

DIRECT EFFECT AND INVOCABILITY OF EC LAW BEFORE NATIONAL COURTS: INTERNATIONAL TREATIES

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Abstract in original language

Účelem tohoto příspěvku je popsat specifika přímého účinku ustanovení mezinárodních smluv uzavřených Evropským společenstvím a najít vztah mezi přímým účinkem a dovolatelností mezinárodní smlouvy ze strany jednotlivce nebo členského státu. Evropský soudní dvůr se ve své judikatuře, která se týká převážně dohod uzavřených v rámci WTO, staví k přímému účinku negativně s odkazem na zvláštní charakter smluvních ustanovení, která se liší od běžného komunitárního práva. Proto také se jednotlivec nemůže těchto ustanovení dovolávat jako důvodu pro neplatnost komunitárního nařízení. Dovolatelnost se však nevyčerpává jen přímým účinkem, ale může být možná při výkladu nařízení (analogie "nepřímého účinku"). Pokud jde o odpovědnost Společenství za škodu způsobenou nedodržením smluvního závazku při přijímání nařízení, judikatura Soudního dvora zatím neexistuje.

Key words in original language

Přímý účinek, dovolatelnost, mezinárodní smlouva, WTO, výklad.

Abstract

The purpose of the present contribution is to describe particularities of the direct effect of the provisions of international treaties concluded by the Community and to find the relationship between direct effect and invocability of treaty provisions by an individual and a member State. In its case law the Court of Justice declines the direct effect of treaties (especially those concluded within the WTO) arguing that an international treaty has a special character different from the Community law. Consequently, the individual cannot invoke a treaty provision as the basis for invalidation of a Community regulation. Nevertheless, the notion of invocability is wider than direct effect and thus may be possible when interpreting the regulation (analogy of the "indirect effect"). As far as the liability of the Community for damages caused by the failure to comply with the treaty when adopting the regulation, no ECJ case law exists so far.

Key words

Direct effect, invocability, international treaty, WTO, interpretation.

The principle of direct effect of Community law is generally very well known. Nevertheless, it shows some specific features for international treaties, concluded by the Community, which are supposed to be integral part of Community law. In this connection the notion of "invocability" of treaties appears. The purpose of this study is to examine this notion on the background of direct effect.

Let us remind conditions for direct effect of Community rules, according to the jurisprudence of the European Court of Justice:

1. There must be a clear and precise obligation or right of an individual (the rule is "directly applicable").

2. The obligation must be unconditional.
3. Compliance with the obligation must not require any further legal act on the part of the Community or the member State.
4. Member States must be left no discretion regarding implementation of the obligation.

What is the meaning of direct effect for the individual?

- He can invoke before the national court the rule of Community law against the State.
- National courts are obliged to apply the rule of Community law in relation to that individual.

What means "invoke" the rule: To use it for the satisfaction of a legal claim. "Use" means to substitute, on the basis of the priority principle, the rule of national law by the rule of Community law. If the direct effect of the Community law is not possible, the national law should be interpreted according to the Community law.

Abovementioned principles concern relations between national and Community law. The question that arises in connection of international treaties concluded by the Community, is whether it is possible to invoke a directly applicable provision of an international treaty against the secondary Community law.

The answer to that question is not obvious. The doctrine tends to recognize direct effect of treaties concluded by the EC. The lack of an express provision of the EC Treaty requires the ECJ jurisprudence, which is a little surprising. The survey of ECJ case law proves, that ECJ is not favorable to recognize direct effect to international treaties concluded by the EC in the field of the common commercial policy, where this problem became urgent.

a) Before establishing WTO:

International Fruit, 24-27/72: The nature of GATT does not allow to be invoked by an individual.

Germany v. Council (C-280/93), Chiquita (C-469/93): same reasoning.

b) After establishing WTO:

Portugal v. Council (149/96): same reasoning. WTO agreements do not provide rules that could be implemented in goodwill by national law of member States.

Dior (C-300, 302/98: WTO agreements are destined to member States, not individuals. The most important were two arguments:

- a) System of settlement of disputes in WTO: too flexible solutions, lack of necessary law exactness.
- b) Other States members do not recognize direct effect (mainly the USA).

The Council decision of 22 December 1994 on the WTO and other agreements states expressly that WTO agreement and other agreements are not suitable for the direct invocability before EC or national courts.

A very specific problem is the control of compatibility (of secondary EC law in relation to the treaties). The ECJ keeps the same opinion (impossibility to invoke the invalidity of a secondary law act not being in conformity with the treaty). There are just two famous exceptions: cases Nakajima (C-69/89) and Fediol (C-70/89). The direct effect may be accepted when the EC regulation has an executing character (of the treaty) or refers expressly to the treaty.

Now let us examine the notion of invocability. As it has been already said, to "use" the rule of Community law means, in the majority of cases, to substitute the national rule by the Community one. Nevertheless, this is possible only in cases when the Community rule is directly effective. The national rule remains intact, it is simply not applied.

In the relation EC secondary law - international treaty this evaluation is different. Here we are operating within one legal system, since international treaties concluded by the Community are considered to be the constituent part of EC law. An EC regulation contradicting the provision of an international treaty should be invalidated. This is possible only when that provision is directly effective. As it has been shown, according to the ECJ case law such a direct effect of treaty provisions does not exist (with a few very special exceptions). The direct effect seem to be the condition of the invocability of the treaty by an individual.

In addition to this, to invoke the treaty against the validity of a regulation can be realized not only by an individual, but also by a member State (Germany v. Council - C-280/93). In such case the invocability has nothing to do with the direct effect, which has a sense only in relation towards an individual.

If we want to clarify the relation between the direct effect and the invocability, we must take out the consequences of the ECJ case law in the following way:

- The problem of invocability appears where the validity of a regulation is contested.
- The international treaty must be invocable also in cases, where the treaty is not, according to the ECJ case law, directly applicable. Consequently, the invocability is the notion wider than the direct effect. The reason is that the relation EC regulation - international treaty differs from the relation national law - EC law. The expression of the invocability outside the direct effect consists in two important aspects, known also in relation EC law - national law: indirect effect (consistent (conformist) interpretation) and the liability for the breach of the international treaty.

1. Consistent interpretation: The EC regulation should be interpreted in the light of the corresponding treaty provision, which is invoked. As an example we can mention the judgment *Goldstar v. Council* (C-105/90), where such an interpretation was required for the EC antidumping code (regulation). Following case law after the establishing of WTO: *Peter Leifer* (C-83/94), *Fritz Werner* (C-70/94), *Commission v. Germany* (C-61/94). The priority of international treaties concluded by the EC requires the consistent interpretation of EC secondary law (regulations). This conclusion is imposed also to national courts.

2. Liability: The claimant invokes the violation of a treaty provision that caused him a damage. The Francovich principle does not apply to international treaties. The ECJ case law concerning treaties is still missing, but it seems that there is no reason for a different conclusion. If the EC breaches a binding treaty and consequently damages occur to an individual, there is no reason to ignore the principle of EC liability, since that liability is the tool for the protection of an individual against the breach of law by the member State and the Community as well.

Let us now summarize conditions for the invocability.

When the conditions for the direct effect are fulfilled, there is no problem. Nevertheless, the ECJ overestimates the specificities of international treaties and takes into account additional criteria (mainly the ability of the treaty to create directly rights to individuals). Already in Kupferberg (104/81) ECJ notices the international origin of the treaty - on the basis of international (not Community) law. The party of the treaty may determine its own conditions for the direct effect of the treaty. The purpose of the treaty is not primarily create rights and obligations to individuals, but only for its parties (States, international organizations). Those parties may determine themselves how to achieve the purpose of the treaty according to its spirit and provisions. In this connection they are not bound by any rule of international law (Kupferberg 104/81 and Germany v. Council - C-280/93). The international treaty should be interpreted in its entirety. The interpretation of different terms may be different in the international law comparing to the EC law (Chiquita Italia C-469/93).

If the direct effect of a treaty provision is denied, it is possible to invoke it for the purpose of the interpretation of the EC secondary law act. It should be taken into account, that the consistent (conformist) interpretation may not be possible, if the act is very rigid and does not allow different interpretations, especially in the sense of the treaty provision. In such case the "indirect effect" is not possible and the treaty provision is not invocable.

The ultimate solution could be, if a damage has occurred, to invoke the violation of the treaty by the Community. The conditions of this kind of invocability have so far not determined by the ECJ case law, but it seems that such situation is likely to occur in practice and that in the future the ECJ will be obliged to decide.

We may conclude that the invocability of an international treaty provision by an individual or a member State before EU courts depends fully on the primacy of the treaty over the EC secondary law. This primacy is contained in Art. 300 of the EC Treaty, according to which Community Institutions are bound by the Treaty, including situations when they adopt an act of secondary law. An act contradictory with the treaty should be invalidated by the ECJ decision, not simply set aside, as it is the case for the national law. If this is not possible for the lack of direct effect, the invocability may exist in another forms, as it has been indicated: indirect effect (consistent interpretation of an act of secondary law) and EC liability for damages. The notion of "invocability" is (and must be) thus wider than a simple "direct effect", generally denied by the ECJ for international treaties.

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