

# **VÝCHOZÍ TEORETICKÉ ASPEKTY PŘÍMÉHO ÚČINKU PRÁVA WTO V PRÁVNÍM ŘÁDU ES/EU**

## **THEORETICAL STARTING POINTS OF THE DIRECT EFFECT OF WTO LAW IN EC/EU LEGAL ORDER**

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### **Abstrakt**

Příspěvek se zabývá hlavními faktory formujícími vztah práva ES/EU a práva Světové obchodní organizace. Primárně se zaměřujeme na problematickou otázku společného členství ES/EU a jednotlivých členských států ve Světové obchodní organizaci. Další zkoumanou otázkou je problematika odpovědnosti ES/EU, resp. členských států za porušení práva Světové obchodní organizace. V neposlední řadě je rozebrán vztah práva ES/EU a práva WTO z pohledu doktríny přímého účinku.

### **Klíčová slova**

ES/EU, WTO, členství, společné členství, odpovědnost, porušení práva WTO, vztah evropského práva a práva WTO, přímý účinek

### **Abstract**

Contribution deals with the main factors influencing the relationship between the law of the World Trade Organization and the European law. We focus on the problematic aspect of the joint membership of the EC/EU and the Member States in the World Trade Organization. Other surveyed question is the responsibility of the EC/EU and Member States for the violation of the World Trade Organisation law. Finally we are focusing on the relationship between the European law and the Law of the World Trade Organisation from the theory of direct effect point of view.

### **Key words**

EC/EU, WTO, membership, joint membership, responsibility, violation of WTO law, relationship European Law – WTO Law, direct effect

## **Introduction**

Authors of this contribution decided to deal with the neglected issue of the relationship between the law of the EC/EU and the law of the WTO which represents general framework of the international commercial law today.

We prefer to examine main preconditions of WTO law in order to have direct effect in the EC/EU law itself. This topic is underrepresented not only in the Czech theory and practice but generally at the European and global level too.

First of all we would like to deal with a problematic aspect of the double (or so called joint) membership of the EC/EU and the Member States in the World Trade Organisation.<sup>1</sup>

The fact is that the EC/EU and EC Member States are both members of the WTO separately with their rights and obligations.<sup>2</sup> This is a unique situation in every international organization and specifically in such as World Trade Organization.<sup>3</sup> This specific situation causes a lot of problematic questions such as: Is EC/EU on the one hand and EC Member States on the other hand bound by all agreements which were negotiated in the WTO? Are they bound commonly or separately? Who is responsible for the violation of the WTO law – EC/EU or EC Member States? Do we need to take into account the division of the powers between EC/EU and EC Member States? Is it important if we are talking about exclusive or shared powers?

The starting point here is the *specific character of the Treaty establishing WTO* (WTO Treaty). The external relationships of EC/EU are regularly realized by specific type of so called “mixed agreements” such as WTO Treaty.<sup>4</sup> This means that such agreement is concluded by the Community

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<sup>1</sup> All the necessary documents of the WTO law can be found here: [http://www.wto.org/english/docs\\_e/docs\\_e.htm](http://www.wto.org/english/docs_e/docs_e.htm).

<sup>2</sup> See in details: Steinberger, E.: The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO. In European Journal of International Law. Vol. 17, No. 4, p. 837.

<sup>3</sup> See in details: Cottier, T., Oesch, M.: International Trade Regulation. Law and Policy in the WTO, the EU and Switzerland. Cases, Materials and Comments. Cameron May, 2005, p. 77.

<sup>4</sup> See in details: Svoboda, P.: Právo vnějších vztahů Evropské unie. 2.vydání. Linde, Praha, a.s. 2007, p. 84.

and some of the Member States separately. Keeping this on minds we need to thoroughly differentiate the question of the “mixity” of an international agreement and the question of the division of the powers between the Community and the Member States. Aspect of “mixity” of such international obligations is not the same as the aspect of shared powers. Mixed agreements are agreements where EC has powers to conclude whole content even some of the obligations belong to the exclusive and some to the shared competences. This means that EC/EU and Member States are equal and separate members of WTO. This type of agreement is not foreign for the EC/EU law. They were used for example in the association agreements.<sup>5</sup> What is problematic is the practical effect of such specific “joint” membership. Which parts of such “mixed agreement” as WTO Treaty are binding for EC/EU and which are binding for each Member States? Who is responsible for the violation of the WTO law – EC/EU or each Member State? In many international treaties of this type we can find the solution in “competence clauses” contained in such agreement itself. The problem in the case of WTO Treaty is that “competence clause” is wholly missing and there is no solution of such question as joint membership included in WTO Treaty. No solution can be found even in the EC Treaty.<sup>6</sup> Articles 302 and 303 only refer to the relationship and cooperation with United Nations, Council of Europe and other international organizations. While we didn't find any solution of the joint membership in WTO law and EC law we need to apply general rules of public international law.<sup>7</sup> Under these rules we can find out that EC/EU is the international organization “sui generis”<sup>8</sup> established in 1957.<sup>9</sup> It has international legal personality. Consequently it is the entity of international law with its rights and duties.<sup>10</sup> In the case of international organizations we need to apply the theory of “unlimited legal personality” even there can be (and this is in fact the case of EC/EU) internal division of powers – competences. The first conclusion then is the fact that EC/EU is capable to come up to the obligations negotiated under the WTO scheme.

The second question is whether the agreement under the WTO scheme allows their members to *agree only with part of this agreement* (in our case if there is a chance to agree only with the part of

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<sup>5</sup> For example with Egypt (2004), State of Israel (2000), Tunisia (1998), Lebanon (2000), Jordan (2002) or Morocco (2000).

<sup>6</sup> *Celex 11957E*

<sup>7</sup> Vienna Convention on the Law of the Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations.

<sup>8</sup> The specific characteristic is supranationality not equality as is generally understood in the international law-

<sup>9</sup> See in details: Týč, V. Základy práva Evropské unie pro ekonomy. 4. Vydání. Linde, Praha 2004, p. 18.

<sup>10</sup> See in details: Klabbers, J. An Introduction to International Institutional Law. Cambridge University Press 2002, p. 42  
This author is speaking about ius tractatum, ius missionis + active and passive legitimization.

WTO Treaty)? The solution can be found in the general international law again – Article 17 Vienna Convention. In our case none of the two conditions stated there for the members to be bound only partly is satisfied: WTO agreements do not presume the partial consent in any of the parts (including all the Annexes) and it is not clear whether there was such agreement (to be bound only partly) among the members of the WTO.<sup>11</sup> The second conclusion is that EC/EU and each of the Member States are fully bound by the whole WTO Agreement with all the Annexes.

Finally third aspect of the problematic joint membership is the *question of the responsibility*. Who is responsible for the violation of the WTO law? EC/EU, Member States or both?<sup>12</sup> It is clear that EC/EU is responsible for the wrongful acts of their own organs. What is less clear is the fact whether the EC/EU is responsible for the violation of the WTO law committed by the Member States. And again there is no express solution at the European law or WTO law level. So as in previous questions the answer is to be found in the general international public law which offers the solution called “the theory of the effective control”. This theory basically says that the subject responsible is the one which exercise the control over the body (organ, state etc.) which violates the law (in our case WTO law). Under the EC Treaty the effective control (which is not so effective in the case of violation WTO law by application purely domestic rule)<sup>13</sup> is according to our opinion represented by the unique position of European Court of Justice and the procedure according to the article 226 EC Treaty. Another provision of the EC Treaty (Article 300/7) says that even the “mixed agreements” (such as WTO Treaty) are binding for EC/EU organs and all Member States.<sup>14</sup> Hence it is EC/EU who is responsible for the violation of WTO law committed by its own organs or by Member States. What is the position of the Member States? They are responsible (according to the theory of the effective control) for the violation of the WTO law by its own organs (this type of violation need to be ascribed to EC/EU and Member State too). Are Member States responsible for the violation of the WTO law committed by the EC/EU bodies? Can we speak about the effective control from the Member States point of view? Hardly...The reason is the famous ECJ decision C-

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<sup>11</sup> See in details Article 17 of the Vienna Convention on the Law of the Treaties.

<sup>12</sup> See in details: Draft Articles on Responsibility of States for Internationally Wrongful Acts of States: [www.un.org/law/ilc](http://www.un.org/law/ilc),

<sup>13</sup> See in details Steinberger, E.: The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO. In European Journal of International Law. Vol. 17, No. 4, p. 837.

<sup>14</sup> See decisions of the ECJ C-13/00 Commission v. Ireland, C-239/03 Commission v. France nebo 12/86 Commision v. Germany. Available: [www.curia.eu](http://www.curia.eu).

280/93 Banana Case (Germany v. Commission)<sup>15</sup> where ECJ expressly refused to apply the theory of the effective control in the case where Member States want to control EC/EU organs and apply the procedure according to the Articles 230 and Article 232 EC Treaty. Finally this is the reason why the Member States cannot be responsible by the violation of the WTO law committed by the organs of the EC/EU.

After we have answered some basic problems of the membership in the WTO concerning EU/EC and the Member States, we can focus on the theoretical grounds of the *relationship between the European law and the Law of the WTO* as a specific set of rules which is binding for EC/EU and each of the Member States.

This issue can be started with the general statement that the relationship between the law of EC/EU and the law of the WTO is very *complicated*, especially because of the *internal division of powers* between EC/EU and Member States.<sup>16</sup> WTO represents general framework that regulates the branch of international commercial law and which need to be respected even in the European legislative procedure.

*External trade relationships* were solely in the hands of the EC/EU – it was an exclusive power conducted by the EC/EU. The situation is very complicated in relation to the WTO law. Because of the increasing role of the external trade regulation the division of the powers between EC/EU and the Member States is *constantly changing and seems to be still unsettled*. What is now decisive is the Opinion 1/94 of the ECJ and the changes that were made in the EC Treaty (new article 133 after the Treaty of Nice) regarded mainly the aspects of the intellectual property questions. But this solution is not final. We don't want to discuss here in details what belongs to the exclusive and what to the shared powers. What is important is the fact that in every concrete case the first thing to do is to attentively examine who has the powers to deal with the specific question (trade in goods, trade in services, intellectual property questions).<sup>17</sup>

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<sup>15</sup> See database available at [www.curia.eu](http://www.curia.eu).

<sup>16</sup> See in details: Svoboda, P.: Právo vnějších vztahů Evropské unie. 2.vydání. Linde, Praha, a.s. 2007, p. 47.

<sup>17</sup> See in details: Rozehnalová, N., Týč, V.: Vnější obchodní vztahy Evropské unie. Masarykova univerzita, Brno, 2006, p. 42.

As we indicated above from the European law perspective we need to examine *the theory of the direct effect* of the WTO in the European legal order having on our minds the specific character of the WTO agreement (as a mixed agreement). Such agreements (including here discussed WTO Agreement - Treaty) are an integral part of the European law.<sup>18</sup> This part of the European law has the ability to effect the domestic law and thus it needs to be respected in setting new rules and interpreting the old ones.

If the private individual can call for the WTO law before the European courts (the real direct effect of the WTO law) remains to be unclear. And still it is the question for the application of law. The *main role here has the ECJ* which is constantly negative to the possibility, refusing the direct effect of the WTO law in the European law level. Understandably the main reason here is protecting own unique position among the European organs at the expense of the real effectiveness of the WTO law.

Here we can see how unique is the position of the organs that actually applies the law. If they will evaluate the concrete mixed agreement as *self-executing* (this means that the rights and duties are specifically set for private individuals + these rules are explicit and unconditional)<sup>19</sup> they will allow the direct effect and vice versa.

### Conclusion

We tried to focus our attention on the ravenous questions connected to the possibility of allowance of the WTO law direct effect in EC/EU legal order. As we stated above, disregarding diversity of opinions, ECJ still rejects the direct effect of WTO law. Nevertheless, it seems that even ECJ is forced to soften its strict position and award the WTO law not with the direct effect but with the indirect interpretative effect as in the ECJ cases C-70/87 Fediol and C-69/89 Nakajima. Also other voices (even from Advocates General) appear more frequently which calls for the direct effect of WTO law in EC/EU and affirm there are no reasons for denying it. We are convinced that the process of formation of the mutual relationship of the WTO law and EC/EU law is still at the beginning and will be a subject of future changes.

### **Literature:**

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<sup>18</sup> See in details the decision of the ECJ in the case C-181/73 R. & V. Haegeman v. Belgium.

<sup>19</sup> See in details: Týč, V.: Základy práva Evropské unie pro ekonomy. 4. vydání, Linde, Praha 2004, p. 84.

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