to that. The strategy proposed policy measures to overcome several unsustainable trends and set up a so called new approach to policy-making which attempted to effectuate that the environmental, economic and social policies of EU mutually reinforced each other. In order to achieve this purpose the European Commission was obliged to submit new policy proposals to impact assessment.[12] The European Council renewed the sustainable development strategy in 2005 which set out main objectives and actions for priority – mainly environmental – areas.[13] Besides in 2009, in the same year when the Treaty of Lisbon entered into force, the European Commission adopted a review of the EU's sustainable strategy and confirmed that Sustainable development remains a fundamental objective of the European Union under the Lisbon Treaty, but a number of unsustainable trends required urgent actions. In this regard, the review emphasized the need to additional efforts in the field of climate change policy, energy policy and biodiversity.

The term "international measures" is questionable because it can be interpreted in two ways. Its first reading could be that the "international measures" encompasses only cooperative, *i.e.* bi- or multilateral instruments which are suitable for ensuring the sustainable development. Although the

[9] Horvathy, B. Sustainable Development and Common Commercial Policy, p. 338

[10] Article 205 TFEU: "The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union."

[11] See commentary for the principles: Grabitz, E. – Hilf, M. – Nettesheim, M. Das Recht der Europäischen Union, Art. 21 EUV side-note 1.

[12] A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development. (15.5.2001). COM(2001) 264 final

[13] Climate change and clean energy; sustainable transport, sustainable consumption & production; conservation and management of natural resources; public health; social inclusion; demography and migration; global poverty and sustainable development challenges. See Review of the Sustainable Development Strategy – A platform for action. (13.12.2005), COM (2005) 658 final.

Article refers to the "a high degree of cooperation in all fields of international relations", this interpretation would quite restrict the scope of Union's external action. Consequently, my view is that the term "international measures" could be interpreted in a wider sense, specifically it can cover beyond the bilateral and multilateral measures also the unilateral actions of the EU (*e.g.* restrictions, taxes for environmental purposes etc.). Hypothetically speaking, it does not mean anyway that the article would provide reasons for justification of measures contravening international law, but its second interpretation would not disregard the possibility of taking unilateral actions in order to ensure sustainable development in advance.

Moreover, the sustainable development principle appears in another context too. According to subparagraph d) the EU foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty. However, this formulation differs from the sustainable development principle in subparagraph f). On the one hand, this conception of sustainable development seems to be much wider, because not only the environmental but also the economic and social dimensions are referred. Second, it focuses on the social aspects, to be more precise, the accent is put on the fight against poverty. Third, this quotation is applied only to the relations established with the development countries; consequently the scope of this objective is restricted to a specific area of the Union's external action.

3 ENVIRONMENTAL ASPECTS OF THE NEGOTIATION ON TRANSATLANTIC FREE TRADE AND INVESTMENT AGREEMENT

3.1 Background of the Transatlantic Trade Negotiations

Commission President Jose Manuel Barroso, EU President Herman Van Rompuy and US President Barack Obama within a Summit meeting held on 28 November 2011, established the High Level Working Group on Jobs and Growth (HLWG), The task of the Group was to identify policy measures which are capable to increase trade and investment between the two major economic areas, the United States and the European Union.[14] The HLWG has issued an interim report in 2012, which referred to the conclusion of a bilateral trade agreement as the best policy option. The final report has been adopted on 13 February 2013. The Free Trade Agreement was cordially announced by US President Obama and EU Commission President Barroso.

Following the final report of the HLWG was recommended to open negotiations for a Free Trade Agreement of the EU with the United States. According to the report, the subject of the negotiations shall be the liberalization of agricultural products, industrial goods, services, of public procurement and investments as well as a regimentation of intellectual property rights. Due to the low tariffs in most areas (according to the EU Commission an average of 4 %), tariff reduction will be far less significant for non-tariff barriers (NTB), which are typical for well-developed industrial nations.[15]

3.2 Environmental concerns in the EU's negotiation mandate

The European Commission has elaborated the draft mandate for the negotiation which was published in March 2013.[16] The draft and the later adopted final version have already contained references to 'Trade and Environment' issues. According to these documents, the environmental concerns should be included into the text of the proposed agreement in the following four manners.

The principle structure of the agreement and the objectives (1) should have clear reference to the environment. First, this part of the agreement (eg. Its preamble) should express the

[14] The bilateral trade relationship is extremely important for both partners. The EU is first trading partner of the US (17.6% in trade in goods), and the US is the EU's second largest trading partner with 13.9% in trade in goods. Together the EU and the US account for approx. 50% of global GDP, 1/3 of total world trade. Bilateral trade volume of goods and services amounted to 702.6bn euro (2011), bilateral investment stock was 2.394 trillion euro (2011). See Commission Staff Working Document – Executive Summary of the Impact Assessment on the Future of the EU-US Trade Relations, SWD(12.3.2013) 69 final, p. 2.

[15] Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM(12.3.2013) 136 final

[16] Ibid.

commitment to sustainable development and the contribution of international trade to sustainable development "[…] in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources […]."[17] The interpretation of the 'sustainable development' can be underpinned at least in two ways. First, the EU mandate can be regarded as a reference to the preamble of the WTO agreement. The other – more plausible – option is that we interpret this reference in context with the EU law, which was explained above. Besides, also at the level of the principle the proposed agreement has to be laid down that the parties are entitled to take any measures necessary to achieve legitimate public policy objectives that they deem appropriate. This sort of unilateral measure should include also the measures based on environmental concerns.[18]

Similarly to the general principles, the mandate of the EU covers also the possible objectives of the treaty, highlighting explicitly the importance of the sustainable development. In this regard the proposition of the EU is that the agreement should recognize the sustainable development as an overarching objective, as well as the aim of the parties at promoting high levels of protection for the environment. In this regard, the mandate emphasizes a specific objective as well. In terms of that the Agreement should also recognize that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental standards. In other words, the agreement should prevent the 'race to the bottom' effect, which could lead to sinking the level of protection in the contracting parties.

Moreover the mandate of the EU requires a separate chapter which focuses on the 'Trade and Environment' issues. In this regard the mandate is not clear enough, it refers only general statements which are in line with the proposed principles and objectives, but the material content of this chapter is questionable. The mandate stresses only that the separate chapter of 'Trade and sustainable development'(2) will include commitments by both Parties in terms of the trade and sustainable development. Consideration will be given to measures to facilitate and promote trade in environmentally friendly and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers. Besides the Agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labor and environmental domain as a necessary condition for sustainable development,[19] end the importance of implementation and enforcement of domestic legislation on labor and environment should be stressed as well. It should also include provisions in support of internationally recognized standards of corporate social responsibility, as well as of the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries' resources. The Agreement will foresee the monitoring of the implementation of these provisions through a mechanism including civil society participation, as well as one to address any disputes.

The third categories of the projected references are those which are linked to the substantial provisions of the negotiated agreement (3). With respect to that the mandate refers, among the market access rules, to the general exceptions, noting that the agreement should a general exception clause based on Articles XX and XXI GATT and Articles XIV and XIVbis GATS. In context with the non-tariff barriers, the agreement should reflect also on the specificity of Sanitary and phytosanitary measures (SPS). According to the mandate, on SPS measures, the negotiations shall follow the former negotiating directives of the EU.[20] In terms of that, the Parties shall establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issues. Moreover the chapter on the SPS measures should be based on "[…] the key principles of the WTO SPS Agreement, including the requirement that each side's SPS measures be based on science and on international standards or scientific risk assessments, applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay […]."[21] In addition to that the proposed agreement should also touches upon the technical regulations, which is also an important regulatory

[17] See COM(12.3.2013) 136, paragraph 6.
[18] COM(12.3.2013) 136, paragraph 6.
[19] See COM(12.3.2013) 136, paragraph 25.
[20] Adopted by the Council on 20 February 1995, see Council Doc. 4976/95.
[21] See COM(12.3.2013) 136, paragraph 18.

area from environmental perspective. In line with the WTO Agreement on Technical Barriers to Trade (TBT), the EU's mandate foresees also provisions in this regard. The objectives of these provisions would be to generate greater openness, transparency and convergence in regulatory approaches and requirements and related standards-development processes, as well as, inter alia, to reduce burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally.[22]

Finally the proposed institutional provisions (4) of the free trade and investment agreement can be highlighted as well. The Agreement will set up an institutional structure to ensure an effective follow up of the commitments under the Agreement, as well as to promote the progressive achievement of compatibility of regulatory regimes, including the provisions regarding the environmental concerns. Besides the mandate intends to set up a dispute settlement system, and also a problem-solving mechanism such as a flexible mediation, but the details of the objectives are not known yet.

4 CONCLUDING REMARKS – THE NECESSITY OF CONVERGENCE?

As the previous analysis has showed the role and position of the European Union to the 'Trade and Environment' debate, comparing with the US stance, represents a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. From the perspective of the ongoing negotiation on a transatlantic free trade and investment partnership agreement, it means that successful compromise can be reached only if the striking divergence between the positions of the parties can be reconciled. However it is hard to pave the way to a mutually acceptable agreement not only because of the big differences in the positions of the parties, but also because of their specific interest. At the current stage of the negotiations it is hardly possible to foresee, which compromise could be found regarding the disputed issues, in which the EU has expressed crucial interest in the last two decades (from the past e.g. GMOs, hormone treated beef and pork, chlorine-sterilized chicken, or quite recent disagreements on the so called 'fracking' shale gas reserves).

But is the reconciliation of these positions really required? On the one hand, technically, it is not, in other terms an agreement could be concluded without real inclusion of 'bridges' between the trade and environmental concerns. On the other hand, the chance of the ratification of such a treaty would be precious little. The specificity of the EU's position to the 'Trade and Environment' issues has its roots not only in the EU law which was examined above, but also in a kind of European sensitivity to environmental concerns. Therefore an agreement without the real inclusions would be politically unacceptable in Europe. Over this, the question can be raised finally, what kind of compromise could be regarded as a real solution, which can bring the concerns of trade as well as of environment together. Essentially, four basic concerns could be highlighted, which are pivotal elements of an 'environmentally conscious' trade agreement.

First, the agreement set down the most important, environmentally relevant principles and objectives and makes clear the relationship between these and the principles of the free trade. It is important to ensure that these principles and objectives have legal effects as well (*eg.* as tools of the interpretation in the dispute settlements etc.), and that the principles of the free trade should not overrule the environmental principles and objectives. The principle structure of the EU funding treaties furnishes a good instance of that solution, when introducing a clear hierarchy between the environmental concerns, as the general principle of the EU's external activities, and the free trade and liberalization, as principles of the Common Commercial Policy. The negation mandate of the European Union is a good base towards this compromise, but at this time, the details in this regard are not clear.

Second, the agreement should cover also substantive provisions, which enables the parties to introduce measures with the intention of realize environmental objectives. The EU's mandate – as it was explained above – refers to these possibilities in the market access rules, and regarding the SPS and TBT matters. The real question is whether also the guaranties could be established which can prevent the parties from introducing illicit discriminatory measures in this way.

Third, essential element of such an agreement is also a dispute resolution system, which is able to effectively reconcile the disagreements of the contracting parties. In this regard the main

[22] Ibid.

point is that the proposed the dispute resolution procedure should be applied to the 'Trade and Sustainable Development' chapter. In other terms the agreement has to express clearly that the same implementation requirements are to be applied to this chapter as for all other content of the agreement. The EU mandate touches upon the question of the dispute resolution but it is silent on its possible extent.

Fourth, a trade agreement which takes into consideration the environmental interest should make clear its relationship to the multilateral environmental agreements. One option could be that the most important relevant agreements previously concluded by the EU[23] are to be listed explicitly in the text agreement. This concern is totally in compliance with the EU commitments to these issues, since mentioned before, the EU has intended to make provision regarding the multilateral environmental agreements already in the course of the Uruguay round.

Bibliography:

A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development. (15.5.2001). COM(2001) 264 final

ARAYA, M. and others: Trade and Environment in the World Trade Organization: The Need for a Constructive Dialogue. In: The Role of the WTO in Global Governance (Ed.: G. Sampson.), New York: United Nations University Press, 2001.

Commission Staff Working Document – Executive Summary of the Impact Assessment on the Future of the EU-US Trade Relations, SWD(12.3.2013) 69 final

DAGNE, T. W.: The Debate on Environmentally Motivated Unilateral Trade Measures in the World Trade Organization: The Way Forward, 9 Wash. U. Global Stud. L. Rev. p. 427

DILLON, S.: International Trade and Economic Law and the European Union, Hart Publishing Oxford and Portland, Oregon, 2002.

GRABITZ, E. and others: Das Recht der Europäischen Union. C.H. Beck, München, 2011. (via Beck-Online)

HORVATHY, B.: Sustainable Development and Common Commercial Policy, Acta Juridica Hungarica, LIII., 2012/4. p. 334.

KRÄMER, L.: The Roots of Divergence: A European Perspective, In :Green Giants? Environmental Policies of the United States and the European Union. American and Comparative Environmental Policy. (Eds.: Vig and Faure), The MIT Press , 2004.

Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM(12.3.2013) 136

Review of the Sustainable Development Strategy – A platform for action. (13.12.2005), COM (2005) 658 final

SANTARIUS, T. and others: Balancing Trade and Environment: An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance. Wuppertal Institute, 2004.

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[23] The most significant agreements are as follows: Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticide

KODIFIKACE MEZINÁRODNÍHO PRÁVA SOUKROMÉHO V ČESKÉ REPUBLICE A KODIFIKACE MEZINÁRODNÍHO PRÁVA SOUKROMÉHO V EVROPSKÉ UNII

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Abstract: During the past decades the private international law went through the boisterous development. The days when the theory of private internation law was of marginal interest of legal practitioners are gone. The flourishing days of private international law are mainly influenced by the attitude of the European Union and since the Tampere conclusions in 1999 the regulation of private international law is in the centre of legislative work of EU institutions. Nowadays the european private international law is regulated by 13 regulations and 2 directives, thus perhaps it is time to ask whether we need to codify the european private international law. This paper examines the possibilities of codification of private international law on the Community level and its comparison with the recent codification of private international law in the Czech Republic.

Abstrakt: Mezinárodní právo soukromé prošlo v uplynulých desetiletích turbulentní vývojem. Od okrajové právní disciplíny, se kterou se bylo možné v praxi setkat jen výjimečně, nabývá požadavek znalosti alespoň základů mezinárodního práva soukromého na významu. Za větší pozornost vděčí mezinárodní právo soukromé především zájmu Evropské unie, kdy regulace této oblasti je v posledních letech jednou z jejích priorit. V současné době je mezinárodní právo soukromé na komunitární úrovni regulováno 13 nařízeními, možná tedy nastal čas položit si otázku, zda by nebylo vhodné tuto oblast práva jednotně kodifikovat.

Key words: codification, private international law, EU

Kľúčové slová: mezinárodní právo soukromé, kodifikace, unifikace, fragmentace.

1 ÚVOD

S rozvojem globalizace se do povědomí právnické veřejnosti stále více dostává oblast práva, které byla ještě v nedávně době opomíjena. Ačkoliv kořeny mezinárodního práva soukromého nacházíme daleko ve starověku, jeho vývoj a doktrína je možná více než v dalších právních odvětvích soukromého práva ovlivněna vývojem v celé společnosti. Ne výjimečně pak lze vysledovat proměnlivost přístupů k jednotlivým institutům, jako je např. výhrada veřejného pořádku, či změna hraničních určovatelů.

V posledních letech se nacházíme ve skutečném boomu norem mezinárodního práva soukromého a můžeme hovořit o jeho „znovuobjevení“[1]. Nicméně s tím, jak se mezinárodní prvek stále více a častěji promítá do dalších oblastí soukromého práva, se setkáváme i s jeho relativizací. Naproti tomu se objevují tendence ke kodifikaci a celosvětové unifikaci norem upravujících soukromoprávní vztahy a řešení sporů z nich vyplývajících. Příspěvek si klade za cíl zhodnotit, zda současný stav regulace mezinárodního práva umožňuje jeho kodifikace a zda je kodifikace tohoto právního odvětví především na komunitární úrovni možná.

2 KODIFIKACE A MEZINÁRODNÍ PRÁVO SOUKROMÉ

Už při snaze vymezit oblast práva, které je označováno jako mezinárodní právo soukromé, je možné narazit na závažná úskalí. Především se lze sekat s rozdílným přístupem k tzv. mezinárodnímu právu procesnímu, do kterého je zahrnována problematika pravomoci soudu, právní

[1] VEERLE VAN DEN EECKHOUT: The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the 'Neutrality' of Private International Law in an Era of Globalisation and Europeanisation of Private International Law. Přístupné na http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338375. (citováno 19.10.2013).

pomoci a uznání a výkonu cizích soudních rozhodnutí. Dle německé doktríny lze rozeznat užší vnímání mezinárodního práva soukromého, kdy je do této oblasti zahrnována pouze část, jež určuje, které hmotné právo je rozhodné pro soukromoprávní vztahy s cizím prvkem. Základní účel mezinárodního práva soukromého je tedy určení rozhodného práva pro soukromoprávní vztahy s cizím prvkem.[2]

Naproti tomu frankofonní státy a státy ovlivněné francouzským právem, jako např. Belgie a Itálie, vnímají mezinárodní právo soukromé v širším smyslu, kdy zahrnuje tři tradiční okruhy úpravy:

určení rozhodného práva pro soukromoprávní vztahy s cizím prvkem

určení pravomoci soudů pro řešení sporů s cizím prvkem

úprava uznání a výkonu cizích soudních rozhodnutí

Mezinárodní právo soukromé tak zahrnuje i oblast označovanou jako mezinárodní právo procesní a mezinárodní právo soukromé v užším slova smyslu.[3]

Při nové vnitrostátní úpravě mezinárodního práva soukromého v České republice se začaly objevovat tendence k zahrnutí kolizní problematiky do nové úpravy občanského, resp. soukromého, práva. Nakonec však byly tyto názory odmítnuty a jak problematika kolizní, tak problematika mezinárodního práva procesního zůstala upravena v samostatném zákoně.[4] Dle české doktríny je tedy mezinárodní právo soukromé a procesní právní odvětví, které je součástí vnitrostátního práva, a lze jej vymezit třemi otázkami – kde bude spor zažalován, jakým právním řádem se bude vztah řídit a jak bude zacházeno s rozhodnutím soudu.[5]

Jak uvádí důvodová zpráva k novému zákonu o mezinárodním právu soukromém[6]: Mezinárodním právem soukromým se rozumí odvětví právního řádu, které zahrnuje právní normy, které jsou výlučně určeny pro úpravu soukromoprávních poměrů, jež obsahují tzv. mezinárodní prvek. Podle pojetí, z něhož vychází tento návrh zákona, se vedle uvedených norem zahrnuje do mezinárodního práva soukromého i tzv. mezinárodní právo procesní, tj. soubor právních norem upravujících postup soudů a jiných orgánů a účastníků a poměry mezi nimi vznikající v řízení o občanskoprávních věcech, v němž je obsažen mezinárodní prvek. Normám, které se zařazují do mezinárodního práva soukromého, je společný znak rozhodující o tomto zařazení: K jejich použití dochází pouze při úpravě poměrů s mezinárodním prvkem; existence takových poměrů je tak důvodem a podmínkou pro existenci mezinárodního práva soukromého.

Vedle vymezení oblasti úpravy, jež je vnímána jako mezinárodní právo soukromé, je možné zaznamenat i polemiky, které se týkají jejího samotného názvu. Tak prof. Katharina Boele-Woelki rozlišuje mezi termíny mezinárodní právo soukromé (international private law) a soukromé mezinárodní právo (private international law). Přičemž mezinárodní právo soukromé je termín širší, který vedle problematiky kolizní zahrnuje i právní komparatistiku a vytváření hmotněprávních norem dopadajících na soukromoprávní vztahy s cizím prvkem. Do této oblasti jsou pak zahrnovány i tzv. normy přímé - např. Vídeňská úmluva o smlouvách o mezinárodní koupi zboží, a normy vycházející z činnosti mezinárodní organizací jako jsou např. UNIDROIT či UNCITRAL. Za soukromé

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[2] KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 55 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 15.10.2013).

[3] KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 55 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 15.10.2013).

[4] Zákon č. 91/2012 Sb., o mezinárodním právu soukromém (dále jen NZMPS).

[5] ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T.: Mezinárodní právo soukromé Evroské unie (nařízení Řím I, nařízení Řím II, nařízení Brusel I). Praha: Wolters Kluwer Česká republika, 2013. 16 s. ISBN 978-80-7478-016-5. K tomu viz i definice prof. Pauknerové in PAUKNEROVÁ M. : Evropské mezinárodní právo soukromé. Praha: C.H.Beck. 2008. 10 s. ISBN 978-80-7400-034-8. Viz také definice prof. Kučery: Mezinárodním právem soukromým se tak rozumí soubor právních norem, které výlučně upravují soukromoprávní vztahy (tj. vztahy práva občanského, obchodního, rodinného a pracovního) s mezinárodním prvkem, včetně právních norem upravujících postup soudů a jiných orgánů a účastníků, příp. i jiných osob, a vztahy mezi nimi vznikající v řízení o soukromoprávních věcech, v němž je obsažen mezinárodní prvek. KUČERA Z.: Mezinárodní právo soukromé. 6. vydání, Brno: Doplněk, 2004. 22 s. ISBN 80-7239-167-4.

[6] Důvodová zpráva přístupná např. http://www.anag.cz/Files/file/duvodova_mezprav.pdf (citováno 19.10.2013).

mezinárodní právo pak považuje pouze oblast práva regulující kolizní problematiku soukromoprávních vztahů s cizím prvkem, otázky určení jurisdikce soudů a uznání a výkon soudních rozhodnutí.[7]

Obdobně problematické se jeví i vymezení termínu kodifikace, kdy se lze setkat s několika jejími formami.[8] O klasické velké kodifikace (big codification) lze hovořit v případě, že jejím účelem je uspořádání a setřídění norem zařazených do téhož právního odvětví a vytvoření jediného zákoníku, ať již normy pocházejí ze stávající roztříštěné právní úpravy, z obyčejů, zvyklostí atd. Je přitom možné rozlišit kodifikaci prostou, kdy se jedná pouze o utřídění stávajících norem, a kodifikaci opravnou, která s kodifikací spojuje novelizaci a doplnění stávající právní úpravy.

Ačkoliv s kodifikací se setkáváme již od dob *Chammurapiho*[9], moderní kodifikace předpokládají splnění několika základních předpokladů - kodifikace by měla být kompletní, v kodifikovaném zákoníku by se neměly vyskytovat nepravené mezery; nově kodifikovaná úprava by měla kompletně nahradit stávající právní úpravu daného právního odvětví a měla by shromáždit všechny stávající normy do jediného právního dokumentu. Nemůže být připuštěna koexistence s jinou normou, která by samostatně upravovala některé otázky obsahem spadající do kodifikovaného předpisu.[10]

S ohledem na vymezené termíny je tedy možné si položit otázku, zda je možné, aby bylo soukromé mezinárodní právo kodifikováno.

3 VÝVOJ KODIFIKACE SOUKROMÉHO MEZINÁRODNÍHO PRÁVA V ČESKÉ REPUBLICE

Po vzniku Československa došlo na základě zákona č. 11/1918 k recepci rakouského práva, které platilo na území Čech a Moravy, a práva maďarského, jež bylo přejato pro Slovensko. Úprava mezinárodního práva soukromého nebyla jednotně upravena v samostatném zákoně[11], ale jednotlivá dílčí ustanovení se nacházela v obecném občanském zákoníku[12] a v několika dalších předpisech. Mezery v právu byly překlenovány především judikaturou Nejvyššího soudu se sídlem v Brně[13], který na základě ustanovení § 7 obecného občanského zákoníku rozhodoval neupravené otázky dle přirozených zásad právních.[14]

K úpravě mezinárodního práva soukromého dochází až zákonem č. 41/1948 Sb., který byl připraven dle předlohy bývalého rakouského ministra spravedlnosti Gustava Walkera.[15] Norma upravovala pouze kolizní normy a měla sloužit především k řešení kolize mezi právem platným v Čechách, Moravě a na Slovensku. Zákon tedy obsahovat i normy spadající do mezioblastního práva soukromého.[16] V zákoně se však nenacházely normy regulující mezinárodní právo procesní, které byly naopak zahrnuty do občanského soudního řádu z roku 1950.[17]

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[7] KATERIN BOELE-WOELKI: Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws. Leiden/Boston: Martinus Nijhoff Publishers, 2010. 31-32s. ISBN 978-90-04-18683-5.

[8] Formy kofikace dle Voermans, Moll, Florijn, Van Lochem in KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 79 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 15.10.2013).

[9] ZIMMERMAN R.: Codification – The Civilian Experience Reconsidered on the Eve of a Common European Sales Law. Max Planc Private Law Research Paper No. 12/30. 370 s.

[10] ZIMMERMAN R.: Codification – The Civilian Experience Reconsidered on the Eve of a Common European Sales Law. Max Planc Private Law Research Paper No. 12/30. 372 s.

[11] PAUKNEROVÁ M.: Private International Law in The Czech Republic. Alphen aan den Rijn: Wolters Kluwer International, 2011. 14 s.ISBN 978-90-411-3836-1.

[12] Zákon č. 946/1811 Sb. z. s. obecný občanský zákoník (dále jen OOZ).

[13] ZIMMERMANN A. M.: Mezinárodní právo soukromé. Brno: Právník, 1933. 122-124 s.

[14] § 7 OOZ uvádí: *Nelze-li právní případ rozhodnouti ani podle slov ani z přirozeného smyslu zákona, jest hleděti k podobným případům v zákonech zřejmě rozhodnutým, a k důvodům jiných, s tím příbuzných zákonů. Zůstane-li právní případ ještě pochybný, musí býti rozhodnut podle přirozených zásad právních, se zřetelem k okolnostem pečlivě shrnutým a zrale uváženým*.

[15] PAUKNEROVÁ M.: Private International Law in The Czech Republic. Alphen aan den Rijn: Wolters Kluwer International, 2011. 14 s.ISBN 978-90-411-3836-1.

[16] Ustanovení § 54 ZMPS z roku 1948 uvádí:
Ustanovení mezinárodního práva soukromého platí přiměřeně, jde-li o poměr práva platného v zemích České a Moravskoslezské k právu platnému na Slovensku, s tou odchylkou, že na místo

Po sjednocení občanského práva společným občanským zákoníkem[18,] stávající úprava mezinárodního práva soukromého rychle zastarala a bylo nutné vytvořit novou. Nový zákon byl přijat pod číslem 97/1963 Sb. a zahrnoval úpravu jak mezinárodního práva soukromého, tak mezinárodního práva procesního, ačkoliv byly upraveny ve dvou samostatných částech. Jak se časem ukázalo, jednalo se o úpravu velice kvalitní, jelikož bez větších zásahů byla v Československu a později v České republice používána 50 let. Teprve v souvislosti s novou kodifikací soukromého práva[19], bylo nutné změny zohlednit i v mezinárodním právu soukromém. V roce 2012 tedy dochází k přijetí nového zákona, který sice nese označení zákon o mezinárodním právu soukromém, ale opět zahrnuje obě části mezinárodního práva soukromého – část kolizní a procesněprávní.

Nová vnitrostátní úprava mezinárodního práva soukromého v České republice se snaží o jeho úplnou kodifikaci. Do zákona byly tedy přidány i normy, které byly v mezidobí upraveny v jiných zákonech, ačkoliv se dotýkaly kolizní či procesní problematiky. Jedná se například o úpravu mezinárodního rozhodčího řízení[20], mezinárodního práva cenných papírů[21] či kolizní normy upravující svéprávnost právnických osob, která byla do té doby zahrnuta do obchodního zákoníku[22]. Nová úprava však zohledňuje i závaznost norem komunitárních, kdy některé části staršího zákona byly z úpravy vyloučeny, jelikož vzhledem k unifikované úpravě v komunitárním právu by byly nepoužitelné[23]. Zákon je pak jinak systematicky členěn, kdy již není rozdělen na dvě části dle otázky kolizní a procesní, ale obě části se vzájemně prolínají s ohledem na regulovanou oblast. V takto kodifikované normě je pak částečně uzákoněna i doktrína mezinárodního práva soukromého, kdy je možné najít zákonnou úpravu kvalifikace[24], nutně použitelných norem[25] či obcházení zákona.[26]

4 VÝVOJ KODIFIKACE MEZINÁRODNÍHO PRÁVA SOUKROMÉHO NA KOMUNITÁRNÍ ÚROVNI

Za vznikem Evropských společenství v 50. letech minulého století bylo především zjednodušení přeshraničního obchodování a rozvoj mezinárodní obchodní spolupráce v rámci Evropy. Primárně tedy byly odstraňovány ekonomické překážky zahraničního obchodu – zrušení cel a dalších exportních a importních povinností. Již záhy se však projevilo, že přeshraniční obchod brzdí i rozdílná právní úprava v jednotlivých členských státech a jev označovaný jako *forum shopping*. Právní nejistota spojená s řešením případných sporů má totiž za následek neochotu k rozvoji přeshraničních obchodů.

Pravomoci Evropských společenství nebyly původně koncipovány tak široce, aby mezi ně bylo možné zahrnout úpravu mezinárodního práva soukromého a procesního.[27] Do původního znění Smlouvy o založení ES byl tedy včleněn článek č. 220, který zněl:

Členské státy zahájí mezi sebou v případě potřeby jednání s cílem zajistit ve prospěch svých státních příslušníků..

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státní příslušnosti vstupuje bydliště nebo poslední bydliště (trvalý pobyt) v Československé republice; neměla-li osoba, o kterou jde, nikdy v Československé republice bydliště ani pobyt, je užíti právního řádu, který je oné osobě vzhledem k její národnosti nebo k jinakým jejím poměrům bližší.

[17] Ust. § 606 - 647 zákona č. 142/1950 Sb. o řízení ve věcech občanskoprávních (občanský soudní řád).

[18] Zákon č. 141/1950 Sb., občanský zákoník, který byl nahrazen zákonem č. 40/1964 Sb., občanský zákoník.

[19] Zákon č. 79/2012 Sb., občanský zákoník (dále jen NOZ).

[20] Do té doby upravenu v zákoně č. 216/1994 Sb., o rozhodčím řízení a výkonu rozhodčích nálezů

[21] Do té doby upraveny v zákoně č. 91/1950 Sb., zákon směnečný a šekový.

[22] Ustanovení § 22 zákona č. 513/1991 Sb., obchodní zákoník.

[23] Např. kolizní ustanovení týkající se pracovní smlouvy, která jsou uvedena v nařízen Řím I. Viz též Důvodová zpráva k zákonu o mezinárodním právu soukromém, 34 s. Přístupné na http://www.anag.cz/Files/file/duvodova_mezprav.pdf.

[24] Viz ustanovení § 20 NZMPS.

[25] Viz ustanovení § 3 a § 25 NZMPS.

[26] Viz ustanovení § 5 NZMPS.

[27] ROZEHNALOVÁ, N. TÝČ, V.: Evropský justiční prostor v civilních otázkách. Brno: Masarykova univerzita, 2003. 12-13 s. ISBN 80-210-3054-2.

vzájemné uznávání společností.., zachování jejich právní subjektivity a možnost slučování či splynutí společností, které se řídí právem různých členských států,

zjednodušení formalit, jimž podléhá vzájemné uznávání a výkon soudních rozhodnutí a rozhodčích nálezů.

Stále však nebyla Společenství přiznána pravomoc otázky mezinárodního práva soukromého a procesního regulovat akty sekundárního práva, a proto byla tato oblast práva upravena v podobě mezinárodních smluv. Smlouva o vzájemném uznávání obchodních společností se nezdařila[28], avšak pokud jde o druhý bod článku č. 220 (293), byl zaznamenán výrazný úspěch v podobě Bruselské úmluvy o pravomoci soudů a uznání a výkonu rozhodnutí ve věcech občanských a obchodních (Bruselská úmluva I.). Následně byla sjednána Úmluva o právu rozhodném pro smluvní závazkové vztahy (tzv. Římská úmluva), která unifikovala kolizní normy dopadající na závazkové vztahy s cizím prvkem. Nicméně jak dokládá i neúčast Společenství na vytváření např. Vídeňské úmluvy o smlouvách o mezinárodní koupi zboží, stála problematika mezinárodního práva soukromého mimo hlavní zájem Společenství.[29]

Výraznější vliv na mezinárodní právo soukromé a procesní měla až Smlouva o Evropské unii, která byla podepsána 7. února 1992 v Maastrichtu a vstoupila v platnost 1. listopadu 1993. Na základě této Smlouvy došlo k větší koordinaci činnosti, kdy vedle evropských společenství (I. pilíř), byly vytvořeny dvě nové právní struktury upravující společnou zahraniční a bezpečnostní politiku (II. pilíř), a spolupráci ve věcech justice a vnitra (III. pilíř). Na základě této Smlouvy byla Radě přiznána pravomoc (čl. K.3) vypracovávat úmluvy mezi členskými státy, a to i mimo rámec čl. 220 (293), a doporučovat členským státům jejich přijetí.[30]

Na základě tohoto oprávnění byla v roce 1998 přijata Bruselská úmluva II o pravomoci a uznání a výkonu rozhodnutí ve věcech manželských, která má podobnou konstrukci jako Bruselská úmluva I., tedy nejprve se zabývá otázku soudní příslušnosti a následně otázkami uznání a výkonu soudní rozhodnutí. Z hlediska svého předmětu byla zaměřena na rozvod, neplatnost a rozluku manželství, a na otázky rodičovské zodpovědnosti, které souvisí se zánikem manželství, tedy nevztahuje se na problematiku rodičovské zodpovědnosti obecně. Úmluva však vstoupila v platnost už v podobě nařízení. Další úmluvou, která byla z iniciativy Rady vypracována je Úmluva o doručování soudních a mimosoudních písemností ve věcech občanských a obchodních, která však taktéž vstoupila v platnost až v podobě nařízení.

Zásadní vliv na vývoj mezinárodního práva soukromého a procesního však měla Amsterdamská smlouva, která byla podepsána 2. října 1997 a vstoupila v platnost v roce 1999. Na jejím základě byla do Smlouvy ES včleněna hlava IV. nazvaná Vízová, azylová a přistěhovalecká politika a jiné politiky týkající se volného pohybu osob, která rozšířila působnost Společenství mimo jiné i na vydávání opatření, která podpoří kompatibilitu norem členských států v oblasti kolizní a určení pravomoci.[31] Od jednání v Tampere (15.-16. října 1999) byla zdůrazňována nutnost

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[28] ROZEHNALOVÁ, N. TÝČ, V.: Evropský justiční prostor v civilních otázkách. Brno: Masarykova univerzita, 2003. 13 s. ISBN 80-210-3054-2.

[29] BASEDOW, J.: The Law of Open Societies – Private Ordering and Public Regulation of International Relation, General Course on Private International Law. In: Hague Academy of International Law: Recueil Des Cours. Leiden/Boston: Martinus Nijhoff Publishers, 2013. 216 s. ISBN 978-90-04-25550-0.

[30] ROZEHNALOVÁ, N. TÝČ, V.: Evropský justiční prostor v civilních otázkách. Brno: Masarykova univerzita, 2003. 12 s. ISBN 80-210-3054-2. ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T.: Mezinárodní právo soukromé Evropské unie (nařízení Řím I, nařízení Řím II, nařízení Brusel I). Praha: Wolters Kluwer Česká republika, 2013. 26 s. ISBN 978-80-7478-016-5.

31 Čl. 65 Smlouvy ES stanoví Čl. 65/ex-čl. 73m Justiční spolupráce v civilních věcech

Opatření v oblasti justiční spolupráce v civilních věcech s mezinárodním prvkem vydávaná podle článku 67

a pokud je to nutné k nále.itému fungování vnitřního trhu, zahrnují:

a) zlep.ení a zjednodu.ení

- systému mezinárodního doručování soudních a mimosoudních písemností;

- spolupráci při opatřování důkazů;

- uznání a výkon soudních a mimosoudních rozhodnutí v civilních a obchodních věcech;

b) podporu slučitelnosti kolizních norem platných v členských státech a předpisů k řezení jurisdikčních

konfliktů;

harmonizace a kodifikace mezinárodního práva soukromého za účelem posílení Evropského justičního prostoru. Pokud není tato oblast jednotně upravena, nejsou dostatečně chráněna práva občanů EU.[32] Haagský program z roku 2004 pokračoval v trendu nastoleném v Tampere, přičemž činnost Společenství měla být zaměřena především na otázky právní pomoci.

Ačkoliv by se mohlo zdát, že Lisabonská smlouva, která vstoupila v platnost v roce 2009, zásadnější změny nepřináší, potvrzuje nastolený trend unifikace a europeizace mezinárodního práva soukromého. Z dikce čl. 81 Smlouvy o fungování EU je patrné, že se pole působnosti stále více rozšiřuje. Podmínka vydávání aktů pouze k vytváření vnitřního trhu již není nutně vyžadována, když v textu je použito pouze slovo „*particularly*" – především.[33] Tato podmínka byla diskutována např. v souvislosti s přijetím nařízení Řím II a její univerzální aplikovatelností – i mimo EU. Nakonec bylo uvedeno, že tato restriktivní podmínka nemusí být bezprostředně dodržena.[34]

Stockholmský program a Akční plán pro roky 2010-2014 je zaměřen na další spolupráci a rozvoj prostoru svobody a bezpečí a jeho rozšiřování i mimo hranice EU, např. rozvoj spolupráce s Haagskou konferencí mezinárodního práva soukromého.[35] Členem Haagské konference se EU stala již v roce 2007. Dále mají být připravena nařízení o evropském příkazu k obstavení

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c) odstraňování překážek pro hladký průběh civilně právního řízení, v případě nutnosti podporou slučitelnosti civilně procesních předpisů platných v členských státech.
Zdroj https://www.euroskop.cz/8917/sekce/zakladajici-smlouvy/ (citováno 17.10.2013).

32 KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 38 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 15.10.2013).

33 *Čl. 81 SFEU zní Článek 81*
(bývalý článek 65 Smlouvy o ES)
1. Unie rozvíjí justiční spolupráci v občanských věcech s mezinárodním prvkem založenou na zásadě vzájemného uznávání soudních a mimosoudních rozhodnutí. Tato spolupráce může zahrnovat
přijímání opatření pro sbližování právních předpisů členských států.
2. Pro účely odstavce 1 přijímají Evropský parlament a Rada řádným legislativním postupem opatření, která mají, zejména pokud je to nezbytné k řádnému fungování vnitřního trhu, za cíl zajistit:
a) vzájemné uznávání a výkon soudních a mimosoudních rozhodnutí mezi členskými státy;
b) přeshraniční doručování soudních a mimosoudních písemností;
c) slučitelnost kolizních norem a pravidel pro určení příslušnosti platných v členských státech;
d) spolupráci při opatřování důkazů;
e) účinný přístup ke spravedlnosti;
f) odstraňování překážek řádného průběhu občanskoprávního řízení, v případě potřeby podporou slučitelnosti úpravy občanskoprávního řízení v členských státech;
g) rozvíjení alternativních metod urovnávání sporů;
h) podporu dalšího vzdělávání soudců a soudních zaměstnanců.
3. Odchylně od odstavce 2 přijímá Rada opatření týkající se rodinného práva s mezinárodním prvkem zvláštním legislativním postupem. Rada rozhoduje jednomyslně po konzultaci s Evropským parlamentem.
Rada může na návrh Komise přijmout rozhodnutí určující ty aspekty rodinného práva s mezinárodním
prvkem, které mohou být předmětem aktů přijatých řádným legislativním postupem. Rada rozhoduje jednomyslně po konzultaci s Evropským parlamentem.
Návrh uvedený v druhém pododstavci se postoupí vnitrostátním parlamentům. Vysloví-li některý vnitrostátní parlament během šesti měsíců ode dne tohoto postoupení svůj nesouhlas, není rozhodnutí
přijato. Není-li nesouhlas vysloven, může Rada rozhodnutí přijmout.
Viz též KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 56 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 15.10.2013).

34 Viz KRAMER, X. a kol.: ibid. 56 s.

35 Viz KRAMER, X. a kol.: ibid. 56 s.

bankovních účtů, nařízení o evropském ochranném příkazu, nařízení o manželských a partnerských majetkových režimech či má proběhnout revize o úpadku.[36]

Vzhledem k nárůstu komunitárních norem unifikujících mezinárodní právo soukromé se stále častěji začínají objevovat hlasy a polemiky zmiňující evropskou kodifikaci mezinárodního práva soukromého. V roce 2012 byla pod vedením prof. Xandry Kramer uveřejněna studie, která měla odpovědět na otázku, zda již nastal čas k učinění tohoto kroku.[37] Tato zpráva jednoznačně potvrzuje, že ačkoliv je velká část mezinárodního práva soukromého již europeizována, přistoupit k evropské kodifikaci je předčasné. Ve zprávě jsou vedle podrobného rozboru stavu úpravy mezinárodního práva soukromého v EU uvedeny i hlavní překážky, které jsou příčinou mezer při snaze o kodifikaci. Zjištěním jsou identifikovány limity *teritoriální*, které se týkají především mezinárodního práva procesního, jehož úprava nemá univerzální dosah, ale je zpravidla limitována obvyklým bydlištěm žalovaného. Dále jsou to limity *systematické*, které představují oblast mezinárodního práva soukromého, která má být ještě europeizována. Sem je řazena např. problematiky mezinárodních adopcí, věcných práv, svěřenectví, právního zastoupení či svéprávnosti fyzických osob. Dále je otázkou, zda by neměla být upravena i doktrinální problematika

[36] V současné době je evropské mezinárodní právo procení regulováno těmito nařízeními:
nař. 44/2001, přebírající text Bruselské úmluvy I. (Bruselské nařízení I), nahrazeno nař. 1215/2012 Brusel I Recast.
nař. 1347/2000, přebírající text Bruselské úmluvy II., které však bylo nahrazeno nařízením č. 2201/2003 (Bruselské nařízení II bis), jímž byla především rozšířena působnost nařízení v otázkách rodičovské zodpovědnosti
Nař. č. 4/2009 ze dne 18. prosince 2008 o příslušnosti, rozhodném právu, uznávání a výkonu rozhodnutí a o spolupráci ve věcech vyživovacích povinností
nař. 1348/2000, přebírající text Úmluvy o doručování soudních a mimosoudních písemností ve věcech občanských a obchodních, které je však od prosince 2008 nahrazeno nařízením Evropského parlamentu a Rady (ES) č. 1393/2007 ze dne 13. listopadu 2007 o doručování soudních a mimosoudních písemností ve věcech občanských a obchodních v členských státech (doručování písemností) a o zrušení nařízení Rady (ES) č. 1348/2000
nař. 1348/2000, přebírající text Úmluvy o doručování soudních a mimosoudních písemností ve věcech občanských a obchodních, které je však od prosince 2008 nahrazeno nařízením Evropského parlamentu a Rady (ES) č. 1393/2007 ze dne 13. listopadu 2007 o doručování soudních a mimosoudních písemností ve věcech občanských a obchodních v členských státech (doručování písemností) a o zrušení nařízení Rady (ES) č. 1348/2000
nař. 1346/2000, přebírající text Úmluvy o řízení ve věcech platební neschopnosti
nař. 1206/2001, o spolupráci soudů členských států při provádění důkazů v řízení ve věcech občanských a obchodních
nař. č. 1896/2006 kterým se zavádí řízení o evropském platebním rozkazu
nař č. 805/2004 kterým se zavádí evropský exekuční titul pro nesporné nároky
nař. č. 861/2007 kterým se zavádí evropské řízení o drobných nárocích
nař. č. 662/2009 ze dne 13. července 2009, kterým se zřizuje postup pro sjednávání a uzavírání dohod mezi členskými státy a třetími zeměmi ve zvláště vymezených věcech v oblasti práva rozhodného ve smluvních a mimosmluvních závazkových vztazích
nař. č. 664/2009 ze dne 7. července 2009, kterým se zřizuje postup pro sjednávání a uzavírání dohod mezi členskými státy a třetími zeměmi o příslušnosti, uznávání a výkonu rozsudků a rozhodnutí ve věcech manželských, věcech rodičovské zodpovědnosti a věcech vyživovacích povinností a o právu rozhodném ve věcech vyživovacích povinností
nař. č. 650/2012 ze dne 4. července 2012 o příslušnosti, rozhodném právu, uznávání a výkonu rozhodnutí a přijímání a výkonu veřejných listin v dědických věcech a o vytvoření evropského dědického osvědčení
Nařízení Rady (EU) č. 1259/2010 ze dne 20. prosince 2010 , kterým se zavádí posílená spolupráce v oblasti rozhodného práva ve věcech rozvodu a rozluky

[37] Plná verze studie je přístupná např. http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 15.10.2013). V českém překladu lez závěry studie Stávající mezery a perspektivy do budoucna v oblasti evropskéhomezinárodního práva soukromého: vznikne kodex mezinárodního práva soukromého? Nalést zde: http://www.europarl.europa.eu/document/activities/cont/201301/20130110ATT58829/20130110ATT58829CS.pdf.

mezinárodního práva soukromého, která je nesystematicky, roztříštěně a nekomplexně upravena pouze v některých nařízeních, např. veřejný pořádek, mezinárodně kogentní normy, aplikace cizího práva či zpětný a další odkaz. A konečně jsou to limity *záměrně vytvořené*, které naráží na již unifikovanou úpravu na mezinárodní úrovni, např. problematika mezinárodního rozhodčího řízení.[38] Studie tedy doporučuje, aby v rámci EU probíhala postupná europeizace mezinárodního práva soukromého, a teprve až bude většina tohoto právního odvětví unifikována přistoupit k jeho kodifikaci.

Přestože ze závěrů studie je patrný jasný cíl i postupu unifikace mezinárodního práva soukromého na evropské úrovni, objevují se i další metody. Jednak je to jakési obdobné použití přímé metody soukromoprávních vztahů s cizím prvek v podobě vytvoření společného 29. právního režimu v EU, který má představovat nařízení o Společné evropské právní úpravě prodeje (CESL).[39] Další možností je využití ustanovení čl. 329/2 Smlouvy o fungování EU a pokračovat v rychlejší unifikaci cestou zesílené spolupráce, tak jak tomu bylo v případě nařízení dopadající na oblast rozhodného práva ve věcech rozvodu a rozluky.[40] Konečně se i na evropské úrovni objevuje snaha regulaci některých otázek spojených s teorií mezinárodního práva soukromého. Příkladem může být výzva označovaná jako Madridské principy z roku 2010[41], která upozorňuje na nutnost vytvoření jednotné úpravy stanovící pravidla pro aplikaci cizího práva.

5 KODIFIKACE MEZINÁRODNÍHO PRÁVA SOUKROMÉHO NA MEZINÁRODNÍ ÚROVNI

Se seriózními myšlenkami unifikace a kodifikace mezinárodního práva soukromého na mezinárodní úrovni je možné se setkat již koncem 19. a začátkem 20. století.

Na neúspěšné pokusy Manciniho navázala nizozemská inciativa v čele s nositelem Nobelovy ceny T.M.C. Asserem, jejíž zásluhou byla svolána mezinárodní konference v roce 1893.Hlavním účelem konference mělo být vytvoření European code of private international law on certain subjects.[42] V daném období se po celém světě konaly i další konference s obdobnými tématy, např. Conress of International Private Law in Montevideo v roce 1888.[43]

Někteří účastníci si dělali naděje, že s ohledem na společný právní základ v podobě římského práva by mohl být vytvořen jednotný zákon upravující mezinárodní právo soukromé (Van Tienhoven). Proti tomuto názoru se však postavily realističtější přístupy, které upozorňovaly na nemožnost přijetí jednotné úpravy, přičemž prof. Asser poukazoval na možnost unifikace pouze některých oblastí vztahů s cizím prvkem, které se týkají mezinárodního obchodu.[44]

Tento přístup byl dále potvrzen a docházelo k unifikaci pomocí mezinárodních smluv, jež se týkaly pouze některých soukromoprávních vztahů, ve kterých se vyskytuje cizí prvek. Hlavní zřetel byl brán právě na oblast mezinárodního obchodu, rodinného práva a uznávání osobních statutů. Trend se projevil i v následně ustanovené Haagské konferenci mezinárodního práva soukromého[45],

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[38] Viz závěry studie in KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 94 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/ (citováno 16.10.2013).

[39] Návrh nařízení přístupný na http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:cs:PDF (citováno 10.10.2013)

[40] Nařízení Rady (EU) č. 1259/2010 ze dne 20. prosince 2010, kterým se zavádí posílená spolupráce v oblasti rozhodného práva ve věcech rozvodu a rozluky.

[41] ESPLUGUES, C. Sr.: Harminization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles of 2010. In Yearbook of Private International Law. 2011, č. 13. 273-297. Přístupné na http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152058 (citována 15.10.2013).

[42] BALDWIN, S. E.: Beginnings of an Official European Code of Private International Law (1903). Yale University Press, 1903. 10-12 s. Přístupné na http://archive.org/stream/beginningsanoff00baldgoog#page/n6/mode/2up (citováno 12.10.2013)

[43] BALDWIN, S. E.: ibid. 10 s.

[44] BALDWIN, S. E.: ibid. 12-13 s. Viz též KATERIN BOELE-WOELKI: Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws. Leiden/Boston: Martinus Nijhoff Publishers, 2010. 98 a násl.ISBN 978-90-04-18683-5.

[45] K oficiálnímu založení Haagské konference mezinárodního práva soukromého jako mezinárodní organizace došlo v roce 1955. Převzato z http://www.hcch.net/index_en.php?act=text.display&tid=26 (citováno 10.10.2013).

která navázala na konference konané pod záštitou nizozemské vlády. Hlavním nástrojem regulace se stala mezinárodní smlouva. V současné době je některou z 39 haagských úmluv vázáno více jak 130 států světa.[46] Nicméně s narůstajícím počtem mezinárodních smluv se projevují i nedostatky tohoto přístupu k unifikaci mezinárodního práva soukromého.

Jednak jsou to dlouhé přípravné práce a následné schvalování textu smlouvy, přičemž není dopředu jasné, kolik států přijatou mezinárodní smlouvu skutečně ratifikuje. Příkladem tohoto složitého procesu může být Haagská úmluva o dohodách o příslušnosti soudu. Kořeny přípravy této úmluvy se nacházejí už v 90. letech minulého století a přijatý text úmluvy byl korigován především s ohledem na to, aby úmluva byla přijata velkým množstvím států, v čele s USA a EU.[47] Přestože byla úmluva přijata již v roce 2005 právě USA a EU s její ratifikací stále váhají.[48]

Další nevýhodou unifikace prostřednictvím mezinárodních smluv je absence záruky jednotné interpretace. Jako příklad může sloužit otázka aplikace mezinárodních smluv, na jevy, které v době jejich vzniku nebyly známy, nicméně do praxe se dostávají legislativním vývojem. Příkladem takové situace může být otázka aplikace haagských úmluv týkajících se manželského práva na manželství, které bylo uzavřeno mezi osobami téhož pohlaví.[49]

Za nevýhodu je nutné považovat i určité zakonzervování právní úpravy, kdy zpravidla není možné, aby bez souhlasu všech signatářských států byla úmluva měněna. Dlouhou bodu byl tento problém patrný u čl. II u Newyorské úmluvy o uznání a výkonu cizích rozhodčích nálezů. Dle tohoto ustanovení bylo možné sjednat rozhodčí doložku co do formy pouze v písemné podobě. Od roku 2006 začaly na půdě UNICITRALu práce na revizi tohoto článku, přičemž nakonec bylo rozhodnuto, že dojde k vydání interpretačního protokolu, který stanovil, že ustanovení čl. 2 Newyorské úmluvy neobsahuje taxativní výčet podmínek pro zachování formy rozhodčí smlouvy a na základě čl. 7 Newyorské úmluvy může být pro posouzení platnosti rozhodčí smlouvy použito i právo státu, kde má být rozhodčí nález vykonán.[50] Změna úmluvy, která má více jak 140 signatářských států se totiž ukázala jako nereálná.

Z těchto důvodů se začínají objevovat i jiné metody regulace mezinárodního práva soukromého, které by vedly k harmonizaci na mezinárodní úrovni. Na významu tedy stále více nabývají normy označované jako tzv. „soft law“. Tyto normy nejsou primárně právně závazné, ale mají odrážet převažující praxi či doktrínu v dané právní oblasti, přičemž zpravidla nejsou ovlivněny mocenskými zájmy, ale na jejich vytváření se podílí především odborná veřejnost. V rámci Haagské konference mezinárodního práva soukromého by nově tímto nástrojem měly být Haagské principy o volbě práva v mezinárodních smlouvách, k jejichž přijetí by mělo dojít v roce 2014.[51] Jak uvádí návrh Preambule Principů[52], měly by sloužit jako vzor pro vnitrostátní, regionální či mezinárodní úpravu volby práva pro mezinárodní smlouvy a dále by měly přestavovat interpretační pravidla při volbě práva jak rozhodci, tak státními soudy. Jejich hlavní charakteristikou je nezávaznost a hlavním posláním je vytvořit obecně uznávané principy, které mají být zohledněny při výkladu vnitrostátního

[46] Viz www.hcch.net (citováno 19.10.2013).

[47] BOHŮNOVÁ, P.: Koncepce mezinárodní pravomoci národních soudů. Disertační práce. Přístupné na http://is.muni.cz/th/53529/pravf_d/ (citováno 19.10.2013).

[48] Viz http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (citováno 19.10.2013).

[49] K tématu více např. BOELE-WOELKI, K.: The Legal Recognition of Same Sex Relationships Within the European Union. Přístupné na http://igitur-archive.library.uu.nl/law/2009-1007-200149/Boele%20the%20legal%20recognition%20of%20same%20sex%20relationships.pdf (citováno 19.10.2013).

[50] Interpretační protokol přístupný např. z http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf (citováno 13.10.2013.

[51] Aktuální plán prací a přijetí Haagských principů např. http://www.hcch.net/upload/wop/contracts2013rpt4en.pdf (citováno 15.10.2013).

[52] Text návrhu preambule Principů uveřejněný v únoru 2013:

The Preamble

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.

2. They may be used as a model for national, regional, supranational or international instruments.

3. They may be used to interpret, supplement and develop rules of private international law.

4. They may be applied by courts and by arbitral tribunals.

http://www.hcch.net/upload/wop/gap2013pd06en.pdf (citováno 12.10.2013).

práva a zároveň sloužit jako vzor pro novou vnitrostátní legislativu.[53] Touto nenásilnou formou tak může být paradoxně dosaženo většího sbližování práva než za použití standartního nástroje unifikace tj. mezinárodní smlouvy. Úspěšnost této formy přibližování práva se prokázala již např. při regulaci mezinárodního rozhodčího řízení prostřednictvím Vzorového zákonu UNCITRALu či Pravidel UNCITRALu pro ad hoc rozhodčí řízení.[54] Z oblasti mezinárodního obchodu je možné poukázat i na Principy smluvního práva vypracované UNIDROIT.[55]

6 ZÁVĚR

Z předchozích řádků je zřejmé, že „znovuobjevení" a rozvoj mezinárodního práva soukromého otevírá prostor jednak pro rozvoj platných doktrín, ale i možnosti pro nové přístupy. V současné době se nacházíme v situaci, kdy většinou je možná kodifikace na národní úrovni, která se liší podle toho, zda národní doktrína vychází z pojetí mezinárodního práva soukromého v užším a širším slova smyslu. Naproti tomu v případě unifikace mezinárodního práva soukromého na evropské a mezinárodní úrovni lze hovořit pouze o fragmentaci. Souhrn norem regulujících mezinárodní právo soukromé se tedy podobá jakémusi patchworku, kdy jednotlivé vrstvy regulace se složitě překrývají a určit konkrétní normu je komplikované a nepřehledné.[56]

V dalším vývoji regulace mezinárodního práva soukromého je především nutné, aby byla posílena míra spolupráce a koordinace při přípravě nových norem a regulací. V opačném případě bude spíše než unifikace (v ideálním případě kodifikace mezinárodního práva soukromého) posilována fragmentace úpravy.

Použitá literatúra:

BALDWIN, S. E.: Beginnings of an Official European Code of Private International Law (1903). Yale University Press, 1903. 10-12 s. Přístupné na http://archive.org/stream/beginningsanoff00baldgoog#page/n6/mode/2up

BASEDOW, J.: The Law of Open Societies – Private Ordering and Public Regulation of International Relation, General Course on Private International Law. In: Hague Academy of International Law:

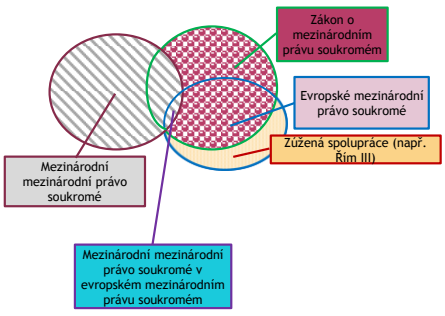
[53] k dalšímu komentáři Haagských principů viz např. SYMEODINES, S. C.: The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments. In: American Journal of Comparative Law, 2013, č. 3. Přístupné na http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256661 (citováno 19.10.2013).

[54] Viz http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html (citováno 19.10.2013).

[55] http://www.unidroit.org/english/principles/contracts/main.htm (citováno 19.10.2013).

[56] Viz BASEDOW, J.: The Law of Open Societies – Private Ordering and Public Regulation of International Relation, General Course on Private International Law. In: Hague Academy of International Law: Recueil Des Cours. Leiden/Boston: Martinus Nijhoff Publishers, 2013. 216 s. ISBN 978-90-04-25550-0.

Střet norem regulujících mezinárodní právo soukromé by se mohl znázornit zjednodušeným diagramem.



Recueil Des Cours. Leiden/Boston: Martinus Nijhoff Publishers, 2013. 216 s. ISBN 978-90-04-25550-0.
BOELE-WOELKI, K.: The Legal Recognition of Same Sex Relationships Within the European Union. Přístupné na http://igitur-archive.library.uu.nl/law/2009-1007-200149/Boele%20the%20legal%20recognition%20of%20same%20sex%20relationships.pdf
BOHŮNOVÁ, P.: Koncepce mezinárodní pravomoci národních soudů. Disertační práce. Přístupné na http://is.muni.cz/th/53529/pravf_d/
ESPLUGUES, C. Sr.: Harminization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles of 2010. In Yearbook of Private International Law. 2011, č. 13. 273-297. Přístupné na http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152058 (citována 15.10.2013).
KATERIN BOELE-WOELKI: Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws. Leiden/Boston: Martinus Nijhoff Publishers, 2010. 31-32s. ISBN 978-90-04-18683-5.
KRAMER, X. a kol.: A European Framework for private international law: current gaps and future perspectives. Study. 55 s. Přístupné na http://conflictoflaws.net/2012/gaps-and-perspectives-in-european-private-international-law/
KUČERA Z.: Mezinárodní právo soukromé. 6. vydání, Brno: Doplněk, 2004. 22 s. ISBN 80-7239-167-4.
PAUKNEROVÁ M. : Evropské mezinárodní právo soukromé. Praha: C.H.Beck. 2008. 10 s. ISBN 978-80-7400-034-8.
PAUKNEROVÁ M.: Private International Law in The Czech Republic. Alphen aan den Rijn: Wolters Kluwer International, 2011. 14 s.ISBN 978-90-411-3836-1.
ROZEHNALOVÁ, N. TÝČ, V.: Evropský justiční prostor v civilních otázkách. Brno: Masarykova univerzita, 2003. 12-13 s. ISBN 80-210-3054-2.
ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T.: Mezinárodní právo soukromé Evroské unie (nařízení Řím I, nařízení Řím II, nařízení Brusel I). Praha: Wolters Kluwer Česká republika, 2013. 16 s. ISBN 978-80-7478-016-5.
SYMEODINES, S. C.: The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments. In: American Journal of Comparative Law, 2013, č. 3. Přístupné na http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256661
VEERLE VAN DEN EECKHOUT: The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the 'Neutrality' of Private International Law in an Era of Globalisation and Europeanisation of Private International Law. Přístupné na http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338375.
ZIMMERMAN R.: Codification – The Civilian Experience Reconsidered on the Eve of a Common European Sales Law. Max Planc Private Law Research Paper No. 12/30. 370 s.
ZIMMERMANN A. M.: Mezinárodní právo soukromé. Brno: Právník, 1933. 122-124 s.

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CIELE A ÚLOHY EURÓPSKEJ ÚNIE V KONTEXTE ŠTVRTEJ ČASTI ZMLUVY O FUNGOVANÍ EURÓPSKEJ ÚNIE – PRIDRUŽENIE ZÁMORSKÝCH KRAJÍN A ÚZEMÍ

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Abstract: The aim of the contribution is to explain in more detail the objectives and tasks of the EU corresponding to the legal regulations of the mentioned Treaty on the Functioning of the EU, embodied in Part IV of the Treaty - Association of Overseas Countries and Territories. The fundamental legal regulations are to be found in the primary law of the European Union. However, there are also other documents and legal acts governing the above issues in more detail, enabling a more comprehensive view.

Abstrakt: Príspevok autora sa orientuje na problematiku európskeho práva, ktorá má z historického hľadiska svoj základ už v Zmluve o založení Európskeho hospodárskeho spoločenstva**.** Cieľom príspevku je bližšie priblížiť úlohy a ciele Európskej únie, ktoré korešpondujú s právnou úpravou danou Zmluvou o fungovaní Európskej únie, zakotvenou v Štvrtej časti zmluvy – pridruženie zámorských krajín a území. Základná právna úprava sa nachádza v primárnom práve Európskej únie, ale na druhej strane existujú aj ďalšie dokumenty a právne akty, ktoré upravujú danú problematiku bližšie a umožňujú komplexnejší pohľad.

Key words: : European law, primary law, Association of the Overseas Countries and Territories

Kľúčové slová: Európska únia, európske právo, primárne právo, rozhodnutie Rady, pridruženie zámorských a území

1 ÚVOD

Súčasná právna úprava daná Lisabonskou zmluvou o pridružení zámorských krajín a území (ďalej ZKÚ) k Únii má svoje základy v ustanoveniach o podpore hospodárskeho a sociálneho rozvoja v rámci pôvodnej Zmluvy o založení Európskeho hospodárskeho spoločenstva (ďalej EHS) z roku 1957 (čl. 131 – 136). Rozvoj hospodárskych, neskôr sociálnych a kultúrnych vzťahov členských štátov Spoločenstva a Spoločenstva ako celku s tzv. neeurópskymi krajinami a územiami, sa charakterizuje ako „osobitný vzťah", ktorý bol historicky determinovaný a spájaný najskôr s krajinami, ktorými boli Belgicko, Francúzsko, Taliansko a Holandsko. Čl. 131 Zmluvy o EHS teda uvádza krajiny Spoločenstva, pričom sa zároveň odvoláva na Prílohu IV. Zmluvy, ktorá vymenúva dotknuté krajiny a územia.[1]

Základom rovnocenných vzťahov medzi zámorskými krajinami a územiami (neeurópske krajiny a územia) a Spoločenstvom a jeho členskými štátmi je teda Zmluva o založení EHS. Právna úprava a hlavný účel pridruženia je daný predovšetkým čl. 131 ods. 2 Zmluvy o EHS: „...podporovať a nadväzovať úzke hospodárske vzťahy medzi nimi a Spoločenstvom ako celkom."[2] Nasledujúci čl.

[1] Príloha IV. Zámorské krajiny a územia, na ktoré sa vzťahuje Štvrtá časť Zmluvy: Francúzska západná Afrika (Senegal, Sudán, Quinea, Pobrežie slonoviny, Dahome, Mauretánia, Nigéria a Horná Volta), Francúzska rovníková Afrika (Stredné Kongo, Ubangi- Šari, Čad a Gabun), Saint-Piere a Miquelon, Madagaskar a závislé územia, Francúzske Somálsko, Nová Kaledónia a závislé územia, Francúzske državy v Oceánii, Južné a antarktické krajiny, Autonómna republika Togo, poručenské územie v Kamerune spravované Francúzskom, Belgické Kongo a Ruanda- Urundi, Somálsko v poručenskej správe Talianska, Holandská Nová Quinea.
Pozri prílohu IV. Zámorské krajiny a územia. Zmluva o EHS, s.123: www.euroskop.cz/gallery/2/754-smlouva o es.pdf.

[2] Citované podľa čl. 131 Zmluvy o EHS, s.51: www.euroskop.cz/gallery/2/754-smlouva o es.pdf.

132 Zmluvy o EHS nám dáva konkrétnejšiu predstavu o cieľoch, ktoré sa sledujú pridružením. Čl. 132 tiež vystupuje ako vhodný základ pre výhody aplikované v niektorých oblastiach pre neeurópske krajiny a územia vo vzťahu k členským štátom Spoločenstva a Spoločenstva ako celku. Zakotvuje zásadu rovnakého zaobchádzania neeurópskych krajín a území v obchodných stykoch nielen medzi nimi a európskymi štátmi, s ktorými má osobitné vzťahy, ale aj s ostatnými členskými štátmi Spoločenstva. Umožňuje rovnaké podmienky pre fyzické a právnické osoby (štátnych príslušníkov členských štátov Spoločenstva neeurópskych krajín a území) ohľadom účasti na verejných súťažiach a dodávkach, ktoré sa dotýkajú investícií financovaných Spoločenstvom. Obsahuje ustanovenia, ktoré vytvárajú predpoklady na právo usadzovania s aplikáciou vylúčenia diskriminácie. Právna úprava sa stáva dobrým základom pre rovnocenné vzťahy pre tieto krajiny a územia a Spoločenstvo, pričom svoje adekvátne vyjadrenie nachádza aj v súčasnej platnej právnej úprave v podobe Zmluvy o fungovaní Európskej únie (ďalej ZFEÚ). Je pochopiteľné, že primárne právo v podobe Zmluvy o EHS otvára cestu princípu uplatňovania rovnakého zaobchádzania medzi členskými krajinami Spoločenstva a neeurópskymi krajinami a územiami, predovšetkým v hospodárskej a obchodnej spolupráci. Na vyššie spomínané články Zmluvy o EHS nadväzujú čl. 133 – 136 (tie obsahujú práve zásadu rovnakého zaobchádzania), ktoré:

- stanovujú cestu odstraňovania ciel na tovar pri dovoze z neeurópskych krajín a území (postupné odstránenie ciel na tovar pochádzajúci z členských štátov a neeurópskych krajín a území v súlade s zodpovedajúcimi článkami Zmluvy o EHS),
- sú významné z hľadiska nasledujúcej právnej úpravy regulácie voľného pohybu pracovníkov z neeurópskych krajín a území a pracovníkov z členských štátov Spoločenstva,
- určujú budúci právny postup a podrobnosti pridruženia neeurópskych krajín a území k Spoločenstvu v podobe vykonávajúceho dohovoru,
- priznávajú Rade právomoc rozhodnúť na základe získaných skúseností a na základe zásad daných Zmluvou o predpisoch pre ďalšie obdobie.

Právnou úpravou zakotvenou v Zmluve o EHS boli položené základy pre spolupráce v sfére hospodárskej a obchodnej. Jej rozvoj postupne zahŕňal riešenie problémov spojených so sociálnym rozvojom a potenciálnym rozvojom pracovnej sily. Zákonite sa do budúcnosti predpokladal pozitívny vplyv a výhody spolupráce v oblasti ďalšieho sociálneho rozvoja, kultúrnej a regionálnej spolupráce.

2 PRÁVNE ZÁKLADY PRIDRUŽENIA ZÁMORSKÝCH KRAJÍN A ÚZEMÍ K ÚNII

Každá revízia zakladajúcich zmlúv, respektíve primárneho práva vychádza pri úprave tejto problematiky z ustanovení pôvodnej Zmluvy o EHS. Súčasná platná právna úprava v podobe Lisabonskej zmluvy vychádza z čl. 198 – 204 ZFEÚ a treba uviesť, že v mnohom korešponduje s pôvodnými formuláciami predtým platného primárneho práva. Vzťahuje sa to aj na základný cieľ pridruženia daného čl. 198 ods. 2 ZFEÚ, ktorý uvádza, že ide o podporu hospodárskeho a sociálneho rozvoja ZKÚ a nadviazanie úzkych hospodárskych vzťahov medzi nimi a Úniou ako celkom. Tým je daný aj základný mechanizmus spolupráce a partnerstva (trojstranné partnerstvo) v rámci pridruženia, ktorý funguje medzi Komisiou, členským štátom, s ktorým má ZKÚ osobitný vzťah a samotnou krajinou alebo územím.[3] Pridruženie má slúžiť podpore záujmov a blahobytu obyvateľov ZKÚ s tým, že to povedie k hospodárskemu, sociálnemu a kultúrnemu rozvoju. Základnou podmienkou a východiskom pre realizáciu krokov pridruženia je však súlad so zásadami, ktoré vyjadrujú základný hodnotový rámec Únie. Čl. 198 ZFEÚ predpokladá (a členské štáty s tým súhlasia), že k Únii sa „pridružia neeurópske krajiny a územia, ktoré majú osobitné vzťahy s Dánskom, Francúzskom, Holandskom a Spojeným kráľovstvom“. Zoznam ZKÚ je obsiahnutý v Prílohe II. ZFEÚ „Zámorské krajiny a územia, na ktoré sa vzťahujú ustanovenia štvrtej časti ZFEÚ“.[4] Tak ako pôvodná Zmluva o EHS[5] a neskoršie revízie zakladajúcich zmlúv, aj ZFEÚ

[3] K princípu trojstranného partnerstva a spolupráce v rámci pridruženia bližšie pozri: SYLLOVÁ, J; PÍTROVÁ, L; PALDUSOVÁ, H.: Lisabonská smlouva. Komentář. Praha: C.H. Beck, 2010. s.714.

[4] Grónsko, Nová Kaledónia a závislé územia, Francúzska Polynézia, Francúzske južné a antarktické územia, Ostrovy Wallis a Futuna, Mayotte, Saint Piere a Miquelon, Aruba, Holandské Antily (Bonaire, Curacao, Saba, Saint Eustatius, Saint Maarten), Anguilla, Kajmanie ostravy, Falklandské ostrovy, Južná Georgia a Ostrovy Južný Sandwich, Monserrat, Picairn, Svätá Helena a závislé územia, Britské antarktické územia, Britské územia v Indickom oceáne, Ostrovy Turks a Caicos, Britské Panenské ostrovy, Bermudy.

predpokladá, že rozhodujúce slovo pri ďalšej právnej úprave otázok spojených s pridružením ZKÚ budú mať orgány Únie. Z nich sa priamo v primárnom práve uvádzajú už klasicky Rada a Komisia, ale aj Európsky parlament. Právomoc uvedených orgánov vyplýva z čl. 203 ZFEÚ, ktorý priznáva Rade a Komisii právo stanovovať podrobné pravidlá a postup v otázke pridružovania. Znamená to, že ustanovenia týkajúce sa pravidiel a postupu stanovuje Rada na návrh Komisie jednomyseľne. Orgány Únie pritom musia vychádzať z predchádzajúcich skúseností z procesu pridruženia a zo zásad, ktoré sú stanovené Zmluvami.[6]

Základný právny rámec pridruženia ZKÚ je bližšie upravený rozhodnutím Rady 2001/822/ES o pridružení zámorských krajín a území k Európskemu spoločenstvu zo dňa 27. novembra 2001,[7]

Podľa: SIMAN, M; SLAŠŤAN, M.: Primárne právo Európskej únie (aplikácia a výklad práva Únie s judikatúrou). 3. vyd. Bratislava: Euroiuris, 2010. s.898.

Čl. 204 ZFEÚ upravuje aplikáciu čl. 198 – 203 ZFEÚ vo vzťahu ku Grónsku. Na jeho základe požíva Grónsko výnimku z režimu pridruženia, aj keď sa Štvrtá časť ZFEÚ na Grónsko vo všeobecnosti vzťahuje. Základom je Protokol č. 34 o osobitnej úprave pre Grónsko, pripojený k Zmluvám. Režim je potom upravený oznámeniami a nariadeniami Komisie, nariadeniami a rozhodnutiami Rady a dohodami medzi Európskymi spoločenstvami (Úniou) s Grónskom a členskými štátmi (napríklad ES – vlády Dánska a Grónska). V roku 2011 bol pripravený návrh novej úpravy v podobe návrhu rozhodnutia Rady o vzťahoch medzi Úniou na jednej strane a Grónskom a Dánskym kráľovstvom na strane druhej (KOM/2011/846).

[5] Čl. 136 ods. 2 Zmluvy o EHS: „Pred skončením platnosti dohody...rozhodne Rada jednomyseľne na základe získaných skúseností a na základe zásad vymedzených touto zmluvou o predpisoch pre ďalšie obdobie“.

Citované podľa čl. 136 ods. 2 Zmluvy o EHS, s.52: www.euroskop.cz/galery/2/754-smlouva o es.pdf.

[6] Jedná sa o všeobecné zásady (čl. 2 Zmluvy o EÚ hovorí o hodnotách) na ktorých je založená Únia. Sú definované v Zmluve o Európskej únii (ďalej ZEÚ) a ZFEÚ, pričom rozhodnutie Súdneho dvora v prípade Emesa Sugar (Free Zone) NV v. Aruba (C-17/98) zo dňa 8. februára 2000 uvádza, že ide tiež o zásady, ktoré sú vyjadrené v Štvrtej časti Zmluvy dotýkajúcej sa pridruženia ZKÚ a tiež aj iné zásady Spoločenstva vrátane tých, ktoré sa vzťahujú na spoločnú poľnohospodársku politiku (predtým čl. 32 Zmluvy o ES, teraz čl. 38 ZFEÚ).

K zásadám zakotvených v čl. 2 ZEÚ, čl. 1 a nasl. ZFEÚ a čl. 38 ZFEÚ bližšie pozri: Dielo cit. v pozn. č. 4, s. 758, 782, 791.

K prípadu Emesa Sugar (Free Zone) NV v. Aruba (C-17/98) bližšie pozri: www.curia.europa.eu/juris

[7] Obsahová štruktúra rozhodnutia Rady 2001/822/ES má komplexný charakter a ustanovenia dotýkajúce sa problematiky pridruženia ZKÚ sú podrobne konkretizované. V rozhodnutí sú špecifikované dôvody jeho prijatia, ktoré berú do úvahy ustanovenia Zmluvy o ES (hlavne čl. 187) a návrhy Komisie. Rozhodnutie má štyri základné časti, štyri prílohy a sedem dodatkov k prílohám.

Obsahová štruktúra rozhodnutia:

Prvá časť Všeobecné ustanovenia o pridružení ZKÚ k Spoločenstvu (čl. 1 – 9)
- Kapitola 1: Všeobecné ustanovenia
- Kapitola 2: Aktéri spolupráce v ZKÚ
- Kapitola 3: Zásady a postupy partnerstva ZKÚ a ES

Druhá časť Oblasť spolupráce ZKÚ a ES (čl. 10 – 17)

Tretia časť Nástroje spolupráce ZKÚ a ES (čl. 18 – 60)

Hlava I. Rozvojová finančná spolupráca
- Kapitola 1: Všeobecné ustanovenia
- Kapitola 2: Zdroje sprístupnené pre ZKÚ
- Kapitola 3: Podpora investícií súkromného sektora
- Kapitola 4: Dodatočná podpora v prípade výkyvov príjmov z vývozu
- Kapitola 5: Podpora ostatným aktérom spolupráce
- Kapitola 6: Podpora humanitárnej pomoci a pomoci pri mimoriadnych udalostiach
- Kapitola 7: Vykonávacie postupy
- Kapitola 8: Prechod od predchádzajúcich Európskych rozvojových fondov k 9. ERF

Hlava II. Hospodárska a obchodná spolupráca
- Kapitola 1: Ustanovenia pre obchod s tovarom
- Kapitola 2: Obchod službami a pravidlá usadzovania
- Kapitola 3: Oblasti súvisiace s obchodom

ktoré v čl. 2 uvádza, že pridruženie je založené na zásadách slobody, demokracie, úcty k ľudským právam a základným slobodám a právneho štátu. Zásady sú spoločné členským štátom a s nimi spojenými ZKÚ. V oblastiach spolupráce je zakázaná diskriminácia založená na pohlaví, rasovom a etnickom pôvode, náboženstve alebo viere, zdravotnom postihnutí, veku alebo sexuálnej orientácii.

Mimo záber novelizácie zakladajúcich zmlúv v podobe Lisabonskej zmluvy neostala ani otázka prijímania pravidiel a postupu pridruženia, nakoľko zakotvuje možnosť ich prijímania prostredníctvom mimoriadneho legislatívneho postupu. Tým sa dopĺňa čl. 187 predtým platnej Zmluvy o ES v tom zmysle, že ak Rada dotknuté ustanovenia o pravidlách a postupe prijíma v súlade s mimoriadnym legislatívnym postupom, uznáša sa jednomyseľne na návrh Komisie a po porade s Európskym parlamentom. Rozhodujúci je pritom čl. 289 ods. 1 ZFEÚ, ktorý zakotvuje mimoriadny legislatívny postup. Použitie mimoriadneho legislatívneho postupu pri stanovovaní podrobných pravidiel a postupu pri pridružení (Rada prijíma na návrh Komisie a po porade s Európskym parlamentom) prichádza do úvahy vtedy, keď to zmluvy stanovujú, respektíve „v osobitných prípadoch ustanovenými zmluvami".

Status pridružených ZKÚ sa môže meniť a to na základe opatrení, ktoré má právomoc prijímať Rada s ohľadom na ciele stanovené v zakladajúcich zmluvách (obmedzenie alebo zrušenie niektorých výhod). Na druhej strane aj zoznam ZKÚ obsiahnutý v Prílohe II. ZFEÚ môže byť rozšírený, keď napríklad v súlade s rozhodnutím Európskej rady z 29. októbra 2010, ktorým sa mení a dopĺňa ZFEÚ, sa francúzske spoločenstvo Svätý Bartolomej stáva od 1. Januára 2012 zámorskou krajinou a územím pridruženým k Únii. Tým sa aj mení a dopĺňa ZFEÚ a jej Príloha II., pretože uvedený ostrov je zaradený do zoznamu ZKÚ, na ktoré sa vzťahujú ustanovenia Štvrtej časti ZFEÚ.[8]

Čl. 199 – 203 ZFEÚ sú zásadné z hľadiska stanovenia podmienok pridruženia vo forme cieľov a zásad,[9] ktoré sa aplikujú vo vzájomných vzťahoch medzi členskými krajinami a ZKÚ:

- členské štáty budú uplatňovať v obchodných vzťahoch vo vzťahu k ZKÚ rovnaké zaobchádzanie, aké uplatňujú členské štáty medzi sebou. Rovnako aj ZKÚ v obchodných vzťahoch vo vzťahu k členským štátom uplatnia rovnaké zaobchádzanie, aké uplatňujú vo vzťahu k európskemu štátu, s ktorým udržiavajú osobitné vzťahy,
- členské štáty sa podieľajú na investíciách, ktoré sú potrebné pre postupný rozvoj ZKÚ. Pri verejných súťažiach a dodávkach investícií financovaných Úniou sa garantujú rovnaké podmienky účasti pre fyzické a právnické osoby bez ohľadu na to, či sú štátnymi príslušníkmi členského štátu Únie alebo ZKÚ,
- vo vzťahoch medzi členskými štátmi a ZKÚ sa pri práve štátnych príslušníkov a spoločností budú aplikovať ustanovenia a postupy stanovené ZFEÚ v kapitole o práve usadiť sa (čl. 49 – 55 ZFEÚ). Regulácia zabezpečuje rovnaké podmienky režimu usadzovania sa nielen zo strany členských štátov, ale aj záväzok rovnakého zaobchádzania orgánov ZKÚ pri režime usadzovania pre štátnych príslušníkov, spoločnosti alebo podniky členských štátov Únie, pričom nesmie byť menej výhodné ako zaobchádzanie so subjektmi z tretích krajín. Orgány ZKÚ nebudú rozlišovať medzi štátnymi príslušníkmi, spoločnosťami a podnikmi členských štátov. V týchto otázkach teda platí zákaz diskriminácie, ktorý môže byť prelomený (výnimka) postupom stanoveným čl. 203 ZFEÚ,[10]
- na tovar pochádzajúci zo ZKÚ platí zákaz dovozných ciel do členských štátov, tak ako sú zakázané medzi členskými štátmi v súlade s ustanoveniami primárneho práva (zákaz

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- Kapitola 4: Menové a daňové záležitosti
- Kapitola 5: Odborné vzdelávanie, spôsobilosť pre programy Spoločenstva a iné ustanovenia

Štvrtá časť Záverečné ustanovenia (čl. 61 – 64).

[8] K zaradeniu ostrova Svätý Bartolomej - COM/2012/061 final-2012/0024 (CNS) do zoznamu obsiahnutého v Prílohe II. ZFEÚ bližšie pozri: www.eur.lex.europa.eu

[9] P. Svoboda upozorňuje, že formulácia alebo uvedenie čl. 199 ZFEÚ nie je presné, respektíve zásady pridruženia sú mylne označené ako „ciele" pridruženia.
Pozri: SVOBODA. P.: Právo vnejších vztahu EÚ. Praha: C. H. Beck, 2010, s. 205.

[10] V zmysle čl. 203 ZFEÚ a čl. 44 rozhodnutia Rady 2001/822/ES môžu ZKÚ prijímať predpisy dotýkajúce sa napríklad obmedzenia rozsahu pohybu pracovníkov, ak sa nimi presadzuje alebo podporuje miestna zamestnanosť. Ak sa tak stane, orgány ZKÚ o tom informujú Komisiu, ktorá o tom upovedomí členské štáty Únie.
K tomu pozri: rozhodnutie Rady 2001/822/ES, s. 31 – 32: www.eur-lex.europa.eu

dovozných ciel a poplatkov s rovnocenným účinkom, ako aj zákaz ciel fiskálnej povahy). Tak isto platí zákaz vyberania ciel ZKÚ pri dovoze tovaru do ZKÚ z členských štátov a ostatných ZKÚ podľa ustanovení primárneho práva. Na druhej strane sa však pripúšťa výnimka, ktorá umožňuje v niektorých prípadoch ZKÚ uplatniť vyberanie ciel (ale s podmienkou, že sa tým sleduje rozvoj a industrializácia ZKÚ) alebo clá fiskálnej povahy, ktoré sú súčasťou rozpočtu ZKÚ. Tieto clá však nesmú byť vyššie ako clá na dovoz tovaru z členského štátu, s ktorým ZKÚ udržuje osobitný vzťah,[11]

- ak by výška cla uplatňovaná ZKÚ na tovar pochádzajúci z tretej krajiny (pri uplatňovaní vyššie uvedených zásad ohľadom ciel) mohla spôsobiť odklon obchodu, ktorý spôsobí škodu členskému štátu Únie, tak dotknutý členský štát môže požiadať Komisiu, aby navrhla ostatným členským štátom opatrenia potrebné na nápravu škody. Tým je možné napraviť vyššie opísaný stav prostredníctvom Komisie,
- voľný pohyb pracovníkov (s výhradou ustanovení týkajúcich sa verejného zdravia, verejnej bezpečnosti a verejného poriadku) zo ZKÚ v členských štátoch Únie a pracovníkov z členských štátov Únie v ZKÚ, je upravený právnymi aktmi prijatými v súlade s čl. 203 ZFEÚ (k čl. 203 ZFEÚ pozri vyššie). Podmienkou však je, aby prijatým právnym aktom neboli narušené všeobecne platné zásady pre oblasť ochrany zdravia, verejnej bezpečnosti a verejného poriadku.

3 POTREBA NOVÉHO LEGISLATÍVNEHO RÁMCA A JEHO PODSTATA

Rozhodnutie Rady 2001/822/ES o pridružení ZKÚ k ES predstavuje (okrem primárneho práva) základ pre úpravu vzťahov v rámci pridruženia ZKÚ. Rozhodnutie však stratí svoju platnosť 31. decembra 2013. Okrem toho na európskej a medzinárodnej úrovni boli zaznamenané nové politické výzvy a priority, vrátane riešenia problémov životného prostredia, zmeny klímy a objavili sa aj zmeny v štruktúrach svetového obchodu. Od prijatia rozhodnutia Rady sa tiež značne zmenilo regionálne a medzinárodné prostredie, v ktorom pôsobia ZKÚ. Z týchto dôvodov začali zainteresované strany (Komisia, ZKÚ, členské štáty, s ktorými sú ZKÚ spojené a ďalšie zainteresované strany) práce na konkrétnych legislatívnych návrhoch, ktoré by mali vyústiť do nového dokumentu, ktorý by po novom upravoval vzťahy k ZKÚ a nahradil by rozhodnutie Rady 2001/822/ES, ktoré sa aplikuje od roku 2001.

Základom pre prípravu novej právnej úpravy sa stali verejné konzultácie prostredníctvom zelenej knihy o budúcich vzťahoch Únie a ZKÚ (zelená kniha prijatá 25. júna 2008, KOM/2008/383). Výsledkom konzultácií o zelenej knihe bolo prijatie konsenzu zainteresovaných strán v niekoľkých všeobecných otázkach, ktoré vyústili do konštatovania, že súčasné opatrenia vo vzťahu ZKÚ a Únie už nezodpovedajú realite a mali by byť nahradené novým prístupom.

Nadväzujúce oznámenie Komisie Európskemu parlamentu, Rade, Európskemu hospodárskemu a sociálnemu výboru a Výboru regiónov – Prvky nového partnerstva medzi EÚ a zámorskými krajinami a územiami z 6. novembra 2009 (KOM/2009/623) uvádza, že osobitný vzťah medzi Úniou a ZKÚ by sa mal transformovať z klasického prístupu rozvojovej spolupráce k vzájomnému partnerstvu s cieľom podporovať udržateľný rozvoj ZKÚ a šíriť hodnoty a normy Únie vo svete. Princípy pridruženia dané primárnym právom a rozhodnutím Rady z roku 2001 majú byť nahradené aktuálnejším prístupom. Celkové zdôvodnenie pridruženia by malo zabezpečiť udržateľný rozvoj ZKÚ, šírenie hodnôt a noriem Únie vo svete. Na základe solidarity Únie voči ZKÚ, by Únia mala podporovať udržateľný rozvoj ZKÚ z hospodárskeho, sociálneho a environmentálneho hľadiska. Budúce vzťahy a partnerstvo má byť viac obojstranné, založené na vzájomných vzťahoch (vzťah medzi ZKÚ a Úniou založený na spoločných záujmoch, reciprocite, právach a záväzkoch). Musia však zohľadňovať osobitosti ZKÚ – ich hospodársky a sociálny vývoj, rôznorodosť, zraniteľnosť, ako aj ich význam z hľadiska životného prostredia. Oznámenie Komisie (KOM/2009/623) navrhlo v rámci nového partnerstva medzi Úniou a ZKÚ tri základné ciele partnerstva, prispôsobené osobitostiam ZKÚ: 1. podpora konkurencieschopnosti; 2. posilňovanie odolnosti a 3. podpora spolupráce.[12]

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[11] Rozhodnutie Rady 2001/822/ES v čl. 40 umožňuje orgánom ZKÚ zachovať alebo zaviesť také clá alebo možnosť kvantitatívnych obmedzení na dovoz produktov pochádzajúcich z členských štátov, ktoré považujú za nevyhnutné a to s ohľadom na súčasné potreby.
K čl. 40 rozhodnutia Rady 2001/822/ES pozri: dielo cit. v pozn. č. 10, s. 29.

[12] K problematike spojenej s oznámením Komisie (KOM/2009/623) bližšie pozri: www.eur.lex.europa.eu

V roku 2012 predkladá Komisia výsledok prác na novom právnom dokumente, ktorý upravuje pridruženie ZKÚ k Únii. Je ním návrh rozhodnutia Rady o pridružení zámorských krajín a území k Európskej únii („rozhodnutie o pridružení zámoria“) z 16. júla 2012 (COM/2012/362). Návrhu rozhodnutia predchádzal pracovný dokument útvarov Komisie, ktorý sprevádzal rozhodnutie Rady o pridružení zámorských krajín a území k Európskej únii (SWD/2012/193).[13] Dokument Komisie z hľadiska cieľov pridruženia nadväzuje na oznámenie Komisie (KOM/2009/623), keď uvádza, že účel a ciele, respektíve zásady pridruženia známe z primárneho práva (čl. 198 – 199 ZFEÚ) by mali korešpondovať s cieľmi, ktoré určila Komisia v oznámení (KOM/2009/623) a ktoré schválila Rada. Podľa Komisie by osobitnými cieľmi ďalšieho rámca pridruženia mali byť tieto ciele:

- pomôcť šíriť hodnoty a normy Únie v širšom svete,
- vybudovať recipročnejší vzťah medzi Úniou a ZKÚ založený na spoločných záujmoch,
- posilniť konkurencieschopnosť ZKÚ,
- posilniť pružnosť ZKÚ, znížiť ich hospodársku a environmentálnu zraniteľnosť,
- podpora spolupráce ZKÚ s partnermi z tretích krajín,
- začleniť najnovšie priority politického programu Únie,
- zohľadniť zmeny v modeloch svetového obchodu a obchodných dohodách Únie.[14]

Komisia sa na základe predchádzajúcich konzultácií, analýz a návrhov dotýkajúcich sa spôsobu upravenia právneho základu pridruženia ZKÚ k Únii vyjadrila aj k možnostiam uplatnenia politiky zmeny právnej úpravy. Vyjadrenie Komisie sa zakladalo na verejných konzultáciách, pravidelných *ad hoc* zasadnutiach ZKÚ a členských štátov Únie, s ktorými sú ZKÚ spojené, a Komisie, ako aj na formách dialógu ako každoročné fóra, pravidelné trojstranné stretnutia a partnerstvo pracovných skupín, zaoberajúce sa otázkami životného prostredia, obchodu, regionálnej integrácie ZKÚ, finančnými službami v ZKÚ a budúcim vzťahom medzi Úniou a ZKÚ. V pracovnom dokumente útvarov Komisie (SWD/2012/193) sa navrhlo, aby uprednostňovanou možnosťou bola možnosť modernizácie rozhodnutia a pridružení zámoria a zosúladenie s politickým rámcom Únie, nakoľko tento variant najlepšie zohľadňuje:

- spoločnú ambíciu Komisie, ZKÚ, členských štátov, s ktorými sú ZKÚ spojené, a Úniou, preskúmať a revidovať otázky pridruženia a vytvoriť recipročnejšie partnerstvo (východiskom sú spoločné záujmy a zohľadnenie výziev, ktorým čelia ZKÚ),
- účel a všeobecné ciele pridruženia ZKÚ k Únii, ktorých základom je Štvrtá časť ZFEÚ,
- osobitné ciele ďalšieho právneho rámca a pridruženia.

Ostatná právna úprava v podobe vyššie spomínaného návrhu rozhodnutia Rady o pridružení ZKÚ k Únii („rozhodnutie o pridružení zámoria“) má nahradiť rozhodnutie Rady 2001/822/ES. Návrh rozhodnutia Rady má byť v súlade s ustanoveniami ZFEÚ, pričom všeobecným cieľom nového rozhodnutia Rady by bolo obnovenie pridruženia a zameranie oblastí spolupráce na priority, ktoré všetky strany uznali za priority všeobecného záujmu. Návrh nového rozhodnutia Rady má:

- stanovovať právny rámec,
- vymedzovať všeobecný rámec pridruženia ZKÚ k Únii,
- určovať možné oblasti spolupráce medzi Úniou a ZKÚ,
- upravovať obchodný režim (bude základom pre oblasť výmeny a spolupráce medzi ZKÚ a Úniou),
- definovať finančné nástroje, na ktoré budú mať ZKÚ nárok (11 Európsky rozvojový fond a horizontálne programy).

Návrh rozhodnutia Rady predstavuje legislatívny návrh, ktorý zohľadňuje politické orientácie Rady, požiadavky ZKÚ a členských štátov, ktoré majú osobitné vzťahy so ZKÚ a boli prezentované v predchádzajúcich diskusiách, konzultáciách a návrhoch ohľadom danej témy. Štruktúra nového návrhu rozhodnutia Rady je oproti rozhodnutiu z roku 2001 po kvalitatívnej stránke rozdielna a z hľadiska svojho rozsahu naozaj bohatá.[15] Úvodné ustanovenia rozhodnutia sú významné aj

[13] Plný názov dokumentu: Pracovný dokument útvarov Komisie. Zhrnutie posúdenia vplyvu. Dokument sprevádzajúci rozhodnutie Rady o pridružení zámorských krajín a území k Európskej únii (SWD/2012/193).

[14] Bližšie pozri SWD/2012/193, s. 5: www.eur.lex.europa.eu

[15] Návrh rozhodnutia Rady (COM/2012/362) má päť základných častí: 1. Všeobecné ustanovenia pridruženia zámorských krajín a území k Únii (čl. 1 – 13); 2. Oblasti spolupráce pre dosiahnutie trvalo udržateľného rozvoja v rámci pridruženia (čl. 14 – 39); 3. Obchod a obchodná spolupráca (čl. 40 – 72); 4. Nástroje pre trvalo udržateľný rozvoj (čl. 73 – 88); 5. Záverečné ustanovenia (čl. 89 – 94). Súčasťou je osem príloh a trinásť dodatkov.

z hľadiska uplatňovania zásad, ktoré majú svoj pôvod v primárnom práve Únie. Čl. 1 návrhu obsahuje účel pridruženia, ktorým je partnerstvo dané čl. 198 ZFEÚ s cieľom podpory trvalo udržateľného rozvoja ZKÚ a šírenia hodnôt a noriem Únie v širšom svete. Partnermi pridruženia sú Únia a členské štáty, s ktorými sú ZKÚ spojené. Čl. 2 návrhu oproti predchádzajúcej úprave špecifikuje ciele, zásady a hodnoty pridruženia. Pridruženie vychádza z cieľov, zásad a hodnôt, ktoré majú ZKÚ, členské štáty, s ktorými sú ZKÚ spojené a zo zásad Únie. Úlohou je dosiahnuť ciele zakotvené v čl. 199 ZFEÚ. Tie by sa mali realizovať prostredníctvom zvýšenia konkurencieschopnosti a odolnosti ZKÚ, znížením zraniteľnosť ZKÚ a podporovaním spolupráce ZKÚ s inými partnermi. Pri dosahovaní cieľov pridruženia sa dodržiavajú zásady slobody, demokracie, ľudských práv a základných slobôd, právneho štátu, dobrej správy vecí verejných a trvalo udržateľného rozvoja – zásady spoločné pre ZKÚ a členské štáty, ktoré majú osobitný vzťah k ZKÚ. Čl. 2 zakazuje diskrimináciu, tak ako je to uvedené v pôvodnom čl. 2 rozhodnutia Rady 2001/822/ES. Na druhej strane však čl. 2 ods. 5 návrhu stanovuje právo partnerov určovať svoje politiky a priority týkajúce sa trvalo udržateľného rozvoja, stanovovať vlastnú úroveň vnútroštátnej ochrany v oblasti životného prostredia a práce a právo na vlastnú legislatívu v súlade so záväzkami vyplývajúcimi z medzinárodne uznaných noriem a dohôd. Pri uplatňovaní svojich práv sa partneri usilujú zabezpečiť vysokú úroveň ochrany v oblasti životného prostredia a práce. Čl. 2 ods. 6 pri výkone tohto rozhodnutia zakotvuje zásadu transparentnosti, subsidiarity a rovnakej miery zamerania na piliere trvalo udržateľného rastu ZKÚ – hospodársky rozvoj, sociálny rozvoj a ochrana životného prostredia. Aj obsah čl. 5 návrhu, zaoberajúci sa spoločnými záujmami, komplementárnosťou a prioritami, je nový, predovšetkým pri stanovovaní siedmych prioritných oblastí spolupráce.[16]

4 ZÁVER

Vyššie uvedený proces modernizácie právnej úpravy pridruženia ZKÚ k Únii ustupuje od tradičného chápania vzťahu ZKÚ a Únie v podobe princípu „darcu a príjemcu“. Akceptuje požiadavku ZKÚ v zmene zamerania pridruženia – od zmierňovania chudoby a rozvojovej spolupráce na recipročnejší vzťah orientovaný na udržateľný rast ZKÚ, pričom by sa zohľadnili aj politické orientácie Únie. Ide o presadenie modelu rozvoja, ktorý je primárne založený na spojení hospodárskych činností a sociálneho blahobytu za súčasného zachovania prírodných zdrojov a ekosystémov pre budúce generácie.

Pridruženie k Únii vyplýva z ústavných väzieb, ktoré ZKÚ spájajú s členskými štátmi uvedenými v čl. 198 ZFEÚ (Dánsko, Francúzsko, Holandsko a Spojené kráľovstvo). Akceptuje sa, že ZKÚ majú rozsiahlu autonómiu, ktorá sa týka aj hospodárskych záležitostí, trhu, práce, verejného zdravia, vnútorných záležitostí a ciel. ZKÚ nie sú súčasťou colného územia Únie a ZKÚ nespadajú do vnútorného trhu Únie. Obyvatelia požívajú status občanov Únie, nakoľko sú štátnymi príslušníkmi toho členského štátu Únie, s ktorým sú ich krajiny či územia spojené.

Použitá literatúra:

SIMAN, M; SLAŠŤAN, M.: Primárne právo Európskej únie (aplikácia a výklad práva Únie s judikatúrou). 3. vyd. Bratislava: Euroiuris, 2010, 1097 s. ISBN 978-80-89406-06-7.
SVOBODA, P.: Právo vnejších vztahu EÚ. Praha: C.H.Beck, 2010. 244 s. ISBN 978-80-7400-352-3.
SYLLOVÁ, J; PÍTROVA, L; PALDUSOVÁ, H.: Lisabonská smlouva. Komentář. Praha: C.H. Beck, 2010. 1297 s. ISBN 978-80-7400-339-4.
Návrh rozhodnutia Rady o pridružení zámorských krajín a území k Európskej únii (COM/2012/362); elektr.verzia://www.eur.lex.europa.eu/LexURIServ/LexUriServ.do?uri=COM:2012:0362:FIN:SK:PDF.
Pracovný dokument útvarov Komisie o pridružení zámorských krajín a území k Európskej únii (SWD/2012/193);elektr.verzia:verzia:http://www.eu.lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0193:FIN:SK:PDF.
Prípad Emesa Sugar (Free Zone) NV v. Aruba ; elektr.verzia:http://www.curia.europa.eu/juris.

[16] 1. Hospodárska diverzifikácia hospodárstiev ZKÚ, vrátane integrácie do svetového hospodárstva a regionálnych hospodárstiev; 2. Podpora environmentálneho trvalo udržateľného rastu; 3. Trvalo udržateľné hospodárenie s prírodnými zdrojmi; 4. Oblasť zmeny klímy a zmiernenie jej následkov; 5. Znižovanie rizika katastrof; 6. Podpora výskumu, inovácií a činností vedeckej spolupráce a 7. Sociálna, kultúrna a hospodárska výmena medzi ZKÚ, ich susednými krajinami a ďalšími partnermi.

Rozhodnutie Rady 2001/822/ES o pridružení zámorských krajín a území k Európskemu spoločenstvu zo dňa 27. novembra 2001; elektr.verzia:http://www.eur.lex.europa.eu/LexUriServ.do ?uri=CELEX:32001D0822:CS:HTML.
Rozhodnutie Rady o ostrove Svätý Bartolomej (COM/2012/061); elektr.verzia:http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:264:0001:0002:SK:PDF.
Zmluva o EHS; elektr.verzia:http://www.euroskop.cz/galery/2/754-smoluva o es.pdf.

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EFFECTS OF THE ECONOMIC CRISIS ON THE FUNCTIONING OF THE EU AND EUROZONE

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Abstract: This article deals mainly with the general analysis of the economic crisis on the EU level and highlights the position of Slovakia in this respect.

Key words: economic crisis, Slovakia, Eurozone, treaty

1 EFFECTS OF THE ECONOMIC CRISIS ON THE FUNCTIONING OF THE EU AND EUROZONE

The economic crisis had wide-ranging effects on the functioning of the EU and Eurozone. Despite some fatigue after the long ratification process of the Lisbon Treaty, the economic crisis served as an accelerator for discussions on the future of European integration, including possible Treaty changes. The first Treaty change which had a limited scope and consisted of the amendment of Article 136 TFEU, was a consequence of an effort to ensure the legal certainty for permanent stability mechanism – the ESM. Despite relatively long ratification process, which lasted almost two years, this amendment has already entered into force. More importantly, legality of its procedural elements was reviewed by the Court of Justice in case Pringle and no legal objection against its validity was found.

It took another year for the Eurozone to realize its volatility and interdependence of its Members resulting in high risk of spill-over effects. This was obvious in the end of 2011, when the markets generated high interest rates for the bonds of the most endangered Eurozone Members. These were the reasons that brought on the agenda of the European Council in December 2011 the question of Treaty change again, however this time in a more ambitious setting.

Sensitive proposals which touched upon some crucial areas of national competence, cumulated with political prudence in question of Treaty change, caused that the European Council failed to reach an agreement and the result of the summit was an intergovernmental treaty, also known as the Fiscal Compact. Although not as ambitious as intended originally, the Fiscal Compact had certainly some tempering effect on the markets.

The discussions about Treaty change resurfaced again in 2012, however it is clear, that any kind of initiative in this respect might be undertaken only after 2014, when the new Parliament and the Commission take their office.

The adopted or discussed Treaty changes after the Lisbon Treaty have a common feature – the tendency towards two or multi-speed Europe. This concept is not completely new, as an example it is possible to mention the Euro, Schengen and various opt-outs and ins. One must accept that this kind of flexibility has enabled the EU to move forward when necessary. Of course the best solution is always the one with all Member States on board, but the reality shows that this is not always possible.

2 LEGAL CHALLENGES

And here the author is coming back to legal challenges related to this process. As Professor Paul Craig clearly states “A political reality well may be a mother of legal invention”.

Indeed the unthinkable legal solutions satisfying the contradictory demands are immanent part of history of EU integration. The story about former legal adviser of the Council of the EU Jean-Claude Piris, who following the unsuccessful referendum on Maastricht Treaty wrote the text of Danish opt-out on the piece of Financial Times during the flight from Brazil to Oslo became a legend. However the future will beyond any doubts bring even more legal questions on the future settings in the EU and Eurozone.

There are some legal questions which we can pronounce even at this stage. What will be the relationship between the core of the EU and the non-participating Member States? How can be the EU institutions involved in the process of closer integration?

3 POSITION OF SLOVAKIA

Last but not least the author would like to say few words about the position of Slovakia in the EU and Eurozone. Next year we will mark the tenth anniversary of Slovak accession to the EU. Slovakia became EU Member in the course of a pending institutional reform process aiming at making the EU more efficient, open and democratic.

Despite some complications in the national ratification process of both Constitutional and Lisbon Treaty, Slovakia was among the countries which supported the institutional innovations.

After our accession we became part of the Schengen area and as the only Visegrad country also the Member of Eurozone. As the process of integration goes ahead, the big difference with previous stages is that today we are part of the core of Europe, and we are able to influence directly the future shape of integration.

So what is the position of Slovakia with respect to deeper integration? The author is of opinion that we are firm supporters of an inclusive approach which aims to involve all Member States into discussions on the future of the EU and the Eurozone. This fully reflects our commitment towards V4 partners who are not part of the Eurozone yet.

The optimal solution remains finding the right balance between the two objectives – necessity for closer integration in the Eurozone and the aim of European unity. This will not be easy, but it seems to be the only solution. If the EU has to move forward instead of breaking-up, and the two or multi-speed Europe is the price to pay, than there seems to be no other alternative. In respect to what I have just said, Slovakia has achieved the highest degree of integration and we believe that its place is in the core of the EU. We are also of the view that further integration is the right tool to address loopholes in the architecture of the European project.

In the process of ensuring sound fiscal and economic policies we must not forget the democratic legitimacy as an accompanying condition to any process of further integration. And by that the author is not speaking only about the strengthening of the competences of the European Parliament, but mainly about bringing these processes closer to our citizens and national parliament. If we fail to explain what is intended by further integration, we risk the scenario of confusion and ultimately reluctance to deeper integration. This is certainly something Slovakia wants to avoid.

4 CONCLUSION

The economic crisis brought further challenges for the EU and the Eurozone. We must be able to face them with open mind and constructive solutions supported by solid legal foundations. In this respect the author is convinced, that the conference can generate important contributions.

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TRANSEURÓPSKE SIETE A ICH SÚČASNÝ VÝVOJ

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Abstract: This article provides an overview about the Trans-European Networks, their importance and how they develop in current days.

Abstrakt: Článok priblíži trans- európske siete, ich význam a ako sa vyvíjajú v súčasnosti

Key words: Trans-European Networks, current development, European Union.

Kľúčové slová: Trans-Európske siete, súčasný vývoj, Európska únia.

1 ÚVOD

Transeurópske siete (TEN) evidujú svoj rozmach až po prijatí Maastrichtskej zmluvy. Sú dôležitým nástrojom na dosiahnutie cieľa vytvorenia vnútorného trhu v rámci ktorého sa realizuje voľný pohyb tovaru, osôb, služieb a kapitálu.
Transeurópske siete (transport, telekomunikácie a energia) a ich význam v procese integrácie je niečo, čo získalo pozornosť Európskej únie. Cieľom programu transeurópskych sietí je vyvinúť kompletnú a rozvinutú infraštruktúru Únie. V strede tohto plánu je úmysel prepojiť a ďalej rozvinúť a racionálnejšie využiť Európsku infraštruktúru.

2 SÚČASNÝ VÝVOJ TRANSEURÓPSKYCH SIETÍ

Po podpise Maastrichtskej zmluvy vznikol tzv. kohézny fond, ktorého účelom bolo zlepšenie infraštruktúry v menej rozvinutých krajinách Únie. Táto pomoc spolu s Európskym fondom regionálneho rozvoja (ERDF) znamená výrazný nárast v rozvoji dopravnej infraštruktúry v krajinách Únie.

Z Európskeho fondu regionálneho rozvoja boli financované aj viaceré projekty na území Slovenskej republiky ako napríklad Operačný program Doprava, ktorého cieľom bola podpora trvalo udržateľnej mobility prostredníctvom rozvoja dopravnej infraštruktúry a rozvoje verejnej osobnej dopravy. Operačný program Technická pomoc, Operačný program pre Bratislavu, ktorého cieľom bolo posilnenie konkurencieschopnosti regiónu prostredníctvom rozvoja jeho znalostnej ekonomiky za súčasného zvyšovania atraktívnosti regiónu a kvality života a iné programy.

V stručnosti by som uviedla niekoľko poznámok k vývoju transeurópskych sietí. Pôvodne Európske spoločenstvá nemali explicitné kompetencie v oblasti infraštruktúry . Prvotná iniciatíva Európskych spoločenstiev sa koncentrovala na zavedenie konzultačného procesu za účelom zlepšenie koordinácie národných infraštruktúrnych politík. Navyše v rokoch 1960-tych Európsky investičná banka začala podporovať projekty na rozvoj infraštruktúry v oblasti Spoločenstiev. Od roku 1975 začala podpora Európskeho fondu regionálneho rozvoja . Počas príprav jednotného trhu v druhej polovici rokoch 1980-tych, Európsky industrialisti vyjadrili svoje znepokojenie, že práve kvôli nedostatočne rozvinutej infraštruktúre.

Momentálne sa úprava transeurópskych sietí nachádza v čl. 170 až 172 ZFEÚ a v ostatných aktoch Únie. Európska únia rozvíja transeurópske siete v oblasti dopravy, telekomunikácií a energetických infraštruktúr. Rozvoj týchto sietí prispieva k rozvoju vnútorného trhu. Ide o podporu vzájomného prepojenia a súčinnosti národných sietí, ako aj prístupu do týchto sietí, v rámci ktorých sa zvažuje prepojenie centrálnych regiónov Únie s ostrovnými, vo vnútrozemí uzavretými a okrajovými regiónmi.

Aktuálna výzva Európskej únie je vybudovanie takej dopravnej siete, ktorá uľahčí prepravu osôb a tovaru medzi členskými štátmi, pričom do roku 2020 by dopravná infraštruktúra mala predstavovať 90 000 km diaľnic a ciest vysokej kvality. Európska únia bude mať možnosť zapájať sa do riadenia bezpečnosti ciest, ktoré sú súčasťou siete TEN, prostredníctvom bezpečnostných auditov požadovaných v štádiu plánovania a pravidelných kontrol bezpečnosti cestnej siete.

Infraštruktúra v sebe nezahŕňa len cesty, potrubia ale už aj technológiu a prenos informácií pomocou technológie, procesov, a ich sieťové služby a efektívny manažment.

Akčný plán s názvom: Európska cesta k informovanej spoločnosti: akčný plán v rámci ktorého začal rozvoj informačných technológií na pôde Európskej únie. Európa sa začlenila do informačnej revolúcie, ktorá sa dá porovnať s priemyselnou revolúciou. Už Biela kniha Komisie v roku 1993 zdôraznila význam vývoja a rozvoja informačných technológií. Na základe Bielej knihy[1] skupina expertov predložila svoju správu a rozvoji informačnej spoločnosti a návrhmi do budúcnosti na jej rozvoj v rámci EÚ. Išlo o tzv. Bangemannovu správu. Táto správa zdôraznila naliehavú potrebu prijatia rôznych opatrení na pôde Európskej únie. Úlohou únie malo byť vytvorenie legislatívneho rámca pre rozvoj informačnej spoločnosti. Táto správa vytvorila základ pre formulovanie už spomínaného Akčného plánu. Podľa akčného plánu malo dôjsť k prijatiu legislatívneho rámca, ktorý umožní liberalizáciu infraštuktúry, tiež propagácia informačnej spoločnosti, snaha využiť potenciál informačnej spoločnosti maximálne pre rozvoj európskej kultúrnej a jazykovej rozmanitosti.

Tiež stojí za zmienku Zelená kniha Komisie – Život a práce v informačnej spoločnosti – ľudia na prvom mieste. Komisia reagovala na obavy ľudí z informačnej spoločnosti týkajúce sa dôsledkov na život ľudí. Je evidentné že informačná spoločnosť prináša pozitíva a rast pre hospodárstvo a životnú úroveň.

Z oblasti energetiky ako jedna z transeurópskych sietí je potrebné spomenúť aktuálne prijatie tzv. tretieho energetického balíka – ENTSO-E. Základom tohto balíka sú Smernice 2009/72/ES, 2009/73/ES a nariadenia 713/2009, 714/2009 a 715/2009. NA Slovensku bol tento implementovaný v júli 2012 do národnej legislatívy. Tretí energetický balík vo všeobecnosti posilnil práva odberateľov, liberalizoval trh s energiami a zvýšil právomoci a nezávislosť regulačného úradu. Európska sieť prevádzkovateľov prenosných sústav, ktorá vznikla na základe tretieho energetického balíka, Agentúra pre spoluprácu regulačných úradov. Nariadenie – má nahradiť existujúci inštrument pre TEN-E a nanovo definovať pravidlá posudzovania a podpory infraštruktúry projektov celoeurópskeho významu. 2014 – dobudovanie jednotného vnútorného trhu.

V rámci telekomunikačného trhu ako jednej z transeurópskych sietí existuje politika dobudovania jednotného telekomunikačného trhu, do ktorej Európska únia vkladá aj nádeje v rámci obnovenia ekonomiky po pretrvávajúcej hospodárnej kríze. V rámci Aktu o jednotnom trhu II, predloženého Komisiou je vyjadrená snaha dobudovať jednotný digitálny trh do roku 2015.

Taktiež v rámci piatich cieľoch stratégie Európa 20202 a siedmych hlavných iniciatív sa nachádza aj „Digitálny program pre Európu“, ktorý je zavedený na urýchlené zavedenia vysokorýchlostného internetu a čerpanie výhod, ktoré prináša jednotný digitálny trh pre domácnosti a podniky. Cieľom je zabezpečiť udržateľný hospodársky a sociálny prínos prostredníctvom jednotného digitálneho trhu založeného na superrýchlom internetovom pripojení a interoperabilných aplikáciách, so širokopásmovým internetovým pripojením pre všetkých do roku 2013 a prístupom k rýchlejšiemu internetovému pripojeniu (30 Mbps alebo viac) pre všetkých do roku 2020, pričom najmenej 50 % európskych domácností by malo mať internetové pripojenie s rýchlosťou nad 100 Mbps.

V októbri 2013 sa uskutoční jesenný summit európskych lídrov zameraný na inovácie a digitálne hospodárstvo. Únia sa venuje politike rozvoju internetovej infraštruktúry, tvorby nových modelov podnikania, zlepšeniu vzdelávania ako aj rozvoju verejných služieb. Internet hrá kľúčovú rolu pri iniciatívach stratégie Európa 2020 prijatej v roku 2010, ktorej cieľom je aj zvýšiť konkurencie schopnosť európskeho hospodárstva. Aktuálne sa na pôde Únie skúma potenciál internetu a jeho vplyv na možnosť zvýšenie HDP, pričom odhady hovoria o možnosti zvýšenia HDP o 5% cez zvýšenie digitálnej gramotnosti pracovnej sily a aj prostredníctvom reformy rámcových podmienok pre internetovú ekonomiku. V rámci stratégie Európa 2020 svetový dopyt v oblasti informačných a komunikačných technológií tvorí trh s hodnotou 2 miliárd EUR, ale iba štvrtina tejto hodnoty pripadá na európske podniky. Európa zaostáva aj v oblasti vysokorýchlostného pripojenia na internet, čo negatívne vplýva na jej schopnosť inovovať, a to najmä vo vidieckych oblastiach, ako aj na šírenie znalostí a distribúciu tovarov a služieb on-line.

[1] Biela Kniha s názvom Rast, Konkurencieschopnosť, zamestnanosť – Výzvy a cesty vpred do 21. storočia

[2] text Stratégie sa nachádza na stránke: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:SK:PDF (10. 10. 2013)

Podľa dokumentu predloženého Komisiou za účelom posúdenia aktuálneho stavu telekomunikačného trhu a predloženia návrhov riešenia vyplýva, že v súčasnosti totiž existujú prekážky pre vstup na trh a poskytovanie cezhraničných služieb, ktoré robia tieto služby nákladnejšími a nedostupnejšími. Fragmentácia zasahuje všetky podstatné sektorovo špecifické pravidlá, teda oprávnenie vykonávať činnosť podľa jednotných pravidiel, prístup ku kľúčovým vstupom pre prevádzkovanie pevných alebo mobilných sietí a pravidlá ochrany koncového používateľa, pričom hlavným príznakom sú neopodstatnené náklady na cezhraničné komunikácie v rámci Únie. Na to, aby sa našlo východisko zo súčasnej fragmentácie, sú nevyhnutné opatrenia na úrovni EÚ, ktoré sa zamerajú na riešenie zistených nedostatkov a umožnia prevádzkovateľom využívať jednotnosť regulácie a spoločné vstupy s cieľom poskytovať služby na celoeurópskom základe. Opatrenia na úrovni EÚ by tiež viedli k zníženiu administratívnej a regulačnej záťaže a k trvale vysokej úrovni ochrany spotrebiteľov, ktorá by posilnila dôveru a istotu a priniesla používateľom širší výber.

V diskusii o smerovaní, ktorá sa uskutočnila na zasadnutí Rady pre dopravu, telekomunikácie a energetiku 6. júna 2013, značný počet delegácií podporil cieľ dobudovania jednotného telekomunikačného trhu, pričom dôraz sa kládol okrem iného na zaistenie silnej hospodárskej súťaže, presadzovanie lepšieho výberu pre spotrebiteľov, zabezpečenie neutrality siete, primerané riešenie roamingu, zabezpečenie väčšej jednotnosti regulácie, predchádzanie regulačnej arbitráži a zaistenie užšej koordinácie vnútroštátnych prístupov k spravovaniu frekvenčného spektra. Veľký počet delegácií vyjadril znepokojenie nad centralizáciou politiky prostredníctvom jednotného európskeho regulačného orgánu a/alebo centrálneho oprávnenia EÚ a prideľovania frekvenčného spektra. V Európskom parlamente sa o nadchádzajúcich návrhoch rokovalo už na troch zasadnutiach. Poslanci EP zdôraznili najmä potrebu odstrániť v rámci skutočného jednotného trhu s elektronickými komunikačnými službami roaming, zaviesť jasné a prísne pravidlá o neutralite siete a zabezpečiť vysokú úroveň ochrany spotrebiteľa. Poslanci Európskeho parlamentu zároveň podčiarkli potrebu reálnosti a posúdenia nových návrhov z hľadiska očakávaní a časových obmedzení

V oblasti transportu a dopravy sa predpokladá, že objem nákladnej dopravy má do roku 2050 vzrásť o 80 percent a osobná doprava by sa mala dovtedy zvýšiť o viac ako polovicu. Nová základná dopravná sieť v EÚ má prepojiť 83 hlavných európskych prístavov so železničnými a s cestnými spojeniami, ako aj 37 kľúčových letísk so železničnými prepojeniami do najvýznamnejších miest. Zároveň by malo byť zmodernizovaných 15-tisíc kilometrov železničných tratí na vysokorýchlostnú prepravu a uskutočnených 35 významných cezhraničných projektov na odstránenie prekážok. Posilnenie jednotného trhu dopravy má podľa Bruselu umožniť skutočný voľný pohyb tovarov a osôb v rámci Únie.

3 ZÁVER

Transeurópske siete sú dôležitým nástrojom na rozvoj vnútorného trhu. Európska únia vkladá do transeurópskych sietí nádej aj vo vzťahu k hľadaniu východiska z pretrvávajúcej hospodárskej krízy a nárastu HDP.

Pre zaujímavosť uvediem, že prvý úspešný prípad porušenia Zmluvy začatý na podnet Európskej Komisie voči Slovenskej republike bol práve prípad neimplementácie smernice Rady 96/48/ES z 23. júla 1996 o interoperabilite systému transeurópskych vysokorýchlostných železníc.[3] Slovenská republika nesplnila povinnosť transponovať danú smernicu v lehote do 01.05.2004 a v samotnom konaní o porušenie zmluvy to ani nepopierala. Slovenská republika však vyhlásila, že nápravu uskutoční podľa rozsudku Súdneho dvora.[4]

Použitá literatúra:

TURNER, C.: Trans-European Networks: Tha infrastructure for the Internal Market, University of North London Press, 1994, 25 s. ISBN 1853771708

SPIEKERMANN, K a WEGENER, M.: Trans-European Networks and Unequal Accessibility in Europe, In.: European Journal of Regional Development (EUREG) 4/96, s. 35-42

[3] Ú.V. ES L 235, s. 6; mim, vyd. 13/017, s. 152

[4] prípad C-114/06 Komisia vs. Slovenská republika, rozsudok z 08. 02. 2007, Zb. r. 2007 I-00018

NORMAN, C., VICKERMAN, R.: Local and regional implications of trans-European transport networks: The Channel Tunel Rail Link In: Environment and Planning A, 1999, volume 31, s. 705-718
STEPHENSON, P.,J.: The Role of Working Groups of Commissioners in Co-ordinating Policy Implementation: The Case of Transeuropean Networks (TENs) In.: Journal of Common Market Studies (JCMS) 2010 Volume 48, číslo 3, str. 709-736
rozsudok Súdneho dvora Európskej únie z 08. 02. 2007, C-114/06, Slovensko vs. Komisia

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RIGHT TO INVIOLABILITY OF THE HOME - GUARANTEED BY THE COMMISSION? [1]

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Abstract: The aim of the article is the inviolability of the home during the administrative procedure of the Commission, when examining the violation of competition law provisions. As regards the Commission's powers under Article 20 and 21 of the Regulation 1/2003, the guarantee of effective mechanism of protection of examined subjects is of crucial importance. The author focuses on detailed analysis of Article 8 ECHR with regards to business premises of legal entities and related jurisprudence of ECtHR and Court of Justice of EU.

Key words: Article 8, ECHR, inspection, home, Commission, interference

1 INTRODUCTION

Article 8 of the European Convention on Human Rights (hereinafter „ECHR“) guarantees the right to respect for private life, family life, home and correspondence. The purpose of the right is to protect the individual against arbitrary action by the public authorities. Generally, it is concluded that this purpose is achieved by shielding the four dimensions of personal autonomy of an individual as divided above. Although the scope of Article 8 ECHR is very broad and thus is one of the most open-ended provisions of the ECHR, it shares its structure with all the ECHR's qualified rights.

The first part sets out the precise rights which are to be guaranteed to an individual by the State, while the second part lies down conditions upon which a public authority might legitimately interfere with the enjoyment of that right. Article 8 (2) ECHR indicates the circumstances in which public authorities can validly interfere with the rights set out in Article 8 (1) ECHR; only interferences which are 'in accordance with law' and 'necessary in a democratic society' in pursuit of one or more of the legitimate aims listed in Article 8 (2) ECHR will be considered to be an acceptable limitation by the State of an individual's rights.

In accordance with the structure of Article 8 ECHR, the following approach to scrutinizing cases, in which this article may have a bearing, should be taken. In a first step, it should be established whether there is an interference with the right to private life, family life, home or correspondence. To this end, it has to be established whether a certain measure, action or omission falls within the scope of one the interests, which Article 8 (1) ECHR protects, and whether it has some impact on the way in which the rights can be exercised, whether it limits the extent to which the right can be enjoyed. Afterwards, it should be scrutinized whether this interference is justified pursuant to Article 8 (2) ECHR.

2 COMMISSIONS'S INSPECTION POWERS AND THE "HOME" CONCEPT

Although there is no clear authority from the European Court of Human Rights (hereinafter "ECtHR"), the Commission's inspection powers under Article 20 of the COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[2] (hereinafter "Regulation 1/2003") raise questions about their compatibility with the right to respect for private and family right under Article 8 (1) ECHR. In 1992 the ECtHR extended the notion of home to cover business premises in the context of justifying a search of such premises under Article 8 (2) ECHR. In *Niemietz v. Germany* (hereinafter "Niemietz case") the ECtHR held that *„as regards the word 'home', the Court observes that in certain Contracting States, it has been accepted as extending to business premises. In this context also, it may not always be possible to draw precise distinctions, since activities which are related to a*

[1] Preparation of this paper was supported by the grant APVV-0158-12.

[2] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1/1. lt 59

profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises".[3] In such circumstances, business premises were entitles to the protection of Article 8 (1) ECHR.

However prior to the *Niemietz case*, the ECtHR consistently stipulated that the 'object and purpose' of Article 8 ECHR was the protection of individuals against arbitrary interference by the State and its authorities.[4] The core argumentation against the inclusion of business premises relied on the fact that is does not fit with the 'object and purpose' of Article 8 ECHR.[5] Therefore, it is necessary to answer the question: Do Commission's powers to inspect business premises conflict with the right to the inviolability of the home as enshrined in Article 8 ECHR? If positive, to what extend?

2.1 Substantive and procedural requirements for conducting inspection

Competition law and its enforcement in the European Union are characterized by the co-existence of EU law and national laws substantive and procedural rules. Convergence in substantive analysis in competition is achieved through the obligation of National Competition Authorities (hereinafter „NCAs") and national courts to apply Articles 101 and 102 Treaty on the Functioning of the European Union (hereinafter "TFEU") pursuant to Article 3 of Regulation 1/2003 and mechanisms contained in this instrument to ensure full cooperation and coherency.[6]

However, the situation is more complex in respect of procedures and sanctions for the implementation of the EU competition rules in the Member States, as this is not generally regulated or harmonized on the EU level. Procedures or sanctions are largely governed by national laws, subject to general principles of EU law, in particular, the principles of effectiveness and equivalence. On the other hand, what is common to competition authorities within almost all EU jurisdictions, is the power to inspect business premises. Most jurisdictions foresee a single legal basis for such inspections, while some Member States carry out inspections on the basis of different sets of powers.

Since the aim of this article is to highlight the relationship between Commission's inspection powers and right to inviolability of home, this chapter gives only very brief overview on procedural matters in Member States and on the EU level, mainly the initiation of the proceeding in different jurisdictions. It should be stressed that in the EU system a distinction is made between inspections on the basis of a written authorization and inspections ordered by decision of the Commission.[7]

From the substantive point of view, the most common ground for initiating an inspection is generally the existence of elements that point towards reasonable grounds for suspecting a violation or infringement. In some jurisdictions it is required that an investigation has been opened in order to support inspections; moreover, others have adopted such a requirement in practice. Usually, an inspection can be performed at any time during the proceedings. If a case begins with an inspection, the order initiating the proceedings has to be submitted to the undertaking concerned firstly, subsequently followed by the court warrant that authorizes the inspection. In almost all of the jurisdictions, either a court warrant or an inspection decision granted by the competition authority is required in order to conduct an inspection in business premises. Nevertheless, in some southern jurisdictions, for instance Spain, Italy, Malta competition authorities need a court warrant in case they face opposition, they want to use coercive measures, or they want to request the cooperation of the police.

In Slovakia the Chair of the Antimonopoly Office of the Slovak Republic authorizes the conduct of an inspection.

2.2 Legitimate interference within the Article 8 ECHR

As already stated, the right of inviolability of home enshrined in the Article 8 (1) ECHR is to some extend limited by the exception of Article 8 (2) ECHR, which stipulates conditions allowing interference by public authority and hence *"in accordance with the law and necessity in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of*

[3] Niemitz v. Germany, para. 30
[4] Emberland, page 115.
[5] Ibid, page 113.
[6] INVESTIGATIVE POWERS REPORT, page 5.
[7] Ibid, page 6.

the rights and freedoms of others". It is not surprising that since the Article 8 (2) ECHR provides for an exception to a right guaranteed by the ECHR, the ECtHR has held that is must be *"interpreted narrowly".*[8]

A measure which constitutes an interference with the right of Article 8 ECHR will only be compatible with that provision where it is 'in accordance with law', implying that it must be based on accessible legal rules, which are sufficiently foreseeable in their application. More precisely, in order to satisfy Article 8 ECHR legality requirement, the quality of the law in question must be such that it is accessible to the persons concerned, and formulated with sufficient precision to enable them, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[9] This is known as the foreseeability requirement and it means that a law which confers discretion is not in itself inconsistent with Article 8 ECHR as long as the scope of discretion and the manner of its exercise are indicated with sufficient clarity to give the individual adequate protection against arbitrary interference.[10] Moreover, the exercise of discretion by administrative authorities may well satisfy the requirements of Article 8 (2) ECHR where it is subjected to review by the courts. On the other hand it must be borne in mind that the greater degree of interference, the greater precision is sought with the law defining the limits of the interference. Even though this criterion is usually linked to domestic law, according to the *Bosphorus case*, the EU law is applicable as the ECtHR held that *"an EU regulation is generally applicable and binding in its entirety on the Member States."*[11]

Once the interference is found to be 'in accordance with law', the ECtHR proceeds to the question whether it 'pursues a legitimate aim' under Article 8 (2) ECHR, that contains a list of the aims upon which the state can seek to rely in this regard. It falls on the respondent State to identify objectives of the interference, and the fact that the grounds for permissible interference are so wide means that the State can usually make a plausible case in support of the interference. The Commission's investigation procedures fall within the public interest exception as it pursues the legitimate aim of protecting effective competition and consequently the 'economic well-being of the EU.'

The final stage of the Article 8 ECHR test is the determination of whether the interference is 'necessary in a democratic society.' It is clearly not sufficient that the State had some reason for taking the measures that created the interference as the interference must be 'necessary'. The meaning of 'necessary' ECtHR explained in *Handyside v. the United Kingdom*. It further elaborated on this issue in *Olsson v. Sweden*, where it held that *"the notion of necessity implies that interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."*[12]

Excessively strict or generous interpretations of the term 'necessary' have thus been rejected by ECtHR, which instead pursues a policy of proportionality. Overall, the principle of proportionality recognizes that human rights are not absolute and that the exercise of an individual's rights must always be checked by the broader public interest. This principle is one way in which this balance is achieved and its use throughout ECtHR's application of ECHR is now widespread. ECtHR has frequently reminded that inherent in the whole of ECHR is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[13] The justification of those limitations is said to arise because of the need to balance the severity of the restriction placed on the private side against the importance of the public interest.

As to the Commission's inspection powers under Regulation 1/2003, these clearly satisfy the conditions of being 'in accordance with law' and 'pursuing legitimate aim'. The issue that needs to be analyzed is the proportionality of such inspections.

[8] Klass v. Germany, para. 42
[9] Andersson v. Sweden, para. 75
[10] Olsson v. Sweden, para. 62
[11] Bosphorus v. Ireland, para. 145
[12] Olsson v. Sweden, para. 67
[13] Soering v. United Kingdom, para. 87

3 RELEVANT CASE LAW

Although the ECtHR's has said that the 'object and purpose' of Article 8 ECHR is to protect individuals against public authorities' arbitrariness, it also reveals a possible extension of the 'home' protection to business premises. However, a broad approach of the provision is not favored.
In *Chappell v. United Kingdom* the ECtHR held that searching a company's premises, which were also the home of the company's only shareholder had interfered with the right to respect for his home. The ECtHR found Article 8 ECHR applicable due to the impossibility to distinguish his private residence from his business premises.

Similar findings were made in *Niemietz case,* where the ECtHR held that the right to respect of private and family life extends to *"certain professional or business activities or premises".*[14]

The *Niemietz case* concerned the privacy protection of a lawyer's professional office which was situated within his private residence. The German government maintained, inter alia, that Article 8 ECHR was not applicable because the provision clearly draws a distinction between private activities (which are protected) on the one hand and business and professional activities (which are not protected) on the other. Unwilling to plunge itself in the endless conceptual gymnastics of defining the terms 'home' and (business or private) 'activities,' the ECtHR took a very practical stand and just accepted the inclusion of the lawyer's office within the reach of the term 'home'.

The search of Mr. Niemietz's office constituted an interference with his rights under Article 8 (1) ECHR. Notwithstanding, the ECtHR held – similar to other Article 8 ECHR cases – that the interference was 'in accordance with the law' and 'pursued aims that were legitimate', namely 'the prevention of crime' and 'the protection of other's rights'. As regards the 'democratic necessity' requirement, however, the search of Mr. Niemietz's premises in quest of documents to be used in criminal proceedings was disproportionate to the aim of preventing crime and protecting the rights of others, even though it took place under the authority of a judicial warrant.

When applying Article 8 (2) ECHR in the context of Commission inspections, the ECtHR in *the Niemietz case* held that interference with Article 8 (2) ECHR *"might well be more far-reaching where professional or business activities or premises are involved than otherwise be the case"*.[15] The ECtHR has also accepted that public authorities have a margin of appreciation with respect to actions taken under Article 8 (2) ECHR, which might be broader where business activities or premises are involved.

When considering that legal persons may invoke Article 8 ECHR under certain circumstances the ECtHR provided a dynamic interpretation, implying that it is not bound by its previous judgments. Such an interpretation is in compliance with the ECtHR's teleological approach, which implies that human rights protection must be evaluated in accordance with the developments of the society. Of particular interest in that regard is the *Colas Est v. France case (hereinafter "Colas Est case")*, where the investigated companies, suspected of anti-competitive practices, claimed that the arbitrary inspections conducted by the French Competition Authorities had infringed their right to respect for their 'home'.[16] In the *Colas Est case*, the ECtHR found Article 8 of ECHR to include the protection of the applicant's business premises, because the applicant (regardless of its corporate nature) had become the victim of unrestricted governmental arbitrariness.

The ECtHR's reasoning concerning this issue leaned heavily on its prior *Niemietz case* in which it had created the necessary space for the inclusion of corporate offices within the confines of the term 'home' in Article 8 of ECHR. The ECtHR stressed that individuals' privacy in the workplace should be treated equally to privacy at home. Consequently, freedom from arbitrariness is both a cornerstone of the rule of law principle and an important object of the Article 8 ECHR protection. According to the ECtHR, the searches and seizures were in accordance with the law. The crucial question both in *Niemietz case* and *Colas Est case* was whether the requirements for a legitimate interference with the company's premises by the public authorities were necessary in a democratic society. It should be borne in mind that the interference pursued legitimate aims as they had been carried out in the interests of the economic well-being of the country and prevention of crime. The ECtHR paid attention to the competition authorities' very wide powers – similar to the Commission's – and explained that additional safeguards against abuse are needed, which must be strictly proportionate to the legitimate aim pursued.[17] At the end the ECtHR found a violation of Article 8

[14] Niemitz v. Germany, para. 31
[15] Niemitz v. Germany, para. 31
[16] Colas Est, para. 28 and para. 35 - 39
[17] Colas Est, paras. 32 and 44

ECHR and held that the 'democratic necessity' requirement had not been met, even though interference might be more far-reaching when business premises are being inspected.[18]

By introducing such a leniency element, the *Colas Est case* implies a lenient standard of judicial review with regard to public authorities' interference with business actors' privacy under Article 8 ECHR.[19]

The Court of Justice of the European Union (hereinafter "CJEU") adopted this leniency element in its *Roquette Frères judgment*[20] delivered the same year. By decision, the Commission had ordered the company to submit to an inspection, assisted by the French Competition Authorities. They had obtained an order under French competition law permitting them to enter Roquette's premises and to seize documents. Roquette cooperated in the investigation under protest and sought the annulment of the French court's order. Since this was a preliminary ruling the CJEU answered the French Cour de Cassation that the Commission is expected to provide very detailed information to satisfy the national court that the decision is not arbitrary or a disproportionate interference.[21] It relied on a general principle of EU law, which required that any intervention must have a legal basis, be justified on grounds laid down by law, and not be arbitrary or disproportionate in its application. The CJEU also stressed that the scope of the Commission's obligation to identify the subject matter and purpose of the inspection, cannot be leveraged due to reasons related to the effectiveness of its investigations.

In the light of the so-called conflict between the ECtHR and CJEU, it further held that to be able to determine the scope of the protection against arbitrary and disproportionate intervention by public authorities in the sphere of business premises, it is necessary to take account of the development of the ECtHR's case law.[22]

In accordance with the ECtHR's case law, the CJEU held that the scope of interference by public authorities might be broader in relation to business premises. In respect of *Colas Est case*, where the ECtHR held that Article 8 ECHR had been infringed due to the French Competition Authorities' inspections, which had been 'disproportionate to the legitimate aim pursued' and violated the 'democratic necessity' requirement, the CJEU held that the Commission's inspections did not comply with Article 8 ECHR.[23]

4 CONCLUSION

The protective scope of Article 8 ECHR has extended on the case-by-case basis. The ECtHR has relied on its prior judgments to substantiate its later decisions. For obvious reasons, the ECtHR has not yet decided on the matter of Commission's inspection powers. Due to the fact that Competition Authorities' powers as described in *Colas Est case* were very similar to those of Commission, the question arises; whether the Commission's inspection powers under Article 20 could stand a review by ECtHR, mainly conditions as enshrined in Article 8 (2) ECHR that justify the public authority interference.

When looking at the Article 8 ECHR case law in the context of legitimacy of inspections of business premises, it may be concluded that the public interest usually prevail the private one. However, the circumstances in each case are decisive leading to legal uncertainty for business entities that may be subject to Commission's inspection powers.

Bibliography:

Andreangeli, A.: EU Competition Enforcement and Human Rights, Edward Elgar, 2008. 296 pages. ISBN-13: 978-1847206329

Craig, P., De Búrca, G.: EU Law: Text, Cases and Materials, 5th edition. Oxford University Press, 2011. 1320 pages. ISBN-13: 978-0199576999

Emberland, M.: The Human Rights of Companies – Exploring the Structure of ECHR

[18] Colas Est, para. 42

[19] Colas Est, paras. 30, 33, 49f

[20] C-90/00 Roquette Freres, para. 29

[21] C-90/00 Roquette Freres, para. 88f

[22] C-90/00 Roquette Freres, para. 29

[23] The Colas Est case was a decisive moment for CJEU, which until the ECtHR'j judgement favoured a restrictive interpretation of business premises 'home' protection.

Protection. Oxford University
Press, 2006. 268 pages. ISBN-13: 978-0199289837
Jones, A., Sufrin, B.: EU Competition Law: Text, Cases and Materials, 4th edition. Oxford University Press, 2010. 1376 pages. ISBN-13: 978-0199572731
Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008, C 115/49.
Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1/1
European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 in Rome.
Joined Cases 47/87 and 227/88, Hoechst AG v Commission [1989] ECR 2859
Case C-94/00, Roquette Frères SA v Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes [2002] ECR I-9011
Appl. No 5029/71, Klass and Others v Germany, 6 September 1978.
Appl. No. 10465/83, Olsson v Sweden, 24 Mars 1988
Appl. No. 10461/83, Chappell v UK, 30 March 1989
Appl. No. 14038/88, Soering v UK, 7 July 1989.
Appl. No. 13710/88, Niemietz v Germany, 16 December 1992
Appl. No. 10828/84, Funke v France, 25 February 1993
Appl. No. 37971/97, Société Colas Est and Others v France, 16 April 2002
Appl. No. 45036/98, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland, 30 June 2005
ECN WORKING GROUP COOPERATION ISSUES AND DUE PROCESS: Investigative powers report, 31 October 2012. It can be found: http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf
A guide to the implementation of Article 8 of the European Convention on Human Rights, 2003. It can be found: http://www.refworld.org/pdfid/49f17e212.pdf
http://echr-online.com/art-8-echr/introduction#Text Article 8

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HOSPODÁRSKA SÚŤAŽ – EURÓPSKE A GLOBÁLNE VÝZVY[1]

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Abstract: Competition - basic principle of market economy. Globalization. Economic and legal impact. European competition policy. European competition law. National champions. Ecomomic approach. International competition law.

Abstrakt: Príspevok sa zaoberá novými podmienkami, ktoré vytvára pre hospodársku súťaž prebiehajúci proces globalizácie. S tým súvisí aj potreba adekvátnej reakcie nielen zo strany Európskej únie a jej súťažnej politiky, ale aj potreba novej právnej úpravy súťažných vzťahov prerastajúcich hranice národných štátov a aj samej Európskej únie.

Key words: Competition - basic principle of market economy. Globalization. Economic and legal impact. European competition policy. European competition

Kľúčové slová: hospodárska súťaž, globalizácia, súťažná politika a súťažné právo EÚ, národní šampióni, ekonomický prístup, medzinárodné súťažné právo

1 VÝZNAM HOSPODÁRSKEJ SÚŤAŽE

Ekonomická teória vníma súťaž ako nevyhnutnú podmienku existencie a fungovania trhu vo všeobecnosti; ak niet tohto najdôležitejšieho samoregulačného mechanizmu, dochádza ku kolapsu trhu. Na druhej strane, medzi trhom a súťažou je vzájomná podmienenosť, nielen trh potrebuje súťaž, ale súťaž môže existovať len v trhovom prostredí. Interdependenčný vzťah medzi súťažou a trhom je imanentný akémukoľvek trhu, počnúc trhom národným, európskym/vnútorným až po globálny trh. V podmienkach Európskej únie (ďalej „EÚ“) plní súťaž navyše svojich ekonomických úloh aj nezanedbateľnú integračnú úlohu. Súvisí to s tým, že súťaž pri liberalizácii hospodárskeho styku prostredníctvom základných slobôd vnútorného trhu (voľný pohyb tovaru, osôb, služieb a kapitálu) bráni vytváraniu nových prekážok obchodu. Stáva sa ta dôležitou garanciou fungovania vnútorného trhu a realizácie jeho základných slobôd.

Súťaž ako primárne ekonomická kategória nachádza svoju prirodzenú reflexiu v súťažno-politických koncepciách a predovšetkým v súťažnom práve, ktorého základnou úlohou je chrániť mechanizmus hospodárskej súťaže. Súťaž ako základný trhový princíp musí reagovať na zmenu objektívnych podmienok, v ktorých pôsobí. V súčasnom období výrazným spôsobom ovplyvňuje súťaž prebiehajúci proces globalizácie. Ako naznačuje už sémantický výklad tohto pojmu, „vedecko-technický, ekonomický a spoločenský vývoj vedie k stavu prepojenosti celého sveta, ...“[2]

Práve prepojenosť vo sfére ekonomického diania spôsobuje aj prenos, resp. šírenie krízových prejavov postupne do celého sveta, inými slovami, dochádza aj ku globalizácii krízy.[3] „Rastúca prepojenosť (interdependencia) problémov znamená aj ich rýchlejšie prenášanie na veľké vzdialenosti.“[4] Ako sa uvádza vo Vízii a stratégii rozvoja slovenskej spoločnosti[5], „globálna kríza sa

[1] Tento projekt vznikol za podpory Agentúry na podporu výskumu a vývoja, grantu c. APVV-0158-12 (Efektívnosť právnej úpravy ochrany hospodárskej súťaže v kontexte jej aplikácie v praxi) a Právnickej fakulty Univerzity Komenského v Bratislave.

[2] VEČEŘA, M., MACHALOVÁ, T. : Evropeizace práva v právněteoretickém kontextu. Výklad základních pojmů. Brno: Masarykova univerzita, 2010, s. 55.

[3] I. Karvaš definuje krízu nasledovne: „O kríze hovoríme vždy, keď ide o porušenie rovnovážneho poriadku medzihospodárskeho. Tento rovnovážny poriadok je daný vzájomnou funkčnou závislosťou medzi všetkými trhmi.“ (KARVAŠ, I.: Základy hospodárskej vedy. 2. zv. Martin: Matica slovenská, 1947, s. 159.

[4] VEČEŘA,M., MACHALOVÁ, T.: cit. dielo, s. 56.

stala katalyzátorom, ktorý ukázal neudržateľnosť niektorých rovín."[6] Veľkým problémom globálnej krízy je podľa Vízie aj komprimácia problémových faktorov v krátkom časovom horizonte, čo „vedie k ohrozeniu základných vitálnych štruktúr fungovania súčasnej spoločnosti."[7]

2 GLOBALIZÁCIA. POJEM. EKONOMICKÉ A PRÁVNE SÚVISLOSTI.

Hoci sa globalizácia často chápe predovšetkým ako ekonomická globalizácia, ide o fenomén, ktorý zasahuje do celého radu oblastí spoločenského diania a predstavuje tak „aj neobyčajne komplikovaný technologický, kultúrny, spoločenský, politický i právny proces s nebývalo širokým dopadom do všetkých oblastí života jednotlivcov a spoločností."[8] Podľa Zygmunta Baumana „módny pojem globalizácia dnes v hlbšom, ba najhlbšom význame znamená nedeterminovaný, neurčitý, sebapoháňací proces svetových udalostí. Znamená absenciu centra, riadiaceho panelu a manažérskeho ústredia. Globalizácia je Jowitov svet neporiadku, ale pod iným menom..."[9]

Imanentnou súčasťou globalizačných procesov je ich ťažká predvídateľnosť, čo sťažuje možnosť ich kontroly a adekvátnej reakcie na ne. V každom prípade je globalizácia zasahujúca vlastne celé spoločenské dianie celosvetovo čoraz naliehavejšou výzvou.[10]

Za jadro globalizácie sa často považuje ekonomická globalizácia. Vníma sa ako „komplexná transformácia trhových vzťahov (ale aj iných spoločenských dejov) v celosvetovom meradle, ktorá sa zhmotňuje v množstve zmien, a to ako v ekonomickej, tak aj mimoekonomickej sfére."[11]

K sprievodným znakom ekonomickej globalizácie patrí, že ekonomické vzťahy sú čím ďalej tým menej určované a limitované národnými hranicami a v súvislosti s liberalizáciou hospodárstva dochádza k zmenám v štruktúre celého svetového hospodárstva.[12]

Za pozitívum globalizácie sa považuje možnosť zvýšiť efektivitu mnohých ekonomických procesov, naopak, za jeden z najväčších problémov, ktoré globalizácia prináša, sa považuje náchylnosť svetovej ekonomiky k náhlym kolapsom.[13]

Globalizácia ako celosvetová integrácia a organizácia výroby, obchodu, finančných operácií, technológií a informácií, spojených s nadvládou nadnárodných spoločností[14] vedie k relativizácii funkcií národných štátov, obmedzuje ich význam a suverenitu a vedie k redukcii moci ich vlád prijímať významné rozhodnutia najmä v ekonomickej oblasti. Podľa D. Ondrejovej tak reálne hrozí strata politickej kontroly štátu nad hospodárstvom.[15]

Globalizácia tak prirodzene modifikuje aj podmienky, za ktorých prebieha hospodárska súťaž. So vznikom svetových,[16] resp. medzinárodných trhov sa jednak posilňuje schopnosť globálnych súťažiteľov súťažiť na globálnych trhoch a jednak narastá význam cezhraničných fúzií ako nástroja posilnenia ich konkurencieschopnosti.

Mimo globalizačných procesov, ktoré postihujú široké spektrum spoločenských vzťahov, pochopiteľne nemôže zostať ani právo. Právo sa usiluje o primeranú reakciu, resp. reflexiu vzrastajúcej prepojenosti rôznych aspektov spoločenských vzťahov (napr. ekonomické alebo obchodné vzťahy), o ich stabilizáciu a zabezpečenie právnej istoty, dochádza teda aj ku globalizácii práva.[17]

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[5] Vízia a stratégia rozvoja slovenskej spoločnosti. Ekonomický ústav SAV, Ústav politických vied SAV, ÚŠaP SAV, Národohospodárska fakulta EU v Bratislave a vybraní experti. Bratislava, február 2010

[6] Tamže, s. 47. Konkrétne sa uvádza extrémne zadlžovania všetkých segmentov ekonomiky, drahá správa spoločnosti v relácii k súčasnému stavu ekonomiky, ako aj presun jednotlivých segmentov ekonomiky z reálnej ekonomiky do virtuálneho sveta (najmä finančný sektor).

[7] Tamže.

[8] VEČEŘA, M., MACHALOVÁ, T.: cit. dielo, s. 55 a literatúra tam citovaná.

[9] Citované podľa VEČEŘA, M., MACHALOVÁ, T.: cit. dielo, s. 55-56

[10] VEČEŘA, M., MACHALOVÁ, T.: cit. dielo, s. 55.

[11] ONDREJOVÁ, D.: Národní šampioni a hospodářská soutěž. Praha. Linde, 2007, s. 33-34.

[12] Tamže, s. 34

[13] JENÍČEK, V.: Globalizace světového hospodářství. Praha: C.H.Beck, 2002, s. 11.

[14] VEČEŘA, M., MACHALOVÁ, T.: cit. dielo, s. 57

[15] ONDREJOVÁ, D.: cit. dielo, s. 38.

[16] K príkladom takéhoto svetového trhu pozri.: PETR, M.: Zakázané dohody a zneužívaní dominantního postavení v ČR. 1.vyd. Praha: C. H. Beck, 2010, s. 147.

[17] VEČEŘA, M., MACHALOVÁ, T.: cit. dielo, s. 65.

Proces globalizácie práva sa nevyhnutne musí vyrovnať s objektívnymi podmienkami, v ktorých prebieha a ktoré vnášajú zmeny aj do tradične prijímaných koncepcií centier tvorby práva a spôsobov zabezpečenia jeho dodržiavania. Ide predovšetkým o zmeny v tradičných východiskách chápania práva v jeho väzbe na štát.[18] Globalizácia totiž, ako sme už uviedli, relativizuje význam štátu a tým aj jeho dosah na právne regulácie v cezhraničných ekonomických súvislostiach, avšak na druhej strane absentujú nové „inštitúcie širšieho globálneho riadenia“[19] a ustanovujúce sa globálne autority trpia nedostatkom legitimity.[20] Je to spôsobené tým, že globalizácii chýba jednoznačný mocenský zdroj, tieto procesy nemajú riadiace centrum a teda ani subjekt, ktorý by za ne niesol zodpovednosť.[21]

Vychádzajúc z takto objektívne determinovaných procesov globalizácie práva, teória rozoznáva štyri základné postupy globalizácie práva:

- národná akceptácia cudzieho práva,
- globalizácia prostredníctvom medzinárodného práva verejného a medzinárodného práva súkromného,
- supranacionalizácia (napr. EÚ)
- spontánny proces (napr. lex mercatoria).[22]

Supranacionalita, osobitne supranacionálny právny systém, sa u nás najčastejšie spája s EÚ a jej právom, t. j. európskym právom. Ide o právo, ktoré sčasti tvoria medzinárodné zmluvy (primárne právo) a sčasti vlastná normotvorba kompetentných orgánov EÚ (sekundárne právo). Európske právo priamo zaväzuje nielen členské štáty, ale aj ich občanov, prípadne iné subjekty na ich území. Prvok supranacionality sa pritom odvodzuje z prenosu časti suverénnych práv členských štátov na EÚ ako osobitnú medzinárodnú organizáciu.

EÚ je výsledkom integračných ambícií európskych štátov a jej základ je práve v ekonomickej integrácii. V tom možno zároveň hľadať aj spojitosť s globalizačným procesom. D. Ondrejová napr. uvádza, že globalizačný proces možno charakterizovať aj ako ďalší stupeň medzinárodnej ekonomickej integrácie vedúcej k vzniku globálnej ekonomiky.[23]

3 EÚ A GLOBALIZÁCIA

3.1 Význam súťažnej politiky

Napriek tomu, že ekonomická integrácia je základom EÚ i jadrom prebiehajúceho globalizačného procesu, vzťah medzi EÚ a globalizačným procesom nemožno v žiadnom prípade považovať za jednoznačný. Na jednej strane totiž napr. podľa Európskej komisie globalizácia EÚ prospieva[24] , na druhej strane však regionalizácia, ktorej výrazom je aj sama EÚ, brzdí proces globalizácie.[25]

Vnútorný trh EÚ, jeho vytvorenie a fungovanie, je jedným z dôležitých cieľov EÚ.[26] So zreteľom na to, že základným princípom vnútorného trhu je hospodárska súťaž[27], ktorá popri svojich všeobecných funkciách plní aj nezanedbateľnú integračnú úlohu, predstavuje súťažná politika a v jej rámci súťažné právo v EÚ veľmi dôležitý nástroj ovplyvňovania vnútorného trhu.

V rámci svojej súťažnej politiky sa EÚ pochopiteľne musí vyrovnať jednak s reakciami členských štátov na globalizačné procesy (napr. ekonomický nacionalizmus), jednak so

[18] Napr. V. Knapp uvádza, že „právo (aspoň podľa prevládajúceho názoru) vyplýva zo suverenity štátu, ...“
(KNAPP, V.: Velké právní systémy. (Úvod do srovnávací právní vědy.) 1.Vyd. Praha: C.H.Beck, 1996, s. 51.

[19] VEČEŘA,M., MACHALOVÁ, T.: cit. dielo, s. 61

[20] Tamže.

[21] Tamže, s. 65.

[22] Tamže, s. 66-72.

[23] ONDREJOVÁ, D.: cit. dielo, s. 39.

[24] K tomu porov. ONDREJOVÁ, D.: cit. dielo, s. 42.

[25] Tamže, s. 42.

[26] Článok 26 Zmluvy o fungovaní EÚ.

[27] Práve hospodárska súťaž a rôzne varianty výroby sa v ekonomickej teórii považujú za faktory, ktoré podporujú rast a blahobyt. (TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R. DUMBROVSKÝ, T.: Evropské právo. 4. vyd. Praha: C. H. Beck, 2011, s. 4).

sprievodnými znakmi samotnej globalizácie, ku ktorým patria najmä cezhraničné fúzie. Význam súťažnej politiky sa zároveň zvyšuje v čase hospodárskej krízy, lebo podľa mnohých ekonómov je práve hospodárska súťaž najlepším prostriedkom na to, ako čeliť hospodárskej kríze.

3.2 Politika národných šampiónov[28]

Politika národných šampiónov patrí k bežným prejavom tzv. ekonomického nacionalizmu aj v členských štátoch EÚ.[29] Túto politiku možno zároveň vnímať aj ako určitú reakciu štátu na globalizačné procesy, ktoré so sebou prinášajú oslabenie významu národného štátu, relativizáciu jeho autonómneho rozhodovania a osobitne stratu politického vplyvu na ekonomické dianie. Jadrom tejto politiky je „podporovanie národných spoločností (národných šampiónov) pôsobiacich v špecifických, významných – tzv. *strategických* či *tradičných* odvetviach štátu a v ich ochrane pred prevzatím (najmä nepriateľskými) zahraničnými spoločnosťami.“[30] Hoci často používaným odôvodnením je posilnenie konkurencieschopnosti týchto spoločností nielen na vnútornom trhu, ale najmä na globálnych trhoch, skutočným motívom je zachovanie vplyvu štátu na konanie týchto subjektov.[31] V tomto zmysle pôsobí politika národných šampiónov ako významný antiglobalizačný fenomén.

Politika národných šampiónov sa pochopiteľne môže dostať do kolízie s pravidlami hospodárskej súťaže nielen na národnom, ale aj na vnútornom trhu EÚ. Vzhľadom na formy podpory, ktoré členské štáty v rámci tejto politiky využívajú (napr. verejná podpora), ako aj vzhľadom na možné prejavy protisúťažného správania favorizovaných spoločností (napr. zneužívanie dominantného postavenia), možno prakticky všetky negatívne protisúťažné aspekty eliminovať prostredníctvom existujúceho inštrumentária národného/európskeho súťažného práva.

Politika národných šampiónov nemá ekonomické odôvodnenie, lebo najlepšou prípravou na súťaž na globálnych trhoch nie je domáci protekcionizmus, ale silný domáci konkurenčný tlak. Koncentrovaným výrazom tohto záveru sú aj slová európskej komisárky pre súťaž Neelie Kroesovej, podľa ktorej „šancu na úspech v globálnom meradle majú spoločnosti, ktoré sú vystavené silnej domácej konkurencii a treba energicky čeliť zvádzaniu politikov, pokúšajúcich sa v ťažkých časoch predávať sen o zaručenom medzinárodnom úspechu v dôsledku vytvárania národných a odvetvových šampiónov.“[32]

3.3 Viac ekonomického prístupu (*more economic approach*)

Politika národných šampiónov uplatňovaná mnohými i veľmi významnými členskými štátmi EÚ pochopiteľne nie je konzistentná s európskou súťažnou politikou, pretože vedie v mnohých prípadoch k vzniku oligopolných trhových štruktúr, či dokonca k monopolizácii trhu, obnovuje bariéry obchodu a v konečnom dôsledku tak pôsobí proti vnútornému trhu, ktorý je jedným zo základných cieľov EÚ.[33]

Európska súťažná politika je nepochybne nástrojom profilujúcim charakter trhu, osobitne vnútorného trhu EÚ. Sleduje pritom nielen podporu konkurencieschopnosti EÚ, ale aj nezanedbateľné integračné ciele. Popri iných nástrojoch využíva predovšetkým európske súťažné právo a jeho inštrumentárium (zákaz dohôd obmedzujúcich súťaž, zákaz zneužívania dominantného postavenia, kontrolu koncentrácie i zákaz verejných podpôr).

Prístup k aplikácii európskeho súťažného práva, ktorého pôvodným východiskom bol ordoliberalizmus[34], v súčasnosti čoraz viac ovláda ekonomický prístup. Ekonomický prístup

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[28] Pojem „národný šampión“ je často predmetom odbornej kritiky pre svoju nejednoznačnosť, je však zaužívaný.

[29] Napr. Francúzsko, SRN, Taliansko.

[30] ONDREJOVÁ, D.: cit. dielo, s. 13-14.

[31] Tamže, s. 15.

[32] Citované podľa BEJČEK, J.: Falešné dilema strnulé právní normativity a pružného ekonomického progmatismu v soutěžním právu. Právník č. 7/2006, s. 761.

[33] „Predseda Komisie J. M. Barroso dôsledne odmietol prejavy nacionalizmu v európskej ekonomike. Konkrétne prípady, keď národné záujmy prevyšujú záujmy ekonomické, treba posudzovať samostatne a striktne podľa európskeho práva.“ (ONDREJOVÁ, D. : cit. dielo, s.163)

[34] Základnou hodnotou tohto myšlienkového prúdu bola sloboda jednotlivca, ktorú „treba chrániť nielen pred mocou štátu, ale aj pred „súkromnou“ mocou hospodárskou, stelesňovanou monopolmi a kartelmi, ...“ (PETR, M. a kol.: Zakázané dohody a zneužívání dominantního postavení v ČR. 1. vyd. Praha: C. H. Beck, 2010, s.9)

zdôrazňuje význam ekonomickej analýzy, efektívnosť a preferuje ekonomické hľadiská pred formálnym prístupom. Na rozdiel od ordoliberalizmu sústredeného skôr na proces, stojí v centre jeho pozornosti posudzovanie účinkov jednotlivých praktík. Niekedy sa hovorí aj o amerikanizácii európskeho súťažného práva.[35] J. Bejček vníma „more economic approach" ako posun od metódy *per se* k metóde *rule of reason.*[36]

Základným hodnotiacim kritériom ekonomického prístupu k posudzovaniu súťažných, či skôr protisúťažných praktík má byť zabezpečenie blaha spotrebiteľa *(consumer welfare).* Spotrebiteľský blahobyt sa používa ako „agregované kritérium európskeho súťažného práva".[37]

Ekonomický prístup zdôrazňujúci predovšetkým ekonomickú efektívnosť a blaho spotrebiteľa ako politicky neutrálne kritériá je zároveň objektívnym východiskom aj pri posudzovaní súťažného pôsobenia národných šampiónov[38], pri ktorých podpore sa členské štáty EÚ opierajú skôr o politické ako rýdzo ekonomické hľadiská. Ekonomický prístup v tomto zmysle napomáha ochrane hospodárskej súťaže, ktorá musí zostať primárnym cieľom, lebo „súťažný tlak je systémovo nezastupiteľným nástrojom racionalizácie a v pravom slova zmysle ekonomického správania súťažiteľov."[39]

4 INTERNACIONALIZÁCIA SÚŤAŽNÉHO PRÁVA

4.1 Supranacionálne európske súťažné právo

Súčasná právna úprava ochrany hospodárskej súťaže je v členských štátoch EÚ spravidla dvojúrovňová. Členské štáty aplikujú na protisúťažné praktiky, ktorých účinok sa prejaví iba na vnútroštátnom trhu, vlastné súťažné právo.[40] Popri antitrustových pravidlách majú spravidla členské štáty aj vlastnú právnu úpravu kontroly koncentrácie. Okrem národného súťažného práva pôsobí na území členských štátov aj európske súťažné právo[41]; delimitačným kritériom jeho aplikácie je vplyv na medzištátny (intraúnijný) obchod.

V EÚ sa od prijatia nariadenia č. 1/2003 o vykonávaní pravidiel súťaže stanovených v článku 81 a 82 Zmluvy o ES[42] uplatňuje decentralizovaný systém aplikácie súťažnoprávnych ustanovení. To znamená, že podľa čl. 3 ods.1 cit. nar. „ak orgány hospodárskej súťaže členských štátov alebo vnútroštátne súdy uplatňujú vnútroštátne súťažné právo na dohody, rozhodnutia združení podnikov alebo zosúladené postupy v zmysle článku 81 ods. 1 Zmluvy, ktoré môžu ovplyvniť obchod medzi členskými štátmi v zmysle uvedeného ustanovenia, uplatnia aj článok 81 Zmluvy na také dohody, rozhodnutia alebo zosúladené postupy. Ak orgány hospodárskej súťaže členských štátov alebo vnútroštátne súdy uplatňujú vnútroštátne súťažné právo na akékoľvek zneužitie zakázané článkom 82 Zmluvy, uplatnia aj článok 82 Zmluvy." Národné súťažné orgány však stratia právomoc aplikovať článok 81 a 82 Zmluvy o ES (t. j. čl. 101 a 102 Zmluvy o fungovaní EÚ), ak v tej istej veci začne konanie Európska komisia. Bezprostredným dôsledkom systému založeného nariadením 1/2003 je „prelínanie nielen komunitárnych súťažných predpisov s národnými právnymi úpravami členských štátov, ale aj prenikanie zásad rozhodovacej praxe Komisie a európskych súdov do národných judikatúr."[43]

Bezproblémové fungovanie tohto systému vyžaduje ustanovenie tzv. konvergenčných kritérií, ktoré vedú ku konzistentnej aplikácii národného a európskeho súťažného práva. Preto čl. 3 ods. 2 cit. nar. vyžaduje, že „uplatňovanie vnútroštátneho súťažného práva nemôže viesť k zákazu dohôd, rozhodnutí združení podnikov alebo zosúladených postupov, ktoré môžu ovplyvniť obchod medzi

[35] PETR, M.: cit. dielo, s. 27.
[36] BEJČEK, J.: cit. dielo, s.752. Pod princípom per se pritom J. Bejček rozumie automatický zákaz protisúťažnej praktiky, kým pri rule of reason (oboje prevzaté z anglickej terminológie) ide o podmienený zákaz vychádzajúci z posúdenia okolností konkrétneho prípadu. (Tamže, s. 747.)
[37] BEJČEK, J.: cit. dielo, s. 755.
[38] Podobne ONDREJOVÁ, D. : cit. dielo, s. 144.
[39] BEJČEK, J.: cit. dielo, s. 766.
[40] Nie je podstatné, kde k protisúťažnému konaniu došlo, dôležité je, kde sa prejavia jeho účinky (extrateritoriálne pôsobenie súťažného práva).
[41] Právna úprava je obsiahnutá jednak v primárnom práve (čl. 101 a nasl. Zmluvy o fungovaní EÚ) a jednak v sekundárnom práve.
[42] Teraz ide o čl. 101 a 102 Zmluvy o fungovaní EÚ.
[43] MUNKOVÁ, J., KINDL, J.: Zákon o ochraně hospodářské soutěže. Komentář. 2. Vyd. Praha: C. H. Beck, 2009, s. 9.

členskými štátmi, ale ktoré neobmedzujú hospodársku súťaž v zmysle článku 81 ods. 1 Zmluvy alebo ktoré sú predmetom nariadenia o uplatňovaní článku 81 ods. 3 Zmluvy. Členským štátom sa týmto nariadením nezabraňuje prijímať a uplatňovať prísnejšie vnútroštátne právne predpisy na ich území, ktoré zakazujú alebo trestajú jednostranné konanie podnikov."

Popri národnej právnej úprave aplikovanej v jednotlivých členských štátoch sa uplatňuje v EÚ aj európska úprava kontroly koncentrácií – nariadenie č. 139/2004. Táto právna úprava predpokladá pri koncentráciách tzv. európskej dimenzie výlučnú kompetenciu Komisie. Pravidlá o odstúpení koncentrácií však predstavujú dôležitý korekčný mechanizmus, ktorý zabezpečuje, aby kontrolu koncentrácie vykonal vždy ten najkompetentnejší súťažný orgán.

EÚ, ktorá si vytvorila vlastnú súťažnú sieť (ECN) tak úspešne vyriešila fungovanie systému hospodárskej súťaže, ktorá je nevyhnutná pre vnútorný trh. Podľa bývalého komisára EÚ, C. D. Ehlermanna „je európske súťažné právo základným stavebným kameňom politického a ekonomického rámca Európskej únie a jeho vynútenie je neoddiskutovateľne jedným z najväčších úspechov Európskej únie."[44]

4.2 Iné možnosti internacionalizácie súťažného práva

Sprievodným znakom globalizácie je, že ekonomické a súťažné problémy presahujú nielen národné hranice, ale aj hranice EÚ. Typickým prejavom tohto procesu sú najmä cezhraničné fúzie a s tým súvisiace jurisdikčné a iné problémy. Tým sa čoraz naliehavejšou výzvou súčasnosti stáva vybudovanie „integrovaného a rozvinutého súťažnoprávneho systému"[45] a vytvorenie určitého spoločného súťažného štandardu[46], ktorý by prinajmenšom eliminoval problémy vyplývajúce z rôznorodých súťažnoprávnych úprav a z toho rezultujúcu absenciu právnej istoty. Vytvorenie univerzálnych súťažných pravidiel sa môže uskutočniť rôznymi spôsobmi a môže nadobudnúť rôzne formy. Vzhľadom na absenciu riadiaceho centra globalizačných procesov sa ako najmenej pravdepodobná javí centralizovaná tvorba medzinárodného súťažného práva a zriadenie medzinárodného súťažného orgánu.

Reálnejšiu podobu postupne nadobúda spolupráca v rámci medzinárodných organizácií (napr. OECD, WTO), ktorých postavenie a štatút sa v priebehu globalizačných procesov tiež mení. Podľa D. Ondrejovej medzinárodné súťažné právo pravdepodobne vznikne najskôr na báze harmonizácie vnútroštátnych právnych úprav s celosvetovými súťažnými pravidlami.[47]

V súvislosti s internacionalizáciou súťažného práva spravidla najčastejšie rezonuje myšlienka medzinárodného súťažného kódexu, ktorý by formuloval aspoň základné pravidlá, či minimálne štandardy, ktoré by boli prijateľné pre jednotlivé štáty. Takéto iniciatívy sa spájajú s činnosťou významných medzinárodných organizácií, najmä WTO. Vzorový zákon o hospodárskej súťaži prijala aj Konferencia Spojených národov pre obchod a rozvoj; opäť ide o pokus kodifikovať aspoň základné súťažné pravidlá. Možno však uzavrieť, že k prijatiu medzinárodnej úpravy súťaže zatiaľ nedošlo a dá sa očakávať, že aj v budúcnosti pôjde o komplikovaný proces.

V praxi však už i teraz dochádza k akceptácii cudzieho súťažného práva vo forme exportu, resp. preberania vybraných súťažnoprávnych doktrín. Azda najznámejším príkladom je prebratie doktríny unikátnych zariadení, ktorá má pôvod v USA, do európskeho súťažného práva a do národných právnych úprav členských štátov EÚ (napr. SR, ČR). Ani tu však nejde o priamočiary proces, čo súvisí s kontroverznosťou samotnej podstaty tejto doktríny.

5 ZÁVER

Súčasné globalizačné procesy ovládajúce primárne ekonomickú sféru prirodzene modifikujú aj podmienky, za ktorých prebieha hospodárska súťaž. Hoci zatiaľ nedošlo ku globalizácii súťažného práva v podobe záväzného svetového súťažného kódexu, s úspechom sa uplatňuje supranacionálne európske súťažné právo. Jednotiace aspekty možno nájsť aj v procese preberania súťažnoprávnych doktrín. Osobitný zjednocujúci význam má aj akceptácia ekonomického prístupu k hodnoteniu súťažných či skôr proti súťažných praktík. Práve ekonomický prístup budujúci na objektívnych ekonomických kritériách je aj spoľahlivým prostriedkom postupu proti prejavom ekonomického nacionalizmu, ktorým sa mnohé štáty usilujú čeliť dôsledkom globalizačného procesu. Hoci primárnym cieľom na všetkých úrovniach zostáva hospodárska súťaž ako

[44] Citované podľa ONDREJOVÁ, D.: cit. dielo, s. 68.
[45] ONDREJOVÁ, D.: cit. dielo, s. 58
[46] Tamže.
[47] ONDREOVÁ, D.: cit. dielo, s. 259

nezastupiteľný trhový princíp, treba pripustiť, že v niektorých prípadoch sú nevyhnutné aj určité regulačné zásahy štátu. Tieto zásahy by však každopádne mali smerovať ku korekcii zlyhaní trhu, nie k neodôvodnenej podpore vybraných hospodárskych subjektov.

Použitá literatúra:

BEJČEK, J.: Falešné dilema strnulé právní normativity a pružného ekonomického pragmatismu v soutěžním právu. Právník 7/2006.
JENÍČEK, V.: Globalizace světového hospodářství. Praha: C: H. Beck, 2002.
KARVAŠ, I.: Základy hospodárskej vedy. Martin: Matica slovenská, 1947.
KNAPP, V.: Velké právní systémy. (Úvod do srovnávací právní vědy). 1. vyd. Praha: C. H. Beck, 1996, ISBN 80-7179-089-3.
MUNKOVÁ, J., KINDL, J.: Zákon o ochraně hospodářské soutěže. Komentář. Praha: C. H. Beck, 2009. ISBN 978-80-7400-173-4.
ONDREJOVÁ, D.: Národní šampioni. Praha: Linde, 2007. ISBN 978-80-7201-678-5.
PETR, M. a kol.: Zakázané dohody a zneužívání dominantního postavení v ČR. 1. vyd. Praha: C. H. Beck, 2010. ISBN 978- 80- 7400-307-3.
VEČEŘA, M., MACHALOVÁ, T.: Evropeizace práva v právně teoretickém kontextu. Výklad základních pojmů. Brno: Masarykova univerzita, 2010. ISBN 978-80-210-5171-3.
Vízia a stratégia rozvoja slovenskej spoločnosti. Bratislava: SAV, 2010.

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IMPACT OF EUROPEAN LAW ON THE RULES ON PAID LEAVE IN GERMAN LABOR LAW – A QUESTION OF NATIONAL SOVEREIGNTY?

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Abstract: The impact of European Law on the law of Member States is growing. An important example is the influence of the European Court of Justice on German labor law to the rules about paid leave after an employee´s long period of inability to work. With the decisions Schultz-Hoff, KHS and Neidel the ECJ designed a detailed legal framework that became fundamental for the current substantive German law on paid leave. The consequences are similar to a law amendment. The author examines whether amendments of substantive law of the Member State can be reconcilable with national sovereignty. He comes to the result that the Member States have transferred parts of sovereign rights to the EU. This authorizes the EU to adopt rules about paid leave and to review whether national law is in accordance with these European rules. The author sees the fundament of the conflict between European provisions about paid leave and German law in the law interpretation of the German Federal Labor Court.

Key words: Directive 2003/88/EC – Right to paid annual leave – Allowance in lieu in the event of sickness - Sovereignty and impact of European Law.

1 INTRODUCTION

The impact of European Law on the law of Member States is growing.[1] An important example is the influence of the European Court of Justice[2] on German labor law to the rules about paid leave after an employee´s longer period of inability to work. With the decisions Schultz-Hoff[3], KHS[4] and Neidel[5] the ECJ designed a detailed legal framework that became fundamental for the current substantive German law on paid leave.[6] The consequences are similar to a law amendment. Reason to submit the cases Schultz-Hoff, KHS and Neidel to the ECJ were differences between European law about paid leave, ruled in Article 7 of Directive 2003/88/EC and § 7 BUrlG[7] in the interpretation of the German Federal Labor Court (BAG)[8]. The discussed German provision had the following text:

"The vacation shall be granted and taken in the current calendar year. Carryover of vacation to the next calendar year is only permissible if compelling operational reasons or reasons personal to the employee justify it. In the case of a carryover, the vacation must be granted and taken within the first three months of a calendar year. At the employee´s request, however, partial vacation arising pursuant to § 5 Para (1) a) shall be carried over to the next calendar year."[9]

Since 1963 the text of the provision remained the same. In 1963 none had the idea that paid leave could lapse.[10] Different is how the Federal Labor Court (BAG) reads the provision since 1969. The FLC´s interpretation and development of the legal provision lead to an unwritten supplement of

[1] See KLEINERT, Transfer of undertakings, pp. 846 – 851.
[2] In the following abbreviated ECJ.
[3] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al.
[4] ECJ 22 November 2011 C-C214/10 - KHS.
[5] ECJ 3 May 2012 C 337/10 – Neidel.
[6] GALLNER, I., § 7 BurlG Note 34, in: MÜLLER-GLÖGE, R. and others (editors) Erfurter Kommentar zum Arbeitsrecht,13. Auflage 2013; SCHLOTTFELD, C.: Europarechtliche „Baustellen" des deutschen Urlaubsrechts, ZESAR 13, 222, 231.
[7] Federal Vacation Act = Bundesurlaubsgesetz, abreviated with BurlG.
[8] Bundesarbeitsgericht, abbreviated BAG - In the following abbreviated with FLC or BAG.
[9] Translation: LINGEMANN, S. and others, Employment & Labor Law in Germany, p. 148.
[10] PLÜM, J.: Wohin im Urlaub, NZA 2013, 11, 12.

the provision. This supplement has for result the lapsing of the right to paid leave at the end of each calendar year. The legal provision had to be read as following:

"The right to paid leave lapses at the end of the instant calendar year when the paid leave has not been claimed within this year.[11] In the case of justified reasons this period extends into the first three months of the following year.[12]"

This was common opinion[13] up to the Schultz –Hoff decision of the ECJ. The ECJ ruled that this result was not in accordance with European law.[14] Article 7 (1) of Directive 2003/88 precluded a national legislation that extinguished the right to paid annual leave at the end of the year or at the end of a carry –over period even when the employees incapacity to work was the reason not to exercise his right to paid annual leave.[15] In the following the FLC changed his adjudication. The FLC followed the ECJ.[16] The FLC stated explicitly that the previous interpretation of the provisions on the right to paid leave did not comply with secondary European law. [17] The FLC underlined that an interpretation in accordance with Directive 2003/88 EC was possible within the text of the provision.[18] Result was that the right to paid leave did not lapse.[19] Consequence was that employees could ask for paid leave for a period of several years, when the period of inability to work had lasted for more than a year. Another effect was of financial weight. When the employment relationship ends after continuing inability to work the employee has a claim on allowance in lieu. The claim could accumulate during the period of inability to work and become of economic interest for employees as well as for employers.

The FLC ended the possibility to accumulate paid leave or allowance in lieu in the aftermath of the KHS case[20]. In this case the ECJ had ruled that Article 7 (1) of Directive 2003/88/EC not precludes national provision which limit a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses.[21] Subject of the KHS-decision was the validity of a provision of a Uniform General Collective Agreement. The provision rules, that the right to paid leave lapses in the case of illness 15 months after the end of the calendar year. Payment in lieu of unused leave is allowed in the case of termination[22]. The ECJ held the provision for valid. Literature used the KHS-decision as argument to claim a general termination of 15 months. After this period the right to paid leave should lapse[23]. In the aftermath of KHS-decision the FLC created a period of limitation of 15 months.[24] The provision must now be read according the FLC as following:

The right to paid leave lapses 15 months after the instant calendar year when the paid leave has not been claimed within this year.[25]

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[11] BAG (German Federal Labor Court) 26 June 1969 – 5 AZR/68 – Headnote 1.
[12] BAG (German Federal Labor Court) 26 June 1969 – 5 AZR/68 – Headnote 2.
[13] PREIS, U. Arbeitsrecht, § 47 III. 3. b).
[14] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al. Headnote 2 and Notes 42 ff.
[15] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al- Headnote 2, Notes 42 ff.
[16] BAG 24 March 2009 – 9 AZR 983/07 Notes 47ff, NZA 2009, 538, 542f.
[17] BAG 24 March 2009 – 9 AZR 983/07 Notes 47; DÜWELL, the former chairman of the 9th senate of the FLC in a later essay spoke of a remodelling of the German Federal Vacation Act, DÜWELL, F.J. Abgeltung des Urlaubsanspruchs als Surrogat? – Ein Luxemburger Missverständnis!, DB 2011, 2492.
[18] BAG 24 March 2009 – 9 AZR 983/07 Notes 59 ff NZA 2009, 538, 544ff..
[19] BAG 24 March 2009 – 9 AZR 983/07 Notes 47ff, NZA 2009, 538 – 547; KRIEGER/ARNOLD, Urlaub 1.+ 2. Klasse – Das BAG folgt der Schultz-Hoff-Entscheidung des EuGH, NZA 2009, 530 - 533.
[20] ECJ 22 November 2011 C-214/10 – KHS, NZA 2011, 1333 – 1335.
[21] ECJ 22 November 2011 C-214/10 – KHS – Headnote, Note 43, NZA 2011, 1333, 1335; approvingly FRANZEN, M. Zeitliche Begrenzung der Urlaubsansprüche langzeiterkrankter Arbeitnehmer, NZA 2011, 1403 – 1405.
[22] ECJ 22 November 2011 C-214/10 – KHS, Note 13.
[23] BAYREUTHER, F., Übertragung von Urlaub bei längerer Arbeitsunfähigkeit nach dem KHS-Urteil des EuGH, DB 2011, 2848; BAUER,J-H.et al. Von Schultz-Hoff zu Schulte – der EuGH erweist sich als lernfähig, NZA 2012, 113, 116; DÜWELL, F.J. Urlaub bei Erwerbsunfähigkeit – Neues Grundsatzurteil steht an! – DB 2012, 1249, 1751; FRANZEN, M. Zeitliche Begrenzung der Urlaubsansprüche langzeiterkrankter Arbeitnehmer, NZA 2011, 1403 – 1405.
[24] BAG 7 August 2012 - 9 AZR 353/10 - NZA 2012, 1216 – 1223.
[25] BAG 7 August 2012 - 9 AZR 353/10 See Headnote 2, Notes 32ff, NZA 2012, 1216, 1221.

German literature accepts this result in general.[26] In European law founded doubts are stated against a fixed period of limitation. [27]But currently has the period of 15 months the character of substantive law[28]. In the result lead two decisions of the ECJ and two decisions of the FLC to changes of a legal provision. Although the text of the legal provision remained the same, the text of the provision must be read with a supplement. Author of the supplement is the FLC – not the parliament. It is not relevant the text of the provision as that has passed the parliament. One may discuss whether the supplement has the character of a prescription or a kind of legal forfeiture. The result is clear: The right to paid leave lapses 15 months after the instant calendar year. It is current substantial law.

This law supplement did not pass the parliament. The legislation procedure began with a decision of the ECJ and ended with a decision of the FLC. Main argument of the FLC was the obligation to interpret the provision in accordance with Article 7 of Directive 2003/88/EC and the adjudication of the ECJ.

One may ask whether this influence of European law is reconcilable with national sovereignty of a Member State. Are amendments and supplements of written law as result of adjudication in accordance with the principle of separation of power?

2 COMPETENCE OF THE EUROPIAN UNION TO RULE PAID LEAVE

2.1 Transfer of sovereign power – integration clauses

Legislation and jurisdiction are fundamental subjects of a sovereign state[29]. The current understanding of the term sovereignty allows the transfer of parts of sovereign power to supranational institutions.[30] The German Basic Law rules in Articles 23 GG[31] the possibility to transfer sovereign power by law to the European Union.[32] Article 24 GG allows the transfer to international organizations. Similar rules to enable European integration exist in all Member States of the EU[33]. Transfer of sovereign power to the European Union needs the consent of the Bundesrat. The eternity clause of Article 79 (3) GG as well as the principles of subsidiarity, must be respected.

2.2 Principle of conferral, subsidiarity, proportionality

The TEU[34] contains a corresponding provision. But neither TEU nor TFEU[35] speak explicit of sovereign power. Both texts use the term competence. Competences that are not conferred to the EU remain with the Member States.[36] Beside the principle of conferral, formulated in Article 5(1) TEU stands the principle of subsidiarity. It limits the use of competence. The EU acts only "*if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*."[37] The principle of proportionality is

[26] GALLNER, I., § 7 BurlG Note 34, in: MÜLLER-GLÖGE; R and others (editors) Erfurter Kommentar zum Arbeitsrecht,13. Auflage 2013; SCHLOTTFELD, C.: Europarechtliche „Baustellen" des deutschen Urlaubsrechts, ZESAR 13, 222, 231.

[27] PLÜM, J.: Wohin im Urlaub, NZA 2013, 11, 15ff.

[28] BAYREUTHER, F., Übertragung von Urlaub bei längerer Arbeitsunfähigkeit nach dem KHS-Urteil des EuGH, DB 2011, 2848.

[29] IPSEN, J.: Staatsrecht I § 14.

[30] SCHLIESKY, U.: Souveränität und Legitimität von Herrschaftsgewalt, pp. 507ff, pp. 517 ff; OETER, S.: Föderalismus und Demokratie in: VON Bogdandy et. Al.: Europäisches Verfassungsrecht, 73 , 96; CHALMERS et al.: European Union Law, pp 196 ff.

[31] Grundgesetz – abbreviated GG is the German Basic Law. It has the function of the German constitution.

[32] In the following also abbreviated with EU.

[33] Article 7 (2) Slovak Constitution; in detail: WEBER, A.: Europäische Verfassungsvergleichung, 14. Kapitel.

[34] TEU = Consolidated version of the Treaty on European Union TEU.

[35] TFEU = Consolidated version of the Treaty on the Functioning of the European Union

[36] Article 4 TEU.

[37] Article 5(2) TEU.

the second borderline to limit the use of EU competencies.[38] The ECJ quotes Directive 2003/88/EC, Article 31 II EU Charter of Fundamental Rights[39] of the European Union of 7 December 2000 and Number 132 of the International Labour Organization conventions[40].

2.3 Enabling act of Directive 2003/88/EC

The Directive regards[41] the Treaty establishing the European Community and "in particular" Article 137(2) EC Treaty (Nice)[42] , now Article 153(2) TFEU. With the act of accession to the Lisbon Treaty the TFEU has become law of the German Federal Republic. [43] These provisions are possible enabling acts. The procedure followed Article 251 EC Treaty (Nice) on proposal from the Commission after participation of the European and Social Committee and after consulting of the Committee of the regions.[44]

Article 137(2) EC Treaty (Nice), the current Article 153(2) TFEU, may be seen as sufficient enabling act for Directive 2003/88/EC. Objective of Article 137 EC Treaty is to support and complement the activities of the Member States improvement in the fields of working conditions[45], social security[46] and social protection of workers[47]. It may be discussed whether paid annual leave must be seen as "working conditions" and Article 137(2) (b) is enabling act for al regulation depending paid leave.[48] This has not been discussed yet.[49]Up to now is not examined the compatibility of the directive with Article 153(5) TFEU. Article 153(5) TFEU excludes Article 153 TFEU as enabling act for remuneration.[50] Another point may be that Directive 2003/88/EC is part of public law, whereas German Vacation Law is part of private law[51]. Idea is that the mere implementation of the directive into private law is not in accordance with the directive.[52] It is expected that neither the ECJ nor the national courts or the German Federal Constitutional Court[53] will discuss the quoted enabling act. [54]

Sovereign rights to rule the right to paid leave are transferred to the European Union, when Article 153(2) TFEU is seen as enabling act for Directive 2003/88/EC. The right to paid annual leave may be seen as "working condition". The EU has the competence to support the Member States in this area. The principles of subsidiarity and proportionality are respected. Rules that guarantee a minimum on paid leave in the whole EU must be regulated either with EU-regulation or with EU-directive. The EU has the sovereign rights to adopt Directive 2003/88 EC. Subsidiarity and proportionality are respected.

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[38] Article 5(4) TEU; CHALMERS et al.: European Union Law, pp 361ff.
[39] EU Charter = EU Charter of Fundamental Rights of the European Union of 7 December 2000.
[40] Holidays with Pay Convention.
[41] Directive 2003/88/EC
[42] Article 137(2) Treaty establishing the European Community (Nice consolidated version) = EC Treaty(Nice) = Article 153(2) Consolidated version of the Treaty on the Functioning of the European Union = TFEU
[43]German Federal Constitutional Court, 30 June 2009 2 BvE 2/08 – Lisbon; see CALLIESS, C.: Die neue Europäische Union nach dem Vertrag von Lissabon, p. 235, 243ff.
[44]Directive 2003/88/EC
[45] Article 137(2) (b) EC Treaty(Nice).
[46] Article 137(2) (c) EC Treaty(Nice).
[47] Article 137(2) (c) EC Treaty (Nic).
[48] REBHAHN, R. et al.: Artikel 153 AEUV Note 35, in: SCHWARZE, EU-Kommentar.
[49] See REBHAHN, R. et al.: Artikel 153 AEUV Note 35, in: SCHWARZE, EU-Kommentar.
[50] REBHAHN, R. et al.: Artikel 153 AEUV Note 35, in: SCHWARZE, EU-Kommentar.
[51] SCHLOTTFELD, C.: Europarechtliche „Baustellen" des deutschen Urlaubsrechts, ZESAR 13, 222f.
[52] SCHLOTTFELD, C.: Europarechtliche „Baustellen" des deutschen Urlaubsrechts, ZESAR 13, 222f.
[53] See German Federal Constitutional Court 6 July 210 – 2 BR 2661/06; SEIFERT, A.: Das Arbeitsrecht nach der Kücükdevci-Entscheidung des EuGH und der Honeywell-Entscheidung des BVerfG, JbArbR, Bd. 48, 2011 p. 119, 127f.
[54] REBHAHN, R. et al.: Artikel 153 AEUV Note 35, in: SCHWARZE, EU-Kommentar

Binding obligation of the Member States is "to take all the measures necessary to achieve the result prescribed by a directive" [55]. This is imposed by Article 291 TFEU and the directive itself.[56]

2.4 Competence of the European Court of Justice

The competence of the ECJ follows from Article 267 TFEU where a *"question concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union" "is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."*[57] The obligation to refer the case to the ECJ leads to the competence of the ECJ pursuant to Article 256 TEU based on Article 267 TEU. The main task of the ECJ is the enforcement of the Community law.[58] The referred questions concerned the interpretation of Directive 2003/88/EC. The references had been admissible.

3 CASE-LAW OF GERMAN FEDERAL LABOR COURT AND ARTICLE 2003/88 EC - NOT COMPATIBLE

The Schulz-Hoff case had been referred because the Higher Labor Court [59]Düsseldorf had doubts whether the case-law of the FLC was compatible with Directive 2003/88/EC.[60] The HLC referred the case "doubting whether" the "case-law of the Bundesarbeitsgericht is compatible with Article 7 of Directive 2003/88".[61] The HLC Düsseldorf did not expound the Federal Vacation Act. The later discussion in literature and in the considerations of the FLC centered the Federal Vacation Act. One could have expected a discussion to the case-law of the FLC. The discussion centered on possibilities to avoid the accumulation of paid leave and allowance in lieu. The FLC followed the ECJ and changed the case-law.

4 SUPPLEMENT OF THE VACATION ACT – IMPACT OF EUROPEAN LAW OR CREATION OF THE GERMAN FEDERAL LABOR COURT?

Less than nine months after the KHS judgment the FLC returned to its former case-law in August 2012[62] . The right to paid leave lapses. The FLC formulated a single restriction. The FLC reads the Federal Vacation Act now with a supplement that limits the right to paid annual leave and allowance in lieu to a period of 15 months instead of three months. The creation of this supplement is neither based in European law nor is it result of the KHS case.

4.1 National legislation with end of reference period or carry-over period acceptable

The KHS case had been referred from the Higher Labor Court Hamm[63]. In the center of this case stood provisions of a Uniform Collective Agreement that provided that the right to paid annual leave and to payment in lieu in the case of termination would lapse 15 months after the calendar year[64]. The ECJ used the questions of the HLC Hamm to make general statements to paid annual leave. The ECJ emphasized that Article 7(1) of Directive 2003/88 does not preclude a rule or national legislation "including even the loss" of the right on paid vacation "at the end of a reference period or a carry-over period" [65]. A carry-over period of 15 months is accepted.[66] The ECJ made no

[55] Article 288(3) TFEU; ECJ 18 December 1997 C-129/96 -Inter-Environnement Wallonie ASBL v Région wallonne, Notes 40ff; HERRNFELD, Artikel 114 AEUV Note 74 in: SCHWARZE, EU-Kommentar: . CHALMERS et al.: European Union Law, pp 98ff.

[56] ECJ 18 December 1997 C-129/96 -Inter-Environnement Wallonie ASBL v Région wallonne, Notes 40ff; HERRNFELD Artikel 114 AEUV Note 74 in: SCHWARZE, EU-Kommentar.

[57] Article 267 III (ex Article 234 TEC).

[58] LIMBACH, J.: Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa, NJW 2001, 2913, 2916.

[59] Higher Labor Court = abbreviated HLC = Landesarbeitsgericht = abbreviated LAG.

[60] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al. Note 17.

[61] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al., Note 17.

[62] BAG 7 August 2012 - 9 AZR 353/10 See Headnote 2, Notes 32ff, NZA 2012, 1216, 1221.

[63] Higher Labor Court = abbreviated HLC = Landesarbeitsgericht = abbreviated LAG.

[64] ECJ 22 November 2011 C-214/10 – KHS, Note 13.

[65] ECJ 22 November 2011 C-214/10 – KHS, Note 26.

[66] ECJ 22 November 2011 C-214/10 – KHS, Note 43.

statements to a general time limit. The carry-over period must ensure that "the worker can have if need be rest periods that may be staggered, planned in advance and available in the long term.[67] It must be "substantially longer than the reference period in respect of which is granted".[68] The ECJ quotes the period of 18 months, ruled in Article 9(1) of Convention No 132 of the International Labor Organization as acceptable and the carry-over period of Schultz-Hoff with six months as not compatible with European law.[69] European law demands no period of limitation for the right to paid leave.

4.2 No explicit provision about lapsing of paid leave and allowance in lieu

The German Federal Vacation Act contains no explicit provision about lapsing of paid leave and allowance in lieu that is not taken within the calendar year or within a carry-over period. The provision provides that paid leave shall be exercised within the calendar year or in a carry-over-period of three months. An explicit regulation about the consequences of paid leave not taken in a certain period as consequence of inability to work lacks. It is not necessary. German law knows a period of prescription with three years and the rules about forfeiture. In the case of forfeiture a right is lost before prescription. Forfeiture needs an element of time and an element of circumstances[70]. Clear circumstances like an explicit renunciation on rights lead to an immediate loss of rights or a loss within short period. Silence without message leads to a loss of rights with prescription.

4.3 Period of 15 months – impact of European law?

The ECJ underlined in the KHS case the importance of an annual period of paid leave. The loss of the right to paid leave after a carry-over period or a reference period is possible. The considerations of the ECJ mention the period of 15 months as acceptable, the period of 6 months is too short. In the Neidel decision a period of nine months has not be accepted.[71] From European law follows no obligation to shape rules about prescription or forfeiture of paid leave.[72] Number 132 of the labor conventions established by the International Labor Organizations rules that paid leave should be taken within a period of 18 months after the calender year.

The German Federal Vacation Act is in compliance with the European provisions on paid leave.

5 ECJ CASE-LAW AS LEGITIMATION FOR THE FLC

European law affords no rule about the loss of the right on paid leave after a certain period. It precludes no rule that accepts the reference period. 15 months had been accepted. 9 months are too short.

5.1 Refining of the law or creation of law without competence

The FLC came to the result that the right on paid leave and on allowance in lieu is lapsing 15 months after the calendar year. The FLC begins the considerations with the text of § 7(3) Federal Vacation Act. The FLC formulates that vacation shall be taken at the latest in the first

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[67] ECJ 22 November 2011 C-214/10 – KHS, Note 38.
[68] ECJ 22 November 2011 C-214/10 – KHS, Note 38.
[69] ECJ 22 November 2011 C-214/10 [69] Article 267 III (ex Article 234 TEC).
[69] LIMBACH, J.: Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa, NJW 2001, 2913, 2916.
[69] Higher Labor Court = abbreviated HLC = Landesarbeitsgericht = abbreviated LAG.
[69] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al. Note 17.
[69] ECJ 20 January 2009 350/06 and C-520/06 - Schultz-Hoff et al., Note 17.
[69] BAG 7 August 2012 - 9 AZR 353/10 See Headnote 2, Notes 32ff, NZA 2012, 1216, 1221.
[69] Higher Labor Court = abbreviated HLC = Landesarbeitsgericht = abbreviated LAG.
[69] ECJ 22 November 2011 C-214/10 – KHS, Note 13.
[69] ECJ 22 November 2011 C-214/10 – KHS, Note 26.
[69] ECJ 22 November 2011 C-214/10 – KHS, Note 43.
[69] ECJ 22 November 2011 C-214/10 – KHS, Note 38.
[69] ECJ 22 November 2011 C-214/10 – KHS, Note 38.– KHS, Note 41.
[70] To the concept of forfeiture see KLEINERT, H.-J.: Between protection of human rights and legal certainty in: DUFALOVA et.al, 370, 374f.
[71] ECJ 3 May 2012 C 337/10 – Neidel – Headnote 4, Note 42.
[72] PLÜM,J.: Wohin im Urlaub, NZA 2013, 11, 15ff.

three months of the following calendar year. Than writes the FLC "In the following it is lapsing".[73]

This sentence is not written in the legal provision. The sentence lacks in the text of § 7(3) German Federal Vacation Act. It is a not written supplement of the FLC. The FLC does not discuss the supplement. Next the FLC jumps without reasoning directly to the reason of the vacation act. Legislation had wanted that employees had a regularly rhythm of vacation.[74] Leave not taken in time should lapse. The FLC refers a decision from 1969[75] that remains the only argument. In the following come extensive elaborations about the interpretation of the supplement according European law.

5.2 Methods of interpretation

Interpretation of legal rules is based on wording, systematic, historic aspects and the reason of the rule.[76] It is common opinion that law interpretation ends with the wording of the legal provision.[77] When the possibility to interpretation ends begins law development. Law development needs a legal gap.[78] A legal gap is a not planned incompleteness inside positive law.[79] Criterion is the whole positive law.[80] A legal gap exists, when the provision contains no rule inside of its wording as well as legal custom although the legal system asks for one.[81] The limits of law development are transgressed where a detailed legal provision is necessary.[82] Separation of power excludes that a court claims the competences of legislation.[83] A judge has not the competence to state his own ideas of justice instead of the decision of the legislator.[84] The judge may not state his own ideas of rights policy instead of the clear decision of the legislator.[85]

5.3 The decision of the Federal Labor Court from 7 August 2012 - 9 AZR 353/10

The FLC begins the interpretation with a not existing text. The FCJ states in the decision from August 2012 that the provision itself does not explicit rule that paid leave lapses when it is not exercised within the calendar year[86]. The legal materials would also contain no note that not exercised leave lapses at the end of the year[87]. Fact is that the provision does explicit not rule any legal consequences when an employee does not exercise the right to paid leave. Nonetheless a gap does not exist. The application of common rules is limiting the right to exercise rights. The rules about prescription and forfeiture lead to a lapse of paid leave at latest after three years. It is not possible to accumulate paid leave or allowance in lieu ad infinitum. The FLC leaves open why in supplement to these provisions must exist another limit for paid leave. It is the valuation of the FLC.

Development of law finds its justification in the argument that a court must decide. It would be denial of justice when a court would refuse to decide a question. It is no denial of justice when a court applies general rules to limit rights. The general rules of prescription and forfeiture are the legal limits of rights. It is not subject of jurisdiction to rule special rules of limitation for each type of right. Limitations beside the legal rules are subject of legislation.

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[73] BAG 7 August 2012 - 9 AZR 353/10, Note 24.
[74] BAG 7 August 2012 - 9 AZR 353/10, Note 24.
[75] BAG 7 August 2012 - 9 AZR 353/10, Note 24.
[76] RÜTHERS, B. et.al.: Rechtstheorie, § 22 Note 702.
[77] LARENZ, K. Methodenlehre der Rechtswissenschaft, Kapitel 5 4.d), p. 426f.
[78] LARENZ, K. Methodenlehre der Rechtswissenschaft, Kapitel 5 4.d), p. 426f
[79] CANARIS, C.-W.: Die Feststellung von Lücken im Gesetz, p. 39.
[80] CANARIS, C.-W.: Die Feststellung von Lücken im Gesetz, p. 39.
[81] CANARIS, C.-W.: Die Feststellung von Lücken im Gesetz, p. 39.
[82] LARENZ, K. Methodenlehre der Rechtswissenschaft, Kapitel 5 4.d), p. 427f
[83] Bundesverfassungsgericht -= German Federal Constitutional Court = FCC 26 September 2011 – 2 BvR 2216/06, NJW 2012, 669, 670.
[84] Bundesverfassungsgericht -= German Federal Constitutional Court = FCC 26 September 2011 – 2 BvR 2216/06, NJW 2012, 669, 670; LARENZ, K. Methodenlehre der Rechtswissenschaft, Kapitel 5 4.d), p. 428..
[85] FCC 3 April 1990 – 1 BvR 1186/89, NJW 1990, 1593; LARENZ, K. Methodenlehre der Rechtswissenschaft, Kapitel 5 4.d), p. 427f.
[86] BAG 7 August 2012 - 9 AZR 353/10, Note 33.
[87] BAG 7 August 2012 - 9 AZR 353/10, Note 33.

Consideration of the FLC is the reason of the Vacation to exercise paid leave within the calendar year. This aspect cannot be falsified. The consideration may be right or wrong. The consideration is wrong when an employee has not the possibility to exercise his right in the case of illness or incapacity to work. The reason of the rule follows the valuation of the court.

Therefore the legal consequence of not in the calendar year exercised paid leave is that it lapses. This result should have been proved. The court signs a circle: Employees must exercise the right within the calendar year. It lapses after this year because they have to exercise it within the year….

Legislation could rule a fixed period. That period could be fifteen months after the calendar year. Another period is possible. Creation of the supplement to the German Vacation Act transgresses the limits of law interpretation and law development.

5.4 Function of the European framework

In the aftermath of the Shultz-Hoff case had to be guaranteed that the employee has the possibility to exercise his right to paid leave. The right to exercise leave could not lapse when the employee had no chance to exercise it. The FLC was forced to change the case-law. The case-law based supplement of § 7(3) BUrlG that lead to lapsing of paid leave after the calendar had to be canceled.

KHS gave the opportunity to return to the overcome case-law with a modified period of 15 months instead of three months to exercise the right. The KHS decision gave the possibility to discuss an interpretation of § 7(3) BUrlG according European law. Result was a changed supplement that rules a new period to exercise paid leave.

It seems that the FLC had waited for the opportunity to return to the former jurisdiction.[88] Literature saw the clear wording of the provision but hoped that the FLC read some period into the text.[89] European impact on paid leave in German labor law had for consequence that the case-law of the FLC had to change.

6 CONCLUSION

A conflict between the provisions of the Federal Vacation Act with the wording that had passed the parliament and Directive 2003/88/EC never occurred. Sovereign rights of legislation have not been touched. The case-law of the FLC led to the conflict. The referred Schultz – Hof f-case brought the possibility to solve it. The considerations of the ECJ point out Directive 2003/88/EC. This directive has been adopted within the competences of the EU. The Member States transferred sovereign power to adopt provisions with the EC Treaty (Nice). An identical provision contains the Lisbon Treaty. The principle of conferral is respected. Directive 2003/88/EC moves within the principles of subsidiarity, Scope of Directive 2003/88/EC is to guarantee each employee a minimum of annual paid leave. The Schultz-Hoff judgment of the ECJ moved within transferred sovereign rights. The ECJ had impact on the adjudication of the FCJ within the limits of Article 267 TFEU.

The FLC used the KHS-case of the ECJ to return to the former case-law. Single amendment is the lapsing of the right to paid leave 15 months instead of three months after the calendar year. This is not dictated by European law. Case-law of European and its impact on the national rules on paid leave - a question of sovereignty? The question must be rejected. The judgements Schultz-Hoff and KHS were decisions within transferred sovereignty. The KHS –case was legitimation for the FLC to return to the former case-law and to refine the case-law about the lapse to the right on paid leave.

Bibliography:

BAUER J-H.et al.: Von Schultz-Hoff zu Schulte – der EuGH erweist sich als lernfähig, NZA 2012, 113 – 119.

BAYREUTHER, F.: Übertragung von Urlaub bei längerer Arbeitsunfähigkeit nach dem KHS-Urteil des EuGH, DB 2011, 2848 – 2849, ISSN: 0005-9935 G 01742.

[88] SCHLOTTFELD, C.: Europarechtliche „Baustellen“ des deutschen Urlaubsrechts, ZESAR 13, 222, 225.

[89] PÖTTERS, S. et.al.: Neuausrichtung des deutschen Urlaubsrechts, ZESAR 2012, 23, 29.

CALLIESS, C.: Die neue Europäische Union nach dem Vertrag von Lissabon, Ein Überblick über die Reformen unter Berücksichtigung ihrer Implikationen für das deutsche Recht, Mohr Siebeck Tübingen 2010 ISBN 978-3-16-149700-1.
CANARIS, C.-W.: Die Feststellung von Lücken im Gesetz, Eine methologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtfortbildung praeter legem, Duncker&Humblot Berlin1964.
CHALMERS, D. et al.: European Union Law, Second Edition, Cambridge University Press, 4th printing Cambridge, New York et al. 2011, ISBN 978-0-521-12151-4.
DÜWELL, F.J.: Abgeltung des Urlaubsanspruchs als Surrogat? – Ein Luxemburger Missverständnis!, DB 2011, 2492 – 2494, ISSN: 0005-9935 G 01742.
DÜWELL, F.J.: Urlaub bei Erwerbsunfähigkeit – Neues Grundsatzurteil steht an! – DB 2012, 1249 - 1751.
FRANZEN, M.: Zeitliche Begrenzung der Urlaubsansprüche langzeiterkrankter Arbeitnehmer, NZA 2011, 1403 – 1405.
GALLNER, I., § 7 BurlG, in: MÜLLER-GLÖGE, R. et al. (Editors) Erfurter Kommentar zum Arbeitsrecht,13. Auflage, C.H.Beck München 2013, ISBN 978 3 406 631009.
IPSEN, Staatsrecht I, Staatsorganisationsrecht, 23. Auflage, Verlag Franz Vahlen München 2011, ISBN 978 3 8006 3907 6.
KLEINERT, H.-J.: Between protection of human rights and legal certainty – information of employees in the case of a transfer of the undertaking and the legal consequences, 370, 374f in: DUFALOVA et al. Communication as a measure of protection and limitation of human rights: information in relation to human rights: collection of papers from 12th international conference on human rights held on June 1-2 2012 in Bratislava / Editors Lenka DUFALOVA et al. 1.vyd – Bratislava: Univerzita Komenskeho v. Bratislave, Pravnicka fakulta 2013. – 661 s. (Sympóziá, kolokviá, konferencie) ISBN 978-80-7160-345-0,
Quoted: KLEINERT, H.-J.: Between protection of human rights and legal certainty in: DUFALOVA et.al p.
KLEINERT, H-J.: Transfer of undertakings in labor law and the adjudication of the European Court, in: The milestones of law in the area of Europe 2012 2nd part, p. 846 – 851, Collection of papers from the International Scholastic Conference for PhD. Candidates and young scientists organized by the Comenius University in Bratislava, Faculty of Law on 29th- 31st March 2012, Comenius University ISBN 978-80-7160-317-7, Quoted: KLEINERT, Transfer of undertakings, p..
KRIEGER S. et al.: Urlaub 1+2. Klasse – Das BAG folgt der Schultz-Hoff-Entscheidung des EuGH, NZA 2009, 530 – 533.
LARENZ, K.: Methodenlehre der Rechtswissenschaft, Sechste, neu bearbeitete Auflage Springer Verlag Berlin, Heidelber New York 1991, ISBN 3-540-52872-5.
LIMBACH, J.: Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa, NJW 2001, 2913 – 2919.
LINGEMANN, S. and others: Employment & Labour Law in Germany, Athens, Verlag C.H.Beck, Ant. N. Sakkoulas 2003, ISBN 3-406-47914-6.
OETER, S.: Föderalismus und Demokratie in: VON Bogdandy et. Al.: Europäisches Verfassungsrecht, 73 – 120, 2., vollständig aktualisierte und erweiterte Auflage Springer 2009, ISBN 978-3-540-79809-1.
PLÜM, J.: Wohin im Urlaub, NZA 2013, 11 – 18.
PÖTTERS, S. et.al.: Neuausrichtung des deutschen Urlaubsrechts, ZESAR 2012, 23 – 29, ISSN: 1611-1958.
PREIS, U.: Arbeitsrecht, 2. Auflage 2003, Verlag Dr. Otto Schmidt Köln, ISBN 3-504-42018-9.
REBHAHN, R. et al. Artikel 153 AEUV, in: SCHWARZE, J. (HrsG.), EU-Kommentar, 3. Auflage, Nomos Verlag Baden –Baden, ISBN 978-3-8329-6329-3.
RÜTHERS, B. et.al.: Rechtstheorie mit Juristischer Methodenlehre, 6. Auflage Verlag C.H.Beck München 2011 ISBN 978 3 406 62921 1.
SCHLIESKY, U.: Souveränität und Legitimität von Herrschaftsgewalt, Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrecht im europäischen Mehrebenensystem, Mohr Siebeck Tübingen 2004, ISBN: 3-16-148121-6.
SCHLOTTFELD, C.: Europarechtliche „Baustellen“ des deutschen Urlaubsrechts, ZESAR 13, 222 - 232, ISSN: 1611-1958.

SEIFERT, A.: Das Arbeitsrecht nach der Kücükdevci-Entscheidung des EuGH und der Honeywell-Entscheidung des BVerfG, JbArbR, Bd. 48, 2011 p. 119 – 133, Erich Schmidt Verlag Berlin 2011, ISBN 978 3503 13623 0.
WEBER, A.: Europäische Verfassungsvergleichung, Verlag C.H.Beck, München 2010, ISBN 978 3 406 60104 0

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RELATIONSHIP BETWEEN TWO EUROPEAN HUMAN RIGHTS TREATIES

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Abstract: The Charter of Fundamental Rights of the European Union (hereinafter: Charter) was formally proclaimed by the leaders of the institutions of the European Union on 7 December 2000 in Nice. Until 2009 its legal status was uncertain and gained legal force only in 2009 when the Treaty of Lisbon came into force. Since it is a legally binding document, the EU has to act and legislate according to the provisions of it. The charter has the same legal value as the European Union treaties. It has to be applied by the EU's institutions, and the member states of the EU but only when the latter are implementing EU law. It means that individuals are not able to take a member state to court for breaching the Charter unless the member state in question was implementing EU law. All EU member states are members of the Council of Europe's European Convention on Human Rights (hereinafter: Convention), so that all EU member states shall apply both international (regional) human rights treaty. The question is, what the relationship is between the two legally binding documents. The aim of the presentation is to scrutinise the relationship of two European human rights document.

Key words: EU, Council of Europe, fundamental rights

1 INTRODUCTION

Europe has its two own international, regional human rights treaties. One of them is more than sixty years old that was created by the Council of Europe (CoE) in 1950. The other one is very new, which was born under the auspices of the European Union (EU) in 2000, however, it was given legal effect only in December 2009, so this treaty is very new.

What are these treaties? The old one is the worldwide most effective human rights treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] (ECHR or Convention), while the new one is the Charter of Fundamental Rights of the European Union[2] (Charter).

What is the relationship between the two treaties? Are they competitive or complementary legal instruments? Do they overlap each other's legal sphere or not, if yes, why does Europe need two human rights treaties? This paper deals with the abovementioned questions.

2 THE HISTORICAL BACKGROUND

In order to understand the present situation, we have to go back to the past. After the Second World War, nations of Europe left for two directions of cooperation. One of them was the way of the Council of Europe, which was the avenue of common values, such as democracy, rule of law and human rights.

The other way was that of economic integration from which the European Communities, later the European Union grew up.

The two regimes were not competitors, the principal aim was common, to integrate the states of Europe, to create stability in order to avoid any possibility of a new world war. However, the organizations placed the accent on different places.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.
[2] OJ C 83/389 of 30.3.2010.

2.1 The Convention

The Council of Europe inspired by the UN Universal Declaration of Human Rights (UDHR) created not only a declaration but a legally binding catalogue of human rights and fundamental freedoms in 1950. The Convention entered into force on 3 September 1953.

In the course of time, the Convention system built its own permanent court, the European Court of Human Rights (ECtHR or Strasbourg Court), which has jurisdiction to deliver judgment on Convention based human rights disputes, not only between state parties, but mainly between states and individuals living under their jurisdiction.

In these days, the Strasbourg Court is overloaded by individual complaints and the CoE has to continuously reform the judicial system in order the ECtHR can cope with the huge work. Although this overloaded human rights judicial system is unique in the world, it is progressive.

2.2 The Charter

In spite of the early codification of human rights under the auspices of the CoE, the foundation treaties of the European Communities did not deal with human rights questions.

The Communities also created their own court, the European Court of Justice (ECJ or Luxembourg Court), but its main task was to interpret and apply community law, which did not include human rights corpus in the beginning.

Until the mid 1970s, the Luxembourg Court had resisted to deal with human rights questions, stated that it had not had competence. Nevertheless, in the mid 1970s this attitude could not be upheld since the constitutions of the member states, as compared to the community law, ensured higher level human rights protection.

Mainly the German and Italian Constitutional Courts resisted the reluctant Luxembourg practice as to human rights matters and so to say declared war on the reluctant, rejecting standpoint of the Luxembourg Court regarding human rights questions.

The Luxembourg Court inspired by international treaties, first of all by the Convention, broke away from its previous practice and as a first step recognized human rights as 'general principles' of the community law. The case of Rutilli was the ornamented example of the changed attitude and of the improvement of law.[3]

Due to the social development and influence of the Luxembourg Court's case law, first the Single European Act[4] (SEA) mentioned the fundamental rights in its Preamble. It recognized the fundamental rights incorporated in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter as the basis of democracy.

After the SEA, the EU human rights codification accelerated. The Maastricht Treaty (1992) in its Article F (2) stipulated that the Union shall respect human rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[5] In addition, the Treaty mentioned human rights among the objectives of common foreign and security policy and in its Preamble, also.[6]

The new Article 6 (ex Article F) of the Treaty on the European Union (TEU) as was amended by the Treaty of Amsterdam[7] (1997) stated that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

After Amsterdam in 1999, a special drafting body, the so-called Convention was given a task to elaborate its own European Fundamental Rights Charter.

During one year, the Convention finalized its drafting work. The Charter was solemnly proclaimed by the European Parliament, the Council of Ministers and the European Commission on 7 December 2000 in Nice, however, it did not gain binding legal status as a consequence of the lack of ratification.

[3] Case 36/75 Roland Rutili v Ministre de l'intérieur. European Court Reports 1975 Page 01219.
[4] OJ L 169 of 29.6.1987.
[5] Treaty on European Union (TEU). OJ C 191 of 29.07.1992.
[6] Article J.1 (2).
[7] OJ C 340 of 10.11.1997.

Notwithstanding, it became part of the failed European Constitution as its Part II, i.e. the Charter was intended to get legal status as primary law.[8] Since the French and Dutch rejected referenda, the European Constitution failed, including its Part II, the Charter.

Nevertheless, during the period from the SEA to the Constitutional Treaty, the development of the protection of human rights, especially of the codification, could not be unquestioned and this process gained reward not only with the Luxembourg Court referring to the Charter, but with national courts doing so. Since its proclamation in 2000, but even more since its incorporation in the Constitutional Treaty, the Charter has started to exist as soft law.

After the unsuccessful Constitutional Treaty, the Charter as independent instrument was amended in December 2007 with the intention that it will enter into force with the new Reform Treaty, so the final step was the Lisbon Treaty.[9] The Charter entered into force simultaneously with the Lisbon Treaty, on 1 December 2009, and ten years after the first step of its drafting it was given binding legal effect.

The new Article 6 (1) of the TEU, as amended by the Lisbon Treaty, provides that 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'[10]

Article 6 (3) of the TEU reaffirmed the 'general principle character' of fundamental rights and repeatedly refers to the Convention and constitutional traditions of Member States, actually this is not a new stipulation.[11]

The really revolutionary stipulation is the abovementioned Article 6 (1) of the TEU because the above quoted paragraph (1) declared the long desired binding legal effect of the Charter. With this provision, the Charter became part of the written primary law of the EU.

By the end of the first decade of 2000, the European law in a wider sense, i.e. EU law and law created by the CoE has its two own human rights treaties, the Charter and the Convention resulting in questions, why there is need for this duplication.

3 THE RELATIONSHIP BETWEEN THE CHARTER AND THE CONVENTION

Regarding the structure of the Charter, it contains a Preamble, 54 articles grouped into the following seven titles: dignity, freedoms, equality, solidarity, citizens' rights, justice and general provisions.

The Preamble stresses the aims of the creation of the new human rights instrument, which, among others, strengthened the protection of fundamental rights in the light of the changes of society, social progress, scientific and technological developments by making those rights more visible.

From the wording firstly it could be concluded that the rights contained in the Charter already existed in the EU, however, they were not collected in a separate catalogue codified by the EU.

Secondly, the main goal is to bring these rights closer to the people, to make them more visible with that enhancing the credibility of the EU.

At the same time, living in a changed, modernised world it was necessary that the drafters reworded, renewed and updated the 'old rights' to some extent.

3.1 Chapter 7 – General provisions

From the point of view of the central topic of this paper, namely the relationship, the linkage between the two treaties, the most important title, the chapter of the Charter is the seventh. This chapter collects the so-called general provisions, which stipulate particularly the following subjects: the scope of the Charter as to subjective and objective effects; the extent of the protection of rights and the possibility of restriction; the meaning and scope of the rights as to the Convention; relationship to other human rights instruments and the common constitutional traditions; difference between rights an principles, status of the official explanations of the Charter.

[8] Treaty establishing a Constitution for Europe (TCE), signed on 29 October 2004, Rome.

[9] OJ C 306 of 17.12.2007. Entry into force on 1 December 2009.

[10] OJ C 115 of 09.05.2008 P. 0001 – 0388. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union.

[11] Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

3.1.1 The scope of the Charter regarding its subjective (personal) effect – the Addressees

According to Article 51 (1), the addressees of the Charter are the EU institutions, organs and agencies without any restriction. It is not surprising that the EU institutions are the primary addressees, because the EU institutions have the power of legislation and execution. The Member States' actions were restricted by different national and international human rights laws, *the EU institutions themselves* explicitly were not restricted by any written human rights catalogue, however, they also have the power to infringe human rights via their different actions. For this reason the main, the primary addressees of the Charter are the EU institutions, organs and agencies. When they act in their competences, they shall totally comply with the Charter's stipulations.

The secondary addressees are the Member States. They are 'secondary' addressees only because they shall take into account the Charter's provisions only when they are implementing Union law. Notwithstanding, in practice it is not easy to determine when a state implements Union law and when it acts exclusively in the framework of its domestic law since the boundaries of competences are not always clear, they often fade.

What conclusion can be drawn from the wording of Article 51 '…they are implementing Union law'? The Member States are not obliged at all by the Charter when they act in their exclusive domestic competences, jurisdictions. This is a very important difference between the Charter and the Convention, because the Convention does not make such a difference. The addressees of the Convention are the State Parties, irrespectively in what competences they act, so there is no importance whether they implement domestic law, EU law or other international obligations. They always, under any circumstances have to comply with the Convention rules.

The main aim of the Convention is to ensure that State Parties respect human rights and freedoms enshrined in the Convention. To this end, contrary to the Luxembourg Court, the Strasbourg Court has the power to scrutinize domestic law of States irrespectively in what competences they act.

To sum it up, under the Charter's system the States – including not only its central, but regional and local organs, too – shall keep the Charter's provisions only when they act in the scope of Union law. On the other hand, under the system of the Convention the States shall keep the Convention's provisions all the time no matter whether they act in the scope of their own domestic law or implement any other law.

3.1.2 The scope of the Charter regarding its objective (material) effect – The enshrined rights

Since all EU Member States are party to the Convention, the Charter rights have to harmonize with Convention rights. It is fundamental to avoid contradictions. For the dual membership, the Member States have to comply with requirements of both treaties at the same time. To this end the Preamble of the Charter declares that the Charter reaffirms the rights as they result from the Convention, the common constitutional traditions, international obligations, the Social Charters and – very important – from the case law of the Luxemburg Court and Strasbourg Court. This wording underpins that the aim is the harmony of two instruments and of case law practices not to make the treaties competitors.

In order to avoid conflict, most of the rights placed in the Charter are common or almost identical with Convention rights, this is the situation especially with the so-called first generation political rights and basic freedoms.

Official Explanation to Article 52 enumerates in detail the corresponding rights and marks the affected articles of both treaties including these parallel rights.[12]

The aim of this paper is not to analyse the corresponding or other rights, so these are only mentioned briefly. Among the corresponding rights could be mentioned inter alia the right to life; the prohibition of torture, inhuman, degrading treatment and punishment; the prohibition of slavery and forced labour; the right to liberty and security; the respect for private and family life; the freedom of thought, conscience and religion; the freedom of expression and information; the right to property. Also in this group can be found the prohibition of collective expulsion, removal, extradition, the

[12] Explanations relating to the Charter. O.J. C. 303/17 of 14.12.2007. According to Article 6 (1) of the TEU ' 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.

presumption of innocence and right of defence, the principles of legality and proportionality of criminal offences and penalties.

The abovementioned rights and freedoms are identical with the Convention rights as to their *meaning and scope*.

Other rights are identical with Convention rights but regarding only their meaning, not their scope. Their scope is wider such is the case regarding the right to marry (it includes not only traditional form of family, in this respect the national law is decisive); the right to education; the right to an effective remedy and to fair trial and the right not to be tried or punished twice.

Besides the above listed 'old', first generation rights, a few words have to be said about the 'modern rights' enshrined in the Charter. At the same time, it has to be pointed out, that these modern rights are not new creatures in EU law, they have already existed in it, but not collected in a catalogue and not at all in the Convention.

The matter of the newly shaped rights is closely connected to the question of the division of competences between the EU and its Member States. The Charter does not create new competences for the EU as Article 6 (1)[13] of the TEU and Article Charter 51 (2) itself stress. The Charter only preserves and strengthens the protection of the rights existing in EU legal order including the Luxembourg case law.

Among modern rights could be mentioned the integrity of the person. The Charter – parallel to medical development – extends the protection of personal integrity in the field of medicine and biology. Likewise, to comply with the requirements of informational technology, the personal data protection had to be extended and strengthened. As a result of social progress, the same could be said as to the right to good administration.

3.2 The Living Instrument as a minimum standard

Concerning the relationship between the two treaties, the very spirit of the Charter is Article 52 (3). This provision stipulates as follows, 'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

From the wording of the first sentence of Article 52 (3) could be concluded that the Charter exclusively regulates the relationship between the corresponding rights. That goes without saying because exclusively the corresponding rights could generate common field (it is to be hoped that not battlefield) of the jurisdiction of two courts. In order to avoid potential conflicts and legal uncertainty, Article 52 (3) of the Charter marks the guided point itself and that point is the Convention functioning as minimum standard. As to minimum standard characterization, the key words are the meaning and the scope. The meaning and scope of the corresponding rights may not be lower than they are guaranteed by the Convention. As a matter of course the Charter could provide higher protection level. Summarizing, a higher protection is not prohibited but a lower is not permissible.

It is important to emphasis, that the well-established case law of the Convention characterises the Convention not as a static, unchanged legal instrument but a living one, which, through Strasbourg Court's case law, adapts to the changes of the social environment. The 'living instrument' feature of the Convention raises the question, whether the Convention's case law, which is established by the Strasbourg Court, functions as minimum standard, too, since the Convention and its case law are closely linked. From the strict wording of the Charter this conclusion could not be read. This matter likely generates controversial legal opinions in the future; all the more the question of the minimum standard feature of the Convention case law concerns the delicate question of the relationship, the potential superiority of two courts as to human rights question.

3.3. Two cases from the past to answer the need of the incorporation of minimum standard requirements

The disposition of Article 52 (3) of the Charter closely links the case law of two Courts. As it was mentioned, since the mid 1970s the Luxembourg Court has adjusted itself to the Strasbourg Court's case law.

[13] The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

In turn, the question of Community law gradually had emerged before the Strasbourg Court. This was the situation in the case of Matthews v. United Kingdom[14] and in the case of Bosphorus v. Ireland.[15]

In Matthews, the Strasbourg Court delivered judgment in 1999, while in Bosphorus six years later, in 2005 (after proclaiming the Charter!). In both cases, regarding protection of human rights, the question of the compatibility of two legal orders, the compatibility of EU and Convention law emerged.

In Matthews, the Strasbourg Court declared that all State Parties to the Convention have rights to conclude international human rights treaties and to access other international organizations. However, they remain responsible for infringement of the Convention rights even if they act in accordance with the EU primary law, which obliges the State, i. e. the State has no discretion to implement it or not.

From the case of Matthews, it could be concluded in the event of dual membership, the Member States serve 'two Lords' (i.e. the EU and the CoE) at the same time. There is no problem if the requirements of the two organizations are in harmony, but in the event that any of the requirements contradicts the other, a problem comes into being. At the same time, the Member States cannot comply with conflicting legal requirements. They inevitably infringe one of them and as a consequence, they have to take responsibility for it. In the case of Matthews, the complaint was held to be founded and the Strasbourg Court decided against the State even if it had applied EU *primary law* and had not had any discretion to implement it.

On the other hand, in Bosphorus case, the Strasbourg Court did not find the complaint founded and rejected it. In that case, the main questions were whether an EU member state could be held responsible for the execution of a compulsory EC *Regulation*? The other question was the level of protection of human rights in the EU, whether this level is equivalent to that of the Convention.

In Bosphorus, the Strasbourg Court created a presumption in favour of the EU. The court stated that the level of protection has to be examined in each situation, case by case. As a result of scrutiny in that case the court found the protection was equivalent to the Convention thus the EU Member State (Ireland) does not depart from the requirement of the Convention when it did no more than implemented obligatory *secondary* law.

In the Bosphorus case, the Strasbourg Court found that the EU protects human rights in equivalent manner to that of the Convention mainly because the Luxembourg Court respects Convention rights and Strasbourg case law. At the same time, it stressed that the cases may be different, so the presumption of equivalent protection may be rebutted. It could not be applied if a State has any discretion to implement EU law. Additional condition of the application of the presumption is that the EU law has to be challenged before the Luxembourg Court (this was not in the case of Matthews). Moreover, the presumption could not be applied if a State implements primary law, not secondary law.

From the complexity of the abovementioned cases, the possible conflict situations between Convention law and EU law could be seen. These cases illustrate the real importance, the harmonization of the two treaties. It is essential as to corresponding rights to create equivalent minimum standard protection between two legal orders on the level of codification. This aim of the 'equivalent minimum standard protection' is served by Article 52 (3) of the Charter.

4 PROSPECTS

The scrutiny of the relationship between the two treaties leads to a further question. What will be the relationship between two Courts and what about the accountability of the EU institutions when they infringe corresponding Convention rights? To sum up, what is the situation on establishment level?

The two Courts are independent. The Strasbourg Court deals only with human rights questions, while the Luxembourg Court's main profile is not human rights questions but matters related to economic problems. Presently neither court is in superior or subordinate position there is no hierarchy between the two courts.

[14] Case of Matthews v. The United Kingdom (Application no. 24833/94; judgment 18 February 1999).

[15] Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others (Case C-84/95.– European Court reports 1996 Page I-03953).

In the case of corresponding human rights and their correct implementation by EU institutions, currently the Strasbourg Court has no jurisdiction over EU institutions they go under Luxembourg Court jurisdiction in all human rights cases, including corresponding rights.

However, the stipulation of Article 6 (2)[16] of the TEU is highly important because that prescribes the EU shall accede to the Convention. Regarding the Convention, Protocol No. 14 amended the Convention and made it possible that EU – however is not a state – will become a Party to the Convention[17].

On the above mentioned legal basis [i.e. Article 6 (2) of the TEU and amended Article 59 (2) of the Convention] in the mid 2000s the drafting process of the accession agreement started, the final version of the draft agreement was finalized by June 2013.[18]

Under the draft agreement, the EU will become a Party to the Convention. After entry into force of the accession agreement, which without doubt claims long and complicated ratification procedure, the Convention will be directly binding for the EU institutions, including the Luxembourg Court. With this, the Strasbourg Court will get jurisdiction over the EU institutions, including the ECJ regarding cases of the infringement of the Convention.

Notwithstanding, Article 6 (2) of the TEU contains a protective stipulation for the EU, namely such accession shall not affect the Union's competences as defined in the Treaties. Protocol No. 8[19] to the Treaty of Lisbon confirms this requirement and sets out others, inter alia the preservation of the characters of EU legal order in the case of accession[20].

As to the need of the accession of the EU to the Convention, there are different opinions, some support it[21] while others hold it unnecessary[22].

5 CONCLUSION

If once the Charter had been created, it was necessary for legal certainty to declare the minimum standard characterization of the Convention concerning corresponding rights. However, the minimum standard feature of the already existing and future Convention's case law may generate new questions. The planned accession of the EU to the Convention likely serves to underpin the harmony of the Strasbourg and Luxembourg human rights system and to complement the treaties relationship. Nonetheless, it is hard to predict what will be the future relationship between the two courts and their case laws. The aim is the accord and the past obviously certified the gradual approach of the two systems. Having shared common values and being two corresponding treaties, which will be underpinned by the hoped accession, it is expected that there will not be essential conflicts between the two human rights regimes.

Bibliography:

LOCK, Tobias: The ECJ and the ECtHR: The Future Relationship between the Two European Courts. The Law and Practice of International Courts and Tribunals, Vol. 8. 2009. 375–398. pages.
LANDAU, Chava Eve: A New Regime of Human Rights in the EU? European Journal of Law Reform. Vol. 10. 2008, Issue 4.

[16] The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

[17] According to Article 59 (2) of the Convention 'The European Union may accede to this Convention.'

[18] Final Report to the CDDH 10 June 2013. http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp.

[19] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[20] Protocol No 8 Article 1 'The agreement relating to the accession … shall make provision for preserving the specific characteristics of the Union and Union law …'.

[21] see e.g.: LOCK, Tobias: The Law and Practice of International Courts and Tribunals.

[22] see e.g.: LANDAU, Chava Eve: European Journal of Law Reform.

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APLIKÁCIA EURÓPSKYCH ANTITRUSTOVÝCH PRAVIDIEL SLOVENSKÝMI ORGÁNMI OCHRANY SÚŤAŽE

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Abstract: Council Regulation (EC) no 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty (now 101 and 102 of the TFEU) decentralized the Commission´s competencies in the antitrust area to the national competition authorities. This article is focused on the application of the powers conferred to Slovak competition authorities and to analyse parallel application of the both – European and national competition rules in the decisions of the Slovak competition authorities.

Abstrakt: Nariadením Rady (ES) č. 1/2003 o vykonávaní pravidiel hospodárskej súťaže stanovených v článkoch 81 a 82 Zmluvy (v súčasnosti 101 a 102 ZFEU) došlo k decentralizácii právomocí Komisie v oblasti antitrustu na národné orgány ochrany súťaže. Príspevok sa zameriava na uplatňovanie prenesených právomocí slovenskými súťažnými orgánmi a zároveň analyzuje paralelnú aplikáciu európskych a národných súťažných pravidiel v rozhodovacej praxi slovenských orgánov ochrany súťaže.

Key words: decentralization of competencies, restrictive agreements, abuse of dominant position, ne bis in idem

Kľúčové slová: decentralizácia právomocí, dohody obmedzujúce hospodársku súťaž, zneužitie dominantného postavenia, ne bis in idem

1 ÚVOD

Podľa článku 3 Zmluvy o fungovaní Európskej únie (ďalej len „ZFEÚ“) uplatňuje Európska únia (ďalej len „Únia“) v oblasti hospodárskej súťaže výlučnú právomoc. Tá jej umožňuje prijímať všeobecne záväzné právne akty, ktoré sú jednotne a priamo uplatniteľné na území všetkých 28 členských štátov.[1] Tomuto oprávneniu Únie na druhej strane koreluje povinnosť lojality[2] členských štátov, obsahom ktorej je jednak pozitívny záväzok členských štátov pomáhať Únii pri dosahovaní jej cieľov a zároveň negatívny záväzok zdržať sa akýchkoľvek opatrení, ktoré by Únii sťažovali postup pri dosahovaní jej cieľov.

Medzi základné ciele Únie, definované v článku 3 Zmluvy o Európskej únii (ďalej len „Zmluva o EÚ“) patrí aj budovanie vnútorného trhu[3] a snaha o dosiahnutie trvalo udržateľného rozvoja Európy, založeného na vyváženom hospodárskom raste a cenovej stabilite. Jedným z prostriedkov, ktorým Únia zabezpečuje dosiahnutie tohto cieľa, je definovanie a aplikácia súťažných pravidiel, prostredníctvom ktorých reguluje správanie subjektov na trhu.

Súťažné právo v oblasti antitrustu[4] prešlo v roku 2004 výraznou modernizáciou. Dovtedy platné nariadenie č.17 zo 6. februára 1962 o uplatňovaní článku 85 a 86 Zmluvy[5] bolo s účinnosťou

[1] V zmysle článku 288 ZFEÚ sú za takéto právne akty považované nariadenia.

[2] Článok 4 ods. 3 Zmluvy o Európskej únii: „Podľa zásady lojálnej spolupráce sa Únia a členské štáty vzájomne rešpektujú a vzájomne si pomáhajú pri vykonávaní úloh, ktoré vyplývajú zo zmlúv. 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 jej úloh a neprijmú žiadne opatrenie, ktoré by mohlo ohroziť dosiahnutie cieľov Únie.“

[3] Podľa článku 26 ods. 2 ZFEÚ rozumieme vnútorným trhom oblasť bez vnútorných hraníc, v ktorej je zaručený voľný pohyb tovaru, osôb, služieb a kapitálu.

[4] T.j. kartelových dohôd podľa článku 101 ZFEÚ a zneužívania dominantného postavenia podľa článku 102 ZFEÚ

od 1. 5. 2004 nahradené Nariadením Rady (ES) č. 1/2003 o vykonávaní pravidiel hospodárskej súťaže stanovených v článkoch 81 a 82 Zmluvy[6] (ďalej len „nariadenie 1/2003“). Nariadenie 1/2003, reagujúc na rozšírenie Únie o desať nových členských štátov, decentralizovalo právomoci Komisie, dovtedy jediného (administratívneho) orgánu ochrany súťaže, aj na orgány ochrany súťaže jednotlivých členských štátov a na vnútroštátne súdy.

Nariadenie 1/2003 v článkoch 5 a 6 explicitne priznáva orgánom hospodárskej súťaže a vnútroštátnym súdom právomoc v jednotlivých prípadoch uplatňovať články 101 a 102 ZFEÚ. To znamená, že európske antitrustové súťažné pravidlá môžu byť aplikované aj slovenskými súťažnými autoritami, ktorými sú Protimonopolný úrad Slovenskej republiky (ďalej len „Protimonopolný úrad“, Krajský súd v Bratislave (ďalej len „Krajský súd“) a Najvyšší súd Slovenskej republiky (ďalej len „Najvyšší súd“). Predmetom výskumu v predkladanom príspevku sú práve aplikačné (ne)úspechy slovenských súťažných orgánov pri rozhodovaní o porušení alebo neporušení článkov 101, resp. 102 ZFEÚ.

2 PARALELNÁ APLIKÁCIA EURÓPSKYCH A NÁRODNÝCH ANTITRUSTOVÝCH PRAVIDIEL

Z pohľadu zamerania predkladaného príspevku je esenciálnym ustanovením článok 3 nariadenia 1/2003, ktorý národným orgánom ochrany súťaže výslovne ukladá, aby pri aplikácii vnútroštátnych súťažných pravidiel na dohody, rozhodnutia združení podnikov, zosúladené postupy a zneužite dominantného postavenia podniku, ktoré sú spôsobilé ovplyvniť obchod medzi členskými štátmi, zároveň aplikovali aj ustanovenia článkov 101 a 102 ZFEÚ.

To znamená, že pokiaľ národný súťažný orgán pri vyšetrovaní zistí, že podnik svojím konaním porušuje súčasne národné aj európske antitrustové pravidlá, je povinný aplikovať na konanie tohto podniku obe právne úpravy. Na druhej strane, Komisia môže aplikovať iba európske súťažné normy, nie však národné.

Z pohľadu posudzovania správania vyšetrovaného podniku môže ísť o situáciu, kedy jediným konaním dochádza k spáchaniu dvoch súťažných deliktov – národného a európskeho. Takýto jednočinný súbeh je možný, nakoľko súťažné záujmy chránené podľa ZFEÚ[7] sú odlišné od záujmov chránených vnútroštátnymi predpismi o ochrane hospodárskej súťaže[8]. Súdny dvor EÚ tento právny názor potvrdil vo viacerých svojich rozhodnutiach.[9]

V súvislosti s paralelnou aplikáciou európskych a národných súťažných pravidiel je potrebné vysporiadať sa aj s častou námietkou vyšetrovaných podnikov, a to či tým nedochádza k porušeniu zásady *ne bis in idem*.

Úplne jednoznačná situácia je pri aplikácii európskych súťažných noriem a súťažných noriem tretích (nečlenských) štátov. Súdny dvor EÚ v rozhodnutí Grafitové elektródy[10] jasne formuloval, že „*zásada ne bis in idem sa neuplatní v situáciách, v ktorých dochádza k ingerencii právnych poriadkov a orgánov hospodárskej súťaže tretích štátov v rámci ich vlastnej právomoci*“. V týchto prípadoch Komisia dokonca ani nemusí prihliadať na výšku sankcie uloženej za protisúťažný delikt v národnom konaní. To samozrejme platí v prípade, ak neexistuje medzinárodná zmluva medzi Úniou a tretím štátom, ktorá by stanovovala iné pravidlo.

V prípade paralelnej aplikácie európskych súťažných noriem a národných súťažných noriem členských štátov, je to trocha komplikovanejšie. Súdny dvor EÚ v konaní o prejudiciálnej otázke vo

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[5] Nariadenie Rady (EHS) č. 17: Prvé nariadenie implementujúce články 85 a 86 Zmluvy (o Európskom hospodárskom spoločenstve)

[6] Išlo o vtedy platnú Zmluvu o Európskom spoločenstve (ďalej len „ZES“). Články 81 a 82 ZES sú od účinnosti Lisabonskej zmluvy prečíslované na 101 a 102 ZFEÚ. Pre jednoduchšiu orientáciu v ďalšom texte budem pracovať s aktuálnym článkovaním a označením článkov 101 a 102 ZFEÚ sa myslí zároveň aj predchádzajúce označenie článkov 81 a 82 ZES.

[7] Ochrana hospodárskej súťaže v Únii, vytváranie vnútorného trhu, odstraňovanie bariér na vnútornom trhu.

[8] Ochrana súťaže na vnútroštátnom trhu.

[9] Napríklad Toshiba Corporation a i.(C-17/10), SGL Carbon AG v. Komisia (C-308/04 P), Akzo Nobel Chemicals a Akcros Chemicals v. Komisia (C-550/07 P), Walt Wilhelm (14/68)

[10] SGL Carbon AG v. Komisia (C-308/04 P)

veci Toshiba Corporation a i.[11] potvrdil, že súťažné orgány členských štátov sú oprávnené súčasne aplikovať oba súťažnoprávne poriadky. V prípade, ak si Komisia v súlade s článkom 11 ods. 6 nariadenia 1/2003 v konaní atrahuje právomoc na rozhodnutie o uplatňovaní článkov 101 a 102 ZFEÚ, orgánom členských štátov zostáva zachovaná právomoc rozhodovať o porušení vnútroštátnych súťažných pravidiel. Súdny dvor EÚ však ďalej špecifikoval, že zásada ne bis in idem sa musí dodržiavať v konaniach o uloženie pokuty.

Nariadenie 1/2003 potom stanovuje konvergenčné pravidlá pre paralelnú aplikáciu národného a európskeho súťažného práva – v prípade kartelových dohôd nesmie byť národné právo prísnejšie, ako je európske. Naopak, v prípade zneužívania dominantného postavenia, je prísnejšia úprava národných predpisov nad európskymi aprobovaná.[12]

3 ROZHODOVACIA PRAX SLOVENSKÝCH SÚŤAŽNÝCH ORGÁNOV

Slovenská republika pristúpila k Únii dňa 1. mája 2004, teda v rovnaký deň, kedy nadobudlo účinnosť Nariadenie 1/2003. Už o dva roky neskôr zaznamenávame prvú „lastovičku" pri aplikácii európskych a slovenských súťažných pravidiel Protimonopolným úradom Slovenskej republiky (ďalej len „Protimonopolný úrad").

Prípad Cargo

Dňa 3. júla 2006 Protimonopolný úrad rozhodol[13], že Železničná spoločnosť, a.s. a jej právny nástupca Cargo Slovakia, a. s. (ďalej „Cargo") v priebehu rokov 2004-2005 zneužili dominantné postavenie podľa článku 102 ZFEÚ a zároveň 8 ods. 2 zákona č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov v znení neskorších predpisov (ďalej len „ZOHS") na relevantnom trhu železničnej nákladnej prepravy veľkého objemu. Zneužívanie spočívalo v tom, že Cargo s cieľom získať dlhodobú zákazku na prepravu služieb pre spoločnosť Holcim, ktorá je na Slovensku významným producentom cementu, vypovedalo Dohody o cenách svojim obchodným partnerom, ktorí dovtedy poskytovali prepravné služby spoločnosti Holcim. Ukončenie cenových dohôd malo dopad na zvýšenie cien prepravných služieb, poskytovaných spoločnosti Holcim dopravcom LTE Logistik a Transport Slovakia s.r.o., v dôsledku čoho Holcim ukončila s týmto dopravcom spoluprácu a nadviazala zmluvný vzťah so spoločnosťou Cargo.

Aby Protimonopolný úrad mohol na dané konanie aplikovať európsku súťažnú úpravu, musel preukázať potenciál praktiky negatívne ovplyvniť obchod medzi členskými štátmi. Protimonopolný úrad mal podmienku vplyvu na obchod medzi členskými štátmi preukázanú nasledovnými skutočnosťami – trh železničnej nákladnej dopravy bol liberalizovaný, čo umožnilo poskytovať služby železničnej nákladnej prepravy všetkým dopravcom, vrátane dopravcov zo zahraničia, ktorí spĺňajú podmienky na prevádzkovanie dopravy na dráhe podľa § 31 a nasl. zákona o dráhach. V roku 2004 sa na slovenský trh pokúsila vstúpiť rakúska spoločnosť LTE Logistik und Transport GmbH, ktorá prostredníctvom dcérskej spoločnosti LTE Logistik a Transport Slovakia s.r.o. poskytovala služby pre spoločnosť Holcim. Spoločnosť Cargo na to zareagovala stratégiou, ktorá znamenala vytlačenie tohto konkurenta z trhu v Slovenskej republike. Ako konštatoval Protimonopolný úrad, toto konanie eliminujúce konkurenta z iného členského štátu viedlo k zmene štruktúry súťaže na trhu v rámci Európskej únie, a teda malo vplyv na obchod medzi členskými štátmi.

Za zneužitie dominantného postavenia Protimonopolný úrad uložil spoločnosti Cargo pokutu vo výške 2 489 544 €.

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[11] Toshiba Corporation a i.(C-17/10)

[12] Podľa článku 3 ods. 2 Nariadenia 1/2003 uplatňovanie vnútroštátneho súťažného práva nemôže viesť k zákazu dohôd, rozhodnutí združení podnikov alebo zosúladených postupov, ktoré môžu ovplyvniť obchod medzi členskými štátmi, ale ktoré neobmedzujú hospodársku súťaž v zmysle článku 81 ods. 1 Zmluvy alebo spĺňajú podmienky článku 81 ods. 3 Zmluvy alebo ktoré sú predmetom nariadenia o uplatňovaní článku 81 ods. 3 Zmluvy. Členským štátom sa týmto nariadením nezabraňuje prijímať a uplatňovať prísnejšie vnútroštátne právne predpisy na ich území, ktoré zakazujú alebo trestajú jednostranné konanie podnikov.

[13] Rozhodnutie Protimonopolného úradu SR č. 2006/DZ/2/1/067 z 3. 7. 2006, potvrdené rozhodnutím Rady Protimonopolného úradu SR č. 2006/DZ/R/2/144 z 22. 12. 2006

Spoločnosť Cargo sa s rozhodnutím Protimonopolného úradu nestotožnila a podala žalobu na preskúmanie jeho zákonnosti. V nej namietala nesprávne právne posúdenie Protimonopolným úradom, keď mala za to, že dominantné postavenie nezneužila. Ďalej namietala uloženie sankcie za protisúťažné správanie svojho právneho predchodcu Železničnej spoločnosti, a.s. a neprimeranú výšku pokuty.

Krajský súd v Bratislave rozsudkom spis. zn. 1S 27/2007-227 zo dňa 6. 12. 2007 potvrdil vecnú správnosť rozhodnutia Protimonopolného úradu, ako i správny postup pri aplikácii testu ekonomickej kontinuity[14] – uloženie sankcie za protisúťažné správanie spoločnosti Železničná spoločnosť, a.s. jej ekonomickému nástupcovi Cargo. Napriek tomu však Krajský súd znížil uloženú pokutu o 88% na sumu 298 745 €, keď dospel k názoru, že uložená sankcia je neprimerane vysoká, voči spoločnosti Cargo je viac represívna ako preventívna a navyše nezohľadňuje jeho ekonomickú situáciu.

Protimonopolný úrad podal proti rozsudku krajského súdu odvolanie a vo veci s konečnou platnosťou rozhodol Najvyšší súd Slovenskej republiky[15] (ďalej len „Najvyšší súd"). Ten rozsudok krajského súdu zmenil tak, že žalobu spoločnosti Cargo zamietol, čím potvrdil správnosť rozhodnutia Protimonopolného úradu i výšku pôvodne uloženej pokuty 2 489 544 €. Najvyšší súd okrem toho v súlade s konštantnou rozhodovacou praxou európskych súťažných orgánov potvrdil, že delenie účelu pokút na represívnu a preventívnu funkciu nemá v súťažnom práve opodstatnenie[16].

Tento prípad je zaujímavý tým, že slovenské súťažné orgány bez vážnejších aplikačných problémov použili v tom čase pre slovenské právo nový inštitút ekonomického nástupníctva. Do konania sa ako *amicus curiae* zapojila aj Komisia, ktorej stanovisko tvoriace časť rozhodnutia Najvyššieho súdu, potvrdzuje, že Protimonopolný úrad nové právomoci podľa Nariadenia 1/2003 zvládol výborne.

Prípad ENVI-PAK

V tomto prípade Protimonopolný úrad rozhodol[17], že spoločnosť ENVI-PAK, a.s. (ďalej len „EnviPak") v priebehu rokov 2007-2009 zneužila svoje dominantné postavenie podľa článku 102 ZFEÚ a zároveň 8 ods. 2 ZOHS na relevantnom trhu udeľovania súhlasu na používanie ochrannej známky Zelený bod na území Slovenskej republiky. Zneužívanie spočívalo v tom, že spoločnosť EnviPak nastavila systému platieb za ochrannú známku Zelený bod tak, že jej servisní klienti mali možnosť používať Zelený bod bez poplatku, zatiaľ čo jej licenční klienti platili zaň poplatok, a to aj za obaly na ktorých sa Zelený bod nenachádzal. Pri uplatňovanej výške tohto poplatku, ktorá nezohľadňovala náklady s ňou spojené, to malo za následok obmedzenie hospodárskej súťaže na

[14] Ekonomické nástupníctvo je inštitút európskeho súťažného práva, ktorého cieľom je zabezpečiť, aby nedošlo k zníženiu účinnosti súťažného práva len v dôsledku zmien v právnej štruktúre podnikateľa. Aplikácia inštitútu ekonomického nástupníctva musí garantovať, aby nástupnícka spoločnosť mohla byť vzatá na plnú zodpovednosť za konanie svojho predchodcu a znášať všetky dôsledky z toho vyplývajúce, vrátane pokút. Prenesenie zodpovednosti na nástupnícku spoločnosť na základe ekonomickej kontinuity medzi ňou a jej predchodcom je zamerané nielen na zámenu podnikateľa, ktorý sa dopustil porušenia súťažného práva, jeho nástupcom ako adresáta rozhodnutia o porušení vyžadujúc si jeho ukončenie. Tiež je jej cieľom zabezpečiť, aby sa podnikateľ nemohol vyhnúť sankciám a pokutám, ktoré by sa na neho inak vzťahovali, len jednoduchou zmenou svojej identity cez reštrukturalizáciu, predaj alebo inú právnu, či organizačnú zmenu.

[15] Rozsudok Najvyššieho súdu SR spis. zn. 1Sžhpu/2/2008 zo dňa 26. 10. 2010

[16] Podľa stanoviska Komisie v tomto konaní čo sa týka úlohy, ktorú pokuty majú v súťažnom práve, pokuty ukladané za porušenie článkov 101 a 102 ZFEU sa stanovujú s cieľom potrestať nelegálne konanie podnikateľov (represívna zložka) a zároveň majú odstrašujúci účinok (preventívna zložka) nielen na takéto konkrétne porušujúce podniky, ale i všeobecne na iné spoločnosti, aby nedošlo k porušovaniu európskeho súťažného práva do budúcnosti. Cieľom pokút je teda nielen trest, ale aj prevencia. Odstrašovanie je vlastne súčasťou posúdenia závažnosti porušenia, keďže toto sa musí posudzovať aj s ohľadom na odstrašujúci účinok pokút. Preto nie je možné rozdeliť tieto dve funkcie pokút.

[17] Rozhodnutie Protimonopolného úradu SR č. 2009/D/2/1/040 zo dňa 28. 8. 2009, zmenené rozhodnutím Rady Protimonopolného úradu SE č. 2010/DZ/R/2/049 zo dňa 6. 8. 2010

relevantnom trhu zabezpečovania zberu, zhodnocovania a recyklácie odpadov z obalov prostredníctvom oprávnených organizácií v Slovenskej republike.

Vplyv na obchod medzi členskými štátmi mal Protimonopolný úrad za preukázaný tým, že na území Slovenska sa dovážajú rôzne tovary označené symbolom Zelený bod. Spoločnosť EnviPak od týchto importérov vyžadovala, aby používali tento symbol iba s jeho súhlasom, t.j. na základe poskytnutia individuálnej licencie. Vzhľadom na to, že záujemcovia o licenciu pochádzali z iných členských štátov, resp. boli prepojení s podnikmi z iných členských štátov, alebo vo výraznej miere importovali tovary z iných členských štátov, uplatňovaná praktika spôsobovala obmedzenie týchto podnikateľov vo výbere oprávnenej organizácie. Z uvedeného dôvodu posudzované správanie spoločnosti EnviPak mohlo mať vplyv na obchod medzi členskými štátmi[18].

Protimonopolný úrad nesubsumoval konanie spoločnosti EnviPak pod konkrétnu skutkovú podstatu, ale pokutu vo výške 18 394 € uložil na základe generálnej zákazovej klauzuly.

Krajský súd v Bratislave na základe žaloby spoločnosti EnviPak preskúmal rozhodnutie Protimonopolného úradu a zrušil ho pre nezrozumiteľnosť, zmätočnosť a nepreskúmateľnosť.[19] Nezrozumiteľnosť rozhodnutia Protimonopolného úradu Krajský videl v tom, že Protimonopolný úrad nepodradil konanie spoločnosti EnviPak pod žiadnu skutkovú podstatu, ale sankcionoval ju na základe generálnej klauzuly, čo bolo podľa názoru Krajského súdu neprípustné. Krajský súd rovnako nepripustil paralelnú aplikáciu európskych a slovenských súťažných noriem.

Protimonopolný úrad podal proti rozsudku krajského súdu odvolanie a vo veci s konečnou platnosťou rozhodol Najvyšší súd.[20] K aplikácii sankcií na základe generálnej klauzuly zaujal Najvyšší súd eurokonformný postoj, keď konštatoval, že *„demonštratívny výpočet praktík má slúžiť súťažiteľom hlavne na orientáciu a poukazuje na najčastejšie porušenia pravidiel ochrany hospodárskej súťaže súťažiteľmi. Z dôvodov efektivity ochrany hospodárskej súťaže pred nezákonnými praktikami podnikateľov, ktorí by chceli zneužiť svoje dominantné postavenie na trhu a takáto praktika nie je uvedená v demonštratívnom výpočte v § 8 ods. 2 ZOHS, resp. čl. 102 ZFEU, tak je povinný takúto praktiku orgán ochrany hospodárskej súťaže podriadiť pod generálnu klauzulu. Orgán ochrany hospodárskej súťaže nemôže určité konanie, ktoré je správnym deliktom, podradiť pod skutkovú podstatu, ktorá mu je svojím obsahom najbližšia, nakoľko tento postup by bol nesprávny a v rozpore so zásadami administratívneho trestania (správny orgán nemôže subsumovať konanie súťažiteľa pod skutkovú podstatu takej praktiky, ktorá zjavne nespĺňa všetky podstatné znaky konania žalobcu)*.“ Argumentáciu krajského súdu o neprípustnosti paralelnej aplikácie oboch súťažných poriadkov Najvyšší súd odmietol ako zjavne nesprávnu.

V konečnom dôsledku Najvyšší súd rozsudok krajského súdu zmenil tak, že žalobu spoločnosti EnviPak zamietol, čím opätovne potvrdil správnosť rozhodnutia Protimonopolného úradu.

Prípad Akcenta

Tento prípad sa týka kartelovej dohody slovenských bánk. Protimonopolný úrad v roku 2009 rozhodol[21], že Slovenská sporiteľňa, a.s. (ďalej len „SlSp“), Československá obchodná banka, a.s. (ďalej len „ČSOB“) a Všeobecná úverová banka, a.s. (ďalej len „VÚB“) uzatvorili na relevantnom trhu poskytovania služieb bezhotovostných devízových operácií poskytovaných spotrebiteľom bez ohľadu na objem devízovej transakcie na území Slovenskej republiky dohodu[22] obmedzujúcu hospodársku súťaž, ktorej obsahom bolo rozdelenie trhu, čo mohlo ovplyvniť obchod medzi členskými štátmi. Protimonopolný úrad konštatoval, že tieto banky porušili ustanovenie článku 101 ods. 1 písm. c) ZFEÚ a § 4 ods. 1 v spojení s § 4 ods. 2 písm. a) a s 4 ods. 3 písm. c) ZOHS a účastníkom kartelu uložil pokutu v celkovej výške 10 191 800 €.[23] Zakázané konanie bánk

[18] V zmysle usmernenia Komisie o vplyve na obchod obsiahnutom v článkoch 81 a 82 Zmluvy (2004/C 101/07) pre konštatovanie ovplyvnenia obchodu v dôsledku správania určitého podniku je postačujúce, ak podnik svojim správaním je spôsobilý priamo, nepriamo, skutočne alebo potenciálne ovplyvniť obchod, t.j. nevyžaduje sa preukázanie skutočného následku.

[19] Rozsudok Krajského súdu v Bratislave spis. zn. 1S/249/2010-571 zo dňa 1. 12. 2011

[20] Rozsudok Najvyššieho súdu SR spis. zn. 8Sžhpu/1/2012 zo dňa 23. 5. 2013

[21] Rozhodnutie Protimonopolného úradu SR č. 2009/KH/1/1/030 zo dňa 9. 6. 2009, zmenené rozhodnutím Rady Protimonopolného úradu SR č. 2009/KH/R/2/054 zo dňa 19. 11. 2009

[22] Dohoda bola preukázaná spoločným stretnutím zástupcov bánk a následnou e-mailovou komunikáciou.

[23] Z toho SlSp 3 197 912 €, ČSOB 3 183 427 € a VÚB 3 810 461 €

spočívalo v dohode o vypovedaní a v budúcnosti neuzatvorení zmlúv o vedení bežných účtov českej spoločnosti AKCENTA CZ, a.s. (ďalej len „Akcenta"), ktorá pre banky predstavovala konkurenta na trhu devízových operácií. Banky dohodnutý postup voči Akcente realizovali, v dôsledku čoho prakticky došlo k vylúčeniu tohto konkurenta, a teda k obmedzeniu súťaže.

Protimonopolný úrad ustálil, že podmienka vplyvu na obchod medzi členskými štátmi, napriek tomu, že všetky dotknuté banky podnikali iba na Slovensku, bola splnená tým, že banky uzavretím a aplikáciou predmetnej dohody obmedzili konkurenta z iného členského štátu (Akcentu) pri realizovaní jeho služieb na trhu bezhotovostných devízových operácií v Slovenskej republike, a to formou dohody ktorá má povahu tzv. ťažkého kartelu, pričom dohody, ktoré sa definujú ako ťažké kartely, sa už s prihliadnutím na ich povahu považujú za spôsobilé ovplyvniť obchod medzi členskými štátmi.

Všetky tri dotknuté banky podali proti rozhodnutiu žaloby na preskúmanie zákonnosti. S konečnou platnosťou je dnes rozhodnuté v prípadoch SlSp[24] a VÚB[25].

V oboch prípadoch Najvyšší súd rozhodoval o odvolaniach Protimonopolného úradu proti rozhodnutiam Krajského súdu v Bratislave, ktorými krajský súd zrušil rozhodnutia Protimonopolného úradu a vrátil veci na ďalšie konanie. Za najväčšie nedostatky v oboch prípadoch súd považoval, že Protimonopolný úrad dostatočne nepreukázal, že spoločnosť Akcenta bola súťažiteľom sankcionovaných bánk.

Rozhodovanie Najvyššieho súdu nebolo úplne jednoduché. Najvyšší súd dokonca v konaní týkajúcom sa Slovenskej sporiteľne, a.s. predložil Súdnemu dvoru EÚ niekoľko prejudiciálnych otázok, týkajúcich sa významu (ne)legality podnikania spoločnosti Akcenta na území Slovenska[26] vo vzťahu určenia tohto podniku ako súťažiteľa voči sankcionovaným bankám. Súdny dvor EÚ rozsudkom č. C-68/12 zo dňa 7. 2. 2013 konštatoval, že „*skutočnosť, že podnik dotknutý kartelovou dohodou, ktorej cieľom je obmedziť hospodársku súťaž, údajne pôsobí na relevantnom trhu v čase uzatvorenia tejto kartelovej dohody nelegálne, nemá vplyv na otázku, či tento kartel predstavuje porušenie tohto ustanovenia*".

Napokon Najvyšší súd v oboch prípadoch rozsudok Krajského súdu zmenil a žaloby SlSp, ako aj VÚB zamietol.

4 ZÁVER

Na záver môžeme konštatovať, že Protimonopolný úrad sa svojej úlohy orgánu aplikácie európskeho súťažného práva, ktorú mu zverilo Nariadenie 1/2003, chopilo správne. Aj v prípade Najvyššieho súdu stále platí pravidlo iura novit curia. Za veľký nedostatok však považujem dĺžku konania, ktoré častokrát od začatia vyšetrovania Protimonopolným úradom po právoplatné skončenie rozsudkom Najvyššieho súdu trvá aj desať rokov.

Použitá literatúra:

Zmluva o fungovaní Európskej Únie
Zmluva o Európskej únii
Nariadenie Rady (ES) č. 1/2003 o vykonávaní pravidiel hospodárskej súťaže stanovených v článkoch 81 a 82 Zmluvy
Usmernenie Komisie o vplyve na obchod obsiahnutom v článkoch 81 a 82 Zmluvy (2004/C 101/07)
Rozsudok Súdneho dvora EÚ vo veci Toshiba Corporation a i.(C-17/10)
Rozsudok Súdneho dvora EÚ vo veci SGL Carbon AG v. Komisia (C-308/04 P)
Rozsudok Súdneho dvora EÚ vo veci Akzo Nobel Chemicals a Akcros Chemicals v. Komisia (C-550/07 P)
Rozsudok Súdneho dvora EÚ vo veci Walt Wilhelm (14/68)
Rozsudok Súdneho dvora EÚ vo veci Akcenta (C-68/12)
Rozhodnutie Protimonopolného úradu SR č. 2006/DZ/2/1/067
Rozhodnutie Protimonopolného úradu SR č. 2009/KH/1/1/030
Rozhodnutie Rady Protimonopolného úradu SR č. 2006/DZ/R/2/144

[24] Rozsudok Najvyššieho súdu SR spis. zn. 3Sžh/4/2010 zo dňa 21. 5. 2013
[25] Rozsudok Najvyššieho súdu SR spis. zn. 2Sžhpu/3/2011 zo dňa 22. 5. 2013
[26] V čase uzavretia kartelovej dohody legalita podnikania Akcenty nebola spochybnená, dodatočne sa zistilo, že na poskytovanie devízových služieb nedisponovala príslušným povolením NBS.

Rozhodnutie Rady Protimonopolného úradu SR č. 2009/KH/R/2/054
Rozsudok Krajského súdu v Bratislave spis. zn. 1S 27/2007-227
Rozsudok Krajského súdu v Bratislave spis. zn. 1S/249/2010-571
Rozsudok Najvyššieho súdu SR spis. zn. 1Sžhpu/2/2008
Rozsudok Najvyššieho súdu SR spis. zn. 8Sžhpu/1/2012
Rozsudok Najvyššieho súdu SR spis. zn. 3Sžh/4/2010
Rozsudok Najvyššieho súdu SR spis. zn. 2Sžhpu/3/2011

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AKTUÁLNY VÝVOJ V SÚKROMNOPRÁVNOM PRESADZOVANÍ SÚŤAŽNÉHO PRÁVA

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Abstract: Competition law enforcement is based on two fundamental pillar, namely public and private enforcement. In the legal context of the EU, public enforcement dominantes,however, there is strong tendency towards enhanced role of the private enforcement. The author addresses current development of the private enforcment of the competition law. In recent years we wittnessed not only judicial recognition of the right to compensation of competition harm but also subsequent activitity of the European Commission leading to a legislative proposal. We could also observe dynamic development at the level of the national courts which frequently filled the gaps which had hindered the effective enforcement of damage claims.

Abstrakt: V právnom priestore Európskej únie dominuje pri presadzovaní súťažného práva verejnoprávny pilier, pričom v záujme zabezpečenia ochrany hospodárskej súťaže rastie tendencia smerujúca k posilneniu súkromnoprávnej roviny presadzovania súťažného práva. Predkladaný príspevok sa venuje aktuálnemu vývoju v oblasti súkromnoprávneho presadzovania súťažného práva. V posledných rokoch sme boli svedkami nielen zakotvenia práva na odškodnenie súťažnej ujmy v judikatúre Súdneho dvora EÚ, ale aj nadväzujúcej aktivity Európskej komisie, ktorá vyústila do predloženia legislatívneho návrhu. Rovnako sme mohli sledovať dynamický vývoj v rozhodovacej činnosti vnútroštátnych súdov, najmä v Nemecku, Holandsku a Veľkej Británii i o čosi menej razantný postup národných zákonodarcov v snahe vyplniť biele miesta na mape efektívneho presadzovania súťažného práva súkromnoprávnou cestou. Rozhodovacia činnosť národných súdov smerovala nielen k explicitnému uznaniu práva na náhradu škody spôsobenej protisúťažným správaním, ale týkala sa aj špecifických hmotnoprávnych a procesnoprávnych podmienok viažucich sa na uplatnenie tohto práva.

Key words: Damage claims, private enforcement of competition law, Competition law, actions for damages

Kľúčové slová: súťažné právo, súkromnoprávne presadzovanie súťažného práva, náhrada škody, žaloba na náhradu škody, kartely, zneužívanie dominantného postavenia

1 ÚVOD

Ochrana hospodárskej súťaže pred jej zneužívaním stojí na dvoch základných pilieroch, a to verejnoprávnom a súkromnoprávnom presadzovaní súťažného práva. V právnom priestore Európskej únie dominuje verejnoprávny pilier, pričom v záujme zabezpečenia ochrany hospodárskej súťaže rastie tendencia smerujúca k posilneniu súkromnoprávnej roviny presadzovania súťažného práva[1]. Pod pojmom súkromnoprávne presadzovanie súťažného práva rozumieme uplatňovanie právnych prostriedkov v horizontálnych vzťahoch medzi dvoma a viacerými subjektmi, ktoré smeruje k ochrane práv a právom chránených záujmov dotknutých porušením noriem verejnej zložky súťažného práva.

Tento príspevok sa venuje práve súkromnoprávnym prostriedkom presadzovania súťažného práva. Z hľadiska aktuálnych trendov v tejto oblasti je primárnou výzvou zladenie súkromnoprávneho a verejnoprávneho presadzovania súťažného práva a nastavenie ich

[1] K verejnoprávnemu presadzovaniu súťažného práva na európskej úrovni pozri VARGA, P.: Inštitucionálny systém pri uplatňovaní komunitárneho súťažného práva. In: Justičná revue, 61, 2009, č. 10, s. 1212-1230. K pojmovému vymedzeniu súkromnoprávneho presadzovania súťažného práva pozri aj KRÁLIČKOVÁ, B.: Súkromnoprávne aspekty protimonopolného práva. Bratislava, Veda, 2012.

vzájomného vzťahu tak, aby spoločne motivovali účastníkov súťaže k rešpektovaniu súťažného práva, maximalizovali odstrašujúci účinok a neviedli pritom k neprimeraným nákladom a prekážkam[2].

Hoci súkromnoprávne presadzovanie súťažného práva môže smerovať k dosiahnutiu rôznych cieľov, v tomto príspevku sa budeme sa sústrediť na najvýznamnejší prostriedok súkromnoprávneho presadzovania súťažného práva, ktorým je uplatnenie nárokov zo zodpovednosti za škodu spôsobenú porušením súťažného práva. V prvej časti príspevku sa budeme venovať snahám o legislatívne zakotvenie súkromnoprávneho presadzovania súťažného práva na úrovni EÚ. V druhej časti potom pozornosť nasmerujeme na najnovšiu judikatúru Súdneho dvora EÚ v oblasti interakcie medzi súkromnoprávnym a verejnoprávnym pilierom presadzovania súťažného práva, a to s dôrazom na sprístupňovanie dokumentov a informácií poskytnutých v rámci programu zhovievavosti.

2 VÝVOJ SMERUJÚCI K LEGISLATÍVNEMU ZAKOTVENIU SÚKROMNOPRÁVNEHO PRESADZOVANIA SÚŤAŽNÉHO PRÁVA V PRÁVE EÚ

Za posledných trinásť rokov sme zaznamenali nielen pevné zakotvenie práva na odškodnenie súťažnej ujmy v judikatúre Súdneho dvora EÚ, ale aj následný vývoj v legislatívnej činnosti Európskej komisie i v rozhodovacej praxi vnútroštátnych súdov. Porušenia práva hospodárskej súťaže majú negatívny dopad na ekonomiku i na spotrebiteľov. Táto ujma nie je abstraktná, je naopak reálna - spotrebiteľ ju cíti na zvýšenej cene, nižšej kvalite, užšom sortimente, podniky ju vnímajú cez nižšie tržby a horšie výsledky v účtovných závierkach. Podľa odhadov Európskej komisie kartely spôsobujú podnikateľom a spotrebiteľom škodu v rozmedzí 25 až 69 miliárd EUR ročne[3]. Subjekty poškodené protisúťažným správaním si v rámci EÚ uplatňujú len nepatrný zlomok tejto ujmy.

Prípady týkajúce sa náhrady škody pre porušenie súťažného práva sa vyznačujú radom osobitostí, ktoré často nie sú dostatočne upravené v súkromnoprávnych a procesnoprávnych kódexoch. Hoci právne poriadky všetkých členských štátov EÚ v zásade umožňujú uplatnenie týchto nárokov, v Európe prevláda názor, že súčasný právny rámec pre uplatnenie nárokov vyplývajúcich zo zodpovednosti za škodu spôsobenú porušením súťažného práva nepostačuje na zabezpečenie účinnej kompenzácie poškodených osôb. Uvedený stav vedie k zamysleniu, akú úlohu v systéme presadzovania súťažného práva zohráva, či má zohrávať, uplatňovanie súkromnoprávnych nárokov vyplývajúcich z porušenia súťažných pravidiel.

Primárne právo EÚ neobsahuje explicitnú právnu úpravu súkromnoprávneho presadzovania súťažného práva. Jediným výslovným ustanovením primárneho práva, ktoré má priamy dopad na súkromnoprávne vzťahy je článok 101 ods. 2 Zmluvy o fungovaní Európskej únie („ZFEÚ"), ktorý stanovuje sankciu neplatnosti pre dohody a rozhodnutia, ktoré sú v rozpore s ustanovením tohto článku.

Aj keď otázka náhrady škody spôsobenej porušením súťažných pravidiel viac, či menej rezonovala už v minulosti, do popredia sa dostala až v nadväznosti na rozsudky Súdneho dvora Európskej únie, ktoré otvorili cestu súkromnoprávnemu presadzovaniu súťažného práva EÚ[4]. Judikatúra Súdneho dvora EÚ vymedzila obsah a právnu povahu nároku na náhradu škody spôsobenej protisúťažným správaním, ako aj základné parametre procesného rámca, akými sú právomoc, aktívna legitimácia, či dôkazné bremeno.

Právo EÚ však ponechalo množstvo hmotnoprávnych a procesnoprávnych otáznikov. Medzi ne patrí otázka kolektívnych žalôb, premlčania, zavinenia ako kritéria pre vznik zodpovednosti za škodu, záväzného účinku rozhodnutí súťažných orgánov, ako aj prístupu k dôkazom. Na vyriešenie týchto otázok si už s použitím zásad primeranosti a účinnosti nevystačíme.

Vo svetle pretrvávajúcich rozdielov v právnych úpravách členských štátov preto vyvstáva otázka o potrebe harmonizácie hmotnoprávnej a procesnoprávnych aspektov súkromnoprávneho

[2] Pozri Private Remedies, OECD Competition Policy Roundtables, DAF/COMP(2006)34, s. 8 a nasl.

[3] Príloha Bielej knihy o žalobách o náhradu škody pre porušenie antitrustových pravidiel: Hodnotenie dopadov možnej regulácie (Impact assessment) - materiál Komisie SEC (2008) 405 zo dňa 2.4.2008, s. 14-15.

[4] Pozri rozsudky C-126/97, Eco Swiss China Time Ltd. v Benetton International NV, C-453/99, Courage Ltd v Bernard Crehan, C-295-298/04, Vincenzo Manfredi a iní v Lloyd Adriatico Assicurazioni SpA a iní. K tomu pozri KRÁLIK, A.: Vývoj súkromnoprávneho presadzovania súťažného práva v judikatúre Súdneho dvora Európskej únie. In: Zo súdnej praxe, 6/2012.

uplatňovania súťažného práva. Rozdiely v právnych úpravách vedú k neistote, pokiaľ ide o podmienky, za ktorých si poškodené osoby môžu uplatňovať svoje právo na náhradu škody, ktoré im vyplýva z právneho poriadku EÚ, čo má vplyv na hmotnoprávnu účinnosť tohto práva. Existencia pretrvávajúcich prekážok naznačuje, že pre dosiahnutie účinnejšieho uplatňovania týchto súkromnoprávnych nárokov v právnych poriadkoch členských štátov bude nevyhnutné aspoň čiastočné zladenie kľúčových aspektov súkromnoprávneho presadzovania súťažného práva. Táto potreba je tiež akcentovaná skutočnosťou, že protisúťažné konanie a jeho škodlivé následky často presahujú hranice jedného členského štátu. Poškodené subjekty si často volia ako miesto na prejednanie svojej žaloby o náhradu škody štát, v ktorom sú usadené. Rozdiely medzi vnútroštátnymi pravidlami vedú k nevyrovnanosti podmienok pri uplatňovaní nárokov, čo môže ovplyvniť hospodársku súťaž na trhoch, na ktorých pôsobia tak páchatelia, ako aj obete protisúťažného konania. Nerovnaké presadzovanie pravidiel môže mať za následok konkurenčnú výhodu pre podniky, ktoré porušili súťažné predpisy a taktiež môže pôsobiť ako brzda v rámci výkonu práv vyplývajúcich z jednotného trhu EÚ v tých krajinách, kde sa právo na náhradu škody presadzuje účinnejšie.

Prijatím Zelenej a Bielej knihy o žalobách na náhradu škody spôsobenej porušením antitrustových pravidiel ES Európska komisia otvorila túto tému na širokú odbornú diskusiu, do ktorej sa zapojilo veľké množstvo národných súťažných orgánov, obchodných komôr, právnych firiem i akademická sféra[5]. Účelom týchto konzultácií bolo identifikovať hlavné prekážky efektívnejšieho systému na uplatňovanie náhrady škody a definovať alternatívy riešenia. Následne nastal čas na to, aby sa navrhovaný právny rámec otestoval v politickej debate. Európsky parlament v roku 2009 síce na jednej strane podporil snahu Komisie pripraviť návrh záväzného právneho rámca pre účinné uplatňovanie nárokov na náhradu škody[6]. Na strane druhej však odznela požiadavka, aby prijatý právny rámec pre oblasť súťažného práva bol konzistentný s inými mechanizmami pre uplatňovanie nárokov z mimozmluvnej zodpovednosti (napr. v oblasti ochrany spotrebiteľa).

Na úrovni EÚ sa tak presadil prístup, ktorý komplexne rieši mechanizmy kolektívneho uplatňovania nárokov na nápravu. Úprava náhrady škody spôsobenej porušením súťažného práva je len jednou z "podmnožín" kolektívnych mechanizmov nápravy. To vyústilo do prijatia komplexného súboru pravidiel pre mechanizmy kolektívneho uplatňovania nárokov na nápravu.

Tento súbor pravidiel prijala Komisia 11. júna 2013. Komisia videla výhodu v uplatnení horizontálneho postupu tak, aby sa predišlo riziku nekoordinovaných sektorových iniciatív a aby sa zabezpečila čo najvhodnejšia interakcia s národnými procesnými predpismi.

Pokiaľ ide "strešnú" právnu úpravu jednotlivých mechanizmov uplatňovania nárokov, bola zvolená forma spoločných nezáväzných zásad cieľom pristupovať v EÚ ku kolektívnemu uplatňovaniu nárokov na nápravu konzistentne aj bez toho, aby sa harmonizovali systémy členských štátov. Vnútroštátne mechanizmy kolektívneho uplatňovania nárokov na nápravu by mali byť k dispozícii v rôznych oblastiach, v ktorých EÚ poskytuje občanom a spoločnostiam práva, najmä v oblasti ochrany spotrebiteľov, hospodárskej súťaže, ochrany životného prostredia a finančných služieb.

Integrálnou súčasťou súboru opatrení je návrh smernice o žalobách o náhradu škody v dôsledku protisúťažného konania („smernica")[7]. Medzi deklarované ciele návrhu smernice patrí zabezpečenie účinného vykonávania práva na náhradu škody a nastavenie optimálneho vzájomného pôsobenia medzi verejnoprávnym a súkromnoprávnym presadzovaním pravidiel

[5] Zelená kniha o žalobách na náhradu škody spôsobenej porušením antitrustových pravidiel ES, COMP(2005) 672 final a Biela kniha o žalobách o náhradu škody pre porušenie antitrustových pravidiel zo dňa 2.4.2008, KOM (2008) 165, doplnená o Diskusnú prílohu (Diskusný materiál Komisie SEC (2008) 404 zo dňa 2.4.2008 a hodnotenie dopadov možnej regulácie (Impact assessment) - materiál Komisie SEC (2008) 405 zo dňa 2.4.2008. K tomu pozri aj KRÁLIČKOVÁ, B.: Krok vpred na ceste k dosiahnutiu efektívneho súkromnoprávneho vymáhania súťažného práva. In: Právny obzor, č. 2, 2009, s. 138.

[6] European Parliament Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules, 2008/2154(INI).

[7] Návrh smernice Európskeho parlamentu a Rady o niektorých pravidlách upravujúcich žaloby podávané na základe vnútroštátneho práva s cieľom získať náhradu škody utrpenej v dôsledku porušenia predpisov členských štátov a Európskej únie na ochranu hospodárskej súťaže. 2013/0185 (COD).

hospodárskej súťaže. Návrh smernice možno považovať za snahu o čiastočnú harmonizáciu v tejto oblasti, najmä pokiaľ ide o sprístupňovanie dôkazov, záväznosť rozhodnutí súťažných orgánov, premlčanie, solidárnu zodpovednosť spolupáchateľov, či dokazovanie a kvantifikáciu škody.

V nasledujúcom texte uvádzame aspoň heslovite niekoľko základných paramentrov návrhu smernice:

a) **Domnienka vzniku škody:** návrh smernice pracuje s domnienkou, že kartelové protisúťažné konanie spôsobilo škodu, a to najmä tým, že ovplyvnilo cenu. V závislosti od okolností prípadu to znamená, že kartel viedol k určitému nárastu ceny alebo zabránil zníženiu cien, ku ktorému by došlo bez existencie kartelu. Ide o vyvrátiteľnú domnienku. Prekladatelia smernice navrhli, aby sa táto vyvrátiteľná domnienka uplatňovala len na kartely vzhľadom na ich tajnú povahu, ktorá zvyšuje informačnú asymetriu a poškodeným subjektom sťažuje získavanie dôkazov potrebných na preukázanie spôsobenej škody.

b) **Sprístupňovanie dokumentov predložených v rámci programov zhovievavosti:** Európska komisia dlhodobo vyvíja úsilie na ochranu integrity a efektívnosti verejnoprávnych nástrojov na presadzovanie súťažného práva. Dlhodobo pri tom chráni dokumenty predložené žiadateľmi o zhovievavosť voči sprístupneniu aj takým spôsobom, že vstupuje do konaní pred súdmi ako vedľajší účastník, či *amicus curiae*, a to tak pred súdmi členských štátov ako aj v jurisdikciách tretích krajín (najmä v Spojených štátoch amerických). Prevláda však presvedčenie, ktoré sa ešte v dôsledku rozsudkov *Pfleiderer*, či *Donau Chemie* posilnilo, že pre udržateľnosť programov zhovievavosti ako efektívnych nástrojov boja proti kartelom bude nevyhnutné túto oblasť záväzne upraviť na úrovni EÚ[8].

Panuje totiž obava, že široký priestor pre úvahu vnútroštátnych súdov v oblasti sprístupňovania dokumentov pochádzajúcich od oznamovateľov kartelov by mohol spôsobiť právnu neistotu, výrazný pokles žiadostí o imunitu, zníženie kvality podaní, čo by v konečnom dôsledku znamenalo aj menší počet odhalených a potrestaných kartelov. V tomto bode by sa začarovaný kruh uzavrel – keďže nižší počet odhalených kartelov má automaticky za následok aj nižší počet následných žalôb o náhradu škody.

Návrh smernice o náhrade škody z júna 2013 má ambíciu túto otázku explicitne riešiť. Predstavené riešenie spočíva v poskytnutí absolútnej ochrany pre dva druhy dokumentov, ktoré sa považujú za zásadné z pohľadu účinného využívania nástrojov verejnoprávneho presadzovania. Týmito dokumentmi sú vyhlásenia podnikov v rámci programov zhovievavosti a návrhy na urovnanie.

V navrhovanej smernici sa stanovuje, že vnútroštátny súd nemôže nikdy nariadiť sprístupnenie takýchto dokumentov v prípade žalôb o náhradu škody. Návrh smernice zároveň smeruje k poskytnutiu dočasnej ochrany pre dokumenty, ktoré účastníci konania pripravili osobitne na účely konania vedeného súťažnými orgánmi alebo ktoré pripravili súťažné orgány v rámci takýchto konaní. Navrhuje sa, aby sa tieto dokumenty mohli poskytnúť až po skončení konania na orgáne na ochranu hospodárskej súťaže[9].

c) **Prístup k dôkazom -** Návrh smernice sprístupňovanie dôkazov koncipuje tak, že žalobca, ktorý *prima facie* preukáže svoj nárok na náhradu škody voči konkrétnemu žalobcovi by mal mať právo žiadať súd, aby žalovanému alebo tretej osobe nariadil, aby sprístupnili dôkazy, a to bez ohľadu na to, či sa dôkazy nachádzajú v spise orgánu na ochranu hospodárskej súťaže. Strana žiadajúca o sprístupnenie by mala splniť dve podmienky. V prvom rade by mala preukázať, že dôkazy pod kontrolou druhej strany alebo tretej osoby sú relevantné z hľadiska odôvodnenia nárokov alebo obhajoby. V druhom rade by mala špecifikovať buď jednotlivé dôkazy alebo kategórie dôkazov a to v maximálne možnej miere na základe dostupných skutočností. Súdy by podľa návrhu smernice mali obmedziť sprístupnenie dôkazov len na to, čo je v danom prípade primerané, čím by sa mala zabezpečiť ochrana informácií pred ich zneužitím, obchodovaním, šikanóznym praktikám a vznikom neprimeraných nákladov pre podniky.

d) **Kolektívne mechanizmy odškodnenia -** Návrh smernice je menej ambiciózny v oblasti kolektívnych mechanizmov odškodnenia. Je koncipovaný tak, že sa vzťahuje len na mechanizmy odškodnenia, ktoré sú v súčasnosti dostupné v členských štátoch. Kým individuálne žaloby

[8] Pozri rozsudky C-360/09, Pfleiderer AG v Bundeskartellamt a C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG a iní.

[9] K otázke sprístupňovania informácií zo správneho spisu Protimonopolného úradu SR pozri: KALESNÁ, K. – BLAŽO, O.: Zákon o ochrane hospodárskej súťaže. Komentár. 1. vydanie, Praha, C.H. Beck, 2012, s. 181.

predvídajú právne poriadky všetkých členských štátov Únie, kolektívne mechanizmy nápravy poznajú len niektoré krajiny EÚ. Návrh smernice v tomto smere nestanovuje povinnosť zaviesť kolektívne žaloby, má ambíciu vymedziť spoločný právny rámec len pre štáty, ktoré tento druh presadzovania nárokov už zaviedli.

e) Viazanosť rozhodnutí národných súťažných orgánov pre súdy - Z pohľadu efektívnosti následných žalôb je dôležité spomenúť, že návrh smernice počíta s viazanosťou vnútroštátnych rozhodnutí pre súdy. Vnútroštátne súdy by pri rozhodovaní o žalobách o náhradu škody nemali prijať rozhodnutie, ktoré odporuje predchádzajúcemu rozhodnutiu vnútroštátneho súťažného orgánu, v ktorom bolo zistené porušenie súťažného práva. V tejto súvislosti je dôležité spomenúť aj významný cezhraničný účinok - rozhodnutie vnútroštátneho súťažného orgánu bude záväzné nielen pre súdy v danom členskom štáte, ale aj pre súdy všetkých členských štátov EÚ.

3 AKTUÁLNY VÝVOJ V JUDIKATÚRE SÚDNEHO DVORA EÚ

Program zhovievavosti je dlhodobo hlavným generátorom kartelových prípadov prejednávaných Komisiou a dlho sa zdalo, že v tejto oblasti nedochádza k výraznejšiemu stretu medzi verejným záujmom na odškodnení osôb poškodených protisúťažným správaním a výhodami poskytovanými oznamovateľom kartelov[10]. Bolo však zrejmé, že takto nastolená rovnováha sa môže narušiť zefektívnením súkromnoprávneho uplatňovania súťažného práva.

Na prvý pohľad pokojnú hladinu rozčeril rozsudok Súdneho dvora EÚ vo veci *Pfleiderer*. Súdny dvor EÚ v tomto prípade riešil prejudiciálnu otázku o prístupe subjektov poškodených kartelom k žiadostiam o zhovievavosť.

Prípad sa na vnútroštátnej úrovni týkal konania, v ktorom nemecký *Bundeskartellamt*, uložil pokuty v celkovej výške 62 miliónov eur trom európskym výrobcom dekoratívnych papierov a piatim osobne zodpovedným fyzickým osobám za uzavretie dohôd týkajúcich sa cien a obmedzenia výrobných kapacít. Dotknuté podniky sa proti rozhodnutiam o uložení pokút neodvolali, a rozhodnutia teda nadobudli právoplatnosť.

Po skončení tohto konania spoločnosť Pfleiderer, ktorá bola odberateľom týchto účastníkov kartelu, požiadala na účely prípravy občianskoprávnych žalôb o náhradu škody, aby jej bolo umožnené nahliadnuť do správneho spisu. *Bundeskartellamt* na žiadosť reagoval predložením troch rozhodnutí o uložení pokút v anonymizovanej forme, ako aj zoznamu dôkazov zistených pri vyšetrovaní.

Spoločnosť Pfleiderer preto následne požiadala o prístup k všetkým písomnostiam uvedeným v spise, vrátane dokumentov týkajúcich sa žiadostí o zhovievavosť dobrovoľne predložených žiadateľmi, ako aj zabezpečených dôkazov. Nemecký súťažný orgán túto žiadosť čiastočne zamietol a umožnil len prístup k spisu, z ktorého boli odstránené dokumenty obsahujúce obchodné tajomstvo, interné dokumenty a neumožnil ani prístup k zabezpečeným dôkazom. Proti tomuto rozhodnutiu o čiastočnom zamietnutí podala spoločnosť Pfleiderer žalobu na správny súd v Bonne. Ten žalobe čiastočne vyhovel a nariadil poskytnutie prístupu k tým dokumentom v spise, ktoré žiadateľ o zhovievavosť dobrovoľne poskytol nemeckému orgánu hospodárskej súťaže, ako aj k usvedčujúcim a získaným dôkazom. Súd naopak neumožnil prístup k dokumentom obsahujúcim obchodné tajomstvo a interným podkladom, t. j. zápisniciam z rokovaní nemeckého súťažného orgánu a korešpondenciu v rámci Európskej siete pre hospodársku súťaž. Vnútroštátny súd dospel k záveru, že pre výsledok sporu, ktorý prejednáva, je potrebný výklad práva Únie, rozhodol sa preto prerušiť konanie a položiť Súdnemu dvoru EÚ prejudiciálnu otázku ohľadom sprístupňovania dokumentov.

Súdny dvor EÚ v tejto veci vážil dva záujmy. Prvým záujmom je ochrana programov zhovievavosti, ktoré predstavujú užitočné nástroje v účinnom boji zameranom na odhaľovanie a ukončenie porušovania práva hospodárskej súťaže, a prispievajú tým k dosiahnutiu cieľa, ktorým je účinné uplatňovanie článkov 101 ZFEÚ a 102 ZFEÚ.

Druhým záujmom je právo na náhradu škody spôsobenej protisúťažným správaním, ktoré vyplýva z predchádzajúcej judikatúry Súdneho dvora EÚ vo veciach *Courage* a *Manfredi*.

Vnútroštátne súdy i súťažné orgány by podľa Súdneho dvora EÚ mali pri posudzovaní žiadostí o prístup k dokumentom, ktoré sa vzťahujú na program zhovievavosti, zabezpečiť, aby príslušné vnútroštátne pravidlá neboli menej výhodné ako pravidlá, ktoré sa týkajú obdobných vnútroštátnych nárokov, a neboli upravené tak, aby bolo prakticky nemožné alebo neprimerane

[10] K programu zhovievavosti pozri bližšie: KRÁLIK, A.: Uplatňovanie programu zhovievavosti (leniency) v EÚ a na Slovensku. In: Bulletin Slovenskej advokátskej komory, 1-2/2011.

ťažké získať takú náhradu. Mali by zvážiť záujmy na oznámení informácií oproti záujmom na ochrane informácií, ktoré dobrovoľne poskytli žiadatelia o zhovievavosť. Takéto zváženie záujmov môžu vnútroštátne súdy vykonať v rámci vnútroštátneho práva len samostatne v každom jednotlivom prípade a po zvážení všetkých relevantných dôkazov v danej veci.

Súdny dvor EÚ v línii týchto argumentov poskytol nasledovnú odpoveď na položenú predbežnú otázku: „*Ustanovenia práva Únie v oblasti kartelov, a najmä nariadenie Rady (ES) č. 1/2003 zo 16. decembra 2002 o vykonávaní pravidiel hospodárskej súťaže stanovených v článkoch 101 a 102 ZFEÚ, sa majú vykladať v tom zmysle, že nebránia tomu, aby bol osobe, ktorá bola poškodená tým, že bolo porušené právo hospodárskej súťaže Únie, a ktorá sa domáha náhrady škody, umožnený prístup k dokumentom vzťahujúcim sa na konanie o zhovievavosti s osobou, ktorá súťaž porušila. V každom prípade však súdom členských štátov prináleží, aby na základe svojho vnútroštátneho práva určili podmienky, za akých má byť taký prístup povolený alebo zamietnutý, pričom musia zvážiť záujmy chránené právom Únie.*“

Po vynesení rozsudku vo veci *Pfleiderer* Súdny dvor EÚ riešil vo veci *Donau Chemie* otázku priestoru pre úvahu vnútroštátneho súdu pri rozhodovaní o sprístupnení dokumentov poskytnutých v rámci programu zhovievavosti[11]. Súdny dvor EÚ sa musel vysporiadať s otázkou, či ustanovenie vnútroštátneho práva môže podmieniť sprístupnenie spisu, vrátane dokumentov poskytnutých v rámci programu zhovievavosti, súhlasom všetkých účastníkov konania, v ktorom sa uplatňuje článok 101 ZFEÚ a to bez toho, aby súdy mali možnosť pristúpiť k zváženiu dotknutých záujmov. Súdny dvor v línii rozsudku *Pfleiderer* neurobil jasnú deliaci čiaru a odmietol stanoviť rigidné pravidlo tak v zmysle absolútneho odmietnutia sprístupnenia, ako aj v zmysle všeobecného sprístupnenia dokumentov. Súdny dvor varoval pred plošným odmietaním sprístupnenia akéhokoľvek dokumentu týkajúceho sa konania v oblasti hospodárskej súťaže, keďže takéto pravidlo by mohlo znemožniť alebo prinajmenšom nadmerne sťažiť ochranu práva na náhradu škody. To zvlášť platí v situácii, kedy poškodené osoby nemajú nijakú inú možnosť zabezpečiť si dôkazy na podloženie nároku na náhradu škody a odmietnutie prístupu k spisu tým pádom vedie k tomu, že právo na náhradu škody stráca akýkoľvek účinok.

Súdny dvor sa na druhej strane nepriklonil ani k plošného sprístupňovaniu akýchkoľvek dokumentov, ktoré tvoria súčasť spisu. Argumentoval pritom obavami o možný zásah do práv dotknutých subjektov, najmä pokiaľ ide o ochranu obchodného a profesijného tajomstva, či ochranu osobných údajov. Ustanovenie vnútroštátneho práva, podľa ktorého je sprístupnenie spisu potenciálnym žalobcom o náhradu škody podmienené súhlasom všetkých účastníkov konania o porušení článku 101 ZFEÚ pričom vnútroštátny súd nemá možnosť pristúpiť k zváženiu dotknutých záujmov je preto podľa Súdneho dvora v rozpore s právom EÚ a najmä zásadou účinnej ochrany práv.

4 ZÁVER

Činnosť Európskej únie v oblasti súťažného práva možno v poslednej dekáde charakterizovať ako snahu o vymedzenie rámca pre optimálne uplatňovanie súťažného práva, ktorý by umožnil odhalenie a potrestanie čo najväčšieho počtu porušení a viedol k maximalizácii preventívneho účinku. Vďaka judikatúre Súdneho dvora sa podarilo vytvoriť základný štandard pre uplatňovanie súkromnoprávnych nárokov vyplývajúcich z porušenia súťažného práva. K citeľnému presadzovaniu týchto nárokov aj napriek vytvoreniu základného rámca pre presadzovanie nárokov na náhradu škody nedochádza. Medzi právnymi poriadkami členských štátov pretrvávajú rozdiely pokiaľ ide o hmotnoprávne a procesnoprávne podmienky súkromnoprávneho presadzovania súťažného práva. Tento stav neprispieva k právnej istote a zvýšenej motivácii poškodených smerujúcej k uplatňovaniu nárokov na kompenzáciu. Navrhovaná smernica by pomohla prekonať najzásadnejšie rozdiely medzi členskými štátmi a vytvoriť predpoklady pre účinnejšie presadzovanie súkromnoprávnych nárokov.

Použitá literatúra:

[11] Anotáciu k tomuto rozsudku možno nájsť tu: BAŽANTOVÁ, I.: Soudní řízení týkající se pokut za porušení článku 101 SFEU a nahlížení do spisu třetími osobami, vztah k vnitrostátní právní úpravě (kartelové dohody). In: Obchodní právo, 6/2013, s. 231 a nasl.

BAŽANTOVÁ, I.: Soudní řízení týkající se pokut za porušení článku 101 SFEU a nahlížení do spisu třetími osobami, vztah k vnitrostátní právní úpravě (kartelové dohody). In: Obchodní právo, 6/2013, s. 231 a nasl.
KALESNÁ, K. – BLAŽO, O.: Zákon o ochrane hospodárskej súťaže. Komentár. 1. vydanie, Praha, C.H. Beck, 2012.
KRÁLIČKOVÁ, B.: Krok vpred na ceste k dosiahnutiu efektívneho súkromnoprávneho vymáhania súťažného práva. In: Právny obzor, č. 2, 2009.
KRÁLIČKOVÁ, B.: Súkromnoprávne aspekty protimonopolného práva. Bratislava, Veda, 2012.
KRÁLIK, A.: Uplatňovanie programu zhovievavosti (leniency) v EÚ a na Slovensku. In: Bulletin Slovenskej advokátskej komory, 1-2/2011.
KRÁLIK, A.: Vývoj súkromnoprávneho presadzovania súťažného práva v judikatúre Súdneho dvora Európskej únie. In: Zo súdnej praxe, 6/2012.
VARGA, P.: Inštitucionálny systém pri uplatňovaní komunitárneho súťažného práva. In: Justičná revue, 61, 2009, č. 10, s. 1212-1230.

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SOME REFLECETIONS ON INDEPENDENCE OF THE EUROPEAN CENTRAL BANK AND THE FINANCIAL CRISIS

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Abstract: This paper examines some of the most recent developments in the Law of the European Central Bank. Several issues related to the ECB are discussed separately: status of the European System of Central Banks (ESCB)/European Central Bank pursuant to the Treaty of Lisbon, ECB's independence within the legal and political framework of the European Union, relationship between ECB and National Central Banks, and finally the impact of the global financial crisis on the ECB, in particular on the widening of its competences and strengthening of its powers.

Key words: Independence, European Central Bank, European System of Central Banks, National Central Banks, Financial Crisis.

1 THE STATUS AND ROLE OF THE EUROPEAN CENTRAL BANK UNTIL THE CRISIS

The institutional framework for the single monetary policy guarantees the independence of the European Central Bank. This principle of central bank independence extends to national banks of Member States, so that bylaws of certain central banks of Member States had to be amended in order to ensure independence of a given national central bank.[1]

The main task of the ECB is to maintain price stability within the Euro-zone, and thus to safeguard the value of the Euro. The ECB may also "general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union...", but only without affecting the pursuit of price stability (Article 127 para. 1 TFEU).[2]

The key motive for ensuring ECB independence is the fact that only a central bank perceived to be neutral may in an open market is able to maintain price stability. Significance of perception of independence for a central bank has been confirmed both by theory and empirical evidence.

The global financial crisis, which began in 2007/2008, has generated new perspectives on the concept of central bank independence. Many central banks of major importance supported the governments and banks by resorting to unconventional monetary interventions, the common denominator of which has been creation of excess liquidity. Presently, central banking policy considerations are focused on the aspect of independence that should mean insulation from both the pressures from the private sector and from the governments in respect of the timing of ceasing such extraordinary monetary interventions.[3]

The ECB differs from other EU institutions because it possesses legal personality.

The ECB's financial arrangements are kept separate from those of the EU. The ECB has its own budget. Its capital is subscribed and paid up by the national central banks of the Euro area.

The Statute of the ECB foresees long terms of office for the members of the Governing Council. Governors of national central banks and members of the Executive Board have security of tenure: both can be removed from office only in the event of incapacity or serious misconduct.

When exercising their powers or carrying out their tasks and duties, neither the ECB nor a national central bank may take instructions from Union institutions, governments of Member States or any other body. The EU institutions and the Member States' governments will not seek to influence the ECB (Article 130 TFEU).

A factor contributing to continuity and stability of the ECB's monetary policy was certainly that its constitutional foundations remained untouched in the first years of existence of the Eurozone –

[1] D' ARCY, F. Les politiques de l'Union européenne, pp. 62.

[2] See more: CRAIG, P, GRAINNE de, B.: EU Law, Text, Cases, and Materials, Fourth edition: pp. 738-741.

[3] CARUANA J. The changing nature of central bank independence.

the Treaty reforms of Amsterdam and Nice which amended many provisions of primary Community law, did not lead to any major changes in the provisions on the ECB.

The Eurosystem is prohibited from granting loans to EU bodies or national public sector entities (Article 123 TFEU). With the global financial crisis, and the European sovereign debt crisis that ensued, all this began to change. The exception from prohibition of financing granted by Article 123 TFEU to public credit institutions has been of major importance for the expansion of the role of ECB in the wake of the global financial crisis.

2 THE CRISIS FIRST CHANGED THE ROLE OF THE ECB

The sovereign debt crisis in Europe prompted ECB to do exactly what it had been forbidden to do: to rescue indebted member countries, most prominently Greece.

The global financial crisis exposed dire repercussions of the core imbalance of institutional architecture of the EU – the Stability and Growth Pact failed, some Member States ran into excessive budget deficits – resulting in the EU-wide sovereign debt crisis in 2010.

The initial response of the European Monetary Union consisted in assistance provided by credit-worthy states to the indebted ones. From the outset, however, the ECB supported the rescue with its *Securities Markets Programme (SMP)*[4], whereby it purchased distressed government bonds.

As the interaction of the debt crisis and the banking crisis threatened to deepen dangerously, the European Central bank (ECB) launched its *Long Term Refinancing Operation (LTRO).* It provided commercial banks with some €1trillion of three-year loans at 1% interest between December 2011 and February 2012; despite this, bank lending to households and firms actually declined slightly in the course of 2012.

After speculation against Spanish and Italian bonds intensified in mid-2012, the ECB also announced in August 2012 its programme of *Outright Monetary Transactions (OMT)*.[5] This promised unlimited central bank intervention to support government bonds in the secondary market – but only if countries first agree to an approved programme of policies with the EU's rescue fund, the *European Stability Mechanism (ESM).*[6] The announcement of introduction of OMT was preceded by a now-famous statement of Mario Draghi, ECB President, that "the ECB would do whatever it takes to preserve the euro."

2.1 And now the crisis is provoking a change of competences of the ECB

The European Banking Union emerged in June 2012 and was defined in December 2012.[7] This was the response to the fact that the sovereign debt crisis in Europe originated from a banking crisis, and was in fact a symptom of the banking crisis[8].

[4] Out of the EUR 208bn the ECB spent on SMP, the most significant portion (EUR 99bn) was spent on Italian bonds in the course of the period of time during which the Italian government led by Mr Berlusconi was failing to implement structural reforms demanded by the ECB president at the time. SPIEGEL, P., STEEN, M., Fears rise that ECB plan has a weakness, p. 3.

[5] "It is hard to overstate the importance the ECB bond-buying programme, known as Outright Monetary Transactions, has had on the three-year-old crisis. Whithin the EU policy circles, it is widely accepted that OMT was the most important element in stopping the panicked flight from the eurozone's periphery last year, a turning point many believed had finally ended the crisis' acute phase. By pushing the programme through despite opposition from Germany's powerful central bank, many officials believed ECB chief Mario Draghi had finally given the eurozone the 'bazooka' it long needed: the central bank's printing presses. Investors no longer had reason to fear their holdings would default or lack for buyers." SPIEGEL, P., STEEN, M., Fears rise that ECB plan has a weakness, p. 3.

[6] see more: LUKIĆ, M., Euro as Trojan Horse of European Unification - Subduing Member State Sovereignty in the Name of Austerity and Solidarity; LUKIĆ, M., Legal and institutional perspective on vulnerability of the EU exposed in connection with the sovereign debt crisis.

[7] The banking community largely supports the idea of a single bank regulator, despite fears that the central EU banking oversight will mean that deep knowledge of national regulators is lost. The banking union is perceived as a means for overcoming the "balkanization" of the banking market, i.e. its fragmentation due to protective measures of national regulators. JENKINS, P., Long road to a single EU regulator, p. 15.

The immediate reason for resorting to the banking union was the need that European rescue funds directly recapitalize Spanish banks, which were on the brink of failure in June 2012. A condition for the rescue was that EMU members agree to a centralized bank supervision.

A month ago, on 12 September 2013, the European Parliament voted to set up the SSM, giving to the ECB the full responsibility for the European banks supervision. These powers will become effective in September 2014. Implementation of the single supervisory mechanisms (SSM) for euro area banks would allow the *European Stability Mechanism (ESM)* to directly recapitalise banks, thus breaking the vicious circle between sovereign debt crisis and banking crisis.

In addition to the SSM – the Single Supervisory Mechanism, the other two pillars of the Banking Union shall be the single resolution mechanism, and the European deposit guarantee scheme. Some additional elements have appeared gradually within the *European System of Financial Supervision (ESFS)*. For the banking union by far the most significant element is the *European Systemic Risk Board (ESRB),* established in 2010.[9]

Problems, of course, persist. Austerity has failed to bring public finances and debt under control. Increases in taxes and cuts in government spending have led to contractions in economic activity, reducing government revenues and increasing welfare payments as unemployment rates increase. Budget deficits persist, and debt levels continue to rise. Deficit and debt reduction targets have been deferred, but are still unlikely to be met.

Outright monetary transaction programme (OMT) remains untested.[10] Germany remains opposed to unlimited purchase of sovereign bonds under the OMT. The programme's legal basis remains uncertain, and the result of the German constitutional court challenge still unknown.

A banking union may not exist without a deposit insurance scheme and Germany is opposing any scheme that would create a "legacy" risk – a liability for problems inherited from the period before the banking union is established.

2.2 Non-transparency of the ECB governing Council's decision making

One particular issue of relevance for ECB independence has been raised during the summer of 2013: expectations that major changes will soon be introduced in respect of transparency of the ECB Governing Council. The ECB is the only major monetary authority in the world that does not publish the detailed minutes of its proceedings nor the voting record of the members of its decision-making body.

Such publication would undermine ECB independence: It could reveal divergence of national interests and undermine confidence in ECB. The Eurozone has existed for less than 14 years, so the ECB is still in the phase in which trust in it as a homogeneous institution is being built.

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[8] The cost and repercussions of the banking crisis in Ireland, for example, were so dire that the country effectively had to bring in entire slates of bank executives for top posts both in the private sector and in its central bank. SMITH, J., The outsiders inside Irish banks, p. 8.

[9] LOUIS, J-V, Le comité européen du risque systémique (CERS).

[10] "The ECB's Outright Monetary Transactions programme was officially justified as an effort to unclog the eurozone's transmission of monetary policy. After six months, we know that it brought down government bond yields, but did absolutely nothing to improve the transition mechanisms. Companies in northern Italy continue to suffer from higher interest rates on bank loans than their Austrian neighbours. Only a fully-fledged banking union could end such discrimination. But that would require common deposite insurance and effective bank resolution policies. Neither is going to happen. The other priority should be to do what the Franco- German legislation purports to do, but on a grander scale: provide adequate insurance that banks do not bring down the economy and hold taxpayers at ransom. A comination of full separation of invenstment and commercial banking, bail-in rules, and transparency requirements would be a useful, yet possibly still incomplete, series of steps. None of this is happening - and yet a lot of people have become more optimistic about the eurozone, in some cases even euphoric. Hardly a day passes by without someone declaring the end of the crisis. But its two most dangerous aspects are unresolved - zombie banks and macroeconomic adjustment. OMT has actually contributed to making the banking crisis worse, by taking away the political pressure to create a genuine banking union. The pressure was crearly present in July last year, but had evaporated by September. The renationalisation of banking means that the monetary union is as unsustainable today as it was in July last year - and now the policies needed to fix this problem have been abandoned." MUNCHAU, W., The eurozone crisis is not finished - far from it, p. 7.

3 CONCLUSION

The Fiscal Compact introduced in early 2012 a legal limit restricting each country's structural budget deficit to 0.5% of GDP. This restriction effectively prevents Member States from pursuing an active fiscal policy in the future. The economic policy instrument that remains viable is monetary policy, and that one is centralized in the hands of the ECB.

But in addition to ECB's significance for monetary policy, its centrality in the on-going transformation of the European Monetary Union may not be overstated. As cannot be overstated the extent to which the role of ECB has been transformed.

The ECB is now holding debt instruments of Eurozone banks on its balance sheet, and is soon to become a major purchaser of eurozone sovereign debt, once OMT is activated.

As the principal bank supervisor, the ECB is gaining wide powers to set capital ratios and capital adequacy criteria across Eurozone. This shall largely restrict ability of banks to buy sovereign debt instruments of member states, and shall thus significantly reduce any autonomy of economic policy that member states have been left with.

ECB was qualified as an EU institution for the first time in Lisbon treaty. If the on-going changes transpire in line as planned, the ECB will come out from the sovereign debt crisis as by far the strongest bond between EU Member States and citizens. The Euro, thus, most often labeled as the weak point of the Union, will turn out to be the one common interest the defense of which has transformed a weak union into a firm unity.

Bibliography:

BORCHARDT, K.-D., The ABC of European Union law, Luxembourg: Publications Office of the European Union, 2010, ISBN 978-92-78-40525-0, p. 73-74.
CARUANA J.: The changing nature of central bank independence : http://www.bis.org/speeches/sp131017.pdf
CRAIG, P, GRAINNE de, B.: EU Law, Text, Cases, and Materials, Fourth edition: Oxford – New York: Oxford University Press, 2008, 738-741.
D' ARCY, F.: Les politiques de l'Union européenne, Clefs - Politique, Paris: Montchrestien, 2003, ISBN 2-7076-1356-8, pp. 61-64.
JENKINS, P.: Long road to a single EU regulator: Financial Times, Wednesday, December 5, 2012.
LOUIS, J.-V.: Le comité européen du risque systémique (CERS): Cahiers de droit européen, 46/2010, ISSN 0007-9758, pp. 645-681.
LUKIĆ, M.: Euro as Trojan Horse of European Unification - Subduing Member State Sovereignty in the Name of Austerity and Solidarity: Pravo i privreda [Law and Business], Belgrade 4-5/2013, 555-572, ISSN 0354-3501.
LUKIĆ, M.: Legal and institutional perspective on vulnerability of the EU exposed in connection with the sovereign debt crisis: Pravni život, tom IV, Begrade 12/2010, 551-564.
MUNCHAU, W.: The eurozone crisis is not finished - far from it: Financial Times, Monday, February, 4,2013.
SMITH, J.: The outsiders inside Irish banks: Financial Times, Thursday, January 31, 2013.
SPIEGEL, P., STEEN, M.: Fears rise that ECB plan has a weakness: Financial Times, Wednesday, February 27, 2013.

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PRÍČINY A DÔSLEDKY EURÓPSKEJ DLHOVEJ KRÍZY Z POHĽADU EURÓPSKEHO PRÁVA

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Abstract: The contribution briefly presents the historical development of the European monetary cooperation and the creation of the European Monetary System. The study focuses on the asymmetry concerning the devolution of powers in the economic and budgetary field and highlights the shortcomings of the European Monetary Union. The main objective of this paper is to clarify the measures that have been taken within the EU to mitigate the consequences of the European debt crisis.

Abstrakt: Príspevok stručne približuje historický vývoj európskej menovej spolupráce a vznik európskeho menového systému. Zameriava sa pritom na asymetriu, týkajúcu sa prenosu právomocí v hospodárskej a rozpočtovej oblasti a upozorňuje na nedostatky Európskej menovej únie. Hlavným cieľom príspevku je objasniť opatrenia, ktoré boli prijaté v rámci Európskej únie na zmiernenie dôsledkov európskej dlhovej krízy.

Key words: debt crisis, European Monetary Union, economic policy, budgetary discipline, emergency measures, structural measures

Kľúčové slová: dlhová kríza, Európska menová únia, hospodárska politika, rozpočtová disciplína, pohotovostné opatrenia, štrukturálne opatrenia

1 ÚVOD

Európska únia sa už viac ako tri roky vyrovnáva s finančnou krízou, ktorej dôsledky sa prejavujú vo všetkých sférach, v ktorých prostredníctvom svojich inštitúcií a orgánov pôsobí. Pri zmienke o kríze sa stretávame s rôznymi prívlastkami – „hospodárska“, „finančná“, „dlhová“, „eurokríza“, „kríza eurozóny“ a pod. Všetky tieto označenia viac či menej vystihujú jej charakter, no nemožno z nich vyčítať, čo vlastne súčasnú situáciu spôsobilo a aké sú jej následky. Kríza, ktorá sa do Európy rozšírila zo Spojených štátov amerických, zasahuje nielen do politickej a ekonomickej sféry, ale dotýka sa aj každodenného života občanov Európskej únie. Vlády členských štátov musia prijímať opatrenia, smerujúce k zníženiu verejných výdavkov a umožňujúce pokles deficitov ich národných rozpočtov. Tieto opatrenia sa výrazne podpisujú pod zníženie životnej úrovne obyvateľov predovšetkým v štátoch, ktoré sa ocitli na pokraji bankrotu a sú nútené čerpať finančnú pomoc. Práve táto pomoc je podmienená veľmi prísnymi reformami, ktoré majú za úlohu zabezpečiť, že daný štát bude schopný v budúcnosti plniť svoje záväzky.

Snahy národných vlád o zabezpečenie udržateľnosti ekonomík sa len zriedka stretávajú s masívnou podporou verejnosti. Prieskumy verejnej mienky z posledných rokov poukazujú na pokles podpory európskej integrácie, ako aj na klesajúcu podporu občanov členských štátov, ktoré prijali spoločnú európsku menu. Eurozóna prekonala veľmi turbulentné obdobie, počas ktorého sa objavili aj úvahy o jej definitívnom rozpade a návrate k národným menám, a to nielen v štátoch, čeliacich finančným problémom, ale aj v štátoch, v ktorých sa negatívne dôsledky krízy neprejavili až v takej veľkej miere. Napriek tomu okolnosti naznačujú, že proces európskej integrácie ešte zďaleka nedosiahol svoj cieľ a bude aj naďalej dochádzať k jeho prehlbovaniu.

2 EURÓPSKA MENOVÁ SPOLUPRÁCA A EURÓPSKY MENOVÝ SYSTÉM

V období kreovania Európskych spoločenstiev – predovšetkým Európskeho hospodárskeho spoločenstva[1] – nebola myšlienka vytvorenia spoločnej meny a hospodárskej a menovej únie

[1] Európske hospodárske spoločenstvo vzniklo v roku 1957 na základe Zmluvy o založení Európskeho hospodárskeho spoločenstva, ktorá nadobudla platnosť v roku 1958.

ústrednou témou rokovaní predstaviteľov už existujúceho Európskeho spoločenstva uhlia a ocele. V Európe v tom čase platil tzv. *Bretton-Woodsky systém*, nastolený po druhej svetovej vojne a riadený Medzinárodným menovým fondom. Systém spočíval vo výlučnej viazanosti dolára na zlato. Ostatné meny boli viazané na dolár a Medzinárodný menový fond bol oprávnený dočasne vyvažovať nerovnováhu v platbách. Na základe Brettonwoodskych dohôd vznikla okrem Medzinárodného menového fondu tiež Svetová banka, no hlavným dôvodom ich prijatia bola snaha o vytvorenie predpokladov pre stabilitu mien a vyriešenie nedostatku vhodného a pre všetkých prijateľného platidla.[2]

V októbri 1970 predstavil vtedajší luxemburský premiér Pierre Werner svoj plán vytvorenia hospodárskej a menovej únie. Wernerova skupina vnímala spoločnú európsku menu ako možnosť, nie povinnosť a zameriavala sa skôr na užšiu spoluprácu národných hospodárskych politík. Hospodárska a menová únia mala byť vytvorená prostredníctvom troch postupných a na seba nadväzujúcich štádií: vytvorenie vnútorného trhu, nárast spolupráce národných ekonomík a hospodárskych politík so stanovením fixných výmenných kurzov a v poslednom štádiu malo dôjsť k presunu právomocí v oblasti hospodárskej politiky na supranacionálnu úroveň. Prvá fáza bola považovaná za testovaciu bez toho, aby vytvárala akékoľvek iné záväzky vo vzťahu k ďalším dvom štádiám.[3]

Sedemdesiate roky boli poznačené krízou, vyvolanou plávajúcim kurzom dolára a vlnou menovej nestability, ktorú sa členské štáty Európskych spoločenstiev snažili vyriešiť vytvorením mechanizmu na riadenie výkyvov svojich mien voči doláru v rámci určitého vymedzeného pásma. Tento spôsob sa však neosvedčil a bolo potrebné nájsť iný nástroj na zabezpečenie dosiahnutia nového cieľa menovej spolupráce – menovej stability.

V roku 1979 bol zavedený tzv. *Európsky menový systém* (EMS), do ktorého sa zapojili všetky meny s výnimkou libry šterlingov.[4] Tento systém spočíval v stanovení fixného menového kurzu pre členské štáty voči ostatným menám a ECU (Európskej menovej jednotke), fluktuácii trhových výmenných kurzov bez marže a v možnosti národných bánk kolektívne zasiahnuť, aby ich kurzy nevybočili zo stanovenej hranice. Výkyvy mien v rámci EMS boli regulované prostredníctvom mechanizmu výmenných kurzov (ERM) a s výnimkou líry sa udržiavali v pásme +/- 2,25%.

2.1 Vytvorenie Hospodárskej a menovej únie

Koncom 80. rokov bola predložená Delorsova správa, ktorá opisovala konkrétne etapy smerujúce k vytvoreniu hospodárskej a menovej únie (HMÚ). Delors však na rozdiel od Wernera nenavrhoval prenos právomocí v oblasti hospodárskej politiky. Táto správa mala výrazný vplyv na podobu Zmluvy o Európskej únii z roku 1993, a tým aj na výslednú podobu hospodárskej a menovej únie. Po páde Berlínskeho múru sa projekt HMÚ stal už nielen ekonomickým, ale aj politickým projektom. K úspešnému naplneniu obsahu Delorsovej správy došlo 1. januára 1999, kedy bola v členských štátoch spĺňajúcich podmienky zavedená spoločná európska mena – euro[5] a boli stanovené neodvolateľné výmenné kurzy. Od tohto dátumu tiež okrem iného nadobudol účinnosť Pakt stability a rastu, ktorý štáty používajúce euro zaväzuje k deficitu verejných financií menšiemu než 3% HDP a k celkovému zahraničnému dlhu menšiemu než 60% HDP.[6]

Európsku hospodársku a menovú úniu možno charakterizovať ako oblasť jednotnej meny v rámci jednotného trhu EÚ, kde sa ľudia, tovar, služby a kapitál pohybujú bez akýchkoľvek obmedzení. Pravidlá a ciele HMÚ sú definované spomínanou Maastrichtskou zmluvou (ZEÚ). V dôsledku vytvorenia menovej únie štáty nenesú kurzové riziká a neplatia kurzové poplatky. To zlepšuje podmienky vzájomného obchodu a investícií medzi jednotlivými členmi EÚ a výrazne prispieva k voľnému pohybu kapitálu. Naopak, nevýhodou je, že členské štáty sa vzdali vlastnej nezávislej monetárnej politiky, nakoľko túto právomoc má výlučne Európska centrálna banka.[7]

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[2] SVOBODOVÁ, H. Brettonwoodsky systém, Mezinárodní měnový fond a Světová banka, s. 8.

[3] Jedna mena pre jednu Európu, s. 3. Dostupné na: <http://ec.europa.eu/economy_finance/publications/publication6730_sk.pdf> [2013-09-24].

[4] Jedna mena pre jednu Európu, s. 3. Dostupné na: <http://ec.europa.eu/economy_finance/publications/publication6730_sk.pdf> [2013-09-24].

[5] V roku 1999 začalo byť euro využívané v bezhotovostnom styku, od 1. januára 2002 aj v hotovostnom styku.

[6] Hospodárska a menová únia (HMÚ). Dostupné na: <http://www.ecb.europa.eu/ecb/history/emu/html/index.sk.html> [2013-09-24].

[7] JANKŮ, M – JANKŮ, L. Politické a právní základy evropských integračných zoskupení, s. 67 – 68.

Rokovania o vytvorení spoločnej meny sa po celý čas niesli v duchu sporu medzi ekonómami a monetaristami. Ekonómovia zastávali názor, že ešte pred prijatím eura je nevyhnutná konvergencia menových politík, zatiaľ čo monetaristi tvrdili, že takýto krok potrebný nie je. Výsledok bol preto kompromisom medzi týmito dvoma stanoviskami.

Členmi hospodárskej a menovej únie však nie sú automaticky všetky členské štáty EÚ. Nevyhnutnou podmienkou pre vstup je splnenie tzv. *konvergenčných kritérií*, ustanovených v článku 140 Zmluvy o fungovaní Európskej únie. V súvislosti s týmito kritériami možno hovoriť o kritériách právnych a ekonomických. Právne kritériá znamenajú súlad národnej legislatívy členských štátov s právom Európskej únie. Hospodárske a finančné kritériá predstavujú štyri požiadavky: vysoký stupeň cenovej stability, zákaz nadmerného deficitu štátneho rozpočtu, stabilitu výmenných kurzov (zákaz devalvácie národnej meny a účasť v mechanizme výmenných kurzov Európskeho menového systému) a stabilitu dlhodobých úrokových mier (konvergencia úrokových sadzieb).[8]

V máji 1998 spĺňalo tieto podmienky jedenásť členských štátov a bolo prijaté vyhlásenie, že ostatní členovia EÚ sú povinní snažiť sa tieto kritériá postupne naplniť. Dánsku a Veľkej Británii je v tomto zmysle udelená osobitná výnimka, vďaka ktorej sa môžu sami rozhodnúť, či niekedy prijmú euro alebo nie. Tieto dva štáty nie sú viazané plnením konvergenčných kritérií, na rozdiel od Švédska, ktoré síce referendom v roku 2003 spoločnú menu odmietlo, no je naďalej povinné plniť ustanovené podmienky.

Pokiaľ ide o politickú dimenziu procesu prijatia spoločnej európskej meny, nastal presun právomocí na úroveň EÚ v oblasti menovej, nie však hospodárskej politiky. Otáznou dnes zostáva riadiaca štruktúra eurozóny, ktorá sa počas krízy otriasla v základoch.

Európska menová únia je riadená Európskou centrálnou bankou (ECB) a jej vykonávateľmi sú národné banky členských štátov eurozóny. Možno preto konštatovať, že v rámci EÚ popri sebe koexistuje „eurosystém" (ECB + 17 národných bánk členov eurozóny) a Európsky systém centrálnych bánk (ESCB), ktorý tvorí ECB a národné banky všetkých 28 členských štátov EÚ.

2.2 Hospodárska politika a rozpočtová disciplína

Od okamihu, keď začali byť prezentované úvahy o prijatí spoločnej meny bolo zrejmé, že hospodárska a menová únia nemôže fungovať bez vybudovania vnútorného trhu. Obe únie sú navzájom previazané, menová únia bola preto nevyhnutne prvým záväzkom, ktorý bolo nutné prekonať. Možno povedať, že každá z týchto únií má akoby minimálny a maximálny stupeň svojej realizácie – v prípade menovej únie bolo minimom udržiavanie stáleho menového systému a maximom prijatie spoločnej meny, v prípade únie hospodárskej za minimum môžeme považovať koordinovaný postup v makroekonomických otázkach a za maximum odovzdanie hospodárskej politiky ako celku do právomoci nadnárodných inštitúcií.[9] Práve posledná spomenutá oblasť - oblasť deľby právomocí medzi EÚ a jej členskými štátmi – však naďalej zostáva problematickou. Napriek tomu, že hospodárska politika a s ňou súvisiace otázky naďalej ostávajú v pôsobnosti členských štátov, jej koordinácia je nevyhnutná.

V rámci hospodárskej spolupráce sa uplatňuje tzv. *otvorená metóda spolupráce*, založená na soft law, čiže v tejto oblasti neexistuje žiadna donucovacia moc. Na druhej strane, v oblasti fiškálnej politiky disponuje Únia podstatne väčším rozsahom právomocí. Článok 126 (1) Zmluvy o fungovaní Európskej únie (ZFEÚ)[10] výslovne zakotvuje povinnosť členských štátov vyhnúť sa nadmernému štátnemu deficitu a definuje tiež postavenie Európskej komisie, Rady Európskej únie a Hospodárskeho a sociálneho výboru. Právne upravený postup Komisie a Rady môže následne viesť až k uloženiu finančnej sankcie členskému štátu.

Z pohľadu rozpočtovej disciplíny je situácia v európskom práve podstatne prehľadnejšia. Článok 123 ZFEÚ hovorí o zákaze menového financovania s výnimkou úverových inštitúcií vo verejnom vlastníctve. Z nasledujúceho článku 124 ZFEÚ vyplýva zákaz zvýhodňovania prístupu k finančným inštitúciám, ktorý má prispieť k zabezpečeniu disciplíny na trhu. Členské štáty sú závislé od ochoty trhu požičiavať im finančné prostriedky. Článok 125 ZFEÚ obsahuje tzv. *„no bail-out" ustanovenia*, ktorých význam spočíva v tom, že v ich zmysle EÚ ani jej členské štáty

[8] Zavedenie eura – konvergenčné kritériá. Dostupné na: <http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/ec0013_sk.htm> [2013-09-23].

[9] VEBER, V. Dějiny sjednocené Evropy (Od antických počátků do současnosti), s. 545.

[10] Konsolidované znenie Zmluvy o Európskej únii a Zmluvy o fungovaní Európskej únie. Dostupné na:<http://europa.eu/lisbon_treaty/full_text/index_sk.htm> [2013-09-20].

nezodpovedajú za záväzky iného členského štátu a nesmú ich ani splácať. Toto ustanovenie bolo neskôr prehodnotené v súvislosti s finančnou pomocou krachujúcim členským štátom.

Napriek rozdielom v prístupe k prerozdeleniu právomocí v hospodárskej a menovej oblasti sú v súčasnej EÚ tieto sféry navzájom veľmi úzko prepojené a zásahy do ktorejkoľvek z nich sa zásadne prejavia v tej druhej.

Ako už bolo spomenuté, vznik hospodárskej a menovej únie v rámci EÚ od začiatku sprevádzali viaceré názorové rozpory. Ekonómovia zastávajú názor, že úplne integrovaná únia nebude nikdy fungovať dokonale. Tvrdia, že jednotná mena je možná len na určitom tzv. *optimálnom menovom území* a keď sa táto hranica prekročí, mobilita kapitálu a pracovnej sily nedokáže nahradiť prácu subjektov na danom území, ktoré majú v rukách nástroje menovej politiky. Hospodárskej únii zasa stoja v ceste veľké historické, ekonomické, politické a kultúrne odlišnosti, ktoré si vyžadujú rozdielny prístup k riešeniu obzvlášť naliehavých problémov.[11] Hoci vznik HMÚ nepochybne prispel k ekonomickému rastu zúčastnených členských štátov, prax odhalila aj viacero nedostatkov, resp. nesplnených a nadhodnotených očakávaní zo strany jej tvorcov.

Trhová disciplína neznamenala automaticky aj disciplínu rozpočtovú, čo sa v plnej miere preukázalo po vypuknutí finančnej krízy v Európe. Pakt stability a rastu takisto nefungoval podľa predpokladov – napr. pred niekoľkými rokmi Francúzsko a Nemecko neplnili stanovené rozpočtové pravidlá, avšak napriek sankciám navrhovaným zo strany Komisie nedosiahla Rada dostatočný počet hlasov na ich reálne presadenie. Zlyhali tiež predpoklady rozpočtovej disciplíny. Ukázalo sa totiž, že ustanovenie čl. 125 ZFEÚ nemožno uplatniť bez toho, aby sa kríza nerozšírila aj do ďalších krajín. V neposlednom rade, prístup k HMÚ bol postavený na prílišnom zameraní sa na rozpočtovú disciplínu, ktoré sa v konečnom dôsledku ukázalo ako chybné.

Európska menová únia je tvorená sedemnástimi členskými štátmi s veľmi odlišnou štruktúrou, ktorá musela v priebehu krízy čeliť asymetrickým šokom najmä v oblasti vonkajšej konkurencieschopnosti a obchodu. V podmienkach absentujúcej pružnosti výmenných kurzov sa tlak prenáša na pracovné trhy a premieta sa do rastu nezamestnanosti. Európa nedisponuje žiadnou jednotnou fiškálnou autoritou a národné vlády sa snažili toto napätie riešiť tým, že umožnili vznik fiškálnej nerovnováhy. Tá bola následne zhoršená finančnou krízou a recesiou, čo prispelo k ďalšiemu prehĺbeniu finančnej nestability.

Finančný systém EÚ mieša tradičné a kapitálové trhové bankovníctvo, čo vytvára spolu s dlhovou krízou nebezpečnú kombináciu. Keď napr. banky nie sú schopné uspokojiť potrebu zabezpečenia pri obchodovaní s cennými papiermi, objavuje sa kríza likvidity a banky nemajú čas na rekapitalizáciu zo ziskov plynúcich z nízkych úrokových sadzieb a na rozšírenie kladného výnosu. Financovanie malých a stredných podnikov je závislé od bánk a znižovanie dlhov ako následok tlaku „zhora“ zasa posilňuje tlak na ekonomiku. To, čo situáciu v Európe značne sťažuje, je prítomnosť množstva konfliktov v politických cieľoch a rozdielnosť agendy všetkých kľúčových hráčov. Je však nespochybniteľné, že banková kríza úzko súvisí s otázkou udržateľnosti dlhov, a preto musia byť riešené zároveň. Je potrebné zvýšiť flexibilitu pracovných trhov a reformovať európske penzijné systémy.[12]

3 PROTIKRÍZOVÉ OPATRENIA

Kríza, ktorá sa prejavila na európskom kontinente v roku 2008, má korene v Spojených štátoch amerických. Na jeseň 2009 Grécko, ako najznámejšia a najmedializovanejšia obeť krízy, prekročilo dve zo štyroch konvergenčných kritérií a navyše vyšlo najavo dlhodobé falšovanie údajov o jeho hospodárskych výsledkoch. Okrem Grécka sa však problémy prejavili vo viacerých štátoch, napr. v Portugalsku, Španielsku, Taliansku či Írsku, aktuálne s problémami zápasia tiež slovinské banky.

Situácia sa postupom času vyhrotila natoľko, že sa čoraz častejšie začali vyskytovať úvahy o rozpade hospodárskej a menovej únie, hoci predstavitelia EÚ deklarovali všemožnú snahu o jej udržanie. Ďalšou diskutovanou možnosťou riešenia bolo vystúpenie problematických krajín z eurozóny a návrat k ich pôvodným národným menám. Ani jedna z týchto vízií sa dodnes nenaplnila a priestor dostali riešenia, napomáhajúce riešenie krízy a zachovanie eurozóny v jej súčasnej podobe.

Začiatkom roka 2011 začal na území EÚ fungovať tzv. *Európsky systém finančného dohľadu*, ktorého úlohou je najmä prispievať k spolupráci medzi orgánmi dohľadu v členských

[11] VEBER, V. Dějiny sjednocené Evropy (Od antických počátků do současnosti), s. 545.
[12] WIGNALL – BLUNDELL, A. Solving the financial and sovereign debt crisis in Europe, s. 14, 17.

štátoch a vytvoriť spoločné pravidlá pre všetky finančné inštitúcie pôsobiace na vnútornom trhu. V júni 2012 predstavil predseda Európskej rady Herman Van Rompuy materiál, definujúci štyri základné rámce „skutočnej hospodárskej a menovej únie“:

a) **Integrovaný finančný rámec** – prenesenie zodpovednosti za dohľad nad bankami v eurozóne na úroveň EÚ, vytvorenie spoločných mechanizmov riadenej likvidácie bánk a ochrany vkladov.

1. Navrhuje sa vytvoriť jednotný systém európskeho bankového dohľadu, ktorý bude tvoriť európsky a národný dohľad. Konečná zodpovednosť bude na európskej úrovni. Európska úroveň bude disponovať nasledujúcimi kompetenciami vo vzťahu ku všetkým bankám, ktoré však bude vykonávať s ohľadom na veľkosť a druh banky: dohľad, preventívne zakročovacie kompetencie vo vzťahu ku všetkým bankám. Preskúmajú sa možnosti zveriť tieto právomoci ECB.

2. Do súčasného systému fondov ochrany vkladov sa zavedie európsky rozmer.

3. Európsky rezolučný fond bude financovaný z príspevkov bánk a poslúži na financovanie riadenej likvidácie bánk podliehajúcich európskemu dohľadu. Fondy ochrany vkladov a Európsky rezolučný fond by mohli podliehať Európskemu rezolučnému orgánu. V prípade vyčerpania fondov bude ako veriteľ poslednej inštancie vystupovať Európsky stabilizačný mechanizmus (ESM, tzv. *trvalý euroval*).

b) **Integrovaný rozpočtový rámec** – zabezpečenie riadneho výkonu fiškálnej politiky na národnej úrovni a úrovni EÚ, silnejšie vynucovanie rozpočtovej disciplíny, postupný prechod na eurodlhopisy a fiškálnu solidaritu.

c) **Integrovaný rámec hospodárskej politiky** – zabezpečenie mechanizmov na podporu udržateľného rastu, zamestnanosti a konkurencieschopnosti.

d**) Posilnená demokratická legitimita a zodpovednosť za prijímanie rozhodnutí v HMÚ** prostredníctvom spoločného výkonu suverenity v spoločných politikách a solidarity.[13]

Uvedené rámce predstavujú východiská vytvorenia európskej bankovej únie, ktorá spočíva vo vytvorení jednotného mechanizmu dohľadu nad bankami s účasťou Európskej centrálnej banky v členských štátoch eurozóny, s možnosťou zapojenia sa aj ostatných štátov EÚ. Okrem iného by banková únia mala prispieť k zachovaniu celistvosti jednotného trhu v oblasti finančných služieb a k zavedeniu možnosti rekapitalizovať banky priamo z Európskeho stabilizačného mechanizmu. K vzniku bankovej únie EÚ by malo dôjsť 1. januára 2014 postupnou realizáciou definovaných čiastkových krokov.

V súvislosti s finančnou pomocou, ku ktorej napokon EÚ pristúpila, vyvstalo niekoľko sporných otázok. Daňoví poplatníci v ekonomicky vyspelejších štátoch si kladú otázku, prečo by práve oni mali zachraňovať štáty, ktoré sa vo viacerých prípadoch ocitli na pokraji bankrotu aj vlastným nehospodárnym zaobchádzaním s verejnými financiami a naopak, obyvatelia štátov na ekonomickej periférii zasa strácajú trpezlivosť s neustále sa rozširujúcim okruhom prísnych reformných opatrení, zameraných na zníženie štátnych deficitov, ktoré prispievajú k výraznému poklesu ich životnej úrovne. Odporcovia pomoci svoje stanovisko opierajú o tvrdenie, že jej poskytnutie je v absolútnom rozpore s ustanovením článku 125 ZFEÚ. Jej obhajcovia naopak argumentujú tým, že pomoc by bola rozporná s uvedeným článkom len vtedy, ak by EÚ alebo jej členské štáty vystupovali v priamom zmluvnom vzťahu s veriteľmi iného členského štátu – napr. v prípade, ak by ručili za dlhy tohto štátu.

Po prehĺbení krízy sa ako veľký problém ukázala absencia akýchkoľvek protikrízových opatrení na nadnárodnej úrovni. Z tohto dôvodu musela EÚ ako prvé prijať pohotovostné a až v nadväznosti na ne štrukturálne opatrenia.

3.1 Pohotovostné (ad hoc) opatrenia

Pohotovostné, alebo ad hoc opatrenia predstavujú ex post opatrenia, riešiace už nie príčiny, ale následky vzniknutej krízy. Únia stála pred otázkou, či problematické štáty nechá priviesť k bankrotu alebo im poskytne finančné prostriedky na vyriešenie najakútnejších problémov.

Možno hovoriť o troch skupinách týchto opatrení: finančné/ záchranné fondy, opatrenia Európskej centrálnej banky a opatrenia v rámci súkromného sektora.

[13] ČILLÍKOVÁ. J. – PÉNZEŚ, P. Banková únia a jednotný mechanizmus dohľadu. Dostupné na: <http://www.nbs.sk/_img/Documents/_PUBLIK_NBS_FSR/Biatec/Rok2012/8-2012/02_biatec12-8_cillikova-penzes.pdf> [2013-10-02].

3.1.1 Finančné (záchranné) fondy

V roku 2010 sa Únia podieľala na vytvorení dočasného medzivládneho nástroja, založeného na úverových garanciách od Medzinárodného menového fondu – European Financial Stability Facility (EFSF, alebo tiež euroval 1). Stál na troch pilieroch – Európskej únii, členských štátoch eurozóny a Medzinárodnom menovom fonde. Okrem Grécka čerpalo túto pomoc aj Írsko a Portugalsko. Pôvodná kapacita tohto dočasného finančného nástroja bola stanovená na 440 miliárd eur (efektívna úverová kapacita 250 miliárd eur), pričom neskôr bola navýšená.

	KOĽKO?	NA ZÁKLADE ČOHO?
EÚ	60 miliárd € z jej vlastných zdrojov	Nariadenie 407/2010 Čl. 122 ods. 2 ZFEÚ
ČŠ EUROZÓNY	440 miliárd € na základe princípu „prísnej podmienenosti“	EFSF (European Financial Stability Facility), ktorého akcionármi sú ČŠ Rámcová dohoda nad rámec zakladajúcich zmlúv podľa luxemburského práva
MMF	250 miliárd €	členstvo

Tabuľka : Finančná pomoc v rámci pohotovostných opatrení (2013)

3.1.2 Opatrenia Európskej centrálnej banky

V máji 2010 sa do riešenia krízy v eurozóne aktívne zapojila aj Európska centrálna banka prostredníctvom Programu nákupu dlhopisov vlád na sekundárnych trhoch. Tento krok je z hľadiska práva otázny, najmä v zmysle článku 123 ZFEÚ, napriek tomu, že dlhopisy nakupovala od investorov, nie priamo od členských štátov. Na druhej strane sa však správala ako hráč a svojou činnosťou ovplyvňovala dianie a fungovanie trhu. Rovnako z politického hľadiska by Európska centrálna banka mala vystupovať ako nezávislá inštitúcia, no nákupom dlhopisov sa stala súčasťou fiškálnej politiky. Uvedená kritika bola jedným z dôvodov, prečo v roku 2011 ECB od nákupu dlhopisov ustúpila, no už o rok neskôr znova zasiahla, keď v decembri 2012 predstavila svoj nový plán s názvom „Priame menové transakcie“ (Outright Monetary Transactions – OMT), orientované na pomoc Španielsku a Taliansku.

Priame menové transakcie sú intervencie na sekundárnych trhoch so štátnymi dlhopismi, ktoré umožnia korigovať závažné nedostatky vo fungovaní týchto trhov spôsobené predovšetkým neopodstatnenými obavami investorov o nezvratnosť eura. Za stanovených podmienok budú priame menové transakcie predstavovať plne účinný nástroj, ktorý umožní zabrániť samonapĺňajúcim sa deštruktívnym scenárom vývoja s potenciálne vážnymi následkami pre cenovú stabilitu v eurozóne. S cieľom zachovať prvoradosť mandátu ECB v oblasti cenovej stability a zabezpečiť, aby boli vlády aj naďalej motivované zavádzať nevyhnutné rozpočtové úpravy a štrukturálne reformy, sa v prípade OMT uplatňujú prísne a účinné podmienky spojené s príslušným programom EFSF/ESM.[14]

3.1.3 Opatrenia v rámci súkromného sektora

Po tom, čo sa prijaté opatrenia začali javiť ako nedostatočné, postupne klesala aj ochota členských štátov podporovať ostatné. V prvom kvartáli roku 2012 získalo Grécko druhý balík pomoci vo výške 130 miliárd eur. Prostriedky z neho boli poskytnuté na základe EFSF, a to akcionármi, ktorí vlastnili viac ako 50% akcií. Snaha vyriešiť naliehavú situáciu na Cypre sa dotkla aj jednotlivcov s vkladmi nad 100 tisíc eur. EÚ sa rozhodla podmieniť poskytnutie pôžičky vo výške 10 miliárd eur tým, že sa na záchrane cyperských bánk Laiki a Bank of Cyprus bude podieľať aj samotný Cyprus,

[14] Menová politika (Odpoveď ECB na krízu). Dostupné na: <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_014.sk.html> [2013-10-05].

a keďže cyperská vláda by v prípade poskytnutia potrebnej pomoci zbankrotovala, pristúpil štát k využitiu vkladov samotných klientov týchto bánk. Prvú banku sa zachrániť nepodarilo, druhá so stratami funguje ďalej. Obe banky riskovali nákupom gréckych vládnych dlhopisov, ktoré výrazne stratili na hodnote pri reštrukturalizácii gréckeho vládneho dlhu.

Predpokladaným následkom „znárodnenia vkladov" bude séria žalôb zo strany dotknutých majiteľov účtov s vkladmi nad 100 tisíc eur.[15]

3.2 Štrukturálne opatrenia

Medzi štrukturálne opatrenia sa radia predovšetkým tri nástroje, ktorých hlavnou úlohou je prispieť k stabilite ekonomík členských štátov EÚ, najmä štátov eurozóny v dlhodobom časovom horizonte. Patrí sem Európsky stabilizačný mechanizmus (ESM), šesť legislatívnych aktov Európskej komisie a Zmluva o stabilite, koordinácii a riadení v Hospodárskej a menovej únii.

3.2.1 Európsky stabilizačný mechanizmus

V decembri 2010 bolo prijaté rozhodnutie o vytvorení trvalého mechanizmu v zmysle ustanovenia článku 136 ZFEÚ, a to na základe medzinárodnej zmluvy medzi členskými štátmi eurozóny, ktorá nadobudla účinnosť v októbri 2012. Španielsko a Cyprus ako prvé štáty využili možnosť čerpať pomoc z novovytvoreného mechanizmu.

ESM sa riadi zásadou tzv. *prísnej podmienenosti*, ktorá vyjadruje podmienenie poskytnutia pomoci prijatiu prísnych šetriacich opatrení a výraznému zníženiu objemu verejných výdavkov. Mechanizmus obsahuje základný kapitál vo výške 700 miliárd eur s efektívnou pôžičkovou kapacitou 500 miliárd eur. ESM pôsobí cez nákup dlhopisov alebo nepriamu rekapitalizáciu bánk.

Tento, tzv. *trvalý euroval* je riadený výkonným riaditeľom, ktorý sa pri rozhodnutiach opiera o rozhodnutia Rady guvernérov a Rady riaditeľov. Rada guvernérov je tvorená ministrami financií členských krajín eurozóny. Trvalý euroval má v situáciách, ktoré ohrozujú spoločnú európsku menu euro, právomoc rozhodnúť na základe kvalifikovanej väčšiny (85%). Čerpať finančnú pomoc z trvalého eurovalu môžu zadlžené krajiny eurozóny v dvoch prípadoch. Pokiaľ sa jedná o slabé ohrozenie makroekonomickej rovnováhy, kde trvalý euroval aplikuje preventívnu pomoc a podporné nástroje, a pokiaľ ide o vážne problémy, kedy trvalý euroval poskytne pomoc, ktorá bude podmienená už spomínaným riadnym programom makroekonomických úprav.[16]

Z dôvodu vytvorenia nového stabilizačného mechanizmu bolo nevyhnutné revidovať ustanovenia zmlúv – k článku 136 ZFEÚ bol na základe Rozhodnutia Európskej rady z 25. marca 2011 (2011/199/EÚ) doplnený nový odsek: „3. *Členské štáty, ktorých menou je euro, môžu vytvoriť mechanizmus pre stabilitu, ktorý sa má v nevyhnutných prípadoch aktivovať na zabezpečenie stability eurozóny ako celku. Poskytnutie akejkoľvek požadovanej finančnej pomoci v rámci mechanizmu bude podliehať prísnej podmienenosti*." Nový odsek sa stal súčasťou Zmluvy o fungovaní EÚ využitím zjednodušeného revízneho postupu. Táto zmena čelila pomerne rozsiahlej kritike, pretože sa objavili obavy zo vzniku tzv. *transferovej únie*, v rámci ktorej budú finančné prostriedky smerovať z bohatých krajín do chudobnejších a pre potenciálny rozpor s článkom 125 ZFEÚ bola žalovaná aj na Súdnom dvore EÚ. Súdny dvor v prípade „Pringle" (C-370/12 Pringle) judikoval, že cieľom tohto článku je zabezpečiť, aby členské štáty dodržiavali zdravú rozpočtovú politiku a zákaz obsiahnutý v článku 125 ZFEÚ smeruje k tomu, aby štáty, ktoré naďalej podliehajú logike trhu, nevytvárali dlhy. Dodržanie rozpočtovej disciplíny podľa Súdneho dvora EÚ prispieva k dosiahnutiu vyššieho cieľa, a tým je udržanie finančnej stability menovej únie.[17]

Reálne fungovanie spoločnej menovej únie poukázalo na potrebu zavedenia väčšieho dohľadu nad rozpočtami a hospodárskou politikou členských štátov. Bol preto vytvorený tzv. *európsky semester* – ročný cyklus koordinácie hospodárskych politík, keď EÚ analyzuje národné reformné programy a dáva odporúčania (viď obrázok nižšie).

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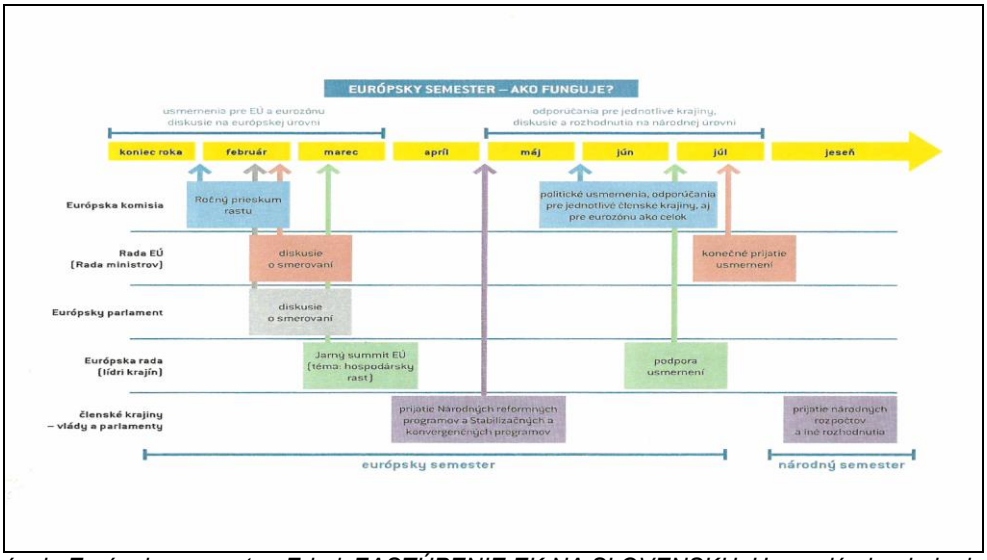
[15] Tí, čo prišli na Cypre o vklady, sa pripravujú na súdny spor. Dostupné na: <http://www.euractiv.sk/ekonomika-a-euro/clanok/ti-co-prisli-na-cypre-o-vklady-sa-pripravuju-na-sudny-spor-021400> [2013-10-05].

[16] Čo je trvalý euroval (ESM) alebo tzv. euroval 2. Dostupné na: <http://europskaunia.sulik.sk/euroval/co-je-to-trvaly-euroval-2/> [2013-10-06].

[17] Rozsudok Súdneho dvora EÚ v prípade Pringle (C-370/12). Dostupné na: <http://curia.europa.eu/juris/document/document.jsf?docid=130381&doclang=EN> [2013-09-25].



Obrázok: Európsky semester. Zdroj: ZASTÚPENIE EK NA SLOVENSKU. Hospodárske riadenie EÚ – Slovník základných pojmov.

3.2.2 Legislatívne akty Európskej komisie

Európska komisia v rámci svojej legislatívnej iniciatívy vytvorila päť nariadení a jednu smernicu, označované tiež ako balíček Európskej komisie (tzv. *six pack*), ktoré sprísnili podmienky rozpočtovej disciplíny a ich primárnym cieľom je predchádzať nerovnováhe v menovej politike. Sú zamerané predovšetkým na prísnejšie sankcie a revíziu kvalifikovanej väčšiny v tejto oblasti. Posilnený Pakt stability a rastu nadobudol účinnosť 13. decembra 2011.

Ide o nasledujúce legislatívne akty:

1. Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1174/2011 zo 16. novembra 2011 o opatreniach na presadzovanie vykonávania nápravy nadmernej makroekonomickej nerovnováhy v rámci eurozóny,
2. Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1175/2011 zo 16. novembra 2011, ktorým sa mení a dopĺňa nariadenie Rady (ES) č. 1466/97 o posilnení dohľadu nad stavmi rozpočtov a o dohľade nad hospodárskymi politikami a ich koordinácii,
3. Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1176/2011 zo 16. novembra 2011 o prevencii a náprave makroekonomických nerovnováh,
4. Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1173/2011 zo 16. novembra 2011 o účinnom presadzovaní rozpočtového dohľadu v eurozóne,
5. Nariadenie Rady (EÚ) č.1177/2011 z 8. novembra 2011, ktorým sa mení a dopĺňa nariadenie (ES) č. 1467/97 o urýchľovaní a objasňovaní vykonania postupu pri nadmernom schodku,
6. Smernica Rady 2011/85/EÚ z 8. novembra 2011 o požiadavkách na rozpočtové rámce členských štátov.[18]

Pri uplatňovaní starého systému Komisia navrhovala sankcie, ktoré musela schváliť Rada. Po prijatí zmien bude sankcia navrhovaná Európskou komisiou prijatá, pokiaľ Rada nezahlasuje proti nej do 10 dní.

3.2.3 Zmluva o stabilite, koordinácii a riadení v Hospodárskej a menovej únii

V decembri 2011 sa na zasadnutí Európskej rady dvadsaťpäť členských štátov (s výnimkou Veľkej Británie a Českej republiky) dohodlo na prijatí medzivládnej zmluvy s názvom „*Zmluva o stabilite, spolupráci a riadení Európskej menovej únie*“. Zmluva nadobudla účinnosť v januári 2013 a jej význam spočíva v zakotvení tzv. *zlatého rozpočtového pravidla*, ktoré musí byť súčasťou každej národnej ústavy. Pravidlo ustanovuje povinnosť zachovávať vyrovnaný alebo prebytkový rozpočet, ktorá sa tak stáva súčasťou národného ústavného práva.

[18] ZASTÚPENIE EK NA SLOVENSKU. Hospodárske riadenie EÚ – Slovník základných pojmov, s. 7 – 9.

4 ZÁVER

Za jednu z hlavných príčin rýchleho šírenia a následného prehĺbenia finančnej krízy v Európskej únii možno označiť niektoré kroky v priebehu integračného procesu. Zmluva o Európskej únii z roku 1993 síce zakotvila prenos právomocí na európsku úroveň v oblasti meny, nie však vo sfére hospodárskej politiky, napriek tomu, že skupina ekonómov už v tom čase upozorňovala na možné následky. Ďalším problémom bolo, že Únia pred vypuknutím krízy nedisponovala žiadnym mechanizmom na jej riešenie a musela už len reagovať na vzniknutú situáciu. Ukázalo sa, že slepá viera v trh a neustály ekonomický rozvoj boli predpokladmi, ktorých význam sa vysoko precenil. Pakt stability a rastu sa stal v niektorých krajinách len akýmsi existujúcim dokumentom bez toho, aby mu bola venovaná primeraná pozornosť a jeho nedodržiavanie nebolo postihnuté žiadnymi sankciami zo strany zodpovedných inštitúcií, hoci ich uloženie mohlo mať sčasti odstrašujúci účinok na ostatné členské štáty. Rovnako zmluvy neposkytovali žiadnu možnosť vystúpenia z EÚ, resp. eurozóny v prípade problémov – tento nedostatok čiastočne rieši až Lisabonská zmluva.

Po zavedení eura do obehu a vytvorení spoločnej menovej únie viac nebolo možné devalvovať menu v členských krajinách eurozóny, pričom tento krok bol jedným zo záchranných mechanizmov, ktoré štáty v prípade potreby uplatňovali. Azda najskloňovanejším sa stal v tejto súvislosti grécky príklad – v Grécku právo nasledovalo politiku. Hoci právo EÚ neumožňovalo vystúpenie z eurozóny, Gréci riešili túto otázku v referende.

Napriek všetkým problémom, s ktorými momentálne Európska únia a jej spoločná mena zápasia je zjavná snaha jej predstaviteľov a členských štátov o jej zachovanie. Mnohé štúdie, ktoré vznikli v krízovom období poukazovali na to, že dôsledky rozpadu eurozóny by boli oveľa ďalekosiahlejšie a náklady podstatne vyššie než tie, ktoré je potrebné vynaložiť na jej záchranu. Litva by sa mala v roku 2014 stať už osemnástym členom eurozóny, takže je očividné, že aj napriek nepriaznivým prognózam bude integrácia v oblasti meny naďalej pokračovať. Prioritou v súčasnosti zostáva potreba znovuoživenia stagnujúcich a naštartovania prepadávajúcich sa ekonomík, ako aj efektívne uplatňovanie vytvorených nástrojov pomoci. Tie možno deliť do rôznych kategórií a nazerať na ne z rozličných hľadísk – prijaté boli opatrenia ad hoc aj štrukturálne, právne aj politické, v rámci i mimo rámca európskych zmlúv, resp. opatrenia prijaté len štátmi eurozóny, viacerými štátmi EÚ alebo všetkými jej členskými štátmi. Ich kritici sa odvolávajú na to, že takáto komplexnosť povedie k fragmentácii a dezintegrácii, ich zástancovia naopak tvrdia, že kríza je príležitosťou na prehĺbenie spolupráce a ďalšie rozšírenie Európskej únie.

V súčasnosti zostáva stále aktuálnou otázka vystúpenia Veľkej Británie, no v zmysle analýz, ktoré naznačujú, že tento krok by bol pre Britániu mimoriadne nevýhodný možno predpokladať, že k nemu reálne nedôjde. Čo však možno vidieť ako dôsledok krízy v eurozóne – a to nie iba v negatívnom zmysle slova, je existencia väčšej solidarity medzi členskými štátmi, posilnenie dohľadu nad rozpočtovou a hospodárskou politikou členských štátov a vytvorenie nástrojov na riešenie prípadných budúcich problémov. Napriek negatívnym správam, šíriacim sa z médií a často aj z vnútorného prostredia Európskej únie samotnej, v porovnaní s inými mimoeurópskymi štátmi a ich dlhmi je ešte Európska únia stále na lepšej úrovni. A nepochybne netreba zabúdať ani na úspechy, ktoré sa podarilo dosiahnuť za posledných 60 rokov prebiehajúcej európskej integrácie.

Použitá literatúra:

ČILLÍKOVÁ. J. – PÉNZEŚ, P. Banková únia a jednotný mechanizmus dohľadu. Dostupné na: <http://www.nbs.sk/_img/Documents/_PUBLIK_NBS_FSR/Biatec/Rok2012/8-2012/02_biatec12-8_cillikova-penzes.pdf> [2013-10-02].

Hospodárska a menová únia (HMÚ). Dostupné na: <http://www.ecb.europa.eu/ecb/history/emu/html/index.sk.html> [2013-09-24].

JANKŮ, M – JANKŮ, L. Politické a právní základy evropských integračných zoskupení. 1. vyd. Praha: C.H.Beck, 2010. 234 s. ISBN 978-80-7400-323-3.

Jedna mena pre jednu Európu. Dostupné na: <http://ec.europa.eu/economy_finance/publications/publication6730_sk.pdf> [2013-09-24].

Konsolidované znenie Zmluvy o Európskej únii a Zmluvy o fungovaní Európskej únie. Dostupné na:<http://europa.eu/lisbon_treaty/full_text/index_sk.htm> [2013-09-20].
Menová politika (Odpoveď ECB na krízu). Dostupné na: <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_014.sk.html> [2013-10-05].
Rozsudok Súdneho dvora EÚ v prípade Pringle (C-370/12). Dostupné na: <http://curia.europa.eu/juris/document/document.jsf?docid=130381&doclang=EN> [2013-09-25].
SVOBODOVÁ, H. Brettonwoodsky systém, Mezinárodní měnový fond a Světová banka. In: Slovenská politologická revue, 2005, č. 3 , s. 3 – 35.
Tí, čo prišli na Cypre o vklady, sa pripravujú na súdny spor. Dostupné na: <http://www.euractiv.sk/ekonomika-a-euro/clanok/ti-co-prisli-na-cypre-o-vklady-sa-pripravuju-na-sudny-spor-021400> [2013-10-05].
VEBER, V. Dějiny sjednocené Evropy (Od antických počátků do současnosti). 1. vyd. Praha: NLN, s.r.o., 2004. 645 s. ISBN 80-7106-663-X.
WIGNALL – BLUNDELL, A. Solving the financial and sovereign debt crisis in Europe. In: OECD Journal: Financial market trends, 2012. č. 2, s. 23.
ZASTÚPENIE EK NA SLOVENSKU. Hospodárske riadenie EÚ – Slovník základných pojmov. Bratislava: EuraActiv. s. 19. ISBN 978-92-79-25523-6.
Zavedenie eura – konvergenčné kritériá. Dostupné na: <http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/ec0013_sk.htm> [2013-09-23].

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EUROPEAN COMPETITION LAW- INTERNATIONALIZATION IN FOREIGN COUNTRIES

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Abstract: The EU competition law model is currently one of the two dominant competition law frameworks. Many countries are transfering to market economy with an instant need to introduce competition policy and they tend to select between the existing competition models. One of such cases is the adoption of EU competition law in Malaysia.

Key words: competition law, internationalization, market economy, EU, Malaysia

1 INTRODUCTION

As we all know, competition law has become a phenomenon, which has increasingly been spreading to countries and governments, which have newly embraced market economy. Although competition law is regulated in each country individually, or on a more multi-national scale, when we focus on European competition law, the globalization of economy has brought the need for a system of international regulation.

The anti-competitive conduct of an undertaking or multiple undertakings can have its effect on a different geographical relevant market or a number of various markets around the globe. When such anti-competitive conduct takes place, the sanctions may vary in different jurisdictions, while there are also procedural distinctions among said jurisdictions, which ultimately causes the application of competition law to not be successful. So far, there have been a number of attempts to solve this ongoing situation, and to this day, two different methods have emerged.

Many of such countries choose to adopt one of the existing competition frameworks. Between these existing competition frameworks, there are two dominant models, which can be perceived as the leading competition policies. Predominantly, we are talking about the competition policy of the European Union (EU) and the United States of America (U.S.).

2 GLOBALIZATION OF COMPETITION RULES

2.1 EU and U.S. Model

Currently, there are two approaches, which aim to internationalize competition law. One is the method of cooperation agreements, where current competition authorities enter into cooperation agreements with each other, thus ensuring that extraterritorial competition infringements do not remain unsanctioned.

The other method is the fascinating phenomenon of foreign countries adopting existing competition law models, predominantly the model of the United States of America or the European Union model. In this case, one may argue, that such adoption technique is a very appropriate means to achieve a high level of globalization in the future. However, international competition law is a phenomenon, which has already come to exist, although it is not regulated on a global scale by any organization with international authority.

2.2 EU Competition Law

The main competition objective of the EU is to create and manage the internal market. All the objectives incorporate equality and fairness.[1] The competition policy of the EU aims to „create and maintain a healthy competitive economic base and to support the growth of small and medium-sized enterprises, which are economically valuable both to their own member state, as well as to the EU as a whole. This policy also encourages an enterprise culture within EU.[2]

[1] Reid, A. European Union. 4th edition. Thomson Reuters. 2010. p.108
[2] *Ibid*, p. 109

Economic efficiency can be counted as one of the main objectives of the EU as well.[3] The efficiency of competition within a specific area, the internal market of the EU, results in an well established and equal market for all competitors as well as satisfied consumers on the other side. But, the competition policies of the EU are not designed to encourage economic efficiency at all costs due to the fact, that if they did so, the most efficient competitors would be protected while the less efficient could be eliminated.[4]

Consumer protection is also an important aim of EU competition law. Although, consumers may be broken up into a number of categories, e.g. consumers of the end products, or consumers obtaining goods are re-selling them, all consumers are influenced by anti-competitive conduct of undertakings. Consumers should only be affected by the conduct of undertakings in a positive fashion, in the form of „ a greater variety of products, improved service and guaranteed facilities to more retail outlets for the provided goods."[5] This is provided by Article 101 (3) of the TFEU, which states, that if agreements, concerted practices or decision „contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit", they are not infringing rules of competition under EU law.

Overall, rules of competition in the EU are concerned with the control of dominance within the internal market, as well as the methods of market power acquisition and the degree of interaction between undertakings, which may result in agreements or other forms of cooperation restricting competition.[6]

The objective of the EU regarding competition law has evolved alongside the development of competition policy. Competition policy is dynamic, and it exists in a changing political and economic setting. Therefore, when we look at the development of EU competition policy, we can detect a number of milestones. At first, there were minimal provisions found in the original EEC Treaty. Seeing as this was not sufficient, new rules were put together aided by a number of judgments of the Court in competition law. Also, the alertness of the EC grew with time, building a complete functional mechanism of control over infringements of the rules of competition law.

The main aim of the EU concerning competition law is enclosed in the Treaty of Functioning of the European Union (TFEU). The competition law in the TFEU is concluded in title VII, chapter 1, section 1 and 2, articles 101 to 109. Also other previous articles of the Treaty are relevant to competition law. Article 3 of the TFEU states that: „ The Union shall have exclusive competence in the following areas (a) customs union;(b) the establishing of the competition rules necessary for the functioning of the internal market;(c) monetary policy for the Member States whose currency is the euro;(d) the conservation of marine biological resources under the common fisheries policy;(e) common commercial policy."

Also, article 119 of the TFEU depicts the activities of member states and the EU, among which is also „the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition". All economical and monetary matters of the EU and its member states should, therefore, be in accordance with the principle of an open market economy with free competition. This particular reference to competition has a strong influence on the judgment of the European Commission (EC), the judgments of the general Court and the judgment of the Court of Justice of the European Union (CJEU). This is the case in judgments C-68/94 and c-30/95.[7]

Article 101 to 109 of the TFEU handle the competition rules of the EU. Article 101 (1) is concerned with the prohibition of agreements, decisions by associations of undertakings, and concerted practices, which aim to restrict competition. However, according to Article 101 (3), the provision in Article 101 (1) may be declared inapplicable in a number of situations, which will be explained below. Article 102 prohibits abuse by one or more undertakings of a dominant position. Article 103 depicts the role of the Council, the EC and the European parliament in generating of proper regulations and directives, which are concerned with the issues of Articles 101 and 102. Under Article 104, until the provisions of Article 103 are in force, it is up to national authorities, to

[3] Jones, A.-Sufrin, B. EC Competition Law: Texts, Cases and Materials. 3rd edition. Oxford University Press. 2008., p. 3
[4] Reid, A. European Union. 4th edition. Thomson Reuters. 2010., p. 109
[5] *Ibid*
[6] *Ibid*
[7] Whish, R. Competition law. 6th edition. Oxford University Press.2009., p. 50

regulate the admissibility of agreements, decisions and concerted practices, within the scope of Articles 101 and 102. Article 105 entitles the EC to ensure the application of provisions of Articles 101 and 102.

„The Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.“[8]

Article 106 inflicts obligations on Member States in regard to public undertakings, where Article 106 (1) impresses obligations upon member states in relation to the TFEU generally and the competition rules specifically, and Article 106 (2) is concerned with the application of the competition rules to public undertakings and private undertakings to which member states entrust specific responsibilities.[9] Articles 107 to 109 are concerned with the topic of state aid. Article 107 declares, that:

„Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. “This article also informs us about the state aid which shall be compatible with the internal market, as well as state aid which should be considered as compatible with the internal market. Article 108 is concerned with the role of the EC when it comes to state aid. Article 109 deals with the role of the Council regarding regulations for the application of Articles 107 and 108.

With the Treaty of Lisbon, there have been a number of changes in the rules of competition law. These changes have been more of the technical matter. Article 3 (1)(g) of the former EC Treaty ceased to exist in this form, the wording „competition is not distorted“ has been moved to the 27th Protocol to the Treaties. Since the Treaties and the Protocols have the same legal status, the change has no substantive legal effect.[10] The TEU was amended in its Article 3 with the addition of „the EU shall establish an internal market“. This Article states, that:

„The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.“

2.3 Adoption of EU Model

Another significant factor in the internationalization of competition law is the fact that a number of countries with a lower degree of economic development have had to incorporate and regulate the area of competition law in recent past. Having not developed in a natural and gradual fashion, the legal provisions concerned with competition law may simply be copied from a functioning competition law system, such as the one in the EU[11]. This development may assist the future internationalization of competition law. However, could this happening be still considered internationalization, if most legal systems of competition law in a significant number of countries would have been modeled after one or two already existing, albeit effective legal frameworks?

Primarily, we have to address the issue of an effective legal framework. The various systems of law, which have “survived” in the world, differ from each other, generally because of a historical and equally importantly geographical factor. When different legal systems successfully operate in certain parts of the world, why should the legal framework within these diverse systems be almost identical, when it comes to the area of competition law? One answer that comes to mind almost instantly is that, in the light of globalization of the market economy, it would require less effort on the level of regional and international competition authorities in market regulation and prevention of anti-competitive behavior, as well as detection of this behavior and its consequent punishment.

Alternatively, as previously mentioned, a legal competition framework utilized i.e. in the EU, might not operate well in a legal system, which differs greatly from the system exercised in the EU, or in any EU member state. Therefore, this copy and paste of competition policy may in fact hinder

[8] TFEU, Article 105

[9] Whish, R. Competition law. 6th edition. Oxford University Press.2009., p. 50

[10] Kallaugher, J.- Weitbrecht, A. Developments under the Treaty on the Functioning of the European Union,articles 101 and 102, in 2008/2009. 2010, p. 1

[11] Dabbah, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594, ISBN 978-0-521-51641-9.p.3

an effective regulation of competition on an international level due to the future existence of a legal competition framework, which will not correspond with all legal systems to an equal degree.

Having stated the positive as well as negative aspects of the copying and pasting competition policy into the legal system of countries with emerging market economies, we have established that various legal systems cannot share the same legal framework in a specific field of law. However, with the globalization of the market, a uniform competition framework is highly desirable. We know that there are a number of similarities between diverse competition law regimes today. We can enlist prohibition of certain types of behavior among the similar characteristics of different competition law regimes.[12] Usually, anti-competitive conduct, such as collusions between undertakings on both horizontal and vertical level, is one of the most commonly prohibited behaviors within the relevant market.

2.4 Competition Act 2010

Malaysia is also included amongst the countries, which are utilizing the EU competition law model as an example for the construction of a competition policy in an unmarked economical environment. The case of Malaysia (MAS) is very specific and special for a number of the following reasons. First of all, Malaysia is a former British colony, which has been an independent country only since 1956.

This factor is very significant on account of the situation, that in such brief period of time, the country has undergone a vast number of political, economic and cultural changes. All these aspect are key to understanding and analyzing the effects of the adoption of the EU model as well as emphasizing the issues of such adoption of existing norms of a supranational body, which stems from a very dissimilar political and cultural background. The key here is to lay emphasis on the question of adoption of existing competition law models versus an emphasis on an invention of cooperation agreements and other cooperation and collaboration techniques, which also promote globalization of competition law.

Currently, competition policy in MAS is a very fresh phenomenon, due to the fact, that the Competition Act (CA) has only been in force since January 2012. At this time, the Competition Commission was also established. The CA is very similar to UK's Competition Act, as well as Singapore's Competition Act. Although the legal document was modeled after EU competition law, there are a number of dissimilarities between the two frameworks.

The main objectives of the CA are the promotion of economic development on one hand, and protection of consumer interest[13] on the other. These objectives may be aligned with the objectives of EU competition law to a certain degree. While the aim of EU competition law is to maintain the internal market, or to sustain this degree of economic development that has already been achieved, the aim of the CA is to promote further economic development within MAS.

There are a number of issues with the CA, which depict it's potential for further development. First of all, there is a concern with the way anti-competitive behavior is being analyzed. Within the EU, as well as in other jurisdictions, such as the UK or Singapore, in order for a conduct of an undertaking to restrict competition, an actual or potential threat is required. Therefore, a behavior may be deemed anti-competitive based on either its object or its effect. In the case of the CA, only the object of a specific agreement is taken into account[14]. Consequently, the CA fails to include anti-competitive behavior based on the effect of said behavior, which is quite regularly the case of vertical agreements.

Another issue stemming from See's analysis of the CA and the competition law framework in MAS is the complete lack of any legislation concerning merger control. The main argument for this situation is that in the EU, as well as in the U.S., merger regulation was introduced in a later stage of competition policy implementation. Another concern with the competition law model case of MAS is the question of applicability of EU competition law cases to future cases in MAS. Due to the vast economic, cultural and legal variations between the two legal systems, one may argue that such parallels would not be able to be drawn.

Overall, the adoption of EU competition law framework in MAS can be seen as a substantive and literal adoption, even though the political and economic situations are so diverse. Therefore, we

[12] Dabbah, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594, ISBN 978-0-521-51641-9.p.13

[13] See, V.E.T., Competition Act 2010: the issues and challenges. Springer.2012 p.3

[14] *Ibid.* p.9

can declare, that the CA is not actually an adoption of EU competition law, but it is merely modeled after the EU competition policy.

3 CONCLUSION

As we have established, the enforcement mechanisms of competition law in general have become increasingly more difficult to carry out, due to the ongoing globalization of the economy. The EU has addressed this trend almost twenty years ago, yet competition authorities have been struggling with this dilemma ever since then. The question of internationalizing the rules of competition law has been attempted to be answered by many supranational and international authorities.

The example of Malaysia underlined the fact, that even in the case of "adoption" of the EU competition law model one can always assume, that although the substantive element of the legal framework is mirrored, the competition policy is not adopted as a whole, but is merely used as a model, upon which the new legal framework is formed. In this current case, many question still remain to be answered, and it is still not intelligible to state, whether this approach has been an admissible fit for the current political and economic situation in MAS.

As we can see, the significantly sophisticated labyrinth of existing competition law frameworks and developing competition law frameworks is swelling and expanding by the minute. Since there are also many possible approaches and methods to shrink and minimize the labyrinth, the main objective of all of them should be the straightening of the path to international competition law.

Bibliography:

DABBAH, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594 p., ISBN 978-0-521-51641-9

JONES, A.-Sufrin, B. EC Competition Law: Texts, Cases and Materials. 3rd edition. Oxford University Press. 2008. ISBN 978-0-19-929904-1

Kallaugher, J.- Weitbrecht, A. Developments under the Treaty on the Functioning of the European Union,articles 101 and 102. Sweet&Maxwell.2011. [Online] accessed at: https://www.lw.com%2FthoughtLeadership%2Fdevelopments-under-articles-101-102-tfeu-in-2010&ei=4J-TUo3RAu_1yAOCyYD4DA&usg=AFQjCNFk3ifg7pK03pk1xQ8sFUC5889qdA&sig2=jozMH7nTBgGiNyWqhDrY3A&bvm=bv.56988011,d.bGQ. p. 1

Reid, A. European Union. 4th edition. Thomson Reuters. 2010. ISBN 978-0-414-01790-0

See, V.E.T. Competition Act 2010: the issues and challenges. European Journal of Law and Economics. 10.1007/10657-012-9344-1. Springer 2012

Whish, R. Competition law. 6th edition. Oxford University Press.2009. ISBN 978-0-19928938-7

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