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PRÁVNICKÁ FAKULTA

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FOREWORD

Dear Ladies and Gentlemen, dear guests and colleagues,

COFOLA 2008 is the II. international conference of doctoral students and young scholars held by the Faculty of Law, Masaryk University. The change of the name of this conference (former PFAMEI) reflects our different philosophical approach. Unlike PFAMEI, which was focused mainly on legal and financial issues, COFOLA 2008 conference has no expressively stated topic for contributions. It is because the aim of the COFOLA 2008 conference is to give to its participants an opportunity to address the most poignant questions from their field of interest, whichever it is.

As the organizers of the conference, we are pleased that also our honorable colleagues from Belarus, Italy, Lithuania, Hungary, Poland, Romania, Ukraine, USA and Yugoslavia participated at the conference.

We are honored that prof. JUDr. Naděžda Rozehnalová, CSc., the Dean of the Faculty of Law, Masaryk University and Roman Onderka, the Mayor of the city of Brno, have accepted auspices over the COFOLA 2008 conference. We would like to express our thanks also to our donators as their appreciated contributions significantly contributed to the success of the conference.

We hope that we will be able to welcome all participants again next year at the COFOLA 2009 conference.

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Martin Orgoník
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CONTENT

INTERNATIONAL PRIVATE LAW SECTION

EUROPEAN LAW SECTION

FINANCIAL LAW SECTION

ADMINISTRATIVE LAW SECTION

LABOUR LAW SECTION

ECONOMIC SECTORS WITHIN EUROPEAN INTEGRATION

LEGAL HISTORY SECTION

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PROBLEMATICAL PROVISIONS OF THE REGULATION CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE

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Abstrakt

Příspěvek se zabývá problematickými ustanoveními nařízení o evropském platebním rozkazu. V úvodu jsou stručně uvedeny charakteristické znaky nařízení. Poté jsou analyzována jednotlivá ustanovení, o nichž se dá předpokládat, že v praxi budou působit potíže při aplikaci: pravomoc soudů, vyloučení nároků z mimosmluvních závazkových vztahů, struktura formuláře, rozsah kontroly návrhu a sankce za nepravdivé informace v něm uvedené, promlčení, doručování a nejasnosti týkající se opravného prostředku. V závěru je nařízení krátce zhodnoceno.

Klíčová slova

Nařízení o evropském platebním rozkazu, mezinárodní pravomoc, návrh na vydání evropského platebního rozkazu, formulářové řízení, opravný prostředek

Abstract

This paper deals with the problematical provisions of the regulation creating a European order for payment procedure. First, the characteristic features of the regulation are briefly sketched. Then, the particular provisions of the regulation, which are supposed to cause troubles in practice, are analyzed: international jurisdiction, exclusion of the claims arising from non-contractual obligations, structure of the forms, extent of the examination of applications and sanctions for untrue information given, lapse, service of documents and obscurities related to the remedy. In the end, the regulation is assessed in short.

Keywords

Regulation creating a European order for payment procedure, international jurisdiction, application for a European order for payment, form – procedure, remedy

1. Introduction

The European legislator decided to create a legal framework for creditors in the European Union (hereinafter referred to as „EU“) for swifter, more efficient and cheaper recovery of probably

uncontested pecuniary claims[1] in cross-border cases. The clue shall be a transnationalized "European procedure" with a subsidiary application of national laws. The legal base for it is the Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (hereinafter referred to as „regulation on European order for payment").[2] The scope of application concerns only pecuniary claims for a specific amount which have fallen due. At the end of the procedure there shall be a "European" title, i.e. a title issued in the procedure which falls under the same regulation in all member states of the EU. Moreover, such a title does not need to be recognized, to be declared enforceable or to be confirmed as a European enforcement order. In this way, a free circulation of European payment orders shall be ensured and the creditors shall have guaranteed the same level of a playing field. The next typical feature of this regulation is a broad use of standardised forms which are mostly to be filled in by marking off of the relevant data. Then, the procedure shall relieve also the courts because applications do not have to be necessarily examined by a judge.

For creditors, the European order for payment procedure shall be a further alternative for a debt recovery. It is an optional means additional to the European enforcement order, which can be issued under the Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (hereinafter referred to as „regulation creating a European Enforcement Order"), a decision declared enforceable under the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as „regulation Brussels I), in particular cases to the "European" decision issued under the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, and to accelerated procedures embodied in some[3] national legal orders.

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[1] The article 6 of the enacting clause as well as the article 1 section 1 lit. a) of the regulation mention „uncontested pecuniary claims". In reality, whether a claim is really uncontested will be clear as late as in the course of the European payment order procedure. It depends on the fact, whether the defendant will lodge a statement of opposition to the European order for payment (article 16) or whether he/she requires its review. For that reason, it is better to speak about "probably uncontested debts".

[2] The idea to establish a European accelerated procedure for recovery of claims is not a new one. The Council of Ministers recommended it already in 1984. The first concretization of the suggestion came in 1987 at the VIII. International Congress on Procedural Law in Utrecht. Here, a working group was created consisting of experts on the procedural law coming from the twelve member states of the EU. In 1993, they introduced the Model Law on European Civil Procedure. Its articles 11.1. – 11.9. contained provisions concerning the European Payment Order Procedure. Although the Model Law has never entered in force, it remains an important master for activities in the area of procedural law. In 1998, the first law-making initiative arose and resulted in a proposal of the Directive on the fight against defaults with payment in commercial relations. As it was not sure, whether the article 95 of the Treaty Establishing the European Community (hereinafter referred to as „EC – Treaty") creates competences of the European Community in this field, again, it has never entered in force. The present regulation was issued after the EC obtained the competence in the field of civil procedure (article 61 lit. c) in conjunction with the article 65 of the EC-Treaty). The aim to establish a European payment order procedure was included in the action plans from Vienna and Tampere and in the related Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. Sujecki, B. Europäisches Mahnverfahren. ZEuP, 2006, No. 1, p. 127 – 129.

[3] E.g. the Czech legal order regulates both the payment order procedure and the procedure on the bill of exchange order and the cheque order. On the contrary, the Dutch law does not know an accelerated procedure at all. Sujecki, B. op. cit. p. 2 (footnote), p. 131.

Regarding the fact that the regulation enters in force only on December, 12 of this year we have not had any response about its use in praxis yet. Therefore, we can not say for a certainty how efficient it will be. Notwithstanding, some provisions can be currently identified which will probably cause troubles by their application. The focus of this paper is to analyze these provisions and to suggest some better solutions. Concerning the course of the European order for payment procedure I refer to the texts already published in legal journals.[4]

2. International Jurisdiction of the Courts

Concerning the determination of international jurisdiction article 6 refers to the article 59 regulation Brussels I. If a defendant is a consumer, a claim can be lodged only by courts in the state, in which the defendant is domiciled. This means, that an exclusive jurisdiction of the courts of a defendant's home state applies in such a case.

However, the use of mentioned provisions of the regulation Brussels I seems not to be suitable for the European payment order procedure. Beside the general rule in article 2 stipulating that a judicial procedure has to take place at a court of the member state where the defendant has his domicile, the regulation contains many other special and exclusive jurisdiction rules, legal regulation of which is quite complicated in some cases. They have to be interpreted partly in conformity with judicial decisions of the European Court of Justice, partly according to national rules on jurisdiction. For that reason, the solution contained in the regulation on European order for payment contravenes the intention to simplify the recovery of probably uncontested claims. The fulfilment of the conditions, that establish the international jurisdiction of a particular court, will have to be examined by a judge and not by an e.g. clerk of court.[5]

Unfortunately, the proposal to introduce an exclusive international jurisdiction of the courts of a member state where the defendant is domiciled (which corresponded to the article 2 section 1 of the regulation Brussels I) did not carry through. This solution would make the European order for payment procedure more accessible and definitely easier. In such a case, an electronic examination of an application for a European order for payment would be possible.

3. Exclusion of the claims arising from non-contractual obligations

[4] See e.g. Horák, P., Zavadilová, M. Evropský platební rozkaz a jeho role v českém civilním procesu. Právní rozhledy, 2006, No. 22, p. 803 – 810; Sujecki, B. Das Europäische Mahnverfahren. NJW, 2007, No. 23, p. 1622 – 1625.
[5] Sujecki, B. Erste Überlegungen zum europäischen elektronischen Mahnverfahren. MMR, 2005, No. 4, p. 214 – 215.

The recovery of debts arising from non-contractual obligations in the way of an European payment order is possible only if they have been the subject of an agreement between the parties or there has been an admission of debt or if they relate to liquidated debts arising from joint ownership of property (article 2 section 2 lit. d)).[6]

It is questionable, whether such a rule was necessary. If there is no pecuniary claim or if its amount is not specified, they would not have to be particularly excluded from the scope of application of the regulation. As already mentioned, the regulation applies only to pecuniary claims for a specific amount.

Moreover, the question whether there is a non-contractual obligation or not is qualified differently in various legal orders (e.g. culpa in contrahendo) which will cause dissension in application of the regulation.[7]

4. Structure of the forms

There are seven forms intended for particular phases of the procedure. They contain a broad catalogue of items with codes which are to be completed by simple ticking off. The forms are translated in all official languages of the EU, which should eliminate the problems with translation: a person responsible for the European order for payment procedure can only compare the form in the official language of the court with the form in the official language of the claimant or defendant.

Unfortunately, this practice is not possible in all cases as some data have to be formulated in whole sentences.[8] The form has to be unconditionally filled in the official language of the state where the court, which has an international jurisdiction, has the residence, or where the person, whom it is served, is domiciled. This might discourage creditors to make an application for a European order for payment in another state than where he is domiciled. It is a complication also for a court which has to use the language of a state, where a creditor or a defendant has his domicile.[9]

5. Extent of the examination of applications

Article 8 stipulates that the court seized of an application for a European order for payment shall examine, as soon as possible, whether the formal requirements (articles 2, 3, 4, 6 and 7) are met and

[6] Furthermore, from the scope of application are excluded revenue, customs or administrative matters, liability of the State for acts and omissions in the exercise of State authority („acta iure imperii"), rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, compulsory composition and similar proceedings and social security.
[7] Sujecki, B. op. cit. p. 3 (footnote), p.1623.
[8] E.g. Form A – Application for a European order for payment - article 7 (interests), article 8 (contractual penalty), article 11 (additional statements and further information).
[9] E.g. Form B – Request to the claimant to complete and/or rectify an application for the European order for payment – completion or correction of the application in particular points.

whether the claim appears to be founded. This examination may take the form of an automated procedure. If the formal requirements are not met, and unless the claim is clearly unfounded or the application is inadmissible, the claimant shall be given the opportunity to complete or rectify the application (article 9). On the contrary, the application can be completely rejected if the legal formal requirements are not met, if the application is clearly unfounded, if claimant fails to send his reply to the court's proposal of modification (rectification or completion) of the application or if he does not accept it (article 10). The claimant is given no right of appeal against the rejection of the application. However, there are no obstacles to lodge the application again.

The question is, how to interpret the world "examine" in the article 8. Which examination is meant here – a formal or a material one? It seems to me that the text allows both possibilities:
The issue of fact has to be described and descriptions of evidence supporting the claim have to be stated in the application. Accordingly, article 16 of the enacting clause mentions the examination of the application including the issue of jurisdiction and the description of evidence. This would indicate a material examination. Conversely, the mere formal examination is supported by the fact that in the European order for payment the defendant shall be informed in conformity with article 12 section 4 lit. a) that the information provided by the claimant was not verified by the court. Furthermore, an electronic examination of an application shall be possible, which is very difficult to imagine if there is a requirement of a material examination. Last, but not least, in compliance with article 16 of the enacting clause the examination of the application by a judge should not be necessary.

Apparently, there is no clear answer to the question in the regulation, although such an explicit rule stipulated directly in the regulation would be more than useful. In respect to the mentioned facts I hold the opinion, that a formal examination of the application is sufficient. The material examination gives more certainty at law indeed; however, it contradicts the aim of the accelerated procedure. In addition, one of the features of the accelerated procedure is that the guarantee of the debtor's right of audience is shifted in the phase after lodging a statement of opposition when the European order for payment procedure continues before the courts of the Member State of origin in accordance with the rules of ordinary civil procedure. The advantage is, that such a rule makes the debtor to behave more responsible – he is obliged to really deal with the European payment order and to decide – after forethought – whether he will lodge a statement of opposition. Besides, the debtor is entitled to make use of a remedy in particular cases.

On the other hand, the interpretation in favour of the formal examination should be amended at least with the possibility to reject the application if it is clearly unfounded (i.e. it would be examined

materially in such a case).[10] This solution would permit firstly, that the examination could be made by e.g. clerks of court, and secondly, the examination could be fully automated. In this way, the procedure would be more effective and the courts would be relieved. If the single member states regulate this issue in their national legal orders, it would lead to discrepancy with the aim of the regulation to establish a uniform European order for payment procedure how it is embodied in article 1.[11]

6. Sanctions for untrue information in an application

In accordance with article 7 section 3, a claimant shall declare that the information provided is true to the best of his knowledge and belief and shall acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the Member State of origin.

This provision explicitly refers to sanctions stipulated by the national legal orders but it is not clear which sanctions the European legislator meant – criminal, civil or administrative ones? We have to be aware of the fact that in the single member states sanctions of various characters may be imposed and moreover, these can be applied differently by the courts.[12] Here the regulation is again shifting away from the idea of a uniform transnationalized European order for payment regulation.

7. Lapse

In the paragraph 5, the conditions for rejection of the application for a European order for payment are listed (article 11). However, there is no rule concerning the maintenance of the term, interrupting running of time or the beginning of a new term after the rejection of the application. With regard to the aim of the unified transnational procedure such a rule would be suitable as in the current situation national legal rules will be applicable.[13]

8. Service of documents

Unfortunately, the legal regulation of the service of documents is not ideal. The European legislator probably overheard the loud criticism of the regulation of the service of documents in the regulation

[10] For example, if doubts about the rightness of information provided by the creditor arise in an Austrian payment order procedure, the court can examine the application materially. This concerns e.g. the cases where creditors try to stake too high interests as a part of their claim. Sujecki, B. Kritische Anmerkungen zum gerichtlichen Prüfungsumfang im Europäischen Mahnverfahren. Das Europäische Mahnverfahren. ERA Forum (2007) 8:91–105, p. 96 and 94.
[11] Ibid., p. 91 – 105.
[12] Sujecki, B. Europäisches Mahnverfahren - Geänderter Verordnungsvorschlag. EuZW, 2006, No. 11, p. 330.
[13] Sujecki, B. op. cit. p. 3 (footnote), p. 1624.

creating a European Enforcement Order (articles 13 and 14),[14] which are exactly the same as in the regulation on European order for payment (including the numbering of the articles).

Except that, it would be desirable to regulate the situation when the European order for payment is served in contradiction to the rules for service of documents but the debtor lodges a statement of opposition though. Does that mean that the European order for payment is completely invalid or can it be considered as a beginning of a civil procedure?[15]

9. Remedy

After the lapse of the time for lodging a statement of opposition, the defendant is entitled to apply for a review of the European order for payment before the competent court in the Member State of origin. It is a compromise between a one – and a two-stage procedure. The conditions are stipulated in article 20:

1. The order for payment was served by one of the methods provided for in Article 14, and service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part, or
2. the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part.

In either case, the defendant has to act promptly (article 20 section 1).

3. Order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances (article 20 section 2).

By this provision, the courts will have to cope (or to wait for judicial decisions of the European Court of Justice) with undefined notions such as "promptly", "extraordinary circumstances" or „clearly wrongly".

In relation to the article 20 section 1 lit. a) ii doubts arose,[16] whether a situation can occur, that the service was not effected in sufficient time to enable the defendant to arrange for his defence as the term for sending a statement of opposition starts not until the European order for payment is served. This distinguishes the European order for payment procedure from an ordinary civil procedure, where the date of proceeding is appointed and between the service of the document giving notice about that and

14 For more details see Bohůnová, P. Nařízení o evropském exekučním titulu. Je dlužníkovi garantováno právo na spravedlivý proces? Evropský exekuční titul. Právní rádce, 2008, No. 3, p. 28 – 36.

15 Considering the aim of the regulation to ensure an efficient recovery of the debts, I think the second solution would be more convenient as it constitutes a parallel to the regulation Brussels I and the regulation creating a European Enforcement Order. Under the former, a formal mistake in the service of documents can not lead to the rejection of the recognition and of the declaring the decision enforceable if the debtor was aware of it (article 34 section 2). In its article 18, the latter makes the debtor to deal with the procedure in which he was invalidly served. If he gets knowledge of the procedure at least upon the service of the decision and if he does not lodge a remedy, the decision can be confirmed as a European Enforcement Order. Lodging a remedy is an active conduct that shows that the European order for payment was served to the defendant.

16 Sujecki, B. op. cit. p. 2 (footnote), p. 146.

the proceeding itself a little time can be left for the defendant to arrange for his defence. According to the diction of article 20 section 1 lit. a), the legislator meant the case when the European order for payment is served in accordance with the rules for service but without proof of receipt by the defendant. I.e. the document taken over by another person than the defendant and the defendant gets knowledge about it too late and is not able to lodge the statement of opposition in the given term.

The negative of this provision is that it does not explicitly state which remedy shall be lodged. Will it be possible to break the legal force of the European order for payment? In this context, the remedy seems to be quite problematical as there is neither a time restriction[17], nor a limitation of its use on particular cases stipulated by the regulation[18]. Hence, there is a danger of a too broad scope of application of the remedy and of its conflict with the institute of material legal force.[19] Such a rule does not bring much certainty at law either.

10. Conclusion

The regulation on European order for payment procedure has surely many insufficiencies as well as the other regulations issued recently[20]. On the other hand, its positives have to be reflected for it is the first attempt to establish a really transnational European procedure. Although some provisions cause interpretation difficulties and sometimes contradict the aims of the regulation itself, the real effects in the practice will be evident after the regulation enters in force. Nevertheless, after five years, the commission will draw a report which will review the operation of the European order for payment procedure (article 32) and according to its findings the regulation can be novelized.

Literature:

[1] Sujecki, B. Europäisches Mahnverfahren. ZEuP, 2006, No. 1, p. 127 – 129.

[2] Horák, P., Zavadilová, M. Evropský platební rozkaz a jeho role v českém civilním procesu. Právní rozhledy, 2006, No. 22, p. 803 – 810.

[17] The regulation maybe does not stipulate any term because in some member states, the enforcement of judicial decisions is possible only in a fixed period after the decision was issued (e.g. England und Wales six years, the Netherlands thirty years). If the term for lodging a remedy would be limited e.g. for three years from the issuing of the European order for payment and the debtor would get knowledge about the proceeding without any fault on his part only together with the enforcement of the decision, he would be deprived of the possibility to get use of the remedy. In consequence, he could not apply for a stay or limitation of enforcement that are provided for in article 23. Joy, M. European Enforcement Order. Seminar on Cross Border Litigation, p. 8.
In such a case, the remedy would break the legal force of the European order for payment. On the other hand it is a question, how such a remedy is compatible with the idea of an accelerated and effective procedure.
Joy, M. European Enforcement Order. Seminar on Cross Border Litigation, Kroměříž, 26. 6. 2006, p. 8.

[18] I.e. consumer affairs.

[19] Sujecki, B. op. cit. p. 7 (footnote), p. 333.

[20] Particularly the regulation on the European Enforcement Order.

[3] Sujecki, B. Das Europäische Mahnverfahren. NJW, 2007, No. 23, p. 1622 – 1625.

[4] Sujecki, B. Erste Überlegungen zum europäischen elektronischen Mahnverfahren. MMR, 2005, No. 4, p. 213 – 217.

[5] Sujecki, B. Kritische Anmerkungen zum gerichtlichen Prüfungsumfang im Europäischen Mahnverfahren. Das Europäische Mahnverfahren. ERA Forum (2007) 8:91–105, p. 91 - 105.

[6] Sujecki, B. Europäisches Mahnverfahren - Geänderter Verordnungsvorschlag. EuZW, 2006, No. 11, p. 330 – 333.

[7] Bohůnová, P. Nařízení o evropském exekučním titulu. Je dlužníkovi garantováno právo na spravedlivý proces? Evropský exekuční titul. Právní rádce, 2008, No. 3, p. 28 – 36.

[8] Joy, M. European Enforcement Order. Seminar on Cross Border Litigation.

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NĚKOLIK ÚVAH NAD PRÁVNÍ REGULACÍ KONCERNŮ S MEZINÁRODNÍM PRVKEM

JANA GLOGAROVÁ

PRÁVNICKÁ FAKULTA, MASARYKOVA UNIVERZITA

Abstrakt

Tento příspěvek se zamýšlí nad stávající právní úpravou koncernů s mezinárodním prvkem. Po obecném uvedení do problematiky koncernů se v další části příspěvek zaměřuje na možná řešení při hledání právní úpravy koncernů sdružujících obchodní společnosti z různých zemí ES. Následující část se zabývá právní úpravou mezinárodních koncernů z pohledu mezinárodního práva soukromého. Autorka dospívá k závěru, že ačkoliv sféra koncernového práva upravená právem komunitárním se pozvolna rozšiřuje, neměla by odborná veřejnost při hledání právní úpravy mezinárodního koncernu rozhodně rezignovat na použití mezinárodního práva soukromého, které pokrývá právě ty oblasti, jež komunitární právo pomíjí.

Klíčová slova

Koncern s mezinárodním prvkem – Koncernové právo – Mezinárodní právo soukromé – Komunitární právo

Abstract

This paper deals with the current legal regulation of groups of companies in the international context. Having introduced the general issues connected with the groups of companies next part focuses on possible solutions of their legal regulation in case they consist of business companies from EC countries. The following part looks at the legal regulation of international groups of companies from the perspective of international private law. The author comes to the conclusion that the legal regulation of groups of companies from the EC countries should be a combination of both, EC law and international private law. Therefore, international private law plays a crucial role for legal regulation of international groups of companies.

Key words

Groups of companies in the international context – Legal regulation of groups of companies – International private law – EC law

Úvod

Současný celosvětový hospodářský trend lze bez nadsázky charakterizovat pojmy globalizace, sbližování právních úprav a technických parametrů, liberalizace a deregulace. Tyto procesy jsou v rámci Evropy nedílně spjaty s evropskou integrací, která je jejich hlavním motorem, a mimo Evropu úzce souvisí s odstraňováním celních i necelních obchodních bariér. Je pouze přirozené, že se v rámci tohoto stále globálnějšího světového obchodního prostředí čím dál častěji setkáváme s obchodními společnostmi začleněnými do podnikatelského seskupení, které jde svým rozsahem nad rámec národních států. Do budoucna lze počítat s tím, že koncerny s mezinárodním prvkem budou ještě častějším a samozřejmějším jevem, proto by na ně měla odpovídajícím způsobem reagovat také právní úprava, jak evropská tak národní. Tento příspěvek si klade za cíl zamyslet se nad tím, zda a jak je vůbec mezinárodní koncern regulován a jaká jsou možná úskalí a východiska této regulace.

Faktický a smluvní koncern

V rámci koncernu dochází k seskupení obchodních společností, jež jsou po formální a právní stránce sice samostatné, nicméně hospodářsky jsou propojeny. Koncern jako takový nemá právní subjektivitu, tou disponují jednotlivé společnosti v rámci koncernu. Vzniká zde tedy napětí mezi právní samostatností jednotlivých částí koncernu a jejich hospodářskou jednotou. Toto napětí s sebou přináší celou řadu praktických problémů a v podstatě definuje jádro problematiky koncernu. V reakci na to je hlavním účelem existence koncernového práva vůbec ochrana subjektu resp. subjektů, jež se v koncernovém vztahu nachází ve znevýhodněném postavení. Typicky je tímto subjektem ovládaná společnost a především její věřitelé a mimo stojící společníci, neboť tito mohou na začlenění ovládané společnosti do koncernu nejvíce doplatit.

Základní rozlišení koncernů souvisí se způsobem jejich vzniku. Dojde-li k faktickému ovládání jedné společnosti druhou, a to zejména na základě nabytí přímé nebo nepřímé kapitálové účasti na ovládané společnosti nebo na základě dispozice s většinou hlasovacích práv, jedná se o ***koncern faktický***. Podle „četnosti“ jednotlivých zásahů ovládající společnosti do společnosti ovládané, pak rozlišujeme faktický koncern na *jednoduchý*, ve kterém jsou zásahy spíše ojedinělé a izolované, a *kvalifikovaný*, ve kterém dochází k takové koncentraci vlivu ovládající osoby, že její jednotlivé zásahy už nelze izolovat. Na druhou stranu ***smluvní koncern*** je nezávislý na existenci faktického vlivu, k jeho vzniku dochází na základě uzavření ovládací smlouvy bez ohledu na to, zda je řízená osoba fakticky ovládána osobou řídící.

Už sama ovládací smlouva by měla řízené společnosti zajistit odpovídající ochranu. U faktického koncernu je třeba tuto ochranu řešit prostřednictvím právní úpravy, jinak u ovládané společnosti hrozí, že její ztráty způsobené právě účastí ve faktickém koncernu nebudou nijak kompenzovány.

Další dělení koncernů souvisí s jejich vnitřní strukturou a s postavením jednotlivých společností. Typický koncern je ***koncernem vertikálním***, kdy je jedna nebo více ovládaných společností pod jednotným řízením společnosti ovládající. Vertikální koncern zajišťuje koordinaci a ovládání jednotlivých stupňů. ***Horizontální koncern*** je naproti tomu uskupení osob pod jednotným řízením bez existence vzájemného vztahu závislosti.

Koncern lze dále dělit na ryze ***národní***, tedy řídící se podle národního práva daného státu a koncern ***s mezinárodním prvkem***. Jestliže se budeme zabývat koncernem s mezinárodním prvkem, bude pro nás relevantní ještě jedno rozdělení koncernů, které se běžně v literatuře neuvádí. V rámci koncernu s mezinárodním prvkem můžeme *rozlišit koncerny sdružující společnosti z různých zemí Evropského společenství*, *sdružující společnosti z různých zemí mimo ES* a *sdružující společnosti jak ze zemí ES tak ze zemí mimo ES*. Toto rozdělení bude zcela zásadní při rozhodování, kterým právním řádem se bude daný koncern řídit. Pokud budeme hledat právní úpravu koncernu v rámci ES, musíme obrátit pozornost k právu ES a hledat alespoň částečnou úpravu tam. U mezinárodního koncernu mimo ES bude zase rozhodující úprava mezinárodního práva soukromého, resp. příslušné kolizní normy. U smíšené verze mezinárodního koncernu, budeme muset kombinovat obě úpravy.

Nástin možného řešení

V Evropě ani ve světě zatím neexistuje unifikované koncernové právo. Naopak se v jednotlivých státech výrazně liší přístupy k úpravě vztahů v rámci skupin společností, resp. podnikatelských seskupení. Koncernové právo nebylo dosud harmonizováno ani na úrovni ES a otázky týkající se koncernového práva jsou jedním z bodů v rámci práva obchodních společností, kde panuje mezi členskými státy výrazný nesoulad.[1]

V evropském měřítku lze odlišit dva základní přístupy ke koncernovému právu – *německý* a *francouzský*. Oba tyto přístupy jsou v Evropě všeobecně uznávané a každý z nich má svá pro a proti. Nemohou však principielně existovat společně. Význam těchto dvou přístupů ke koncernovému právu bych však neomezovala pouze na Evropu. Domnívám se, že i v celosvětovém kontextu představují německý a

[1] Salač, J.: *Koncernové právo v novele obchodního zákoníku*, ASPI, citováno dle ASPI.

francouzský model koncernové úpravy ve zobecněné rovině dva ze základních způsobů, jak je možno ke koncernovému právu přistupovat.

Německý přístup je založen na požadavku transparentnosti koncernových vztahů a kompenzace jakýchkoliv majetkových újem, které vzniknou z důvodu existence koncernu.[2] Typická pro německou úpravu je také rozsáhlá ochrana menšinových společníků a věřitelů ovládané společnosti. Tato ochrana je ochranou následnou, to znamená, že se uplatní až v okamžiku, kdy má existence koncernu negativní důsledky pro znevýhodněné skupiny (typicky jsou znevýhodněni mimo stojící společníci a věřitelé ovládané společnosti). V této následné ochraně bývá někdy spatřována slabina německé úpravy, která přes svou propracovanost a obsáhlost nebyla evropskými státy nikdy v širším měřítku akceptována.[3]

Francouzská úprava je založena na kombinaci předběžné kontroly negativních důsledků existence koncernu v podobě nabídek převzetí a následné kontroly již způsobených újem, která se zakládá na soudní judikatuře. Základním soudním rozhodnutím týkajícím se koncernového práva je rozsudek francouzského kasačního soudu ve věci Rozenblum ze 4.2.1985. V tomto rozhodnutí trestní senát judikoval přednost zájmů koncernového seskupení před zájmy dceřiné společnosti za splnění přesně určených předpokladů. Podstatným rozdílem oproti německému pojetí regulace koncernu je skutečnost, že prosazení zájmů skupiny nemusí být bezprostředně a v každém jednotlivém případě koncernové společnosti ze strany mateřské společnosti kompenzováno.[4] Absence komplexní pozitivně právní úpravy koncernového práva je ve francouzské právní úpravě do určité míry nahrazena právní úpravou v souvisejících odvětvích jako je např. pracovní právo, soutěžní právo a především právo daňové.[5]

A) Úprava mezinárodních koncernů sdružujících společnosti ze zemí ES z pohledu komunitárního práva

Jak jsem již předeslala výše, na úrovni ES neexistuje ucelená právní úprava, natož ucelená koncepce koncernového práva. Přesto docházelo již v sedmdesátých letech 20. století k úvahám a snahám o sjednocení právní úpravy koncernů. Výsledkem těchto úvah je návrh *Deváté směrnice* práva obchodních společností z let 1974 a 75. Tento návrh do značné míry vychází z německého modelu koncernového práva, v poslední době se však odborná veřejnost od německé koncepce odklání s odůvodněním, že je

[2] *Ibid.*
[3] Německou úpravu převzalo pouze Portugalsko, Chorvatsko a Slovinsko. Česká úprava koncernového práva je německou úpravou výrazně ovlivněna, nicméně lze najít i významné rozdíly.
[4] Doležil, T.: *Regulace koncernu z pohledu komunitárního práva – doporučení pro rekodifikaci českého obchodního práva*, Dizertační práce, Praha: Univerzita Karlova, 2007, str. 99.
[5] Francouzskou úpravu následovala např. Itálie nebo Velká Británie.

příliš komplikovaná a byrokraticky náročná. Navíc je zjevná tendence k liberálnímu myšlení, které má blíž k francouzské koncepci a odmítá poskytovat např. minoritnímu akcionáři rozsáhlou následnou ochranu, jestliže se dobrovolně rozhodl setrvat v ovládané společnosti, třebaže měl několik příležitostí ji opustit. Jak uvádí T. Doležil na základě všech dostupných informací je zřejmé, že Devátá směrnice obsahující ucelenou regulaci koncernu pravděpodobně nebude nikdy přijata. Příčinou je především chybějící kompromis na evropské úrovni týkající se ručení řídící osoby za závazky ovládaných osob, požadavek transparentnosti a zveřejňování vztahů uvnitř koncernu, změna chápání úlohy komunitárního práva v oblasti práva obchodních společností oproti pojetí z šedesátých a sedmdesátých let dvacátého století, akcentování principu subsidiarity a tendence k soutěži právních řádů.[6] V současné době tedy máme v rámci ES dvacet pět různých národních koncernových práv.

Přesto, že s přijetím jednotné úpravy evropského koncernového práva zřejmě nelze do budoucna počítat, existují v rámci komunitárního práva dílčí normy, které upravují alespoň některé aspekty vztahů vznikajících v koncernech nebo při ovládání. Tyto dílčí normy se ne vždy primárně zabývají úpravou koncernového práva a někdy dokonce spadají i mimo právo obchodních společností. Například *Sedmá směrnice*,[7] která obsahuje v článku 1 definici pojmu mateřská a dceřiná společnost, upravuje v prvé řadě konsolidované účetní závěrky, jde tedy o normu komunitárního daňového práva. Je však nutno předeslat, že na komunitární úrovni chybí i jednotná úprava těch nejzákladnějších koncernových pojmů a institutů. Příslušné právní předpisy tedy buď obsahují definici pojmu ad hoc (jako je tomu právě v případě Sedmé směrnice) nebo by měly alespoň výslovně odkázat na vnitrostátní úpravy.

Ačkoliv by bylo nepochybně zajímavé zabývat se podrobněji roztříštěnou právní úpravou některých aspektů koncernového práva tak, jak je obsažena v příslušných normách práva komunitárního, musím již nyní předeslat, že toto jde nad rámec mého příspěvku. Tato problematika je natolik obsáhlá, že by vydala minimálně na samostatný článek. Omezím se tedy pouze několik obecných závěrů, z nichž budu ve svých úvahách dále vycházet.[8]

Přesto, že komunitární právo jednotnou úpravu koncernového práva neobsahuje, je z výše uvedeného zřejmé (především ze zmíněného neúspěšného návrhu Deváté směrnice), že existenci koncernu uznává a do určité míry s ní počítá. Komunitární řešení otázek koncernového práva je roztříštěné, účelové a často nekonzistentní, přičemž ho lze nalézt i mimo oblast práva obchodních společností. Nicméně členské státy jsou za podmínky respektování komunitárního právního rámce relativně svobodné

[6] Doležil, T.: *o.c.*, str. 55.
[7] Sedmá Směrnice Rady ze dne 13. června 1983, založená na čl. 54 odst. 3 písm. g) Smlouvy o konsolidovaných účetních závěrkách.
[8] Navíc byla problematika komunitární úpravy koncernového práva poměrně obsáhle zpracovaná v citovaném díle T. Doležila.

v určení míry ochrany menšinových společníků, věřitelů a zaměstnanců při existenci koncernu.[9] *Druhá směrnice*, zejména její článek 24a, dává členským státům jen obligatorní rámec pravidel pro ochranu základního kapitálu dceřiné společnosti, jestliže její akcionář je v ní oprávněn vykonávat rozhodující vliv.[10] Poněkud ucelenější úpravou koncernového práva na komunitární úrovni je úprava squeeze-outu a sell-outu ve *Třinácté směrnici o nabídkách převzetí*.[11] Tato úprava se však omezuje pouze na akciové společnosti s kotovanými akciemi.[12] Přijetím *Nařízení o Evropské společnosti*[13] a *Směrnice o přeshraničních fúzích*[14] jsou členské státy ponoukány, aby míra regulace vedla k usazování Evropských společností v jejich jurisdikcích, resp. aby společnosti po přeshraničních fúzích měly své sídlo právě tam.[15] Koncepce těchto dvou komunitárních norem podporuje jev zvaný *forum shopping*, se kterým se v současném evropském právním prostředí můžeme setkat stále častěji.

Je tedy zřejmé, že stávající fragmentární komunitární úprava koncernového práva (lze-li za současného stavu vůbec mluvit o komunitární úpravě koncernového práva) řeší pouze dílčí situace, ke kterým při existenci koncernů sdružujících společnosti z různých zemí ES může dojít. Pokud chceme dospět ke komplexnější právní úpravě těchto koncernových vztahů, musíme se obrátit jinam, a to do právního odvětví, které tu bylo dříve než komunitární právo a řeší problémy vztahů s mezinárodním prvkem obecně - do oblasti mezinárodního práva soukromého. V této fázi se tedy úprava koncernů sdružujících společnosti z různých zemí ES a z různých zemí mimo ES bude překrývat, proto se této úpravě věnuji v následující kapitole týkající se koncernů s mezinárodním prvkem obecně.

B) Úprava mezinárodních koncernů z pohledu mezinárodního práva soukromého

Tato úprava by tedy měla řešit, resp. měla by poskytnout vodítko pro řešení jak vztahů v rámci koncernu společností ze zemí mimo ES, tak vztahů v rámci koncernu společností ze zemí ES, pokud tyto vztahy nejsou upraveny jednotnou komunitární úpravou. Vzhledem k tomu, že komunitární úprava je kusá a upravuje jen některé dílčí aspekty koncernových vztahů, bude i pro regulaci druhého zmíněného koncernu hrát mezinárodní právo soukromé významnou roli.

Obecně lze říci, že rozdíly v hmotně právní úpravě různých států lze odstraňovat v zásadě dvojím způsobem. První způsob je sbližování nebo přímo unifikace hmotně právní úpravy mezi jednotlivými

[9] Doležil, T.: *o.c.*, str. 71.
[10] *Ibid.*
[11] Směrnice Evropského parlamentu a Rady 2004/25/ES ze dne 21. dubna 2004 o nabídkách převzetí.
[12] Slovy směrnice „cenné papíry společností, pokud jsou všechny nebo některé tyto cenné papíry přijaty k obchodování na regulovaném trhu ve smyslu směrnice 93/22/EHS v jednom nebo více členských státech. (čl. 1 odst. 1 Třinácté směrnice).
[13] Nařízení Rady (ES) č. 2157/2001 ze dne 8. října 2001 o statutu evropské společnosti (SE).
[14] Desátá směrnice Rady ze dne 19. září 2005 o přeshraničních fúzích akciových společností.
[15] Doležil, T.: *o.c.*, str 71.

státy cestou harmonizačních právních norem, např. v rámci ES prostřednictvím směrnic, případně nařízení.[16] Tato cesta je však zjevně schůdná pouze pro určitá odvětví (např. ochrana spotřebitele nebo právo duševního vlastnictví). U koncernového práva jsou rozdíly v národních úpravách natolik velké, že zde chybí vůle k vytvoření unifikované hmotně právní úpravy.

Druhý, méně ambiciózní způsob respektuje různost hmotně právních úprav v jednotlivých státech, avšak snaží se o to, aby v konkrétním případě bylo aplikováno vždy hmotné právo téhož státu. Toho lze docílit unifikací kolizních norem, která se v mnoha problematických oblastech již částečně zdařila.[17] Například v roce 1980 byla sjednána *Římská úmluva o právu rozhodném pro závazkové vztahy ze smluv*. Tato úmluva je smlouvou uzavřenou, tedy omezenou na členské státy ES. Z její působnosti jsou vyňaty ty smlouvy, jejichž kolizní režim je upraven sekundárním právem ES, což by však v případě koncernů nebyl problém z důvodu fragmentárnosti a neúplnosti komunitární koncernové úpravy. Budeme-li tedy chápat koncernové vztahy jako vztahy alespoň do určité míry závazkové, Římská úmluva by mohla teoreticky dopadat alespoň na ty koncernové vztahy, které vznikají v rámci ES a jsou založeny smlouvou (např. smlouvou ovládací).

Nicméně článek 1 Římské úmluvy vymezující její aplikovatelnost v druhém odstavci, písmeno e) uvádí, že úmluva se nepoužije na otázky týkající se práva společností, spolků a právnických osob, jako například zřízení, způsobilost k právním úkonům, vnitřní uspořádání a rozpuštění společností, spolků a právnických osob, osobní odpovědnost společníků a orgánů za závazky společnosti, spolku nebo právnické osoby. Jak uvádí N. Rozehnalová základním důvodem tohoto vynětí je, že v oblasti společenstevního práva bylo dosaženo vysokého stupně harmonizace a současně je nutné zohlednit skutečnost, že snad s výjimkou předběžných jednání a smluv mezi budoucími zakladateli společností nejsou kolizní normy řešící obecně problematiku závazků vhodné k použití pro tuto materii.[18] S tímto závěrem nelze než souhlasit. Koncernové právo s právem obchodních společností úzce souvisí, lze se tedy domnívat, že ani na úpravu koncernových vztahů není aplikace kolizních norem z Římské úmluvy vhodná.

Na základě výše uvedeného je zřejmé, že se Římská úmluva na problematiku diskutovanou v tomto příspěvku nepoužije a v oblasti unifikovaných kolizních norem nebyla zatím sjednána žádná jiná všeobecně uznávaná úmluva dotýkající se alespoň nepřímo koncernového práva. Lze tedy dospět k závěru, že při hledání úpravy mezinárodních koncernů nebudou ani doposud sjednané unifikace kolizních norem příliš nápomocné a je tedy nutno obrátit pozornost do oblasti mezinárodního práva

[16] Rozehnalová, N., Týč, V.: *Evropský justiční prostor (v civilních otázkách)*, Brno: Masarykova univerzita, 2006, str. 10 – 11.
[17] *Ibid.*, str. 11.
[18] *Ibid.*, str. 50.

soukromého. Toto s sebou nese určitá rizika, neboť téměř každý stát má svoji vlastní vnitrostátní úpravu mezinárodního práva soukromého a mezi národními úpravami mohou být výrazné rozdíly. Vzhledem k omezenému prostoru tohoto příspěvku se budu dále zabývat pouze relevantní úpravou českého a německého mezinárodního práva soukromého.

Z hlediska mezinárodního práva soukromého je problém koncernů s mezinárodním prvkem definován takto: 1) Jakým právem se budou řídit koncernověprávní vztahy mezi společnostmi jedné koncernové rodiny, pokud se dané společnosti řídí různými osobními statuty? 2) Jsou-li koncernové vztahy založeny smluvně, budou se řídit právem rozhodným pro smlouvu, na základě které koncern vznikl, osobním statutem některé ze společností nebo jiným právem?

Německá literatura je jednotná v názoru, že se právní vztahy mezi ovládající a ovládanou společností řídí osobním statutem ovládané společnosti.[19] K. Siehr uvádí, že převážně se uplatní právo s nejužším vztahem k dané věci, což je zpravidla právo státu, kde má své sídlo dceřinná společnost, jakožto strana, jež je existencí koncernu zasažená především.[20] Toto platí i tehdy, pokud se právo rozhodné pro smlouvu, kterou byl koncern založen, liší od osobního statutu ovládané společnosti. Německo se řídí při určení osobního statutu obchodních společností tzv. teorií sídla. To znamená, že za německou je považována ta společnost, která má své skutečné sídlo v Německu bez ohledu na to, podle kterého právního řádu byla založena.

Vzhledem k tomu, že jedním z hlavních cílů koncernového práva je ochrana minoritních akcionářů a věřitelů ovládané společnosti, situace, kdy německou společností je pouze společnost ovládající, nebude přinášet mnoho kolizně právních problémů. Pokud však bude německá společnost v pozici společnosti ovládané, uplatní se německé koncernové právo vždy, a to zejména ta jeho část, která výslovně slouží k ochraně minoritních akcionářů a věřitelů ovládané společnosti. Dle V. Emmericha a J. Sonnenscheina je sice zdůvodnění tohoto německého přístupu sporné, nicméně o jeho výsledku v Německu panuje do značné míry shoda a odchylná ujednání nejsou možná.[21] Co se týká rozsahu použití práva rozhodného pro koncernové vztahy v mezinárodním koncernu, musí toto právo vedle sebe strpět i právo, jež je osobním statutem ovládající společnosti. To platí především tehdy, pokud osobní statut ovládající

[19] Tento závěr lze nalézt v Siehr, K.: *Internationales Privatrecht: Deutsches und europäisches Kollisionsrecht für Studium und Praxis*, Heidelberg: Müller, 2001, str. 315 - 316; Braun, A., Maurer, R.: *Problémy nového koncernového práva*, Právní rozhledy, číslo 1, rok 2002, str. 28. Ke stejnému závěru dospěli v případě mezinárodního smluvního koncernu také V. Emmerich a J. Sonnenschein v Emmerich, V., Sonnenschein, J.: *Konzernrecht*, München: C. H. Beck, 1997, str. 140 – 141.

[20] Siehr, K.: *o.c.*, str. 315. Z principu nejužšího vztahu (the principle of the proper law, Grundsatz der engsten Verbindung) vychází např. i ustanovení § 10 našeho zákona č. 97/1963 Sb., o mezinárodním právu soukromém a procesním, které jej formuluje jako rozumné a spravedlivé uspořádání právního vztahu.

[21] Emmerich, V., Sonnenschein, J.: *o.c.* , str. 140 – 141.

společnosti předvídá pro uzavření smlouvy zakládající koncern určitá schválení orgány dané společnosti.[22]

Naše odborná literatura se problematikou mezinárodních koncernů zatím příliš nezabývala. Pouze J. Dědič a P. Čech uvádí, že úprava koncernového práva se udává z osobního statutu společnosti. Tímto osobním statutem (lex societatis) je právní řád rozhodný pro posouzení klíčových právních skutečností souvisejících se vznikem, existencí a zánikem společnosti. Zásadně se jedná o otázky vnitřní povahy, ty se však v řadě případů odrážejí ve vztazích navenek a mohou mít závažné důsledky i pro osoby stojící mimo společnost. Pro koncernové vztahy je rozhodující obvykle osobní statut ovládaného subjektu, což platí dle Dědiče a Čecha jak pro faktický, tak pro smluvní koncern. Obligační statut ustupuje do pozadí vzhledem k převažující organizační povaze koncernového smluvního vztahu a rovněž k jejich podstatným důsledkům pro práva třetích osob.[23]

V této souvislosti je třeba zmínit, že situace bude zřejmě jednodušší u smluvního mezinárodního koncernu než u mezinárodního koncernu faktického. Toto tvrzení vychází především z faktu, že u smluvního koncernu obecně je právní situace většinou přehlednější a transparentnější díky existenci právního rámce koncernu v podobě ovládací smlouvy. Tato smlouva zpravidla nejenže zakládá vztah ovládání, nýbrž také upravuje některé organizační aspekty koncernu a práva mimo stojících společníků a akcionářů ovládané osoby. Vzhledem k vyšší míře právní přehlednosti smluvního koncernu, není problém smluvně ošetřit, kterým právním řádem se budou řídit koncernové vztahy.

Na druhou stranu u faktického koncernu je situace často mnohem méně přehledná. Díky tomu, že faktické koncerny vznikají tím, že nastanou určité zákonem specifikované faktické okolnosti a nikoli na základě právního úkonu, může být už samotné prosazení aplikace právní úpravy faktického koncernu (se všemi jejími ochrannými instituty) na dané seskupení problémem. Jsou známy případy, kdy se veřejně dlouhou dobu vůbec nevědělo, že nějaký faktický koncern vůbec existuje, natož aby někdo zkoumal jakým právem se koncernové vztahy mají řídit nebo zda je vyrovnána újma, která vznikla ovládané osobě v důsledku existence tohoto koncernu. V této situaci je postavení věřitelů a mimo stojících společníků ovládané společnosti ohroženo, neboť mohou být záměrně poškozováni a jejich práva mohou být opomíjena.

Nicméně, i když akceptujeme závěr, že koncerny s mezinárodním prvkem, ať už faktické nebo smluvní, se mají řídit osobním statutem ovládané společnosti, je někdy už samotné určení tohoto osobního statutu problematické. Existuje několik teorií, na základě kterých lze obecně určit osobní statut

[22] Siehr, K.: *o.c.*, str. 315.
[23] Dědič, J., Čech, P.: *Evropské právo společností*, Praha: BOVA POLYGON, 2004, str. 31 – 32.

právnické osoby, z nichž nejvýznamnější jsou teorie sídla a teorie inkorporační.[24] Český právní řád vychází obecně z teorie inkorporační, když v § 22 obchodního zákoníku stanoví, že vnitřní právní poměry i právní způsobilost zahraniční osoby se řídí právním řádem, podle něhož byla tato osoba založena. Nicméně podle § 21 odst. 2 obchodního zákoníku je při rozlišování mezi zahraniční a českou právnickou osobou podstatné, zda má tato osoba sídlo na území České republiky či nikoliv – relevantní je tedy teorie sídla. V české kolizionistické literatuře se lze setkat s převažujícím pojetím, že § 21 odst. 2 je významný pouze pro určení státní příslušnosti dané právnické osoby. Nicméně tato státní příslušnost neovlivňuje osobní statut této právnické osoby. Osobní statut se určuje výhradně dle § 22, přičemž není vyloučeno, aby se osobní statut lišil od práva státu, k němuž právnická osoba přísluší na základě § 21 odst. 2.[25]

Jestliže dojde k situaci, kdy jeden koncern sdružuje jak společnosti z ES tak společnosti mimo ES, nastane podivná situace, ve které se pravděpodobně uplatní kombinace obou výše nastíněných způsobů úpravy koncernů s mezinárodním prvkem. Jestliže nebude právo rozhodné pro koncernové vztahy upraveno smluvně (při současném respektování práva komunitárního), budou určité aspekty koncernových vztahů mezi společnostmi z ES upraveny komunitární úpravou a tytéž aspekty se u ostatních společností budou řídit osobním statutem ovládané společnosti. Také u společností z ES najde osobní statut ovládané společnosti výrazné uplatnění, neboť se jím budou řídit oblasti koncernových vztahů neupravené právem komunitárním. Už samotná představa, že se koncern s více ovládanými společnostmi bude řídit vůči každé jednotlivé ovládané společnosti jiným právním řádem, a to osobním statutem ovládané společnosti, je kuriózní. Pokud si však představíme, že by se navíc u určitých ovládaných společností některé dílčí aspekty namísto jejich osobním statutem řídily komunitárním právem, stává se situaci už natolik nepřehlednou, že by s jejím vypořádáním měl problém nejeden expert na koncernové právo.

Závěr

Přesto, že sféra koncernového práva, na kterou dopadá komunitární úprava se pozvolna rozšiřuje, neměli bychom při hledání právní úpravy mezinárodního koncernu rozhodně rezignovat na použití mezinárodního práva soukromého. Právní úprava mezinárodního práva soukromého dopadá jak na

[24] Dle *inkorporačního principu* je právem rozhodným pro danou právnickou osobu (obchodní společnost) právo státu, podle něhož byla daná právnická osoba založena. Dojde-li k přemístění jejího sídla, rozhodné právo právnické osoby se nezmění. *Princip sídla* vychází při určení rozhodného práva z toho, kde má právnická osoba své skutečné sídlo. S přemístěním sídle osoby se změní i rozhodné právo.

[25] Viz např. Kučera, Z.: *Mezinárodní právo soukromé*, 5. vydání, Brno: Doplněk, 2001, str. 249; Pauknerová, M.: *Společnosti v mezinárodním právu soukromém*, Praha: Karolinum, 1998, str. 33. Podrobně se touto problematikou zabývá také Dědič, J., Čech, P.: *o.c.*, str. 58 a násl.

koncerny sdružující společnosti mimo ES, tak na ty oblasti koncernových vztahů koncernů sdružující společnosti z ES, na které nedopadá úprava komunitární. Odborná literatura se shoduje v tom, že při použití mezinárodního práva soukromého je nutno dospět k závěru, že koncernové vztahy se budou řídit osobním statutem ovládané společnosti. Na závěr nelze než doporučit zákonodárcům, a to především těm evropským, aby měli při vytváření budoucích právních úprav koncernových vztahů nebo jejich dílčích aspektů na zřeteli současnou komplexnost právní úpravy mezinárodního koncernu. Bylo by žádoucí, aby se tato právní úprava dále nekomplikovala, ba právě naopak by bylo záhodno ji zjednodušit a zpřehlednit, bude-li to možné.

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Použité právní předpisy:

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[2] Směrnice Evropského parlamentu a Rady 2004/25/ES ze dne 21. dubna 2004 o nabídkách převzetí.
[3] Sedmá Směrnice Rady ze dne 13. června 1983, založená na čl. 54 odst. 3 písm. g) Smlouvy o konsolidovaných účetních závěrkách.
[4] Desátá směrnice Rady ze dne 19. září 2005 o přeshraničních fúzích akciových společností.
[5] Zákon č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů.
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AMIABLE COMPOSITION IN THE INTERNATIONAL COMMERCIAL ARBITRATION

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Abstrakt

Tento příspěvek analyzuje rozhodování jako amiable compositeur v mezinárodním rozhodčím řízení. Rozhodování jako amiable compositeur je v rozhodčím řízení sice častým, nicméně poněkud kontroverzím jevem. Samotná definice tohoto institutu není jasná, stejně tak jako rozsah pravomocí rozhodce jednajícího jako amiable compositeur. V příspěvku se snažím postihnout výhody a nevýhody tohoto typu rozhodování, jak takovýto rozhodce používá hmotné právo a čím a do jaké míry je ve svých pravomocech limitován.

Klíčová slova

Amiable compositeur, rozhodčí řízení, pravomoc, ekvita

Abstract

This contribution analyzes decision-making as amiable compositeur in the international commercial arbitration. Such decision-making within the international arbitration is frequent but quite controversial. The definition of this institute itself is not clear, as well as the scope of powers of the arbitrator acting as amiable compositeur. In this contribution I am endeavouring to analyze the advantages and disadvantages of this concept, how the arbitrator uses the statutory law and to what extend is he limited in his powers.

Keywords

Amiable compositeur, arbitration proceedings, powers, equity

The concept of *amiable compositeur* has its historical origins in French law, namely in amicabilis compositor of canon law, who acted rather as conciliator than decision-maker in a dispute, and in dispute settlement through the arbitrator which developed in the second half of the 17th century and who was not bound to apply strict rules of civil procedure and substantive law (ex aequo et bono). The concept was first enacted in the Code Napoleon and the French Code of Civil Procedure of 1806.

Amiable composition is very often **defined synonymously with arbitration in equity or *ex aequo et bono***. It is difficult to specify differences between these two forms of arbitration, as national legal systems accept the possibility of use of both of them, or either of them[1], but define them differently. Generally the literature identifies the differences as follows:

An arbitrator acting as *amiable compositeur* is deciding the dispute before him according to law and legal principles, nevertheless is authorized to modify the effect of certain non-mandatory legal provisions.

Ex aequo et bono is a dispute settlement out of law, according to moral principles. An arbitrator deciding as ex aequo et bono is allowed to disregard not only the non-mandatory rules, but also the mandatory provisions of law, as long as they respect international public policy[2].

In this contribution I will try to analyze the scope and limitations of powers of the *amiable compositeur* and other questions connected therewith.

Traditionally, amiable composition provided an equity correction to strict rules of law applicable to a dispute. Today an amiable compositeur has a power to depart from the strict application of rules of law and decide the dispute according to justice and fairness. This concept is usually chosen by the parties as a **substitute for, rather than an addition to, national law**. It is therefore sometimes regarded as a "negative choice of law" as the arbitrator is appointed to apply "equity and fairness" instead of a specific national law.

All of the arbitration rules allow the arbitrator to decide a dispute as amiable compositeur if **duly authorized by the parties** prior to or during the arbitration. Article 13(4) of the ICC Arbitration Rules and Articles 28(3) and 33(2) of the UNCITRAL Model Law allow the arbitrators to act as amiable compositeurs, but only if the parties confer such powers upon them. Contrary to this "express authorization", Dutch and Swiss law permit an "implied authorization[3]" by the parties[4]. In this case, the tribunal will always reassure itself of the basis of its decision-making power, because lack of authorization to act as amiable compositeur may result in the arbitration award being set aside before the court of the seat of the arbitration.

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[1] Some national legal systems do not accept amiable composition or arbitration in equity at all, come acccept only decision-making as amiable compositeur (France, Quebec) or only on the basis of equity (Czech Republic, Switzerland, Italy) or some legal system accept both of these concepts (legal systems, which have fully adopted UNCITRAL Arbitration Rules). Rozehnalová, N.: *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*, Praha: ASPI Publishing, s.r.o., 2002, p. 138-139

[2] Bühring-Uhle, Ch.: *Arbitration and Mediation in International Business*, The Netherlands: Kluwer Law Internaitonal, 2006, p. 40

[3] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 565

[4] e.g. German doctrine regards the appointment of a non-lawyer as an implied authorization to decide as amiable compositeur

In some cases, the **parties choose a law applicable to their dispute, and at the same time provide for the arbitrator to decide as amiable compositeur**. Such clauses are not exceptional and were also dealt with by the ICC Arbitral Tribunal in its award No. 2216 of 1974. Here the arbitral tribunal stated that by such clause the parties authorize the arbitrator to decide the case on the basis of equity, but the scope of the arbitrator's leeway is limited by the law chosen by the parties. This means that the arbitrator may disregard only non-mandatory rules of the chosen law, but is bound by its mandatory rules. The applicable law in fact determines the limits of arbitrator's decision-making according to equity.

The concept of amiable composition is criticized by its opponents for unpredictability, uncertainty and subjective imposition of equity by the arbitrator. Nevertheless, to avoid subjectivity of the arbitrator in the application of equity, the parties may make use of their right to **provide the arbitrators with specific criteria for their decision** – either by reference to amiable composition developed in a particular legal system, or by referring to some broad notion of fairness, or by including a set of concrete standards to guide the arbitrators in reaching their decisions. This way the arbitrator is guided by what the parties consider to be fair and equitable.

Parties´ authorization of the arbitrator to act as amiable compositeur is usually regarded to include the authorization to **apply the lex mercatoria**. But the concept of use of lex mercatoria and deciding as amiable compositeur cannot be equated. The arbitrator applying the lex mercatoria acts as a judge and applies a legal rule, despite the fact that this rule has a transnational origin. Application of such rule does not reflect the arbitrator's notion of justice and equity. The arbitrator acting as amiable compositeur may focus solely on the circumstances of the case without having to apply a legal rule or principle. Although a clause permitting amiable composition might be seen as implying a reference to lex mercatoria (in this context application of lex mercatoria would not be based on conflict-of-laws principles but solely on the persuasion of the arbitrator of what he deems to be fair and reasonable), an arbitrator does not need to have powers of amiable compositeur in order to apply lex mercatoria.

In practice, the distinction between these two concepts is blurred. The arbitrators, regardless of the law or principles they apply, try to reach an award which they consider just and appropriate. Many legal systems have incorporated equitable principles into their substantive law, within which an arbitrator bound to apply the law can manouvre to reach equitable solution. As a matter of principle, the authority to **apply notions of equity secundum legem or praeter legem** contained in substantive law is always linked to the underlying purpose of the law which it is intended to perfect or supplement. Those

arbitrators who apply the law are therefore not granted full discretion to reach an equitable solution for the case. The similar applies to the application of lex mercatoria. The arbitrator applying equity in the context of lex mercatoria always has to take into account the underlying rationale of the general principle of law. Contrary to this fact, amiable compositeur while deciding a particular dispute may be guided merely by what he deems just and equitable.

Some commentators contend that an amiable compositeur must apply the law, because there is a presumption that what is in the law is fair and equitable[5]. Some other scholars suggest transferring this reasoning to the transnational sphere and assume that the amiable compositeur should base his decision not on the particular national legal system, but on general principles of law and trade practices. Although the amiable compositeur is obliged to apply neither any national law nor the lex mercatoria, in practice, "**the amiable compositeurs regard the law as ratio scripta** and do not find any good reason for departing from its application in particular cases. The amiable compositeur is in fact a judge, but one who enjoys greater flexibility in adopting the solution which he regards as best"[6]. Nevertheless the arbitrator would not apply national law or lex mercatoria if the result contravened his idea of an equitable solution of the dispute.

Literature gives several examples of the deviation from the strict rules of law by amiable compositeur: e.g. awarding of fair and economically adequate damages[7] or distribution of the burden of proof according to the particular circumstances of the case[8].

In its award No. 3344 as of 1982 the ICC Arbitral Tribunal stated that "if the application of the law would lead to an inequitable result, the arbitrator may **decide not to apply the rule or at least to mitigate its effects** in the case before him to reach an equitable result. In its award No. 1677 as of 1975 the ICC Arbitral Tribunal stated that "even in these cases, however, the arbitrator has to abide by those principles which form part of the international public order or morals". Following this reasoning as regards lex mercatoria, amiable compositeur while modifying the law may apply those rules and principles of lex mercatoria which do not yet belong to the list of principles acknowledged as international public order.

Repetition of the decisions based on equity can eventually generate new rules that will be binding even upon arbitrators who apply the transnational law. The fact is that many principles and rules of lex mercatoria have first been developed by arbitrators acting as amiable compositeurs[9].

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[5] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 570

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[8] ICC Award No. 1977 (1978), No. 2502 (1978)

[9] ICC Awaed No. 2216 (1974)

As studies show[10], even the arbitrator authorized to act as amiable compositeur, who applies general principles of law, very often refers to and relies on concordant national laws of the jurisdiction of the parties involved in the dispute, to assure himself that the transnational laws have been correctly stated.

The arbitrator acting as amiable compositeur may decide the case outside the law, except for principles of international public order, or **may apply a particular national law in the absence of an express choice by the parties**. In its award No. 3742 of 1983 the ICC Arbitral Tribunal acting as amiable compositeur used its powers to find a law applicable to the merits of the case. It did not search for the applicable law on the basis of choice-of-law rules, but used the concept of voie directe and chose the national law which had the closest connection with both parties concerned in a given case. The Arbitral Tribunal proceeded this way because within its powers of amiable compositeur such solution seemed equitable to him.

Moreover, the powers of an arbitrator acting as amiable compositeur extend to the **arbitral procedure**. The powers of amiable compositeur in this field are, however, not that significant given the fact that modern arbitration laws provide the arbitrator with enough leeway to shape the arbitration procedure according to particularities of an individual case. Such powers nevertheless allow the arbitrator to flexibly handle the deadlines for submission of written pleadings or evidence.

The arbitrator's powers to decide as amiable compositeur finds its **limits** in the will of the parties and, as mentioned above, the *ordre public*.

The parties express their will in the directions that they give to the arbitrator as to how to use the equity, and also in the arbitration clause itself. Generally, the arbitrator is bound by the contractual stipulations of the parties. Article 28(4) of the UNCITRAL Model law expressly requires the arbitral tribunal to "decide in accordance with the terms of the contract in all cases", including the ex aequo et bono decisions, "provided that these contractual terms do indeed reflect the true intent of the parties and are not in conflict with mandatory provisions of law". The question is **whether the arbitrator acting as amiable compositeur can deviate from or modify the contractual agreement of the parties**. A thinkable exception from this general rule is an express authorization by the parties of the arbitral tribunal to deviate from their agreement or where the circumstances of the conclusion of the contract show that, at the time of its conclusion, the parties were not able to foresee all instances which

[10] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 572

might occur during the course of the contract. In these cases, continental doctrine allows the arbitrator to deviate from the express stipulations of the contract and to adapt it to the changed circumstances[11].

A possible modification of the parties´ agreement by the amiable compositeur has been decided on several occasions by the ICC Arbitral Tribunal. In its award No. 3267 of 1979 Tribunal held that "although some legal writers have expressed the opinion that the arbitrators sitting as amiable compositeurs may disregard the provisions of the agreement between the parties, this view has not been accepted in international arbitration. On the contrary, it is generally accepted principle in international arbitration that the paramount duty of the arbitrator, even the amiable compositeur, is to apply the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties, or violate a basic commonly accepted principle of public policy. In the view of the Arbitral Tribunal, this principle is a basic requirement for the security of international trade. It is furthermore binding in ICC arbitrations, in view of Article 13 (5) of ICC Rules that makes clearly a duty to ICC arbitrators to apply the provisions of the contract in any case, even if they have the powers of amiable compositeurs". Nevertheless the Tribunal in this award goes further by stating that "the arbitrator sitting as amiable compositeur is entitled to disregard legal or contractual rights of a party when the insistence on such right amounts to an abuse thereof".

This opinion was similarly repeated in an ICC award No. 3267 of 1984 where an ICC Tribunal held that an arbitrator acting as amiable compositeur may to certain extend modify the provisions of the parties´ contract, but such modification may not lead to abuse of the law and may not exceed the powers conferred upon the arbitrator. The term "to certain extend" is quite disputable, but it would correspond to the concept of amiable compositeur that the extend of modifications will be determined by the arbitrator himself according to what he deems to be equitable[12].

As mentioned above, the limits of the amiable compositeur powers lie in the international public order of the applicable law and possible enforcement jurisdictions. The arbitrators have a general procedural obligation to render an **enforceable award**. Even when acting as amiable compositeur, the arbitrator must ensure enforceability of the award in the state which has a connection with a given case[13]. It depends on the law of the state of enforcement whether it recognizes arbitration conducted under the amiable compositeur concept or not.

I have chosen three examples to demonstrate various attitudes that the national legal systems have towards the amiable composition: English, French and the US legal system.

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[11] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 573

[12] Another ICC award dealing with question of possible modification of the parties´ contract by the amiable compositeur is award No. 3938 as of 1982).

[13] If the arbitrators are not able to foresee the possible enforcement at the time when they render their award they need only apply the international public order of the lex causae.

Traditionally, in England the powers of amiable compositeur were viewed with great skepticism. Equity clauses were not given a legal effect[14] and therefore foreign awards based on amiable composition were not enforceable. The attitude of the English courts has been changed in the 70´s by the court decision in *Eagle Star Insurance Co. v Yuval Insurance Co*.[15] and by the adoption of the Arbitration Act of 1979. Consequently, although were carefully, English legal system is moving towards acceptance of equity-type clauses.

On the other hand, French legal system is very liberal towards amiable compositeurs, whose powers were used for he first time in 1956[16]. In 1981 a Decree of May 12[17] was adopted and permitted almost unlimited freedom in the choice of law to be applied in international commercial arbitration[18]. The Decree provides that "the arbitrator shall decide the dispute in conformity with the rules of law chosen by the parties; in the absence of a party choice, he shall decide according to the rules that he deems appropriate"[19]. This document allows amiable composition when expressly provided for by the parties. At the same time, the Decree provides specifically that there is no right of appeal where the arbitrator was given amiable compositeur authority unless otherwise agreed by the parties. Restricted re-examination of the substance of the award opens the door to unrestricted enforcement of foreign award based on amiable composition.

In the United States of America amiable composition is not expressly recognized in statutory or case law, but is very frequent in practice. Here, amiable composition is not regarded as a different form of decision-making by an arbitrator. Equity is an integral part of the law, so every arbitrator ought to make equitable considerations, even without express authorization by the parties[20]. In the US the arbitral awards rendered under the concept of amiable composition are sheltered form judicial review. The court in *International Standard* case[21] stated that even if an arbitrator were to act as amiable compositeur without authority, the New York Convention[22] would not allow a court to refuse enforcement of the arbitral award.

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[14] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 236

[15] 1978 1 Lloyd´s Rep. 357

[16] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 238

[17] Decree of May 12, 1981, 1 J.O. 1492, translated in 20 I.L.M. 878, 917 (1981)

[18] Crook, J. R.: *Applicable Law in International Arbitration: The Iran – US Claims Tribunal Experience*, 83 A.J.I.L., 1989, p. 278, 285-286.

[19] Nouveau Cede de procedure civile, Art. 1496 („L´arbitre tranch le litige confomément aux règles de droit que les parties ont choisies; à défaut d´un tel choix, conformément à cellem qu´il estime appropriées")

[20] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 241

[21] International Standard Electric Corp. v Bridas Sociedad Anonima Petrolera, Industrial Y Commercial, 745 F. Supp. 172 (S.D.N.Y. 1990)

[22] The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

What are the **advantages** of amiable composition? Why should the parties provide for such kind of dispute settlement? Denationalization[23] of the procedure is a big advantage, but the one inherent to the arbitration as such. There must be more reasons to resort to amiable composititon, especially as this system is more uncertain and unpredictable. Literature[24] states four reasons: First, the differences between businessmen and layers from different legal environments as regards application of national law might lead them to agree on a less strict standards provided for in equity applied by the amiable compositeur. Second, this system can be particularly suitable in the context of a continuing, long- term relationship, where a degree of flexibility is desirable. Third, deciding as amiable compositeur might make the dispute settlement simpler and thus perhaps less costly. Finally, equity-type clauses can help to "soften" the situation for the loosing party. Such adaptability is necessary in international commercial relations, since laws are generally adopted to deal with domestic situations and do not reflect the specifics of international trade.

Although the concept of amiable compositeur has many advocates, there are maybe even more **opponents, who criticize lack of predictability, uncertainty and subjectivity** of the arbitrator. Truth is that the purpose of a written agreement is to give the contracting parties a certain degree of predictability as to their rights and obligations both in performance and in the event of dispute[25]. It is very natural, especially in international business transactions, that the parties seek more certainty, predictability and stability in the result of possible dispute. That this also a reason why they very carefully negotiate on the applicable law. First problem with amiable composition is that there is no precise definition of what amiable compositeur is. The definition varies among particular jurisdictions, in some the concept is equated with ex aequo et bono decision-making, in some it is more restricted by the mandatory provisions of the applicable law. The amiable composition includes the application of certain equitable principles. The second problem is that it is not always obvious what those principles are. Moreover, where a particular jurisdiction allows an amiable compositeur to derogate from the parties´ contract itself, the thin line of predictability is eliminated. In the opponents´ view the result of amiable compositeur arbitration is just an ad hoc justice. The arbitrators are permitted to apply the principles either in accordance with their comparative law interpretation of general principles and trade customs or they may refer to their favourite school of thought and its corresponding published arbitral awards. In such a situation, the arbitrator is more an inventor, rather than legal authority, applying its own notion on what is fair and equitable, and thus implicates his personal creativity and subjective values. Such subjectivity may be dangerous, especially to the loosing party. In my opinion,

[23] i.e. Decision making out of any national law

[24] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 234-135

[25] Park, W. W.: *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in: Lex Mercatoria and Arbitration. Thomas E. Carbonneau ed., 1990

however, the parties, while negotiating on the arbitration clause, could have considered risks connected with the amiable composition and thus voluntarily agreed to such a system of decision-making and the person holding a position of their amiable compositeur.

The advocates of amiable composititon see the most valuable advantages in flexibility of this system, especially (i) in long-term contracts where the rights and obligations of the parties cannot always be determined from the beginning, (ii) where unforeseen circumstances may occur throughout the duration of the contract, and (iii) where the parties involved may be more like joint ventures than adversaries with conflicting interests. Professor Highet[26], an opponent of this system, argues that if an increased flexibility is what the parties seek, why they should stop halfway. They should rather seek to settle their dispute in mediation, especially since within mediation they have a sufficient space to impose their own notion of fairness and equity, and to avoid the imposition of the arbitrator's personal views.

The opponents also argue that an ad hoc justice, as the amiable composition in their view certainly is, leads to conflicting decisions and thus loss of confidence in the system. Uncertainty involved in this system helps the discrimination and bias to flourish. They also criticize a lack of precedential value of the amiable compositeur awards. But, in my opinion, the goal of the amiable composition and the aim of the parties is to find a solution appropriate for particular circumstances of their case. The parties have an opportunity to asses the risks connected with this concept during the negotiations and those choosing amiable composition to settle their dispute are certainly not concerned with the consequences of the award on the evolution of law.

The concept of amiable composition is still generally seen with much skepticism. On the other hand it is used by prestigious international arbitration institutions such as ICC Arbitral Tribunal and modern legal systems allow for this concept as well. It remains for the future development of this system of decision-making to determine the scope of powers and limitations of the amiable compositeur and to clarify disputed questions.

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[8] Crook, J. R.: *Applicable Law in International Arbitration: The Iran – US Claims Tribunal Experience*, 83 A.J.I.L., 1989

[9] Park, W. W.: *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in: Lex Mercatoria and Arbitration. Thomas E. Carbonneau ed., 1990

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THE SELECTED TOPICS OF PRIVATE INTERNATIONAL LAW IN CHINA

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KATEDRA MEZINÁRODNÍHO A EVROPSKÉHO PRÁVA, PRÁVNICKÁ FAKULTA, MASARYKOVA UNIVERZITA, BRNO

Abstrakt

Tento příspěvek se zabývá základními otázkami čínského mezinárodního práva soukromého. Čína se řadí ke státům s několika rozdílnými právními systémy a v praxi to znamená problém jak řešit mezioblastní kolize v rámci územních oblastí Číny. Mezioblastní právo soukromé je důsledkem politiky „jedná země, dva systémy“ po návratu Hong Kongu a Macaa pod správu Číny v roce 1997, resp. 1999. Čínské mezinárodní právo soukromé je relativně novým odvětvím práva, které se začalo vyvíjet v 80. letech minulého století a úzce souvisí s otevřenou ekonomikou a zapojením Číny do mezinárodního obchodu.

Klíčová slova

Mezioblastní právo soukromé, princip „jedna země, dva systémy“, rozhodné právo pro smluvní závazky, autonomie vůle stran, princip „nejužšího spojení“

Abstract

This contribution deals with the basic aspects of Chinese private international law. China belongs to the countries with several different legal systems and in practice it means the problem of dealing with the issue of “inter-regional conflict of laws”. This is a result of the “one country, two systems” policy after the return of Hong Kong in 1997 and Macao in 1999. Chinese private international law is a “new” branch of law which has started to develop from 1980`s and is closely related to the “open economy” policy.

Key words

Inter-regional conflict of laws, “one country, two systems” principle, choice of law in contracts, party autonomy, the closest connection rule

1. Introduction

The development in the relations of foreign trade and naturally contracts between Chinese and European partners in the past few years has caused a great number of civil and commercial cases relating to the matters with "foreign element". This is a natural result of China's integration into the World Trade Organization (WTO). In November 2001, the member states of the World Trade Organization ("WTO") approved the proposal to admit the People's Republic of China ("PRC") to the international trading body in the Doha Ministerial Conference. After fifteen years of negotiations, China formally became the 143rd member of the WTO on December 11, 2001.

The membership in the WTO means that China participates in international competition and co-operation in broader areas. The WTO entry has brought about unprecedented opportunities and challenges to the adjudication of foreign related civil and commercial cases in China.[1]

This article is focused on basic aspects of Chinese private international law. As we classify the private international law into three operating areas – choice of jurisdiction, choice of law and recognition and enforcement of foreign judgments – this paper will be also concerned with essential characteristics of Chinese approach to the choice of law in contracts since business transactions with foreign countries have become an indispensable part of Chinese economy.

2. Specialties of private international law in China

2.1 Inter-regional conflict of laws

China belongs to the countries with several different legal systems and in practice it means the problem of dealing with the issue of "inter-regional conflict of laws" (it means in the United States "interstate conflict of laws"). In general, inter-regional conflict of laws refers to the conflict of laws among people from different regions (or states, cantons, provinces) with a separate system of law within a country, or involving foreign interests within a sovereign country.[2]

There are set up four conditions to consider conflict of laws as inter-regional conflict of laws. These conditions are:

a) multiple legal regions with different legal systems,
b) civil contacts and commercial transactions among these various legal regions leading to legal

[1] Huang, J. - Du Huan, F.: Chinese Judicial Practice in Private International Law 2002. Chinese Journal of International Law, Vol. 4, No. 2, 2005, pp. 647.
[2] Huang, J. – Qian, X. A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 292.

relations involving "foreign" interests,

c) every legal region's recognition of the civil legal status of natural persons and legal persons from other legal regions,
d) every legal region's recognition of the exterritorial effects of the laws of the other legal regions.

With my experiences in conflict of laws in the USA, it arises from civil and commercial matters among people from different regions within a sovereign country. It is provided in the United States Constitution. Article I Section 8 of the United States Constitution is a group of rules determining legislative jurisdiction and provides that "commerce with foreign nations, and among the several states", "uniform laws on the subject of bankruptcies throughout the United States" etc. are regulated by the federal Congress. It means that, in these fields, there are uniform federal laws and no interstate conflict of laws exists. In other areas, if conflict of laws issues arise when there are foreign elements in a dispute and these elements lead to a conflict between competing laws of a different legal systems, state law is applicable on such disputes. As a general rule, American conflicts law is state law and does not differentiate between interstate and international cases: the same rules with respect to jurisdiction, choice of law and the recognition of judgments apply to both. Chinese are European scholars criticize the United States conflict of laws theory and practice which developed from experiences in interstate conflicts of laws rather than on international conflicts of laws.[3]

Inter-regional conflict of laws is a new conception in private international law in China. It is a result of the conclusion of the Joint Declaration of the Government of People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong ("Sino-British Joint Declaration") signed in 1984 and the Joint Declaration of the Government of People's Republic of China and the Government of the Republic of Portugal on the Question of Macao ("Sino-Portuguese Joint Declaration") signed in 1987 and on the other hand the promulgation of *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* and *Basic Law of the Macao Special Administrative Region of the People's Republic of China*. At the same time, there are emerging issues in conflict of laws in the civil and commercial relations between Mainland China and Taiwan. After the Chinese exercise of sovereignty over Hong Kong in 1997 and Macao in 1999 and after peaceful unity of Taiwan, China will become one country with two systems, three families and four legal regions.[4]

2.2 "One country, two systems" principle

[3] Zhang, M.: Choice of Law in Contracts: A Chinese Approach. Northwestern Journal of International Law & Business, 2006, pp. 305.
[4] Huang, J.: Constitutional Law and Inter-regional Choice of Law: A comparative Survey. Presented at 2005 U.S.-China Private International Roundtable, Temple University Beasley School of Law.

In the respect of Hong Kong and Macao, China has become from previous country with a single legal district to country with multiple legal regions. Such plural legal system includes socialist law, common law and civil law.[5] This creates unique legal system all over the world. The legal system in Hong Kong is based on British common law and law consists of statutory provisions and common law doctrines. In addition, English common law and rules of equity have in most cases legal force. On the other hand, Macao is influenced by Portuguese civil law.

The different legal systems adopted in Mainland China, Hong Kong and Macao call for question which regional law should be applied and whether courts in different regions will recognize and enforce the judgments of the courts of other regions. These inter-regional conflicts of laws may remind of the interstate conflict of laws in the federal system of the United States. But China does not have a formal federal system. China has had a unitary socialist legal system with a single legal district since its establishment in 1949. The adequate provision provides Article 5 of the People's Republic of China Constitution: *"The State upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local rules and regulation may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law."*

Article 31 of the People's Republic of China Constitution is directly concerned with the Hong Kong and Macao Special Administrative Regions and states that: *„The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."* The most articles of the People's Republic of China Constitution will not be applied in Hong Kong and Macao. These Special Administrative Regions have adopted the *Hong Kong Basic Law*[6] and the *Macao Basic Law*.[7] The two Basic Laws provide identically in Article 1 that Hong Kong and Macao are the inalienable parts of the People's Republic of China. Basically, both regions continue to exercise independent legislative, judicial and adjudicate powers to maintain the prosperity and stability.[8]

China does not have a private international code, but Chinese scholars have proposed *"Model Law of*

[5] Huang, J. – Xuefend Qian, A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 295.
[6] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was adopted at the Congress of the People's Republic of China on 4 April 1990 and put into effect on 1 July 1997.
[7] The Basic Law of the Macao Special Administrative Region of the People's Republic of China was adopted at the Congress of the People's Republic of China on 31 March 1993 and is effective from 20 December 1999.
[8] Huang, J. – Xuefend Qian, A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 294.

Private International Law of the People's Republic of China", drawn up by Chinese Society of Private International Law at Wuhan University International Law Institute which is called a centre of Chinese private international law.[9] China has not any legislative jurisdiction for making national uniform inter-regional conflict of laws and the legislative jurisdiction in this area belongs to Hong Kong and Macao Special Administrative Regions. As a result, China, Hong Kong and Macao have their own private international law.

There is an existence of judicial assistance between China and Hong Kong and China and Macao. The provisions of judicial assistance are included in the Hong Kong Basic Law and the Macao Basic Law. Both allow judicial relations with the judicial organs of other parts of the country (China as whole country, not only Mainland China). The Hong Kong Basic Law states in Article 95 that *"The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other."* The Macao Basic Law contains the same in Article 93: *"The Macao Special Administrative Region may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country and they may render assistance to each other."*

The inter-regional conflict of laws is different from the conflicts issues that arise within a federal state. Chinese scholars use the term *domestic conflicts with international scope*.[10] Hong Kong and Macao enjoy certain degree of autonomy which is greater than the rights of individual states within the United States, and both are based on different legal traditions than Mainland China. From this point of view, the inter-regional conflicts of laws may approach the level of international conflicts of laws.[11] Because of autonomy and judicial independence of the regions, the process of uniform national laws will be slow with many obstacles and perhaps ultimately impossible.[12]

Also unique system of inter-regional conflict of laws in international dimension exists in China. Hong Kong and Macao has become party to international agreements and treaties and all continue to be effective after China has taken control over these regions even through China has not acceded to such international agreement or treaty. This complicated circumstances lead to conflicts between law of the region and the international agreements applicable to another region, and between the international

[9] Model Law of Private International Law of the People's Republic of China (Sixth Draft), Chinese Society of Private International Law, 2000, http://translaw.whu.edu.cn/cn/english/20031104/033704.php.
[10] Huang, J. – Xuefend Qian, A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 303.
[11] Ibid, pp. 304.
[12] Ibid., pp. 304.

agreements that are applicable to different regions in the same field.[13]

3. Choice of law in contracts

The choice of law deals with the determination of the substantive law governing the dispute with foreign element and answers the question which law should court apply on particular dispute. The choice of law in contracts is the larger discipline of conflict of laws. China has a unitary legal system which is entangled with the Special Administrative Regions of Hong Kong and Macao. These regions raise choice of law issues not only between China and other countries, but also between Mainland China and its administrative regions.

The choice of law may result that contract is governed by foreign law. After 1949 no foreign law was applied before the people's courts in China. The dominant theory was that judicial sovereignty of Chinese courts is absolute and should not yield to any foreign jurisdiction.[14] In practice, there was a fear of foreign influence and there had long existed a resistance against western countries during Mao Ce-tung's era when the Cultural Revolution (1966 – 1976) destroyed everything associated with western countries. In the 1980`s China has started to move closer to the rest of the world economically and business transactions with foreign countries and parties of the contracts call for legal provisions.

The first choice of law rules were provided in the 1985 *Foreign Economic Contract Law* which is applicable to economic contracts concluded between enterprises and other economic organizations of the People's Republic of China and foreign enterprises, economic organizations or individuals.[15] Article 5, paragraph 1 contains choice of law rules: *"The parties to a contract may* ***choose the law to be applied*** *to the settlement of the disputes arising from the contract.* ***In the absence*** *of such a choice by the parties,* ***the law of the country which has the closest connection*** *with the contract applies."* The special provision is given in second paragraph of Article 5[16] to Chinese-foreign equity joint ventures, Chinese-foreign co-operative enterprises and for Chinese-foreign co-operative exploitation and development of natural resources performed within the territory of the People's Republic of China. In all three mentioned the law of the People's Republic of China will govern such contracts.

The Foreign Economic Contract Law was followed by the *General Principles of Civil Law* (1986). Article

[13] Ibid., pp. 306.
[14] Zhang, M.: Choice of Law in Contracts: A Chinese Approach. Northwestern Journal of International Law & Business, 2006, pp. 300.
[15] Article 2 of the Foreign Economic Contract Law.
[16] Article 5 (2) of the Foreign Economic Contract Law: *„Contracts for Chinese-foreign equity joint ventures, Chinese-foreign co-operative enterprises and for Chinese-foreign co-operative exploitation and development of natural resources to be performed within the territory of the People's Republic of China shall be governed by the law of the People's Republic of China."*

145 calls for this provision: *"The parties to a contract involving foreign interests may **choose the law** applicable to settlement of their contractual disputes, **except as otherwise stipulated by law**. If the parties to a contract involving foreign interests have not made a choice, **the law of the country to which the contract is most closely connected** shall be applied."*

In 1999 the biggest step forward has been done and the *Contract Law of China* was adopted. The Contract Law of China stipulates choice of law in Article 126 which states that *"Parties to a foreign related contract may **select the applicable law** for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract **failed to select the applicable law**, the contract shall **be governed by the law of the country with the closest connection** thereto. "*

3.1 Party autonomy

According to all above mentioned laws, the party autonomy has become a universal principle also in China. Party autonomy gives to the parties of contract the freedom to decide the law applicable to the contract. Party autonomy is quite new principle in China. The 1985 Foreign Economic Contract Law allowed to choose the applicable law, but Chinese citizens were excluded from such provision and it had limited the ability of Chinese citizens to make contracts with foreign parties.[17] It was not possible until the adoption of the 1999 Contract Law of China. Since then Chinese citizens are able to become parties to a foreign contract. The party autonomy enables the parties to predict the outcomes of their legal relations and maintains the stability of their legal relations.

Article 126 of the Contract Law provides parties to a foreign contract choose the law applicable to contract, except as otherwise stipulated by law. This article contains two clauses:[18]

a) the party autonomy clause, and
b) the exception clause (this shall be applied to contracts such as Chinese-foreign Equity Joint Venture Enterprise, Chinese-foreign Cooperative Joint Venture Contract and Chinese-foreign Joint Exploration and Development of Natural Resources performed within the territory of the People's Republic of China when the law of the People's Republic of China applies).

Chinese private international law is very closely connected to the Chinese courts and their judicial interpretation. This is result of unclear provisions in laws. If the unclear provision occurs, the Supreme People's Court will fill the gap by judicial interpretation. In order to implement the 1985 Foreign

[17] Zhang, M.: Choice of Law in Contracts: A Chinese Approach. Northwestern Journal of International Law & Business, 2006, pp. 312-314.
[18] Ibid., pp. 314-315.

Economic Contract Kaw, the Supreme People's Court issued in 1987 *"The Answers to Questions about Application of the Foreign Economic Contract Law of China"* (called "Answers"). Even through the Foreign Economic Contract Law was replaced by the 1999 Contract Law, many opinions in "Answers" have influential and strong effect upon Chinese courts.[19]

3.2 "The closest connection" rule

If there is no choice of law made by the parties, China follows the approach of *"the closest relationship"* to determine which law is to be applied. "The closest relationship" is influenced in China by doctrine of „the most significant relationship" incorporated in the *Restatement (Second) of the Conflict of Laws* in the United States.

"The closest relationship" is in China neither defined in the 1986 Civil Code nor the 1999 Contract Law.[20] The courts follow the interpretation of the Supreme People's Court in „Answers". It provides a list of laws applicable to the contract in absence of parties' choice of law. For example, a contract for the international sale of goods shall be governed by the law of the place of the seller's business office at the time of contract conclusion. If the contract was concluded at the place of the buyer's business office, or the contract is made mainly according to the terms and conditions stipulated by the buyer or on the basis of the buyer's bidding request, or the contract clearly provides that the seller shall deliver the goods at the place of the buyer's business office, the law of the place of the buyer's business office at the time of contract conclusion shall apply.
Notwithstanding this guidance, a people's court may apply the law of the place to which the contract was found to be the most closely related.[21] China follows rather flexible approach in determination of governing law than rigid approach.

4. Conclusion

The inter-regional conflict of laws in China is a logical result of the "one country, two systems" policy after the return of Hong Kong in 1997 and Macao in 1999. Both Special Administrative Regions were established and by law enacted by the National People's Congress (Article 31 of the People's Republic of China Constitution). Nevertheless, the most articles of the Constitution will not be applied in Hong Kong and Macao and both regions continue to exercise independent legislative, judicial and adjudicate powers. In the area of private international law, China has no jurisdiction to create national uniform

[19] Ibid., pp. 315-318.
[20] Ibid., 324.
[21] Ibid., 325.

inter-regional choice of law rules and this jurisdiction belongs to Hong Kong and Macao.

Chinese private international law is "new" branch of law which has started to develop from 1980`s and is closely related to the foreign business transactions with foreign states and "open economy". China is influenced by foreign approaches, such as trend of party autonomy and "the closest relationship" in the choice of applicable law.

Chinese private international law is in the process of its development. There is no private international law code and with the relationships with foreign elements deal the 1999 Contract Law of the People's Republic of China and the 1986 Civil Code of the People's Republic of China. Moreover, the Model Law of Private International Law of China was approved by the Chinese Institute of Private International Law and published in 2000.

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BRUSSELS I REGULATION AND "THIRD STATES"/ BRUSELSKÉ NAŘÍZENÍ A TŘETÍ STÁTY

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Abstrakt

Příspěvek se věnuje vlivu procesních norem Společenství na třetí (nečlenské) státy. Ačkoli to původně nebylo zamýšleno, aplikují se existujících procesní normy, zejména Bruselské nařízení, téměř univerzálně – tedy i v případech, kdy má skutkový stav silné vztahy ke třetím, neevropským státům. Příspěvek se zabývá rozsahem použitelnosti Bruselského nařízení na třetí státy, podmínkami takového použití a problémy, které v této oblasti vznikají.

Klíčová slova

Owusu, Group Josi, Coreck, Bruselské nařízení, třetí státy, domicil, prorogace, derogace.

Abstract

Conference paper deals with the impact of European procedural norms on the third (non-member) states. Although it was not the intention of the drafters of Brussels I regulation, it could, under certain circumstances, apply "universally" also in situations with "third state element". The extension of application scope of Brussels I at one side leads to the restriction of application scope of national procedural laws at the other side. Conference paper deals with the application of Brussels I to the extra-community cases, circumstances, under which is this approach possible, case law of ECJ and problems resulting from this case law.

Key words

Owusu, Group Josi, Coreck, Brussels I Regulation, third states, non-member state, domicil, jurisdiction agreement, derogation.

This conference paper dealts with the requirements for application of Brussels I Regulation[1] (thereinafter "Brussels I") and discuss especially the crucial question of its application in situations with "third state element". If the dispute is connected not only with the territory of Member State of European Union (e. g. because of the defendant's domicile) but also with the territory of a non-Member

[1] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

State (e. g. domicile of one of the parties is in the third state, the place of performance, place where the harmful event occurred or may occur) the Brussels I provides no instructions for allocation of jurisdiction. Moreover it is doubtful whether the Brussels I is applicable at all or whether the national procedural law of the member states should provide the rules for allocation of jurisdiction between member state and non-member state. This conference paper will analyze the application scope of Brussels I in the light of the last case law of European Court of Justice (thereinafter "ECJ") and outline the main problems connected with this case law and its interpretation.

The boundary between the European jurisdiction regime and national law is troublesome. The difficulty arises especially in situations with "third state element", where the courts of a member state have jurisdiction pursuant to the European regime, but the courts of a non-member state also have competence (based on their national procedural laws) to decide on a dispute. As mentioned above, neither the Brussels I nor any other provision of European Private International Law contain provision for ceding jurisdiction of European courts for the benefit of third state's courts. Such provisions are normally included only in national procedural laws of member states. But in absence of any European mechanism for ceding jurisdiction to third States, are Member Stares entirely prevented from declining their own jurisdiction in such cases? Are they therefore without exception obliged to apply the Brussels jurisdiction regime? Or is the allocation of jurisdiction in cases with "third state element" under certain circumstances still a matter for national law?

These questions have long provoked academic controversy. There are also different judicial opinions not only of national courts, but of ECJ as well. These questions were very important especially for English courts. According to the national law were the English courts entitled to use doctrine *forum non convenience* in order to decline to exercise jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice[2]. On 1st May 2005 the ECJ issued a judgment in Case C-281/02 Andrew Owusu v N.B. Jackson (thereinafter "Owusu") and had put an end to the use of this controversial theory of English courts.

This decision targets the application scope of Brussels I in cases where a strong connection with a third State exists, but the reasoning seems to be very controversial - especially in the light of ECJ previous

[2] See Judgment of ECJ, Case C-281/02 from 1st May 2005, par. 8 and 9: "An English court which decides to decline jurisdiction under the doctrine of *forum non conveniens* stays proceedings so that the proceedings which are thus provisionally suspended can be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum".

[2] Forum convenience: a forum having competent jurisdiction

case law, of the factual situation and problems which could arise as a result of strict interpretation of this decision. In order to the explain problems concerning the Owusu it seems to be necessary to introduce the earlier cases of ECJ where ECJ addressed different aspects of the same problem: *Group Josi*[3] and *Coreck*[4] case.

Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)

UGIC, an insurance company incorporated under Canadian law, having its registered office in Vancouver, instructed its broker, Euromepa, a company incorporated under French law, having its registered office in France, to procure a reinsurance contract in relation to a portfolio of comprehensive home-occupiers' insurance polices based in Canada. Euromepa offered Group Josi a share in that reinsurance contract. Later, Group Josi refused to pay requested amount of money, essentially on the ground that it had been induced to enter into the reinsurance contract by the provision of information which subsequently turned out to be false. In those circumstances, UGIC brought proceedings against Group Josi before the Tribunal de Commerce (Commercial Court), Nanterre, France.

Group Josi case concerned proceedings initiated in France by a Vancouver-domiciled claimant against a Belgian-domiciled defendant. The defendant argued that it could be sued only in Belgium (his domicile). This case prompted a question whether Article 2 applied, given that the claimant was domiciled in a third state. The court held that the claimant's origin was irrelevant to the operation of Art. 2: „… It must be concluded that the system of rules on conferment of jurisdiction established by the Convention is not usually based on the criterion of the plaintiff's domicile or seat. Moreover, as is clear from the wording of the second paragraph of Article 2 and the second paragraph of Article 4 of the Convention, nor is that system based on the criterion of the nationality of the parties. The Convention enshrines, on the other hand, the fundamental principle that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction. Title II of the Convention is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State."[5]

[3] Judgment of ECJ, Case C-412/98 from 13 July 2000, Group Josi
[4] Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck
[5] See Judgment of ECJ, Case C-412/98 from 13 July 2000, par. 53-61.

Although this decision does not directly impose the question in Owusu[6], the aim of this decision seems to be clear. A court of a member state has jurisdiction based on the Brussels I regardless of the claimant's country of origin.

Coreck Maritime GmbH v Handelsveem BV and Others[7]

The second important decision concerning the application scope of Brussels I in situations with "third state element" was Coreck decision. This decision concerned the effect of jurisdiction agreement which laid down an exclusive jurisdiction of a non-member state. In this case, various bills of landing were issued in respect of the carriage of goods between the parties. These bills of landing contained jurisdiction agreements in favour of a non-member state court. But, as the defendant (Coreck) had his habitual residence in a member state (Germany), according to Art. 2 of Brussels I, the courts of this member state were entitled to decide on the dispute as well.

The crucial question for the ECJ was whether Art. 17 of the Brussels Convention governs also the validity of a clause which specifies the forum having jurisdiction to settle disputes, or whether it is question for national law to examine the validity of this clause. Only in case the national law will govern the validity of this clause it will be possible to use national procedural law provisions and based on them decline the jurisdiction of member state resulting from Art. 2 of Brussels I.

The ECJ pointed out that Art. 17 „only applies if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes to a court or the courts of a Contracting State."[8] As concerned the above mentioned question, the answer of ECJ was that the validity of such a jurisdiction clause should be governed by the law applicable under the conflicts rules of the forum. „A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits."[9]

This particular reasoning of ECJ implies that a court must have the power to decline jurisdiction if such an agreement is valid. It means that if such an agreement is valid, the European regime is inapplicable and the court is allowed to decline the jurisdiction under the national law provisions.

[6] The issue in Group Josi was whether a court has jurisdiction under the European Regime where a claimant is domiciled in a third state, not whether a court may stay proceedings where such a jurisdiction is acknowledged.
[7] Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck
[8] Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck, , Summary par. 2.
[9] Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck, par. 19.

Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others[10]

Mr Owusu ('the claimant'), a British national domiciled in the United Kingdom, suffered a very serious accident during a holiday in Jamaica. Following that accident, Mr Owusu brought an action in the United Kingdom for breach of contract against Mr Jackson, who is also domiciled in that State. Mr Jackson had let to Mr Owusu a holiday villa in Mammee Bay (Jamaica). The defendant argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice (forum convenience).[11]

This decision concerns situation when the courts of a member states have jurisdiction pursuant to the European regime, but the courts of a non-Member States also have competence (based on its national procedural norms) to decide on a dispute. The key question was when is possible, if at all, to stay the proceedings in a Member State for the benefit of the non-Member State proceedings.

The ECJ ruled that Brussels I is applicable in each case, when the defendant is domiciled in a Member state[12]. Article 2 is applicable in proceedings where the parties before the courts of a Contracting State are domiciled in that State and the litigation between them has certain connections with a third State but not with another Contracting State. Although, for the jurisdiction rules of the Convention to apply at all, the existence of an international element is required, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of that provision, from the involvement of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State would also make the legal relationship at issue international in nature.[13]

According to ECJ there is no space for the application of national procedural rules which enable to exercise jurisdiction on the ground that a court in a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.[14]

Critique of Owusu reasoning

This reasoning of ECJ seems to be very controversial. The ECJ has extended the hegemony of Community law norms at the expense of national law in the area of international private law. The European

[10] Judgment of ECJ, Case C-281/02 from 1st May 2005
[11] See Judgment of ECJ, Case C-281/02 from 1st May 2005, par. 10-15.
[12] See Art. 2 of Brussels I Regulation
[13] Summary, par. 1.
[14] See Judgment of ECJ, Case C-281/02 from 1st May 2005.

jurisdiction regime should according to the Art. 2 of Brussels I be applicable at each time, when the defendant is domiciled in a Member state. The fact, that a non-Member state has also jurisdiction based on its national procedural norms and that the dispute might have closer connection to a non-Member state, or even that the non-Member state might have an exclusive jurisdiction, does not seem to play any important role. The reasoning is so general that also the Coreck case law and the possibility to decline a jurisdiction in case, when there is a valid jurisdiction agreement for the benefit of a non-member court, seems to be prevailed.

But should we really understand this decision in such a broad way? Should we really apply the ruling in Owusu generally and extent it also to the cases which does not share the same pattern as Owusu did? E. g. to the situation, where the defendant is domiciled in the EU, but the parties have agreed to the non-Member state court's exclusive jurisdiction or where the non-Member state court has according to its national procedural norms exclusive jurisdiction to decide on a dispute? Or where a non-Member state court was seized earlier that the Member state court? If the same situations appear between two Member states courts, the Brussels I provides us with a reasonable solution and avoids parallel proceedings. But this is not the case if non-member court is involved. Should the fact that treatment of extra-community cases concerning allocation of jurisdiction is not regulated by the Brussels I leads to the conclusion that the allocation of jurisdiction in a non-member state is impossible at all? Because of this approach it might easy happened, that the non-Member state judgment will not be recognized and therefore enforced at the territory of EU and that the Member states judgment will not be recognized and therefore enforced at the territory of non-Member state. All these tasks were submitted to the ECJ in the second question, but the ECJ refused to answer.[15]

Risks resulting from strict interpretation of Owusu

The risks resulting from the strict interpretation of Owusu are really high: e.g. wasteful parallel proceeding, judgments that could not be enforced in the other country, wasteful costs and waste of time, violation of the legal certainty ad predictability, unreasonable unequal treatment of purely community and extra-community cases. Taking this risks into the consideration, we should try to distinguish the Owusu case law from other situations which do not share exactly the same pattern. There are many arguments which we could use:

1. Is the question of declining the jurisdiction governed by the Brussels I al all?

[15] „Is it inconsistent with the Brussels Convention to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State **in all circumstances or only in some and if so which?"**

2. The nature of Owusu case
3. Equality of treatment

1. Is the question of declining the jurisdiction governed by the Brussels I al all?

There are many tasks in the Owusu reasoning which are still opened - especially if the matter of declining jurisdiction in favour of a third state falls within the scope of Brussels I. An answer to this question might be assembled from the materials in the judgment.

The ECJ concluded three crucial ideas:

- The wording of Art. 2 is mandatory

"It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention."[16]

If Art. 2 is mandatory provision, it must be respected under each circumstances and without any exception (unless provided for by the convention). Therefore, each time when Art. 2 is touched, the European courts has jurisdiction to decide on a dispute and there is no possibility to decline this jurisdiction based on the national procedural provisions.

- The purpose of Convention was to harmonize the jurisdictional rules of Member states, except presumably in cases where national law is expressly preserved.

If this reasoning is correct, it becomes impermissible to rely upon national rules for ceding jurisdiction, even in cases involving the rival jurisdiction of third states. To allow resorting to national law would inevitably impair the uniform application of the European jurisdictions rules. On the other side it is necessary to point out, that the argument from harmonization ignores a very important fact: The legislative history of the Brussels Convention and the terms of its preamble. According to them is harmonization is required only to the extent that the mutual enforcement of judgment would be served.[17]

[16] See Judgment of ECJ, Case C-281/02 from 1st May 2005, par. 37.
[17] Compare the wording of Art. 220 EC Treaty as well recitels to the Convention.

- The uniform application of Convention promotes the functioning of the internal market.

"In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market. However, the uniform rules of jurisdiction contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of Member States. Suffice it to observe in that regard that the consolidation as such of the rules on conflict of jurisdiction and on the recognition and enforcement of judgments, effected by the Brussels Convention in respect of cases with an international element, is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject."[18]

This is probably the most important point in the courts reasoning. The functioning of internal market is the overriding measure of the objectives, and thus the scope of the whole Community law. In the hierarchy of relevant considerations it stands supreme. To say it easy: If it is in the favour of internal market, it is Ok, regardless the consequences.

It follows from this short analysis of the courts decision, that the reasoning in Owusu could easily be understood in a very broad way. It is therefore difficult to find there any restriction of its interpretation based only on the wording of the arguments used by ECJ. Are there any other arguments which allow the restriction of its interpretation?

2. The nature of Owusu case

Owusu had four defining features: (1) No other Member state was implicated, no other member state had jurisdiction nor was otherwise connected with the case, (2) Jurisdiction of Member state derived from Art. 2 of Brussels I, domicile of defendant, (3) the claimant as well as the defendant were domiciled in the same Member state, (4) the ground for ceding jurisdiction to a third state was discretionary.

In reality, it seems to be very difficult to isolate Owusu from other cases, which do not exactly share the same pattern. It can make no difference in the future if in some future case another Member state is implicated. Before Owusu it was suggested, that in case when two member states and non-member state are involved, there is a higher possibility that European jurisdiction regime will apply than in case of

[18] Par. 33. 34.

involvement of one single member state (point 1). But as follows from the judgment the ECJ clearly did not share this point of view.

From the wording of the decision as well as from the wording of Brussels I follows that the ruling in Owusu applies irrespective of the ground upon which the jurisdiction is asserted (point 2), and the claimant's country of origin. Also neither the third nor the fourth point could help us to distinguish Owusu from other cases.

3. Equality of treatment - Argument from Consistency

The European regime allows Member state's courts to defer to the paramount jurisdiction of other Member state in certain circumstances. It does so e.g. if another Member state's courts have exclusive jurisdiction and if they are first seized of an identical or related action. But if a non-Member state is involved, the same situations are not regulated. Should it really lead to the conclusion, that the denying of Member state's jurisdiction is entirely prohibited? It seems to be inconsistent to allow national courts to decline jurisdiction in such cases in favour of Member states but not third States. If national courts can not decline jurisdiction in the case of prior proceedings in a third State, wasteful parallel litigation may ensue, with the possibility of conflicting judgments in each court.

It seems to be clear that the overall consistency of European jurisdiction regime requires parity of treatment between Member states and third States in the matter of declining jurisdiction. It is commonly assumed that national courts should be free to cede jurisdiction to third states in two prominent cases: where the parties have agreed an exclusive jurisdiction and where the alternative court of a non-member state has a unique interest in the dispute. To say that national courts may never decline Community jurisdiction in favour of non-member courts risks inconsistency. Especially if this approach is allowed to the member state courts and expressly provided for by the Brussels I. It is inconsistent to allow national courts to decline jurisdiction in cases in favour of Member states but not third states. It is argument from Consistency, which justifies parity of treatment between Member States and third States in the matter of declining the jurisdiction. Certainly, it can not be inconsistent with the European regime to oust jurisdiction opposite to a non-member state on grounds which the regime itself recognizes opposite to a member state.

Argument from Consistency would enable to restrict the reasoning in Owusu only to the cases where forum non convenience or other ground for declining of jurisdiction (resulting from national procedural norms) is involved, provided that this ground has no analogy in the European jurisdiction system.

Therefore, it will be possible to respect e.g. the jurisdiction agreement of parties or exclusive jurisdiction of non-member state court as well as the fact that an action was already brought before a non-member state court. The argument from Consistency would also enable to respect the previous case law of ECJ, especially the Coreck case law, where the ECJ ruled the possibility to decline the jurisdiction following from European jurisdiction regime if a valid jurisdiction agreement exists.

RESUME:

European procedural norms, especially Brussels I, are applicable also in situations with "third state element". The extent of the application of these norms and the border between European procedural law and national procedural laws is highly controversial. Neither the analysis of the wording of laws, nor the case law of ECJ could provide us with a sufficient clear answer. Moreover, the case law of ECJ seems to contradict each other. The Owusu judgment could be understood in a very broad way and therefore widely extents the application scope of Brussels I and restricts the scope of national laws. Despite this fact, if we consider the practical problems resulting from Owusu case law, we should try to find out a clever argumentation in order to restrict Owusu and establish a viable border between national and European procedural law. In this respect, the argument from Consistency seems to be the right way.

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NEW TYPES OF EUROPEAN CIVIL PROCEEDINGS IN THE SLOVAK REPUBLIC*

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Abstract

The article deals with two new European summary proceedings established by the Regulation (EC) No. 1896/2006 and Regulation (EC) No. 861/2007. The European order for payment procedure and small claims procedure shall offer to the parties, beside the national proceedings of particular Member States, alternative possibility for enforcing the cross-border claims. The article also analyzes the impact of the above mentioned Regulations on the Slovak procedural law and their future application in the conditions of the Slovak Republic.

Key words

European Law – Judicial cooperation in civil matters – Civil Procedure – cross-border cases – European order for payment – European Small Claims Procedure – Conflict of Jurisdictions

Introduction

One of the key prerequisites for developing and maintaining the European Union the area of freedom, security and justice is providing the speed and smooth recognition of foreign judgments between the EU Member States.[1] For this purpose and in order to provide the parties of the cross-border disputes better access to justice with regard to "*cross-border*" claims, two regulations have been recently adopted: Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (hereinafter referred to as "Regulation on order for payment") and Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereinafter referred to as "Regulation on Small Claims Procedure", together hereinafter referred to as "Regulations").

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[1] Conclusions of European Council Meeting in Tampere on 15 and 16 October 1999

The above-stated Regulations establish the special procedures for uncontested claims, or for low value claims with cross–border implications (so-called "small claims"). The judgments rendered in these procedures, unified for all Member States except from Denmark, should fully comply with the requirement of mutual trust in the administration of justice and, as such, these judgments can be enforced without exequatur. However, the Regulations include only basic framework of the procedure. The questions not stipulated in the Regulations shall be governed by the national procedural law of the Member States. This concept is based on the presumption that legal orders of Member States include similar simplified (summary) proceedings concerning the uncontested pecuniary claims or small claims.

In this article, we would like to deal with how the application of the Regulations will look like in the legal environment of the Slovak Republic. We would also like to analyze, whether and to what extent the application of Regulations in question would require the amendments of Slovak procedural law. At the same time, we would try to confront our findings with the draft amendment of the Slovak Code of Civil Procedure, currently being prepared and discussed in the Slovak Republic.

I.

The Regulations provide, beside the national procedural measures, alternative possibility for enforcing claims of the parties before the courts of Member States. The choice between these two alternatives of enforcing claims is up to the claimant. The regulation provided by the given Regulations, therefore, does not mean the harmonization of the national procedural orders of the Member States, but the special procedure available for the parties of the cross-border disputes. The benefit of such procedure shall consist in smooth recognition and enforcement of the judgment in any other EU Member State without exequatur. At the same time, when drafting these Regulations, it was often pointed out that, in comparison to similar national proceedings, the costs of cross-border disputes are disproportionately higher (legal services, interpreting, translation of documents, etc.). These impediments should be dismantled by the unified formalized European proceedings.[2]

The cross-border dispute (case) is defined identically in both Regulations, as the one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. The Regulations do not require this party to be a defendant. Therefore, it is sufficient if the claimant has his/her residence in one Member State and the defendant has his/her property in different Member State, or if there is any other circumstance establishing the jurisdiction of the court of another Member State. It should be pointed out that in the original draft of the Regulation on order for

[2] Explanatory memorandum to Draft Regulation on European order for payment.COM (2004) 173 final, point 2.2.1.

payment, there has been no reference on cross-border cases. However, Commission has then taken into account arguments pointing out at the fact that Art. 65 of Treaty Establishing the European Community enables the Community bodies to take measures only in "civil matters having cross-border implications", and has completed the draft regulation in this way.[3]

The Regulations do not contain the entire set of procedural rules. They stipulate only the basic framework for the procedure on payment order and small claim procedure. The questions not stipulated by the Regulations shall be governed by the national law of the Member States. This relates to the interpretation of particular concepts (the concept of clearly unfounded claim or inadmissibility of the claim – see point 13 of the Preamble to the Regulation on Small Claims Procedure), as well as to the course of procedure. Provided that these questions are regulated on the Community level, such regulation shall take precedence. Particularly, the court jurisdiction shall be determined in accordance with the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as "Regulation Brussels I.") Such procedure is explicitly stated in Art. 6 of the Regulation on order for payment, where, at the same time, the court jurisdiction is modified for the purpose of payment for order procedure in consumer contracts´ disputes.[4]

In Regulation on Small Claims Procedure, there is no explicit reference to establishing the court jurisdiction according to provisions of Regulation Brussels I. Therefore, the situation would be different here. Regulation Brussels I. is obviously to be applied due to its generally binding character, however, the judgments under Regulation on Small Claims Procedure could be rendered also by the court of the Member State which established its jurisdiction under its national law in cases not covered by Regulation Brussels I. (Art. 4 of Regulation Brussels I.).[5] In connection with the definition of the cross-border cases in Regulation on Small Claims Procedure, in these cases it will be possible to render judgments in summary proceedings enforceable in any other Member State, without any further formal requirements.

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[3] See BOGDAN, M.: *Concise introduction to EU Private International Law*, Europa Law Publishing, Groningen 2006, p. 87 and foll.

[4] The provision that the consumer can be sued only in the state of his/her residence is undoubtedly in favor of consumer´s protection. However, it is then questionable why the similar protection is not granted at least to the employee (these categories enjoy protection either on the field of procedural law – Regulation Brussels I., as well on the field of conflict law – Rome Convention of 1980). On the other hand, this invokes question whether the eventual prorogation agreement made with the consumer will not be automatically invalid. See, for instance, L. de Tejada, M. – D´ Avout, L.: *Les non-dits de la procédure européenne d´injonction de payer*. In: RCDIP 2007, No. 4, p. 723 and foll.

[5] If the defendant has not his/her residence on the territory of the Member State, Regulation Brussels I. shall not apply. Against such defendant, it is possible to apply the rules of so-called exorbitant jurisdiction, based, for instance, only on the fact the defendant is citizen of the state of forum. See Gaudement -Tallon, H.: *Les Conventions de Bruxelles et de Lugano.* Paris, L.G.D.J., 1996, p. 56 and foll.

We presume that the interpretation of the key concepts already provided by the European Court of Justice in relation to Brussels Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters of 1968, being the predecessor of Regulation Brussels I., will be in accordance with the above-cited case-law of the European Court of Justice. Particularly, this concerns definition of *civil and commercial matters*, which is crucial for the application of Regulation Brussels I.[6] The subject matter of the Regulation on order for payment and Regulation on Small Claims Procedure is very similar to the subject matter of Regulation Brussels I. The most important difference consists in the partial exclusion of non-contractual claims from the subject of the Regulation on order for payment. Similarly, the Regulation on Small Claims Procedure shall not apply, contrary to Regulation Brussels I., to matters concerning, *inter alia*, the employment relationship, tenancies of immovable property, except of actions for monetary claims, violation of privacy and rights relating to personality, including defamation.

Similar to Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, both Regulations pay attention to the transparent method of service of documents (Art. 13 and 14 of Regulation on order for payment, Art. 13 of Regulation on Small Claims Procedure). The given provisions represent the compromise between the protection of the other party to the proceedings on one hand, and the interest to enable smooth proceedings with reduced costs in cross-border cases on the other. Threfore, the Regulations provide, beside service attested by an ackowledgment of receipt, also other methods of service providing "very high degree of likelihood that the document served has reached its addressee".[7]

If the European order for payment or claim form in small claims procedure have been served by a method without proof of receipt by the defendant personally, both Regulations explicitly provide the possibility for the defendant to apply for a review of the judgments rendered in such proceedings (Art. 18 of Regulation on Small Claims Procedure). In case of European order for payment, this is possible even after the expiry of the time limit for lodging a statement of opposition to European order for payment (Art. 20 of Regulation on European order for payment). In case of small claims procedure, the provision of Art. 18 of Regulation on Small Claims Procedure raises question, whether the remedy stated in Art. 17 thereof shall be admissible for the parties only in cases where service has not been provided by a method with proof of receipt in situations described in Art. 18.[8] From preparatory works leading to the adoption of Regulation on Small Claims Procedure it is obvious that such an

[6] Point 16 of the Preamble to Regulation on Small Claims Procedure explicitly refers to the interpretation of Regulation Brussels I. concerning the concept of "counterclaim".

[7] Point 20 of the Preamble to Regulation on order for payment

[8] This interpretation is supported also by Art. 18 (2) of Regulation on Small Claims Procedure, according to which if none of the grounds referred to in paragraph 1 apply, the judgment shall remain in force, or, *vice versa*, the judgments shall be null and void if there is one of the reasons laid down in paragraph 1.

interpretation shall not apply and the given provision shall provide the observance of certain minimum standards of serving documents. However, Member States will have to amend their national law accordingly.

II.

The Regulation on Small Claims Procedure has also become the source of newly proposed legal regulation in the Slovak Republic. The draft amendment of the Code of Civil Procedure, currently being prepared and discussed in the Slovak Republic, which should enter into force on 1 July 2008, is undoubtedly based on the above-mentioned EC regulation. Based on this, the draft amendment of the Slovak Code of Civil Procedure introduces some concepts and institutes provided by the Regulation on Small Claims Procedure also to the Slovak national law. Regulation on Small Claims Procedure, which has direct effect in EU Member States and, therefore, no transposition by the national law of the Member State is required, regulates the small claims procedure in cross-border matters. On the other hand, the proposed amendment of the Slovak law introduces also to Slovak procedural law the concept of small claims[9], whereas the creators of the draft amendment have definitely inspired themselves by the European law regulation. According to the statement of the submitter of the concerned draft amendment, Ministry of Justice of the Slovak Republic, the aim of this new institute is to strengthen the principle of promptitude and efficiency of the civil proceedings and to provide the prompt administration of justice and smooth enforcement of law.[10]

After the amendment of Code of Civil Procedure enters into force, the small claims procedure will extend the list of so-called summary proceedings in Slovak civil procedural law, which are known also in the European law (e.g. European order for payment procedure or European small claims procedure). *De lege lata,* summary proceedings in the Slovak Republic include order for payment procedure and order for payment bill of exchange (cheque) procedure[11]. Beside these and based on Regulation on Small Claims Procedure, the summary proceedings in the Slovak Republic shall be completed with the small claims procedure (in non cross-border cases). Moreover, the submitter of the draft amendment of the Code of Civil Procedure intends the summary proceedings to cover all matters for fulfillment, since for the time being it is possible to issue the order for payment only in cases where petition to commence proceedings claims a right to the payment of a pecuniary amount. According to newly proposed Art. 172 (1) of Code of Civil Procedure, the court will be entitled, even without an explicit request by the claimant

[9] The draft amendment of Code of Civil Procedure uses the notion „*veci s malou hodnotou sporu*" or „*bagateľné pohľadávky*".
[10] Explanatory report to the draft amendment of Code of Civil Procedure. Special part, point 29 (§ 83a), available on www.justice.gov.sk
[11] In Slovak „*konanie o platobnom rozkaze*" and „*konanie o zmenkovom (šekovom) platobnom rozkaze*".

and without hearing of the defendant, to issue order for fulfillment[12], if it is claimed to be decided on fulfillment of an obligation arising from law, legal relationship or breach of the law.

In such significant expansion of the summary proceedings in the Slovak civil procedure, which is definitely influenced by the European secondary law rules, one can see the tendency of growing declension from traditional principles of civil procedure, such as principle of contradictory procedure[13] and principle of oral and immediate procedure. Only time will show, whether this would not mean also the breach of the principle of "equality of arms" in civil procedure, because the experience in the Slovak Republic leads to the conclusion that in summary proceedings the guarantee that the payment for order corresponds with the real state of matter is significantly diminished.[14] Not rarely it is decided by the order for payment on the lapsed claims, fault or objectionable claims. The defense of the defendant in the form of protest is, indeed, possible, however, it is subject to the court fee in the same amount as petition to commence proceedings[15]. If the amount of (very often disputable) pecuniary claims is high, it sometimes causes even liquidating problems for defendants. Despite of this negative experience, according to draft amendment of Code of Civil Procedure, it will be possible to decide by order also claims for material fulfillment.

The small claims procedure, as the form of summary proceedings, will be entire novelty in the Slovak procedural law, criteria of which are, for the time being, not known and these will not fully correspond with the conditions of small claims procedure in cross-border cases according to Regulation on Small Claims Procedure. In draft amendment of the Code of Civil Procedure, small claims are defined as claims, in which the value of the claim without attribution on the day of submission of the petition to commence proceedings does not exceed the amount stipulated by special law. The precise amount of so-called small claim in Slovak civil procedure, which is stipulated for EUR 2.000 in cross-border cases, is therefore not known today. Matters related to the social security and procedure on revision of the judgments rendered in arbitration proceedings are not considered to be small claims. This is significantly narrower limitation of what is not considered small claim than the one stipulated in Art. 2 (1) of Regulation on Small Claims Procedure in matters concerning cross-border implications.

In order to strengthen the principle of promptitude and efficiency of the civil proceedings (to the detriment of the principle of contradictory and oral proceedings), rules similar to those stated in Regulation on Small Claims Procedure for cross-border cases are being introduced for domestic small

[12] In Slovak „*rozkaz na plnenie*".
[13] In Slovak „*kontradiktórnosť konanie*"
[14] KRAJČO, J. a others.: Code of Civil Procedure. Commentary. I. volume. EUROUNION, Bratislava, 2006, p. 433.
[15] 6% of the value of the case, at least SKK 500, at most SKK 500.000 in civil matters, in commercial matters at least SKK 2.000, at most SKK 1.000.000.

claims procedure, too. For instance, it will not be required to schedule the hearing in small claims procedure. The court shall schedule a hearing only if the court considers the hearing useful, or if required so by one of the parties.[16] Similarly, based on the European legal regulation, also in domestic cases the court may hold an oral hearing through videoconference or other communication technology if technical means are available.[17]

According to newly proposed wording of Art. 150 (2) of the Code of Civil Procedure, the court shall not award costs of proceedings to the successful party to the extent they were unnecessarily incurred or are disproportionate to the claim in small claim procedure.[18] The aim of this provision should be the enforcement of the claim with lowest possible costs, whereas the interest to continue in the proceedings because it is for the benefit of legal counsel due to counsel's fee, must not prevail.[19]

According to the draft amendment of the Code of Civil Procedure, in small claims procedure the appeal shall not be admissible, except from an appeal against the verdict on costs in order for fulfillment. Despite of the fact that it is not explicitly stated in draft amendment, we do presume that such inadmissibility of an appeal against the judgment of the court in small claims procedure shall relate also to the judgment rendered in the European Small Claims Procedure, since under Art. 17 of Regulation on Small Claims Procedure, the admissibility of an appeal shall be assessed according to the national procedural law of the Member States. However, at the same time point 31 of the Preamble to the Regulation on Small Claims Procedure stipulates that there should be minimum standards for the review of a judgment in situations where the defendant was not able to contest the claim. It is, indeed, questionable whether the total exclusion of an appeal in small claims procedure will not be contrary to this recommendation stated in Preamble to the Regulation on Small Claims Procedure, or to the right for effective remedy as a part of the right for a fair trial.

One of the contingent questions will be the one of costs of proceedings. This question is regulated neither by Regulation on order for payment, nor by Regulation on Small Claims Procedure. The Regulations reserve it for national procedural law of Member States. For instance, in case of European order for payment against the consumer with his/her residence on the territory of the Slovak Republic, the Slovak court shall have the jurisdiction, however, the claim itself may be for a rather high amount in

[16] Compare Art. 5 of Regulation on Small Claims Procedure
[17] Compare Art. 8 of Regulation on Small Claims Procedure
[18] Compare Art. 16 of Regulation on Small Claims Procedure
[19] Explanatory report to the draft amendment of Code of Civil Procedure. Special part, point 49 (§ 150), available on www.justice.gov.sk

foreign currency. Therefore, the consumer would be then obliged to pay significant court fee in foreign currency. [20]

Conclusion

Two recent European regulations, Regulation on order for payment and Regulation on Small Claims procedure keep number of issues open. Eventually, the Regulations in question enable considerable divergence due to the discrepancies in national procedural orders. Moreover, the Regulations contain several provisions which may lead in the future to the breach of the equality or legal certainty[21] of the parties of the given proceedings. Since today approximately half a year remain to the start of the application of Regulations, we will see how their application will look like in practice of particular Member States and how this application will be influenced by national procedural orders and *vice-versa*.

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[20] According to Art. 172 (4) of Code of Civil Procedure, the order for payment can be issued also in foreign currency.

[21] See Júda, V.: Právna istota verzus retroaktivita v práve. (Vybrané problémy), Právnická fakulta UMB, Banská Bystrica 2006, p. 174 and foll.

LEGAL ENVIRONMENT FOR INTERNATIONAL INVESTMENTS IN UZBEKISTAN

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Abstrakt

Cílem tohoto příspěvku je přiblížit čtenáři současné podmínky pro umístnění mezinárodních investic v Uzbecké republice. Úvodní část příspěvku popisuje historické a geografické souvislosti ovlivňující investování v této zemi. Druhá část práce se věnuje jednak obecně problematice mezinárodního investování a mezinárodní ochrany zahraničních investic a současně i specifikům investování v Uzbekistánu. Tato část se rovněž zabývá vývojem právní úpravy zahraničního investování a jejím současným stavem. Závěrečná část práce poukazuje na některé problémy, se kterými se zahraniční investoři v Uzbekistánu stále potýkají.

Klíčová slova

Uzbekistán, Střední Asie, tranzitivní ekonomika, tržní ekonomika, zahraniční investice, investiční legislativa

Abstract

The purpose of this paper is to give the reader an overview of the current legal conditions for placing foreign investments in the Republic of Uzbekistan. Its first part describes the historical and geographical predispositions which still effect international investing in this country. The second part deals with international investments and their protection in general, as well as with specifics of placing investments in Uzbekistan. This part also deals with the evolution of law on international investments and their protection. The final part then points out some of the problems the foreign investors have to be dealing with.

Key words

Uzbekistan, Central Asia, transitional economy, market economy, foreign investments, investment legislation

Introduction

Uzbekistan and other Central Asian Countries sometimes seem to be forgotten by most European foreign investors when looking for a place to invest their capital. This is true even though the Central Asian republics are strategically located and land-locked between Europe and Asia[1]. The question arises if it is so because these territories are geographically quite far from Europe, because of a fear that Central Asia does not offer a secure environment for foreign investments or simply because of not having enough information about these countries, their investment legislation and their actual capability of enforcing such legislation. The purpose of this paper is to provide introductory information about the investment legislation of Uzbekistan, its implementation in practice and also to point out specific problems the foreign investors have to deal with once placing their investment in this country. The first part of my paper will briefly describe the country's location and history. Its purpose is to make sure that the reader is provided with at least a basic knowledge of the geographical location of Uzbekistan and its historical background because both of these are important for further elaboration on as well as for understanding the investment issues in this country. The second part will introduce some basic facts concerning the transfer of international capital and the main means of international investment protection. In the final two parts of my paper I will move onto discussing the current investment legislation and the problems connected with its application in practice.

1. Geography and History of Uzbekistan

Uzbekistan is the geographic and economic heart of Central Asia. With its population exceeding 27 million people[2], it is the biggest market[3] among other Central Asian countries[4]. Lying on the ancient Silk Road[5] between Europe and the Far East, the cities of Samarkand, Bukhara and Khiva have been centers of commerce and trade for centuries and have undergone revivals since the dissolution of the Soviet Union[6]. Uzbekistan is the only country to border each of the other four Central Asian republics, as well as Afghanistan and therefore offers an easy access to the entire Silk Road market of over 142 million people.

Since 1865 until the revolution in 1917, the territory of today's Uzbekistan was under the rule of Russian Tsar. In 1917 these regions initially supported the Bolshevik revolution thinking they could achieve independence from Russia. When realizing that independence was not possible, the nationalist opposition managed to force the Soviet military to withdraw. Nevertheless, the Soviet military power

[1] Dowling, M., Wignaraja, G., *Central Asia After Fifteen Years of Transition: Growth, Regional Cooperation, and Policy Choices*. Office of Regional Economic Integration, Asian Development Bank, 2006.

[2] Which is approximately half of the whole population of Central Asia. www.mzv.cz

[3] GDP of Uzbekistan is currently approximately 12 billion USD (12 billion in 2004, 12.9 billion in 2005, and approximately 11 billion in 2006)

[4] Kazakhstan, Tajikistan, Kyrgyzstan, Turkmenistan.

[5] Uzbekistán has been the Gross roads of the most important trade route in history, the Great Silk Road. UNDP, *Investment Guide to Uzbekistan*, 2007

[6] Baker & McKenzie – CIS, Limited; *Doing Business in Uzbekistan*. January 2007

eventually prevailed[7]. On 27 October 1924 the Uzbek Soviet Socialist Republic was created, and in May 1925 it became part of the Union of Soviet Socialist Republics. On 29 August 1991, 10 days after the collapse of the anti-Gorbachev coup in Moscow, an extraordinary session of the Supreme Soviet voted to declare the Republic independent, and changed its name to the Republic of Uzbekistan[8]. The Republic of Uzbekistan then declared its independence of the Soviet Union on 31 August 1991[9]. After gaining the independence, the country was supposed to become "the Tiger" with the strongest economic potential among the former Soviet republic[10], which would be able to take the biggest advantage of foreign investments inflow. Compared to Central and Eastern European post-communist countries which were able to attract the foreign investors to their territories and to take advantage of the world's policy of liberalization of cross border investments, Uzbekistan was unfortunately less ready to do so[11].

2.1. International investing

The transfer of cross-border investments has become a daily reality of today's more and more globalized world. In order to promote international investment exchange, the states insist on mutual facilitation of transfer of international capital and are trying to take all advantages connected with the inflow of foreign investments.

For developing countries, the placement of foreign investment in their territories does not mean only acquiring financial capital, but also an opportunity to strengthen the stagnating economy, acquiring the latest foreign technologies, decreasing unemployment, as well as raising the qualification of the laborers and managers employed by foreign companies[12]. The advantages for foreign investors lie especially in the opportunity to use cheaper labor force in the host state, opportunity to enter new markets and also getting an access to natural resources which are not available in his home country. The foreign investors, however, don't feel comfortable to invest in foreign territory, unless they feel that their investment is sufficiently protected against non-commercial risks. One of the indispensable conditions for attracting foreign investments is therefore the creation of favorable legal environment in the host

[7] Even though the armed struggle for independente continued until the early 1920s. PriceWaterhouseCoopers; *Business and Investment Guide Uzbekistan 2007*

[8] PriceWaterhouseCoopers; *Business and Investment Guide Uzbekistan 2007*

[9] Uzbekistan is a presidential republic with bicameral legislature. The country is a member of the Commonwealth of Independent States (CIS), the United Nations, the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development, the Organization for Security and Cooperation in Europe, the Asian Development Bank, the Organization of the Islamic Conference, and several other international organizations. Baker & McKenzie – CIS, Limited; *Doing Business in Uzbekistan*. January 2007

[10] „Upon its declaration of independence in September 1991, the Republic of Uzbekistan appeared poised to take the lead among its Central Asian neighbors in attracting foreign investment". Newman, A., *Investing in Uzbekistan: A Rough Ride on the Silk Road*. 30 Law & Pol'y Int'l Bus. 1998-1999

[11] "Less than a decade after independence, Uzbekistan has fallen far short of investors' initial expectations. In comparison with other Central Asian nations – particularly Kazakhstan – Uzbekistan has failed to lure, and, more revealingly, to retain foreign investment". Newman, A., *Investing in Uzbekistan: A Rough Ride on the Silk Road*. 30 Law & Pol'y Int'l Bus. 1998-1999

[12] „For transitional economies foreign direct investments (FDI) has a special significance as it can accelerate the modernization of their economies not only through capital inflows but also through the transfer of technology and business and management skills". UNDP, *Investment Guide to Uzbekistan*, 2007

state. In order to stimulate international investing, the states are usually concluding bilateral investment treaties[13], accessing to multilateral treaties dealing with international investment protection and passing national legislation aimed at protection and promotion of foreign investments[14]. Any country should however bear in mind at all times that the sole acceptance of international obligation in form of an international treaty or by passing national investment legislation, is not sufficient and that the protection embodied in these legal acts has to be effectively promoted in practice. The host country has thus an important duty to guarantee an appropriate protection of foreign investors property placed at the host state's territory. Such protection currently lies especially in providing foreign investor with such treatment as is guaranteed by investment treaties and investment legislation. Breach of these obligations leads to international responsibility of the host state and creates an investor's right to claim compensation at a national court or agreed arbitral tribunal[15].

2.2. Investing in Uzbekistan

2.2.1. Investment legislation

As for any other country, foreign trade and investment could be the major driving force for Uzbekistan, which would help to attain higher and more sustainable economic growth rates through supporting economy modernization and its structural adjustment, creating employment, providing more opportunities for domestic private sector, facilitating competition, transferring skills, knowledge and technology, etc[16]. It is obvious that there is a great need to promote foreign trade and at the same time attract foreign investments. After the collapse of the Soviet Union, the government of the independent Republic of Uzbekistan did realize the chance and carefully began opening the door for market economy and working on improving business climate to become favorable for domestic and foreign investors[17].

The first piece of Uzbek investment legislation appeared in 1994 when "the Law on Foreign Investments and Guarantees of Foreign Investors Activity" (hereafter 1994 FIL) was passed. This initial law was replaced four years later by the Laws On Foreign Investments and On Guarantees and Measures for the Protection of Rights of Foreign Investors which was adopted on 30 April 1998 and which currently provide the legal framework for international investment in Uzbekistan[18]. These laws specify the means

[13] So called „Bilateral treaties on reciprocal promotion and protection of foreign investments".

[14] International Convention on Settlement of Investment Disputes between States and Nationals of Other States (the Washington Treaty), The Soul Treaty on Multilateral Investment Guarantees Agency, Energy Charter Treaty.

[15] As was for instance the case in C.M.E. v the Czech Republic (2002) in which the Czech Republic was found in breach of investment treaty treatment standards and had to pay compensation of about USD 300 milion.

[16] UNDP; Capacity Building and Strenghtening Foreign Trade in Investment Promotion Institutions in Uzbekistan

[17] „After declaring independence the Government adopted a gradual approach to its transition to market economy. UNDP, Investment *Guide to Uzbekistan*, 2007

[18] The main legislative acts concerning the rights and responsibilities of foreign investors consist of:

- Law of the Republic of Uzbekistan „On foreign investments" No. 609-I, 30. 04. 1998
- Law of the Republic of Uzbekistan „On investment activities" No. 719-I, 24. 12. 1998

of foreign investors' participation[19], the conditions governing repatriation of profits and earnings as well as the general rights to and guarantees of foreign investors. These laws distinguish between "enterprises with foreign participation" and "enterprises with foreign investment which qualify to receive certain benefits. It is stated therein that in order to create "an enterprise with foreign investment", the charter capital of the entity must be at least USD 150,000, at least one participant must be a foreign legal entity and foreign investor owns at least 30 % of the total charter capital. All other enterprises with foreign investments which do not meet these criteria are considered to be "enterprises with foreign participation". In addition to national legislation applicable to foreign investments, Uzbekistan has also signed a number of bilateral investment treaties on reciprocal promotion and protection of investment (BITs)[20] which complement the national legislation aimed at protection and promotion of foreign investments. The content of these treaties is traditional. They contain the scope of definition of covered investment, admission and establishment, treatment of foreign investment (national treatment, most-favored-nation treatment, fair and equitable treatment, non-discrimination), compensation of damages to the investor in emergency events, prohibition of expropriation of the investment except for extraordinary cases, guarantee of transfer of funds, and dispute settlement mechanism, both state-state and investor-state arbitration[21]. The body of Uzbek investment law therefore consists of both national and international legal norms.

2.2.2. Current Issues of Uzbek Investment Legislation

The biggest problem foreign investors faced in Uzbekistan during the early 1990s, was the legal uncertainty caused by high frequency of investment legislation's changes[22]. The first piece of investment legislation which was purported to change this situation was the above mentioned "Law on Foreign Investments and Guarantees of Foreign Investors Activity" passed in 1994(1994 FIL). The 1994 FIL introduced so called "grandfather clause" which gave the foreign investor the opportunity to opt out of any piece of legislation passed after the registration of its company in Uzbekistan which "impairs the

- Law of the Republic of Uzbekistan „On guarantees and means of protection of foreign investors' righs No. 611-I, 30. 04. 1998
- Law of the Republic of Uzbekistan „On protection of investors' rights in equity market" No. 262-II, 30. 08. 2001

[19] Such are acquiring share in an existing company by participating in auction or tenders organised under the privatisation program, acquiring share in an existing company by direct negotiation with the owners of the shares (or by purchasing shares on the stock market), forming a joint venture with an Uzbek enterprise or individual, establishing a new, wholly owned comany etc. PriceWaterhouseCoopers; *Business and Investment Guide Uzbekistan 2007*

[20] By 1 January 2007, Uzbekistan has signed BITs with 48 States (including a BIT with the Czech Republic). UNDP, Investment *Guide to Uzbekistan*, 2007

[21] As far as dispute settlement mechanisms are concerned, i is important to note that Uzbekistan is a member of the International Center for the Settlement of Investment Disputes, as well as a signatory party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. UNDP, Investment *Guide to Uzbekistan*, 2007

[22] „A primary complaint of foreign investors was the legal uncertainty caused by the remarkable frequency with which the Uzbek government adopted new laws and repeals old ones." Newman, A., *Investing in Uzbekistan: A Rough Ride on the Silk Road*. 30 Law & Pol'y Int'l Bus. 1998-1999

conditions of investing."[23] The 1994 FIL guaranteed foreign investors protection from such changes for "a period of no more than ten years". The new investment law passed in 1998[24] (hereafter 1998 FIL) fixed the period of protection from these legislative changes at full ten years[25]. Despite these great sounding provisions, the real situation was somewhat different. The foreign investors were in reality not able to take advantage of this provision because the negative effect of any subsequent legislation was determined by the Uzbek authorities themselves[26].

According to the 1998 FIL the foreign investor has the right to freely transfer his hard currency income to and from Uzbekistan. The 1998 FIL then, however, adds that such right exists "pursuant to the legislation of the Republic of Uzbekistan" and therefore introduces an additional condition which is to be determined by following Uzbek legislation. This is in contrast with the right guaranteed by Uzbek investment laws to freely (and "without restriction whatsoever") to repatriate profits of foreign investors from Uzbekistan. The above mentioned provision thus grants (again[27]) the Uzbek authorities a great amount of discretion to restrict the freedom of profit repatriation basically at any time. International investors has to realize and be aware of the fact that immediate transfer of hard currency capital is not going to be possible due to pertaining problem with hard currency conversion and that the conversion and transfer of hard currency profit out of the country is in reality not as simple and can last for several months[28] or even longer[29]. As can be implied from this fact and as was already mentioned above the conversion and following repatriation of profit can be very burdensome[30].

Conclusion

As can be implied from all of the above, the investment climate of Uzbekistan is far from being perfect. In spite of the current reality the government realizes its need to attract more foreign investors in order to start up the economy towards greater growth. At the same time Uzbekistan has quite a lot to offer to foreign investors as well. As was written already in the first part of this paper, the Republic of Uzbekistan is strategically located between Europe and Asia and has access to market of more than 142 million people. Uzbekistan has quite rich reserves of natural resources and also quite cheap but educated (and young[31]) labor force. All of these facts should make the country enough attractive for

[23] Article 11 of 1994 Foreign Investment Law

[24] „The Laws on Foreign Investment and On Guarantees and Measures for the Protection of Rights of Foreign Investors", adopted on 30 April 1998.

[25] Article 3 of 1998 FIL

[26] As can be implied from this fact, there has been a great scope of discretion on part of the authorities and their objectivity was unfortunately doubtful (comment of the author).

[27] See footnote 26

[28] According to information received from a country manager of an international company based in Tashkent, the conversion lasts six months.

[29] Information provided by the Ministry of Foreign Affairs of the Czech Republic. www.mzv.cr

[30] The Uzbek investment laws often employ disingenuous tactic of granting a right, then qualifying that right in such a way as to eviscerate it. Newman, A., *Investing in Uzbekistan: A Rough Ride on the Silk Road*. 30 Law & Pol'y Int'l Bus. 1998-1999

[31] "The labor force of Uzbekistan possesses a number of important characteristics; it is ample, literate, young and highly trainable according to the international requirements of the global office". UNDP, Investment *Guide to Uzbekistan*, 2007

foreign investors. However, international investors are still coming very slowly especially due to the belief that investing in this country is still too dangerous. The first step the country has undertaken in order to change this perspective was to begin creating its national investment legislation and also concluding bilateral investment treaties[32]. The persisting problem, however, still lies in the frequency of legislative changes and the possibility of administrative interference in foreign investor's business. Any potential investor thus has to realize that establishing in Uzbekistan will not be easy and has to be ready to face the above mentioned problems with patience. However, if the investor will be able to do that, the reward for his patience may be very good.

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LEGAL PERSONS IN PRIVATE INTERNATIONAL LAW AND RELATED CASE LAW OF THE EUROPEAN COURT OF JUSTICE

PETRA NOVOTNÁ

PRÁVNICKÁ FAKULTA, MASARYKOVA UNIVERZITA, KATEDRA MEZINÁRODNÍHO A EVROPSKÉHO PRÁVA

Abstrakt

Tento příspěvek se zabývá nejnovější judikaturou Evropského soudního dvora k právnickým osobám. Rozhodnutí v oblasti svobody usazování měla velký dopad v oblasti obchodního práva, resp. volby osobního statutu obchodní společnosti. Autorka se zaměří na některé zajímavé aspekty těchto rozhodnutí. Zejména bude věnována pozornost fúzím a přesunu skutečného, resp. zapsaného sídla v nejnovějších rozhodnutích.

Klíčová slova

Svoboda usazování, judikatura, ESD, osobní statut, obchodní společnost

Abstract

This paper focuses on the latest case law of the European Court of Justice related to legal persons. Decisions on the freedom of establishment have had a great impact in the area of corporate law, or more precisely the choice of corporate statute. The author will outline several interesting issues related to those decisions. In particular, she will focus on decision related to cross-border mergers and transfer of the real and/or registered seat and the latest developments.

Key words

Freedom of establishment, case law, ECJ, corporate statute, company

National Framework

EC law does not regulate the determination of the corporate (or personal) statute[1] of legal persons as well as it does not determine the personal statute of a natural person. The member states are thus free to determine it under their own legal rules. In general, there are two main theories under which the corporate statute can be determined.

Under incorporation theory the personal statute of a company is determined by the laws of a country under which it was created. The company is usually registered with the register of commerce of that respective country too.[2] It is quite common that the headquarters or the central administration of such company lies within a different state than its registered seat. Under real seat theory the personal statute of a company is determined by the laws of a country in which it has its real seat. Real seat usually corresponds to the place where the company has its central administration and main activity. The states of real seat and registered seat may differ.[3]

Freedom of Establishment and Registered Seat of a Company

Free movement of persons is one of the four fundamental freedoms guaranteed by the EC Treaty (hereinafter, ECT) and the freedom of establishment falls within its scope. Article 43 bans the member states from limiting the freedom of establishment, setting up an agency, branch or subsidiary of one member state in the territory of another member state.[4] Freedom of establishment includes the right to set up businesses and especially companies. Articles 45 and 46 of the ECT set forth the allowed restrictions to the freedom on the grounds of exercise of official authority, public policy, public security or public health.

Article 48 of the ECT sets a basic framework for the companies to exercise their right. Company means companies or firms constituted under civil or commercial law, including
cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making (article 48, paragraph 2 ECT). The Companies have to be formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community.

1 Corporate or personal statute of a company regulates its foundation or dissolution, internal affairs etc.

2 This theory is used in Czech law (§§ 21 and 22 of the commercial code), the U.S., Great Britain, Ireland, Netherlands, Denmark, Croatia, Slovakia).

3 Real seat theory is used e. g. in France, Germany, Austria, Belgium, Poland, Hungary. Compare e. g. KUČERA, Z., Mezinárodní právo soukromé. Brno: Doplněk, 2001, p. 248-251.
HODÁL, P., ALEXANDER, J. Evropské právo obchodních společností. Praha: Linde 2005, p. 48-50.

4 It enables secondary change of seat, primary change of seat entails founding of a corporation and transfer of the seat to another member state without being dissolved and reincorporated under the laws of another state.

If a company complies with the article 48 requirements it should have the possibility to do business and exercise its establishment right freely within the territory of EC. This principle however had been rejected by member state for a long time and was in fact "enforced" only by line of judgments of ECJ. The ECJ´s freedom of establishment judgments can be briefly reduced into the following main principles:

1. The home country of a company is allowed to set forth the conditions under which a company may transfer its real seat abroad (restrictions upon exit).[5]
2. The host country cannot refuse to register a branch of a validly constituted foreign company which is to be the real seat of that company (restrictions upon entry - secondary establishment).[6]
3. The host country cannot limit the transfer into its territory of the real seat of a validly constituted foreign company (restrictions upon entry - primary establishment).[7]
4. The host country cannot discriminate against a validly constituted foreign company registered in its territory by requiring it to comply with extra set of conditions as opposed to the domestic companies (discriminatory conditions upon entry).[8]

For the time being it is not possible to transfer the registered seat freely.[9] Transfer of registered seat is therefore allowed only for Societas Europaea formed under the EC law. However, the latest developments in ECJ´s case law show that this might not be the case very soon, as it will be discussed later with relation to the Cartesio case. The incorporation theory encourages so called „societas shopping". The companies choose states and rules that offer them the best or most suitable conditions.[10] It is and it will be common more and more often that a company will not have its real seat and will not exercise any activity in the state where it was incorporated.

Transfer of Seat by Merging with Foreign Corporation

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5 See ECJ decision from 27th September 1988, in The Queen contre H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc., C 81/87. [1988] ECR 05483. The terms *"home country, host country, outbound, inbound, incoming, outcoming, upon entry, upon exist"* are used both by ECJ in its judgments on freedom of establishment and also in general by commentators.
See also ECJ judgment from 10th July 1985 in Segers, C 79/85. Compare commentary: DASSESSE, M,. Obligation de reconnaissance des sociétés „boite aux lettres": l´Arrêt Inspire Art. Revue Générale de fiscalité, 2/2004, p. 5-11.

6 See ECJ decision from 9th March 1999, in Centros Ltd vs Erhvervs-og Selskabsstyrelsen, C-212/97. [1999] ECR I-01459. This freedom is not absolute and the decision discusses the possibility to restrict freedom of establishment in case of fraud and abuse based on objective circumstances.

7 See ECJ decision from 5th November 2002, in Überseering BV vs Nordic Construction Company Baumanagement GmbH, C-208/00. [2002] ECR I-09919. This decision confirmed the "victory" of incorporation theory.

8 See ECJ decision from 13th September 2003, in Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd., C-167/01. [2003] ECR I-10155.

9 This kind of transfer should be dealt with in the 14th company directive. See e.g. JOHNSON, M., Roll on the 14th Directive – Case Law Fails to Solve the Problems of Corporate Mobility Within the EU – again. Hertfordshire Law Journal, 2004, Vol. 2(2), p. 9-18.

10 See e.g. GELTER, M., The Structure of Regulatory Competition in European Corporate Law. The Journal of Corporate Law Studies, 2005, Vol. 5, Issue 2, p. 6 et seq.

According to one of the latest ECJ´s decision[11] a freedom of establishment includes establishment by cross-border mergers. German court in this case refused to register merger[12] of a German and Luxembourg company into its commercial register because German law did not know cross-border mergers.[13] Advocate general and the ECJ have come to the same conclusion holding that the right to establishment *"covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators".*[14] Cross-border mergers thus represent a special exercise of the freedom of establishment which has to be respected by the member states.[15] Without taking into account the harmonization,[16] it is necessary to point out the importance of cross-border merger case law. It is however important to keep on mind that articles 45 and 46 may limit the freedom. Fraudulent transfer of seat could fall under the respective restrictions allowed by those articles.[17]

Distinguishing the Cases

Based on the above mentioned case law, it is possible to distinguish several kinds of cases related to freedom of establishment.[18] There is a general line of case law compelemented with the special case law line. The special line relates in particular to specific tax problems. The cases may also be differentiated based on whether it is the home country or host country that restricts the freedom of establishment. Since Daily Mail decision there have been very few decisions concerning the restrictions upon exit. Most of those cases are again direct taxation cases. After Daily Mail there has been a similar case only in 2003 in the matter of Lasteyrie du Saillant which concerned the tax restrictions upon exit of a natural person.[19] ECJ held that French tax regulation limits the freedom of establisment because it discriminates the persons leaving France to establish themselves in another member state as opposed to those who stay

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11 See ECJ decision from 13th December 2005 in SEVIC Systems AG, C-411/03 [2005] ECR I-10805. For detailed commentary see BEHRENS, P., Case C-411/03, SEVIC Systems AG, [2006] 43 C.M.L.Rev. 1669.

12 In this case merger involves the dissolution of a company without liquidation and transfer of all of its assets to SEVIC company without changing the legal name of the company.

13 ECJ decision from 13th December 2005 in SEVIC Systems AG, C-411/03 [2005] ECR I-10805, par. 2. ECJ thus interpreted German law restrictively. If it was not so, we could conclude that in absence of express regulation by national law there is no ban to cross-border mergers. Compare: BEHRENS, P., Case C-411/03, SEVIC Systems AG, [2006] 43 C.M.L.Rev. 1669, 1673.

14 ECJ decision from 13th December 2005 in SEVIC Systems AG, C-411/03 [2005] ECR I-10805, par. 18 with refference to par. 30 thereof.

15 Id., par. 19.

16 Directive 2005/56/ES from 26th October 2005, on cross-border mergers of corporations.

17 For related issues see e.g.: HICKMOTT, R., Views From Here – Tailored Migration. Legal week, 2007. Available at http://www.legalweek.com [quoted 19.3.2007].
See also the opinion of the advocate general Maduro in Cartesio case C-210/06, nyr, delivered on 22 May 2008, par. 28 et seq.

19 ECJ decision from 13th March 2003 in Hughes de Lasteyrie du Saillant vs Ministère de l'Économie, des Finances et de l'Industrie C-9/02, Recueil, s. I-2409, par. 45.

in France. Daily Mail and Lasteyrie du Saillant then left the door open for issues related to exit of a legal person. One of the most important "gap-filling" decisions in this area is the Marks and Spencer case.

Marks and Spencer (2005)[20]

British laws make it possible for the groups to set off losses and profits incurred by their UK resident subsidiaries.[21] British courts however refused to apply the same regulation to the foreign subsidiaries which did not have any seat or economic activity within the Great Britain. Advocate general classified this restriction as restriction upon exit, i. e. the restriction discriminating against corporations which have subsidiaries in other member states than Great Britain.[22] By this case the ECJ departed from the general freedom of establishment case line to a special tax related regime. [23] This shift has been confirmed in other ECJ decisions later on. [24] Consequently, it is possible to make difference between the national restrictions that are discriminatory, and restrictions which result from the mutual relations between the member states but which cannot be considered as limiting the freedom of establishment.[25]

Transfer of Registered Seat

In one Italian case a corporation with its registered seat in Rome moved this registered seat to Luxembourg. The *Corte di Cassazione* held that by this the company moved both its registered and administration seat to Luxembourg where it was founded again under Luxembourg laws. Under Italian law it is not important whether company moves its registered seat abroad. It does not change the country of its origin.[26] The transfer of registered seat is allowed[27] if it is in compliance with both the

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20 See Kingston, S. A Light in the Darkness: Recent Developments in the ECJ´s Direct Tax Jurisprudence. 44 CMLR 1321, 2007. The author cites the following decisions related to freedom of establisment and direc taxes as to date of her article: *Case C-436/00, X & Y, [2002] ECR I-10829; Case C-324/00, Lankhorst-Hohorst, [2002] ECR I-11779; Case C-168/01, Bosal, [2003] ECR I-9409; Case C-9/02, De Lasteyrie de Saillant, [2004] ECR I-2409; Case C-268/03, De Baeck, [2004] ECR I-5961; Case C-446/03, Marks & Spencer, [2005] ECR I-10837; Case C-494/03, Senior Engineering Investments, [2006] ECR I-525; Case C-253/03, CLT-UFA, [2006] ECR I-1831; Case C-471/04, Keller, [2006] ECR I-2107; Case C-346/04, Conijn, [2006] ECR I-6137; Case C-470/04, N, [2006] ECR I-7409; Case C-196/04, Cadbury Schweppes, [2006] ECR I-7995; Case C-345/05, Commission v. Portugal; Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation, judgment of 12 Dec. 2006, nyr; Case C-446/04, Test Claimants in the Franked Investment Income (FII) Group Litigation, judgment of 12 Dec. 2006, nyr; Case C-170/05, Denkavit, judgment of 14 Dec. 2006, nyr; Case C-104/06, Commission v. Sweden, note 12 supra; Case C-329/05, Meindl, judgment of 25 Jan. 2007, nyr, Case C-150/04, Commission v. Denmark, note 12 supra; Thin Cap Test Claimants; Case C-383/05, Talotta, judgment of 22 March 2007, nyr, Case C-347/04, Rewe, judgment of 29 March 2007, nyr.* The list of relevant case is also available on the websites of ECJ in Repertoire de la jurisprudence (in French only).

21 Marks and Spencer, opinion, par. 9.

22 Id., par. 53.

23 Kingston, op. cit. sub. 20, p. 1337.

27 See for example decisions in Test Claimants and Denkavit as cited above.

25 Kingston, S. A Light in the Darkness: Recent Developments in the ECJ´s Direct Tax Jurisprudence. 44 CMLR 1321, 1359 (2007).

26 For more details see MUCCIARELLI, F.M., The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: An Important Decision from Italy, (2005) ECFR, Issue 4, p. 520.

27 Id., p. 521. Author refers to art. 2437 of the italian *codice civile.* Compare generally the impossibility of transfer of the registered seat and 14th directive.

laws of home and host country. The transfer on itself cannot be the reason for dissolution of a company. Naturally, if the company keeps its Italian "nationality" it is a bit difficult as it regard the enforcement of Italian law abroad.[28] Luxembourg law sets forth a condition of change of nationality after reincorporation, but the transfer itself is no reason for the dissolution of a company. Nevertheless, the court dissolved the company based on the fact that it lost its Italian nationality after it was reincorporated in Luxembourg.[29] As the transfer or registered seat has not yet been clearly classified as falling under the freedom of establishment by the ECJ, it is only possible to enforce it in the states which allow such a transfer. It seems, however, that the decision in Cartesio case could bring the long awaited shift in the approach.

Cartesio Case[30] – Daily Mail Overruled?

In the brand new opinion delivered by advocate general Maduro, it is argued that a development in case law over the past decades have made it possible to depart from the original conclusions once made in Daily Mail case.[31] Maduro describes the methods used to distinguish between the cases as described above.[32] He points out that "*these efforts were never entirely convincing."*[33]

The problems in this case have their roots in the facts of the case itself. It concerns the transfer of registered seat from Hungary to Italy, Hungary being the real seat theory state. In other words, the transfer of the seat is in fact a transfer of the real seat (thus an issue previously regulated by ECJ case law) which in this particular case happens to be the registered seat at the same time. It is also interesting to note that the "court language" speaks of "operational headquarters" in the text and also in its conclusion. One might argue that there is a space for discussion concerning the transfer of the registered seat which is not the operational headquarters in the incorporation theory states.

Of all the previous decisions, the Sevic case is the one where ECJ holds that both inbound and outbound cases are subject to the same treatment under article 43 of ECT.[34] This approach seems to be followed by Cartesio. Nevertheless, freedom of establishment is not absolute and there are still possibilities for restrictions if it is justified by general public interest (e.g. prevention of abuse or fraudulent conduct,

28 Id., p. 521.
29 Id., p. 523.
30 Cartesio C-210/06, nyr, Opinion of advocate general Maduro delivered on 22 May 2008 (hereinafter, Cartesio).
31 Cartesio, par. 27.
32 Cartesio, par. 28.
33 Cartesio, par. 28.
34 Cartesio, par. 28, referring to Sevic case in footnote no. 50.

protection of interests of creditors, minority shareholders, employees or tax authorities).[35] The limits may also be specified by secondary law.[36]

Conclusion

Questions remain with the opinion in the Cartesio case in hands. It is clear that a complete negation of the right to free establishment is not allowed. Even if confirmed by the ECJ, it is still unclear what the scope of restrictions allowed under articles 45 and 46 is. Is this the way where the case law is going in decisions on freedom of establishment as such like it is in the tax related matters? Having in mind the works on the 14th directive (transfer or registered seat) it is possible that the final situation will be quite similar to the relation the between Sevic decision and the 10th directive on cross-border mergers. In any case the decision in Cartesio will have a huge impact on the national approaches to the incorporation or real seat theory.

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35 Cartesio, par. 32.

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ARBITRATION CLAUSE AS UNFAIR CONTRACT TERM: SOME OBSERVATIONS ON THE ECJ´S CLARO CASE

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Abstrakt

Předmětem tohoto příspěvku je rozhodčí doložka jako nekalé smluvního ujednání ve smyslu směrnice 93/13/EEC o nekalých ujednáních ve spotřebitelských smlouvách. Touto problematikou se zabýval Soudní dvůr Evropských společenství v nedávném rozhodnutí *Claro v Móvil*. Soudní dvůr v této věci rozhodl, že rozhodčí nález může být zrušen soudem členského státu, pokud bylo rozhodčí řízení založeno na rozhodčí doložce, která byla nekalým smluvním ujednáním ve smyslu výše uvedené směrnice. Důvodem pro zrušení rozhodčího nálezu je podle Soudního dvora rozpor s tzv. Evropským veřejným pořádkem, jehož součástí je i ochrana spotřebitele před nekalými smluvními ujednáními.

Navzdory rozdílným názorům na rozhodnutím *Claro* je vzkaz Soudního dvora jasný. Rozhodčí řízení je určeno pro obchodníky. Spotřebitelé mají vést své spory v rámci alternativních způsobů jejich řešení nebo před obecnými soudy.

Příspěvek nabízí několik úvah nad potenciálním dopadem rozhodnutí *Claro* na český právní řád zejména s ohledem na zákon o rozhodčím řízení a občanský zákoník.

Klíčová slova

Spotřebitel – rozhodčí řízení – rozhodčí nález – nekalé smluvní ujednání – rozhodčí doložka – případ Claro – Směrnice o nekalých smluvních ujednáních – ochrana spotřebitele - Evropský veřejný pořádek – uznání a výkon – nevznesení námitky nekalosti rozhodčí doložky během rozhodčího řízení

Abstract

This paper address the problem of the annulment of an arbitration award by national courts on the grounds that the arbitration proceedings were based on arbitration clause as an unfair contract term under the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The ECJ decided in the case *Claro v Móvil* that arbitration award may be annulled by national court if it is based on arbitration clause which turns out to be unfair contract term. Moreover, according to the ECJ, consumer has no duty to object unfairness of the arbitration clause in the course of arbitration proceedings. Therefore, the national court may find the term unfair thus void on its own motion. The reasoning behind this was that the arbitration award was at odds with mandatory provisions of the

Directive on unfair terms in consumer contracts, which form part, in the view of the ECJ, of the so called European public policy.
Notwithstanding the different opinions on this case, the message from the ECJ is clear. The arbitration is a mean of settlement of disputes which is intended for the B2B disputes. On the contrary, the B2C disputes should be resolved in Alternative Disputes Resolution or before ordinary national courts.
Consequently, I would like to offer some ideas on the potential impact of the *Claro* decision upon Czech legal order. Thus, particularly the existing legal frame for consumer disputes created by the Czech Arbitration Act and Civil Code is analysed.

Key words
Consumer – Arbitration – Arbitral award- Unfair contract term – Arbitration clause – the Claro case – Directive on Unfair Contract Terms – protection of consumers - European public policy- Recognition and enforcement- Failure to raise the unfairness of a term in the course of arbitration proceedings

1.Setting the scene

In the recent decision of the European Court of Justice (hereinafter "ECJ") in the case *Claro v Móvil*[1] has arisen a grave conflict between arbitration law and consumer contract law. This decision is important because it enables the national courts to annul arbitration award if the arbitration proceedings were based on arbitration clause which proved to be unfair contract term under the Directive 93/13/EEC on unfair terms in consumer contracts, even though the unfairness thus invalidity of the arbitration clause was not objected in the course of arbitration proceedings.

I would like to analyse in this paper the Claro case from two viewpoints. Firstly, I am concerned with the possible influence of this decision on both national and international arbitration.Second, I offer some thought on the implications of the Claro case for the Czech law.

My personal belief is that the decision in the Claro could open an avenue to protect consumers again the daily practice of some of the businessmen, who (ab)use the arbitration clauses included in their standard business terms, to remove the consumer from his "natural judge". This is of importance in the Czech Republic where, contrary to the majority of the EU Member States, has not been so far introduced sufficient and adequate legislation dealing with the mechanism of solving consumer disputes.

2. Legal basis for unfair contract terms

[1] Case C-168/05 *Elisa Maria Mostaza Claro* v *Centro Movil Milenium SL* [2006] ECR I-10421.

The legal basis for unfair contract terms is created by Council Directive 93/13/EEC on unfair terms in consumer contracts (hereinafter "Directive").[2] The Directive states as one of its aims that "*acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.*"[3]

For our purposes, the key provision of the Directive are the articles 3(1), 6(1) and 7(1) of the Directive. Article 3(1) of the Directive contains general clause which serves for assessment of unfairness of contract terms. This provision reads as follows: *"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."*[4] Article 6(1) of the Directive sets forth that "*Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."* This rule is of mandatory nature and it is intended for Member States in order to ensure that the consumers will not be bound by unfair terms in contract with businessmen. The method which should be used to achieve this aim has been left to Member States. Last but not least, the article 7(1) of the Directive stipulates that *"Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers."* It entails both protection by means of both public and private law. In the sphere of private law, the effective legislative reaction by Member States to prevent continuation of using the unfair contract terms by businessmen is expected.[5]

The Directive contains in its Annex an indicative and non-exhaustive list of unfair contract terms. Thus, Member States have had a choice which of these terms, if any, will introduce into their national legal orders. It bears noting that the list contains *inter alia* that as unfair contract term may be considered *"excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes* ***exclusively to arbitration*** [emphasis added by Z.N.] *not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."* Therefore, the European legislator was perfectly aware of the fact that arbitration clause may be unfair

[2] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, p. 0029-0034.
[3] Cf the Preamble to the Directive.
[4] Art. 3 of the Directive.
[5] Cf the Preamble of the Directive.

term *par excellence*.[6] And it was an arbitration clause as unfair contract term which was at the heart of the dispute in the Claro case.

3. The Claro case

The case concerned a mobile telephone contract concluded between *Móvil and Ms Mostaza Claro*.[7] The contract included an arbitration clause, under which any disputes arising from the contract were to be referred for arbitration to the *Asociación Europea de Arbitraje de Derecho y Equidad* (European Association of Arbitration in Law and in Equity, hereinafter "*AEADE*").

Ms *Claro* did not comply with the minimum subscription period, therefore *Móvil* initiated arbitration proceedings before the AEADE. The *Móvil* granted Ms *Claro* a period of 10 days in which to refuse arbitration proceedings, stating that, in the event of refusal, she could bring legal proceedings. Ms *Claro* presented arguments on the merits of the dispute, but did not repudiate the arbitration proceedings or claim that the arbitration agreement was void. The arbitration proceedings subsequently took place and the arbitrator found against her.

Consequently, Ms Claro contested the arbitration decision delivered by the AEADE before the *Audiencia Provincial de Madrid* (Provincial Court de Madrid), submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void. The *Audiencia Provincial de Madrid* found that the arbitration agreement is an unfair contractual term and is therefore void.

However, since Ms *Claro* did not plead that the arbitration agreement was void in the context of the arbitration proceedings, and in order to interpret the national law in accordance with the Directive, the *Audiencia Provincial de Madrid* decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
"May the protection of consumers under Council Directive 93/13/EEC … require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?"[8]

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[6] At this occasion, it is worth mentioning that Czech legislator has not taken over the arbitration clause from the Annex into the list of unfair terms which is contained in the article 56(3) of the Czech Civil Code. On the other hand, the catalogue of unfair contract terms is only demonstrative thus enabling the courts to find contractual term unfair even though not mentioned in the 56(3) of the Czech Civil Code.
[7] Case C-168/05 *Elisa Maria Mostaza Claro* v *Centro Movil Milenium SL* [2006] ECR I-10421.
[8] The Claro case, para 20.

The ECJ answered that "*Directive must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, ev*en *though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment."*[9]

4. The Grounds for the ECJ´s decision

The *Claro* decision follows the line of the ECJ´s cases in *Océano, Freiburger Kommunalbauten* and *Cofidis*.[10] Generally speaking, these decision answered to the question whether the national court may on its own motion find the contractual term unfair. The ECJ´s answer was in affirmative. However, it should be borne in mind that the ECJ cannot, generally taken, asses unfairness of a concrete contract term. This is the task for national court.[11]

The ECJ´s reasoning in the *Claro* case was based on the nature of the system of protection introduced by the Directive. The ECJ emphasised that *"the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge"* and *"such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract."*[12]

Furthermore, the ECJ held that *"the national court's power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and*

[9] The Claro case, para 40.
[10] Joined Cases C-240/98 to C-244/98 *Océano GrupoEditorial and Salvat Editores* [2000] ECR I-4941.; Case C-473/00 *Cofidis v Jean-Louis Fredout* [2002] ECR I-10875.; Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger and Ulrike Hofstetter* [2004] ECR I-3403 Cf also Liebscher, Ch. *Case C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL, judgment of the Court of Justice (First Chamber) of 26 October 2006 ECR I-10421*, CMLR, 2008, 45, p. 549.
[11] Cf Research Group on the Existing EC Contract Law (Acquis Group). *Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*. München: Sellier. European Law Publishers, 2007, p. 244.; Nebbia, P. *Unfair Contract Terms in European Law. A Study in Comparative and EC Law*. Oxford-Portland Oregon: Hart, 2007, 169. Both these books refer to the mentioned decision *Freiburger Kommunalbauten.*
[12] The Claro case, para 25.

contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers."[13] Such power of national court is necessary in order to ensure real and effective protection of consumers, for the consumer is not able to foresee possible legal consequences of arbitration clause as unfair contract term. The purpose of the Directive cannot be achieved if the court seized of an action for annulment of an arbitration award is unable to determine whether that award was void only due to the fact that the consumer did not plead the invalidity of the arbitration clause in the course of the arbitration proceeding.[14]

Moreover, the ECJ found that *"the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory."*[15] Therefore, the ECJ considers the protection provided by the Directive as a part of economic European Public Policy, because the protection of consumers is essential for the functioning of internal market. This reasoning is analogous to that employed in the famous *Eco Swiss* judgement where the article 81 of the EC Treaty was found to be part of European Public Policy.[16] However these grounds may seem reasonable, some doubts remain. How could one identify the rules of Community Law which are of mandatory nature? It seems that it is somewhat unpredictable whether the concrete rule of Community Law is of Public Policy nature or not.

It is worth mentioning that the opinion of Advocate General *Tizzano* in this case was slightly different from that of the ECJ.[17] Advocate General took the similar position as the ECJ so far that the problem in the Claro case is based on public policy considerations. Yet, unlike the ECJ, in the opinion of Mr. *Tizzano* the right to a fair hearing as one of the fundamental rights derived from constitutional traditions common to the Member State was breached.[18] Therefore, whilst the ECJ based its decision on wide understanding of European public policy as economic public policy, Advocate General suggested the narrower application of European public policy, limited *"only to rules that are regarded as being of primary and absolute importance in a legal order"*[19]. Thus, Mr. *Tizzano* put emphasis on fundamental

[13] The Claro case, para 27.
[14] The Claro case, para 30.
[15] The Claro case, para 37.
[16] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.
[17] Opinion of the *Advocate General Tizzano* in the Claro case, para 57-61.
[18] Opinion, para 59.; cf case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935, para 38.; cf also Nález Ústavního soudu ČR ze dne 25. 4. 2006, sp. zn. I. ÚS 709/05 (The decision of the Constitutional Court of the Czech Republic no. I ÚS 709/05)
[19] Opinion, para 56. Cf Pauknerová, M. *Evropské mezinárodní právo soukromé*. 1. vydání. Praha: C. H. Beck, 2008, p. 163.

human rights and freedoms as meta-economic public policy.[20] Consequently, the breach of these fundamental rights is the sufficient reason to annul arbitration award.

6. The Claro decision and arbitration law

One of the main advantages of arbitration as an alternative mean of settling the disputes lies in the limited grounds of review of arbitration awards by national courts.[21] Therefore, the arbitration award should be smoothly recognised and enforced. Among the possible defences to arbitration award both in international and national arbitration are absence of a valid arbitration agreement and violation of public policy of the country where the enforcement is sought.[22] These two defences were also raised in the *Claro* case. Nonetheless, the *Claro* case was purely of domestic nature.[23] Thus, one may ask if the reasoning of the ECJ would be also employed in the international arbitration. In the light of the *Claro* case, it seems that this question should be answered in affirmative, because the mandatory nature of the Directive as the part of European public policy will override the foreign arbitration award. Albeit, there must be a sufficient connection with the territory of the EU in order to apply the EU consumer protection rules as public policy exception.[24]

However, the *Claro* decision has caused worries to persons involved in international arbitration owing to the wide and relaxed scope of European public policy (in comparison with the ECJ´s previous decision in *Eco Swiss*[25]) adopted by the ECJ, causing uncertainty as for the rules of Community law which form part of it. Moreover, the *Claro* decision opened yet not fully resolved issue of the rather problematic relationship between arbitration law and European Law. The difficulties in this relationship arise, *inter alia*, from the fact that arbitrator are expected to apply Community law as on the merit of a dispute[26],

[20] For more profound analysis of the fundamentals rights as public policy cf Hammje, P.: *Droits fondamentaux et ordre public*, Revue Critique de droit international privé, 1997, 86, 1, p. 2 *et seq*.; For understanding of public policy as derived from constitutional values cf Novelli, G.: *Compendio di Diritto Internazionale privato e processuale*. Napoli: Esselibri, 2007, p. 59.
[21] Landlot, P. *Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements*, Arbitration International, 2007, vol. 23, no. 1, pp. 65-66.
[22]Graf, B.U.-Appelton, A. E. *Elisa María Mostaza Claro v Centro Móvil Milenium: EU Consumer Law as a Defence against Arbitral Awards, ECJ Case C-168/05*, ASA Bulletin, 2007, 1, p. 48.; cf also Rozehnalová, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku. 2., aktualizované a rozšířené vydání.* Praha: ASPi, Wolters Kluwer, 2008, p. 333.
[23] It was the Spanish case.
[24] Graf, B.U.-Appelton, A. *op. cit.* sub 22, p. 60.; Landlot, P. *op. cit.* sub 21, p. 82.; I see this sufficient connection particularly in the fact that arbitration award was issued by the arbitrator with his seat in Member State against the consumer domiciled in another Member State. However, in my view, the public policy exception based on consumer protection could be raised even though the arbitration award was issued in a non-member state against consumer domiciled in Member State.
[25] Cf Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 35.
[26] Of course, there may be some exceptions, for instance, when arbitrators are entitled by parties to decide the case *ex aequo et bono*. Cf also Lew, J. D. M.- Mistelis, L. A.- Kröll, S. M. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, p. 476.

but on the other hand they are not allowed to ask the ECJ to interpret European Law in preliminary ruling.[27]

7. The impact of the Claro decision on Czech legal order

In this part of my paper I offer some ideas on the compatibility of the Claro decision and some rules of Czech legal order. Particularly, I aim to elucidate that both the Arbitration Act[28] and the Civil Code[29] of these laws are at odds with the Directive as well as the line of the cases from the *Océano* to the *Claro*. My impression is that namely article 33 of the Czech Arbitration Act and the art. 55(2) of the Czech Civil Code are in strong contrast to the protection provided by the Directive.

First, the Arbitration Act lays down in its article 31 the exhaustive list of reasons, for which the arbitration award may be annulled. The article 31 b) sets forth that court on the motion of the party of an arbitration proceedings shall annul arbitration award if the arbitration clause is invalid. So far so good. However, this article should be read together with article 33 of the Arbitration Act which determines that court shall refuse the claim which seeks to annul arbitration award based upon nullity of arbitration clause, if the party seeking for annulment of arbitration award, did not object the invalidity of arbitration clause in the course of arbitration proceedings, although she was able to do so. In the light of the ECJ decision in the *Claro* case, the national court shall asses the unfairness of the contract term thus arbitration clause on its own motion. Therefore, the article 33 of the Arbitration Act having stipulated that party has to object the unfairness thus invalidity of arbitration clause only in the course of arbitration proceedings and nevermore is clearly contradictory to the *Claro* decision. It appears that the article 33 of the Arbitration Act impedes the Directive to fulfil the aim stipulated in its art. 6(1) that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. Thus, it seems to me that the Directive was not implemented into Czech law properly.[30]

Unfortunately, the improper implementation of the Directive does not *per se* mean that Czech courts are obliged to annul arbitration award if the consumer did not object the invalidity of arbitration clause in the course of arbitration proceedings. However, the Czech consumer against whom the arbitration award was issued may attack this decision before court on the grounds that the arbitration clause was

[27] Cf Case 102/81 *Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei und Reederei Friedrich Busse Hochseefischerei Nordstern* [1982] ECR 1095.
[28] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálezů, ve znění pozdějších předpisů.
[29] Zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů.
[30] This is not only main impression. Cf Švestka, J.- Spáčil,J.- Škárová, M. Občanský zákoník. Komentář. Praha: C. H. Beck, 2008, § 55, marginal number 10,

unfair thus invalid. Consequently, the supplier or seller would object that the consumer did not plead the invalidity of the arbitration clause in the course of arbitration proceedings (under article 33 of the Arbitration Act). Then, the consumer might claim that in accordance with the *ECJ´s Claro* decision court seized of an action for annulment of an arbitration award must determine whether the arbitration clause is void and annul that award when it is based on an unfair term, even if the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but solely in that of the action for annulment.

Although the Czech court has no duty to respect the ECJ´s decision in the *Claro*, it is, at the very least, obliged to interpret the Czech law, therefore article 33 of the Arbitration Act, as far as possible in accordance with Community law[31], therefore the article 6(1) of the Directive and the *Claro* decision giving interpretation of the Directive. The consumer may also ask the court to refer the similar preliminary question to the ECJ as was in the *Claro* case. Then, it is probable that the ECJ would consider the case similarly. In consequence, the national court will be bound by the answer of the ECJ. Yet, it is far from clear how court may give interpretation in conformity with Community law when the article 33 of the Arbitration Act is absolutely contradicted to it.

Finally, if the consumer lose the dispute, he may claim damages caused by the defective implementation of the Directive against the Czech Republic.[32] Albeit, at the end of the day, it will be on Czech law-maker to ensure the conformity of the Arbitration Act with the Directive. As was mentioned, article 33 of the Arbitration appears to be contrary to the aims of the Directive.

In my opinion, however, there is another path, how the Czech consumers may fight against the using of unfair arbitration clauses by businessmen. My impression is, and it was indicated by Advocate General *Tizzano* in his Opinion in *Claro* case, that taking the consumer before a arbitrator due to arbitration clause which turns out to be invalid, thus illegal, amounts to a breach of right to a fair hearing.[33] This right is guaranteed in the Czech Republic by the article 36 of the Bill of Fundamental Rights and Freedoms (hereinafter "Bill of Rights") which provides that *"anyone may claim her right before independent and impartial court and in defined situations before the other institutions."*[34] This article should be read together with the article 38 of the Bill of Rights which stipulates that *"anyone may not be*

[31] Cf Craig, P.- De Búrca, G. *European Law. Texts, Cases and Materials*. Oxford: OUP, 2008, p. 295.
[32] Cf *Joined cases C-178//94, C-179/94, C-188/94 and C-190/94 Erich Dillenkofer and others v Bundesrepublik Deutschland* [1996]ECR I-04845. This case dealt with the improper transposition of the Package Travel Directive. However, I must confess I am not fully convinced that the claims for State liability will work easily in practice in the Czech Republic. But it is still one of the solutions how to face the improprely implemented Directive.
[33] The Advocate General Tizzano opinion, para 57.
[34] Usnesení předsednictva České národní rady č. 2/1993 Sb. ze dne 16. prosince 1992 o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky.

removed from her lawful judge. The competence of court and judge is provided by law." Therefore, I am inclined to say that the bringing of a consumer before arbitrator due to arbitration clause which is invalid, provided that there was the ordinary court otherwise competent, in which the case might have been heard, means that the consumer was deprived of his right of fair hearing and right to lawful judge. This holds true especially in cases of so called arbitration centres or arbitrators *ad hoc*. On the other hand, I would be somewhat reluctant to reach the same conclusion as for the *Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic*.[35] Although I am aware that I have opened can of worms by proposing these argument, I think that they could prove correct in the (perhaps nearly) future.

The content of the Directive was introduced into the Civil Code, which lays down the rules for unfair contract terms in its articles 55 and 56. The article 56(1) of the Directive contains the general clause for assessing of unfairness of the contract term.[36] The same article contains in its third paragraph the non-exhaustive list of unfair terms which may be considered unfair. In addition, it is worth mentioning that said list does not include the arbitration clause.

In my judgement, the most problematic provision in the Civil code concerning unfair contract terms is the article 55(2) of the Civil Code which provides that *"term in consumer contract is considered to be valid thus binding unless the consumer has objected its invalidity."* This conception of so called relative invalidity of unfair contract term has been based on fallacy that consumers are able to consider whether the contract term is advantageous or not.[37] Hence, if the term is favourable to consumer, then he will not claim its invalidity.[38] The good example to illustrate how illusory this conception is might be just an arbitration clause contained in standard business terms, whose far-reaching impact cannot be practically foreseen by consumer. Thus, since consumers have often only limited knowledge about their rights and the consequences of the contractual terms, the article 55(2) of the Civil Code cannot fulfil the requirement of art. 6(1) of the Directive that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. At the same time, the article 55(2) of the Civil Code is contrary to the line of the ECJ´s cases in *Océano, Cofidis* and *Claro*, where the ECJ decided that the court should asses the unfairness thus invalidity of arbitration clause on its own motion.[39]

[35] More information available at: http://www.soud.cz/en_index.php?url=en_obsah.htm [visited 18th May 2008]
[36] Its wording is practically identical with that of art. 3(1) of the Directive. Cf chapter 2 of this paper.
[37] Cf Švestka, J.-Spáčil, J. - Škárová, M.-Hulmák, M. *et al*. *Občanský zákoník. Komentář.* Praha: C. H. Beck, 2008, *§55, bod 11*.
[38] *Ibid.*
[39] L.c.

Last but not least, practically all Member States have reacted in their legislation on arbitration agreements between businessmen and consumers.[40] For instance, French Code Civil excludes the possibility to conclude arbitration clause between consumers and businessmen.[41] The specific regulation contains German law which lays down strict formal requirements for the arbitration agreement. According to the § 1031(5) German Code of Civil Procedure an arbitration agreement "*must be contained in a document signed by the parties themselves*".[42] Some countries, for example Denmark, have chosen rather different was of dealing with consumer arbitration by establishing state complaint boards in which business and consumer associations participate.[43] The Danish law provides that the consumer can at any time take his complaint before the board.[44] The arbitration proceedings shall be staid until the complaint board has decided the case. It seems to be the one of the possible avenues leading to satisfactory regulation of consumer disputes in the Czech Republic.

7. Conclusion

Only recently the *Juzgado de Primera Instancia No 4, Bilbao* (the Court of First Instance, Bilbao, Spain) has referred to the ECJ following preliminary question[45]: *"May the protection of consumers under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts require the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and accordingly to annul the award if it finds that that arbitration agreement contains an unfair term to the detriment of the consumer?"*

The prognosis of the answer by the ECJ would be that the Member States´ court may on its own motion annul arbitration award provided that the arbitration clause is unfair contract term, therefore void, even if the consumer was absent in the arbitration proceedings. The reason behind this is the message given by the *Claro* decision: the arbitration is a domain of the disputes between businessmen. In consequence, in the B2C dispute preference should be given to the other alternative dispute resolution methods.

The *Claro* case has brought another important point. It has shown that the procedural consequences of the arbitration clauses are far-reaching. Therefore, one may even say that these "procedural unfair

[40] Comprehensive overview provides Reich, N. *More clarity after 'Claro'? Arbitration clauses in consumer contracts as an ADR (alternative dispute resolution) mechanism for effective and speedy conflict resolution, or as'deni de justice'?* ERCL, 2007, 1, p. 44

[41] Cf Reich, N., *op. cit.* sub 40, p. 47.(with reference to article 2061 Code Civil)

[42] Reich, N., *op. cit. sub* 40, p. 45.

[43] Reich, N., *op. cit. sub* 40, p. 48.

[44] Article 8(3) of the Danish *"Lov om Forbrugerklagenoevnet"*(cited according to Reich, N., *op. cit.* sub 40)

[45] The reference for a preliminary ruling from Juzgado de Primera Instancia No 4, Bilbao (parties to an original proceedings *Asturcom Telecomunicaciones S.L.*and *Cristina Rodríguez Nogueira*), OJ C 92 , 12 April 2008, p. 17.

terms" are even more dangerous for consumers than, for instance, excessive penalty clauses. Thus, the Czech law-maker should ensure that the using of these arbitration clauses in the consumer contracts shall not continue. In consequence, there must exist an effective mechanism of settling consumer disputes. Notwithstanding the latest efforts of the Ministry of Industry and Trade which tries to employ voluntary mechanism of settling the consumer disputes, it is not for sure that this will lead to desirable consequences.[46] Hence, There should be a mechanism of settling the disputes between consumers and businessmen which is obligatory for both sides so that there is no room for those of businessmen who abuse the arbitration clause in their standard business terms.

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[4] Landlot, P. *Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements*, Arbitration International, 2007, vol. 23, no. 1, pp. 65-66.

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[46] More information available at: http://www.mpo.cz/zprava42563.html [visited 18th May 2008]

[11] Reich, N. *More clarity after 'Claro'? Arbitration clauses in consumer contracts as an ADR (alternative dispute resolution) mechanism for effective and speedy conflict resolution, or as'deni de justice'*? ERCL, 2007, 1, p. 44.
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TOWARDS FRANCHISING IN INTERNATIONAL TRADE

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Abstract

First part of the article deals with the general description and definition of franchising system. After description of possible types of franchise contracts, a part of the paper is also dedicated to the topic, what is franchise agreement and what is not (like exclusive distribution and purchasing agreements). Different clauses from agreements which may be considered as restrictive are discussed in next part. Last part deals with the Pronuptia case, which is considered as major case in this field.

Key words

Franchising, franchise, franchise agreement, competition, franchisor, franchisee, Pronuptia case.

Introduction

The term franchising has French origins and was used for advantaged trading without taxes.[1] But today is the meaning very different and what stays is probably the fact that franchising as selling system enjoys some advantage in competition law, which are normally not allowed and considered as banned.

In this paper I intend to prove whether that is true, if so, how far can franchisor go in infringements of competition rules and where are limits of franchise regulation, when it comes to competition effects in European area. The Europe (in comparison to Canada and USA) is typical for none national regulation of franchise contracts. As we call in-nominated contract those, who are (often) used in public but has no codeficated name in any code or bill. The reason for regulating franchising contract may be the wish to protect smaller businessmen and sole-proprietorship against experienced franchisors[2].

Franchising does concern many legal branches. One of them is competition law for general reason of trading conditions between franchisor and franchisee, which are legally independent trading entities, but in fact they are so close like depended entrepreneurs.

[1] Řezníčková, M., Franchising: podnikání pod cizím jménem, 2. vyd., Praha : C.H. Beck, 2004. ISBN 8071798940, p.113
[2] Jakubíková, D., Franchising, Plzeň : Západočeská univerzita, 1997. ISBN 8070823399, p.13

Czech Competition Code was in the past followed by directives of Office for protection of competition no. 198/2001 Coll. about general exemption for certain kind of vertical restraints, where franchising contracts belong to. This directive and some other block exemptions were annulled by the Office with legal force from 1.10.2005 for simple reason: The exemption was similar to European exemption rules issued by Commission and for creation of duplicated regime with similar effects.

Definition

There are more definitions of franchising, but usually means an arrangement whereby the proprietor of trade mark, trade name or other distinctive marketing presentation (the franchisor) grants one or more parties (the franchisees) a license to use that trade mark, trade name or presentation in the supply of goods or services and to arrange their premises in accordance with the distinctive layout or format associated with the franchisor.[3] The franchisee keeps independency, all risks in trade, including financial risks and shall pay fees to a franchisor (calculated per amount, time, consumption, franchisor's expenses on marketing etc.).

Types of franchising

The typical example of franchising company is McDonald's. As everyone knows, there are independent entrepreneurs running their canteens, but they are fall under scope of uniformity, regionally same or similar products, same level of services and quality. For "outsider" all the canteens look similar or same.

We may distinguish more types of franchising than the mentioned one[4]:

- Distribution Franchise – The franchisee sells specified goods in an outlet bearing the franchisor's name. Two other sub-categories may be identified: manufacturer's franchises and chain franchise. The first includes namely cosmetics and luxury goods, where all are produced by the one franchisor, the latter includes broader spectrum of products such as food, hardware, automotive parts etc.
- Service Franchise – the services are offered in this case under same name or mark, typically restaurants and hotels cleaners or travel agents are often concerned.
- Manufacturing Franchises – the recipient of the franchisee is the producer of some product in this case. Principal examples are agreement in the beverage industry, such as Coca-cola.

[3] Roth, P.M., Bellamy, Ch., Child, G., European Community Law of Competition, London : Sweet and Maxwell, 2001. ISBN 0421564407, p. 503

[4] Ritter, L., Braun, W. D., Rawlinson, F., EC Competition Law, Kluwer Law International : Cambridge, 2000. ISBN 9041112677, chapter IV

> Competition problems may arise partly from production restrictions or partly from distribution restrictions. A condition for exemption is the preservation of freedom with respect to prices and parallel supplies within the franchise system.[5]

Franchising as selling system can be applied to almost every type of product; a normal franchise agreement for the distribution of goods is lengthy document of up to 100 pages, presenting in great details the way in which the parties are to carry out their mutual obligations.[6]
It is essential to most of franchising contracts that they do or may restrict competition, because they incline to be exclusive distribution system. It case they fall under Article 81(1), we still may consider if the contract falls under one of the exemptions.

There is number of clauses, which are considered as a partial or total distortion of competition. Following clauses may be considered as restrictive:
Territorial issues:

- Not to sell contract goods to somebody, who would resell it in the located area (obligation for both franchisor and franchisee)
- Not to sell contract goods dealers outside the franchising framework / not to include new franchisee in located area
- Not to change the location of shops

Price issues:

- Sell at (minimum) prices laid down by franchisor

Direct competition:

- Not to sell competing goods (or in certain extend)
- Not to work in competing business after end of franchising agreement

Is it a franchise agreement or not?

There might be and often are doubts whether a certain contract is a franchise contract or not. As we need to distinguish the franchising contract form others, which are not covered from competition exceptions, the franchise contract differs to exclusive distribution and purchasing agreements because

[5] Ritter, L., Braun, W. D., Rawlinson, F., EC Competition Law, Kluwer Law International : Cambridge, 2000. ISBN 9041112677, chapter IV
[6] Goyder, D. G., EC Competition Law, Oxford University Press : New York, 2003. ISBN 0199257884, p. 209

franchisees uses the franchisor's trade name and the franchise agreement normally provides for the communication of commercial know-how and the payment royalties.[7]

The franchise contract distinguishes from commercial agency agreements because the franchises are independent trades who bear the full financial risks of their business. The franchise contract distinguishes from selective distribution agreements, because a franchisee does not distribute competing goods and employs the franchisor's trade name and commercial know-how, for which he pays the royalties. It differs also to know-how licensing agreements because a distribution or service franchising agreement normally does not confer technical, but commercial know-how.[8]

The Pronuptia Case[9]

This case showed that European Court of Justice took a relatively positive attitude to franchising. In this case, Mrs. Schillgalis concluded a franchising agreement under the trade mark Pronuptia de Paris to sell wedding dresses. This agreement included several competition restrictions on both her and Pronuptia:

a) Franchisee had exclusive right to use the trade mark for marketing purposes (in Hamburg, Oldenburg and Hannover)
b) Pronuptia won't open other shop or provide goods in that territory to the third parties
c) Franchisee gets assistance regarding marketing/ education etc.

In return Mrs. Schillgalis accepted a large number of restrictions, which included following:[10]

a) To sell wedding gowns under the trade mark Pronuptia de Paris (in especially designed shops)
b) To purchase 80 per cent of goods (wedding dress) from Pronuptia or approved partners, use only approved marketing tools
c) To pay entry-fee and royalty fees (15 000 DM and 10% turnover)
d) Not to compete (refrain from competition) in any way with Pronuptia.

The Franchisee was sued later for refusing to pay royalties, but she claimed, that the agreement is void under Article 81. Court of Justice ruled in line with its earlier decisions on distribution agreements, that

[7] Ritter, L., Braun, W. D., Rawlinson, F., EC Competition Law, Kluwer Law International : Cambridge, 2000. ISBN 9041112677, chapter IV
[8] Ritter, L., Braun, W. D., Rawlinson, F., EC Competition Law, Kluwer Law International : Cambridge, 2000. ISBN 9041112677, chapter IV
[9] Case 161/84, *Pronuptia de Paris GmbH v. Irmgard Schillgalis* [1986] ECR 353.
[10] Goyder, D. G., EC Competition Law, Oxford University Press : New York, 2003. ISBN 0199257884, p. 211

the compatibility of franchise agreement with Article 81 was not to be evaluated in the abstract, but rather only in the light of provisions of each agreement and the economic context.[11]

One of key messages from the Pronuptia case is that there are inherent restrictions in the franchising system as such. The court stated two conditions to be fulfilled: First, the franchisor must be able to communicate his know-how to the franchisees and provide them with the necessary assistance in to enable them to apply his methods, without running the risk that that know-how and assistance might benefit competitors, even indirectly. It follows that provisions which are essential in order to avoid that risk do not constitute restriction on competition for the purposes of Article 85 (1) – today Article 81. That is also true of a clause prohibiting the franchisee, during the period of validity of the contract and for a reasonable period after its expiry, from opening a shop of the same or similar nature in an area where he may compete with a member of the network.

The same may be said about the franchisee's obligations not to transfer his shop to another party without the prior approval of the franchisor. That provision is intended to prevent competitors form indirectly benefiting from the know-how and assistance provided.

Secondly, the franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol. It follows that provisions which establish the means of control necessary for that purpose do not constitute restrictions on competition for the purposes of Article 85 (1)[12] – today Article 81.

Conclusion

There are always reciprocal benefits between franchisor and franchisee as well as both sides stipulations, which protect each other interest. The franchisor may extend his/her own business without running many outlets, which is very demanding on capital. The franchisee may start up business easily with no former experience, but with proved methods and know-how granted from franchisor. They both are likely to conclude an agreement with strong provisions restricting the competition. The Pronuptia case stated also for future, that provisions which establish the means of control necessary for the purpose of franchise network DO NOT constitute restrictions on competition for the purpose of Article 81.

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[11] Ritter, L., Braun, W. D., Rawlinson, F., EC Competition Law, Kluwer Law International : Cambridge, 2000. ISBN 9041112677, chapter IV

[12] Case 161/84, *Pronuptia de Paris GmbH v. Irmgard Schillgalis* [1986] ECR 353.

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PERSPECTIVE OF UNIFICATION OF OBLIGATION LAW IN ASPECT OF IMPOSSIBILITY OF PERFORMANCE

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Abstract

The main aim of this work is to show advantages, disadvantages and perspectives of obligation law unification. The Author shows how private law unification influences the legal systems of particular countries. The institution of impossibility of performance is a very good example for showing these influences, according to the fact, that projects of unified obligation law by UNIDROIT and the Lando Commission are changing traditional point of view for the matter covered.

Key words

Private law unification, obligations, impossibility, performance, Lando Commission, UNIDROIT, international private law, codification, Roman law, pandectists, civil code

The traditional role of the international private law, which is virtually known since the dawn of this province of law, was a delimitation of the functioning of private law systems of different countries in space. This function of the international private law, gained its significance in the period great codification of civil law which developed the "national" private codes. The international private law aimed to point out, which legal systems of particular countries would be the most convenient and proper to a legal assessment of the interplay between private law and international elements, thus, its general principles had properties of collision norms.

However, it would be inaccurate to limit the function of international civil law solely to an arbitration of law and conflicts of law. The discrepancies that occurred between variable legal systems constituted a brake in the development of the international trade, therefore, since the end of the 19th century there has been a tendency to unify legal systems by means of contracts between particular countries. Within international private law, this tendency is called the law unification. The law unification aims to decisively exclude any conflicts of law.

The unification of law has changed the perception of the international private law and to a certain extent increased the role of this domain of the law. It is no longer treated as a group of collision norms, which are derived solely from an internal law. The catalogue of the international private law sources has been extended by means of international agreements, thus, the norms of substantial character constitute an element of the legal system.

There is a number of reasons that make the unification of law an extremely difficult process. It has to be taken into consideration that it may have the scope limited only to a few countries. Exceptionally it embodies certain fields of the law, predominantly the unification of law concerns exclusively civil law privity with an international element. The Geneva Conventions concerning the bill of exchange and cheque law are considered the most successful examples of the unification of law.

Obviously the most ambitious undertaking that appeared during last decades in the area of the law unification, was an attempt to unify the obligation law. The obligation law plays a pivotal role either in the national or international economy. It constitutes a basis of goods and services trade, therefore it allows an unconstrained flow of commodities, services, capital and people which is an indispensable element of globalised world functioning.

Yet, the task of the unification of the obligation law is very difficult, especially by means of its social significance. It has to be mentioned that there is a number of main law traditions in the world which notably differ in their perception of the unification law. It concerns particularly the common law system and the civil law system, derived from the Roman tradition, along with its German, Romanic and mixed law families.

The concept of an unification of the contract law has its origins in the period following the Second World War, however, the first attempts to unify the obligation law were made shortly before the outbreak of war. Especially worth mentioning is the proposal of the obligation law unification in Poland, The Czech and Slovakia Republic, Yugoslavia and Bulgaria submitted by one of the most eminent Polish civilists – R. Longchamps de Berier, during the First Congress of Slavonic Jurists in 1933.

The first issue to be unified were problems concerning the international sale agreement in international trade. The work resulted with the two Hague Conventions – on International Sale of Goods and on Formation of the Contract of Sale of 1st July 1964. These conventions were not widely accepted, therefore, in 1971 the UNCITRAL started a work on preparing a new international convention concerning the sales problems.7 This work resulted in resolution of United Nations Convention On Contracts For The International Sale Of Goods, (CISG) in 1980. Over 70 countries which constitute 70% of world trade, ratified the convention and recognised it a successful attempt, to unify a component of the obligation law relevant to the international sales. It was a long step towards the process of the harmonisation and unification of obligation law.

Another significant event for the matter in question, was the creation of UNIDROIT, being a specialised department of UN. Within the frames of its competences the UNIDROIT elaborated and published in 1994, a draft of UNIDROIT Principles of International Commercial Contracts, (UPICC) up dated and supplemented in 2004.

Simultaneously, there was continued a work on the unification of European obligation law, initiated by Danish professor of law Ole Lando, who in 1976 announced a concept of a preparation of European Unified Trade Code or European Law of Contracts, Torts and Private Property. In 1982, by his initiative the Committee of European Contract Law started, which is better known as the Lando Commission. The committee was not a European Union department but was considered a private enterprise. There were three stages of the Lando Commission activities, namely, 1982-1990, 1992-1996 and 1997-2001. The Lando Commission work resulted in publication of the Principles of European Contract Law (PECL) The background for the PECL, constituted the legislation of particular countries being the members of The UE, European Union Law, mentioned above UPICC and the Vienna Convention as regards to international sales. Nowadays, the Lando Commission does not function.

Both projects of the obligation law unification display a far reaching similarities. First of all, they cannot be considered a source of a law in force. They do not have a normative character but they obviously constitute a recapitulation of the current practice in the realm of the international conventional obligations, being at the same time a form of a model legislation for a national legislators.

Most of the institutions which appear in the projects is reflected in current law orders, they were developed as a result of a law-comparative or historical analysis. The sources of some of them are found in Roman law traditions. However, a lion's share of regulations in both projects was readapted in a manner often revolutionary strayed away from their traditional formulation, accepted within many law systems as obligatory.

To the legal institutions which as a result of the unification work gained a brand new shape, belongs mainly the institution of impossibility of performance. Therefore, this institution has to be particularly examined because this specific example may perfectly show the advantages and disadvantages of the unification of private law process.

The institution of impossibility of performance has a very long tradition. It occurred firstly in Roman Law. The rule "*impossibilium nulla obligation est*" was first created by Celsus, Roman lawyer living in the second century. It states, that no one shall be obligated to perform something impossible from the beginning. Till the middle of XIXth century, this institution was understood in a very narrow way. A breakthrough in perception of the impossibility of performance came from German Pandectists, especially by F. Mommsen works. It is F. Mommsen, who divided impossibility of performance into initial and subsequent. He also created an idea of results of these kinds of impossibility. The result of initial impossibility of performance is that contract is null and void. The subsequent impossibility

touches the matters, which occurred after the formation of contract. The result of subsequent impossibility may be twofold. When the debtor is responsible for this kind of impossibility and when the debtor is not responsible for occurring impossibility.

A model proposed by F. Mommsen was realised in the primary text of the German Civil Code (Burgerliches Gestzbuch) called BGB. The ideas of Mommsen has influenced not only the German legal system. It was an example for many European civil law codifications for example for 1932 Polish Obligations Code , 1965 Polish Civil Code and also 1964 Czechoslovak Civil Code.

The project of unified obligation law proposed by UNIDROIT and the Lando Commission is totally opposite to a model proposed by the Roman Law and German Pandecists. According to article 4:102 PECL "A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates." It means, that the initial impossibility has no influence on contract validity. As a result a traditional division into initial and subsequent impossibility does not longer exist in those projects. In case of initial impossibility a contract stays valid and it may be a debtors civil liability.

The projects of UNIDROIT and The Lando Commission have influenced mostly German civil law. It is significant due to famous durability of German Civil Code and its provisions. It seemed that the provisions stipulating impossibility of performance, which inspired many legal systems were going to stay undone. But entering into power of the Obligation Law Modernization Act of 26th November 2001 (BGBl. I S. 3158) has revolutionized the matter of impossibility of performance in German legal system. The provision of § 306 BGB providing, that the contract whereas the main performance was impossible is null and void. It has been replaced by § 311a, which main aim is that this kind of contract stays valid. According to § 275 BGB the debtor has a possibility to avoid fulfilling the performance and the creditor has the right to get compensation and the right to reimburse the primary input. It shows, that the present solutions proposed in BGB were inspired by projects of UNIDROIT and the Lando Commission.

As doctrine says, the provision of projects of UNIDROIT and the Lando Commission related to the impossibility of performance are concentrated on solving practical problems and more flexible than solution proposed by Mommsen in the XIXth century.

However it is worth to notice, that the influence of the projects by UNIDROIT and the Lando Commission on legislation of different countries is limited. In the matter of fact only Germany decided to take over those regulations. Other countries rather prefer the traditional point of view to the matter covered and are reluctant to change their legal systems.

It means, that the process of unification of obligation law is still *in statu nascendi* and nothing seems it soon to be changed. For example the project of the new Civil Code of the Czech Republic has not been inspired neither by PECL nor UPICC. The impossibility of performance in those project is still divided into initial, which makes contract null and void and subsequent, which may lead into a civil liability of

the debtor. Even the countries, which decided to restate their civil law systems are very cautious in introducing such a revolutionary ideas as changes in the institution of impossibility of performance.

As it is written above the process of unification of the obligation law is extraordinarily complicated. It does not change the fact, that this process is inevitable, but on the other hand we should not expect the forthcoming finalization of this process. Certainly, the states would rather preserve their original legal ideas, which were under the influence of the tradition, history and the civil law development level. That is why unification has to be done conservatively with a respect to the legal order of every state. The author claims, that unification should be subsidiary, which means it should be conducted only in those areas of law, where it is truly necessary to provide efficiency of international economic affairs.

We should also consider if the existing particularism of legal systems is an advantage. The good example to this claim are the United States, where 50 different legal systems co-exist. This does not lead to the expected chaos because of existence of developed rules of conflicts of law. Due to the collision norms, the parties may choose law, which is the most advantageous for them, what would be impossible if the private law was unified. The pluralism of private law allows the countries to compete with each other in enforcing of solutions good for entrepreneurs, what is expected by them. But the pluralism of laws will be advantageous only when there will be clear rules of choice of law for the parties.

So what is the future of the unification of private law, especially the law of contracts? In this case we need to take a look at the Polish experience from the XXth century. After Poland gained its independence, there were five legal systems in different parts of the country i.e. Austrian, French, German, Hungarian and Russian. Polish legislator decided to unify the conflicts of law rules firstly, what was done in 1926 by enforcing the International and Inter- Province Private Law Act. The unification of obligation law was done later, in 1932.

The unification of private law in the European Union seems to be done in a very similar way. The countries of European Community decided to unify the principles of the choose law applicable to contractual obligations. The Convention of Rome introduced a clear system of indication of law, which is applicable to law of contracts. Paralelly the works on a draft of the European Civil Code were lead. But as it seems those works stuck in a dead point.

To sum up, the unification, which take place in the area of obligation law is certainly one of the most interesting process in the field of modern private law. Thus this process is very complicated, due to the fact of diversity of legal systems. Enforcing of the institutions which are totally unknown to the internal legal systems and sometimes which are incompatible to internal legal systems seems to be a step in bad direction. That is why, the best way of unification of private law is to unify provisions of international private law. This would connect advantages of unification with positive sides of existing legal pluralism.

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WTO NON-VIOLATION COMPLAINT: A MISUNDERSTOOD REMEDY OF THE DISPUTE SETTLEMENT SYSTEM?

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Abstrakt

Na základě čl. XXIII odst. 1 GATT mohou být v případě potřeby podány tři druhy stížností. Výše zmíněný článek začíná úvodní klauzulí a dále dává vymezuje tři možné situace. Prvním a zároveň nejvíce používaným druhem stížnosti je tzv. „violation complaint (stížnost podaná při porušení konkrétních ustanovení práva WTO), druhou možností je pak podání tzv. „non-violation complaint“ (stížnost podaná v případě zrušení či zhoršení již garantovaných výhod či zhoršení dosažení některého cíle GATT). Jako třetí přichází v úvahu tzv. „situation complaint“ (může být podána za všech určitých ostatních okolností). Tento příspěvek se bude zabývat tématem „non-violation complaint“ jako v minulosti možná nepochopeného a často kritizovaného právního prostředku v rámci řešení sporů před WTO. Tento druh stížnosti není sice nejhojněji používán, avšak význam jeho existence již mnohokrát podpořily panely či odvolací orgán WTO.

Klíčová slova

Světová obchodní organizace, řešení sporů, odpovědnost za jednání právem WTO nezakázaným, právní nástroj, právo mezinárodního obchodu, odvolací orgán WTO, panel.

Abstrakt

According to the article XXIII 1 GATT, three kinds of complaints can be provided. This article starts with an introductory clause and offers three alternative options. The first, and by far, the most common complaint is „violation complaint“. The second type is the so-called „non-violation complaint“ and finally the third type is „situation complaint“. This article addresses the issue of „non-violation complaint“ as a maybe misunderstood and often critized remedy of the WTO Dispute settlement system. It is not the most common remedy, but still it is a part of WTO legal instruments and its importance was in the past supported by WTO panels and the Appellate Body.

Key words

World Trade Organization, Dispute Settlement Understanding, International trade law, legal [1]remedy, Non-violation complaint, WTO dispute settlement system, Violation complaint, The Appellate Body, Panel.

1. Past and Present of the WTO Dispute Settlement System

The WTO dispute settlement is a well organized and institutionalized procedure operating since 1 January 1995. But it is not a novel system, it was built on almost fifty years of experience from GATT disputes. GATT 1947 was not international organization for trade but treaty and it contained only two short provisions relating to dispute settlement, namely article XXII and XXIII. A dispute, which was not successfully resolved through consultations, was in early years given to the working parties. The members of such working parties were representatives of all interested Contracting Parties, including the parties to the dispute. Decisions were made in consensus. In 1950s were disputes usually firstly heard by a so-called panels of three to five independent experts. Those experts were from GATT Contracting Parties, but any other the involved in the dispute. This panel reported to the GATT Council.

All above mentioned practices and procedures and some more were codified and in 1983 was established GATT Legal Office within the GATT Secretariat. During the time the legal quality of panel reports improved in one hand with increasing confidence of the Contracting Parties. While the GATT dispute settlement has been rather considered as successful, one could observe also some serious shortcomings. In so far that the improvement of the dispute settlement was on the agenda of the Uruguay Round negotiations. The number of improvements to the GATT dispute settlement system was reached already in 1989. Finally one of the Uruguay Round outcomes was new Understanding on Rules and Procedures Governing the Settlement of Disputes providing more precise rules and guidance of dispute settlements. The WTO dispute settlement is a tool for helping to ensure regulated trade with its rules and a structure for overseeing procedural norms[2].

The WTO dispute settlement system has been operated for almost 13 years now as one of the most prolific and known of all international dispute settlement systems. This long period of development influenced also types of possible complaints. Their names didn't changed but their use and content were created together with the evolution of dispute settlement system. The dispute settlement system is often described as a most significant activity of the WTO – the jewel in its crown – but in recent years has been the subject of various controversy[3].

[1] Course on Dispute Settlement, Geneva: United Nations, 2003, str. 39. (celkem 63)
[2] Cottier, T. The Challenge of WTO Law: Collected Essays, London: Cameron May, 2007, str. 75.
[3] Jakson, J. Sovereignty, the WTO and Changing Fundamentals of International Law, New York: Cambridge University Press, 2006, str. 135.

2. Types of Complaints within the frame of WTO Dispute Settlement System

Types of complaints are mentioned in Article XXIII 1) GATT 1994. It provides for three alternative options. However, this article starts with an introductory clause giving a condition that if a Member should consider that any benefit accruing to it directly or indirectly under that agreement is being nullified or impaired or that the attainment of any objective of GATT 1994 is being impeded, as a result of one of the scenarios specified in subparagraphs such as[4]:

- (a) the failure of another member to carry out its obligations under GATT 1994
- (b) the application by another contracting party of any measure, whether or not if conflicts with the provisions of GATT 1994
- (c) the existence of any other situation

In connection with above mentioned situation, the recognized types of complaints are following[5]:

- violation complaint – it is the most common complaint pursuant to the Article XXIII 1) (a) of GATT 1994. This complaint requires nullification or impairment of a benefit as a result of the failure of another member to carry out its obligations. It is a case of legal inconsistency with GATT 1994 and nullification or impairment is a result of it,

- non–violation complaint – this second type of complaint is pursuant to Article XXIII 1) (b) of GATT 1994. It may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in nullification or impairment of a benefit. Few of such complaints appeared under the GATT and in the WTO system,

- situation complaint – as a third type of complaint is pursuant to Article XXIII 1) (c) of GATT 1994. According to the text of the provision, it could cover any situation whatsoever, as long as it results in nullification or impairment. In a history few such situation complaints have been raised under the GATT, none of them has ever resulted in

[4] The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge: Cambridge University Press, 1999, str. 457.
[5] A Handbook on the WTO Dispute Settlement System, New York: University Press, 2004, str. 30.

a panel report. Any complainant has not invoked that kind of complaint in front of WTO dispute settlement organs.

3. The legal roots of non-violation complaint

3.1 General Agreement on Tariffs and Trade 1994

Under the GATT is non-violation complaint mentioned in Article XXIII 1) (b) named "*Nullification or Impairment".*. According to this article a member who considers that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that attainment of any objective of the Agreement is being impeded as the result of the application by another member of any measure, whether or not it conflicts with the provisions of this Agreement, may make written representations of proposals to the other member or members which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representation or proposals made to it.

3.2 General Agreement on Trade in Services

Article XXIII named *"Dispute Settlement and Enforcement*" is the one, which deals with the issue of non-violation complaint in its subparagraph 3. Here is stated, that if any member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of GATS is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of GATS, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the affected member shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI. If the event an agreement cannot be reached between the concerned members, Article 22 of the DSU shall apply. Contrary to non-violation in GATT, under GATS can not be this remedy used so widely. Here the affected member can not argue that the attainment of any objective was being impeded as a result of non-violation behavior of the other member.

3.3 Agreement on Trade – Related Aspects of Intellectual Property Rights

Another legal source of non-violation complaint is Article 64 of Agreement on Trade – Related Aspects of Intellectual Property Rights. This article is named *"Dispute Settlement"*. It states that the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

But subparagraph 2 of this article deals with five years moratorium for non-violation and situation complaints and states, that these shall not apply to the settlement of disputes for that period from the date of entry into force of the WTO Agreement. During this period the TRIPS Council was supposed to agree the scope and modality for above mentioned complaints[6]. The deadline already passed in 2000 and any goal was not so far reached yet. This situation is apprehended about, because of the different positions of developing and developed countries. The five years transition period for developing countries to enforce intellectual property regimes expired simultaneously with a five-year moratorium on non-violation and situation complaints. The opinion of developed countries is, that their developing partners indifference to intellectual property right prejudices copyright, patent and trademark based industries ability to trade abroad[7].

The Article 45 of Hong - Kong Ministerial Declaration is a commitment of ministers to continue in examination of the scope and modalities of this issue and make recommendation to the next Session. It was agreed, that meantime, members would not initiate such complaints under the TRIPS Agreement.

3.4 Agreement on Agriculture

Similar to TRIPS also Agreement on Agriculture contains in Article 13 named *"Due Restraint"* a provision about moratorium in its subparagraph (a) (iii). According to this provision during the implementation period was domestic support measures which were in conformity with the provisions of Annex 2 to that agreement, were exempted from actions based on non-violation complaint. This provision as well as TRIPS Article 64 and its subparagraph 2 have temporarily excluded the non-violation complaint form the scope of their dispute settlement mechanism. This provision is not in force anymore.

3.5 Understanding on Rules and Procedures Governing the Settlement of Disputes

In this legal source we can find the issue of non-violation complaint in Article 26. Here is written, that where the provisions of paragraph 1 (b) of Article XXIII of GATT 1994 are applicable to a covered agreements.

4. Case law connected with non-violation complaints

[6] Evans, E.G. A Prelimitary Excurcion into TRIPS and Non-Violation Complaints, vol. 3, nr. 6, 2000, str. 875.
[7] Samahon, T.N. TRIPS Copyright Dispute Settlement after the Transition and Moratorium: Nonvilation and Situation Complaints against Developing Countries. In Law and Policy in International Business,vol. 31, nr. 3, 2000.

In a history there have been only a handful of non-violation cases arising under Article XXIII (1) b) of the GATT. No panel reports have been ever issued about a non-violation complaint based upon the impediment to the attainment of an objective. So that GATT/WTO reports have been in majority focused upon non-violation complaints based on nullification or impairment. All together 14 non-violation complaints arisen and 6 from them were successful.

The panel´s report in Japan – Fuji Film became the standard of non-violation cases in the latter jurisprudence of the WTO. In this case, the United States argued, under Article XIII (1) b) of GATT 1994, that certain Japanese measures, relating to commercial distribution of photographic film and paper, large retail stores and sales promotion techniques nullified or impaired benefits accruing to the United States based on tariff concessions made by Japan. The Panel made a general statement about the significance of the non-violation remedy within the GATT/WTO legal framework, stating that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The same opinion had the Appellate Body in case EC – Asbestos and stated, that to the non-violation complaint as a remedy should be approached with caution and should remain as an exception[8].

The purpose of this rather unusual remedy was described by the panel in the case EEC – Oilseeds and Related Animal-Feed Proteins as following:

"The idea underlining is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with the Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.

In cases EEC – Tariff Treatment on Imports of Citrus Products and EEC – Production Aids Granted on Canned Peaches found the panel the non-violation complaints justified but the panel report were not adopted. In cases as for example Japan – Semi-conductors, US – Agricultural waiver, the non-violation claims failed for lack of detailed justification. The theoreticians highlight non – violation complaint as a essential part of GATT/WTO dispute settlement system, however lawyers and other practitioners would never prefer this remedy to violation one.

[8] WTO Analytical Index: Guide to WTO Law and Praktice, New York: Cambridge University Press, vol. 1, second edition, str. 282 – 283.

5. Conclusion

There are three types of complaints that can be made under the GATT/WTO Dispute settlement system. Namely a violation complaint in Article XXIII (1) a), non-violation complaint in Article XXIII (1) b) and finally situation complaint in Article XXIII (1) c). Under non-violation complaint the complaining Member does not allege any specific breaches of WTO rules, but contends that the adoption of a measure by the responding party has nevertheless nullified or impaired its benefits or legitimate expectations or under the GATT 1994. The other possibility to invoke non-violation complaint is that the attainment of any objective of GATT 1994 is being impeded.

Non-violation complaint has been used almost sixty years and this fact leads into two deductions. The number of non-violation complaint is not very numerous by virtue of its exceptional mettle. The contracting parties to GATT and member of WTO clearly didn't trust its application without problems. The other remark is, that only some of GATT parties or WTO members were able to use this unusual remedy. This can be a result of inequality of parties in front of the dispute settlement organs.

The scope of the WTO dispute settlement system is broader than other international dispute settlement systems which are based only on violations of agreements and its provisions. On the other hand, the WTO dispute settlement system is much narrower than those others systems in the point of view that a violation must also result in nullification or impairment or possibility of impeded attainment of an objective. The WTO is also not the only international organization which have codified the use of non-violation complaint, but the approach to this remedy is not the same. For example the members of the North American Free Trade Agreement (NAFTA) have immensely learned from their GATT/WTO dispute settlement experience. It was refered to WTO panels reports involving non-violation complaints to argue their case before NAFTA panels.

The core idea of non-violation complaint is to improve competitive opportunities that can be legitimately expected from a tariff concession and to encourage contracting parties to make tariff concessions. The non-violation clause is used to obtain the fairness of the dispute settlement system. The opinions about this remedy differ a lot some people consider it as a legal fantasy and useless and dangerous construction that should have never been included in WTO law, other point to non-violation complaint as keystone element of the WTO dispute settlement system.

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ARBITRATION PUBLIC BID

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Abstrakt

Článek se zabývá novým smluvním institutem, který se objevil v kontraktační praxi, tzv. Veřejnou rozhodčí nabídkou. Ta se objevuje ve smlouvách mezi českými registrátory doménových jmen a držiteli doménových jmen. Toto nové smluvní ustanovení se pokouší regulovat řešení možných doménových sporů mezi držitelem doménového jména a třetími osobami. Článek vysvětluje smysl tohoto institutu a jeho reálný dopad na strany případného budoucího doménového sporu.

Klíčová slova

Rozhodčí řízení, veřejná rozhodčí nabídka, řešení doménových sporů

Abstract

The article deals with one new practical contractual institute “Arbitration public bid” that has started to appear in contracts between the Czech Registrars of domain names and the Holders of these domain names. This new institute tries to regulate solving possible disputes between the Holder of a domain name and the third party. The article explains the sense of this institute and its real impact on the parties of future domain dispute.

Key words

Arbitration, arbitration public bid, domain name disputes

Arbitration and domain names

Arbitration, as an alternative to the judicial proceeding, is still more used way of dispute resolution in the Czech Republic although the number of disputes solved via arbitration is much more less than those that are litigated at courts. Nevertheless, it is true that there are some types of disputes for which the arbitration is more suitable solution than a court proceeding. One of these areas is the issue of domain names disputes. The most important reason is simple – domain name disputes are very specific. They must be decided in very short time interval of weeks or months. The litigants (especially if the adverse

party is a domain speculator) can hardly wait years for the final court decision. And the arbitration is undoubtedly faster than civil court proceeding.

It is understandable that there are attempts to implement arbitration process into domain disputes from the side of the association CZ.NIC, z. s. p. o. (hereinafter CZ.NIC).[1] But while doing this, it is important to respect valid arbitration law and find the right solution of implementation arbitration process into domain names disputes. The association CZ.NIC has chosen a specific approach. Contracts between an association and the Registrars[2] and between the Registrars and the end users contain one new arbitral institute called "Arbitration public bid". This tries to regulate solving possible disputes between the Holder of a domain name and the third party.

This article will deal especially with this new institute and will explain its sense and impact on the parties of future domain disputes.

Alternative dispute resolution

The regulation of solving domain names disputes is incorporated in two separate documents, in Registration Rules and in ADR Rules. These form integral parts of contracts between Registrars and domain name Holders (hereinafter referred to as a Holder). The first interesting regulation of solving disputes is contained in the Registration Rules. The article 16 of the Rules is called Resolution of disputes between Holder and the third parties. The interesting thing on this provision is that the way of solving disputes between the Holder and the third party is regulated in the contract between the Registrar and the Holder. This is not a normal way of creating contracts, but if there are no legal duties imposed on the third party, it is not prohibited. The article 16.1 of the Rules enacts: *"Holders are obligated to make every effort that may reasonably be required from them to achieve an amicable settlement of disputes concerning Domain Names and/or their registrations that might arise Rules of Domain Name Registration Under ccTLD .cz between a Holder and other persons. If the disputing parties cannot agree on an amicable settlement of their dispute, they are at full liberty to resolve their dispute under the applicable legislation, i.e. by means of arbitration or before general courts of justice."*[3] At the beginning of this provision we can see the reasonable attempt to settle the disputes by the negotiation.

[1] CZ.NIC, z. s. p. o., is an interest association of legal entities, founded in 1998 by leading providers of Internet services. The key activities of the association include operation of the domain name registry for the .CZ domain and the 0.2.4.e164.arpa (ENUM) domain, operation of the CZ top-level domain and public education in the area of domain names. Information cited on 20. 4. 2008, accessible from http://www.nic.cz/page/351/.

[2] Registrar is a subject, which can approach the Central Registry in a defined way and can order demands for changes of records kept in the Central Registry. Registrar administers domains for end users – the Holders of domain names.

[3] Rules of Domain Name Registration Under ccTLD .cz. [Cited on 20. 4. 2008], accessible from: http://www.nic.cz/files/nic/doc/registrar_package.zip.

Problematic is the intention of the second part of the provision. In fact it is not an arbitration agreement. This article of the Registration Rules only informs a Holder (and a party of some possible dispute that is unable to reach this information) about the Czech law that enables to solve certain disputes via courts or via arbitration. The Holder is not legally bound to accept the arbitration as the only way of solving the possible dispute. It is not an arbitration agreement, because there in not expressed a will to transfer power to decide a dispute from the courts on the arbitrators. While closing there is no obligation coming from this provision, the question on sense of it still remains.

Arbitration public bid

We can find the answer on the question posed above in article 16.3. of the Registration Rules, that deals with a new term "Arbitration public bid". It says: *"The Holder hereby makes a public arbitration offer in accordance with the Rules of Alternative Dispute Resolution, specifically for all Holder's Domain Names entered in an electronic database of Domain Names under ccTLD .cz maintained by CZ.NIC."* Public arbitration offer is a completely new institute that has appeared in the Czech arbitration law. To be able to interpret this regulation, we have to find out, how the Public arbitration offer is defined. It is explained in the Rules of ADR: "*2. 1. The Holder hereby irrevocably and publicly pledges to comply with the decisions of the Arbitration Court at the Chamber of Economy of the Czech Republic and the Chamber of Agriculture of the Czech Republic (hereinafter the "Arbitration Court" only), based on arbitration proceedings held at this Arbitration Court according to the special amendment to its Rules governing on-line arbitration proceedings, published in the Commercial Journal (hereinafter the "On-line Rules"), with respect to property disputes in which a compromise can be achieved and in which a third person challenges any Holder's Domain Name, included in the electronic database of domain names under the national domain ccTLD .cz, administered by the CZ.NIC Association; provided that the third person expresses its will to the Holder to pledge to the decision of this Arbitration Court in the given issue, particularly by initiating such proceedings at the Arbitration Court in writing […] 2. 2. This arbitration public bid concerns all domain names of the holder, including those registered by the holder after making this arbitration public bid.*"[4] This is all we can find about Arbitration public bid in all the Rules published by the association. Very important is that there is no penalty settled here for the breach of this provision in the whole contract.

This instrument – Arbitration public bid – is not known to the Czech arbitration law. Therefore it seems that there has been a really new instrument created in the Czech contractual practice. So it is important

[4] Rules of Alternative Settlement of Disputes. [Cited on 20. 4. 2008], accessible from: http://www.nic.cz/files/nic/doc/registrar_package.zip.

to describe, what rights and duties come from this regulation and who is under which obligation rising from this provision.

Interpretation

Prima facie, it seems, that the Holder of a domain name (in fact the one, who asks for a registration and later becomes a Holder of a domain name), covenants in the contract with the Registrar, that if there appears any third person, who wants to solve the dispute about the domain name via arbitration, the Holder has no chance to refuse the arbitration, because of the obligation from the Arbitration public bid. It seems that the Arbitration public bid means that the Holder of a domain name is legally bound to conduct arbitration about the domain disputes every time, when some third person calls upon him to start arbitration. And according to the web sites of the association CZ.NIC, z. s. p. o., it is clear that this is the purpose for which the Arbitration public bid was created.[5] But in fact the meaning of the Arbitration public bid is rather different.

The contract about the domain name establishes the legal relationship between Holder and Registrar. It is natural, that there is an enforceable liability for the breach of the contractual obligations between the parties. The contract can't establish the obligations for the third parties and it can't substitute the declaration of will between the one of the contractual party and the third party.

The arbitration agreement is an agreement between the parties that the disputes from their legal relationship between them will settle one or more arbitrators (§ 2 of the Czech arbitration law, 216/1994 Sb.). The Czech law does not allow entering into an arbitration agreement via "public proclamation" containing an obligation that all the disputes between the one who declares an Arbitration public bid and any other subject will be settled via arbitration. The arbitration agreement is not made even at the moment of service of an action to the arbitration court. The obligation to accede to arbitration is claimable only by the party of a contract, where the Arbitration public bid was incorporated but not by any third subject. It means that when anybody wants to settle the disputes related to the domain name between him and the Holder of a domain name via arbitration, he will have to enter into an arbitration agreement with the Holder irrespective of the existence of any public proclamation. If the Holder refuses to conclude an arbitration agreement to settle the dispute via

[5] „Provisions of the Alternative Dispute Resolution Rules state that a third party which thinks that their rights were injured by registration of a domain name may decide to resolve such dispute using a general jurisdiction court, or using the Arbitration Court of the Chamber of Commerce and Agriculture of the Czech Republic. Should such third person decide to use the Arbitration Court of the Chamber of Commerce and Agriculture of the Czech Republic, the domain name holder is obliged to comply with its ruling." [Cited on 20. 4. 2008], accessible from: http://www.nic.cz/page/314/pravidla-a-postupy/.

arbitration, there is no other possibility to solve the dispute than to bring the action against the Holder before a court.

If the Holder of a domain name does not settle the dispute via arbitration, he will break the contract about the registration of a domain name between him and the Registrar. Therefore the Holder is responsible for breach the contract only to the Registrar. It is very problematic to enforce performance of any obligation form any contract that is not rightly secured. The obligation contained in Arbitration public bid is very specific one. And in the respect of the fact, that there is no penalty for breach of the obligation declared in Arbitration public bid, the obligation to settle the dispute via arbitration is in principle unenforceable. The only way how to secure the performance of this obligation is to settle some kind of easily enforceable penalty for its breach. In that case the Holder of a domain name should choose what will cause less troublesome consequences, if breach of the contract or its completion. To settle the contractual penalty in a reasonable motivating rate it seems to be the most suitable solution of this situation. The third party has no chance to force the Holder of a domain name to accept the arbitration. It is only the fear of paying the contractual penalty for breach of the contract between the Holder and the Registrar that can force the Holder to complete the contract. And it is only Registrar, who can compel the contractual penalty. If the Registrar does not know about the breach of contract, he can't claim for the penalty. The problem is also on the other side. The third party that wants to settle the disputes via arbitration should be informed about the contract between the Holder of a domain name and the Registrar. And if the Holder refuses arbitration, the third party can inform the Registrar about breach of their contract.

Conclusion

The idea and the sense of creating Arbitration public bid are clear. The association CZ.NIC wanted to implement arbitration as an essential way of disputes resolution, because it is more suitable solution of domain name disputes than court proceeding. In fact it is an attempt how to effectively force to the attack of domain speculators (in the positions of the Holders). The association CZ.NIC intends to use arbitration as the fastest way to decide disputes between domain speculators and the third parties that wants to assert their claim on the certain domain name. But the practical realisation of this "arbitration implementation" is not planned well to reach the presumed result.

This means that the Arbitration public bid in fact does not influence the way of solving domain disputes, despite of the opinion of the association CZ.NIC and the Registrars. According the information from web sites of CZ.NIC it seems to be clear, that the association presumes, that if the third party brings an action

against the Holder at arbitrator, the arbitration agreement will be created by delivering this action to the arbitrator and this domain name dispute will be settled via arbitration. This article showed that it is not a true and explained that Arbitration public bid has no real effect on the rights and obligations between of the Holder and the third party and their domain dispute.

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SANKČNÍ POLITIKA EVROPSKÉ UNIE

RADKA DRULÁKOVÁ, ZUZANA TRÁVNÍČKOVÁ, ŠTĚPÁNKA ZEMANOVÁ

FAKULTA MEZINÁRODNÍCH VZTAHŮ/STŘEDISKO MEZINÁRODNÍCH STUDIÍ JANA MASARYKA, VYSOKÁ ŠKOLA EKONOMICKÁ V PRAZE

Abstrakt

Restriktivní opatření (sankce) představují významný nástroj zahraniční politiky. Některé státy ukládají sankce jednostranně, jiné – jako například Česká republika - se pouze zapojují do mnohostranných sankčních režimů, vyhlašovaných OSN nebo EU. Příspěvek shrnuje dosavadní vývoj sankční politiky EU. Sleduje používání jednotlivých typů omezujících opatření (obchodní, finanční sankce, zbrojní embrga, diplomatické sankce, omezení pohybu). Na případě lidských práv ukazuje praktické využití omezujících opatření.

Klíčová slova

Evropská unie, sankce, lidská práva

Abstract

Restrictive measures (sanctions) represent an important foreign policy instrument. Some states apply unilateral sanctions, others (e.g. the Czech Republic) take part only in multilateral sanctions regimes, authorized by the United Nations or the European Union. The paper describes existing development of EU sanction politics. It regards the use of particular kinds of restrictive measures (trade, financial sanctions, arms embargoes, diplomatic sanctions, travel restrictions). Further it shows the usage of restrictive measures in practice in connection with human rights enforcing.

Key words

European Union, sanctions, human rights

Úvod

Evropská unie (EU) v současnosti používá sankce jako nástroj společné hospodářské politiky (jde obvykle o výjimku ze zásad společného trhu) a jako nástroj společné zahraniční politiky. Obojí je důkazem pokročilosti evropského integračního procesu, neboť používání sankcí bývá spojováno spíše

s tzv. *hard powers* než s tzv. *soft powers*. Příspěvek v úvodní části dokumentuje cesty, jakými se sankční politika k unijním politikám dostala. V textu je reflektována i rozmanitost nástrojů sankčních mechanismů, které jsou uplatňovány jako zbrojní embarga, ekonomické sankce či diplomatické sankce. Každý z nástrojů sankční politiky má své specifické cíle, přičemž příspěvek akcentuje především zajištění respektování lidských práv, které patří k nejdiskutovanějším.

Etablování sankční politiky v Evropské unii

Sankční politika je v Evropské unii (EU), respektive Evropských společenstvích, přítomna už od samých počátků integrace, i když ne v podobě, v jaké ji známe dnes. V zakládajících smlouvách (1957) se objevuje výjimka ze zásad vnitřního trhu Společenství, které *„... nezabraňují zákazům ani omezením dovozu, vývozu nebo tranzitu, které jsou odůvodněny požadavky veřejné mravnosti, veřejného pořádku, veřejné bezpečnosti, ochrany zdraví a života lidí, živočichů a rostlin, ochrany národního kulturního pokladu umělecké, historické nebo archeologické hodnoty, nebo ochrany průmyslového a obchodního vlastnictví. Tyto zákazy nebo omezení nesmějí být prostředkem svévolné diskriminace ani skrytého omezení obchodu."*[1] V praxi to znamenalo, že až do konce 70. let 20. století Společenství vlastní sankce neuvalovalo a v podstatě pouze provádělo sankční omezení uvalovaná Organizací spojených národů (OSN), vždy jako výjimku ze zásad vnitřního trhu.

Evropská společenství vypracovala postupy pro uplatňování sankcí až v rámci tzv. Evropské politické spolupráce (1970). Jejím základem byl závazek států Společenství vytvářet a formulovat evropskou zahraniční politiku, nicméně nestanovovala žádné závazné postupy a představovala spíše platformu pro diskuze bez častější shody mezi členskými státy. To se potvrdilo i v v záležitostech týkajících se sankcí, neboť členské státy byly často názorově rozděleny. Nepřekvapuje proto, že Společenství poprvé automomně uvalila sankce až v roce 1981.[2]

Další rozvoj v používání sankcí nastartovalo přijetí Jednotného evropského aktu (1987), který integroval Evropskou politickou spolupráci do politicko-právních struktur Evropských společenství.

[1] Článek 13 Protokolu o zboží pocházejícím a dováženém z určitých zemí, které v některém členském státě podléhá zvláštnímu dovoznímu režimu, který byl připojen ke Smlouvě o založení EHS (1957).
[2] Vůči Sovětskému svazu kvůli událostem v Polsku, tyto sankce nadto nebyly nijak specifikované. V tomtéž roce byla také přijata tzv.Londýnská zpráva upřesňující zahraničně-politické aktivity Společenství, která položila subtilnější základ i pro možnost formulovat společnou sankční politiku.

V konečném důsledku to znamenalo zapojení orgánů Společenství do sankční politiky, mj. odpovědnost Komise za implementaci jak společných sankcí, tak sankcí OSN. Z tabulky 1 je patrné, že sankce začaly být v období 80. a 90. let 20. století používány častěji a staly se viditelným projevem shody členských států v podobě společných akcí (nejčastěji používaným nástrojem se v tomto období stala zbrojní embarga).

Tabulka 1: Přehled sankcí uvalených Evropským společenstvím do vstupu Maastrichtské smlouvy v platnost

Cíl (země)	Datum uvalení sankcí	Datum ukončení sankcí	Důvody uvalení sankcí	Typy uplatněných sankcí
SSSR	leden 1982	nejasné (1982)	Intervence v Polsku	částečné obchodní embargo
Argentina	duben 1982	červen 1982	konflikt s Velkou Británií	zbrojní embargo, obchodní embargo
Írán	březen 1984	červen 1985	konflikt s Irákem	zbrojní embargo – chemické zbraně
Irák	březen 1984	červen 1985	konflikt s Íránem	zbrojní embargo – chemické zbraně
Jižní Afrika	červenec 1985	květen 1994	porušování lidských práv	zbrojní embargo, částečné obchodní embargo
Libye	leden 1986	listopad 1994	terorismus	zbrojní embargo, omezení pohybu, diplomatické sankce
Sýrie	listopad 1986	listopad 1994	terorismus	zbrojní embargo
Čína	červen 1989	dosud	porušování lidských práv	zbrojní embargo
Myanmar / Barma	červenec 1990	dosud	porušování lidských práv	zbrojní embargo, omezení pohybu, finanční sankce, částečné obchodní embargo
Irák	srpen 1990	dosud	konflikt s Kuvajtem	zbrojní embargo
Jugoslávie	červenec 1991	dosud	vnitrostátní konflikt, porušování lidských práv	zbrojní embargo, omezení pohybu, finanční sankce, částečné obchodní embargo, zákaz přeletu
Slovinsko	červenec 1991	srpen 1998	vnitrostátní konflikt	zbrojní embargo
Chorvatsko	červenec 1991	listopad 2000	vnitrostátní konflikt	zbrojní embargo
Makedonie	červenec 1991	listopad 2000	vnitrostátní konflikt	zbrojní embargo
Bosna a Hercegovina	červenec 1991	dosud	vnitrostátní konflikt	zbrojní embargo
Ázerbajdžán	únor 1992	dosud	vnitrostátní konflikt	zbrojní embargo
Arménie	únor 1992	dosud	vnitrostátní konflikt	zbrojní embargo

Zdroj: Kreutz (2008): str. 17 – 19

Restriktivní opatření ve Společné zahraniční a bezpečnostní politice EU

Rozvoj sankční politiky EU umožnila Maastrichtská smlouva (1993), která institucionalizovala spolupráci členských států v záležitostech zahraniční a bezpečnostní politiky. Tato spolupráce získala podobu tzv. druhého pilíře, který formalizoval mimo jiné i podobu rozhodovacích procedur při uplatňování sankčních mechanismů. Sankce mají být podle článku 15 SEU[3] přijímány jako společný postoj, který napomáhá členským státům vymezit přístup ke konkrétním záležitostem. Rozhodnutí o společných postojích přijímá Rada jednomyslně,[4] přičemž odpovědnost za implementaci těchto sankcí (zbrojní embarga, cestovní restrikce) leží na jednotlivých členských státech. EU definuje sankce jako nástroje diplomatické nebo hospodářské povahy, jejichž účelem je dosažení změny v činnostech nebo politikách porušujících mezinárodní právo či lidská práva nebo politikách nerespektujících právní stát či demokratické zásady.[5]

Je však třeba odlišit sankce přijímané v rámci společné bezpečnostní a zahraniční politiky a sankce, které mají hospodářskou povahu anebo znamenají finanční omezení. Takové nástroje patří do prvního pilíře a jsou přijímány v Radě[6] obvykle kvalifikovanou většinou jako nařízení a na návrh Komise. Odpovědnost za implementaci takto přijímaných opatření leží na Komisi, protože jde o záležitosti spojené s vnitřním trhem. Právním základem sankční politiky je tedy jak společná zahraniční a bezpečnostní politika (tj. společný postoj), tak sekundární komunitární legislativa (nařízení). EU pochopitelně i nadále provádí sankce přijaté v rámci OSN (a OBSE), může je přitom aplikovat i přísněji.

EU uplatňuje sankce (restriktivní opatření) [7] nejenom vůči státům, ale rovněž vůči skupinám (organizacím) či dokonce jednotlivcům. Děje se tak v souladu s posledními trendy sankčních politik, kterými jsou jednak převažující multilaterální sankce a jednak tzv. *inteligentní* sankce (smart sanctions). Tento typ sankcí totiž umožní lépe zacílit na subjekt, jehož změna chování je požadována a současně minimalizovat negativní dopady sankcí na civilní obyvatelstvo. Škála přijímaných sankcí je z těchto důvodů rozmanitá: EU může zmrazit aktiva, uvalit zbrojní embargo, uvalit finanční omezení atd. Stále platí, že zbrojní embarga jsou uvalována nejčastěji, nicméně na významu nabyly i ekonomické sankce,

[3] "Rada přijímá společné postoje. Společné postoje vymezují přístup Unie ke konkrétní záležitosti geografické nebo tématické povahy. Členské státy zajistí, aby jejich národní politiky byly v souladu se společnými postoji." (Článek 15 SEU).

[4] To, že se přítomní nebo zastoupení členové zdrží hlasování, nebrání přijetí těchto rozhodnutí. (Článek 23 SEU)

[5] *Sankce (společná zahraniční a bezpečnostní politika).* Dostupné z: http://ec.europa.eu/external_relations/cfsp/sanctions/index_cs_2006.pdf [29.1.08] Konkrétně vymezené cíle viz článek 11 SEU.

[6] V roce 2004 vznikla v rámci Rady skupina RELEX/Sanctions, která má ve své agendě mnoho aktivit spojených s prováděním a hodnocením sankcí (např. sběr a výměnu informací, asistence při hodnocení výsledků atd.).

[7] V EU jsou používány oba termíny (viz *Restrictive Measures (Sanctions) in the framework of the CFSP*. Dostupné z: www.abgs.fov.tr/tarama/tarama_files/31/SC31EXP_Restrictive%20measures.pdf nebo *Sanctions or restrictive measures in force (measures adopted in the framework of the CFSP).* Dostupné z: http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm)

neboť ekonomické aspekty bezpečnosti hrají v evropské integrační agendě významnou roli (podrobněji viz Kreutz 2005).

Kromě ekonomických sankcí a zbrojních embarg patří do společné evropské zahraniční politiky i restriktivní opatření v oblasti diplomatického práva a omezení pohybu (cestovní omezení).[8] EU používá opatření diplomatické povahy jen zřídka.[9] Opatření zakládající se na diplomatickém právu byla vyhlášena v roce 1996 proti Barmě a v roce 2003 proti Kubě. Sankce proti Barmě/Myanmaru byly uvaleny v roce 1990, v roce 1996 pak formou společného postoje,[10] a s modifikacemi (a ve formě nařízení) platí dodnes. V současné době zahrnují kromě obchodních, finančních a zbrojních sankcí také zákaz vydávání víz (vstupních i tranzitních) členům vojenského režimu, členům vlády, vysokým vojenským a policejním představitelům a jejich rodinným příslušníkům, vysokým úředníkům ministerstva turistiky (EU vydala seznam osob na které se tento zákaz vztahuje) a zákaz návštěv ze zemí EU na nejvyšší vládní úrovni a na úrovni vysokých vládních úředníků.[11]

Pokud donucující stát ukládá obchodní a finanční sankce, musí tak činit s přihlédnutím ke skutečnosti, že jeho rozhodnutí zasáhne velké množství podnikatelů i soukromých osob. Ekonomické sankce musí být vyhlášeny ve stanovené formě, aby se staly závaznými a donucující stát mohl jejich provádění kontrolovat (případně trestat porušitele). Rozhodnutí o diplomatických sankcích přináší důsledky především pro stát samotný, může být tedy přijato rychleji. Diplomatické sankce jsou také samy o sobě dostatečně *inteligentní*; donucující stát přitom není při jejich ukládání vázán jakýmikoliv podmínkami nebo okolnostmi a může je použít zcela volně. Na druhé straně, diplomatické sankce působí na donucovaný stát spíše morálně, a i když je jejich použití jednoduché, musí donucující stát vždy zvážit, jaký bude mít tento jeho krok smysl.

Hojněji se v evropské praxi můžeme setkat s cestovními restrikcemi. Jejich aplikace dopadá nejen na osoby mimo Unii (jimž je zamezen vstup na území členských států), ale i na subjekty z členských států, proto je nutné, aby byly vyhlášeny v závazné formě. Nástrojem pro jejich uvalení je společný postoj. Opatření je úzce navázáno na vízovou politiku, protože vstupu nežádoucích osob lze nejlépe zabránit

[8] Skupina diplomatických sankcí zahrnuje celou řadu opatření, která směřují do oblasti diplomatických, konzulárních a jiných oficiální styků mezi státy. Východiskem pro jednotlivá opatření jsou závazné mezinárodní smlouvy, kodifikující obyčejové právo a platné ve většině zemí světa: Vídeňská úmluva o diplomatických stycích z roku 1961 (Vyhláška ministra zahraničních věcí č. 157/1964 Sb. ze dne 10.6.1964) a Vídeňská úmluva o konzulárních stycích z roku 1963 (Vyhláška ministra zahraničních věcí č. 32/1969 Sb. ze dne 12.2.1969).

[9] Zcela nestandardním případem (nad rámec společné sankční politiky, která směřuje proti třetím státům) bylo použití diplomatických sankcí proti členskému státu – Rakousku – v roce 2000. Blíže viz: Bantekas I.: *Austria, the European Union and Article 2(7) of the UN Charter.* ASIL Insights, February 2000 (online) http://www.asil.org/insights/insigh40.htm 4.4.2008; Happold M.: Fourteen against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government, *The International and Comparative Law Quarterly*, Vol. 49, No. 4 (Oct., 2000), pp. 953-963

[10] *Společný postoj ze dne 28.10.1996 (96/635/CFSP)*

[11] Nařízení Rady (ES) 194/2008

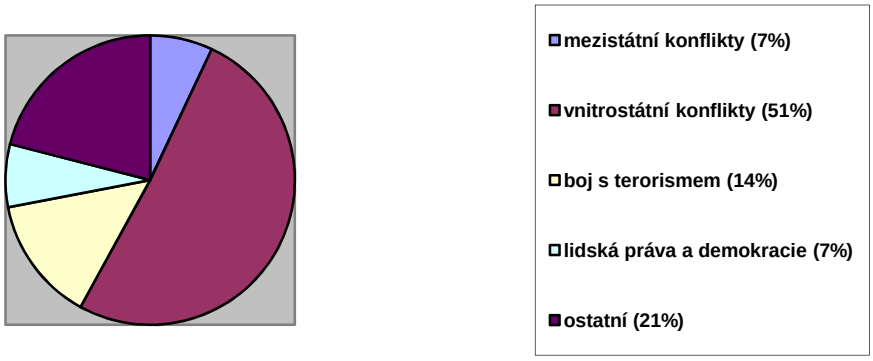
neudělením víza. Unie nařízením stanoví, občané kterých států potřebují ke vstupu na území Unie víza[12] a současně (obvykle v rámci společného postoje) je vydán jmenný seznam osob, na které působí zákaz vstupu a kterým nebude vízum, v případě, že o něj požádají, vydáno.

Současná sankční politika EU

Od 90. let 20. století převyšuje počet sankcí uvalených EU sankce, které uplatňuje OSN či OBSE. Nárůst lze přičítat jednak skutečnosti, že sankční politika EU dostala v této době legislativní rámec a jednak EU používá sankce též jako prevenci a nikoliv až ve fázi akutně hrozícího nebezpečí. EU vypracovala od počátku 21. století několik dokumentů k unijní sankční politice. Prvním byl programový dokument z roku 2004 *„Basic Principles on the Use of Restrictive Measures (Sanctions)"* (Council doc. 10198/1/04),[13] který se zaměřoval především na politické aspekty této problematiky.

Podle nejnovějších dokumentů EU definuje sankce jako nástroje diplomatické nebo hospodářské povahy, jejichž účelem je dosažení změny v činnostech nebo politikách porušujících mezinárodní právo či lidská práva nebo politikách nerespektujících právní stát či demokratické zásady.[14]

Obrázek 1: Příčiny uvalení sankcí v regionu blízkého sousedství EU

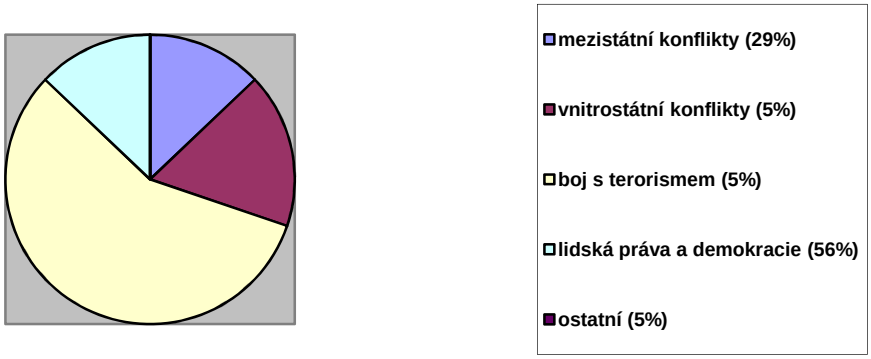


Zdroj: Kreutz (2005): 20

Příčiny uvalení sankcí Unií jsou přitom rozdílné, pokud se podíváme na regionální zacílení – v rámci konceptu blízkého sousedství[15] jde především o předcházení konfliktů, zatímco na vzdálenějších teritoriích je hlavním příčinou nerespektování lidských práv (viz obrázek 1 a 2). Z počtu uplatněných sankcí je zřejmé, že EU chce hrát především roli regionálního hráče – na evropský kontinent bylo Unií uvaleno jedenáct sankcí, na Afriku devět, na Blízký východ čtyři a na Asii rovněž čtyři (Kreutz 2005: 17).

[12] Nařízení Rady (ES) č. 539/2001 ze dne 15. března 2001 (nařízení bylo několikrát změněno, naposledy v roce 2006).
[13] Council doc. 10198/1/04
[14] *Sankce (společná zahraniční a bezpečnostní politika).* Dostupné z: http://ec.europa.eu/external_relations/cfsp/sanctions/index_cs_2006.pdf [29.1.08]
[15] Blízké sousedství EU zahrnuje evropské nečlenské státy + Alžírsko, Egypt, Izrael, Palestinskou samosprávu, Jordánsko, Libanon, Libyi, Maroko, Sýrii a Tunisko (podle Kreutz 2005: 19).

Obrázek 2: Příčiny uvalení sankcí vůči ostatním zemím světa



Zdroj: Kreutz (2005): 20

Respektování lidských práv jako specifický cíl sankční politiky EU

V mezinárodním společenství se EU snaží vystupovat jako aktér, který dbá na dodržování lidských práv nejen v rámci Unie, ale zohledňuje tuto problematiku i ve vztazích s nečlenskými státy. Ochrana lidských práv vně Společenství (podobně jako např. rozvojová politika) nebyla zakládajícími smlouvami předvídána, ve větší míře se nepromítla ani do navazujících dokumentů. Zaměření na ekonomické otázky s absencí ustanovení o lidských právech bylo příznačné i pro první verze dohod z Lomé.

Při přípravě další Loméské dohody (Lomé II) byla diskutována možnost rozšířit možné reakce Společenství na hrubé porušování lidských práv, avšak nakonec v dohodě reflektována nebyla. Přesto Společenství při slavnostním podpisu deklarovalo, že napříště budou významnou součástí jeho rozvojové politiky a že může přistoupit k adekvátním opatřením v reakci na jejich hrubé porušování. Limity takového postupu však odhalil již na přelomu 70. a 80. let komplikované případy Uruguaye, Středoafrické repuliky nebo Surinami.[16]

Teprve nové mezinárodněpolitické podmínky otevřely v 90. letech cestu k tomu, aby se standardní součástí obecných dohod uzavíraných Společenstvím s nečlenskými státy[17] staly klauzule o lidských právech. První klauzule tohoto typu spatřila světlo světa v Loméské dohodě IV. Zatímco v tomto případě je třeba její zařazení přičítat především tlaku Společenství, v dohodách s demokratizujícími se zeměmi Latinské Ameriky se tak stalo přímo na žádost rozvojových států hledajících vnější záruky pro stabilizaci

[16] Poté co v Surinamu bylo popraveno několik významných představitelů opozice a řada dalších záhadně zmizela, Nizozemí, jako jeden z hlavních donorů poskytujících pomoc této zemi její poskytování přerušilo a suspendovalo bilaterální dohodu s odůvodněním, že nadále nebude podporovat represivní režim. Na úrovni Společenství jako celku se však (v souladu s ugandskými pravidly) podobný krok nepodařilo prosadit. Díky tomu vznikl na Společné shromáždění AKT-EHS prostor pro to, aby Surinam nizozemský postup kritizovala a požadovala rychlé obnovení finančních toků. (Baehr 2000, Bartels 2005)

[17] Klauzule se zařazovaly do rámcových dohod. Neobjevovaly se v tzv. sektorových dohodách řešících konkrétní otázky spolupráce v určitých ekonomických odvětvích.

nových režimů. Klauzule měly ovšem spíše symbolický význam – lidská práva zde byla označena za základ spolupráce s nečlenskými státy bez specifikace důsledků jejich porušování. Zároveň nešlo o zcela jednotnou praxi. Pokud se nečlenská země zařazení klauzule bránila, v textu obsažena být nemusela, jak ukázala dohoda s Mexikem z roku 1991.

Novou kvalitu získaly klauzule o lidských právech v úpravě vztahů se zeměmi střední a východní Evropy. Společenství se zde jednak mohlo opřít o širší škálu mezinárodněpolitických dokumentů, neboť s těmito zeměmi se nesetkávalo jen na půdě OSN, ale též na platformě ustavující se Organizace pro bezpečnost a spolupráci v Evropě (OBSE, dříve KBSE). Zároveň začalo označovat lidská práva v souladu s pravidly mezinárodního práva jako „základní prvky" příslušných smluvních instrumentů, což mu umožňovalo v případě hrubého porušování lidských práv nečlenským státem instrument zcela nebo částečně suspendovat. Vlastní text klauzule prošel určitým vývojem od tzv. baltského typu[18] povolujícího okamžité suspendování dohody, pokud dojde k hrubému porušování lidských práv, k bulharskému typu,[19] který vedle možnosti suspendování nabízí i další adekvátní prostředky a před jejich využitím zavádí ještě systém konzultací. Za začátek nového trendu se považuje nová generace úpravy vztahů se zeměmi AKT v dohodě s Cottonou z roku 2000 zahrnující do klauzule rovněž princip dobrého vládnutí, s možným suspendováním, pokud by byl tento princip porušen výraznou korupcí.

Sankce na základě doložek o lidských právech – rozvojová pomoc

Pokud se týče praktického využití klauzulí o lidských právech, EU upřednostňuje aktivaci konzultačních mechanismů a sankční opatření považuje za krajní řešení. Přesto k nim v minulosti přistupovala poměrně často, a to nejen v případech hrubého porušování lidských práv, ale i v reakci na státní převraty, případně zpomalení nebo úplné přerušení demokratizačních procesů (viz tabulka 2).

Tabulka 2: Sankční opatření EU z důvodu porušování lidských práv – příklady 1990 - 2000

Stát	Rok uvalení sankce	Charakter sankce
Súdán	1990	Částečné přerušení rozvojové pomoci
Haiti	1991	Úplné přerušení rozvojové pomoci s výjimkou pomoci humanitární
Somálsko	1990 1991	Pozastaveny projekty v oblasti infrastruktury Úplné přerušení rozvojové pomoci
Keňa	1991	Částečné přerušení rozvojové pomoci (zejména programy zaměřené na strukturální změny)
Togo	1991 1992	Přerušení plánování rozvojové pomoci Částečné přerušení rozvojové pomoci
Zair	1992	Úplné přerušení rozvojové pomoci s výjimkou humanitární
Malawi	1992	Částečné přerušení rozvojové pomoci

[18] Baltský typ klauzule se objevuje v dohodách s pobaltskými státy a s Albánií.
[19] Poprvé použit v dohodách s Bulharskem a Rumunskem.

Guatemala	1993	Přerušení jednání o nových rozvojových programech
Nigérie	1993 1995	Částečné přerušení rozvojové pomoci Úplné přerušení, zachována pouze možnost zahájení programů na podporu lidských práv, demokratizace a boje proti chudobě
Burundi	1993 1996	Úplné přerušení rozvojové pomoci Částečné přerušení rozvojové pomoci
Gambie	1994	Částečné přerušení rozvojové pomoci
Rwanda	1994	Úplné přerušené rozvojové pomoci, v následujícím roce zmírněno – umožněna pomoc v oblasti zdravotnictví a školství, programy na podporu lidských práv
Komory	1995	Zpomalení rozvojové pomoci
Chorvatsko	1995	Přerušení pomoci z programu PHARE
Sierra Leone	1995 1997	Částečné přerušení rozvojové pomoci Úplné přerušení rozvojové pomoci
Bělorusko	1997	Zastavení technické pomoci
Kambodža	1997	Přesně nezjištěno
Tádžikistán	1997	Přerušení pomoci z programu TACIS
Guinea Bissau	1999	
Srbsko	1999	Přerušení pomoci z programu PHARE a pomoci na obnovu země
Rusko	2000	Přerušení pomoci z programu TACIS, s výjimkou pomoci určené na podporu demokratizačních procesů a lidských práv

Zpracováno podle: Arts, K. (2000) a Smith, Karen E. (2001): s. 194-195

Přerušení rozvojové pomoci pro porušování lidských práv, případně demokratických principů a dalších základních prvků obsažených v dohodách s nečlenskými státy, může být využito i v kombinaci s dalšími „tradičními" sankčními mechanismy, a to jak uplatňovanými EU samostatně nebo v rámci realizace sankcí uložených jinými mezinárodními organizacemi. Např. k přerušení rozvojové pomoci Haiti v roce 1991 o tři roky později přibylo hospodářské embargo, jímž EU prováděla rezoluci Rady bezpečnosti OSN. Sankce vůči Sierře Leone doplnila EU z popudu OSN koncem roku 1997 o embargo ropné a zbrojní. Z vlastní iniciativy naopak přistoupila k rozšíření sankcí o přerušení vojenské spolupráce a cestovní omezní v roce 1993 vůči Nigérii (Arts 2000). Zároveň EU může na porušení lidských práv reagovat pouze tradičními sankčními mechanismy, bez využití opatření v oblasti rozvojové spolupráce.

Přes širokou škálu možností, kterými EU v reakci na porušování lidských práv disponuje, i přes poměrně vysokou četnost jejich využití, jsou však její postupy poměrně často kritizovány jako nekonzistentní, a to i po odstranění základních omezení vyplývajících v minulosti z reality studené války. Poukazuje se např. na to, že Společenství nereagovalo sankčními opatřeními na zrušení voleb v Alžírsku v lednu roku 1992 nebo že do již zmiňovaných sankcí vůči Nigérii nezahrnula ropný bojkot. Neuralgický bod sankční politiky související s lidskými právy pak od počátku 90. let 20. století až do současnosti představuje postup vůči Číně.

Závěr

Sankční politika EU se jako autonomní nástroj společné zahraniční politiky etablovala až v 90. letech 20. století. Používá širokou škálu sankčních mechanismů: zbrojní embarga, ekonomické sankce,

diplomatické sankce atd. Ekonomické sankce jsou používány především jako alternativa vojenských zásahů a současně jako projev tlaku na přítomnost etických prvků v zahraniční politice (Hill 2003: 149). Častým motivem jejich užití v současnosti je nátlak aktéra na dodržování lidských práv subjektem, vůči němuž jsou namířeny.

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CONFLICT RULES FOR DELICTS AND QUASI-DELICTS[1]

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Abstract

Following contribution deals with the conflict rules for delict/torts and quasi-delicts. We will refer to unsuitability of present Czech national legal regulation and on the hierarchy of the conflict rules set in innovative Regulation Rome II we will document how huge shift is coming to the practise of Czech courts.

Key words

Conflict rule, delict, tort, non-contractual obligation, private international law, Rome II, choice of law, unfair competition, product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, industrial action, defamation, unjust enrichment, *negotiorum gestio*, *culpa in contrahendo*

1. Introduction

Czech private international law which has been until recently envisaged as exclusively national discipline only with higher number of international sources of law has been coming through fundamental changes connected with entering EC during the last decade. We don't want to justify all the changes by the accession into EC but in context of PIL it is not superficial simplification but pure establishment of facts. The scope of this contribution is not to analyze the course of events on the field of PIL in general but to concentrate on one of the last PIL communitarian regulations – n. 864/2007 on the law applicable to non-contractual obligation (ROME II). This abbreviated name reflects among others connection to ROME I (both Convention on the law applicable to contractual obligation and coming Regulation with the same name). These two legal acts – Rome I and Rome II – cover together both contractual and non-contractual obligations.

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In general - present Czech national conflict of law regulation is more likely fragmentary and unsuitable therefore the new European legal regulation represents the huge step in this field of PIL. We will document this establishment thereinafter.

The purpose of this contribution is to give the reader the summarizing review of the conflict of law rules which are implicated in the Rome II Regulation and to compare this legal regulation with present Czech national one. We will skip over the genesis of the European area of justice, freedom and security and also over the development of Rome II. We also put aside the area of international conventions regulating the area of conflict rules for delicts.

2. Non-contractual obligation

First of all we consider necessary to outline very briefly what we think of delict. It would be more accurate to use the term non-contractual obligation which is used in the regulation Rome II. Non-contractual obligation rises not from the contract but from the breach of a duty defined by the objective law while there is no legal but only factual relationship between parties. From the breach of a legal provision the responsibility obligation arises and this obligation is already the legal one. Usually two divisions of non-contractual obligation are distinguished. The first one where the irregularity (wrongfulness) constitutes the essential presumption of existence (unfair competition, defamation) and the second group where contrariwise the irregularity (wrongfulness) is absent. The first group – delicts – is better known and represents the bigger part but we can't leave out of consideration the second group – sometimes called in the Czech theory as quasi-delicts i.e. unjust enrichment or pre-contractual liability.

We would like to mention very shortly whether it is necessary to diverse between delicts (Czech/continental point of view) and torts (common-law point of view). Even though there is a difference in the methodology of these two institutes – continental systems of law prefer general clause combined and supplemented by a few of particular provisions whereas high number of concrete types of torts inhere to common law systems but the main principles of both legal institutes are the same – the breach of a duty defined by the objective law, implication of such a breach and the causal connection between previous mentioned two points.

3. Czech PIL Act n. 97/1963

In the present Czech law there is only one legal provision dealing with non-contractual obligation – section 15 of PIL Act. And even this information is a little bid flaming. This provision concerns not the delicts/torts as such but only their effect – with the liability for damage. It is found insufficient while it doesn't cover delicts as such and also doesn't cover all possible effect only the liability for damage[2]. On the other hand there are delicts where the existence of damage is not the essential presumption of a delict such as unfair competition where the menace of damage is fully sufficient. The other inadequacy can be found in the lack of the explicit regulation of torts committed abroad but with effect between two Czech citizens[3]. Entirely improper the rule is for other non-contractual obligations than delicts such as negotiorum gestio, unjust enrichment or pre-contractual liability. The creation of these conflict of law rules has stayed on the Czech doctrine of PIL and on the practise of courts. We don't want to be too rough to the Czech PIL. The truth is that also present Czech doctrine of civil substantive law leaves delicts out and concerns only on their effects. If the delict is dealt with than it is mentioned only as one of the causes for rise of the obligation. So both doctrines (of substantive law and private international law) mentioned above have gone hand in hand. Usually the legislator tries to cover by the conflict of law rules all the tasks lay out by the substantive law. Where there is none substantive provision there is no need for a conflict of law rule.

According to the Czech doctrine of PIL sec. 15 covers besides the effect of delicts – liability for damage also premises of inception of damage, substance, range and the ways of compensation, competence to perform delict, circumstances excluding liability, burden of proof and preclusion or expiration of rights for damage. Sec. 15 uses two equal connecting factors which are formulated alternatively to each other. These are *lex loci delicti commissi* (the law of the place where the delict was commited – where the wrongfulness arose) and *lex loci damni infecti* (the law of the place where the effect of the wrongfulness showed itself). In many cases these two places would be the same (car accident, injury of a skier by another skier) but there are a lot of imaginable situations where these places vary (leak of poisonous chemicals in one state and getting through a river to the second state and causing damages, transmission of commercial in TV which is consider to be an unfair competition and receiving of this commercial in the neighbouring state in which the same or very similar language is used). We can put a question whether in such cases the decisive institution or the plaintiff side has a right to make the choice. Notwithstanding opinion appeared that both the court and also the plaintiff was allowed to make the choice lead by the stand-point of material justice[4] it was overrun by the opinion that the right to choose belong only to the court which should follow the collision justice[5]. We lean towards Kucera´s

[2] Though we agree it would be the most frequent effect.
[3] Such a situation is currently solved by the enunciation of absence of relevant international element.
[4] Tichý, L. *Náhrada škody při mimosmluvním porušení povinnosti,* kand. dis.práce, Praha 1982, příloha IV
[5] KUČERA, Z. *Mezinárodní právo soukromé.* 5. vydání. Brno : Doplněk, 2001. s. 308. ISBN 80-7239-100-3

opinion for taking into account the collision justice even though we admit that usage of this point of view lowers the plaintiff legal certainty.

The truth is that since 11th January 2009 sec. 15 is going to be replaced (but not completely) by the Regulation (EC) n. 864/2007 on the law applicable to non-contractual obligation (Rome II).

4. Regulation (EC) n. 864/2007 on the law applicable to non-contractual obligation (Rome II)

4.1 General overview

Let start a little bit more generally. Among the member states of EC the rules to set up the competence of national courts in relation to courts of other member state courts were unified (partly) early in Brussels Convention (now Regulations Brussels I and also Brussels II). Nevertheless it wasn't sufficient while parties have been able to agree on the jurisdiction of particular state courts or even the plaintiff alone has been able according to alternative jurisdiction rules to choose between courts of member states. This is a typical background for *forum shopping* phenomenon which can be avoided by unification of conflict of law rules. First attempt supposed to be a Convention on the law applicable to contractual and non-contractual obligations[6]. The draft was introduced in 1972 but after accession of UK and Ireland the preparatory works slowed down rapidly and finally in 1978 ECC refrained from reception of the whole project and cut it down only to contractual obligation. The reason embodied in the very dissimilar attitude to non-contractual obligation among member states. Therefore the area of no-contractual obligation stayed untreated on the ECC/EC level.

After Amsterdam Treaty entered into force the situation changed considerably due to the new competences[7] of EC institutions[8]. Passionate discussions about the Rome II draft started in May 2002 in which member states, academics and also private organizations representing contractors or consumers participated. Further development was even more convoluted. Report on proposal for regulation Rome

[6] KUČERA, Z., KUNZ, O. Návrh úmluvy států EHS o právu použitelném na smluvní i mimosmluvní závazky. *Právník*, 1975, s. 891 - 899

[7] See also BASEDOW, J. The communitarisation of the Conflict of Laws under the Treaty of Amsterdam. Common Market Law Review, 2000, č. 37, s.687 - 708., HAMBURG GROUP FOR PRIVATE INTERNATIONAL LAW. Comments on the European Commission's Regulation on the Law Applicable to Non-Contractual Obligations. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2003, č. 67, s. 1 - 56. ISSN 0033-7250., REMIEN, O. Community law versus conflict of laws. Common Market Law Review, 2001, č. 38, s. 53 - 86.

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II[9] worked by rapporteur Diana Wallis was of a high impact on the whole process while it represented more likely the common law point of view[10].

4.2. Characteristic and the Scope of Rome II

According to art. 6 the Regulation should be the necessary step to improve the predictability of a dispute and thus it is necessary for the proper functioning if an internal market. While it is a Regulation which is directly applicable and has the primacy over the national legal provisions it should be applied whenever a dispute is decided by a court of a member state[11] – the Rome II is of universal use (art. 3)[12].

The Regulation consists of 7 Chapters:

a) Scope
b) Torts/Delicts
c) Unjust Enrichment, *Negotiorum Gestio* and *Culpa In Contrahendo*
d) Freedom of Choice
e) Common Rules
f) Other Provisions
g) Final Provisions

Some non-contractual obligations are excluded from the Scope of the Regulation, i.e. those which are arising out of family relationships and relationships with comparable effects; of matrimonial property regimes; arising under bills of exchange, cheques and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; non-contractual obligations arising out of nuclear damage; non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation[13] and others (art. 1(2)). Regulation shall not apply to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii[14])* and to evidence and procedure.

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[9] FINAL A6-0211/2005
[10] Wallis proposed to remove almost all of the special rules – will be mentioned infra.
[11] Excemtion is represented by Denmark (art. 1(4))
[12] See VALDHANS, J. Evropský justiční prostor ve věcech civilních. Část XIII. Návrh nařízení o právu rozhodném pro mimosmluvní závazky. *Právní fórum*, 2006, č. 2,
[13] Tort/delict of defamation reveals oneself as a very problematic provision. It used to be included in the draft but caused one of the largest protests and malevolence. On the Swedish proposal this tort/delict was after long discussions excluded because it seemed that this one provision alone is able to stop the reception procedure. The largest task lay in finding of well-balanced position between the protection of freedom of speech and liberty of press in one hand and protection of privacy and personal rights (among others in face of media attacks) in the other hand.
[14] *Acta iure imperii* were not mentioned in the primary Commission draft.

Tort/Delict status (the law applicable in accordance with the conflict of law rules) include above all (art. 14):

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) the grounds for exemption from liability, any limitation of liability and any division of liability;
(c) the existence, the nature and the assessment of damage or the remedy claimed;
(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision
of compensation;
(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) persons entitled to compensation for damage sustained personally;
(g) liability for the acts of another person;
(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relation to the commencement, interruption and suspension of a period of prescription or limitation.

4.3 Hierarchy of the choice of law rules in Rome II

Rome II follows out trends of the last decades in PIL and puts stress on the principle of autonomy and introduces to the Czech legal system connecting factor for delicts which was unknown – *lex electa* (art. 14). Even though this possibility is substantially limited it stands for a huge innovation. Law elected by the parties represents the primary rule which can be used for both delicts and quasi-delicts. Choice can be performed both *ex ante* and *ex post*[15] in relation to the wrongdoing with the condition that ex ante can be performed only between professionals. Settlement shall be expressed or demonstrated with reasonable certainty by the circumstances of the case. The choice doesn't affect the rights of third parties. Additional restrictions result from art. 14(2) and 14(3) according to which the choice shall not prejudice the application of rules of country which cannot be derogated from by agreement if all elements relevant to the situation are located in this country. EC law if all elements relevant to the situation are located in EC state is treated likewise when the law on non-member state is chosen. Certain conflict rules which are mandatory can't be excluded by the choice made by the parties – unfair competition and acts restricting free competition and infringement of intellectual property rights.

[15] Analogous to Rome I the Regulation tries to protect the position of a weaker party – employee or consumer.

Choice of law is succeeded by the general conflict rule which is choosing between *lex loci delicti commisi* and *lex loci damni infecti* for the benefit of *lex loci damni infecti.* Again it is the illustration of accent of modern trends in PIL when the scope has shifted from choosing of law optimal for sanction of the malefactor to the law optimal for indemnity of sufferer[16]. If we talk about damage than only direct damage is considered. In the preamble there is said explicitly that for example in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively[17]. The general rule shall be used for all torts/delicts with exclusion of those for which the special rules have been formulated. Following two subsections formulates the *lex communis* rule for situation when the malefactor and sufferer have their habitual residence in the same country or the escape clause for situations where circumstances of the case are closely connected with country other than previous mentioned.

As we mentioned hereinbefore special conflict rules are formulated for certain delicts[18]:

a) Product liability (art. 5)
b) Unfair competition and acts restricting free competition (art. 6)
c) Environmental damage (art. 7)
d) Infringement of intellectual property rights (art. 8)
e) Industrial action (art. 9)

Legislators consider these torts to be specific in such a degree it is impropriate to use the general rule. European Parliament and the rapporteur Diana Wallis above all strongly disagreed and tried to reduce this number but were not successful.

Compared to the former Commission draft in the final text there is no general rule for quasi-delicts and explicit conflict rules for 3 particular delicts have been submitted – for unjust enrichment (art. 10), *negotiorum gestio* (art. 11) and *cupla in contrahendo* (art. 12). First two have very similar conception

– *lex causae* if quasi-delict is connected with the relationship previously existed between the parties,

– *lex communis* where the parties have their habitual residence in the same country

– law of the country in which the quasi-delict took place.

[16] KRÁL, R. Ke kolizní úpravě občanskoprávní mimosmluvní odpovědnosti. *Právník*, 1989, č. 8, s. 687 – 695.
[17] Due to the same terms used both in Rome II and Brussels I it is possible to use the preliminary case sof ESD as C-364/93 Marinari or C-168/02 Kronhofer.
[18] For closer information see VALDHANS, J. Evropský justiční prostor ve věcech civilních. Část XIII. Návrh nařízení o právu rozhodném pro mimosmluvní závazky. *Právní fórum*, 2006, č. 2,

Culpa in contrahendo differs partly. *Lex cauase* stays on the first place and for situations the previous rule can't be used than *lex loci damni infecti*, *lex communis* and the escape clause shall be used.

4.4 Other provisions

Similar attention as Rome I does Rome II gives to overriding mandatory rules, public policy of the forum or exclusion of renvoi. Due to the range of this contribution we will not deal with these questions.

5 Conclusion

Contemporary Czech conflict rule regulation for delicts and quasi-delicts could be hardly described as sufficient or suitable. Soon it will be replaced by the new, modern legal regulation – Rome II which will constitute a sizable drift. We suppose this drift will lead to the easier application of law and higher certainty of parties concerned.

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Zeitschrift für ausländisches und internationales Privatrecht, 2003, č. 67, s. 1 - 56. ISSN 0033-7250.

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LOOKING FOR THE LAW APPLICABLE TO NON CONTRACTUAL OBLIGATIONS IN THE REGULATION ROME II

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Abstract

The contribution deals with three main aspects of looking for the law applicable to non-contractual obligations. Firstly it focuses on the short history of this process, then introduces the justification for the regulation and finally presents the scope of the general rule cointained in Article 4.

Key words

Rome II, european private law, lex loci delicti commissi, lex loci damni

1. The beginning of the european cooperation in civil matters

Treaty establishing the European Economic Community didn't empower the European Economic Community in competencies to establish private law. Only the article 220 of the TEEC stated that the members of Community could undertake, if neccessary, the negotiations concerning the simplification of formalities in the matter of mutual recognition and execution of judgements and arbitral awards[1].

Taking the foregoing into account the members of the EEC could cooperate in civil matters only by the way of international conventions. The first project of the Convention on the law applicable to contractual and non- contractual obligations was announced in 1972 r. The accession of Great Britain and Ireland to the EEC caused the limitation of the Convention's scope only to the law applicable to the contractual obligations[2].

But it was Treaty on European Union from Maastricht which placed the cooperation in civil matters in the so called Third Pillar of the EU. According to the article K.1 paragraph 6 of this Treaty, for the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard as the matter of common interest judicial cooperation in civil matters[3]. Unfortunately the basic tool of cooperation in the Third Pillar was still the international convention.The Third Pillar maintained an intergovernmental

1 R. Mańko, *Prawo prywatne w UE. Perspektywy na przyszłość*, Warszawa 2004, s. 5

2 J. Gołaczyński, Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej, Warszawa 2007, s. 226

3 http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001

lawmaking structure. While Member States had a general right of initiative, that of the Commission was more limited and the European Parliament played a minimal role[4].

In October 1994 the European Council announced the plan which aim was to establish european regulation concerning the law applicable to non-contractual obligations. In 1998 the Member States received the questionnaires worked out during the four meetings. The questionnaires led to the preliminary project of the convention on the law applicable to non-contractual obligations. In the same time the European Commission introduced the other project prepared by the European Private International Law Group (GEDIP) in the frames of the project Grotius.This project referred the solutions of the Rome Convention from 1980 on the law applicable to the contractual obligations but it also introduced the new ones. Firstly it permitted the choice of proper law after the damage occured. Secondly, in the lack of the law chosen by the parties, it permitted the clause of the closest connetion[5].

Unfortunately the project never came into force. The process of preparing its next versions showed all the weaknesses of the solution adopted in the Treaty on European Union. The basic tool of cooperation remained the international convention what made it ineffective. The text of such a convention usually wasn't ratified by the all Member States and the whole project collapsed[6].

The second problem was too limited participation of the european institutions. They could only initiate the negotiations and consult the problems but they couldn't lead the official works as they didn't have proper competencies.

Everythig changed when the Treaty of Amsterdam came into force in May 1999. The new Title IV transfered the cooperation in civil matters from the Third Pillar to the First one. Currently the art. 61 states that in order to establish progressively an area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65. According to Article 65 measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases, (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction, (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States[7].

On the basics of this Article the problem arose if the European Union had the competencies only to create the norms of competences which referred to the acts which happened within the territory of the

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4 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6605.htm

5 M. Fabjańska, M. Świerczyński, Ujednolicenie norm kolizyjnych dotyczączych zobowiązań pozaumownych, KPP, r. 2004, z. 3, s. 719

6 P. Saganek, Współpraca w dziedzinie wymiaru sprawiedliwości i spraw wewnętrznych, [w:] D. Milczarek, A.Z. Nowak (red.), Integracja europejska. Wybrane problemy, Warszawa 2003, s. 214-218.

7 http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0001010001

Community. The European Commission acknowledged that such norm of competence were universal and could also indicate the law of the third country, otherwise their use would be very limited[8].On the basics of this article the European Council on the 3 December 1998 accepted so called Vienna Action Plan which aim was to create proper tools of Community Law reffering to competence law[9].

Thanks to the solutions of the Treaty of Amsterdam the Member States could use the regulation as a mean of unifying of the international private law. According to the Article 249 of the TEU a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States[10].In this way all Member States are forced to apply solutions adopted by regulations.

In May of 2002 the European Commission introduced the preliminary draft of regulation on law applicable on non-contractual obligations. The draft was opened to discussion and in 2003 r. the European Commission, after taking into consideration all comments and remarks, published the project and sent it to the European Parliment. In the meantime the Hague Programme, adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).The regulation follows the private international law of many european countries. It was officially published on the 11th July 2007[11].

2. The need for Rome II

Recitals 2 and 3 of the draft Regulation refer to the Vienna Action Plan 1998 and the Tampere Summit 1999. In 1998 the Council and Commission adopted an Action Plan on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice.[24] That required, within two years, "drawing up a legal instrument on the law applicable to non-contractual obligations".

Following the Tampere Summit, in November 2000 the Council of Ministers adopted a Programme of measures to implement the principle of mutual recognition in civil and commercial matters. This is also cited by the Commission as part of the political mandate for Rome II. It quotes the programme as saying that harmonisation of conflict of laws measures are measures that "actually do help facilitate the implementation of the principle" of mutual recognition.

Paragraph 9 of the Protocol on the Application of the principles of Subsidiarity and Proportionality states: "Without prejudice to its right of initiative, the Commission should: -except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever possible, publish consultation documents …". The Commission did not publish a Green Paper. It is true that it published a

8 J. Gołaczyński, Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej, Warszawa 2007, s. 226

9 M. Fabjańska, M. Świerczyński, Ujednolicenie norm kolizyjnych dotyczączch zobowiązań pozaumownych, KPP, r. 2004, z. 3, s. 722

10 http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0001010001

11 J. Gołaczyński, Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej, Warszawa 2007, s. 227

draft text and invited comments. The Commission also held an oral hearing at which interested parties could hear and respond to the Commission[12].

3. The position of the regulation Rome II within private international law

Private international law (sometimes referred to as the conflict of laws) deals with disputes between private persons, natural or legal, arising out of situations having a significant connection or connections to more than one country. Private international law covers three basic types of rule:

—jurisdictional rules (which country's courts can hear a case);

—choice of law rules (which country's law will the court which hears the case apply);

—rules relating to the recognition and enforcement of judgments of foreign courts (when will a court in one country enforce the decision of a court in another country).

There already exists within the European Union an established body of private international law rules of the first type and the third type. As to the second type, the 1980 Rome Convention on the law applicable to contractual obligations ("Rome I") lays down choice of law rules for contractual claims. The rules are binding on all Member States.

4. General rule

General rule of the non-contractual liability is expressed in Article 4. Paragraph 1 of this article states that unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur[13].

The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in Regulation cover also non-contractual obligations arising out of strict liability[14]. Moreover the regulation doesn't explain the term „damage". In the case of Great Britain it can cause problems. Drs Crawford and Carruthers (University of Glasgow) pointed to the difficulty caused by the use of the word "damage" which in English and Scots law may cover (i) the wrongful act or omission; or (ii) the consequential loss.[15].

The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific

12 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6606.htm
13 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:01:EN:HTML
14 Pkt 11
15 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6606.htm

rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner[16].

In the preamble it is provided that the principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable[17]. The European Economic and Social Committee noticed that article 4, which deals with obligations arising out of a tort or delict, goes to the heart of the matter. Theoretically, a number of criteria, usually grouped together without distinction under the catch-all heading lex loci delicti (commissi) could be applied here, i.e. the law of the place where the event occurs, that of the place where the damage arises, that of the place in which the indirect consequences of the event arise or that of the place of habitual residence of the injured party. All these criteria have a basis in tradition and strong arguments in their favour. All are in fact used in various current systems of conflict rules. The priority task of the Commission is therefore to introduce a uniform set of rules in all Member States[18]. The main defect of the first criteria is lack of the certainty in providing the proper low of the delict/tort as very often both the injured party and the party responsible for the damage can't foresee which law will be applied in their case. What's more it doesn't take into account so called „social surroundings" of the delict/tort[19].

This concept is strongly bound with the ideology of crimminal law. According to it perpetrator should bear responsibility for his act in the place in which he committed it. The concept is based on the assumption that the interest of the country which legal order is infringed should be protected in particular way. On the other hand the concept doesn't take into account the standpoint of the injured party and therefore doesn't guarantee compensation. Moreover, it doesn't apply to strict liability[20]. The discussed rule is also criticised because it doesn't take into account personal relations between parties which play important role in contemporary private international law[21].

Therefore the regulation introduces lex loci damni. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability

16 Pkt 14

17 Pkt 15

18 Pkt 5.1 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II-COM(2003) 427 final - 2003/0168 (COD)

19 M. Świerczyński, *Delikty internetowe w prawie prywatnym międzynarodowym*, Kraków 2006, s. 53-55

20 T.Pajor, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym,* Warszawa 1989, s. 183-184

21 T.Pajor, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym,* Warszawa 1989, s. 31-38

and the development of systems of strict liability[22]. The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively[23].

This choice was also accepted by the European Economic and Social Committee. It noticed that it was perhaps questionable whether this was consistent with recent developments in legal consolidation in this area12, but the Commission's choice is justifiable on the grounds that it gives priority to protection of the injured party, without however completely neglecting the interests of the party causing the damage[24]. Lex loci dammni takes into account both the interest of the injured party and the protection of legal order in this country in which the damage occured. Moreover it is apllied to the strict liablity because it lays emphasis on the place of the damage and not on the place of act which caused it. It doesn't of course mean that against the lex loci dammni aren't presented any arguments. Firstly, it is emphasised that the term"lex loci dammni" is ambiguous because it can mean both the law of the country in which the event giving rise to the damage occured, the law of the country in which the damage occured and last but not least the law of the country in which the indirect consequences of that event occured[25]. Therefore the Regulation Rome II states clearly that the law applicable to a non-contractual obligations arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise on the damage occured and irrespective of the country or countries in which the indirect consequences of that event occur.

To sum up the general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. The regulation didn't introduce neither the term „citizenship" nor the „place of residence". The term „citizenship is the most public and unambiguous.It the most of coutries it is understood in the similar way. On the other hand the problem occurs when the person is stateless or when it has the citizenship of many countries[26]. The term „place of residence" (domicilium) is more public but also more difficult to define than the „citizenship". It is the legal binding between the person and the state that decides about the citizenship. In the case of the place of residence the mere fact of living on the terrority is taken into account. This term has different

22 Pkt 16

23 Pkt 17

24 Pkt 5.1 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II-COM(2003) 427 final - 2003/0168 (COD)

25 T.Pajor, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym,* Warszawa 1989, s. 185-188

26 M. Pazdan, Prawo międzynarodowe prywatne, Warszawa, s. 46

meaning not only in different coutries but also in different branches of law in the same country[27]. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country[28].

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[6] T.Pajor, M. et al.:*Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym, Warszawa*: PWN, 1989, p. 286, ISBN 8301089040

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[27] W. Ludwiczak, Międzyanrodowe prawo prywatne, Warszawa 1990, s. 28-29, K. Kruczalak, Zarys międzynarodowego prawa prywatnego, Warszawa, s. 60-61.
[28] Pkt 18

SELLER'S LIABILITY FOR COMPLIANCE OF THE GOODS WITH PUBLIC LAW STANDARDS – IN THE LIGHT OF CISG CASE LAW

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Abstrakt

Příspěvek se zabývá otázkou, který z různých vnitrostátních souborů veřejnoprávních předpisů (např. předpisů o bezpečnosti výrobků, hygienických a zdravotních norem nebo technických norem) se použije na zboží vyvážené v souladu s mezinárodní kupní smlouvou z jedné země do druhé. Problém je analyzován především na základě publikovaných soudních rozhodnutí, s několika odkazy na odbornou literaturu. V závěru autor činí poznámky k používání pravidel formulovaných v rozhodovací praxi a uvádí doporučené řešení.

Klíčová slova

Mezinárodní koupě zboží, Vídeňská úmluva, porušení smlouvy, vady zboží, veřejnoprávní předpisy.

Abstract

The paper addresses the issue which of the different national sets of public law standards (e.g., product safety regulations, sanitation and health standards or technical norms) apply to the goods exported under a cross-border sales contract from one country to another. This problem is analysed mainly on the basis of published court rulings, with some references to the literature. In the conclusion the author makes some remarks concerning the application of the rules formulated in the case law and recommends preferred solution.

Key words

International sale of goods, CISG, breach of contract, non-conforming goods, public law standards.

Introduction

Probably any kind of goods which may be supplied under a sales contract is subject to some standard imposed by public law. These "public law standards" include, for example, product safety regulations,

sanitation and health standards applicable to foodstuffs, rules of packaging and technical norms.[1] In the area of cross-border trade an important question arises which of the different national sets of public law standards apply to the goods exported from one country to another. Does the seller have to comply with the requirements to be observed in the buyer‘s place of business or in the place where the goods are eventually exported? Or is his obligation to deliver conforming goods fulfilled when the merchandise is perfect according to the rules effective in the seller‘s own country? The wording of the UN Convention on Contracts for the International Sale of Goods (hereinafter the “CISG”) does not provide definite solution. The quality of the goods is governed primarily by Art. 35(1) CISG providing that the seller must deliver goods *“which are of the quantity, quality and description required by the contract”*. Where the parties have not agreed on certain quality of the goods, the second paragraph of the Art. 35 CISG comes into play, especially letters (a) and (b) according to which the goods must fit for any particular purpose known to the seller, or, in the absence of such known intent, for the purposes for which goods of the same description would ordinarily be used. One could assume that the “fit for particular use” rule comprises also requirement to supply goods complying with the public law standards *of destination country* as, if the binding regulations are not observed, the goods are not capable of being used there (the consumer goods would not be approved for retail sale, the buyer would not be allowed to operate the purchased machine etc.). On the other hand, it can be argued that such solution is too burdensome for the seller who would be required to know the often very detailed public law standards effective in all of the countries where he exports to. Regard must be had also to the second part of Art. 35(2)(b) CISG excluding the claim to deliver goods being fit for particular purpose *“where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment”*. In the present paper, we will try to find solution to the above problem on the basis of case law, as required by the principle of uniform application of the CISG set down in Art. 7(1) thereof.[2]

Case law analysis

It follows from the above mentioned provision of Art. 35(1) CISG (as well as from the general rule of precedence of the parties’ will set forth in Art. 6 CISG) that the best way how to avoid disputes over quality of the goods is to stipulate all their characteristics, including applicable standards, directly in the sales contract. Should the contract determine the public law standards of the *destination country* to be respected, no room remains for seller’s argumentation that the goods conform to the contract because

[1] The term “public law standards” is used by Schwenzer, I. In Schlechtriem, P., Schwenzer, I.: *Commentary on the UN Convention on International Sale of Goods (CISG).* 2nd (English) edition. Oxford: Oxford University Press, 2005, 1149 p., ISBN 0199275181, p. 419.

[2] Art. 7(1) CISG highlights, inter alia, “the need to promote uniformity in application of the Convention”. The meaning and practical implications of this principle (as well as the other two interpretative principles laid down in Art. 7(1) CISG) are dealt with in Žídek, P. Úmluva o smlouvách o mezinárodní koupi zboží. Specifika výkladu mezinárodně unifikovaného právního předpisu. Právní fórum, 2008, No. 3, pp. 83 – 84.

he observed all the regulations effective in *his country*. For instance, a German court dismissed the claim of a Spanish seller for payment for a consignment of paprika which a German buyer declined to pay because the spices contained an amount of ethylene oxide exceeding the limit permitted under the German Food Safety Law. The court held that the parties were in general agreement that the ordered goods had to be fit to be sold under the German Food Safety Laws and the seller therefore could not assert his ignorance of those Laws. The court concluded that the seller by delivery of contaminated spices committed fundamental breach of contract since the buyer was substantially deprived of what he was entitled to expect. Consequently, the buyer was entitled to avoid the contract with respect to the consignment in question.[3] Similar decision was rendered by a court in the Chinese province of Shandong which heard a dispute between a Chinese exporter of frozen shrimps and a buyer with the place of business in the U.S.A. The parties agreed that the quality of the goods should meet U.S. sanitation and health standards. If the goods were refused admission to the United States by the U.S. Food and Drug Administration, seller shall be obligated to return the price paid and compensate the cost of freight to ship the goods back to China and other relevant costs. When the U.S. authorities indeed found that the shrimp had decayed and denied their entry to customs, the court had no doubt about the breach of the contractual obligations of the seller and the right of the buyer to use the remedies as specified in the contract.[4]

Which public law standards should apply, however, when the parties themselves have not addressed this issue in the sales contract? This question was first dealt with by the German Supreme Court in so called „mussels case". A Swiss seller delivered to a German buyer New Zealand edible mussels which contained a concentration of cadmium exceeding the limit recommended by the German health authority. The buyer declared the contract avoided, but the court held that the goods conformed to the contract. The court did not find any agreement of the parties on preference of the German health standards. In the opinion of the court, the German standards were in such a situation not relevant. The court referred to an extensive list of literature[5] alleging that the compliance with specialized public law provisions of the buyer's country or the country of use of the goods cannot be expected. Certain standards in the buyer's country can only be taken into account *(i)* if they exist in the seller's country as

[3] Judgment of Landgericht Ellwangen (Germany) dated 21 August 1995.

[4] Judgment of Rizhao Intermediate People's Court (China) dated 17 December 1999, Hang Tat v. Rizhao (all judgments quoted in this paper all accessible at www.cisg.law.pace.edu). However, the buyer had to bear part of the loss of the value of the returned shrimp because he failed to take measures to preserve them.

[5] Cf. Bianca, C. M. In Bonell, M. J., Bianca, C. M.: *Commentary on the International Sales Law – 1980 Vienna Sales Convention.* Milano: Giuffrè, 1987, accessible at www.cisg.law.pace.edu, pp. 274, 282 – 283 (*„The fitness of goods for ordinary use must be ascertained according to the standards of the seller's place of business. Indeed, the seller is not supposed to know about specific requirements or limitations in force in other countries (unless that may reasonably be expected from the buyer according to the circumstances* […])."); Enderlein, F., Maskow, D.: *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, Oceana, 1992, accessible at www.cisg.law.pace.edu, p. 144 (*"The CISG stipulates nothing with respect to qualitative prerequisites which may be mandatory in the buyer's country or in the country of destination. An obligation of the seller to fulfil those requirements would have to be expressly agreed in the contract* […]*").*

well, *(ii)* the buyer has pointed them out to the seller, or *(iii)* if the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the case (because, for instance, the seller has a branch in that country, he has already had a business connection with the buyer for some time, he often exports into the buyer's country or because he has promoted his products in that country). Nevertheless, none of these conditions was proved in the case at hand. The Supreme Court summarized his reasoning in the following statement: *„Decisive is that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.“*[6]

Several other courts later arrived at similar conclusion as in the “mussels case”. A Dutch court ruled against a German buyer of mobile room units who refused payment alleging, inter alia, lack of conformity of the mobile units with the industrial standards applicable in the buyer’s country. The court found that the buyer had never requested application of the industrial standards to the mobile units. The warning addressed to the seller that governments of German states had issued requirements with respect to mobile units was insufficient to deduce such a request. The possible expectation of the buyer that the seller would abide by the respective norms was, pursuant to the court’s opinion, unjustified, if those norms were not explicitly discussed. The court concluded: *“The fact that [the seller] knew that the mobile units would be exported to Germany does not alter this analysis given that it was up to the client to point out which governmental requirements were to be observed in the place of destination of the mobile units.”*[7]

The Austrian Supreme Court heard a dispute between a German seller of four used machines and an Austrian buyer who refused to pay the rest of the purchase price on the grounds that the goods lacked the European Community "CE" mark, indicating that the product conformed to applicable European Community directives. The court held that the seller cannot be expected to know all special rules of the buyer's country or the country of usage. It cannot be derived from the information on the country of destination that the seller is bound to observe the public law provisions of this country. It is rather for the buyer to observe his country's public law provisions and specify these requirements in the sales contract. The requirements of the buyer's country should only be taken into account if they also apply in the seller's country, if they are agreed on, or if they are submitted to the seller at the time of the formation of the contract. Therefore, the Supreme Court remanded the case back to the lower courts

[6] Judgment of Bundesgerichtshof (Germany) dated 8 March 1995.
[7] Judgment of Hof Arnhem (the Netherlands) dated 27 April 1999.

and directed them to determine which security provisions and standards had to be applied and whether the machines complied with such provisions.[8]

The "mussels case" was explicitly referred to in the judgment of the U.S. District Court for the Eastern District of Louisiana whereby the court upheld an arbitral award issued in favour of an American importer of Italian medical equipment (mammography units). The arbitrators awarded damages to the buyer because the Italian seller of the equipment delivered units which failed to comply with U.S. safety standards. The seller challenged the award on the grounds that the arbitrators allegedly did not follow the rule formulated in the "mussels case" that under Art. 35 CISG, a seller is generally not obligated to supply goods that conform to public laws and regulations enforced at the buyer's place of business unless certain exceptional circumstances occur (see above). The court, however, confirmed the view of the arbitrators that the case fit one of the exceptions articulated in the "mussels case" rather than the basic rule, specifically because the seller knew or should have known about the U.S. safety standards due to "special circumstances" (unfortunately, the exact nature of these "special circumstances" is in the case presentation not described). Violation of the safety regulations by the seller therefore amounted to a breach of contract which was fundamental and the buyer was therefore entitled to declare the contract avoided.[9]

On the other hand, there have been also decisions which applied the regulations of the buyer's state as a matter of course. For instance, a French court found against an Italian seller who supplied ordered parmesan cheese in sachets not conforming to the requirements of local law (the composition and expiry date were not stated on the packaging). Pursuant to the opinion of the court, the seller undisputedly knew that the cheese would be marketed in France and this knowledge imposed a duty on him to deliver the goods wrapped in the manner required by French law (composition and expiry date printed on the packaging). Omitting to place appropriate labels on the sachets resulted in delivery of non-conforming goods.[10]

For the time being, the latest decision concerning the issue of public law standards was rendered in 2005, again by the German Supreme Court. A Belgian seller entered into a contract with a German buyer for the sale of frozen pork meat. It was agreed that the meat should be delivered directly to the buyer's customer and from there redispatched to the final destination, a company in Bosnia-Herzegovina. Shortly after the delivery of the goods a suspicion arose in both Germany and Belgium that the meat produced in Belgium is contaminated by dioxin. This prompted first Germany, then the EU and afterwards also Belgium to enact a regulation on the subject, requiring for pork meat a certificate stating the absence of dioxin. The sold meat was confiscated by the Bosnian customs. As the seller failed

[8] Judgment of Oberster Gerichtshof (Austria) dated 13 April 2000.

[9] Judgment of U.S. District Court, Eastern District of Louisiana (U.S.A.) dated 17 May 1999, Medical Marketing v. Internazionale Medico Scientifica.

[10] Judgment of Cour d'appel Grenoble (France) dated 13 September 1995, Caito Roger v. Société française de factoring.

to deliver the requested certificate, the buyer refused to pay the outstanding price. The court, with reference to the "mussels case" and others, reiterated that the seller could not be generally expected to know the relevant provisions in the buyer's country or in the country of the ultimate consumer. Because there were no special circumstances, the provisions issued in Bosnia-Herzegovina were not applicable. Neither could the meat be found defective on the basis of the regulation effective in Belgium (the seller's country) since this was enacted only after the date of delivery. Despite this, the court held that the goods did not conform to the contract on the grounds that the suspicion of dioxin contamination constituted a hidden defect which existed at the time when the goods were delivered to the buyer, even though the lack of conformity became apparent only after that time (see Art. 36(1) CISG). According to the court, the suspicion alone, which became apparent later and which was not invalidated by the seller, had a bearing on the resaleability and tradability. Put differently, the Supreme Court formally adhered to the rule formulated in the "mussels case", but avoided its strict application (which would exclude finding of any non-conformity of the goods) on the basis of (hidden) inability of the goods to be resold. Contrary to the "mussels case" and other above mentioned rulings, the court considered actual merchantability of the goods to be important for the conformity of the goods with the contract rather than the fact whether the public law standards were observed.[11]

Conclusion

Two different approaches can be identified in the case law. Prevailing part of judgments apply the rule that the public law standards effective in the *seller's country* control the quality of the goods. The regulations in force in the buyer's place of business or in the country where the goods are eventually consumed or utilized are to be respected only in exceptional circumstances when the seller's knowledge of such regulations can be presumed. However, other rulings prefer the "merchantability" approach which results in considering the infringement of the public law standards of the *destination country* as a breach of contract. The majority approach is criticised also in part of literature[12] and a different solution is proposed based on Art. 35(2)(b) CISG, that is, the seller who knows where the goods are intended to be used should be usually expected to have taken all factors that influence the possibility of their use in that country into consideration, including the local public law standards (except when the exporter,

[11] Judgment of Bundesgerichtshof (Germany) dated 2 March 2005.

[12] For example, Schlechtriem points out certain objectionable consequences of the rule developed in the "mussels case". On the one hand, the buyer must take the goods which violate the standards enforced in his (or destination) country and are therefore non-merchantable only because the same standards do not apply in the seller's place of business (although this place may have no actual connection with the delivery). On the other hand, the seller is not allowed to supply goods non-conforming with the regulations effective in his place to another country even if the level of administrative protection in such importing country is lower. Schlechtriem, P.: *Compliance with local law; seller's obligations and liability. Annotation to German Supreme Court decision of 2 March 2005.* In Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006. München: Sellier, 2007, 260 p., ISBN 3866530161, pp. 201-202. For the criticism of "mussels case" approach see also Schwenzer, ibid., p. 420.

especially a smaller enterprise, could not know all such standards).[13] We believe, however, that one universally applicable formula does not exist. The right solution, in our opinion, lies in an ad hoc approach taking into account the particular circumstances of each case. Thus, the liability for compliance of the goods with detailed (e.g., technical or health) standards in the destination place should not be transferred to the seller when the buyer failed to specify respective qualities of the goods in his purchase order or during negotiation. On the other hand, the seller should not be allowed to rely on his country's rules when it should be clear to him, on the basis of his professional experience or plain common sense, that the regulations in the buyer's country, or in the place where the goods are exported, are different.[14] We would therefore recommend (also in view of the principle of uniform application of the CISG) to follow the rules formulated in the "mussels case", provided that the exceptions set down in this case are construed in a sufficiently extensive way. Still, the most secure way for the parties how to avoid potential disputes is to specify the qualities of the goods and applicable public law standards directly in the contract.

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[13] Schlechtriem, P.: *Uniform Sales Law in the Decisions of the Bundesgerichtshof*. Translated into English by Todd J. Fox, accessible at www.cisg.law.pace.edu, part IV.1.

[14] Schlechtriem, ibid., gives example of export of foodstuffs containing pork or beef to countries in which the consumption or resale for consumption of pork or beef is prohibited due to religious reasons.

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THE LEGAL CONVERGENCE CRITERION AND THE CZECH REPUBLIC

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Abstract

The "Maastricht" criteria are to ensure the convergence of economic performance as a basis for the introduction of the single currency. There are five conditions, grouped in two classes: the economic convergence criteria and the "legal convergence" criterion. The last criterion is the one of the most forgotten in discussions of the "Maastricht criteria". This Treaty obligation applying to Member States with a derogation is also referred to as "legal convergence". This paper takes a closer look at the areas of legal convergence criterion and the Czech Republic.

Key Words

Legal convergence criterion; the Act on Czech National Bank; the independence of national central banks; legal integration of NCB's into the Eurosystem.

Introduction

According to the European Central Bank: *„Czech law, and in particular the Law on the Czech National Bank, does not comply with all the requirements for Czech National Bank's independence and legal integration into the Eurosystem. The Czech Republic is a Member State with a derogation and must therefore comply with all adaptation requirements under Article 109 of the Treaty."*[1] The Czech Republic is a member state with a derogation. A derogation shall entail that the following articles do not apply to the Member State concerned:

- In the excessive deficit procedure the Council can't decide to give notice to the Member State to take measures for the deficit reduction and can't apply any sanctions.[2]
- The objective system and the basic tasks of the ESCB, and the community rules of the issue of banknotes and coins.[3]
- The lawmaking of the ECB.[4]

[1] ECB Convergence Report 2006, pp. 36
[2] EC-Treaty, Art. 104 (9), (11)
[3] EC-Treaty, Art. 105 (1)-(3), (5), 106

- The competence of the Council concerning the exchange-rate policy.[5]
- The appointment of the members of the Executive Board of the ECB.[6]

According to the Treaty, those states can join the third part of the economic and monetary union (EMU), and can introduce the single currency, who meet the necessary economic and legal requirements. These requirements are known as the Maastricht convergence criteria. There are five conditions, grouped in two classes: the economic convergence criteria and the "legal convergence" criterion.[7]

However the most interesting research area is the legal convergence criterion for us. According to the Article 109 of the Treaty: *"Each Member State shall ensure, at the latest at the date of the establishment of the ESCB, that its national legislation including the statutes of its national central bank is compatible with this Treaty and the Statute of the ESCB."* Article 122(2) of the Treaty requires the ECB (and the Commission) to report, at least once every two years or at the request of a Member State with a derogation, to the EU Council in accordance with the procedure laid down in Article 121(1). Each such report must include an examination of the compatibility between, on the one hand, the national legislation of each Member State with a derogation, including the statutes of its NCB, and, on the other hand, Articles 108 and 109 of the Treaty and the Statute of the European System of Central Banks and of the European Central Bank. This Treaty obligation applying to Member States with a derogation is also referred to as "legal convergence". When assessing legal convergence, the ECB is not limited to a formal assessment of the letter of national legislation but may also consider whether the implementation of the relevant provisions complies with the spirit of the Treaty and the Statute. The ECB is particularly concerned about recent growing signs of pressure being put on the decision-making bodies of some Member States' NCBs, which would be inconsistent with the spirit of the Treaty as regards central bank independence. The aim of assessing legal convergence is to facilitate the EU Council's decision as to which Member States fulfil the necessary conditions for the adoption of the single currency.

The following legislation forms the legal basis for Czech National Bank and its principal operations:

- the Constitution of the Czech Republic[8],
- the Act on Czech National Bank.[9]

Article 109 of the Treaty requires that national legislation is "compatible" with the Treaty and the Statute; any incompatibility must therefore be removed. Neither the supremacy of the Treaty and the Statute over national legislation, nor the nature of the incompatibility, affects the need to comply with

[4] EC-Treaty, Art. 110
[5] EC-Treaty, Art. 111
[6] EC-Treaty, Art. 112 (2)
[7] About the economic convergence criterion see the protocol on the convergence criteria.
[8] Constitution Law No 1/1993 Coll.
[9] Act No. 6/1993 Coll. of 17 December 1992, on the Czech National Bank

this obligation. The requirement for national legislation to be "compatible" does not mean that the Treaty requires "harmonization" of the NCB statutes, either with each other or with the Statute. National particularities may continue to exist to the extent that they do not infringe the Community's exclusive competence in monetary matters. Rather, the term "compatible" indicates that national legislation and the NCB statutes need to be adjusted to eliminate inconsistencies with the Treaty and the Statute and ensure the necessary degree of integration of the NCBs into the ESCB. In particular, any provisions that infringe an NCB's independence, as defined in the Treaty, and its role as an integral part of the ESCB should be adjusted. It is therefore insufficient to rely solely on the primacy of Community law over national legislation to achieve this. Furthermore, inter alia as a tool to achieve and maintain the compatibility of national legislation with the Treaty and Statute, the ECB must be consulted by the Community institutions and the Member States on draft legislative provisions in its fields of competence, pursuant to Article 105(4) of the Treaty and Article 4 of the Statute. Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[10] expressly requires that the Member States take the measures necessary to ensure compliance with this obligation. According to the practice of the ECB the legal convergence means: the independence of national central banks; prohibition on monetary financing and privileged access; the single spelling of the euro; and legal integration of NCB's into the Eurosystem. This paper takes a closer look at the areas of legal convergence criterion and the Czech Republic, especially the independence of national central banks and legal integration of NCB's into the Eurosystem.

1. The independence of national central banks

In 1997 the EMI established a list of features of central bank independence for the first time which were the basis for assessing the national legislation of the Member States at that time, in particular the NCB statutes. The concept of central bank independence includes various types of independence that must be assessed separately, namely functional, institutional, personal and financial independence.

Functional independence

[10] OJ L 189, 3.7.1998, p. 42.

Functional independence requires that each NCB's primary objective is stated in a clear and legally certain way and is fully in line with the primary objective of price stability established by the Treaty. It is served by providing the NCBs with the necessary means and instruments to achieve this objective independently of any other authority. The Treaty's requirement of central bank independence reflects the generally held view that the primary objective of price stability is best served by a fully independent institution with a precise definition of its mandate. Section II of the Act on the Czech National Bank (furthermore 'the CNB-Act') declares that the primary objective of the CNB is to maintain price stability and the CNB shall, without prejudice to its primary objective, support the general economic policies of the European Community with a view to contributing to the achievement of the objectives of the European Community.[11]

Institutional independence

The Treaty refers clearly to the institutional independence.[12] The basic of the institutional independence is the prohibition of asking for order and accepting order given by other outside organ. The content of it is laid down by the convergence reports in the following:

- *Prohibition on giving instructions*

  Rights of third parties to give instructions to NCBs, their decision-making bodies or their members are incompatible with the Treaty and the Statute as far as ESCB-related tasks are concerned. According to the CNB-Act: *"When exercising the powers and carrying out the tasks and duties conferred upon them by this Act, the Treaty establishing the European Community and the Statute, neither the Czech National Bank, nor any member of its Bank Board shall seek or take instructions from European Community institutions or bodies, from any government of a Member State of the European Union or from any other body."*[13]

- *Prohibition on approving, suspending, annulling or deferring decisions*

[11] CNB-Act, Section II 1. (a)

[12] *"When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks."*EC Treaty, Art. 108

[13] CNB-Act, Section II 1. (c)

Rights of third parties to approve, suspend, annul or defer NCBs' decisions are incompatible with the Treaty and the Statute as far as ESCB-related tasks are concerned. There aren't such provisions in the Act on the CNB.

- *Prohibition on censoring decisions on legal grounds*

A right for bodies other than independent courts to censor, on legal grounds, decisions relating to the performance of ESCB-related tasks is incompatible with the Treaty and the Statute since the performance of these tasks may not be reassessed at the political level. There aren't such provisions in the Act on the CNB.

- *Prohibition on participating in decision-making bodies of an NCB with a right to vote*

Participation by representatives of third parties in an NCB's decision-making body with a right to vote on matters concerning the exercise by the NCB of ESCB-related tasks, even if this vote is not decisive, is incompatible with the Community law. According to the Act on the CNB the Minister of Finance or other nominated member of the Government may attend the meetings of the Bank Board in an advisory capacity and may submit motions for discussion.[14]

- *Prohibition on ex ante consultation relating to an NCB's decisions*

An express statutory obligation for an NCB to consult third parties ex ante provides the latter with a formal mechanism to influence the final decision and is therefore incompatible with the Treaty and the Statute. There aren't such provisions in the Czech law.[15]

Personal independence

- *Minimum terms of office for Governors*

EC law require a minimum term of office of five years for a Governors. The Act on the CNB does not make any distinction between the Governor of the CNB, the two Deputy Governors of the CNB and the four other members of the Bank Board of the CNB. Their term of office is six years and no person shall be allowed to hold this position more than twice.[16]

- *Grounds for dismissal of Governor*

[14] CNB-Act, Art. 11 (2)
[15] See CNB-Act, Art. 49b
[16] CNB-Act, Art. 6

According to EC law a Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. The purpose of this requirement is to prevent the authorities involved in the appointment of Governors, particularly the government or parliament, from exercising their discretion to dismiss them as Governor. There are three grounds of dismissal in the Czech law: *"The Governor shall be relieved from office by the President of the Republic if he no longer fulfils the conditions required for the performance of his duties or he has been guilty of serious misconduct. The President of the Republic may also relieve the Governor from office if he fails to perform his duties for a period exceeding six months."*[17] According to the ECB this Article needs to clarify in what circumstances the President may justifiably consider the Governor to "fail to perform his duties…". In particular, it is unclear how such additional ground for dismissal interacts with the first ground for dismissal, namely "if the Governor no longer fulfils the conditions required for performance of his duties." In the ECB's opinion this Article should therefore be brought into line with the Community law.[18] It must be stressed that the Czech Governemnt and Parliament haven't terminated this incompatibility yet.

- *Security of tenure and grounds for dismissal of members of NCBs' decision-making bodies, other than Governors, who are involved in the performance of ESCB-related tasks*

In my opinion there is serious problem that the legal assurances of personal independence on community level apply only to the members of the Executive Board of the ECB and the governors of national central banks. The other members of the decision-making panel of member state central banks is not stabile from this perspective, however, especially that the governor of national central banks have the right to designate a deputy for a shorter or longer period, who can participate in the work of the Governing Council with full legal jurisdiction. Therefore, it would be justified that the guarantees mentioned previously be extended also to them in some way. According the ECB personal independence would be jeopardised if the same rules for the security of tenure of office and grounds for dismissal of Governors did not also apply to other members of the decision-making bodies of national central banks involved in the performance of ESCB-related tasks.

- *Right of judicial review*

Members of the NCBs' decision-making bodies must have the right to submit any decision to dismiss them to an independent court of law, in order to limit the potential for political discretion in evaluating the grounds for their dismissal. Article 14.2 of the Statute stipulates the rules in

[17] CNB-Act, Art. 6 (13)
[18] ECB Convergence Report 2004, pp. 218

connection with it.[19] National legislation should either refer to the Statute or remain silent on the right to refer the decision to the Court of Justice of the European Communities (as Article 14.2 of the Statute is directly applicable). National legislation should also provide for a right of review by the national courts of a decision to dismiss any other member of the decision-making bodies of the NCB involved in the performance of ESCB-related tasks. The Czech legislation is harmonized with these Community rules.[20]

- *Safeguards against conflict of interest*

Personal independence also entails ensuring that no conflict of interest arises between the duties of members of NCB decision-making bodies in relation to their respective NCBs and any other functions which such members of decision-making bodies involved in the performance of ESCB-related tasks may have and which may jeopardise their personal independence. As a matter of principle, membership of a decision-making body involved in the performance of ESCB-related tasks is incompatible with the exercise of other functions that might create a conflict of interest. In particular, members of such decision-making bodies may not hold an office or have an interest that may influence their activities, whether through office in the executive or legislative branches of the state or in regional or local administrations, or through involvement in a business organisation. Particular care should be taken to prevent potential conflicts of interest on the part of non-executive members of decision-making bodies. According the CNB-Act membership of the Bank Board is incompatible with the position of member of a legislative body, member of the Government and membership of the governing, supervisory or inspection bodies of other banks or commercial undertakings, and the performance of any independent gainful occupation, except - for example - for scientific and literary activities, and incompatible with any activity which may cause any conflict of interest between the performance of this activity and membership of the Bank Board.[21]

1.4. Financial independence

Even if an NCB is fully independent from a functional, institutional and personal point of view its overall independence would be jeopardised if it could not autonomously avail itself of sufficient financial resources to fulfil its mandate. Member States may not put their NCBs in a position where they have

[19] *"A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of this Treaty or of any rule of law relating to its application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."*
[20] CNB-Act, Art. 6 (13)
[21] CNB-Act, Art. 6 (6)

insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable. Additionally, the principle of financial independence implies that an NCB must have sufficient means not only to perform ESCB-related tasks but also its own national tasks. The concept of financial independence should therefore be assessed from the perspective of whether any third party is able to exercise either direct or indirect influence not only over an NCB's tasks but also over its ability There are two aspects of financial independence.

- *Determination of budget*

If a third party has the power to determine or influence the NCB's budget, this is incompatible with financial independence unless the law provides a safeguard clause to the effect that such a power is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks. The rules of the Act on the CNB are compatible with this legislation.[22]

- *The accounting rules*

The accounts should be drawn up either in accordance with general accounting rules or in accordance with rules specified by an NCB's decision-making bodies. If such rules are instead specified by third parties, then the rules must at least take into account what was proposed by the NCB's decision-making bodies. The annual accounts should be adopted by the NCB's decision-making bodies, assisted by independent accountants, and may be subject to ex post approval by third parties. Where NCB operations are made subject to the control of a state audit office or similar body charged with controlling the use of public finances, the scope of the control should be clearly defined by the legal framework and should be without prejudice to the activities of the NCB's independent external auditors, as laid down in Article 27.1 of the Statute.[23] The state audit should be done on a non-political, independent and purely professional basis. According the CNB-Act: *"The annual accounts of the CNB shall be audited by one or more auditors appointed by agreement between the Bank Board and the Minister of Finance."*[24] According to the ECB these provisions do not acknowledge the Community's and the ECB's competence in this field under Article 111 of the EC Treaty. These provisions must be harmonised only at the time of the accession to the third phase of the EMU by a member state with a derogation.

2. Legal integration of NCB's into the Eurosystem

[22] CNB-Act, Art. 47 (1-2)
[23] "*The accounts of the ECB and national central banks shall be audited by independent external auditors recommended by the Governing Council and approved by the Council. The auditors shall have full power to examine all books and accounts of the ECB and national central banks and obtain full information about their transactions."* (Art. 27.1 of the Statute)
[24] CNB-Act, Art. 48 (2)

Provisions in national legislation which would prevent the performance of Eurosystem-related tasks or compliance with ECB decisions are incompatible with the effective operation of the Eurosystem once the Member State concerned has adopted the euro. Statutory requirements relating to the full legal integration of an NCB into the Eurosystem need only enter into force at the moment that full integration becomes effective, i.e. the date on which the Member State with a derogation adopts the euro.

2.1. Tasks of the NCB's

The tasks of an NCB of a Member State that has adopted the euro are predominantly determined by the Treaty and the Statute, given that NCB's status as an integral part of the Eurosystem. In order to comply with Article 109 of the Treaty, provisions on tasks in NCB statutes therefore need to be compared with the relevant provisions of the Treaty and the Statute, and any incompatibility must be removed.

- Any national legislative provisions relating to monetary policy must recognise that the Community's monetary policy is a task to be carried out through the Eurosystem.
- National legislative provisions assigning the exclusive right to issue banknotes to the NCB must recognise that once the euro is adopted, the ECB's Governing Council has the exclusive right to authorise the issue of euro banknotes.
- With regard to foreign reserve management, any Member States that have adopted the euro which do not transfer their official foreign reserves to their NCB are in breach of the Treaty.

It must be keep in mind that the Czech Republic is a Member State with a derogation, therefore the ESCB's tasks and the right to issue banknotes do not refer to it. These provisions must be harmonised only at the time of the accession to the third phase of the EMU.

2.2. Exchange rate policy

A Member State with a derogation may retain national legislation which provides that the government is responsible for the exchange rate policy of that Member State, with a consultative and/or executive role being granted to the NCB. However, by the time that Member State adopts the euro, such legislation has to reflect the fact that responsibility for the euro area's exchange rate policy has been transferred to the Community level. Article 111 of the EC Treaty assigns the responsibility for such policy to the EU Council, in close cooperation with the ECB. However in the Czech Republic the CNB shall after

discussion with the Government stipulate the exchange rate regime of the Czech currency vis-à-vis foreign currencies.[25]

Conclusion

It can be ascertained that the Czech Republic meets the legal convergence criterion. The Act on the CNB is almost fully harmonised with the community law. Therefore gaps occur on the one hand with regard to the accession to the third phase of the EMU and on the other hand in connection with the personal independence, especially the grounds for dismissal of Governor, as I mentioned above. Last but not least the ECB finds important the principle of legal certainty as well. In my opinion in view of the fact that Act on the CNB has been amended several times in the last few years, it must be stressed the importance of legal certainty. It is in this regard essential for fundamental legislation regulating the central bank to serve as clear and constant guidance, and overly frequent changes to the central bank legislation may compromise this function.

Table of European legislative instruments and national legislation

- The Treaty establishing the European Community (OJ C 321 E, 29.12.2006)
- Protocol on the convergence criteria
- ECB Convergence Report 2004, www.ecb.int
- ECB Convergence Report 2006, www.ecb.int
- Act No. 6/1993 Coll. of 17 December 1992, on the Czech National Bank

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[25] CNB-Act, Art. 35

REMEDIES OF UNION CITIZENS VIS-À-VIS DISCRIMINATION

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Abstract

Prohibition of discrimination on the base of nationality is at the core of Union citizenship - but does Community law guarantee any tool to enforce this right? I state in my paper that there is at least three of such kind of remedies: to bring an action directly or indirectly before the Court of Justice, to submit a complaint to the European Ombudsman and to address a petition to the European Parliament. In my paper I give a comparative analysis of these instruments.

Key words

Citizenship of the European Union – Article 17 EC – Prohibition of discrimination on the base of nationality – Court of Justice – Preliminary ruling – Article 234 EC – Action for annulment– Locus standi – Article 230 EC – Action against a Member State – Articles 226, 227 and 228 EC – Complaint to the European Ombudsman – Maladministration – Right to petition to the European Parliament – Lisbon Treaty

1. Prohibition of discrimination as core of Union citizenship

Prohibition of discrimination on the base of nationality is at the core of the dispositions governing Union citizenship. Although it is not enumerated amongst their rights in Part II of EC Treaty,[1] the Court of Justice of the European Communities (hereafter: the Court) reinforced it at several occasions that a citizen of the European Union who resides lawfully in the territory of an other Member State can rely on prohibition of discrimination (now, after amendment, Article 12 EC) in all situations that fall within the

[1] EC Treaty enumerates the following rights: right to free movement (Article 18 EC), right to vote and to stand as a candidate in municipal elections (Article 19 (1) EC), right to vote and to stand as a candidate in European Parliament elections (Article 19 (2) EC), right to address a petition to European Parliament (Articles 21 and 194 EC), right to address a complaint to European Ombudsman (Articles 21 and 195 EC), access to documents (Article 255 EC), right to diplomatic and consular protection in the territory of third countries (Article 20 EC).

scope *ratione materiae* of Community law [2]. This twofold requirement of lawful residence and scope of Community law were broadly interpreted by the Court. Thus, it held in several cases that even a Union citizen not possessing a residence permit can be a lawful resident in the host State[3], and even such situations, which do not fall under the exclusive competence of Community law, must be exercised with due regard to Community law[4].

It means that Union citizenship is not a symbolic institution at all, not an 'empty shell', [5] it has real power. In case Grzelczyk the Court reinforced this ruling*:*

> "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for." [6]

Union citizenship grants broader rights than the former status of 'citizen of the Member States' or 'Community citizen'. It must be noted, however, that the simple status of Union citizenship does not place the person into the absolutely same situation as nationals of a Member State. Where are its limits? According to the findings of the Court, a citizen coming form another Member State and applying for a social allowance must have an established link with the host country. This link can be based either on belonging to the labor market[7] or on the period of residence and integration into the host society.[8] Without these factors the host Member State can refuse the right of residence from Union citizen.

In this article I am going to give a comparative presentation of Community tools to combat against discrimination on the base of nationality. I will merely focus on the method of use of these instruments, on their advantages, disadvantages and possible interaction between them. I will not deal, however,

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[2] See Case C-85/96 Maria M. Sala v. Freistaat Bayern [1998] ECR I-2691

[3] See case Sala, cited above.

[4] See cases concerning child raising allowance (case Sala, cited above), student loan (C-209/03 Bidar [2005] ECR I-2119), direct taxation (case C-224/02 Pusa [2004] ECR I-5763, C-403/03 Schempp [2005] ECR I-6421), right to use maternal language before administrative and criminal courts (C-274/96 Criminal proceedings against Horst Otto Bickel and Ulrich Franz [1998] ECR I-7637), determination of surnames (C-148/02 Garcia Avello [2003] ECR I-11613) and allowances for civil war victims or prisoners of war (cases C-192/05 Tas-Hagen and Tas [2006] ECR I-10451 and C-386/02 Baldinger [2004] ECR I-8411).

[5] Groenendijk, Kees: *Citizens and Third Country Nationals: Differential Treatment or Discrimination?* In: Carlier, Jean-Yves – Guild, Elspeth (eds*.): L'avenir de la libre circulation des personnes dans l'UE – The Future of Free Movement of Persons in the EU*. Bruylant, Bruxelles, 2006, pp. 94-95

[6] Case C-184/99 Grzelczyk [2001] ECR I-6193, para 31

[7] See cases C-224/98 D'Hoop [2002] ECR I-6191, C-413/01 Ninni-Orasche [2003] ECR I-13187, C-138/02 Collins [2004] ECR I-2703

[8] See cases Sala, Grzelczyk and Bidar, cited above.

with the question of achievements attained by them, since this topic is worth a further independent essay.

In spite of the fact that two of these instruments, the right to petition and the right to complaint to European Ombudsman, were established in the circle of instauration of Union citizenship, all of these tools are available not only for Union citizens but for every natural or legal person having a residence in the territory of a Member State[9]. Although Community law guarantees in a few special situations certain benefits for third country nationals (e.g. for family members of Union citizens or for citizens of acceded States), generally it dose not require equal treatment on the base of nationality, so they can use these instruments only for other purposes.

First of all, I will focus on the most obvious instrument given by Community law since the entry into force of the EEC Treaty, the possibility of judicial review by the European Court of Justice. Then I will briefly examine the right to address a complaint to the European Ombudsman and the institution of petition to the European Parliament. Finally I reveal some interactions between these instruments. In my closing remarks I give some guidance on the near future: I take a look at the changes bringing by the Lisbon Treaty with the probable effect of 1st of January 2009.

2. Judicial review by the Court of Justice

It is indisputable, that the Court of Justice has an outstanding role in guaranteeing equal treatment on the base of nationality for Union citizens. This role arises from Article 220 EC according to this disposition "the Court of Justice […] shall ensure that in the interpretation and application of this Treaty the law is observed". This provision implies that it guards over the respect of prohibitions involved in the EC Treaty, amongst other over the respect of prohibition of discrimination [10].

It was the Court of Justice who interpreted the notion of prohibition of discrimination and right to equal treatment. This role appears mainly in two proceedings: in one hand, in proceedings seeking to establish the failure of a Member State to comply with Community law, and, in the other hand, in proceedings aiming to interpret Community law dispositions or to establish their validity, in preliminary rulings[11]. It is quite rare when individuals go before the Court of Justice seeking the

[9] Right to petition and to bring an action is open for an even wider circle, for non resident third country nationals and enterprises also.
[10] Király Miklós: *A diszkrimináció tilalma az Európai Bíróság joggyakoraltában.* Akadémiai Kiadó, Budapest, 1998, p. 73
[11] Király, op.cit., p. 75

protection of their right to equal treatment via a direct claim, usually via claim for annulment, and it is even less frequent that the Court accepts these claims.

Right to equal treatment under Community law can be invoked against dispositions of national law and, on the other hand, against dispositions of Community law.

2.1. Prohibition of discrimination v. Community law

As I mentioned above, it is a very rare occasion when – natural and legal – persons, including Union citizens, bring a direct action before the Court of Justice in the alleged violation of their right to equal treatment by a disposition of the Community law. One of its reasons is that their right to bring an action before the Court is quite limited. Under fourth paragraph of Article 230 EC, they can institute proceedings only against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. This condition of 'direct and individual concern' is still interpreted strictly by the Court in spite of the propositions of Advocate Generals and the Court of First Instance[12].

The present situation is that if a person considers that a Community action violates his right to equal treatment on base of nationality, it is more useful to bring a proceeding before a national court, and to ask the national judge to suspend the proceeding and to refer questions to the Court on the interpretation or on the validity of Community law. Although the parties of the main proceeding cannot enforce the preliminary ruling, since, according to fourth paragraph of Article 234 EC, it is only a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, is under the obligation to bring the matter before the Court of Justice; preliminary ruling has more advantages compared to action for annulment. The main advantages are the followings:

- In preliminary ruling, the circle of contestable actions is wider: this indirect proceeding can be brought not only against decisions and, in exceptional cases, against regulations (which ones were adopted in the form of a regulation, but essentially decisions), but every legal actions of the institutions;

[12] See conclusions of Advocate General Jacobs delivered in case C-50/00 Union de Pequeños Agricultores (UPA) v. Council [2002] ECR II-3357, and judgement of the Court of First Instance in case T-177/01 Jégo-Quéré and Cie SA v. Commission [2002] ECR II-2365.

- The circle of *locus standi* also wider: it must not to be the person to whom the act was addressed or to justify direct and individual concern for the referring the question to preliminary ruling, it is enough that the question has a link to the matter of the main proceeding, and it fulfils the general conditions of preliminary ruling: the question is not too general, the dispute has not a hypothetic nature and legal and factual background is clear;

- The time limit of referral is not connected with the two months delay for opening an action for annulment. A question on the validity of a Community act can be referred to the Court of Justice even after years of the adoption the act;

- Legal effect of constitution of invalidity of a Community act goes back to the date of the entry into force of the act in question, as wall as in action for annulment. The Court limits this effect only in exceptional cases, taking into consideration the principle of legal certainty and serious economical interests of Member States;

- If a national court adjudicating at last instance fails its obligation to make a reference for preliminary ruling and causes damage to individuals, Member States are obliged to make good this damage[13]. In this way, an individual has a minimum protection in that case if he or she cannot enforce preliminary ruling in the national proceeding.

The third possibility for an individual to contest a Community action before the Court is to bring an action for damages under Article 288 EC. Although it is generally noticed that this possibility is obviously conditioned by the occurrence of damage and, furthermore, there is a little chance of such proceedings against acts of general nature[14].

2.1. Prohibition of discrimination v. national law

In this case an individual has not the possibility of a direct action to the Court of Justice, his or her only chance to bring a matter before the Court of Justice is preliminary ruling.

[13] Case C-224/01 Köbler [2003] ECR I-10239

[14] Söderman, Jacob: *The Citizen, the Administration and Community Law*. General Report for the 1998 FIDE Congress, Stockholm, Sweden, June 3-6, 1998, 1998.05.18., p. 30 http://www.euro-ombudsman.eu.int/fide/pdf/en/fide.pdf (30.11.2005)

For Member States or for the Commission of the European Communities it is possible to bring an action for the establishment of the infringement of the Community law under Articles 226 and 227 EC, if they consider that a national rule is not compatible with the prohibition of discrimination on base of nationality. An individual can inform the Commission of an infringement, but in this case the latter institution has not an obligation to bring a procedure against that State[15], it has a wide discretion whether it does or not. Following several complaints and an own-initiative inquiry of the European Ombudsman on the possibilities of improving the quality of the Commission's administrative procedures for dealing with complaints from citizens about infringements[16], the Commission adopted a communication[17] in which it acknowledged "the vital role played by the complainant in detecting infringements of Community law" and their procedural rights, such as their right to be informed in writing of the decision taken by the Commission in connection with their complaint and any subsequent Commission decisions on the matter, data protection, access to documents under Regulation 1049/2001 and review by the European Ombudsman where a complainant considers that, in handling his or her complaint, the Commission has been guilty of maladministration.

Prior to the procedure before the Court of Justice there is a pre-litigation stage for the establishment of the facts and for trying to make a friendly solution. If only this phase is unsuccessful that a procedure can be brought before the Court. It is more frequent that the Commission brings this proceeding and it is quite rare that a Member State takes this action against another Member State.

The purpose of this proceeding is establishing whether a Member State has infringed its obligation under Community law. Under Article 228 EC, if the Member State concerned fails to take the necessary measures to comply with the Court's judgment, the Commission may bring the case before the Court of Justice again, and if the latter finds that the Member State concerned has really not complied with its judgment, it may impose a lump sum or penalty payment on it. The two types of financial sanctions can be applied simultaneously, as the Court stated[18].

This separation of proceedings seeking the possible establishment of infringement of Community law and imposing a penalty does not incite Member States to the respect of Community law. Thus, the Treaty of Lisbon amends the dispositions of the EC Treaty and makes possible that if the Commission

[15] Cases 48/65 Lütticke v. Commission [1966] ECR 19, 87/89 Sonito v. Commission [1990] ECR I-1981 and 247/87 Fruit Star v. Commission [1989] 291
[16] Case 206/27.10.95/HS/UK et al. (complaint 'Newbury Bypass') and own-initiative inquiry OI/303/97/PD
[17] Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law [COM (2002) 141 final]
[18] In case C-304/02 Commission v. France [2005] ECR I-6263

considers that a Member State has failed to fulfill its obligation to notify measures transposing a directive adopted under a legislative procedure, it may propose that the Court would impose a financial sanction right in the first proceeding, at the establishment of the alleged violation of Community law.

3. Complaint to the European Ombudsman

A non-judicial tool for Union citizens is to submit a complaint to the European Ombudsman. Comparing to the action to the Court of Justice or to a national court or tribunal, it is an alternative way of solution of a debate, and it does not alter the time limit open to bring an action. So, where an individual decides to turn to the European Ombudsman, it normally excludes an action before the Court, because if he decides to open an inquiry, its procedure always lasts for more than two months. The opposite situation is also excluded, since the European Ombudsman cannot investigate the judicial activities of the Court of Justice and the national courts, because is not an appeals body for decisions taken by these entities.

The power of the Ombudsman is wider than solely discrimination cases; it investigates cases of maladministration in the activities of the Community institutions and bodies. Maladministration occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights, in the case of administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information or unnecessary delay.

The European Ombudsman in its individual redress function complements the Union and Member State courts and the parliamentary petitions committees[19]. As the Court of First Instance put it: "in the institution of the Ombudsman, the Treaty has given citizens of the Union, […] an alternative remedy to that of an action before the Community Court in order to protect their rights. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings." [20] Ombudsman proceedings are flexible, swift and no cost for the parties. They may in some instances be quasi-judicial by the review of legality both in substance and procedure, but generally they display typical features of mediation: win-win types of solution, consensual settlement, broader standard of review, non binding solutions, no enforcement or follow up procedure[21].

The European Ombudsman emphasizes however, that his functions does not include mediation within the meaning of assisting the parties involved in a dispute to settle their differences, without examining

[19] Peters, Anne: *The European Ombudsman and the European Constitution*. Common Market Law Review (2005) 42: p. 711
[20] Case T-209/00 Frank Lamberts v. European Ombudsman and European Parliament [2002] ECR II-2203, para 65
[21] Peters, op,cit., p. 711 and pp. 715-716

the merits of the dispute. In fact, the European Ombudsman can only propose a friendly solution for the purpose of eliminating an instance of maladministration, he dose, however, actively seek to encourage the Community institutions and bodies to use mediation to resolve disputes[22].

There is no express *locus standi* restriction in the EC Treaty nor in the Statute of the Ombudsman, so it means, that it is not necessary for a citizen to show any specific interest in order to complain to the Ombudsman. *Actio popularis* is also admissible.

The European Ombudsman is vested with broad powers of inquiry on one hand, but more limited powers to undo the maladministration on the other hand, he cannot quash an administrative decision. Apart from proposing a friendly solution, he can issue draft recommendations to the authority concerned, in the case the authority does not comply with these draft recommendations, the European Ombudsman can submit a special report to the European Parliament. He also makes public critical remarks in decisions closing an inquiry. It usually does not remedy the maladministration occurred, but helps to promote better administrative behavior in the future.

This can be the most powerful instrument of the Ombudsman: on the base of individual complaints he can identify general instances of maladministration and he can give a general guidance for better administrative practice. His most important achievement in this field is the Code of good administrative behavior which serves as a useful pattern for each institution and body in contact with pubic.

The work of the European Ombudsman is under judicial review also. This means that he himself must comply with the requirements of good administration. Although his findings in a case should not be subject to citizens' actions for annulment or to failure to act, an action for damages is admissible in principle, in the case of 'sufficiently serious breach of law'.[23] Since the Ombudsman enjoys a very wide discretionary power, only in very exceptional circumstances will a citizen be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of Community law in the performance of his duties likely to cause damages.

4. Petition to the European Parliament

The subject matter of a petition addressed to the European Parliament is wider than the remit of the Ombudsman, as well as a petition may concern any matter which comes within the Community's fields

[22] Annual report of the European Ombudsman, 2006, p. 38
[23] Case Lamberts, cited above.

of activity[24]. Another important difference is that most of the work of the Committee on Petitions of the European Parliament concerns the application of Community law by authorities of the Member States.

Where the Committee on Petitions and, consequently, the European Parliament considers, that it should be appropriate to bring an action against a Member State who infringed their obligations under Community law, it has no more power than to inform the Commission. It is up to the latter institution to decide whether it brings an action in the alleged case of violation of obligation or not.

While the work of the Ombudsman with citizens' complaints has no political implications in principle, it is generally assumed that the form of petition is more appropriate for political issues[25]. Judicial review on the decisions of the Committee on Petitions is excluded. An alleged maladministration of the Committee could be, in principle, subject of the review of the European Ombudsman; however he refuses to conduct inquiries on petitions, because he does not consider himself as investigator of the European Parliament[26].

Although, according to Article 194 EC, a matter addressed to the European Parliament must affect the petitioner directly, this condition does not restrict the circle of petitioners in practice, contrary to similar condition of bringing an action for annulment before the Court. The Committee on Petitions considers that this conditions fulfils if a matter comes within the field of activity of the European Union, it is not necessary for the petitioner to prove exclusive material or moral personal interest such as in action for annulment. This is very true of matters related to environmental pollution, social matters or transplantation of organs where many people are affected simultaneously and directly. This *locus standi* is interpreted generously[27].

5. Interaction between the three instruments

There is a strong interaction between the three instruments. On one hand, it appears on practical level: the Committee on Petitions transfers, with the consent of the petitioner, any petition containing an allegation of maladministration in the activities of the Community institutions and bodies to

[24] Article 194 EC. It must be mentioned that this condition is contradictory, since according to Article 190 (1) and (4) of the Rules of Procedure of the Euopean Parliament, it is enough if the subject matter of the petition concerns any matter which comes within the *Union's* fields of activity. However, this difference between formulations of texts will not have any importance after the entry into force of Lisbon Treaty.
[25] Peters, op. cit., p. 714
[26] Ibidem.
[27] Marias, Epaminondas: The *right to petition the European Parliament after Maastricht.* European Law Review (1994) 19 p. 179

Ombudsman, to be dealt with it as a complaint. Similarly, when appropriate, the Ombudsman transfers complaints to the Parliament, with the consent of the complainant, to be dealt with it as a petition. If direct transfer is not possible or suitable, the European Ombudsman advises to the complainant to turn to the competent Community or national institution or body, including the Court of Justice[28].

It must be noted that the European Ombudsman has not a right to bring an action before the Court, and the Parliament's similarly right is also limited; it cannot bring an action against a Member State, only against another Community institution under Articles 230 and 232 EC.

The other level of interaction is more theoretical. The European Ombudsman, as well as the Court of Justice, became a novel source of law, especially, a source of soft law in the European Union[29]. In individual cases he adopts a soft law discourse simply to avoid legalistic counter-arguments by the administration's legal services. Within this role, he follows the case law of the Court. In Söderman's words, "the jurisprudence of the Courts in Luxembourg […] will safely guide the Ombudsman's ship on the heavy seas of good and bad administration." [30] This 'administrative soft law' of the Ombudsman may be 'crystallized' into hard law via legislation or via judicial case law.

6. Closing remarks

Principle of non-discrimination is at the core of the fundamental rights of Union citizens. The Lisbon Treaty will reinforce it, since it takes into one unit, into Part Two of the EC Treaty the provisions governing prohibition of discrimination and Union citizenship, under the title of 'Non-Discrimination and Citizenship of the Union'. Afterwards, it will not be possible to argue for that this provision must be interpreted that it extends to non-Community nationals also[31].

The Lisbon Treaty will expand the circle of contestable acts in the way of action for annulment before the Court of Justice. New Article 230 EC will provide that 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. But the requirement of justifying a legal interest will be still in force, and it shall be continue that

[28] In fact, the number of transfers is quite law: less than 1 percent of the complaints received is transferred year by year (in 2006, only 22 complaints of 3 830). The importance of advice is greater, since the European Ombudsman gives an advice to contact an other institution or body in half of the cases.
[29] See Bonnor, Peter: *The European Ombudsman: a novel source of soft law in the European Union*. European Law Review (2000) 24 pp. 39-56
[30] Peters, op. cit., p. 717.
[31] Groenenedijk, op.cit., pp. 84-85

it can be only the Court who could change this situation and give a broader meaning of 'individual and direct concern'.

In the field of reinforcement of protection of fundamental rights, a further innovation of the Lisbon Treaty is the decision on accession to European Convention for the Protection of Human Rights and Fundamental Freedoms. It will not be true anymore, that Union citizens do not have any possibility to invoke their fundamental rights against the Community law on European level.

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HUNGARY – "TOWARDS SUSTAINABILITY"

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Abstract

Ideology of sustainable development was created for solving the conflict between economic growth and environment. Sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs. [1] In order to implement sustainability it is required common action of the countries all over the world. The European Community undertook fulfilment of requirements of sustainability in the Fifth Environmental Programme. Harmonizing with it Hungary created its special programmes, plans and legislation concentrated to protection of natural and built environment

Key words

Sustainable development, requirements of sustainability, implementation of sustainability, organisations for sustainability, programmes, plans and legislation for sustainable development in the European Community and Hungary

Sustainable development

Report of Rome Club [2] created a great international stir by presenting steady growing environmental damaging, overusing of natural resources and giving out of non-renewable resources as "aftermaths" of economic development. It started a bitter controversy over the conflict between the economic growth and the environment. [3] Searching after the solution for resolving of the conflict didn't stay in the frame of scholarlies and representatives of green movements, it was transferred to the international forums of economy and politics.

The solution for saving the Globe for the future generations was "found" by the World Commission on Environment and Development in 1972, and it became known the ideology of sustainable development.

[1] Our Common Future, Report of United Nations, 1987.

[2] Meadows Report, 1972

[3] There were some stand points that considered economic growth favourable for environment also, some in contrast with views held growth among main causes of degradation of environment.

[4] The Commission's Report on "Our Common Future" emphasized the requirement of sustainability in all human activity and stressed that "Human beings are at the centre of concerns for sustainable development". [5] "To consider as sustainable a development which meets the needs of the present without compromising the ability of future generations to meet their own needs." [6]

Based on the definition sustainable development has three main characters are the following:

- preservation of general quality of life
- ensuring available of natural resources
- avoidance of steady environmental damages.

In order to implement sustainable development it is required to manage economy, society and environment as a unit, dependent system. [7] Since resources of raw materials, that forms bases of economical development are limited, its movement is required to direct in different phase of processing, consumption and use to promote the best use and recycle. In this way waste can be avoid and giving out of raw materials can be prevented, there will realise economic development that meets the needs of the present and future generations as well. Moreover to implement sustainable development there is essential required to rationalize energy production and use, besides that to change the society's consumption and behaviour costumes.

Fifth Environmental Action Programme of EU: "Towards Sustainability"

The first significant common action for implementing sustainable development was the European Union's Fifth Environmental Action Programme "Towards Sustainability". The Programme determines European Community's policy for environment and sustainable development particularly, and promotes implementing of Rio Ideals as a part fulfilment of Agenda 21. [8] The Action Programme defines as fundamental requirements maintaining of natural resources and avoiding of environmental pollution on the interest of living quality. The plan determines factors and activities that can cause environmental damages or giving out of natural resources: such as agriculture, industry, energetic, traffic and tourism. The Programme initiates changing of present trends damaging for environment and promotes changing of society's customs.

National organizations for sustainable development of Hungary

[4] The UN called upon Gro Harlem Brundtland prime minister of Norway for working out the overall programme determining the directions of the required change for the solution between environment and economic growth.
[5] World Conference on Environment and Development organized by the United Nations in Rio de Janeiro in 1992. Sustainable development became basic, fundamental principle of the environmental protection by the World Conference.
[6] Our Common Future, Report of United Nations, 1987.
[7] Our Common Future, Report of United Nations, 1987.
[8] BÁNDI, Gy.: Environment Law, Osiris Press, Budapest, 2006, p. 276

Implementing of sustainable development started in Hungary in the last decade following the European trends. Special instruments, programmes and legal means are introduced for sustainable development, special bodies are established as well. At national level there are two bodies that may influence on the sustainability aspects of the decisions: Sustainable Development Committee of Hungary and National Council of Environment.

- Sustainable Development Committee

In order to define the domestic duties deriving from the programmes and plans for sustainable development in Hungary the Government established the Sustainable Development Committee in 1993. The Committee also has the main duty of working out of sustainable development's domestic concept with its special national tasks and promoting of preparing for national exercises arise from sustainable development strategy of European Community. The body also works as a consultative organisation, it makes opinions on different plans and programmes in the aspect sustainable development, and promotes information for professional and civil society. All the ministries are represented in the inter-ministerial committee as well as the representatives of several agencies of national competence and NGOs are included in the committee.

- National Council of Environment Protection [9]

The National Council of Environmental Protection is special advisory organ in order to establish wide social and scientific, professional bases for environmental protection. The body also "protects" the environmental "side" of sustainable development. It takes a stand on the matters of principle of various environmental programmes, on the legal rules, all decisions and other issues related to environment.
The Council consisting of up to 22 members has representatives of public organizations registered with environmental goals, representatives of organs representing professional and economic interests, representatives of the scientific communities and the Chairman of the Hungarian Academy of Sciences in equal proportions.

Legislation for sustainable development of Hungary

The main legislative framework for implementing sustainable development in the aspect of environment is the Act of 1995 on the General Rules of Environmental Protection and the Act XXI of 1996 on Regional Development and Land Use Planning.

- Act LIII of 1995 on the General Rules of Environmental Protection

[9] The detailed provisions of National Council of Environmental Protection are regulated in the Act LIII of 1995 on the General Rules of Environmental Protection, Chapter III, Section 45.

The centre legislation of environmental protection in Hungary has the object developing a harmonious relationship between humans and their environment, protecting the components and processes of the environment, after that providing for the environmental conditions of sustainable development. Sustainable development is determined as a principle of all use of environment and defined as a required [10]: system of social and economic conditions and activities, which preserves the natural values for the present and future generations, uses the natural resources economically expediently, and ensures the improvement of the quality of life and the preservation of diversity in the long run from the aspect of ecology.

The Act of environmental protection provides basis for more specialized rules that are regulated in further acts and decrees. [11] These special statutes regulate the given field of speciality in accordance with the enforcement of environmental requirements.

- Act XXI of 1996 on Regional Development and Land Use Planning

The purpose of the Act is to establish the fundamental objectives and rules of regional development and land use planning, and to define its institutional system. The goal of regional development and regional planning is to promote the development of the social market economy in all regions of the country, to create conditions for sustainable development, [12] to promote the spatial spread of innovation, to develop a spatial structure which is suitable for the social, economic and environmental goals. For strengthening sustainable development – became decisive element of regional development policy – the biological activity-value defines the impact of characteristic vegetation for settlement's ecological condition and human health condition in given area. The sustainable development requires the land sparing, appropriate rainwater management and creating of green rings. [13]

National programmes and plans towards sustainable development of Hungary

Implementation of requirements and instruments of sustainable development are found in strategic programmes and plans mostly: the New Hungary Development Plan, the National Environmental Programme II, the National Development Policy Concept and National Spatial Development Concept determine the required development trends with its implementing for sustainability of Hungary.

[10] The Act LIII of 1996 on Nature Conservation includes also the principle of sustainable development in the objectives of the Act, and it defines the notion of sustainable development among the basic concepts.
[11] The Act includes the most essential definitions, and based upon its authorization, the norms of the sector are detailed in further legal sources.
[12] Sustainable development is prioritised in the Act among the separate rules on land use planning.
[13] green areas, rings of natural environment

• New Hungary Development Plan [14]

The New Hungary Development Plan has the main objective of expanding employment and creating the conditions for long term growth. [15] In order to achieve above objectives, developmental efforts will concentrate among six special areas on Priority of Environment and Energy development. The Priority contributes to the achievement of the long term growth objective by reducing influences damaging the environment, by preserving the natural environment and with prevention, efficiency as well as an integrated approach to complex problems.

The strategy included in the Priority supports the following guidelines:

making Europe and its regions more attractive places to invest and work by strengthen the synergies between environment protection and growth, moreover by address Europe's intensive use of traditional energy sources.

In order to this objectives the Plan determines two main special developments: developments improving the environment and environment friendly energy developments. Developments improving the environment, the elements of which include:

• achieving healthy and clean settlements including waste management; waste water management and improvement of drinking water quality;

• wise management of our waters including protection against floods; protection of quality and quantity of our waters; prevention of further pollution of waters state measures of its implementation;

• wise management of our natural assets;

• promotion of sustainable production and consumption habits, raising awareness of environmental and climate issues;

• regional dimensions of environment developments.

Environment friendly energy developments, the planned tools of which are:

• the promotion of developments aimed at energy efficiency and saving and at

• the production and utilisation of renewable energy;

The implementation of the strategy defined in Priority of Environment and Energy Development is ensured mainly in the frame of the Environment and Energy Operational Programme, financed from the Cohesion Fund, but the Economic Development Operational Programme and the regional operational programmes also contribute to its implementation.

• National Environmental Programme II [16]

[14] National Strategic Reference Framework of Hungary 2007–2013, Employment and Growth

[15] The objectives of the sustainable use of the environment are to be realised in line with the priorities of the Community Strategic Guidelines and the 6th Environment Protection Action Programme of the European Union.

[16] Parliament Resolution No. 132/2003 (XII.11.) OGY on the National Environmental Programme for 2003-2008

The centre plan of sustainability development in the aspect of environment is the National Environmental Programme 2. The Programme is the basis for environmental planning. It also defines the environmental policy objectives of Hungary with its implementation for 6 years. The Plan requires taking into account the principles of sustainable development in all use of environment that is according to Herman Daly, "progressive social betterment without growing beyond ecological carrying capacity."

The Programme determines main purposes for trend of the environmental management and protection of Hungary in conformity with the 6th Environmental Action Programme of the European Union [17] harmonising with the national environmental characteristics. The document also identifies four priority targets:

1. Protection of the ecosystem implies consideration of the sustainable development's principles in management of natural resources, protection of the natural environment for the on-coming generation, preservation of the biosphere.
2. Ensuring of harmonic connection between society and environment tends to improvement of society's health status, preservation of appropriate environment state required to life conditions, reduction and decreasing of dangerous effects.
3. Ensuring of environmental aspects aims at economical development involves decreasing environment load. It requires sustainable using of resources and areas, prevention and reduction of environmental damages.
4. Stressed is the information related to environmental progresses, effects, natural- and environmental protection, the environmental awareness and strengthening of co-operation.

In these special management required areas the second National Environmental Programme delineates concrete interventions, thematic action programmes: [18]

1. Action Programme for Increase of Environmental Awareness
2. Action Programme against Climate Changing
3. Action Programme for Environmental Sanitation and Food-safety
4. Action Programme for Municipal Environment Quality
5. Action Programme for Protection of Biodiversity and Land Protection
6. Action Programme for Rural Environment Quality, Leasehold and Land Use
7. Action Programme for Protection and Sustainable Use of Waters
8. Action Programme for Waste Management

[17] The 6th Environmental Action Programme identifies four priority areas:
Climate change
Nature and biodiversity
Environment and health
Natural resources and waste.

[18] Besides the thematic action programmes the Programme involves the National Nature Conservation Master Plan.

9. Action Programme for Environment Safety

The Programme based upon prevention principle requires choosing and applying of instruments, that prove to be the most effective in environmental, social and economical aspects, at the same time that means are clear, simple and concerted applicable, and can successful contribute to environmental structure changing and developing of environmental sensitiveness. [19]

The contents of the Programme shall be enforced during the drawing up of the social and economic plan of the country,[20] the development of the decisions on economic policy, regional and locality development, regional planning,[21] furthermore, the planning and execution activities carried out in any sector of the national economy by the state.[22]

- National Development Policy Concept [23]

The National Development Policy Concept provides that Hungary should become one of the most dynamically developing countries of Europe by 2020. The living standards and the quality of life of people should improve, there should be more and better jobs, higher incomes, safe, clean and quality environment providing healthier, longer and more complete life. The key objectives of Hungarian development policy also targets the implementation of sustainable development in terms of environmental, social and economic sustainability alike.

A development is considered sustainable based on the Concept,, if the development takes environmental and human resource criteria into account (including natural resources, areas, landscapes, biological diversity, human health, social cohesion and demographic factors), and moreover, protects the built environment, cultural heritage and creates economically sustainable production. In addition, it takes the capacity of the ecological system of a given area into account (including the residents of the area) as a criterion regulating development. [24]

Priorities of sustainability are therefore:

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[19] The National Environmental Programme 2 commends the applying and developing of following instruments:

- integration of environmental standpoints into legislation and special policies
- direct developments in environmental protection
- indirect developments in environmental protection
- legal and official instruments
- economical instruments
- innovation and research
- improvement of environmental achievement of local governments and institutions
- environmental qualifying of products, services and firms
- environmental information
- social participation and obtaining environmental information
- environmental education, training and changing environmental attitudes.

[20] See: Hungarian Constitution, Section 19, subsection (3), paragraph c)

[21] Regional and county environmental protection programmes are required to harmonyzing with the Programme.

[22] Act LIII of 1995 on the General Rules of Environmental Protection, Chapter III, Activities of the Government Aimed at Environmental Protection, Section, Section 41, subsection (4)

[23] Parliamentary Decree 96/2005. (XII. 25.) OGY on the National Development Policy Concept

[24] See in connection of Natural and environmental protection key priorities of Water management, Cultural heritage protection, Housing policy, Energy policy of the National Regional Development Concept.

• conservation of natural assets and resources;

• clean settlements, safe environmental protection;

• general validation of preventative, cautious environmental protection and innovation effective in terms of the environment.

- National Spatial Development Concept [25]

The goal of the creation of a spatial concept is to bring to life a harmonized and sustainable social, economic and environmental spatial structure and regional system. According to the principles of sustainability in the Concept, the development and resource management that is taking place today does not jeopardize future generations' ability to securely fulfil their needs. The development process does not increase the threat to the local natural- and built environment, cannot lead to the depletion of resources or the disappearance of cultures rich in value, and at the same time ensures the conditions for a high standard of living for society.

The document also aims at sustainable territorial development and protection of heritage that ensures besides the safeguarding of environmental, natural and cultural value the safe utilization of the resources necessary to economic functioning, while taking into account the intrinsic qualities of the area. For implementing sustainability in the aspect of environment in spatial development it is required:

• the use of working methods during development that are appropriate to the intrinsic landscape, environmental and natural qualities of the area; giving preference to environmentally friendly production and transport systems;

• ensuring the preservation of traditional land use, the town/village system, and the archaeological and folk heritage;

• cessation of existing environmental pollution, the safe disposal of sewage and waste using modern technology.

According to this the Concept states that regions and areas must be turned into sustainable systems whose value, heritage, resources and integrity are not merely safeguarded, but further strengthened. The harmony of society, the economy, and the natural-environmental and cultural components within their local territorial system is ensured by comprehensive environmental management and integrated environmental planning.

„Person" responsible for implementation of sustainability of Hungary

For implementation of sustainable development of Hungary is required concerted action of all participation of all „person" in the country. The public administration has the duty of realization of the

[25] Parliamentary Decree 97/2005 (XII.25.) OGY on the National Spatial Development Concept

aimed middle-range policy in compliance with the environmental requirements and interests of the social. The environment policy involved in the national plans and programme is required to bring in harmony of economical conception and other plans for development. The local government has enlarging function in environmental management and protection. It has the primary duty of participation in local implementation of sustainability and promoting it by working out of regional environmental plans.

Non governmental organizations, professional groups and representations are required active co-operation in environmental information, PR activities, in deepening of social relationship and in consultation as well. The institutions and professionals are desirable to be initiated in planning, preparation and realization progresses in environmental working.

For elimination and prevention environmental problems there is required the partnership with the economical actors. Promoting of environmental friend action in economic that can serve essential the environmental interests.

Scientists, scientific institutions for research and educational institutions play stressed role in research and strategic work in realizing environmental purposes. These scientific partners are responsible for changing of the social environmental attitudes in the direction of environment consciousness and sensitiveness.

„By environmental protection are invested all the society with rights and liabilities as well."[26] All the nationals have right to healthy environment and are obliged to consider sustainability in ordinary activity.

Lectored by: Dr. jur. Csilla Csák PhD., LLM

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THE DRAFT COMMON FRAME OF REFERENCE: WHAT FUTURE FOR EUROPEAN CONTRACT LAW?

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Abstract

Does the Draft Common Frame of Reference signalize the new stage in the development of the European Contract Law? And if yes, hasn't the process been rather abrupt? This paper will try to give an overview of the debate and the current problems in the European Contract Law today, analyze to the greater detail some of the problems, which surfaced in connection with the DCFR and finally attempt to show that the readiness of Europe for any fundamental harmonization of the contract law has to be balanced by more fundamental changes in the multi-level system of governance.

Keywords

Private Law, European Private Law, Contract Law, European Contract Law, Common Frame of Reference, Consumer Law, Maximum Harmonisation, European Law, Europeanization of Private Law

I. Introduction

Many enthusiastic scholars, politicians (mainly from the European Parliament) and officials (predominantly from the Commission) for almost 30 years are playing with the idea of creating a European Civil Code (ECC). This idea has grown by now into the "Academic" Draft Common Frame of Reference (hereinafter Academic DCFR).

This paper aims to accomplish at least three major quests: to give an overview of the debate and the current problems in the European Contract Law today, to analyze some of the problems, which surfaced in connection with the DCFR and finally to show that the readiness of Europe for any fundamental harmonisation of the contract law has to be balanced by more fundamental changes then the enthusiasm of the few.

Perhaps I should start this paper with few questions: What is the so-called Academic DCFR? Does any non-academic / non-draft Common Frame of Reference (CFR) exist? If this is the case, what is the

relation between all these 'common frames'? And what is their relation of these to the European Civil Code?

There is a number of legitimate questions that might be raised; even more so by the legal community which is not directly part of the discussion[1], therefore, I will first try to clarify some problematic terms - in a very rough, but hopefully clear language - and only then I will go to the substance of the paper. The reader might use this introduction as a dictionary or as a set of definitions, eventually guidance on how to understand the terms used in this paper.

The Academic DCFR[2] is practically a draft of a Civil Code. This draft has been prepared by the groups of academics, practically during the last 30 years. From 2005 the EU Commission started to fund this project, because the Commission intended to use it for its own purposes. I discuss this issue closer in the Part II of this paper, which deals with the question "how did we get to the Academic DCFR".

During the year 2008 the evaluation of this draft code is to take place, and after the revision of the text (at the end of 2008), the academics will deliver the final **Academic Common Frame of Reference** (The Academic CFR)[3] to the Commission.

The reason for delivering the Academic CFR (which looks practically as a draft civil code) to the Commission is that it is intended to be used as a preliminary draft for the creation of **Common Frame of Reference (CFR)**, which should emerge through the political process (and thus we may also call it a political CFR). This CFR – at its minimum – is meant to serve a *set of background rules and principles* on the basis of which the European Legislator will develop future legislative instruments in the area of private law or the EU law in general. CFR is supposed to be a "toolbox" or a set of "definitions, model rules and principles", which would serve for the more efficient and coherent European lawmaking in the area of private law as well as for the better implementation of European Legislation[4].

However, there is number of issues that are still not resolved. And that is, how will the CFR be 'passed'? There is number of options. It could be a Directive, Regulation, Recommendation or Decision. But is it

[1] Given that this conference is not a specialized private law conference, I will try to accommodate the readers which are not entirely familiar with the topic. Therefore, I will try to explain different terms at this place scarifying the terminological accuracy in order to explain better what these confusing terms stand for; this approach seems necessary as otherwise it might be difficult to grasp the meaning. Further in the paper I will be using 'politically' correct terminology, however, whenever necessary, the reader should come back to this dictionary while reading - not to loose out of the sight what is at stake.

[2] The term Academic DCFR and the DCFR will be used interchangeably; the only reason to stress the word "Academic" sometimes is that I have subjective feeling that it adds some more clarity.

[3] The word 'draft' has disappeared because this is supposed to be the final product of the academic; at least in this stage.

[4] This means, that in case the Directive sets that someone is liable in damages – from the CFR – we will be able to interpret what kind of damages should be included – material damage, non material damage, loss of joy, etc.

going to be an Intra-institutional agreement or an Optional Instrument? Or is the CFR just going to be somehow officially approved (by e.g. publication in the Official Journal)? Eventually, should we do anything about it? The only thing that we are sure in this moment about is that it is not going to be a European Civil Code (at least not now). Another crucial question in this regard is the legal basis on which the chosen instrument would be passed. More about all these questions you could find in Part III of this paper. At this point I will just explain two of the terms mentioned.

An **Intra-institutional agreement** (IAA) stands here for an agreement between the institutions of the EU. In this case, it would be an agreement that the institutions are going to take the CFR into account, or eventually, that they would be bound to take the CFR into account when legislating. On the other hand, an **Optional Instrument** would go much further. It would allow the private parties to choose the Optional Instrument as a 28th legal order, i.e. it would replace the national legal orders, including their mandatory rules.

The last term that might need some clarification at this place is the **Revision of Consumer Acquis**. Simultaneously with the work on the DCFR, the Commission started (though this time in its own direction) to reflect on the revision of the consumer acquis, i.e. the revision of the currently valid directives on consumer protection. The reason is that these are often not only 'outdated', but also incoherent with each other. One of the functions of the CFR would be to give the common framework on which the system of consumer acquis would be rebuilt upon. Why might the DCFR prove not particularly helpful will be outlined in the Part V of the paper.

The organization of the paper will thus be following: Part II will be dealing with the way toward the Academic DCFR, Part III will discuss the future of DCFR within the EU framework Part IV will be devoted to some problems in the structure of the Academic DCFR and Part V will be concentrate to the selected problems in the content of the DCFR.

II. Towards the Academic DCFR

The beginning of the Europeanization of Contract Law is tracked usually back to the First Consumers Protection Directives[5]. This set of consumer directives – the so called "Consumer Acquis" - form today the core of the European Contract Law.

[5] The "Consumer Acquis" is created by 8 Directives adopted from the 1985 onwards. These are: The Doorstep Selling Directive (85/577/EEC); The Package Travel Directive (90/314/EEC); The Unfair Terms in Consumer Contracts Directive (93/13/EEC); The Timeshare Directive (94/47/EC); The Distance Selling Directive (97/7/EC); The Price Indication Directive (98/6/EC); The Injunctions Directive (98/27/EC); and The Consumer Sales Directive (1999/44/EC).

Yet, of a different nature (and with a different rationale behind) was an idea adopted by a group of European academics, who felt the necessity for the "common set or rules and principles", which would be the basis for Europe-wide discussion about contract or wider private law. An impulse was the publication of American Restatement of the Law of Contract by the American Law Institute, which provoked establishing of the **Commission on European Contract Law** (Commission on ECL)[6]**,** a group which aimed at creation of the European counterpart of the American Contract Law Restatement. However, given that the task of American and European groups was hugely different[7], such comparison might be felt as misleading[8].

After the 1995, the Commission on ECL gradually issued thee volume 'Restatement' of European contract law: ***The Principles of European Contract Law (PECL)***. It was hoped that the PECL will form the basis of what will later be a European Civil Code. The idea of the European Civil Code had perhaps a broader support in Europe in the second half of the 90s; thus in February 1997, the Dutch Government organized a symposium on a future European Civil Code, and after a **Study Group of a European Civil Code** has been established under the leadership of *Professor Christian von Bar*[9]*,* and financed predominantly by governments of Netherlands, Germany and Austria, etc[10].

The role of the European Parliament (EP) for the acceleration of the whole 'unification' idea/process[11] should not be omitted; in 1989 and in 1994 the EP requested the Commission and the Council to prepare a European Civil Code[12]. This was an important psychological moment for academics working on the creation of a code[13]. The official "EC venture" however started only after October 1999 (Tampere meeting), when the European Council decided that the Commission and the Council of Ministers should prepare an overall study on the need to approximate the Member States' legislation in civil law matters.

In response to the conclusion of the Tampere Council, the Commission published a Communication to the Council and Parliament[14], asking them what kind of instrument they envisage: a kind of Restatement

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[6] See http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm

[7] With unavoidable simplification: the American Restatement of Contract law aimed at systematization of existing common (contract) law, while the Study group had to engage in a comparative exercise, which aimed to find the 'best solutions' (thus it rather reminds us of the work on the UNIDROIT principles or CISG Convention). Nonetheless, Professor Bar still argues that the task is practically the same. See Christian Von Bar, Coverage and Structure of the Academic Common Frame of Reference (2007), *European Review of Contract Law* 5.

[8] Jonathan Mance, Is Europe Aiming to Civilize the Common Law? (2007); *European Business Law Review*

[9] See http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm

[10] *Ibid.*

[11] See Christian Von Bar, Coverage and Structure of the Academic Common Frame of Reference (2007), *European Review of Contract Law* 90.

[12] The impulses were the two resolutions of the European Parliament: Resolution A2-157/89 and Resolution A3-0329/94).

[13] Though the support for the "European Civil Code" was later 'moderated', The EP continues support to the Common Frame of Reference. See Resolutions of the EP: P6_TA(2006)0352 and P6_TA(2006)0109.

[14] See COM (2001) 398.

of law, or, a comprehensive and binding Union legislation on the law of contract should be prepared. The Commission also asked whether the existing Community contract law (created predominantly by above mentioned Consumer Acquis), should be improved and co-ordinated. The responses to that Commission's communication were rather positive: the Council did not object to a harmonisation of contract law if a need for it was revealed. The European Parliament supported the enactment of a binding European Contract Law in 2010 as an ultimate goal. Other interested parties preferred the improvement and coordination of the existing Consumer Acquis, and eventually a non-binding instrument.

In 2003, the Commission published Action Plan[15] as a second step in the ongoing discussion about the future European Contract Law. It gave priority to the revision of Consumer Acquis, with the help of "Common Frame of Reference"[16]. The Action Plan also discussed the possibility of an Optional Instrument of European Contract Law, which might have been based on the Common Frame of Reference.

In the next communication[17] the Commissions outlined its vision of how the CFR is to be developed[18], what is the CFR going to serve for and the Commission set the deadline for December 2007. The Commission decided to build on the work ongoing in Europe for the last decades and therefore engaged the Study group on European Civil Code (under leadership of Ch. von Bar), but also Acquis Group[19] and the Insurance contract law group. This CFR-network (Network of Excellence) was established in 2005 and their aim was to deliver the CFR.

Except for the CFR-Net, number of other groups of scholars were involved in its creation as so called 'evaluative groups"[20] The DCFR is to be evaluated by these other groups during the first half of 2008 and, after the revision, final academic CFR should be submitted to the Commission at the end of 2008.

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[15] See Communication from the Commission to the European Parliament and the Council: A more coherent European Contract Law: ACTION PLAN, COMM (2003) 68

[16] This is the first time the term 'Common Frame of Reference' was introduced.

[17] See COM(2004) 651.

[18] Control of the content through the stakeholder meetings (in the cooperation with EP and the Council), but foremost the prioritization of Consumer Acquis revision functions of the CFR.

[19] The results of the work group Acquis Group is an independent product, so-called "Acquis principles" (the principles extracted from the currently valid Consumer Acquis). See: Research Group on the Existing EC Private Law (Acquis Group); *Contract I : pre-contractual obligations, conclusion of contract, unfair terms* and *Performance, Non-Performance, Remedies*; (both München : Sellier European Law Publ. 2007)

[20] Such groups are Association Henri Capitant, Economic Impact Group, to some extent also Social Justice Group. These groups could perform their evaluative task only after the DCFR was published as, because of the lack of time, they were not involved in the preparation of the DraftCFR directly.

In the meanwhile the rejection of the Constitutional Treaty in France and Netherlands in 2005[21] led to the change in political mood and partial retreat in the rather courageous plans concerning the DCFR[22], i.e. what happened is the reprioritization of the work and the shift of efforts to the consumer Acquis[23]. As Diana Wallis put it "*the political moment, the political context is not right*" [24].

This change of course might be seen as positive for many reasons; some of them will be discussed further in this paper.

III. The future of the DCFR and the question of legal basis

What will be the future of DCFR is not clear; it is not even clear by now whether there will be any future. According to the creators of the DCFR some minimal acknowledgement at the EU level is expected. According to Eric Clive[25], one of the most prominent figures in the Network of Excellence, the minimum expected outcome is the publication of the DCFR in the Official Journal or some other kind of **Official Approval of the DCFR**. This position seems to be shared by Christian von Bar and Hugh Beale[26]. It is believed that this would be enough to ensure minimally the toolbox function of the DCFR, which is seen as a rather useful or least harmful function. Nonetheless, any official approval would 'breathe life' into this academic accomplishment with the threat of "spontaneous harmonization"[27] taking place,what might not be welcomed by certain part of the academia.

Further option according to Clive is an **Inter-Institutional Agreement** (hereinafter IIA). Martjin von Hesselink[28], in the recent study for the European Parliament[29], questions the binding nature of such agreement from a pragmatic standpoint:

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[21] The French Referendum was on 29 May 2005, The Dutch referendum on 1 June 2005.

[22] To create an Optional Instrument (as the Commission intends) or even a European Civil Code (what was the wish of the EP). For the common law side of the story see: Jonathan Mance, Is Europe Aiming to Civilise the Common Law? (2007); *European Business Law Review*, 2007

[23] Compare the Communications of the Commission: COM (2006) 744, COM(2005) 456 and COM(2007) 447

[24] Diana Wallis, European Contract Law – The Way Forward: Political Context, Parliament´s Preoccupations and Process (2008), *ERA Forum*, *Special Issue: European Contract Law* 9

[25] Presentation at the Conference 'The Draft Common Frame of Reference', organized by the Academy of European Law:, 6th and 7th March 2008, Trier, Germany

[26] *Ibid.*

[27] The concept was introduced by the article by Marco B.M. Loose, The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization (2007), *European Review of Private Law*

[28] One political remark: It is rather puzzling that the European Parliament has assign the task to examine the legal basis for an Optional Instrument to the person who is not an EU constitutional lawyer, but rather a private lawyer, who was moreover involved in the preparation of the DCFR.

[29] Martijn W. Hesselink, Jacobien W. Rutgers, Tim de Booys, *The legal basis for an optional instrument on European contract law*, Centre for the Study of European Contract Law, Working Paper Series No. 2007/04

'*if the intra-institutional agreement was to compel the Commission, Parliament and Council always to make sure that the revised acquis communautaire and any new legislative measures in the area covered by the CFR ('new acquis') be in conformity with the CFR and never to deviate from it, the issue might arise whether such an agreement should not be regarded as binding.* ***However, it seems unlikely that an IIA on the CFR will ever be phrased in such terms. Rather, it will probably state that the Institutions will have to take the CFR into account when enacting rules relating contract law*** *(and other subjects dealt with in the CFR).* ***Indeed, the Council has already stated explicitly that the CFR will not be a legally binding instrument****."* (emphasis added)

Another question however seems much more worrying in respect of the binding character of the IIA. If we accept that EU institutions have any democratic legitimacy, then we can hardly accept that these democratically elected (in this way or another) institutions for a certain period of time could bound their 'descendants' in office in any binding way, i.e. binding in the sense of unchangeable[30]. In other words, one lawmaking body can not make decision that would infringe upon the democratically acquired mandate of the following lawmaking body[31]; the only exception being of course the legislation. Therefore, it is hard to understand what kind of "binding" instrument creators might have in mind[32].

A possibility to turn CFR into an **Optional Instrument** (in a form of Directive or Regulation) is discussed widely from the 2003 Action Plan on. The Optional Instrument is meant to be the 28th autonomous legal order, which the parties could choose for governing their contractual relation. The purpose of such a mandatory instrument is to create a common set of mandatory rules, which would enhance the cross border transactions because eliminating insecurity as to which mandatory norms are applicable and generally lower the transaction costs.

As mentioned above, Martijn W. Hesselink has been assigned the task to elaborate a comprehensive study for the European Parliament on the question of legal basis for such an Optional Instrument[33].

[30] The procedure for the change might be more difficult (eg. in case of constitutional provisions), but we can never bound next generations impossible to legislative

[31] See Reference Re Canada Assistance Plan (B.C.) [a.k.a. CAP], where the Candian Supreme Court has discussed the question of binding character of the agreement between the federal government and the state government for the next parliamentary majority. "Pacta sunt servanda" in this context would be unconstitutional, i.e. it would infringe the principle of parliamentary sovereignty.

[32] There is a substantial difference between the IIA envisaged for the CFR and the classical IIA, which were used more for different institutional arrangements, namely for the benefit of EP. See Isabella Eiselt and Peter Slominski, Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU(2006), *European Law Journal.*

[33] Above, n 29.

According to this study, the most appropriate legal basis for the so called "28th legal order" is Art. 308 of the Treaty[34]; after all it seems that after the *Tabacoo Judgement* Art. 95 is "out of play"[35]. He recommends that the most appropriate time for passing the Optional Instrument after would be after the Lisbon Treaty comes into force, as at the co-decision procedure would then apply also to the Art. 308. The only problem he sees is that under this article not the whole of the DCFR could be included in the Optional Instrument, because this legal basis can be used only for the fulfilment of "Community objectives", which according to the ECJ are Internal Market and Competition (Art. 2 and 3 of the Treaty) [36].

Finally, according to Eric Clive, the DCFR might serve as a basis for the **European Civil Code.** This option is however not envisaged in the nearest future.

Some other voices were raised claiming that an **International Agreement/Treaty** would be necessary (and appropriate) for the future European Civil Code or the Optional Instrument; within or outside of the EU framework[37]. This seems a reasonable solution; it would remove the obstacles concerning the scope of the potential Optional instrument, it could be hardly be contested on the basis of lack of democratic legitimacy and in addition, given there is no attributed competence on the side of EU, such international agreement of the Member States could not be successfully contestable in front of the ECJ. Perhaps, this way of adoption would contribute to the whole enterprise as the Optional Instrument would get more publicity, which is a precondition for the success.

IV. Structure of the DCFR

Few words to the structure of the DCFR: the text is divided into Books and each Book is divided into Chapters, Sections, Subsections and Articles. Book I is trying to give general guidance on how to use the whole, Book II is dealing with the "Contracts and other Juridical Acts", Book III with "Contractual and Non-contractual Obligation", Book IV with the Specific Contracts, Book V with benevolent Intervention in the Another's Affairs, Book VI with Tort, Book VII with Unjustified Enrichment, Book VIII with Transfer of Movables, Book IX with Proprietary Security Rights in Movable Assets and Book X with Trusts.

[34] He discusses also article 65, 94, 95 and concludes that none of these is an appropriate legal basis.
[35] Given that I have no space to go into details in respect of this judgment, please see: Stephen Weatherill; Reflections on the EC's Competence to develop a 'European Contract Law' (2005), *European Review of Private Law* 412 and ff.
[36] See ECJ: [1996] ECR I-1759 para 23, 24, 29 or above, n. 29, p. 65.
[37] See e.g. Van Gerven, Is there a competence for European Civil Code (1997), *European Review of Private Law*.

What I have found surprising is the division between Book II and III. Thus these books incorporate (revised) PECL into the DCFR and practically divide its content in line with Germanic group of civil codes – a book on Juridical Acts and a book on Obligations[38]. I will not enter the discussion whether this is the most successful model; however, it seems necessary to me to draw attention to the fact the PECL was reconstructed in the line with the BGB (and other codes in Central Europe). The chairman of the Study group, Ch. von Bar, according to my knowledge did not publicly discuss the question of necessity to divide the PECL into two books in some great length, but rather devoted his writing to the question "how"[39].

In addition, it seems that the Book II has a great potential to confuse. The title of the book is "Contracts and other Juridical Acts" and it starts first with the definition of contract (an agreement, which consists on 2 or more Juridical Acts) and only then we come to the definition of the Juridical Act. I do not find this approach very helpful: if we have already adopted the "juridical acts" paradigm, it seems better to be consistent and proceed *a minori ad maius*. Is there any reason to speak first about contract and only after about its integral part - Juridical act? I am not sure whether creators tried to hide their choice, or there was another reason, but it is hard to understand why such an unconvincing and obscure way was chosen.

V. The Content of the DCFR: Issues of concern

Many different objections might be raised as to the content of this academic exercise. Given the fact that during 2008, the revision of the DCFR is planned – on the basis of suggestions of the evaluative groups and other interested parties – it seems that the time for the constructive criticism has come.

Two main problems from the outset are:

a) The PECL, now forming the general contract law part is based on the "best solution" rationale[40], while the parts dealing with existing Consumer Acquis are based on "restatement" rationale[41] and thus sometimes perpetuating outdated or inapt models[42]. Particularly worrying is that the consumer

[38] I am familiar with this division because I am educated in a system which has adopted this German model.
[39] See eg. Christian von Bar, Coverage and Structure of the Academic Common Frame of Reference (2007), *European Journal of Contract Law* or Christian von Bar, Working Together Toward a Common Frame of Reference (2005), *Juridica*, available at http://www.juridica.ee/get_doc.php?id=879
[40] It means that the creators tried to find the best solution available. See eg. http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm
[41] The example might be the input of Acquis group, which worked more on the principle of restating the existing consumer contract law then constructing the better solutions.
[42] Eg. regulation of Agency was strongly disputed on the Conference 'The Draft Common Frame of Reference', organized by the Academy of European Law:, 6th and 7th March 2008, Trier, Germany

protection afforded by the DCFR is often significantly lower then in the member states[43], which is the moment for serious social justice objections. This is even more valid if the model for the revision of acquis would be "maximum harmonisation".

b) The relation of the DCFR to the (consumer) contract law in the regulated markets. The DCFR does not reflect on the great bulk of the contract law that emerged in the regulated markets (energy, transport, telecommunication, etc.) – all except for the insurance contract law (and even this with inconsistencies if these are not removed until the end of this year[44]). There is number of reasons why the questions of the "isolated islands of consumer contract law" take into consideration – just to mention one: the negative effects of the fragmentation of consumer contract law.

There is however a number of less fundamental problems related to the content of the DCFR, which could be removed during the following year. I will try to highlight 3 of them – two deal with the social justice issues and one with the unsuitable solution adopted in respect of the validity clauses.

First of all, the DCFR has adopted very a narrow definition of the consumer (the reason for this was explained above), which is lower then current standards in large number of the Member States[45]. The DCFR defines consumer as *"any natural person acting primarily for the purposes which are not related to his or her trade, business or profession".* It means that every non natural person would always be denied the protection of consumer law – though provably in a much weaker position when compared to the counterparty (eg. a one person 'house painting' company buying IT technology). The protection would be also denied to the natural persons if buying for the purposes primarily related to its trade business of profession, i.e. IT equipment for its law office, or eventually, a small shop keeper who is buying a car for supplying green grocery shop. In fact, most of the businesses are small firms[46], worth of protection, and this is true not only for the social justice (distributive) reasons[47]. Perhaps this is the reason why so many Member States adopted the wider definition[48]. It therefore seems that the DCFR did not adopt

[43] One of the most important issues is the narrow definition of consumer. See below, n. 48.
[44] For illustration, the PEICL (Principles of European Insurance Contract Law) use term "cooling off" period, while the DCFR uses "withdrawal period".
[45] See below, n 48.
[46] Compare eg. OECD Small and Medium Enterprise Outlook – 2002 Edition

[47] I would argue that enlarging the notion of consumer is the best solution also from the efficiency standpoint; and from the same reasons as advance by the Law and Economics literature for the enhanced protection of consumers - i.e. lowering the transaction costs, increasing the trust and thus also consumption.
[48] The Member States use concepts like "final user who does not use the goods for further commercialisation' (Spain), similarly also in Greece, Hungary or Luxembourg. Other Member States extend the consumer protection to the persons (natural and legal) who act outside their primary business of profession. See Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (ed.), *Consumer Law Compendium* (2008) p. 721 and ff.

neither the most common solution in the MS nor the "best solution" (in distributive and efficiency terms).

Second objection has to do with the DCFR goal to regulate all kinds of contracts, i.e. C2C, B2C and B2B and the adopted model for the control of unfair terms. The control of unfairness of contract terms is bound to the fact that the terms were not individually negotiated[49]. Given that standard terms hardly ever appear in C2C contracts and, on the other hand, C2C contracts might (and often are) very abusive ones, it seems unjustified to exclude individually negotiated terms from the court review. Of course, it might be claimed that there are some other provisions[50] that might be used to remedy this deficiency, however, it will be often difficult to reach or prove the threshold. The DCFR thus introduces a socially undesirable model, which, contrary to the national codes, it is not able to remedy eg. through the validity clauses (such as good morals or public order clause).

Thus finally I will address the question of (non)incorporation of the autonomous European Public Policy / Order (EPO) clause in the DCFR. From the outset can be said that the incorporation of autonomous conception of *ordre public* into any kind of European Contract Law Instrument would be an important symbol for Europe, an important moment in the building of European Identity. It however does not mean that the appropriate moment has come already. Thus I will further argue that the readiness of the EU for the European Civil Code could be measured upon the plausibility of the claim that it EU can have or has an autonomous conception of *ordre public:* EPO.

The authors of PECL decided to go in the direction none of the international instruments took before, namely, to incorporate an autonomous EPO clause[51] in the Art. 15:101. According to the Comment[52], this clause should interpret on basis of the principles on which the Communities are based as well as certain human rights instruments (European Convention on Human Rights, European Charter). This decision is however not uncontroversial and raises many fundamental questions.

First of all, with incorporation of such an instrument as PECL into contract, parties exclude the application of the national default rules. Therefore mandatory rules apply, except if otherwise would be provided by the provisions of applicable national law (Art 1:103 of the PECL). However, what PECL does

[49] Book II, Chapter 9, Section 4. These provisions are in line with the Unfair Contract Terms Directive (93/13/EEC).
[50] See Art. II-7:204 Reliance on incorrect information, Art. II-7:205 Fraud, Art. II-7:206 Coercion or threats and Art. II-7:207 Unfair exploitation
[51] The wording of Art. 15:101 of PECL: "*A contract is of no effect to the extent that it is contrary to principles recognized as fundamental in the laws of the Member States of the European Union."*
[52] Ole Lando et al (eds.), Principles of European Contract Law Part III, Kluwer Law International, 2003, Comment to the Art. 15:101, p 211

not discuss, is how possibly could the introduction of an autonomous concept of EPO, in an instrument like PECL, mean that the parties would exclude the application of the national *ordre public*[53]. The issue is that the concept of PO is in fact the last thing parties could from application by its own will.

However, the solution adopted by the DCFR is even more puzzling. Recital 34 states:

> *34. Contracts harmful to third persons and society in general. A further ground on which a contract may be invalidated, even though the EU a common example is freely agreed between two equal parties, is that it (or more often the performance of the obligation under it) would have a seriously harmful effect on third persons or society. Thus contracts which are illegal or contrary to public policy in this sense (within the framework of contracts which infringe the competition articles of the Treaty) are invalid. The DCFR does not spell out when a contract is contrary to public policy in this sense, because that is a matter for law outside the scope of the DCFR – the law of competition or the criminal law of the Member State where the relevant performance should take place. However the fact that a contract might harm third persons or society is clearly a ground on which the legislator should consider invalidating it, and the DCFR contains rules to that effect'.*
> (stress added*).*

The invalidation of contracts on the basis of the public policy (like infringement of competition law or criminal law) are according to the Recital 34 outside the DCFR, and the states should rely on its own concept of public policy. However, Art. II-7:301 of the DCFR adopts practically the same wording as does Art. 15:101 of the PECL.

What however these fundamental principles spelled out in the Art. II-7:301 should be if not public policy or *ordre public*? In addition, the wording "principles fundamental in the laws of the Member States of the EU" really suggest that we are talking about European conception of ordre public (EPO).

There is number of readings of the Recital 34 in connection wit the II-7:301. Either we could infer that the national PO still is in effect, and the EPO (Principles recognized as fundamental in the laws of MS)

[53] One hyperbola for the illustration: A contracts related to the establishment of abortion clinic would not likely be found in accordance with the national conception of *Ordre Public* (in wider sense – including the mandatory norms), and thus enforceable; very likely despite the fact that the parties included PECL into the contracts and might claim that such contract is accordance with the autonomous conception of EPO (as an important instrument for the protection bodily integrity and personal autonomy of women

are an additional constraint on the contractual freedom.[54] Or we could accept that "ruling" in this regard is Article II-7:301 and that autonomous conception of EPO applies. The third reading is that the DCFR status quo remains and the DCFR adopted an autonomous conception for something that has no any meaning. But, in this case, why not adopt a fair position as (eg.) the UNIDROIT principles and say openly these matters are out of the scope?

One of the evaluative groups (Association Henri Capitant) has issued two volumes; one on the Terminology used in the DCFR, and second revising the PECL. The volume on Terminology praises the need for using autonomous European Concepts – such as Principles fundamental in the laws of the MS. The volume dealing with the revision of PECL suggests, that the relevant provision of PECL (and consequently DCFR) would be much clearer if a clearer language was adopted, namely: "Principles recognized as fundamental in the common laws of the EU"[55]. It seems the deceptive potential of the provision is really great.

More fundamentally, the autonomous concept of EPO would be feasible in the moment when the EU acquires competence over the fields that PO (traditionally) covers. In other words if an European instrument can not impose mandatory rules – or at least majority of them - even less can it can impose EPO. The public order clause is a "sovereignty clause", and till either EU acquires the most of the sovereignty from the states or sovereignty as such looses its meaning, the EU can not set the content of what are fundamental tenets of the society. Indeed, it can impose an additional burden on contractual freedom, i.e. EPO over the national PO. The relation between Identity, Sovereignty and *ordre public* is still to be examined. However, at least as the world still stands today, only when European judges start to think in European terms, more as a European then a Czech, and when the tips on the sovereignty weight prevails on the EU side (which indeed is not only matter of black letter law), then we can speak of European Ordre Public.

I mentioned above that I intend to argue that there is a connection between the readiness of EU for an autonomous EPO clause and the readiness for the European Civil Code. I believe, and with reference to Manifesto, that the Union first has to undergo some fundamental changes before the ECC or the EPO clause can be introduced. The changes that are needed for the introduction of either of them are of the same nature.

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[54] And this is indeed claimed by some scholars for already longer time. See : Association Henri Capitant des amis de la culture juridique française, Bénédicte Fauvarque-Cosson et Denis Mazeaud (ed), *Terminologie contractuelle commune : projet de cadre commun de référence*, Société de législation comparée (2008), p 172.

[55] Association Henri Capitant des Amis de la Culture Juridique Francaise, Societe de Legislation Comparee, *Principes Contractuels Communs*, Societe de Legislation Comparee, 2008, page 421

The most fundamental change needed is a gradual change of the mindset of European citizens[56], i.e. the restructuring of the national identities to embrace also the European identity[57]. Perhaps only then necessary consensus for the restructuring of the European multi-governance system could take place. A positive change in the system of governance would have a consequence that the EU would acquire more democratic legitimacy and, consequently, also acquire a bigger portion of power. This would mean that the issues the EU will be dealing with in the future will go far beyond the internal market regulation and thus perhaps it would acquire more legitimacy (from the social justice point of view) to enact a ECC or claim the existence of EPO.

VI. Conclusion

The creation of DCFR is an important moment for the development of European Contract Law: it raised attention of the problems encountered in European consumer and contract law and it has a good potential of becoming a useful toolbox for achieving more coherence in this the area of European Private Law. But perhaps the DCFR has shown us even something more, namely: where we are in this moment, but perhaps more importantly, where we are still not.

Very convincing objections against the creation of European Civil Code were raised by number of prominent scholars; some of them[58] touching the core question of existence of EU legitimacy to develop such an instrument - not solely on the ground of formalistic discussion on (non)existence of legal basis, but also raising serious concerns about legitimacy of the EU for action in social justice related areas[59], and eventual need for reconceptualisation of the EU governance system if any action is to be taken.

The failure of ambitious plans for the creation of European Civil or European Contract Code has given us more time to reflect (just like in the case of Constitutional Treaty) and eventually remedy deficiencies of the current system. We learned that there is only one consensus in respect of the ECC in Europe today,

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[56] Perhaps it might be argued that 'identity" might be imposed rather easily – "great job" in this sense was done in France 200 years ago, but if we to adopt more democratic methods, then we have to be prepared that it will take a longer time.

[57] As Lord Mance put it: *"Europe's problem may however be that its populations remain Eurosceptically attached to their individual national identities, but its institutions (particularly the Commission and Parliament) are composed of enthusiastic Europeans."* Johnatan Mance, Is Europe Aiming to Civilize the Common Law? (2007), *European Business Law Review*, p. 86

[58] Social Justice in European Contract Law: a Manifesto (2004), *European Law Journal* pp. 653 – 674. For the response see Hugh Beale, The future of the Common Frame of Reference (2007), *European Journal of Contract law*

[59] According to the authors of Manifesto, the interlink between social justice and contract law is clear e.g. in the field of services of general interest, constitutionalization of private law, etc. National governments had a great leeway to regulate for the purpose of ensuring social justice; the Treaty however does not endow the Communities with this power. The EU consumer protection is also drawn mainly by efficiency rationale and thus its patchwork approach and restriction e.g. only to the natural persons.

and that is that we need more consensus, ie. longer and more democratic deliberation as well as also some fundamental changes in the current system of governance.

With the failure of European Civil Code quest, however, not all the problems have passed away. Very pressing seem the urge of the Commission to push for the maximum harmonisation[60] of the consumer law. The conservation of the amount of protection afforded to consumers (and taking into consideration that the currently valid EU legislation as well as the DCFR afford substantially lower breath of protection then is the case in majority of Member States[61]) in fact raises many of the objections which were be applicable to the introduction of European Civil Code: and foremost the objection concerning the legitimacy of the EU to harmonise maximally areas where it can not make the full decision (ie. take into consideration all relevant aspects, including social justice aspects).

I would like to end with a claim that any fundamental harmonisation of the European contract law should only follow some fundamental changes in the EU multi-level organisational structure; enthusiasm of the few would not make it.

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CROSS-BORDER ENFORCEMENT OF EC CONSUMER LAW - CPC REGULATION

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Abstract

Regulation (EC) No 2006/2004 on Consumer Protection Cooperation was adopted in 2004 to tackle the growing cross border problems in the Internal Market. It lays down the framework and general conditions under which authorities, responsible for enforcement in the Member States, are to cooperate.The Regulation links up national, public enforcement authorities in an EU-wide Enforcement Network which has been given the means to exchange information and to work together to stop rogue traders or any other cross-border breach to consumer protection laws.

Key words

EC consumer protection, administrative cooperation, public enforcement, cross-border enforcement

Introduction

There are two main EC law instruments containing specific provisions on powers to enforce consumer law: a 1998 Directive[1] and a 2004 Regulation[2]. The purpose of the Directive 98/27 is to approximate laws, regulations and administrative provisions of the Member States relating to injunctions in order to

[1] DIRECTIVE 98/27/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 1998
on injunctions for the protection of consumers' interests, O J L 166/51, 11. 06. 1998. Hereinafter referred to as the Directive 98/27.

[2] REGULATION (EC) No 2006/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (Text with EEA relevance),
OJ L 364, 9.12.2004, p. 1–11 amended by: DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance), OJ L 149, 11.6.2005, p. 22–39; Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007
amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) OJ L 332, 18.12.2007, p. 27–45. Hereinafter referred to as the CPC Regulation.

protect the collective interests of consumers included in the Directives listed in the Annex[3]. The Directive 98/27 requires that all member states make it possible for qualified entities to take action before domestic courts to protect the various specific rights given to consumers under the measures implementing the EC directives on consumer law into the domestic legal system. Such action may be taken for purely domestic problems[4] or for the cross-border enforcement of such rights by allowing qualified entities from one member state to take action against a trader from another member state in the courts of that trader's jurisdiction. CPC Regulation allows cooperation between Member States for consumer protection. The Regulation establishes a network of authorities responsible for monitoring the application of legislation concerning consumers. The aim is to ensure compliance with the legislation and the smooth functioning of the internal market. Whereas the action for injunction uder the Directive may be taken for either domestic or cross-border problems, the Regulation applies only to intra-Community infringements of consumer protection legislation. The above acts create combined effects on a number of conceivable transnational enforcement scenarios.

A legal framework for improving co-operation between consumer protection enforcement authorities – has it been needed?

The Internal Market depends as much on the adequacy of enforcement of the rules as on the rules themselves[5]. Consumer protection laws – like virtually all legislation – are only as good as their enforcement. The Directive 98/27 gives national consumer enforcement bodies and consumer associations nominated by the Member States the power to seek

[3] See: Directive 98/27/EC, Article 1 and the list of the Directives in Annex:
* Directive 84/450/EEC (misleading advertising and comparative advertising);
* Directive 85/577/EEC (contracts negotiated away from business premises);
* Directive 87/102/EEC et seq. (consumer credit);
* Directive 89/552/EEC et seq. (Television without Frontiers);
* Directive 90/314/EEC (package travel, package holidays and package tours);
* Directive 2001/83/EC (Community code relating to medicinal products for human use)
* Directive 93/13/EEC (unfair terms in consumer contracts);
* Directive 94/47/EEC (time-sharing);
* Directive 97/7/EC (distance contracts);
* Directive 1999/44/EC (sale of consumer goods and associated guarantees , included in the annex following adoption of the Directive of 25 May 1999);
* Directive 2000/31/EC (Directive on electronic commerce);
* Directive 2005/29/EC (unfair commercial contracts , entered in the Annex following the adoption of the Directive of 12 June 2005)
* Directive 2002/65/EC (Distance contracts for financial services);
* Directive 2006/123/EC (Services Directive).

[4] I.e., an entity from member state A can take an action before the courts in that state to prevent infringements of the relevant legislation by a trader from that state.

[5] See: Hearing on the Green Paper on Consumer Protection, 7 December 2001, Enorcement, Tornblom Carina, http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/speech_tornblom_en.pdf

injunctions in courts (on their own or other Member States initiative) to stop traders infringing EU consumer protection directives. What was lacking, it was the ability for these bodies to cooperate effectively in cracking down on rogue traders who operate cross-border.

The creation of the internal market had already necessitated the development of some cooperation on enforcement and co-ordination. For example, formal co-operation mechanisms had been put in place with respect to internal market policies on taxation[6], customs[7], food[8] and product safety, competition[9], financial services[10]. The need for effective cross-border enforcement for consumer protection has also been recognised in the international domain. In 1999 the OECD adopted a recommendation on consumer protection in relation to e-commerce that stated that member countries should through 'their judicial, regulatory and law enforcement authorities co-operate at the international level, as appropriate, through information exchange, coordination, communication and joint action to combat cross-border fraudulent, misleading and unfair commercial conduct'[11]. On 11 June 2003, the OECD adopted further guidelines protecting consumers from cross-border fraudulent and deceptive commercial practices that recognise that the same enforcement problems and inadequacies of existing systems exist worldwide[12].

The starting point for closer co-operation in EC consumer protection was International Marketing Supervision Network (IMSN)[13] that is a bi-annual forum for informal co-operation between enforcement practitioners from around the world[14]. Therefore informal mechanisms have had their place and a legal framework for co-operation could have been built on these achievements. The IMSN, especially its European sub-group attained much in trying to establish better cooperation and identified its limitations, i.e.: in some Member States there was no formal single contact point; differing confidentiality requirements made practical information exchange complex and often impossible; there were no systematic or reliable channels to ensure that other national enforcement authorities would provide assistance or even respond to requests for information. Similarly, the European Commission in

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[6] Proposal for a Council Regulation on administrative cooperation in the field of value added tax COM (2001) 294 final OJ C270 of 25.09.2001 p 87

[7] Council Regulation 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters OJ L 082 of 22/03/1997.

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[11] Recommendation of the Council of the OECD concerning Guidelines for Consumer Protection in the context of electronic commerce, adopted on 9 December 1999 [C(99)184/FINAL]

[12] http://www.oecd.org/sti/crossborderfraud

[13] Recently re-named: the International Consumer Protection Enforcement Network (ICPEN).

[14] See: para. 5.1 of the GREEN PAPER on European Union Consumer Protection (presented by the Commission) Brussels, 2.10.2001, COM(2001) 531 final. Hereinafter referred to as the Green Paper.

the Green Paper acknowledged that the existing informal co-operation arrangements have been highly successful within their informal framework. However, they do not provide the necessary co-operation tools that have been developed in other policy areas[15]. Commission also stressed that a framework for systematic information exchange was essential for effective market surveillance, lack of formal co-operation within the EU also had the consequence that the EU was unable to co-operate effectively with third countries.

The key elements of such a legal framework according to the Commission's reasoning in the Green Paper were the following: the nomination of competent authorities by each Member State to co-ordinate enforcement co-operation among national, regional and local bodies and act as a single point of contact; the establishment of common databases and communication networks that respect confidentiality requirements; the establishment of reciprocal mutual assistance rights and obligations among the Member States (that could cover information exchange on request and spontaneously, reciprocal use of national notification, surveillance, investigation and seizure powers); the possibility for Member States to carry out co-ordinated enforcement actions (simultaneous investigations, injunctions etc.) albeit under national enforcement powers; the establishment of obligations on Member States to supply information (statistics, complaints, risk patterns, emergencies) to the Commission for dissemination, to other Member States to enhance the co-ordination of market surveillance; the possibility for the EU to enter into co-operation with third countries on enforcement and join global enforcement networks; the possibility to carry out common EU and national projects such as the creation of information and communication networks, common databases, training, seminars, exchanges and common inspections[16]. Most of the member states' governments strongly supported the Commission's ideas[17]. There was widespread agreement that such an instrument would help secure the proper functioning of the internal market and enhance consumer protection.

The Regulation on consumer protection cooperation

According to Article 1 of the Regulation there are two specific objectives to achieve. First, providing for cooperation between enforcement authorities in dealing with intra-Community infringements that disrupt the internal market. Second, contributing to improving the quality and consistency of enforcement of consumer protection laws and to the monitoring of the protection of consumer

[15] Ibidem.
[16] Ibid. Paragraph 5.2
[17] See: Responses to the Green Paper on Consumer Protection, Member States' Governments: http://ec.europa.eu/consumers/enforcement/governments_en.htm

economic interests[18]. Article 2 limits the scope of the regulation to intra-Community infringements of EU legislation that protects consumers' interests.

Competent authorities, defined as public authorities with specific consumer protection enforcement responsibilities, are at the heart of the proposed regulation[19]. Each Member State designates the competent authorities and a single liaison office responsible for the application of the Regulation. These authorities have the investigation and enforcement powers necessary for the application of the Regulation and exercise them in conformity with national law. The action must be taken without delay to put a stop to any infringement identified, using the appropriate legal instrument. In most cases this will be an injunction that makes it possible to stop or prohibit unlawful activities and take rogue traders to court in other Member States. European legislation in this field is harmonised and provides for injunctions against any infringements which may harm consumers' collective interests[20]. E.g. in the case of misleading advertising and unfair commercial practices, contracts negotiated away from business premises, consumer credit, television without frontiers, package travel, package holidays and package tours, medicinal products for human use, unfair contractual terms, time-shares, distance contracts, sale of consumer goods and associated guarantees and unfair commercial contracts. No enforcement rights or responsibilities have been granted for the European Commission.

The Regulation establishes a framework for mutual assistance which covers the exchange of information (Articles: 6, 7), requests for enforcement measures (Article 8) and coordination of market surveillance and enforcement activities (Article 9). Rules for the implementation of Regulation regarding mutual assistance between competent authorities and the conditions governing that assistance are laid down by the Commission Decision 2007/76/EC.[21] To set an example, according to Article 7 of the Regulation: when a competent authority becomes aware of an intra-Community infringement it must notify the authorities of other Member States and the Commission. It also supplies, at the request of another competent authority, all relevant information required to establish whether an

[18] Paragraph 3.1.1 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on cooperation between national authorities responsible for the enforcement of consumer protection laws, Brussels, 18.7.2003 COM(2003) 443 final, 2003/0162 (COD)

[19] Ibidem, para. 27.

[20] Article 4 (1) of the Directive 98/27 requires that each member state where an infringement originates must permit any qualified entity from another member state where the collective interests of consumers are affected by the infringement, to bring an action for an injunction. The locus standi of a qualified entity to launch proceedings may not be questioned if it is included in the list compiled and published by the Commission. To that end, member states are obliged by Art. 4(2) of the Directive to notify the Commission of the qualified entities from their jurisdiction.

[21] Commission Decision 2007/76/EC of 22 December 2006 implementing Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance (notified under document number C(2006) 6903) (Text with EEA relevance),OJ L 32, 6.2.2007, the annexes of that Decision stipulate the information requirements, which include the minimum information to be included in requests for mutual assistance and alerts, the time limits for such requests, the access to information exchanged and the languages to be used.

intra-Community infringement has occurred. In addition, it must take all necessary enforcement measures to bring about the cessation or prohibition of the infringement. Furthermore the competent authorities inform the Commission of intra-Community infringements, the measures taken and the effect thereof, and the coordination of their activities. Information communicated may only be used for the purposes of ensuring compliance with the laws that protect consumers' interests. The Commission stores and processes the information it receives in an electronic database (Article 10). According to conditions governing mutual assistance (Chapter III of the Regulation) requests for mutual assistance must contain sufficient information to enable the authority to fulfil the request. In certain circumstances an authority may refuse to comply with a request for enforcement measures or information or decide not to fulfil its obligations. In this case it informs the applicant authority and the Commission of the grounds for refusing to comply with a request for assistance.

With reference to various activities of Community interest Article 16 states that: 'To the extent necessary to achieve the objectives of this Regulation, Member States shall inform each other and the Commission of their activities (...) in areas such as' e.g.: concerning enforcement coordination: the training of their consumer protection enforcement officials, the collection and classification of consumer complaints, the development of information and communication tools the development of standards, methodologies and guidelines for consumer protection enforcement officials; with regard to administrative cooperation: provision of consumer information and advice, support of the activities of consumer representatives, support of consumers' access to justice; collection of statistics, the results of research or other information relating to consumer behaviour, attitudes and outcomes.

In conclusion - what progress has been made with the 2004 Regulation?

CPC Regulation - the most extensive piece of Community law legislation focusing on enforcement of consumer law undoubtedly strengthens public enforcement[22]. The Regulation seen as complementary to the Injuntions Directive adds to the remedies available under it.

The major purpose of the CPC Regulation is to create a network of national authorities responsible for enforcing EC consumer law and to oblige them to work together. These mechanisms until now remained unexplored in the consumer law context. Therefore we can perfectly say that the Regulation cuts out a potential avenue to harmonised consumer protection that could work better than the wholesale

[22] While the EC Commission is searching for a suitable 'mix' of public and private enforcement (see: e.g. EC Commission Green Paper – Damages actions for breach of the EC antitrust rules COM (2005) 672) some authors consider public enforcement of consumer law to be potentially more valuable than private enforcement. In the UK context in particular, the Office of Fair Traiding has been very active in policing unfair terms (over 6,000 contract terms have been deleted or amended after 1000 cases) see: Monti G., The Revision of the Consumer Acquis from a Competition Law Perspective, speech at the conference: The Common Frame of Reference and the Future of European Contract Law, Amsterdam 1-2. 06. 2007, p. 5.

harmonisation of private law. Having come to such a conclusion we shall wait for the first Member States' reports to the Commission on the aplication of the Regulation.

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THE TREATY OF LISBON: EUROPEAN „PHILADELPHIA“? COMPARISON FROM THE JURISTIC POINT OF VIEW.

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Abstrakt

Tento článok sa zaoberá dopadom Lisabonskej zmluvy na Európsku úniu. Po popise a analýze zmien, ktoré táto revízia primárneho európskeho práva prinesie, článok sa snaží odpovedať na otázku, či Lisabonská zmluva môže byť vnímaná ako akási európska „Filadelfia“. Činí tak pomocou porovnania súčasného stavu európskeho „ústavného“ usporiadania s vývinom ústavného usporiadania v Spojených štátoch amerických.

Kľúčové slová

Lisabonská zmluva, Európska únia, ústavnosť, Európska ústava, Ústava Spojených štátov amerických

Abstract

This article deals with the impact of the Treaty of Lisbon on the European Union. After description and analysis of the changes brought by this revision of the primary European law, it tries to answer the question whether the Treaty of Lisbon can be perceived as a European “Philadelphia”. It does so by the means of comparison of the present state of the European “constitutional” settlement with evolution of that of the United States of America.

Keywords

Treaty of Lisbon, European Union, constitutionalism, European constitution, US constitution

Introduction

The Treaty of Lisbon has been adopted after a failure of the Treaty Establishing Constitution for Europe (“the Constitution”), as a kind of its successor; it preserved the key elements of the failed Constitution, while dropping constitutional, or to be more precise, statist language and terminology. However, as it

will be argued in this contribution, it has also a constitutional character. In the following lines, I will shortly describe the notion of constitution and present its key elements. After this, the constitutional development of the European Communities ("the EC") and the European Union ("the EU") will be shortly described; the main attention being paid to the transformation of the founding treaties ("the Treaties") from an act of international law to constitutional acts. At this point, a short comparison of this development to the constitutional development of the United States of America ("the USA") will be made. I will inspect, if there are any similarities in constitutional development of these two entities and if any lessons can be learnt from them.

1. Constitution and constitutionalism in general

A constitution in a broad sense is the law that establishes and regulates organs of government. In a thin sense, it is this kind of document, which is also stable, written, superior to other laws and justifiable, i. e. that there is a constitutional court, or other mechanism that can test the compatibility of other laws and acts with the constitution and possibly, if there is a conflict, declare them to be invalid. Also a constitution has to express a common ideology.[1]

The notion of constitution can be perceived in three different ways, having regard to the "contents" of the constitution: material, formal and ideal.[2] In its material meaning, a constitution is formed by all of the legal norms regulating power structures in the state, its organization, functioning and relations to the individuals. It regulates these types of relations:

- Relationship between state and constitution, by denomination of the highest state organs, defining the mode of their creation, their mutual relations and area of their competences, as well as the relation to the individual citizens;
- Relationship between constitution and law, by regulating of the process of adoption of legal norms, particularly the creation of laws;
- Relationship between constitution and polity and politics, by defining the basic features of political system of a country.

In this sense, no attention is paid to the substantial form of the constitution; the norms mentioned above can be found in any type of legal regulations, judicial decisions or constitutional practices.[3]

[1] Craig, P. *Constitutions, Constitutionalism and the European Union.* In: European Law Journal, 2001, Vol. 7, No. 2, p. 127.
[2] See Filip, J., Svatoň, J., Zimek, J. *Státověda.* Brno: Masarykova univerzita, 2004, p. 58.

[3] Filip, J., Svatoň, J., Zimek, J. *Státověda*, p. 64.

In the formal sense, a constitution is a document which regulates matters mentioned above and has a special, more rigid form, combined with a higher legal force. A constitution in this sense is a document different from "ordinary" laws.

In ideal point of view, the attention is paid to the substance of a constitution; to norms which should be entailed in such a document. Of course, there is no internationally agreed list of the features; however, we can identify these key elements that shall be included in an ideal constitution:

1. Norms regulating organization and functioning of a state[4]
    a. Norms of creation and dissolution of a state as such,
    b. Norms defining the territory and population of a state,
    c. Norms regulating questions of exercise of state power, i. e. identifying the holder(s) of power, division of powers, statute of state organs and specification of their competences,
    d. Norms defining basic characteristics of a legal order,
    e. Norms on inner administrative structure of a state,
    f. Constitutional norms symbolizing a state, i. e. definition of state symbols, capital town and preamble.
2. Norms that embody the relationship of a state to the individuals and other states; defining relationships of a state to its environment, by creation of citizenship and stating the basic rights of freedoms of individuals. As for the other states, there are provisions on entering into international legal obligations, most prominently on conclusion of international treaties.
3. Norms defining state aspirations and values; for example respect to human rights, principles such as rule of law or (parliamentary) democracy.

After this short identification of elements of ideal constitution and defining the meaning of the notion as such, we will inspect the constitutional process of the EU in detail, in the light of trying to answer the question, whether the is a European constitution.[5]

2. European constitution

[4] A statist terminology will be used in this section. This is not in any case to indicate that the EU is to be considered as a state. The reasons are rather pragmatic, since the theory of constitution is framed in a statist framework. Thus, the terminology is left unchanged.

[5] Please not the small "c" at the beginning of the word, indicating, that this is not a reference to the Treaty Establishing a Constitution for Europe that is being referenced to as "the Constitution".

Does the EU have a constitution, even though the Constitution failed? This core question will be addressed to in this section.

The constitutionalism, the term in one of its meanings describing the extent, to which a particular legal system possesses the features described above in a thin sense of the notion of constitution, in the EC developed gradually over time. The EC has developed from an international organization to a supranational entity that confers rights and duties directly to its individual citizens and in which the controls on the exercise of public power are similar in nature to those found in nation states.

The existing Treaties do meet the criteria enlisted above. The decision-making in the Council, by the qualified majority, rather than unanimity, the existence of the European Parliament and the Court of Justice, as well as institute of Union citizenship, principles of direct effect and primacy of communitarian law are the most prominent features of line of thought leading to this conclusion.

Also, the interpretation of the Court of Justice ("ECJ"), according to the Article 234 Treaty Establishing the European Community and corresponding relationship between national courts and the ECJ has had a profound effect on constitutional development of the Communities and Union.[6] The jurisprudence of the Court of Justice developed the basic doctrines that included fundamental rights to the remit of European integration.

There has been a significant shift of the ECJ's attitude to the constitutional character of the Treaties. In *Van Gend en Loos*[7] the Court spoke on "a new legal order of international law for the benefit of which the member states have limited their sovereign rights". In this case, the Netherlands, supported by Belgium and Germany, argued that Treaty establishing European Economic Community does not differ from a standard international treaty and consequently, there is no direct effect of disputed Article 12 of this treaty. However, the Court did not follow this line of reasoning and held that the Treaty had created a new legal order, different from international law. The question of relationship of new established European law to the national law was not addressed at that time.

It was precisely this question that created momentum for the Court to change the view mentioned above. In *Costa v. ENEL*[8], the Court held that "in contrast with the international treaties, the EC Treaty has created its own legal system…which had become an integral part of the legal system of the Member States and which their courts are bound to apply." Thus, in the accord of Van Gend en Loos reasoning, the Treaties have established a new legal order, that is different from international law. Thus, and this

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[6] Craig, P. *Constitutions, Constitutionalism and the European Union*, p. 137.

[7] See *Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Available at [online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:HTML, cit. May, 13th, 2008.

[8] See *Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L.. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64.* Available at [online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:EN:HTML, cit. May, 13th, 2008.

was a new development, unlike international treaties, the EEC Treaty forms automatically after ratification a part of national law. That means application of monistic concept.

This contrast with the international law has important consequences, both in substantive and procedural terms. Procedurally, the lower (Italian) courts can address the Court of Justice with preliminary questions without prior having to address higher, or even constitutional national court. Substantially, this has meant that the communitarian European law is supreme to national legal order of a member states. This argument has been derived from the phrase "bound to apply." This position clarified the relationship between national and communitarian law.

The last shift occurred in *Les Verts.*[9] After declaring the communitarian law to be a new legal order, which is different from both national and international law, the Court has addressed the question of the role of founding Treaties in this legal order. The Court stated, on the background of a challenge of legality of the act of the European Parliament, that "the Treaty is a basic constitutional charter for the Communities". This view enabled it to hold that the Communities are based on a rule of law and to establish a system of remedies that ensured legality to be observed. The Court held that if action taken by the European Parliament had not been a subject to the (judicial) review, this situation would have been in contrary to the spirit of the Treaties. Thus, the constitutional character of the Treaties was used to ensure that review of legality is always applicable. This line of reasoning was further strengthened by establishing the principles of indirect effect in *Von Colson*[10] and governmental liability in *Francovich*[11]*.* Constitutionalism in the European Union thus might seem to some observers to be a sort of by-product. As I will argue later in this article, this is certainly not the case.

We can consider the Treaties to be the European constitution also for the other reasons[12]:

1. They are a higher-level, reflexive law that is used to produce legal norms;
2. They guarantee the normative primacy of the European law over national law;
3. They constitute independent organs;
4. They constitute a single, unitary EU (since Maastricht);
5. They produce new rights of the European citizenship;
6. ECJ regularly uses constitutional discourse.

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[9] See *Judgment of the Court of 23 April 1986. - Parti écologiste "Les Verts" v European Parliament. - Action for annulment - Information campaign for the elections to the European Parliament*. - Case 294/83. Available at [online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0294:EN:HTML, cit. May, 13th, 2008.

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[12] Brunkhorst, H. *The Legitimation Crisis of the European Union.* In: Constellations, 2006, Vol. 13, No. 2, p. 166.

To be even more precise, Shaw[13] identifies as key constitutional elements these provisions of the Treaties:

- Provisions on nature of a system - Art. 1, 312 Treaty establishing the European Communities ("TEC") and 48, 49, 51 Treaty on European Union ("TEU")[14]
- Provisions on rule of law, including the role of ECJ - Art. 6, 10, 220, 226, 228, 230-35 TEC
- Provisions on values, principles and norms of a system - Art. 1, 5, 6, 12, 13, 17-22 TEC
- Provisions on exercise of power within the EU - Art. 5, 7, 308 TEC

Thus, although the EU possesses characteristics of constitutionalism, it does not possess a constitutional document. This kind of document was almost accidentally produced[15] as an outcome of the deliberations of the Convention on Future of Europe, which took place in 2002 and 2003 in Brussels. Its proceedings are described in detail elsewhere,[16] for our purposes its outcome is important - the Draft Treaty Establishing the Constitution for Europe.

In the light of aforementioned premises, we can argue, that the EU has a constitution, even though the ratification process of the Constitution has failed. The founding Treaties are to be considered as a European constitution, although not based upon revolutionary action. This is an important difference from the US constitution. The other differences, as well as similarities of constitutional experience both of the EU and the US will be described in a further detail in the following section.

3. A sketch of comparison of the European constitution to the constitutional settlement of the United States of America

The constitutional experience of the USA and the EU has in common more than is usually accepted.[17]

The Philadelphia convention, besides laying foundation of the republican federalist order of the USA, founded a congressional, not a presidential system. The shift towards presidency is a development started by President William McKinley, who held the office from 1897 till 1901. Thus, the most powerful

[13] Shaw, J. *Process and Constitutional Discourse in the European Union.* In: Journal of Law and Society, 2000, Vol. 27, No. 1, p. 11.

[14] Both treaties are cited in the version after the reform by the Treaty of Nice.

[15] The constitutional process of the EU was unexpectedly launched in 2001. Until this time, the notion of "constitution" had not entered a mainstream European political discourse. As a breakthrough, the speech of Joschka Fischer, that time German foreign minister, at Humboldt University in 2000 can be seen. See de Burca, G. *The European Constitution Project after the Referenda.* In: Constellations, 2006, Vol. 13, No. 2, pp. 207-217.

[16] See for example Tsebelis, G. *Thinking about the Recent Past and the Future of the EU*. In: Journal of Common Market Studies, 2008, Vol. 46, No. 2, pp. 265-292.

[17] See Fabbrini, S. *Transatlantic constitutionalism: Comparing the United States and the European Union.* In: European Journal of Political Research, 2004, Vol. 43, pp. 547-569.

actors were state parties and politician. Only after the Great Depression, the presidency fully acquired its present-day importance. This is very similar to the position of the European Parliament in the present-day constitutional setting of the EU.

Also, the American constitution regulated relations between the federal government and states, by providing that the federal institutions possess the enumerated powers and the rest lies with the states. This is not dissimilar to the separation of powers introduced, or perhaps better put, clarified, by the Treaty of Lisbon.[18]

Also, the American system favors smaller states - it overrepresents them in Congress and in the Senate. Smaller states have thus more representative powers as they ought to have, if an ideal mathematic model was applied. This is also a feature of the European constitutional settlement, a principle that flows directly from the founding treaties and has been only slightly modified.[19]

The structure of the US governmental system also lays foundation for permanent confrontation of the legislature and the president. Is this the case of the EU? There are the tensions between the Council and the European Parliament, indeed. If we take a presidency of the EU, as a part of the Council, which it indeed is, we arrive at the conclusion that this is the case of the European Union. The changes introduced to the Council composition introduced by the Treaty of Lisbon further strengthen this conclusion.[20]

If we look at the process of framing of the two constitutions, there are would be also some similarities if we compared the Philadelphia convention to the Convention on the Future of Europe. Both entities were indirectly electorally accountable, both based on an ambiguous mandate, which they soon overlapped. There was also a kind of domination of the representatives of the states in both cases, but also a substantial difference in the mode of their operation; Philadelphia convention deliberated in secrecy, while this was not, at least ideally, true for the Convention on Future of Europe. However, as we have seen, the process of constitutionalization in the EU has been rather a longer term evolution, than a single act. Thus, from the procedural point of view, there are not many similarities.

Procedurally, it can be said that experience of the USA and the EU is of a totally different nature. Whereas the USA started with the written constitution and only gradually developed constitutionalism, the EU experienced the process of constitutionalization first, without having a formal written constitution[21] Nevertheless, it was judiciary in both cases, that promoted suprastate, or supranational, legal order aimed at guaranteeing the development of the common markets.

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[18] See Art. 3b TEU (Lisbon version) and Art. 2A - 2F Treaty on Functioning of the EU.

[19] See respective provisions on distribution of seats in the European Parliament and on voting by qualified majority in the Council.

[20] See Art. 1, para. 16 and Art. 2, para. 191 of the Treaty of Lisbon. At this point, it shall be noted, that the Council and the European Council are perceived of a common nature, being both formed by the officials belonging to the Member States' executives, and thus forming two layers of the same institution.

[21] Fabbrini, S. *Transatlantic constitutionalism: Comparing the United States and the European Union*, p. 561.

Conclusion

We can conclude that there are some significant similarities in the constitutional settlement of both entities. A strong position of Parliament, clear separation of powers between layers of governance, overrepresentation of smaller member states, as well as a kind of element of permanent confrontation inherent to the system form the similarities in the substantial point of view. However, from a procedural point of view, the constitutional developments of the two entities are rather different; the US started with a written constitution, followed by process of constitutionalization, the EU followed a reversed path.

Thus, the Treaty of Lisbon cannot be perceived as a unique event, a kind of European Philadelphia, even if we consider it to be a direct successor of the Treaty establishing Constitution for Europe; we'd better view it as a part of gradual constitutional development of the European integration process.

Nevertheless, the central role of the judiciary in the constitutional process, as well as substantial similarities in the constitutions of both entities allow us to pose a question whether there can be a possibility to learn some lessons from the evolution of the US constitutional settlement in respect to the EU.

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COMPETITION IN ELECTRICITY MARKET ACCORDING TO THE REGULATION OF DIRECTIVE 2003/54/ EC

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Abstract:

Energy policy is a kind of a subject in the European Community, which is generally not in the field of common legislation. The main element of European energy policy is the creation of internal gas and electricity markets. From 1st of July 2007 all consumers can choose their electricity and gas services free. It sounds very simple, but it is not so simple legislative task for member states. Common market for gas and electricity promotes the use of renewable energy sources, increases the safety of gas and electricity supply and competitiveness of the European Community.

Key words:

Electricity market, competition, energy supply, public service

I. Problems of energy supply and internal market of electricity

European energy policy's three aims are: energy supply's sustainability, safety and competitiveness. The main instrument of European energy policy is creation of internal gas and electricity markets, because a European energy market promotes the use of renewable energy sources, increases the safety of gas and electricity supply and competitiveness of the European Community. The idea to liberalise energy sector appeared late (only in the 1980th) at Community level due to resistance of member states and the specialities of the sector. Electricity power has advantages and disadvantages. Electricity is mostly produced in the Community, it is not depends on import and it can be generated using different technologies and raw material. But electricity can't be stored, so supply has to follow consumers' and electricity supply is fixed to network, so all actors of the market need access to the network-system. [1] Member states want to protect their competence above market regulation and especially above energy sectors. Electricity supply is a public service, while safety and continuousness of supply is very important for whole or for biggest part of society. The task of states is to guarantee continuousness and safety for everyone, even if the suppliers are reluctant to satisfy consumers' demand. A state generally

restricts competition in these sectors to fulfil high social expectations. Some undertakings are obliged by the state to supply energy for all consumers, who have a demand for electricity or gas. To recompense this obligation, suppliers can get special or exclusive rights, and state compensations. The results of this process are the appearance of monopolies. Monopolies can be owed for activities of the state (legal monopolies), but also for the mechanism of electricity and gas sector. The European Community would like to abolish unwanted monopolies and liberalise national gas and electricity markets to create an internal energy market and to guarantee the best conceivable level of competition in these sectors.

According to the specialities of electricity market the general competition rules of the EC are not enough to create an internal electricity market. Special regulation was needed, which comes before and completes general rules. [2] The liberalisation of electricity markets started with directive 1996/92/EC, which was expired by directive 2003/54/EC concerning common rules for the internal market in electricity. The difficulty of task, to fit up the market for the new requirements, is the reason, why these directives have determined the principle of progressivity. It means that the requirements of competition have to be stricter step by step. Common regulation, liberalisation until now has not resulted free competition, because in some fields of electricity sector restrictions still has to be preserved. In my work I would like to introduce these fields and their awarding at European-level.

II. Discrimination

„Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations."[3]

Electricity directive's main principle is prohibition of discrimination. The prohibition of discrimination, which is one of the fundamental principles of Community law, requires that comparable situations are not treated differently unless such difference in treatment is objectively justified. [4] This prohibition must be interpreted to all kind of discrimination. According to the directive in electricity sector rules of discrimination can be examined in three subjects:

- fairly proceed network access,
- technical conditions of access,

- refusal of access.

Infringement of prohibition can not occur if member states determine objective, transparent and non-discriminatory conditions of access.

Discrimination can come from legal relations originated before and also after opening-up market. Before community regulation some member states have made long-term contracts to secure their energy-supply. These contracts infringe rules of directive, because they give priority access rights, or because their content doesn't fulfil requirements of directive. Member states can excuse themselves that these long-term contracts guarantee the continuous and safe supply of an important sector of economy, and these infringements must be maintained until the end of contracts. European Commission generally accepts these arguments, while liberalisation of electricity sector can not be fulfilled one day to another, but member states must abolish discriminations after a transition period. Some cases of discrimination are determined in directive, these are public service obligations. The directive correctly specifies the cases when member states have the right or they are obliged to regulate public service obligations and they can give special or exclusive right to undertakings. In the next part I'm going to introduce Public Service Obligation and its two special cases: universal service and promotion of alternative technologies.

II. 1. Public Service Obligations

„The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and equivalent levels of competition in all Member States."[5]

In spite of principle of competition electricity supply is still a public service (or in European terminology one of services of general interests). Member states still have the right to determine public service obligations (PSO) but in a common legal frame. The rules of public service obligations have two groups: when member states shall determine public service obligation, and when it is possible for member states to regulate these types of services. [6] For security of PSO member states can still give special, exclusive rights, compensations for appointed undertakings. All national rules - which determines public service obligations, or exclusive, special rights or compensations – must be reported to European Commission and their compatibility with Community rules must be examined.

II. 2. Universal service as public service obligation

The most important public service obligations are universal services. For consumers liberalisation of electricity markets means a right to choose their suppliers. According to the principle of progressivity opening up energy market had three steps:

1. until 1st July 2004 only consumers those, who were determined in the 1996th directives, mainly large consumers,
2. after 1st July 2004 all non-household consumers, (non-household consumers are those natural and legal persons, who buy energy not for supply of their household),
3. from 1st July 2007 all consumers can choose their services free.

Today all consumers have the right to decide on energy supply, but member states have to ensure minimum level of supply for some consumers. This is so called universal service. "Universal service is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices." Universal service provides a security that the most uninformed consumers, household consumers have never been closed out of service by reason of economic interests of undertakings. To protect household consumers' supply, even if universal supplier has gone into bankruptcy or become insolvent, member states may apply a supplier of last resort. It means that an undertaking takes over the task to provide service for these consumers until appearance of a new universal supplier.

II. 3. Promotion of alternative technologies as public service obligation and common aim

„Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, which may include energy efficiency/demand-side management measures and means to combat climate change, and security of supply. Such measures may include …….. adequate economic incentives."
„A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power." [7]

Public service obligations can be determined for environmental reasons and for safety of energy supply. European directives have determined obligations to increase the use of some alternative technologies. In 2001 the European Community has accepted a directive about the use of renewable energy sources in electricity. [8] Member states have to accept legal rules to reach this common aim. The use of alternative

technologies and energy sources, like renewable energy sources, (waste and combined heat and power) can promote environmental protection and safety of supply. Some member states give subventions to increase use of non-traditional energy sources and technologies. The reasons of subventions and special rights are very simple: costs of these alternative technologies are very high. This subvention can appear in charges paid for the use of networks or in obligatory feed-in of electricity generated from renewable energy sources. Obligatory feed-in means a special priority by access to network, because some actors of the market have to take over electricity produced from renewable energy sources in a fixed quantity and price.

Institution of obligatory feed-in was examined by European Court in several cases. In Case "Preussen Elektra" the facts were the following. German law regulated that electricity supply undertakings which operate a general supply network have to purchase electricity produced from renewable sources of energy and have to pay compensation. The subject of examination was the question: if this German law has realized infringement of EC Treaty or not. Although these compensations are state subventions the European Commission and the European Court has found them compatible with community law, because they do not fulfil requirements of community prohibition. National rules are the basic of discrimination and surplus receipts of some producer, but this surplus is not guaranteed from national budget, it is worth in legal relations of private undertakings. Of course European Court and Commission are not so compliant in all cases. Slovene system of obligatory feed-in was valued differently by the European Commission. In Slovenia electricity produced from renewable energy sources had to be purchased only from three favoured power plant in a fixed price, but obligants can sell electricity in a lower price. This loss was compensated by the state from network access tariffs, which are paid by users of network (consumers, producers, suppliers), so it is a kind of taxation and it is part of national budget. There are two differences between German and Slovene cases: in Germany all producers, who produce electricity from renewable energy sources are favoured, in Slovenia only three plants had this priority. The other difference is in the source of subventions, in German law there wasn't any duty for national budget, but in Slovenia obliged undertakings could get compensation from the state. In these cases the possibility for member states to give special rights, subventions for undertakings using non-traditional technologies on the bases of special directive and European obligation, are not enough reasons to be excused. National regulations have to fulfil requirements of general competition rules and they can be allowed after strict examination by European institutions.

III. Legal conditions of production and transmission

III. 1. Unbundling

„In order to ensure efficient and non-discriminatory network access it is appropriate that the distribution and transmission systems are operated through legally separate entities where vertically integrated undertakings exist." [9]

Unbundling is mainly in connection with transmission and distribution system operator. If system operator is part of a vertically integrated undertaking, the rules of unbundling come to the front. Unbundling has four forms: ownership-, legal-, and management unbundling and unbundling of accounts. [10]
Ownership unbundling means, that undertaking is independent in ownership of assets. It is the highest level of unbundling, but the 2003rd directive hasn't determined it compulsory.

Legal unbundling: „the distribution and transmission systems are operated through legally separate entities where vertically integrated undertakings exist." Undertakings must be independent in legal form, in its organisation and in decision making from other activities. These rules don't contain the necessity to separate the ownership of assets of the transmission system from the vertically integrated undertaking.

Management or functional unbundling is related to the work of management. This is the minimum obligatory level of unbundling. It means, that persons, who takes part in management of the transmission system operator, can't participate in the decisions of the integrated electricity undertaking, which directly or indirectly provide generation, and supply of electricity. These persons make their decision independently and have effective decision-making rights, independent from the integrated electricity undertaking.

Unbundling of accounts: Member States shall ensure that undertakings keep separate accounts for each of their activities, separately for transmission or distribution and separately for supply and generation. National authorities have the right to access to the accounts of electricity markets.

The European Commission has examined the result of liberalization and found that the rules of unbundling are not enough. Functional unbundling – as minimum requirement - can not achieve the expected aims. The directive must be modified to create legal unbundling as basis of separating the activities of undertakings. [11]

III. 2. State control over generation and transport

„For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non discriminatory criteria." [12]

Generation means production of electricity. According to the characteristic of electricity, that it can't be stored and supply and demand always have to be balanced, member states need control above production to secure safety of supply. Producers are authorized by the state and this process has to fulfil conditions determined in the directive (for example: protection of environment and public health, land-use). To lighten this control the directive oblige member states, that if power plants authorized by the state are not sufficient to satisfy the demands of consumers, new plants have to be appointed through tendering procedure.

"Member States shall designate, or shall require undertakings which own transmission/distribution systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more transmission/distribution system operators." [13]

Transport means two activities in electricity market: transmission and distribution. The differences between the two activities are in the voltage of system and in the end of transport (transmission in extra high-voltage and high-voltage system to final customers or to distributors, distribution in high-voltage, medium voltage and low voltage distribution system to customers). They are responsible for operation and development of the system; operators have to ensure the „long term ability of system to meet reasonable demands for the transmission of electricity." The network system allows only one or a few system operators, whose are appointed by the state. The directive still maintains monopolies in transport, but determines the principle of non-discriminatory access to the system for all users of network. Conditions of non-discriminatory access are regulated by the state and to balance this strict obligations and tasks of undertakings, member states can give special or exclusive rights for system operators.

IV. Conclusions

Liberalisation of markets has accomplished, but its result is not a free competition in electricity (and gas) market. Free competition in these sectors can't be managed by reason of the high priority of service

and specialities of electricity supply (first of all fixity to networks). For several years member states didn't let European measures in their national regulation of energy markets. But the problems of energy supply, the necessity to create more competitive common market put internal electricity and gas market into the front. Competition in electricity sector is still restricted but in a common legal frame. Some undertakings still have exclusive, special rights and compensations, but these measures are necessary to ensure not only competition, but also safety of supply in this market. The biggest result of opening up electricity sector is consumers' right to choose their services and supplier free. The process has not ended with directive 2003/54/EC the European Commission urges stricter common measures in the field of legal unbundling, consumers' protection and tasks of national authorities.

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[8] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market

[9] Directive 2001/54/EC Par. 8. of preamble

[10] P. D. Cameron, M. et al: *Competition in energy markets – Law and regulation in the European Union* London: Oxford University Press 2007. 138-141. p. ISBN 13-978-0-19-928297-5

[11] Sauter R. und Grashor K.: *„Ein neuer Impuls für eine europäische Energiepolitik? Ergebnisse des EU-Frühjahrsgipfels* In: Integration 3/07: 264-280. p.

[12] Directive 2003/54/EC Art. 6. Par. 1.

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COMMON FRAME OF REFERENCE: A TOOLBOX OR A BASIS FOR A FUTURE EU CIVIL CODE?

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Abstrakt

Despite its inconspicuous title the project of so-called Common Frame of Reference for European contract law (CFR) represents a highly sensitive issue. On the one hand, the European Commission describes it as modestly as "toolbox" for better lawmaking in the area of contract law containing principles, definitions and model rules that would serve as non-binding guidelines for the Community institutions when revising existing legislation and preparing new one in the area of contract law. On the other hand, some aspects of the project may be perceived in a way that the CFR is intended to serve as a basis for a uniform EU-wide contract law or even a full-blown EU civil code.

Key words

Contract law, European Civil Code, Common Frame of Reference, Unification of Private law

Introduction

The project of a Common Frame of Reference for European contract law (CFR) has been developed since 2003 without any significant interest of the public and media. It would be no wonder considering the inconspicuous title and the fact that the European Commission has been presenting it above all as a "toolbox" for better lawmaking in the area of contract law. Nevertheless, the project deserves much higher attention, provided that there are many who link it with efforts to create a uniform EU-wide contract law or even a full-blown EU civil code. The purpose of this paper is to analyse in brief the whole project and its political potential.

Background and origins of the CFR

Over recent years, the debate over a possible EU-wide unification of contract law or even creation of a common civil code has intensified. Voices claiming that such unification would be useful or even necessary for the proper functioning of the internal market can be heard.[1]

On the one hand, there have appeared several academic initiatives wishing to prepare a model for a possible EU civil or contract law code. One can remind first of all the Commission on European Contract Law chaired by Ole Lando (the "Lando-Commission") that published so-called "Principles of European Contract Law" (PECL), a model contract law code, in the second half of the 1990s or the Academy of European Private Lawyers (known as "Pavia Group") that presented so-called "European Contract Code-Preliminary draft" in 2001.[2] Most recently the Study Group on a European Civil Code, successor of the "Lando-Commission" with a wider remit (as also the name hints) whose leader is Christian von Bar,[3] is perhaps the most visible one.

The unification efforts have not been limited to academic spheres. The European Parliament (EP) and more recently also the Commission have tried to launch a debate on this subject. The EP has adopted a number of resolutions in this respect since 1989 and several times it has directly called for drawing up an EU Civil Code. In 2000 it repeated "that greater harmonisation of civil law has become essential in the internal market".

In 2001 the Commission issued a Communication on European contract law stating that it wanted to initiate an “open, wide-ranging and detailed public debate on the contract law” *inter alia* in order "to find out if the co-existence of national contract laws in the Member states directly or indirectly obstructs to the functioning of the internal market, and if so to what extent." According to the Commission “[i]f such obstacles do exist, the EU Institutions may be called upon to take appropriate action." Among other possible future options the Communication offered the "adoption of new comprehensive legislation" at EC level as a scenario to be discussed.[4] This scenario was widely understood as an EU civil code.[5]

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[1] Kanda, A.: *Nové trendy ve vývoji smluvního práva v oblasti soukromého práva* in: Právník, No. 7/2003, pp. 658-659; European Commission: *Communication from the Commission to the Council and the European Parliament on European contract law*, COM (2001) 398 final, points 1-5

[2] House of Lords, European Union Committee: *European Contract Law - the way forward?,* 12th Report of Session 2004-05, London, 2005, pp. 13-15

[3] von Bar, C. et al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Interim outline edition,* 2007, p. 24; House of Lords : op.cit., p. 15

[4] European Commission: cit. COM (2001) 398 final, points 1-3, 22, 23

[5] compare the reactions of consulted parties in: European Commission: *Communication from the Commission to the European Parliament and the Council - A more coherent European contract law* - An Action plan, COM(2003) 68 final, section 4

Although the advocates of the EU-wide unification idea affirm there is a wide support for the idea in business circles,[6] this idea in fact faces significant opposition in political, business and academic circles. The fact that civil law has not only economic but also cultural aspects is emphasized. It is widely considered to be a part of culture of every nation deeply rooted in old national legal traditions (e.g. the British common law, the French Code Civil, the Austrian ABGB). Any possible EU interference in the area of private law is therefore seen as highly sensitive.[7]

Some authors point out in this respect that the diversity is a value that must be protected. Also the obstacle represented by the deep differences between common law and continental law culture are often mentioned as well as the conviction that the EC lacks competence for such unification. Last but not least some emphasize that there is no exact evidence that the unification would be advantageous from the economic point of view.[8]

Anyway, the consultations on the Commission's communication from 2001 showed that most Member States did not support a comprehensive harmonisation of contract law systems.[9] There appeared to be no consensus on the overall scale of the problems and the extent of additional costs attributable to differences in national contract laws.[10] The consultation rather indicated problems in the EC law such as the use of abstract legal terms in directives that were either not defined or too broadly defined or inconsistencies in directives.[11]

After the consultation the Commission admitted that there is no need to abandon the sector-specific approach and that future efforts should focus mainly on the improvement of the acquis. In 2003 it presented an action plan called "A more coherent European contract law." In this document it suggested "a mix of non-regulatory and regulatory measures" and three objectives to follow. (a) The first one was to increase the coherence of the contract law acquis. However, it seems that the Commission did not fully abandon the idea of unification, even if it should be a long-term run, as the other two objectives may hint. They are the following: (b) to promote the elaboration of EU-wide standard contract terms,

[6] see e.g. von Bar, C.: *Working together toward a Common Frame of Reference*, Juridica International X/2005, pp. 17-23
[7] Tomášek, M.: *Lesk a bída „evropeizace" občanského práva*, Právník, No. 1/2004, pp. 8-10; Beunderman, M.: *Academic handbook could form basis for EU civil code*, EUobserver.com, 22.10.2007
[8] Tomášek, M.: op.cit. p. 9.; Nový, Z.: *Principy evropského smluvního práva a transformace Římské úmluvy o právu rozhodném pro závazky ze smluv*, master thesis, Masarykova univerzita, Brno, 2006, pp. 9, 10
[9] European Commission: cit. COM(2003) 68 final, section 4; Beunderman, M.: op. cit.
[10] House of Lords, European Union Committee, 12th Report of Session 2004-05, *European Contract Law - the way forward?,* point 12
[11] European Commission: cit. COM (2003) 68 final, points 92-95

and (c) "to examine whether non-sector specific measures such as an optional instrument may be required to solve problems in the area of European contract law."[12]

The optional instrument ("28th regime") was explained as an EU-wide contract law rules which would exist in parallel with national contract laws leaving the 27 sets of rules untouched. It could be introduced by a legal instrument sitting alongside but without replacing national rules and be available as an option to the parties to a contract.[13] The Commission spoke about two possible models: either a purely optional one which could be chosen by the parties ("opt in"), or a set of rules which would apply for certain matters unless its application is excluded by the parties ("opt out").[14]

Now, we are finally coming to the CFR, the creation of which was envisaged in the same action plan as certain common tool to achieve the objectives.

Member States have endorsed the first two of the three objectives [see (a), (b) above] of the action plan in the Hague Programme in 2004 and also the creation of a CFR, which was mentioned as one of tools for achieving the objective to improve the quality of existing and future EC contract law.[15]

The Commission's vision of a CFR

The Commission presented the CFR primarily as a "toolbox" or a handbook for the Commission and the EU legislator to be used when revising existing and preparing new legislation in the area of contract law. This document would contain a) fundamental principles of contract law (e.g. principle of contractual freedom, binding force of contract, good faith), b) definitions of key terms and concepts (e.g. definition of contract or damages) and c) model rules, forming the bulk of the CFR.[16] It should provide for best solutions in terms of common terminology and rules found in national legal orders, the existing acquis and relevant binding international instruments (e.g. UN Convention on Contracts for the International Sale of Goods, 1980).[17] It should be a better regulation instrument with the purpose of ensuring consistency and good quality of EC legislation in the area.[18]

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[12] European Commission: cit. COM (2003) 68 final, points 1-5
[13] European Commission: cit. COM (2003) 68 final, points. 92-95; European Commission: *First Annual Progress Report on European contract law and the Acquis Review*, COM(2005) 456 final
[14] European Commission: *Communication from the Commission to the European Parliament and the Council - European contract law and the revision of the acquis: the way forward*, COM (2004) 651 final
[15] *The Hague Programme: strengthening freedom, security and justice in the European Union*, 2004, *Official Journal C 053 , 03/03/2005 P. 0001 - 0014,* point 3.4.4.
[16] European Commission: cit. COM (2004) 651 final
[17] European Commission: cit. COM (2003) 68 final, point 63; European Commission: cit. COM (2004) 651 final; European Commission: *Report from the Commission - Second Progress Report on the Common Frame of Reference*, COM (2007) 447 final
[18] European Commission: cit. COM (2003) 68 final, points 59, 62, 64; European Commission: cit. COM(2007) 447 final

As far as the scope is concerned the Commission envisaged the CFR would not only concern the existing acquis, but also "the future measures". It should deal above with general contract law and "all the relevant cross-border types of contract such as contracts of sale and service contracts";[19] specific attention should be paid to consumer and insurance contracts.

The Commission considered that the CFR would be a non-binding instrument. However it said that "this question might be raised again."[20]

What has been said so far shows the basic way the Commission describes its project. Nevertheless, the Commission has envisaged also other possible roles of the CFR. Accordingly, the CFR could become "an instrument to increase convergence" between the Member States' contract laws. National legislators could take them as a point of reference when transposing EU contract law directives or draw on the CFR when enacting legislation not regulated at EC level, which might diminish divergences between national laws.[21]

Moreover, In Commission's view the CFR should be used as extensively as possible to develop a body of standard contract terms, which *inter alia* the Commission itself could integrate it in the contracts concluded with its contractors and it would encourage other EU institutions and bodies to use it this way.[22]

The Commission further envisaged that the CFR could serve as a basis for the development of a possible optional instrument. Reflection on the opportuneness, form or content of an optional instrument was to be carried out in parallel with the preparation of the CFR and the results were to be expected only after the finalisation of the CFR.[23]

Finally, according to the Commission the CFR could inspire the ECJ when interpreting the contract law acquis.[24]

Preparation of the CFR

[19] European Commission: cit. COM (2003) 68 final, point 63
[20] European Commission: cit. COM (2004) 651 final
[21] European Commission: cit. COM(2003) 68 final; European Commission: cit. COM (2004) 651 final
[22] European Commission: cit. COM (2004) 651 final
[23] European Commission: cit. COM(2003) 68 final
[24] European Commission: cit. COM (2004) 651 final

As far as the preparation of the CFR is concerned the Commission decided to finance extensive research.[25] It established a net of researches called Network of Excellence 'Common Principles of European Contract Law' under the Sixth Research Framework Programme to prepare a draft which could form a basis for the final CFR. Two groups of researchers got the leading role therein - the Study Group on a European Civil Code and so-called Aquis Group (Research Group on Existing EC Private Law).[26]

Besides, two auxiliary expert networks were established: (a) one of stakeholder experts (so-called CFR-net), consisting of business and consumer representatives and legal practitioners and (b) one of experts representing Member States. These two groups were to discuss various matters connected with the content of the researches' draft and provide the researchers with comments. Both networks started their work in December 2004.

The researchers were to present their draft by the end of 2007. The Commission promised to "select very carefully" parts of their draft in order to prepare a document that corresponds to the objectives of the project. It envisaged that it could submit its approach in the form of a White Paper. The Commission invited the Council and the EP to present their positions on the project, before it starts this work.[27]

CFR as a "Trojan horse" of an EU civil code?

The Commission stated repeatedly that it did not intend to propose an EU civil code or an extensive harmonisation of private law.[28] However, many aspects of the project may raise serious doubts in this respect. As the EP noted in a resolution from March 2006: "Even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be an EU code of obligations or even a full-blown European Civil Code."[29]

When the British House of Lords examined the project it sensed a concern that the Commission "has in the back of its mind the object of moving towards an eventual harmonisation of contract law" and that

[25] European Commission: cit. COM(2003) 68 final, point 63
[26] von Bar, C. : op. cit., pp. 17-23
[27] European Commission: cit. COM (2007) 447 final
[28] European Commission: cit. COM (2004) 651 final; European Commission: cit. COM (2004) 651 final
[29] Beunderman, M. op. cit.

the CFR might be something of a Trojan Horse leading to that outcome.[30] According to the House of Lords, when the CFR is in place, the Commission may be expected to search for opportunities for its use and to try to maximise the "benefits" of such a large investment. There could be then an increased pressure for harmonisation of contract law across the EU.

The House of Lords was above all worried about the idea of an optional principle and the link between the CFR and it, because the "optional instrument" in time could be turned into a draft harmonisation measure (or even an EU Civil Code).[31] The British industrial stakeholders referring to their long experience of EU proposals feared that "what initially starts off as optional may later become mandatory."

The report also rightly pointed out that the way the Commission described the project was ambiguous. On the one hand the Commission speaks about a mere "toolbox" for EC legislators for better lawmaking and at the same time it describes it as an instrument towards achieving a higher degree of convergence between national contract laws.[32]

Moreover, the concept of toolbox itself seems ambiguous. Professor von Bar noted that the idea is altogether not clear and allows for a wide range of meanings. "Perhaps it was chosen for this reason, and if that was the case, then it fills an obvious political function. The idea of a toolbox allows those who manage and handle the political process to buy time before taking a final decision" commented von Bar.[33]

Finally, another remarkable fact is the composition of the researchers net. One can note that the leading role pertained to academics who are passionate in favour of a possible unification of private law on the EU level and some even engaged in previous academic initiatives in this respect. First of all we can mention the members of the Study Group on a European Civil Code. Its leader Professor von Bar said publicly in the connection with the CFR project: "I would like it not to be forgotten how exciting it is to witness the creation of a new *jus commune europaeum*. ... The chance to create European-level private law is more realistic than ever before."[34]

[30] House of Lords*:* op.cit., point 62
[31] House of Lords*:* op.cit., point 7, 67.
[32] House of Lords : op. cit., point 63
[33] von Bar, C.: op. cit., pp. 17-23
[34] von Bar, C.: op. cit., pp. 17-23

Position of EP and Council

The EP has already issued its position on the subject through its resolutions, in which it pleaded for the widest ambitions going "towards developing a system of Community civil law".[35] The Council's position was adopted just at the time of the completion of this paper.[36] This position was prepared by a Council's expert group called Committee on Civil Law Matters (CLC), which was mandated with this task in April 2007 by the Council.

The discussions in the CLC focussed on four aspects: (a) purpose, (b) content, (c) scope, and (d) legal effect. As regards the purpose the CLC rejected the option of using the CFR to harmonise the national contract laws by creating an EU civil code or a CFR consisting of a complete set of standard terms and conditions of contract law which could be chosen by companies and trade associations as the law applicable to a specific contract. It would like to shape the CFR "as one tool amongst others for better lawmaking" targeted at EC lawmakers, who could use it when drawing up new legislation or review existing legislation. The CFR should "serve to ensure greater coherence in Community legislation and thereby to improve the quality of that legislation." The CLC rejected the idea of targeting the CFR also at national lawmakers, "but acknowledges that it may nevertheless serve as a source of inspiration or reference for [them] and may help ensure a more consistent implementation of Community legislation in the Member States."

As far as the content of the CFR is concerned the CLC speaks about a set of definitions, general principles and model rules in the area of contract law, which should be derived from the existing contract law acquis, from national legislation and legal traditions, from the material produced by the research network and the stakeholders and from other existing research in this area.

The CLC concluded that the scope should cover the general contract law including consumer law. The CFR should not be binding legal instrument, but a "set of guidelines to be used by the lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process".[37]

Academic Draft Common Frame of Reference (DCFR)

[35] European Commission: cit. COM(2007) 447 final
[36] It was aproved by the JHA Council on 18 April 2008.
[37] *Draft report to the Council on the setting up of a Common Frame of Reference for European contract law*, note from Presidency to COREPER II, 8092/08, JUSTCIV 64 CONSOM 37, Brussels, 4.4.2008

The form of the DCFR was foreseen long time before it first edition appeared. It was clear that the researchers would take the PECL as the model and that they would extend it to new areas. The researches understood the term CFR "to refer to a text bearing a resemblance to a codification".[38]

On 29 December 2007 the researchers presented an interim outline edition of the DCFR, which includes almost complete basic text, but not the comments and notes, which will be published later. If this document were to be described in one sentence, it is an entire model code of obligations or non-completed model civil code. As foreseen it looks like an extended PECL covering also law of non-contractual obligations. The final edition will also cover some matters of movable property law. The researchers state expressly that the DCFR is consciously drafted in a way that, given the political will, would allow a transformation into an optional instrument.[39]

The coverage thus goes well beyond the coverage of the CFR as contemplated by the Commission in its communications[40] and by the Council (as described above). On the other hand, it corresponds to the ambitions of the EP.

The researches emphasize that the DCFR is not structured on an 'everything or nothing' basis. Thus, for the final CFR larger areas of DCFR could be taken up without any need to accept the entirety of the text.[41]

According to the researchers "the DCFR may furnish the notion of a European private law with a new foundation which increases understanding for 'the others' and promotes collective deliberation on private law in Europe" and if the content of the DCFR convinces, it may contribute to a harmonious and informal Europeanisation of private law.

The full and final version of the DCFR is to be submitted to the Commission in December 2008.[42]

Conclusion

[38] von Bar, Ch.: *Working together toward a Common Frame of Reference*, in : Juridica International, No. X/2005, pp. 17, 23
[39] von Bar, C. et. al.: op. cit. (DCFR), pp. 3, 4
[40] von Bar, C. et al: op. cit. (DCFR), pp. 38, 39
[41] von Bar, C. et al: op. cit. (DCFR), p. 36
[42] von Bar, C. et al: op. cit. (DCFR), pp. 38, 39

Owing to all the uncertainties as regards the link between the CFR and the efforts to unify the private law of the Member States, the whole CFR project is an extremely sensitive issue. The future of the project is far from clear at this stage.

The ball is now in the court of the Commission. It has at its disposal the first edition of the DCFR, it knows the opinions of the Council and of the EP. Now it is up to the Commission to show what its real intentions as regards the project are. We can only await the results of its work, which are expected to come out in 2009. Once the output appears, there will be fewer questions and ambiguities, although others will remain and will be answered only in the farther future.

The Czech Republic and most Member States have confirmed, they do not wish a new extensive harmonisation in the field of contract law or even an EU civil code. The future will show whether the Commission will respect this stance or whether it will try to take advantage of the CFR or the DCFR for the unification.

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EUROPEANIZATION AND UNIFICATION OF PRIVATE INTERNATIONAL LAW

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Abstrakt

Práce se zabývá vytvořením evropského justičního prostoru coby právního rámce pro unifikaci kolizních norem v Evropě, jež určují výběr právního řádu použitelného na vztahy s mezinárodním prvkem. Jedna část práce je věnována otázkám evropského kolizního práva obecně, včetně otázky nutnosti a prospěšnosti jednotné úpravy. Další část potom používaným metodám a dosavadním unifikačním snahám v této oblasti.

Klíčová slova

Evropeizace, evropské mezinárodní právo soukromé, unifikace práva kolizního a hmotného, soukromé a mezistátní unifikační snahy

Abstract

The article deals with the European area of justice as a legal framework for the unification of conflict-of-law rules in Europe that determine the law applicable to legal relations involving an international element or having a cross-border implication. Its first part introduces the European private international law as such, including the question of necessity and utility of the unified regulation. The second part is focused on conflict-of-law methods and actual unification achievements in this field.

Key words

Europeanization, European private international law (conflict of laws), unification of private international and substantive law, private and inter-state unification groups

Introduction

In the ceaseless and fast moving process of the global as well as the European integration, the states attempt to cross their own borders and to create larger cooperating units, which bring to them (not only but foremost) economic advantages. The cooperation started first in the field of trade that necessarily called for administrative and subsequently legislative changes too. Intervention in the public law regulation could not stay without any response in the private sector. Still increasing amount of trade and migration of inhabitants have required cooperation among the states also in other areas, justice not excepting.

Acceding to the European Union, the Czech Republic happened to be a part of the European area of justice which is one of the integration steps within the EU. On 1st May 2004 all the EC regulations became legally binding also in the territory of our state and consequently some of the Czech law acts have been inapplicable to legal relations falling within the scope of these EC norms. In the field of judicial cooperation in civil matters the Act on the Private International Law is concerned.[1]

This article deals with the European area of justice as a legal framework for the unification of conflict-of-law rules in Europe that determine the law applicable to legal relations involving an international element or having a cross-border implication. Its first part introduces the European private international law as such, including the question of necessity and utility of the unified regulation. The second part is focused on conflict-of-law methods and actual unification achievements in this field. The findings are to be applicable to both contractual and non-contractual obligations.

[1] Act No. 97/1963 CL, on the Private International Law.

From Unity to Diversity and an Attempt to Get Back

The European continent is a region with specific evolvement of law. The beginning of the legal culture in Europe is associated with the legal system of ancient-Greek polis and later with the Roman law which laid the foundations of so-called *Ius Commune*. It is understood as uniform legal culture that survived till the era of national civil codes starting in the 19th century.[2] Although stemming from the Roman law, these national codices reflected and reflect historical, social and political development of the individual states. Thus they have necessarily distinguished themselves from the others not only in the perception of particular legal institutes but also in conception of and attitudes to the whole areas of law.

After the dissolution of the great colonial powers and notably after the World War II in the period of "reconstruction" of depleted Europe, exigency of mutual cooperation arose; especially in economic sphere. One of the first motions to integration was the European Recovery Program, known as Marshall Plan (1947) for reconstruction of the allied countries of Europe in years 1948 – 1952. The programme was followed by many international conferences that brought into being number of international organizations.[3]

In 1950 the French Jean Monnet submitted a plan (later called after French Foreign Minister – Schuman's Plan), introducing a common steel and coal market, that led to the creation of the European Communities,[4] nowadays one of the largest economic and political organization in Europe. Originally purely economic community gradually advanced to other areas of cooperation. Citizens of the Member States ceased to be seen only as workers, a sort of economic entities, and started to be considered as members of society, citizens, married couples, students, parents or the bereaved.[5] This view introduced a new social dimension to the previous economic perception of persons. It was essential to secure the realization of private contracts, legitimacy of ownership and proprietary relations, family and marital issues, inheritance as well as resolution of disputes arising out of these legal relations. Private legal transactions became a stimulus to the integration and accomplishment of the Four Freedoms – the free

[2] For details see VRANKEN, M., *Fundamentals of European Civil Law and Impact of the European Community*. London: Blackstone Press, 1997, p. 19 af., or also TICHÝ, L., *Spontánní europeizace soukromého práva*. Evropské právo, 2000, No. 2, p. 2, STEIN, P. G., *Roman Law in European History*. Cambridge: Cambridge University Press, 1999, and others.

[3] In short – foundation of the OEEC (April 1948), European Congress in the Hague (May 1948), on the basis of documents adopted there, the Council of Europe was established (May 1949), military alliance NATO (April 1949). Further in FIALA, P., PITROVÁ, M., *Evropská unie*. Brno: Centrum pro studium demokracie a kultury, 2003, p. 38 af. The post-war integration in Europe does not fall within the scope of this article; numerous publications devoted to this topic are referred to.

[4] The European Communities is an overall name for three organizations founded in the 1950's on the ground of the foundation treaties: Paris Treaty from 1951 that laid the foundations of the European Coal and Steel Community was in force for 50 years till July 23, 2002, and further the Treaties of Rome from 1957 establishing the European Economic Community (in 1993 renamed European Community) and the European Atomic Energy Community.

[5] From the very beginning far more attention was focused on the legal persons, the producers of goods and services as well as competitors taking part in the European economic competition.

movement of goods, persons, services and capital. The public law of the Community thus has to be considered as a base for the realization of the private institutes.[6]

The need for the European private law contributed to rediscovery of the common European tradition,[7] on which it should have been based. This begs the question: Are we going back to the ancient model of *Ius Commune*?[8] Is the way back indeed possible? Some authors[9] maintain a negative position to harmonization and unification of private law respectively, because the diversity of legal regulation of the Member States is conceived as a part of national identity and culture of each of the countries. Entire unification of substantive law could according to some experts create barriers to "progressive development of law".[10]

Do the European Union and its citizens want to wend the way of uniformity? In my point of view a certain degree of harmonization and unification of law in the "Euroregion" is desirable and necessary; not only for achievement of the Community's goals but in the first place for the effective functioning of the Common Market and legal certainty to be assured. On one side, some extent of unification seems to be in the interest of both the Union and its citizens, but on the other side, the power to decide upon this "extent" is still in hands of the Member States. It only depends on their common will whether they will or will not confer the power to the supranational Community.

[6] ROZEHNALOVÁ, N., *Principy evropského smluvního práva*. In Ročenka evropského práva 1997, Svazek III., Brno: Masarykova univerzita, 1998, p. 70.

[7] TICHÝ, L., *Spontánní europeizace soukromého práva*. Evropské právo, 2000, No. 2, p. 2.

[8] Compare e.g. SCHULTZE, R., *Vom Ius commune bis zum Gemeinschaftsrecht*. München, 1991.

[9] BETLEM, G., HONDIUS, E., *European Private Law after the Treaty of Amsterdam*. European Review of Private Law, 2001, No. 1, p. 18, or also VAN GERVEN, W., *Harmonization of Private Law: Do We Need It?* Common Market Law Review, 2004, No. 2.

[10] ROZEHNALOVÁ, N., op. cit. 6, p. 69.

Process of Europeanization

Private international law (further "PIL") is one the instruments regulating social relations in a situation of conflicting legal orders, in other words, social relations with a foreign element. As a consequence of the above described process of integration, the exigency of such norms in the European area is even heightened. How far *common* is the Common Market if all the transactions being grounded on the Four Freedoms are governed by national conflict-of-law regulation that is *not common* to all Member States?

For this reason, in the process of so-called Europeanization the European private international law (further "EPIL") was formed within the European law (sometimes narrowed to the EC law).[11] Under the notion of Europeanization we may understand a shift of competences from the intrastate to the European level.[12] Contrary to Private international law the EPIL is not part of any national legal system, but the international. It might be seen as a set of unified conflict-of-law rules on a higher than national level, regulating relations with a "European" element. Thus it bridges the differences between national legal orders for the needs of the European market.[13]

The attention to procedural issues of the EPIL – international jurisdiction, recognition and enforcement of judgements – was paid already in the turn of 1960's and 1970's. The question of unification of conflict-of-law rules was brought into play only in 1980's. Nowadays, the EPIL is considered as a means to achieve legal certainty which is necessary more than ever,[14] although there are different opinions of its successfulness.[15] Considering that the unification of private substantive law is not reachable under present conditions, the unification of the EPIL is in my point of view an acceptable compromise.

Unification of Conflict of Laws

[11] In my opinion the European law should also include other legal instruments, primarily international treaties adopted on the ground of the EU or other organization that form a part of the European legal area, and thus should not be restricted only to the EC law.

[12] Compare TOMÁŠEK, M., *Vytyčování hranic prvního a třetího pilíře Evropské unie*. Právník, 2005, No. 7, p. 691 af., or also TOMÁŠEK, M., *Lesk a bída "evropeizace" občanského práva*. Právník, 2004, No. 1. Tomášek defines the Europeanization as a shift of competences from the national to the EU level – in a narrow sense only to the 2nd and 3rd pillar (which becomes irrelevant after the Lisbon Treaty), in a broad sense also to the "European" level, i.e. the European Community. Similarly as stated above, the Europeanization might be generally seen without these restrictions to the Union or Community level only, respectively. See supra 11.

[13] ROZEHNALOVÁ, N., TÝČ, V., NOVOTNÁ, M., *Evropské mezinárodní právo soukromé*. Brno: Masarykova univerzita, 1998, p. 26.

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[15] ROZEHNALOVÁ, N., TÝČ, V., *Evropský justiční prostor (v civilních otázkách)*. Brno: Masarykova univerzita, 2006, p. 29.

This chapter ought to be prefaced that its aim is not to give any comprehensive list of all former and later groups aspiring to unify law, but rather to categorize them pursuant to their level of organization and unification methods used.[16] Some of them will be discussed into more details.

Institutionalized groups

The first attempts on unification originated in the 19th century when The Hague Conference on Private International Law (further "HC" or "the Conference") was established.[17] Arising from its name, the HC goes the traditional way of the PIL.[18] Soon it was followed by the others. At the beginning of the 20th century The International Chamber of Commerce, The International Institute for the Unification of Private Law (UNIDROIT) and later on under the patronage of the United Nations, The UN Commission for International Trade Law (UNCITRAL) were founded. Except for the directly applicable UN Convention on Limitation Period in the International Sale of Goods (1974) and the UN Convention on Contracts for the International Sale of Goods (known as Vienna Convention of 1980), all three initiatives went rather the way of alternative unification, notably in the form of standardized contract terms (INCOTERMS), issued by the International Chamber of Commerce), UNCITRAL model law, and UNIDROIT Principles of International Commercial Contracts respectively.[19]

Last but not least, the European Community is also one of the institutionalized and organized initiatives. On its ground and on the ground of the EU, number of crucial EPIL documents was drafted; e. g. Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968) and the Convention on the Service in the EU Member States of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (1997).[20] However, as a principal document of the EPIL is to be

[16] Compare TICHÝ, L., op. cit. 7, p. 1. Unlike prof. Tichý I have chosen criterion of the form of organization (extent of institutionalization) for the categorization of the groups, and not the unification methods. Used methods cannot play the main role in the classification because most of the groups combine them all. Besides that I introduce another criterion of searching approach (see below).

[17] The first session of The Hague Conference took place already in 1893. On its seventh session in 1951 the Statute of the Hague Conference was adopted and its irregular meetings were converted into the international organization. The Czech Republic has been a member of the HC since 1993. *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* and *Convention of 4 May 1971 on the Law Applicable to Traffic Accidents* belong among the most important deeds of the Conference. Significant amount of the drafts, however, never came in force because they were not ratified by the required number of states. Despite the fact, they are of considerable importance in the field of the PIL as they served as a source of inspiration to later achievements.

[18] Traditional methods of the PIL are regulations via (i) conflict-of-law rules and (ii) directly applicable norms (treaties). It is not within the scope of this article to analyze the PIL methods, thus in details it is referred to KUČERA, Z., *Struktura a třídění kolizních norem*. In Studie z mezinárodního práva, Svazek 16, Praha: Nakladatelství Československé akademie věd ACADEMIA, 1982; KUČERA, Z., *Mezinárodní právo soukromé*. 4. vydání. Brno: Doplněk, 1999; or ROZEHNALOVÁ, N., TÝČ, V., NOVOTNÁ, M., op. cit. 13.

[19] They are usually overall named as *lex mercatoria* or transnational law commercial law. ROZEHNALOVÁ, N., op. cit. 6, p. 70. For closer explanation see ROZEHNALOVÁ, N., *Transnacionální právo mezinárodního obchodu*. Brno, 1994.

[20] Presently, each of them has its "mirror" instrument in a form of regulation – Regulation (EC) No 44/2201 (Brussels I Regulation) and No 1348/2000.

considered the Convention on the Law Applicable to the Contractual Obligations (known as Rome Convention of 1980).[21] The part dealing with the non-contractual obligations, nonetheless, never came in force. Only in late 1990's the European Group for Private International Law (EGPIL) drafted a proposal for a convention on the law applicable to non-contractual obligations.[22] Although this proposal was never ratified, it stood as a cornerstone for further unification work.

After 1999, when the Treaty of Amsterdam came in force, the secondary Community instruments (mainly directives, harmonizing the law of the Member States, but lately regulations as well)[23] have started to play more important role in the process of unification of the PIL. The EC secondary law assures the unified application of the law in the European area of justice.

Finally, alongside these European continental methods there are other PIL methods, typical for common law system, that do not regard the diversity in approaches necessarily as a negative feature. Using various criteria, they attempt to find the most appropriate law.[24]

Spontaneous initiatives

Current trend is going towards spontaneous private codifications,[25] an antipole of organized unification groups. These study groups work mainly with the alternative methods that, unlike the traditional PIL methods, do not lead to binding legal instruments but to a model private law. Both forms coexist on general European level as well as the EC level.

[21] The sion of the Czech Republic (and othe ligations, by ratification of the Conv *Úmluva o právu rozhodném pro smlu*

[22] FALL *ns non contractuelles*. European Revi

[23] ROZE *tech Evropské unie*. In Ročenka evro

[24] B. Cu eaction to rigid rules of former "*Vest* olved legal orders; therefore it is pure even more to extremes in this resp r the others, "*Local Law Theory*" by W e named. An analysis of these meth ations (see supra 18) or for the forei – *Questions*. 6th Edition. St. Paul: West

[25] TICH *ce*. Právní rozhledy, 2005, No. 6, p. II.

Fig. 1: Outline of the most important institutionalized and spontaneous enterprises aspiring to unify private law on the European as well as the Community level.

Any absolute classification into purely European and purely Community groups is not nor possible, neither desirable, because most of the so-called European study groups comment also the Community regulation and vice versa. The borderline between the two categories is only vague.

There are two different approaches to research[26] among all the groups, using either traditional or alternative methods. The comparative approach based on comparison of national legal orders, typical for the US law, is nowadays common likewise in Europe. For instance it is employed by Londo's group[27] in its research work.

The second approach being inspired by the European Commission's Action Plan[28] is call *acquis* approach. It is aimed at unified European contract law drawing on patterns from the EC law, is supported by the European Commission and coordinated by the Center for European Private Law (Acquis Group in Münster). Both approaches are focused first and foremost on the contract law.

[26] SCHULTZE, R., *European Private Law and Existing EC Law*. European Review of Private Law, 2005, No. 1, p. 7-8.

[27] Ole Lando together with Hugh Beale are the leading figures of the Commission on European Contract Law, also known as Lando's Commission. It was founded already in 1982 and with the support of the European Commission it has been working on the restatement (private commentary) of European contract law since the very beginning. BETLEM, G., HONDIUS, E., op. cit. 9, p. 19.

[28] Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan; 15 March 2003, OJ 2003 C 63/01. It was followed by the Communication on European Contract Law of 13 September 2001 (OJ 2001 C 255/01).

One of the most important steps sure is presented by the Principles of European Contract Law (PECL, 2003)[29] formulated by Lando's Commission. Its objective ought to be an introduction of framework principles and rules for national courts as well as a motion for national parliaments. Moreover, the Principles should serve as a bridge between the continental and Anglo-American common law system.[30]

The Study Group on a European Civil Code sets itself far more ambitious task. It has responded to the Resolution of the European Parliament[31] calling upon to formulate a European Civil Code. This initiative combines the alternative methods of questing for common principles and fundamentals in national legal orders and the traditional methods as the final stage should lead to adoption of a binding, directly applicable document. The form of the instrument is, however, still discussed. Some authors are convinced that a way of total unification of substantive private law is under the present circumstances burdensome and almost closed, and therefore the Code ought to go the time-tested way of common principles.[32] Others look further and assert that the EC has not enough legal power to adopt any complex civil code. It would be necessary to limit the regulation only to contractual and related issues hence this attempt would get stuck in a half way between the unification and existing fragmented regulation in the national legal orders.[33]

Although the contractual law stays usually in foreground, recently attention has been drawn to the tort law as well.[34] The European Group on Tort Law (originally called Tilburg Group) represents one of the pioneers in this field. It was established in 1992 in Tilburg, the Netherlands, as a group of scholars with a main figure of professor Spier. The group employs the comparative approach and alternative methods in its work that supports the Roman tradition is recognizable similarly in the field of tort law.[35] It introduces a research project that seeks after common elements of tort liability across the spectrum of

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[29] For further details see ROZEHNALOVÁ, N., op. cit. 6, and ROZEHNALOVÁ, N., *Evropský justiční prostor ve věcech civilních, část XIV. – Principy evropského smluvního práva a další iniciativy směřující k vytvoření jednotného smluvního práva*. Právní fórum, 2006, No. 3, and for the foreign authors BERGER, K. P., *The Principles of European Contract Law and the Concept of the „Creeping Codification*". European Review of Private Law, 2001, No. 1.

[30] TICHÝ, L., op. cit. 7, p. 3.

[31] Resolution of the European Parliament on the Harmonization of Certain Sectors of the Private Law of the Member States, 6 May 1994, OJ 1994 C 205/518, that follows up the Resolution of the European Parliament of 29 May 1989 (OJ 1989 C 158/400) and calls upon the Commission to formulate a common European Civil Code with reference to the Commission on European Contract Law.

[32] TICHÝ, L., op. cit. 7, p. 2. Compare with BAR, CH. VON, HARTKAMP, A. S., *Towards a European Civil Code*. 2nd Edition. Nijmegen: 1998.

[33] BASEDOW, J., *Codification of Private Law in European Union: the Making of a Hybrid*. European Review of Private Law, 2001, No. 1.

[34] Professor Tichý speaks in this context about the Europeanization of tort law caused by "an enormous growth of cross-border fluctuation as a result of the free movement of persons". TICHÝ, L., op. cit. 7, p. 3 af.

[35] Principal publications of the group are: SPIER, J., *The European Group on Tort Law*. In KOZIOL, H., STEININGER, B. C., *European Tort Law 2002*. Vienna: 2003; a KOZIOL, H., *Die "Principles of European Tort Law" der "European Group on Tort Law"*. Zeitschrift für Europäisches Privatrecht, 2004. For further details see its web site http://civil.udg.es/tort

the European legal orders. The objective of the group is to formulate the fundamental principles of European tort law, analogously to Lando's PECL or UNIDROIT Principles. The Principles of European Tort Law (further "PETL") was for the first time published on a conference in Vienna in May 2005 and afterwards on a conference of Academy of European Law (ERA) in Trier, Germany, in November 2006. It is supposable that similarly to the PECL the Principles of European Tort Law will wait to see their amended version or versions.[36] There are, however, some opinions calling these endeavours into question.[37] Their cardinal argument against the unification of tort law lies in variety of economic demands of subjects and in competition that requires differential regulation. In my point of view, nonetheless, the need of legal certainty as a consequence of unified law is so urgent that it prevails. Despite the fact that the economic subject save a significant part of their costs if they act within an area of unified rules than if they have to comply with more (often even antagonistic) requirements of several legal orders.

Likewise the above mentioned Study Group on a European Civil Code and lately also Research Unit for European Tort Law in Vienna deal with tort law, employing the *acquis* approach. The Hamburg Group for Private International Law has to be mentioned as well. The Hamburg Group jointly with Max-Plank Institute commented a proposal for the Rome II Regulation, important legal instrument of tort law, finally adopted in July 2007.[38]

All above mentioned private codifications constitute unified law regulation that serves as an outline for law-making bodies as well as private parties. They can refer to the principles (*soft law*) and thus make them effective and binding. Although these private codes and principles are not obligatory, their formulation, comparison, exchange of opinions and cognition of other legal institutes might serve as a motion to self-reflection and subsequently to more effective solutions. The process of Europeanization has thus advanced from the level of private law to the level of legal science.[39]

The shift of competence in Europe to the EC institutions has already overstepped mere common public and administrative rules and procedures towards common regulation of private law. As mentioned above the unified European private law has been an illusory vision so far; that is true for both contractual and non-contractual obligations. Notwithstanding, there is the possibility of unified conflict-

[36] Further details in KOCH, B. A., "*European Group on Tort Law*" *and Its* "*Principles of European Tort Law*". American Journal of Comparative Law, 2006, No. 1.

[37] For instance VAN DEN BERGH, R., VISSCHER, L., *The Principles of European Tort Law*: *The Right Path to Harmonization?* European Review of Private Law, 2006, No. 4.

[38] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40

[39] TICHÝ, L., *Unifikace soukromého práva v EU a naše kodifikace*. Právní rozhledy, 2005, No. 6, p. II.

of-law rules as a solution *per medias vias* between the code and non-obligatory principles or codifications which in their present form do not lead even to unified application of law, therefore they leave space for the dissimilar national legal orders.

Conclusion

Bearing in mind the goals and objectives of European Community, notably the functioning of the internal market, as well as needs for predictability for parties in private transactions, a common regulation in a field of the conflict of laws is desirable and necessary. Recently, the common European legal tradition as a basis for unification of law has been revealed by numerous comparative legal researches. There are two ways of unification. International treaties and conventions still personify the traditional means of the conflict of laws (so called *hard law*). As an antipole or an alternative we can find non-binding private codifications of general legal principles and model laws (*soft law*). They form a modern stream of the unification of law.

It cannot be agreed with opinions saying that the European unification of law destroys cultural heritage and diminishes national identities of states by blurring demarcation lines between national legal orders. In my point of view, this is rather a new quality of law, common to all participating states and fruitful for their citizens. Moreover, the unification of the European conflict of laws is only a *via media* between two extremes – one of an ideal (however today a utopian) vision of the unification of substantive law and the other one of crumbled national legal regulations. It is a means of choosing the most proper applicable law, and thus the national legal orders are affected only in a minimalist way.

According to some authors we cannot comprehend the private codifications as an autonomous legal system but only as a means of international commercial praxis bridging the gaps between the national legal orders.[40] Despite all that, they are of a significant value because they document social needs for legal regulation and may serve as an impulse for further law-making activity. This begs the question. Would it be ever possible to come to a code of the unified substantive law? Is Europe waiting to see a modern version of *Ius Commune*?

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[40] Compare KUČERA, Z., *Mezinárodní právo soukromé*. 4. vydání. Brno: Doplněk, 1999, p. 41 and 206 af.

[2] BASEDOW, J., *Codification of Private Law in European Union: the Making of a Hybrid*. European Review of Private Law, 2001, No. 1

[3] BERGER, K. P., *The Principles of European Contract Law and the Concept of the „Creeping Codification*". European Review of Private Law, 2001, No. 1

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SOME LEGAL ASPECTS OF AGRI-ENVIRONMENTAL EFFORTS IN THE COMMON AGRICULTURAL POLICY

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Abstract

The legal aspect of agri-environmental protection, the agri-environmental law is based on the principles of sustainable development and integration of environmental priorities into agricultural legislation and practice. The important steps of agri-environmentally relevant legislation – actuating the agri-environmental programs in the European Union – are aiming at the protection of natural values, the environmental media and strengthening food safety, the quality of agricultural products intended for human consumption.

Key words:

Agri-environmental law, agri-environmental protection, sustainable development, principle of integration, CAP-reform, the human right for healthy environment

The agri-environmental law and the collection of programs that encourage improved conservation and environmental performance in agriculture, the so called agri-environmental policy of the EC (EU), which took shape in a narrow, one and a half decade before the turn of the millennium is the experiment of the achievement of sustainability in the agricultural sector. The challenge of sustainable development requests building the environmental interests into all politics of the Union, and their efficient enforcement inside them. The „integration-principle" of environmental law is the connecting link between sustainability and agri-environmental efforts.

The paradigm of sustainable development is based on environmental-, economic- and social pillars and it is necessary to consider all these three aspects in the actual measures, but their diverse heaviness has to be taken into consideration, especially in case of an interest-collision arising between them. Environmental sustainability has the primarcy between the pillars according to the narrower meaning of sustainable development. The main problem is that „while the economy is growing exponentially, the earth's natural capacities have not increased. A team of scientists led by Mathis Wackernagel concluded in a

2002 study published by the U.S. National Academy of Sciences[1] that humanity's collective demands first surpassed the earth's regenerative capacity around 1980. Today, global demands on natural systems exceed their sustainable yield capacity by an estimated 25 percent. This means we are meeting current demands by consuming the earth's natural assets, setting the stage for decline and collapse"[2]. There cannot be reached economic- and social sustainability for the lack of basic conditions of life, so the conservation of them has to be the prior issue.

The goal of sustainability, the „give-and-take" proposal between the extremities of the unlimited- and the zero-increase versions, was aimed in the Report of the World Commission on Environment and Development of the United Nations („Brundtland Commission"), a commission hallmarked with chairing the Norwegian Gro Harlem Brundtland.

The report titled "Our Common Future" defines tersely the concept of *sustainable development*, „which implies meeting the needs of the present without compromising the ability of future generations to meet their own needs, should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises"[3]

The primary- and secondary law of the European Union uses the term of sustainable development according to the Brundtland Commission's definition, melding the ecological-, economic- and social viewpoints, too. The Union sets itself the objective of achieving „balanced and sustainable development"[4] from 1992. The secondary law determining the Common Agricultural Policy (CAP) of the Community is also in harmony with the Rio de Janeiro Protocol on the environment and development (1992), which called for sustainable development, the form of development achieved when agricultural exploitation technologies are compatible with the rational use of the earth, so as to ensure its productive capacity for future generations[5].

The utmost theoretical basis of agri-environmental protection – besides sustainable development – must be the other one of environmental protection: the human right for healthy environment[6], which appeared in the Principle 1 of the Stockholm Declaration of the United Nations Conference on the Human Environment[7]. The Expert Group on Identification of Principles of International Law for Sustainable Development stated that „the right to a healthy environment provides a focus to guide the

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[1] MATHIS WACKERNAGEL et al., "Tracking the Ecological Overshoot of the Human Economy," Proceedings of the National Academy of Sciences, vol. 99, no. 14 (9 July 2002), pp. 9, 266–71; Global Footprint Network, WWF, and Zoological Society of London, Living Planet Report 2006 (Oakland, CA: Global Footprint Network, 2006), p. 14

[2] LESTER R. BROWN: PLAN B 3.0, Mobilizing to Save Civilization, W. W. Norton & Company, Earth Policy Institute, New York, London, 2008, p. 11

3 General Assembly Resolution 42/187, 11 December 1987., Our Common Future: Report of the World Commission on Environment and Development (Brundtland Commission). Oxford University Press, Oxford, 1987. p. 43

4 CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 2, Official Journal (OJ) C 325, 24 December 2002

[5] See the conclusions of the "Earth Summit" on sustainable development in Johannesburg, August 26th – September 4th, 2002

[6] The Constitution of the Hungarian Republic declares our right for a healthy environment as a human right (Article 18., Article 70/D)

[7] Stockholm Declaration, part II (Principles), Principle 1

integration of environment and development. Development is sustainable where it advances or realizes the right to a healthy environment."[8]

The Aarhus Convention[9] is the clearest statement in international law to date of a fundamental right to a healthy environment. The Convention's objective is stated in Article 1, where it refers to the right to a healthy environment as a concrete and accepted fact ("the right of every person of present and future generations to live in an environment adequate to his or her health and well-being")[10].

Agri-environmental protection is practically doing the best endeavours to soften the growing environmental damages of agricultural land and all of the environmental elements in connection with it, pursuing agricultural activities in the highest sense of the principles of precaution, prevention and restitution. This special field of environmental protection is incarnated in the harmonisation of the agricultural policy and the environmental policy.

The legal aspect of agri-environmental protection, the agri-environmental law forms a point of contact between agrarian law and environmental law. It's naming (agri-environmental law, Agrarumweltrecht, agroenvironnement) gives expression to it's borderland nature.

Trying the briefest definition of agri-environmental law we can ascertain that it is the entirety of the norms of environmental law being against the environmental pollution of the agriculture. In a wide sense it contains the rules of the general part of environmental law (horizontal division, weaving in all special fields of it) and the ones of the special part (with a vertical division) which can be applied in the agricultural sector. In a narrow sense only those norms belong to it that choose as addressees exclusively environment-users of this sector.

The more sensitive, positivist definition of agri-environmental law can be derived from the normative concept[11] of the environmental protection with a teleological[12] approach. Those rules of law, legislative measures and other legal devices of measure of state management, and those regulations of latter ones, that are aiming at

- the prevention or reduction of environmental risking, degradation and pollution which can be ascribed to activities bound to the agriculture directly or indirectly,
- the reduction or ceasing of damage (damaging) of the environmental media and processes in them

[8] Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26–28 September 1995, paragraph 31.

[9] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark on 25 June 1998.

[10] SUELI GIORGETTA: The Right to a Healthy Environment, Human Rights and Sustainable Development, In.: International Environmental Agreements: Politics, Law and Economics, Vol. 2, No. 2, 2002., Kluwer Academic Publishers, Springer Netherlands, p. 187

[11] See the Hungarian act on the general rules of environmental protection, No 53. of 1995, 4. §, point 32.

[12] As per the sentence of Aristotle things must be defined from the points of their purposes, goals (teleology). See on the subject EDWARD GOLDSMITH,: Scientific Superstitions: The Cult of Randomness and the Taboo of Teleology; The Ecologist, 27/5/1996, 1997 IX.

- the restoration of an antecedent state of them just like before the activity entailing the mentioned effects (environmental in integrum restitutio)

belong to the concept of agri-environmental law, filling it entirely.

The wider concept of agri-environmental protection annexes agri-environmental law, since the previous one includes every human activity and measure (in this manner for example legislation in this subject and all human behaviours that are prescribed by those rules of law), that is aimed at the mentioned goals.

„Environmental law and environmental protection are means and aim. They are complementary to each other, and often leave white spots on the canvas of our environment."[13] The relation is just the same between agri-environmental protection and agri-environmental law.

The landscape as „cultivated nature"[14] is the carrier of the traces of a million-years-long human work. It is an ambivalent connection, that in this relation agriculture is a damage causing factor and and a bearer stakeholder in one, „agricultural production is the suffering subject of the pollution of the environment, but – particularly it's intensive manner – the agent of the degradation of the environment"[15].

The intensification of agriculture in Europe can be attributed mainly to the measures of CAP. The CAP, as common politics, possibly the area regulated to the highest degree, it is indicative fact of this that CAP regulations amounts to almost 50 per cent of the whole legal material of the Union[16], so the „intensification" of the agrarian law of the Union moved in parallel with the increase of the production volume.

The question of the environment protection appeared for the first time in the Single European Act (1987) at the level of the community's primer legal sources. It has added section 130R to the text of the Treaty of Rome, thus the member States agreed that the Community is intended to guarantee a high degree of protection for the environment and human health.

It is obvious, that environmental law is spreading in the legal system as a virus, because it orders to follow the imperative basic principle of the integration, according to which it is necessary to build the environmental priorities into the process of planning and shaping of the socio-economic conditions and into executing of all activities since they – at least potentially – may cause changes in the state of the environment. Every single planning and executive, economic and social activity in all branches of the national economy are causing environmental effects, even the preparation and creation of a legal norm

[13] MÁTÉ JULESZ: Interdisciplinary fields of environmental law and new branches of civil law, Journal of Legal Theory, 2003/3., http://jesz.ajk.elte.hu/julesz15.html (08. 04. 2008.)

[14] Op. Cit., p. 104

[15] LÁSZLÓ DORGAI: Az agrártermelés és a környezetvédelem EU követelmények szerinti összehangolása, Magyar Tudomány, 2002/9, p. 1181

[16] NAGY GÁBOR: Jogharmonizáció és jogalkalmazás a csatlakozást követően, AZ EURÓPAI UNIÓ AGRÁRGAZDASÁGA, 2004. 9. évf. 7. szám, p. 33

and in the course of it's execution the protection of all environmental media, the interactions going on between them and the whole environment must be ensured.

For the legal aspect of the environment protection, as a „cross-lying" area of law and for the horizontal natured environment politics have to prevail spectacularly inside other law branches and in politics, too. This is a „sine qua non" of it's efficiency. Also according to European Union's primary law „environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities[17] […], in particular with a view to promoting sustainable development"[18]. Emphasis must be placed on puting across the principle of integration especially in the agriculture, because it is an economic sector showing one of the most considerable environmental influence.

The European story of bursting into bloom of agri-environmental measures dates back to the middle of the 1980's when the 19. paragraph of a regulation 797/85 EGK allowed for the member states to give supports from their national budget to smallholders who apply certain farming methods on environmentally sensitive areas (ESA). The concept that smallholders' switching should be favoured to more extensive production appeared at the level of the community politics at the end of the 80's. This manifested soon legally in a regulation spanning a wider circle, in the wave of the CAP-reform.

The CAP-reform starting in 1992 developed the multi-purpose model's construction of the agriculture. Since then the guiding principle of the sustainable agricultural development is providing the long-term protection of natural resources. The „accompanying measures" of the CAP-reform were serving also the dampening of the agricultural overproduction[19]. One of them was Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside[20] which stated that the requirements of environmental protection are an integral part of the CAP[21]. So the statement of professor Götz made in 1990, that the Community in the future undoubtedly increasingly pledges itself strongly for agri-environmental protection[22], proved true inside two years, indeed today appears true similarly and with regard to the future, in spite of all troubles.

According to this agri-environmental regulation Member States have to start multiannual zonal programmes which shall be drawn up for a minimum period of five years. These multilevel special

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[17] referred to in Article 3 of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, listing the goals of it

[18] EUROPEAN UNION – CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Article 6, Volume 49**,** 29 December 2006, OJ, C 321 E/47

[19] It was realized that all measures to reduce agricultural production in the Community have a beneficial impact on the environment

[20] That was the so called "agri-environmental regulation", OJ L 215, 30/07/1992 P. 85-90

[21] Council Regulation (EEC) No 2078/92 of 30 June 1992, preamble

[22] GÖTZ VOLKMAR - HUDAULT JOSEPH: Harmonisierung Des Agrarrechts in Europa, V. Agrarrechtssymposium des C.E.D.R., Göttingen 20./21. September 1990, Carl Heymanns Verlag KG, Köln, 1991, Band 37, p. 25

programs, „the agri-environmental programs" are earmarking the dissemination of environmentally friendly farming techniques. The programs seek to increase environmental benefits and decrease environmental damages and can provide substantial benefits to society. The number of the programs are significantly different in the Member States, they must not cover each other, and it is important to form a coherent system, which can be easily treated from an administrative viewpoint and understandable for the smallholders, whose participating is voluntary. Though the single support programs have to be adjusted to the local conditions and priorities, the coordination with the national level is very important, because this assures efficiency and coherency.

The most important target areas of agri-environmental protection are the protection of natural values, natural resources and a related anthropocentric aim, the quality of food, the residue- and pollutant exemption (food safety) of agricultural products intended for human consumption.

The reform package took action for the introduction of the so called „sustainable agriculture" by supporting low-input farming systems producing healthy food. As described in chapter 14 of Agenda 21, the major objective of sustainable agriculture and rural development is to increase food production in a sustainable way and enhance food security. Degradation of agricultural land and decline in soil fertility continue to be major threats to food security and sustainable development[23].

The CAP-reform was drawn up based on Ray MacSharry's proposal, the essence of which was the transformation of the logic of function: guaranteeing the agricultural incomes being based on the check of the production processes, not on the high level of the prices. It was necessary to near the institution prices to the world market prices, the producers income falling out wished to be compensated with direct payments of an aid scheme. The purpose of the aid scheme is to contribute to the achievement of the Community's policy objectives regarding both agriculture and the environment[24].

This Community aid scheme[25] is intended to promote:

- the use of farming practices which reduce the polluting effects of agriculture, a fact which also contributes, by reducing production, to an improved market balance;
- an environmentally favourable extensification of crop farming, and sheep and cattle farming, including the conversion of arable land into extensive grassland;
- ways of using agricultural land which are compatible with protection and improvement of the environment, the countryside, the landscape, natural resources, the soil and genetic diversity;

[23] Sustainable agriculture and rural development, Report of the Secretary-General Economic and Social Council, Commission on Sustainable Development, Eighth session, E/CN.17/2000/7, point 35. and 57.

[24] Council Regulation (EEC) No 2078/92 of 30 June 1992, Article 1

[25] Regulation (EEC) No 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures is incorporated in the scheme introduced under the Agri-environmental Regulation

- the upkeep of abandoned farmland and woodlands where this is necessary for environmental reasons or because of natural hazards and fire risks, and thereby avert the dangers associated with the depopulation of agricultural areas;
- long-term set-aside of agricultural land for reasons connected with the environment;
- land management for public access and leisure activities;
- education and training for farmers in types of farming compatible with the requirements of environmental protection and upkeep of the countryside.[26]

Although the rate of the co-financing[27] is very preferential, in the first two years of the introduction of the CAP it could not be managed to trigger the considerable part of the programs, they did not make use of the bases standing for the provision entirely. The Commission accepted 127 agri-environmental program-pockets, and shared out approximately five billion ECU-s as support-payment and agri-environmental programs were in operation in all member states already by 1996.

The agri-environmental program of the Union in it's present form – despite the number correction achieved since then – seems not being able to counterbalance financial interests „in the backyard" of intensive farming. Quite considerable financial expenditure seems to be needed, which cannot be piled up that would let the Union achieve the goal of really sustainable agriculture. Nevertheless connected with the expensiveness the agricultural production methods which can prove maintaining the level of quality of the environment require a vast amount of living labour, so they can create jobs for agricultural experts and other workers.

An expert substance was made in the end of the nineties (Towards Common Agricultural and Rural Policy for Europe)[28], that valued the results and deficiencies of the CAP in details. The conclusion of the paper is that it is inevitable to tighten the contact between the common agricultural policy and the rural development politics to reach healthier development. In the springtime of 1999 the agreement about this came into existence on the Berlin-peak[29].

By creating integrated rural development the CAP was transformed into CARPE (Common Agricultural and Rural Policy for Europe). The first "rural development regulation", Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations[30] repealed the

[26] Council Regulation (EEC) No 2078/92 of 30 June 1992, Article 1

[27] The rate of Community part-financing shall be 75 % in regions covered by the objective defined in point 1 of Article 1 of Regulation (EEC) No 2052/88 and 50 % in the other regions. (Council Regulation (EEC) No 2078/92 of 30 June 1992, Article 8)

28 Ld.: Towards a Common Agricultural Policy for EU: Report of an Expert Group Commission of EU Communities DGVI/AI. 1997 Figura 1.

29 See: Agricultural Council: Political Agreement on CAP Reform, Newsletter 11 March 1999. European Commission Directorate general of Agricultural p. 7

[30] OJ L 160., 1999.6.26., P. 80-102.

Regulation (EC) No 2078/92 and quasi annexed it while simplifying the rules of it. According to this regulation the agri-environmental aid scheme should continue to encourage farmers to serve society as a whole by introducing or continuing the use of farming practices compatible with the increasing need to protect and improve the environment, natural resources, soil and genetic diversity and to maintain the landscape and the countryside[31].

CHAPTER VI of the Regulation deals with "agri-environment" (that is the title of it) and gives a brief definition of it: it is a whole bulk of "agricultural production methods designed to protect the environment and to maintain the countryside"(Article 22). According to the Regulation support for agri-environment shall promote (among others):

- ways of using agricultural land which are compatible with the protection and improvement of the environment, the landscape and its features, natural resources, the soil and genetic diversity,
- an environmentally-favourable extensification of farming and management of low-intensity pasture systems,
- the conservation of high nature-value farmed environments which are under threat (Article 22).

Agri-environmental issues come in many shapes and sizes and a one-size-fits-all policy tool does not exist. Hence, harmonizing agricultural production with preferences for improved environmental quality requires a menu of policy options. How well an agri-environmental policy instrument performs (e.g., the extent of environmental gains, cost of achieving gains, and distribution of these costs) depends largely on program design and implementation. In other words, the "devil is in the detail."[32] For example land retirement programs – focused largely on soil conservation providing annual payments to farmers for retiring land from crop production – are relatively cheap and besides soil conservation they are dampening the agricultural overproduction, are stabilizing markets and in addition efficiently increase the soil's carbon sequestration.

Agenda 2000[33] introduced the concept of the first (commodity production) and second (rural development, that contains agri-environmental efforts, too) pillars within the CAP, with the aim of strenghtening the latter one. The „mid-term review" of Agenda 2000, later renamed „Towards sustainable farming: a long-term perspective for sustainable agriculture", but more easily referred to as the 2003 Fischler reforms, went further. According to Council Regulation (EC) No 1782/2003 of 29 September 2003[34] Member States shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition (Article 5 point 1.).

[31] COUNCIL REGULATION (EC) No 1257/1999 of 17 May 1999, preamble (31)
[32] ROGER CLAASSEN, et al.: Agri-Environmental Policy at the Crossroads: Guideposts on a Changing Landscape, Economic Research Service/USDA, Washington DC, 2001, p. 1
[33] Agenda 2000: For a stronger and wider Union. COM(97) 2000 Final
[34] OJ L 270 , 21/10/2003, P. 01 - 69

According to the next important step of agri-environmentally relevant legislation, Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)[35] support should continue to be granted to farmers to help address specific disadvantages in the areas concerned resulting from the implementation of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in order to contribute to the effective management of Natura 2000 sites, while support should also be made available to farmers to help address disadvantages in river basin areas resulting from the implementation of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of the water policy [Preamble (34)]. Agri-environmental payments are to be continued to play a prominent role in supporting the sustainable development of rural areas. In accordance with the polluter-pays principle[36] these payments should cover only those commitments going beyond the relevant mandatory standards [Preamble (35)].

While setting down the landmarks of agri-environmental protection the central question is the taking into account of the affected environmental elements, the consideration of the medial-, causal- and vital fields of environment protection that can be involved. The special fields dealt with thoroughly in the literature – according to the degree of the human-hygienic relevance and the involvement of the environmental media – the quantitative- and qualitative water protection, the similarly two-way protection of the soil, or nature conservation dealing with the only living environmental element (too), finally the one that became popular recently, the speciality dealing with the environmental risks of the genetic modifications of genetic engineering, the so-called agrár- or „green biotechnology"[37].

Compared to these the fields of the protection of air quality, the protection against noise- and vibration, the animal protection and the waste management are under-represented in the legislation and specialized literature of agri-environmental law because of their indirect involvement (the latter one can be caught practically just from the viewpoint of air quality management and soil-, and water protection) or because of their significance regarded as relatively smaller one.

Not to be forgotten the landscape as manifold combined environmental unit[38], that counts as an important environment protection object from the viewpoint of agri-environmental protection. The protection of landscape serves as a part of nature conservation since landscape is a biological-geologic

[35] OJ L 277, 21/10/2005 P. 01 - 40

[36] whoever is responsible for (potential) harming the environment must pay the expenses of (prevention or) clearing up

[37] This special field of agri-environmental law is the youngest one. In the German agri-environmental literature it is called shortly „Gentechnikrecht"

[38] TAMÁS ANDRÁS: A környezetvédelem jogi alapkérdései, ELTE Jogi Továbbképző Intézet, Bp. 1976, 73. o.

unit in one, it is to be included into nature conservation by the categorisation of the environment protection specialities.

When and where agricultural policies stimulate intensive use of inputs environmental risks and the loadings of the environmental media – the legal subjects protected by the above mentioned special fields of law – show being on the increase.

Although farming activities mainly lead to environmental damages, they also can provide some benefits (e. g. by holding back natural succession on grasslands), so the question of the effects of agriculture is complex. The orders of agri-environmental law are meant to be the sensible balance.

However „in the case of agriculture, the most important issue is food safety"[39], which is the other main goal of agri-environmental protection, offering the solution also to keep up the level of this human demand.

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[1] LESTER R. BROWN: *PLAN B 3.0, Mobilizing to Save Civilization*, New York, London, W. W. Norton & Company, Earth Policy Institute, 2008, p 399, ISBN 978-0-393-06589-3 (cloth) 978-0-393-33087-8 (pbk)

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ISSUES RELATED TO THE TRANSPOSITION INTO THE ROMANIAN LAW OF THE FRAMEWORK DECISION 2002/584/JHA ON THE EUROPEAN ARREST WARRANT AND THE SURRENDER PROCEDURES BETWEEN MEMBER STATES

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Abstract

The Framework Decision 2002/584/JHA was transposed into the Romanian law by Law no. 302/2004 regarding the judicial cooperation in the criminal law area. At that time, for a candidate state to accession into the European Union, the transposition came as an obligation to respect the Community acquis before joining the EU. Law no. 302/2004 was modified by Law no. 224/2006 and entered into force in first of January 2007. This study aims to analyze the perception of the principle of mutual recognition into the Romanian legal system, the case-law of the Romanian courts and the jurisprudence of the Romanian Constitutional Court.

Key words

Judicial cooperation, criminal matters, mutual recognition, European arrest warrant.

I. General issues on the EAW Framework Decision

1. In 1999 the European Council decided that the principle of mutual recognition should become the cornerstone for judicial cooperation in criminal matters. The traditional system of extradition and mutual legal assistance appeared to be in general slow. Moreover, the establishment of a common area of freedom, security and justice, introduced by the Treaty of Amsterdam, required a new way of carrying out judicial cooperation in EU. A first response was given with the 2000 EU Convention on mutual assistance in criminal matters and, in the 2005 Hague program, the Council reaffirmed the importance of full implementation of the principle of mutual recognition in all stages of criminal procedure.

2. As a reflection, in the field of the third EU pillar, at 13 June 2002, the Framework Decision on the EAW and the surrender procedures between Member States was adopted[1]. This Framework Decision has

[1] The Framework decision is published in the Official Journal of the European Communities no. L190/1 from 18.07.2002.

been regarded as the first and most striking example of the extensive judicial cooperation in criminal matters adopted within the third EU pillar and based on the principle of mutual recognition. It arose from the need to respond to the danger of terrorism and cross-border crime, something that has been felt more accurately after 11 September 2001[2]. Its main purpose is to simplify and expedite procedures for extradition of persons convicted or accused of crimes between the EU member states. It took the procedure from the hands of politicians and made it purely judicial matter whereby only the courts of the member states cooperate without the need to turn to the executive which traditionally participated in the process of extradition[3].

3. This Framework Decision reflects the idea that judicial cooperation between member states should no longer be regarded as a matter of international relations between sovereign states that decide on a case – by – case basis whether or not to render the requested assistance.
That's why the philosophy of EAW is based on the idea that the judicial decision pronounced by a court from one member state is recognized and put in practice into another member state in the same way like a national one. In this view, the judicial decisions pronounced in criminal matters have a great liberty of movement into the EU and have Union – wide legal effects in the purpose is that of creating a common area of freedom, security and justice.

II. The principle of mutual recognition between members states in the field of criminal law

4. The mechanism of the EAW is based on a great confidence between the member states. The executing state has trust in the judicial decision of the issuing state and, based on this trust, puts this decision into practice. This confidence is the essential element which stays on the basis of the principle of mutual recognition between members states in the field of criminal law.
Although the principle of mutual recognition was well known in the context of the first pillar, it was a new concept in relation to criminal matters. In its Communication of 26 July 2000 on mutual recognition of final decisions in criminal matters the Commission stated the following:
„Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are acceptable as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's parteners' rules, but also trust that these rules are correctly applied. Based on the idea of equivalence and the trust it is based on, the

[2] For general considerations on the grounds which stay on the basis of the EAW, see Munteanu, C.-S., *Mandatul European de arestare. Un instrument juridic apt sa inlocuiasca extradarea*, in Caiete de drept penal, nr. 1/2007, p. 91-94
[3] Komárek, J., *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, New York, New York University School of Law, 2005, 27 pages, ISSN 1087-2221, p. 8.

results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even thought a comparable authority may not even exist in that state or could not take such a decision or would have taken an entirely different decision in a comparable case".

5. Mutual recognition in its purest manifestation implies that it should be possible to execute a judicial decision of a member state in any other member state. The fact that the decision could not have been issued by the executing member state in a similar domestic case may not be a reason not to execute it. This means in the first place that traditional grounds for refusal based on the nature of the offence (political, fiscal), nationality of the person or related to sovereignty, security, public policy or other essential interests of the state should be abolished. Furthermore, differences in legislation concerning substantial, procedural or sanction law should not impede cooperation between member states and may not be a reason not to provide the requested assistance.

6. Although was sustained by the most important organisms of the EU, the principle of mutual recognition within the EU third pillar had raised serious objections from some member states. A powerful voice was the German one.

7. According to the decision of Federal Constitutional Court (FCC) from 18 July 2005 the cooperation should be based on a limited mutual recognition within the EU third pillar[4]. The key word in this sentence was „limited". While the ECJ stated in Gozotok and Bruge [C-385/01, 2003] that „there is a necessary implication that the member states have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other members states even when the outcome would be different if its own national law were applied", the German Constitutional Court takes a very different view.

The FCC of Germany admits that, because every member state must respect the principles listed in article 6 (1) TEU, the foundation for mutual trusts exists. However, in the FCC's opinion this does not liberate the legislator from the duty to react if the trust is shaken. This is why, according to the FCC, in every individual case a concrete review of whether the rights of the prosecuted are respected should be made.

The existence of article 6 (1) EU and article 7 EU

[4] For further discussions, see Komárek, J., *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, p. 14 - 18; Benke, K., *Mandatul european de arestare in jurisprudenta instantelor constitutionale*, in SUBB Iurisprudentia nr. 1/2007, p. 74-77.

„does not justify the assumption that state law structures of the EU member states are materially synchronized and that proportional national review of individual cases is nugatory".
As a result, in case of German nationals, the whole of the EAW approach must be replaced by a procedure under which all circumstances of the case and also the system of criminal justice of the requesting member state will be examined.
This is a very different perspective as compare to the one sustained by the principle of mutual recognition in the interpretation of the ECJ. On the basis of this principle, the executing state must have a total confidence in the criminal justice of the issuing state and must eliminate all types of preliminary control of the factual basis and of the legality of the acts of the issuing judicial authority. This confidence determines that a control over this system and over his compatibility with the national standards of protection of human rights to be unnecessary.

The concerns raised by the FCC of Germany are different from those expressed in the cases concerning first pillar constitutional conflicts: while in community law it is the European standards created by the ECJ which may be in conflict with the standards provided by national laws, in the case of criminal cooperation based on mutual recognition the standards of other Members States are at play.
We have to recognize that some of the new Member States, and Romania is a good example, still have problems with their judiciary and it is understandable that a Constitutional Court like the German one is not willing to give up all control over what happens in these countries with persons surrendered.

8. In the same way of doubt is also the Italian example. The Italian law which transposes the EAW framework decision appears to be one which negates the framework decision, rather than implementing it[5]. It offers to the Italian executing state new ground of refusal, both explicit and implicit. Italian courts will be called upon not only to control the merits of the case, but also to effectively judge the foreign state and its constitutional system. Moreover, the principle of dual criminality will return as the rule in the Italian system, while the framework decision had made it the exception.

9. The case of Germany and Italy must be viewed in the context of this contrast between Europe with its impulse towards integration and the national systems with their instinct of self-preservation[6]. In the criminal field, the center of gravity is shifting from the national level to the supra-national level. The growing menace constituted by terrorism and by cross-border criminality demands an appropriate response at EU level. But our national systems are still highly resistant to change coming from outside.

[5] Impalà, F., *The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, Utrecht Law Review, vol. 1, nr. 2/2005., p. 56.
[6] Impalà, F., *The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, p. 61.

10. As we can see the principle of mutual recognition in the field of criminal cooperation is considered problematic. The principal cause of this consideration is due to the fact that most fundamental rights are at stake in the field of criminal justice. While perhaps the majority of the previous cases of constitutional conflict concerned economic rights, which follows from the nature of the first pillar law, criminal justice cooperation involves rights such as human dignity, liberty, protection from torture and the like. That's why the Constitutional courts may be inclined to stress their role as guarantors of individuals' rights at the expense of creating a coherent legal order, although significant mutual trust is possible because the member states built their legal orders on structural principles that guarantee the protection of fundamental rights and freedoms.

III. The implementation of the EAW framework decision in the Romanian system

11. In the process of integration of Romania into the EU, the assimilation of the European norms in the field of judicial cooperation was seen as an obligatory demand. This is why the judicial cooperation in criminal matters was an important part of the Chapter 24 of the negotiations.

12. Until now the only framework decision based on the principle of mutual recognition which is implemented into the Romanian system is the one concerning the EAW. This implementation was realized by the introducing into the Law no. 302/2004 concerning the international judicial cooperation in criminal matters of the third Title concerning the application of the Council framework decision on the EAW and the surrender procedures between Member States. Taken in consideration the experience of the others members states after a year of application, this law was amended and supplemented by Law no. 224/2006.

These dispositions concerning the EAW had entered in force in the first of January 2007, in the moment of the integration of Romania in the EU.

In 2007, the executive initiated a project of law for the modification of the Law no. 302/2004. The objective of this project is the implementation of others three framework decisions based on the principle of mutual recognition in criminal matters:

1) The framework decision of 22 July 2003 on the execution in the EU of orders freezing property and evidence;

2) The framework decision of 24 February 2005 on the application of the mutual recognition to financial penalties;

3) The framework decision of 6 October 2005 on the application of the mutual recognition to confiscation orders.

For the moment this project is to be discussed by the Chamber of Deputies. Unfortunately, the first chamber of the Romanian parliament, the Senate, did not adopted it because the lack of votes due to the absence of the senators.

IV. The compatibility with the Romanian Constitution of the Law which implement the EAW into the national system

13. The implementation of the EAW Framework decision caused constitutional problems in several member states mainly because their constitutions prohibited extraditing their own nationals as required in the Framework decision. Based on this rule, the Constitutional Tribunal of Poland declared on the 27 April 2005 that the implementing law is unconstitutional.

The rule which prohibits the extradition of the nationals is founded on mistrust in criminal justice systems of other countries and the need of the national state to protect his citizens. Conversely, the criminal justice cooperation within the area of freedom, security and justice is based on the member states' mutual trust in their systems of criminal justice.

14. Some member states changed their constitution to be able to fully implement the framework decision, as was the case of Germany. Romania too is one of these examples and this is why our system did not have the same problems like Poland.

The article 19 of the Constitution was modified by the Law no. 419/2003 and, in its new form, disposes that the Romanian citizens can be extradited from Romania only if the following conditions are observed: 1) the application of an international convention in which Romania is a part; 2) on the basis of reciprocity; 3) in the conditions of the law.

This change of the Romanian constitution was based on the future integration of our state into the EU. Even the Constitutional Court has declared in the decision no. 148/2003 that „in the purpose of fulfilling some demands of the European law, demands imposed by the fight against terrorism, cross-border criminality, organized crime, it is necessary to modify the constitutional interdiction concerning the extradition of Romanian citizens".

15. The only discussion on the compatibility of the EAW with the art. 19 of the Constitution was the one which concern the equivalence between a framework decision and an international convention. The Constitution recognizes only the application of an international convention as an exception from the

interdiction concerning the extradition of Romanian citizens. And, for sure, the EAW framework decision is not a convention. But this framework decision is rooted in the TUE (article 31 and 34) which is an international convention[7]. So, the law implementing the EAW framework decision is based on an international convention and, in conclusion, the Romanian system does not have problems with the constitutionality of the procedure of surrender the Romanian citizens to another member state.

V. The interpretation of the principle of mutual recognition by the Romanian courts in the context of the implementation of the EAW

16. The Law no. 302/2004 makes a reference to the principle of the mutual recognition in criminal matters. In art. 77 [the definition of the EAW], this law disposes that:

„ (1) The European arrest warrant is a judicial decision issued by the competent judicial authority of a Member State of the European Union, with a view to the arrest and surrender to another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

(2) Member States shall execute any EAW on the basis of the principle of mutual recognition and confidence, in accordance with the provisions of the Council Framework Decision No. 2002/584/JHA of 13 June 2002, published in the Official Journal of the European Communities No. L 190 /1 of 18 July 2002".

But the law does not make an interpretation of this principle.

Also, the validity of such a principle was not put into question into the process of implementing the EAW. In the field of the principle of the mutual recognition under the third pillar of the EU, neither the Romanian legislator neither, in the same way, as we will see, our constitutional court did not have the same doubts like the Italian legislator or the FCC of Germany. Moreover, since the very start of the negotiations, Romania did not know a strong political reaction to this principle. Like many others aspects of the integration into the EU, the principle of mutual recognition of the decisions in criminal matters was taken like a „thing given" which is not to be discussed.

17. The principle of mutual recognition was interpreted by the Supreme Court of Justice and by the Constitutional Court.

The Supreme Court declared in the decision no. 4045/2007 that „it is not in the competence of the executing court to analyze the existence of factual basis and the validity of the accusations, the principle of mutual recognition and trust being applied".

Also, in the decision no. 2862/2007, the Supreme Court declared that the Romanian court, in the quality of executing authority, does not have the competence to make an analysis concerning the opportunity or the legality of the prosecution in the issuing state, or concerning the opportunity of the preventive

[7] Streteanu, F, *Cateva consideratii privind mandatul european de arestare*, in Caiete de drept penal, nr. 1/2008, p. 13.

detention decided by the issuing state. This kind of analysis would infringe, in the eyes of the Supreme Court, the principle of mutual recognition and trust.
The Constitutional Court has the same view.
The first reference of Constitutional Court concerning the EAW was made in the decision no. 134/2007: „for Romania, after the integration in the EU, the EAW is the cornerstone of the judicial cooperation based on the principle of mutual recognition of decisions pronounced in criminal matters. In fact, the application of the EAW framework decision has like objective to simplify and expedite procedures for extradition and, in the same way, to transform the EU into an area free of security and justice".
Concerning this decision we can make two observations.
First, our constitutional court was very enthusiastic and impatience to make an interpretation of the EAW and of the principle of mutual recognition. The case which was submitted to the court had no relation with the EAW. It concerned some legal dispositions related to the extradition and this case was submitted to the court before the entry in force of the dispositions concerning the EAW. So this consideration of the court had no connection with the matters submitted to her analyze.
Second, it is not correct to sustain that the EU is „an area free of security and justice". The right terminology is the one referring to the „area of freedom, security and justice" and the differences between these two are considerable. In other words, it was nice for the Romanian CC to say something about this interesting area which is the EU. But the affirmation was in fact amusing.

In others decision the Romanian Constitutional Court sustained the principle of mutual recognition in the form that was imposed by the framework decision. In the decision no. 400/2007 the Court declared that the Romanian judge does not have to make an analysis concerning the opportunity or the legality of the prosecution or of the conviction in the issuing state, or concerning the opportunity of the preventive detention decided by the issuing state. This kind of analysis would infringe, in the eyes of the Constitutional Court, the principle of mutual recognition of the judicial decisions in criminal matters. In the same way, in the decision no. 419/2007 the Court said that the EAW is a concrete measure which transpose the principle of mutual recognition and, in this view, the executing authority does not have to verify the grounds of decision on preventive detention or of the decision of conviction.

18. In the same way, neither the law nor the jurisprudence of the Supreme Court or the Constitutional Court imposes a control over the compatibility of the issuing state criminal system with the national standard of the protection of human rights.
In the Romanian system, the confidence in the criminal justice systems of the others member states is absolute. The implementation law and the national jurisprudence, in the same way like the framework

decision, do not impose any type of control over the criminal justice system of others members state. As we mention above, taken in consideration some kind of mistrust in the others criminal justice systems, the Constitutional Court of Germany and the Italian law impose this type of control.

19. In conclusion, in the field of EAW, in the Romanian system the principle of mutual recognition is absolute. In fact, the implementation law did not say a word beyond the conception imposed by the framework decision. Romania did not introduce others grounds for refusal and did not extend the application of the exception concerning dual criminality. Since Romania was in the process of negotiation for the integration in the EU, the law was totally in line with the framework decision. In this context, the obedience of the Romanian legislator face to the demands of the EU was significant.

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PUBLIC SECURITY, PUBLIC POLICY AND PUBLIC HEALTH AS POTENTIAL GROUNDS FOR IMPOSING RESTRICTIONS ON THE RIGHT OF FREE MOVEMENT OF PERSONS

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Abstract

The issue of employment and the situation of workers and their family members have always been in the focus of the European Union's attention. It is of common knowledge that the free movement of workers is one of the fundamental principles of the European Community, one of the four pillars. Today this kind of freedom is an elemental right of all EU citizens, but there are some restrictions in exercising the right of entry and the right of residence. In my paper I would like to deal with these restrictions, which are based on public policy, public security and analyse the most important cases related to this topic.

Key words

Free movement of persons – restrictions of free movement of persons- public policy – public security- public health

INTRODUCTION

Free movement of persons has a central, distinguished place among common politics, one of the four, fundamental freedoms. Working in the territory of another Member State is a right of every citizen of the Union and also of their family members. They can move and reside freely within the territory of the Member States'.[1] However the realization of this principle was motivated originally by economic aims, the principle of free movement is more than merely just regulating economic questions.[2] In addition to this, demographical and labour market imbalances and unequal economic development of the Member

[1] Directive 2004/38/EC, Preamble point 1.

[2] GYULAVÁRI, Tamás – KÖNCZEI György: *Európai szociális jog*, Budapest: Osiris Kiadó, 2000., p. 86., ISBN 963 379 641 5

States resulted in growing migration in the last few years.[3] In our days therefore the knowledge and analysis of the legal base of these tendencies is a must.

The rules regulating the free movement have been changed a lot since this principle was first declared in the Treaty of Rome. The most important turning point was the Maastricht Treaty, which established that not only workers, but also every citizen of the Union has the right of free movement. In the meantime the EU-level regulation of this topic has became really complex, two regulations and nine directives contained rules in relation to this issue, therefore the simplification of these norms was of high priority. Therefore the 2004/38/EC Directive was accepted for simplifying these rules, and it has replaced the former fragmented and sectorial regulation. Member States had to achieve the aim of this Directive within two years from the date of its publication.

Although the goal of the Union is to ensure the right of free movement of the citizens, i.e. the right of entry and residence, to the possible maximum extent, there are some cases, when it could be restricted. The grounds of these restrictions could be the public politics, public security and public health, amongst others.

I. COMMUNITY RULES OF RESTRICTIONS ON FREE MOVEMENT

I.1. RULES ESTABLISHED BY THE EC TREATY AND COUNCIL DIRECTIVE 64/221/EEC [4]

The legal basis of the restrictions on the free movement of persons was set out in the EC Treaty, pursuant to which the right of free movement could be restricted. These restrictions contain on one hand the *„limitations justified on grounds of public policy, public security or public health"*;[5] on the other hand, the Treaty restricted the scope of applicability too: *„the provisions of this Article shall not apply to employment in the public service."*[6]

Consequently the above-mentioned provisions of the Treaty allow Member States to not to admit citizens from other Member States to their territory or to expel them. Nevertheless, neither the EC Treaty, nor Directive 64/221/EEC had determined, which kind of situations and behaviour could be

[3] DR. JUHÁSZ, Judit: *A nemzetközi vándorlás fogalmai és mérése*, Európa Tükör Műhelytanulmányok 61., p. 11.
[4] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
OJ 56, 4.4.1964, p. 850–857, English special edition: Series I Chapter 1963-1964 P. 0117
[5] EC Treaty, Article 39. (3)
[6] EC Treaty, Article, 39. (4)

qualified as to be dangerous to public policy, public security or public health.[7] According to the case law of the European Court of Justice, this notion has to be interpreted strictly. Member States must take into account different general and individual conditions, if they want to restrict the right of residence of citizens from other Member States, alluding to his or her behaviour to be against public policy, public security or public health.[8] As a general rule, the examination taking place before the expulsion or the forbiddance of entry shall aim the individual concerned,[9] and *"measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned."*[10] According to the dominant standpoint, a general restriction is absolutely invalid. These viewpoints can be the basis of the investigations against native persons.[11]

A behaviour jeopardises the public policy or it can be qualified as a danger, if it effectively and essentially detrimental for the society and it infringes the elemental interests of the society, at the time of exercising such behaviour, because the qualification of the behaviours endangering the public policy is able to change in the course of time. Member States may define these notions themselves. Consequently, it could be qualified as being dangerous to the public policy if somebody is threatening the democratic order or security of a country, takes part in violent actions to overthrow the order of the state, call on the public to do so, or shall be guilty of an offence or drug abuse.[12]

It could be mentioned as a failure of the Directive that although it provides for a remedy in case of expulsion and ban, it does not define precisely which are the possible ways of that.[13]

Council Directive 64/221/EEC was amended by Council Directive 72/194/EEC.[14] It has extended the effect of the Directive to nationals of the other Member States and members of their families who

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[7] GYULAVÁRI, Tamás: *Az Európai Unió szociális dimenziója,* Budapest: Szociális és Családjogi Minisztérium, 2000., p. 58., ISBN 963 00 3854 4

[8] A személyek szabad mozgása az Európai Unióban - munkavállalás és tanulás a magyar állampolgárok számára, Forrás: Külügyminisztérium, see: http://mathom.dura.hu/mszeib/eubovites/szabadmozg.htm (20.04.2008.)

[9] DR. GELLERNÉ DR. LUKÁCS, Éva: *A munkavállalás feltételei az Európai Unióban*. In: Európai Tükör, A Kormányzati Stratégiai Központ Folyóirata, Különszám, 2004., p. 39.

[10] Council Directive 64/221/EEC, Article 3. (1)

[11] BANKÓ, Zoltán: *Válogatás az Európai Bíróság munkajogi ítéleteiből, Munkavállalók szabad mozgása*, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, 2004., p. 21., ISBN 963 224 774 4

[12] GYULAVÁRI, Tamás: *Az Európai Unió szociális dimenziója*, p. 58.

[13] KIRÁLY, Miklós-LUKÁCS, Éva: *Migráció és Európai Unió*, Budapest: Szociális és Családügyi Minisztérium, 2001., p. 118., ISBN 963 00 6654 8

[14] Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
OJ L 121, 26.5.1972, p., English special edition: Series I Chapter 1972(II) P. 0474

pursuant to Regulation (EEC) No 1251/70, exercise the right to remain in the territory of a Member State.[15]

I.2. PROVISIONS OF DIRECTIVE 2004/38/EC[16]

Member States had to implement this Directive until 30 April 2006, which has replaced Council Directive 64/221/EEC. It contains elements of certain former secondary legal sources and the related case law of the Court of Justice of the European Communities.[17] The aim of this Directive was to impose stricter conditions in respect of determining the circumstances under which citizens of the Union and their family members could be declined to enter in the territory of other Member States or could be expelled from that countries. In addition, it has defined stricter procedural safeguards as well.[18] Similarly to the provisions of the former Council Directive, the measure shall comply with the principle of proportionality, it must be based solely on *„the personal conduct of the individual concerned"*, and such measure should not be accepted on the basis of previous convictions.[19]

Host Member States, in order to make sure whether the individual concerned is dangerous for the public policy or public security, upon issuing the registration certificate, or no later than three months from the date of arrival of that person or from the date of reporting his/her presence, are allowed to inform about any former police record of the individual concerned from the State of origin or form the others. The Member States have two months to answer these questions. This kind of opportunity is also available for the Member State upon issuing the residence card.[20]

The host Member State has to take into account different factors in case of an expulsion order on grounds of public policy or public security. The following factors has to be taken into account: *„how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin."*[21] An expulsion order could be taken against the EU citizens and their family

[15] Council Directive 72/194/EEC, Article 1.
[16] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC
OJ L 158, 30.4.2004, p. 77–123
[17] ASZTALOS, Zsófia: *Új irányelvek az uniós polgárok és családtagjaik szabad mozgásáról.* In: Európai Tükör, 2004/7 október sz., p. 104.
[18] Directive 2004/38/EC, preamble, section 22.
[19] Directive 2004/38/EC, Article 27. (2)
[20] Directive 2004/38/EC, Article 27. (3)
[21] Directive 2004/38/EC, Article 28. (1)

members, who have permanent residence card only on the grounds of serious violation of public policy or public security[22] An expulsion order could be taken only in specific circumstances against the EU citizens and their family members, who have been living in the host Member State for at least ten years, or who are minors. It is an expectation that the expulsion has to be *„necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."*[23]

According to the provisions of the Directive, the individual concerned has to be informed about the issuance of an expulsion order, the grounds based on which the expulsion order was made, and the court or the administrative authority, to which the individual concerned may submit an appeal.[24] The Directive also contains the requirement that the procedural safeguards must be determined precisely and the citizens of the Union shall always have the right to initiate redress procedure against the orders denying the entry or residence. Except of especially forcing cases, the time provided for leave the Member State's territory should not be less than three months. The expulsion procedure should not be a routine procedure and the authorities of the States have to conduct effective investigations.[25] If the application for appeal or judicial review of the expulsion order accompanied by a motion for interim measures to suspend the enforcement of that order, the expulsion order should be executed only, if it was based on a previous court decision; the individual concerned previously had access to judicial review; or the expulsion order was based on coercive grounds of public security. The individual concerned has the right to represent his or her defence personally, however the Member State may deny the permanent residence of the individual concerned during the redress procedure in that country.[26] The Directive forbids to issue orders excluding the persons for life, moreover it shall be provided that *„Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order."*[27] The host Member State has three months to decide in this respect, however during this period the individual concerned is not allowed to entry to the territory of the State.[28] Expulsion orders as a penalty or custodial penalty may be enforced only, if the above-mentioned conditions and requirements are met. If an expulsion order will be enforced more than two years after it was issued, the Member State has to investigate whether the individual is still a real threat to the public policy or public security.[29]

[22] Directive 2004/38/EC, Article 28. (2)
[23] Directive 2004/38/EC, Article 28. (3)
[24] Directive 2004/38/EC, Article 30.
[25] ASZTALOS, Zsófia: *Új irányelv az uniós polgárok és családtagjaik szabad mozgásáról*, p. 104.
[26] Directive 2004/38/EC, Article 31. (2) and (4)
[27] Directive 2004/38/EC, Preable point 27.
[28] Directive 2004/38/EC, Article 32.
[29] Directive 2004/38/EC, Article 33.

II. CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

However the protection of public policy has been codified in the EC Treaty,[30] the Member States are not allowed to use the notion of public policy and public security arbitrarily. The European Court of Justice has expressed this opinion in the Bouchereau-case,[31] in which a British authority had initiated the expulsion of a French national, who had been employed in the United Kingdom, after he was found guilty twice of unlawful possession of drugs. The Court declared that „*in so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."*[32] Equality is a quiet problematic issue, since a Member State may expel citizens of other Member States, but not its own citizens. „*Any action affecting the right of persons coming within the field of application of article 48 of the treaty to enter and reside freely in the Member States under the same conditions as the nationals of the host state constitutes a ' measure ' for the purposes of article 3 (1) and (2) of directive no 64/221/EEC. That concept includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another Member State, where such recommendation constitutes a necessary prerequisite for a decision to make a deportation order.*[33]

One of the most often cited cases is the Van Duyn-case,[34] in which a woman of Dutch nationality was not allowed to enter into the United Kingdom to work as a secretary at the "church of scientology".[35] British politics did not assist the "church of scientology", and however it was not forbidden; according to the standpoint of the British politics it was socially harmful. The main question was whether in this case it is possible to refer to the danger of the public policy or public security. It was declared by the Court that *"the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with*

[30] BANKÓ, Zoltán: *Válogatás az Európai Bíróság munkajogi ítéleteiből, Munkavállalók szabad mozgása*, p. 21.
[31] Case 30-77. Régina v Pierre Bouchereau, Judgment of the Court of 27 October 1977., European Court reports 1977 Page 01999
[32] Case 30-77. Régina v Pierre Bouchereau, Summary, point 3.
[33] Case 30-77. Régina v Pierre Bouchereau,, Judgement, point 1.
[34] Case 41/74. Yvonne van Duyn v. Home Office, Judgment of the Court of 4 December 1974., European Court reports 1974 Page 01337
[35] Case 41/74. Yvonne van Duyn v. Home Office, Grounds, point 2.

the same body or organization."[36] The most problematic issue of the practice that measures could be based only the conduct of the individuals. This problem was addressed in the Bonsignore case.[37]

The problem in the case of Commission of the European Communities v Kingdom of the Netherlands[38] was that the general legislation of the Netherlands made it possible to establish a systematic and automatic connection between a criminal conviction and the issuance of expulsion orders.[39] The Court declared that the Netherlands has failed to fulfil its obligations under Directive 64/221/EEC[40]

The Court has declared in the Commission of the European Communities v Kingdom of Spain[41] case that Spain has failed to fulfil its obligations under Council Directive 64/221/EEC, because the state has refused entry into its territory and refused to issue a visa to nationals of a third country who were the spouses of Member State nationals. The reason why the state has done so, was that in connection to these persons alerts were entered in the Schengen Information System, but it was *„without first verifying whether the presence of those persons constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."*[42]

According to the judgement of the Court made in the Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg cases,[43] the Council Directive 64/221/EEC *„precludes national legislation which requires national authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, where the sentence has not been suspended."*[44]

III. PUBLIC HEALTH

[36] Case 41/74. Yvonne van Duyn v. Home Office, Operative part, point 3.
[37] Case 67-74. Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln, Judgment of the Court of 26 February 1975., European Court reports 1975 Page 00297
[38] Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgment of the Court (Third Chamber) of 7 June 2007., European Court reports 2007 Page I-04383
[39] Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Pre-litigation procedure, point 17.
[40] Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgement
[41] Case C-503/03. Commission of the European Communities v Kingdom of Spain, Judgment of the Court (Grand Chamber) of 31 January 2006., European Court reports 2006 Page I-01097
[42] Case C-503/03. Commission of the European Communities v Kingdom of Spain, Judgement
[43] Joined cases C-482/01 and C-493/01. Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, Judgment of the Court (Fifth Chamber) of 29 April 2004., European Court reports 2004 Page I-05257
[44] Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, Judgment, point 2.

Article 4 of Council Directive 64/221/EEC deals with the question of public health, which refers to the Annex to the Directive, since *„the only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit shall be those listed in the Annex to this Directive."*[45]

Directive 2004/38/EC is relevant in the restriction of free movement on the grounds of public health, since it has amended the Annex to the Council Directive 64/221/EEC, in which the diseases endangering public health were listed. The amended Annex did not include new, important epidemics and diseases; moreover, diseases listed therein were dangerous in the 60-70's and for today they are successfully handled.[46] *„The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State."*[47] The basis of expulsion order shall not be a disease occurred more than three months after the entry.[48] Member States have the right to require persons with residence permit to bring themselves under medical examination free of charge in three months upon their arrival.[49]

SUMMARY

Although the one of the most important goals of the European Union is to bring everyone in the position to be able to use the opportunities of free movement and to realise the four freedoms to the highest possible extent, there are some cases when the Member States are interested in to not to admit certain persons into their territory or expel them from there. The main purpose of my paper was to present such cases where the principle of free movement could be restricted. The grounds for such restrictions might be the public policy, public security or public health. I summarised the safeguards, which ensure free movement against restrictions; the strict conditions of expulsion and denial of entry; and the most important cases related to this topic.

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[47] Directive 2004/38/EC, Article 29. (1)
[48] Directive 2004/38/EC, Article 29. (2)
[49] Directive 2004/38/EC, Article 29. (2)

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OJ 56, 4.4.1964, p. 850–857, English special edition: Series I Chapter 1963-1964 P. 0117

[2] Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of

25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
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APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU IN THE UNITED KINGDOM AND POLAND ACCORDING TO THE LISBON TREATY

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Abstract

This paper deals with the impact of the Charter of Fundamental Rights of the European Union on the United Kingdom and Poland after the Lisbon Treaty comes into effect. The first part briefly describes the history of drafting the Charter and focuses on the current legal status of the Charter. Then the approach of the United Kingdom and Poland towards the Charter is examined. The final part discusses the provisions of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom and the possible role of the Court of Justice.

Key words

European Union, Lisbon Treaty, human rights, Charter of Fundamental Rights of the European Union, legal force, the United Kingdom, Poland, Protocol, European Court of Justice.

The Charter in General, its Legal Force and its Inclusion in the Lisbon Treaty

It is a well-known fact that the Charter of Fundamental Rights of the European Union[1] (hereinafter "the Charter") was drafted by a body called the "Convention" on the basis of a decision of the European Union Heads of State or Government at the Cologne European Council adopted in June 1999. The Charter was then solemnly proclaimed by the Presidents of the European Parliament, the Council of the European Union and the European Commission in Nice European Council on the 7th December 2000.[2]

One practical reason for drafting the Charter was certainly the opinion[3] of the European Court of Justice (ECJ), in which the Court held that the Community has no competence to join European Convention on Human Rights: first a revision of the fundamental Treaties has to be made. However, accession to the

[1] Charter of Fundamentals Rights of the European Union, 18th December 2000, CELEX: 32000X1218(01).

[2] For broader history of the Charter see McCrudden, Ch.: *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No.10/01, accessible from http://www.jeanmonnetprogram.org/papers/01/013001.rtf, pp. 1 – 7.

[3] Opinion of the Court of 28th March 1996, 2/94. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. European Court reports 1996, p. I-01759.

European Convention on Human rights was an important issue since the doctrine of supremacy of community law developed by the ECJ meant that even constitutional legal norms of the Member States (including human rights) were subordinate to Community legal rules of any type. A convention on protection of human rights binding on the Community could there fore effectively limit any unwanted actions of the Community in the field of human rights. Since the protection of human rights within the Communities (European Union[4]) was based only on more less unforeseeable case law of the ECJ and accession to the European Convention was not on topic, the idea of own bill of rights was a natural step forward made by the European Union. Nevertheless, the Charter was not annexed to the fundamental Treaties[5] and its legal force remained undetermined.

Many commentators took the view that the present legal status of the Charter is not clear.[6] On the one hand, the Charter should not be legally binding, since it was only declared by presidents of three institutions of the European Union (EU), it is not a treaty and it was not even annexed to the existing Treaties. On the other hand, this could be perceived as too formal view and there are several reasons why the Charter should by legally binding. First, the Charter shall be binding at least on the European Parliament, European Commission and European Council due to the fact that the Charter was proclaimed by the presidents of these institutions. As the Commission put it nicely, "the institutions that have proclaimed the Charter, have committed themselves to respecting it".[7] The Charter could be there fore regarded as a binding inter-institutional agreement. Second, certain provisions of the Charter must be considered as binding on all institutions of the EU and also on Member States. These are provisions that consolidate the existing law[8] (mainly the case law of the ECJ). Moreover, we cannot hide the fact, that the Charter has been already used by the European Court of Human Rights in its decisions[9] and also

[4] The term European Union (EU) is used to describe the broader European institution covering also the European Community (EC), following linguistic convention after the entry into force of the Maastricht Treaty in 1993.
[5] Treaty Establishing the European Economic Community, 25th March 1957, CELEX: 11957E. Treaty Establishing the European Atomic Energy Community, 25th March 1957, CELEX: 11957A. Treaty on European Union, 7th February 1992, CELEX: 11992M. (As amended by subsequent Treaties).
[6] See e. g. Craig, P., de Búrca: G. *EU Law. Text, Cases and Materials*, New York: Oxford University Press, 2008, pp. 417 – 418. Liisberg, J. B.: *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?,* Jean Monnet Working Paper 4/01, available from http://www.jeanmonnetprogram.org/papers/01/010401.rtf, p. 7. McCrudden, Ch.: *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No.10/01, available from http://www.jeanmonnetprogram.org/papers/01/013001.rtf, pp. 12 – 14.
[7] Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, COM (2000) 644 final of 11th October 2000, CELEX: 52000DC0644.
[8] See further Menéndez, A. J.: *Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union*. Journal of Common Market Studies, vol. 40, No. 3, 2002, pp 471–490.
[9] See e. g. Judgment of the European Court of Human Rights (Grand Chamber) of 11th July 2002 (Application no. 28957/95) Christine Goodwin v. the United Kingdom; or very important Judgement of the European Court of Human Rights (Grand Chamber) of 30th June 2005 (Application no. 45036/98) Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland. Both available from www.echr.coe.int.

the ECJ mentioned the Charter (although very carefully).[10] Using the Charter in court's decisions could signify that it has certain legal effect.

The debate on legal force of the Charter shall be finished when the Lisbon Treaty comes into effect. The Lisbon Treaty (or Reform Treaty) amends current fundamental Treaties and expressly recognizes the rights, freedoms and principles set out in the Charter which shall have the same legal value as the Treaties.[11] After the ratification process is finished, the Charter shall be legally binding for institutions of the EU and for the Member States when they are implementing Union law.

The Approach of the United Kingdom and Poland towards the Charter

The Charter could be marked as a large bill of rights which joined together fundamental rights of every human being, citizen's rights and social rights. Such large legal work is of course full of ambiguities and vague provisions – as a result of compromise achieved by so many Member States. However, two countries (the United Kingdom and Poland) were so worried about the effect of the Charter that they put over a special protocol annexed to the Lisbon Treaty which should limit any unwanted impact of the Charter in their legal systems.

The United Kingdom expressed its general objection against a legal binding European bill of rights already during drafting the Charter. The British politicians were afraid that such bill of rights (administered by the ECJ) could mean more interference from Europe in British domestic affairs.[12] Particularly, the British opposed a large concept of the so called rights of solidarity[13] (Title IV of the Charter) because of very liberal conditions and rules governing this area in the UK. An acceptation of this part of the Charter as legally binding would visibly change the legal system of the United Kingdom.

[10] See e.g. Judgment of the European Court of Justice (Grand Chamber) of 27th June 2006, C-540/03 European Parliament v Council of the European Union, European Court reports 2006, p. I-05769; or Judgment of the Court (Grand Chamber) of 12th September 2006, C-13/03 R.J. Reynolds Tobacco Holdings, Inc. and Others v Commission of the European Communities, European Court reports 2006, p. I-07795.

[11] See Art. 6 par. 1 of the Treaty on European Union as amended by the Lisbon Treaty and Declaration concerning the Charter of Fundamental Rights of the European Union annexed to the Final Act of the conference which adopted the Lisbon Treaty.

[12] Verkaik, R. *Britain may veto EU's new human rights charter*. The Independent, 8th February 2000, available from http://www.independent.co.uk/news/uk/politics/britain-may-veto-eus-new-human-rights-charter-726359.html.

[13] In this paper, I do not examine the possible conflict between the solidarity rights and art. 51 of the Charter stating that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. It is questionable whether the solidarity rights establish a new field of EU competence. See Eeckhout, P.: *The Proposed EU Charter of Fundamental Rights: Some Reflections on Its Effects in the Legal Systems of the EU and of Its Member States*, In: Feus K. (ed): *The EU Charter of Fundamental Rights: Texts and Commentaries*, London: Federal Trust for Education and Research, 2000, pp 109.

The "striking" example of a conflict between the legal system of the United Kingdom and the provisions of the Charter is the right to take a collective action including the right to strike (art. 28 of the Charter). The British see strikes as impediments to the rights of those whose lives would be hindered or endangered by the strikers.[14] The right to strike has been restricted in the United Kingdom since the 1980s and there are also rules about ballots and picketing. However, none of these restrictions is mentioned in the Charter.[15]

Although United Kingdom did not want to preclude the ratification of the Lisbon Treaty, it was not willing to accept the Charter as a legally binding document. There fore the UK decided to attach a special protocol to the text of the Lisbon Treaty in which an opt-out from the Charter was realized. Later on, Poland decided to join this protocol and further more it attached two declarations to the Lisbon Treaty clarifying its attitude towards the Charter.

The Polish reason to object the Charter is, one could say, a more political one. The Polish government led by the Prime Minister Jaroslaw Kaczynski was not satisfied with the provision of the Charter prohibiting discrimination on the grounds of sex and with the definition of the right to marry and the right to found a family. These provisions aim among others to the legal recognition of the same-sex union; however, the Polish government assumed that such recognition would violate the country's cultural heritage.[16] The new government, formed after elections in October 2007, has no such objection and the new Prime Minister Donald Tusk told the Polish parliament that his party and its coalition ally were in favor of signing up to the Charter. Nevertheless, the Polish Parliament ratified the Lisbon Treaty with the opt-out from the Charter, because the new government needed the support of Jaroslaw Kaczynski's party in order to reach the two-thirds majority required to ratify the Lisbon Treaty as a whole.[17]

The Possible Practical Results

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[14] Berlin, J.: *Political Cause and Cost: Human Rights in the European Union*, The Brownstone Journal, vol. XII, 2005, pp 98, available also from http://www.bu.edu/brownstone/issues/12/berlin.html.

[15] You, Europe and your rights. The Independent, 22nd June 2007, available from http://www.independent.co.uk/news/europe/you-europe-and-your-rights-454139.html.

[16] *Poland Rejects EU Charter on homosexual rights*, Catholic World News, 29th June 2007, available from http://www.cwnews.com/news/viewstory.cfm?recnum=52095. Zoll, A. et al.: *Poland and the Charter of Fundamental Rights of the European Union*, available from http://kj.org.pl.

[17] *No EU rights charter for Poland*, BBC News, 23. 11. 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7109528.stm. *Slovenian Presidency welcomes the adoption of the ratification bill on the Lisbon Treaty by Poland's Parliament*, Slovenian Presidency Press Realeases, 2nd April 2008, available from http://www.eu2008.si/en/News_and_Documents/Press_Releases/April/0402MZZ_ratifikacija_Poljska.html.

Article 1 paragraph 1 of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (hereinafter "the Protocol") states: "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms". In General, this provision says that the Charter as a whole is not legally binding towards the respective countries. Although there is not any express ban on applying the Charter in Poland and the UK, the provision of the protocol does not allow the said courts to find out that some Polish or UK legal rules are incompatible with the Charter. This means that the provision in question simply forbids the ECJ and national courts to apply the Charter effectively in Poland and the UK.

This ban, however, does not seem so clear when we look at the second paragraph of art. 1 of the Protocol: "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law". This paragraph rises a question whether it limits the application of the general rule stated in first paragraph only to Title IV of he Charter (the rights of solidarity). Does this mean that the Charter is applicable and legally binding towards both countries just with exception of Title IV? Such limitation would be justifiable in relation to the UK, since this country opposes just this solidarity rights. But why should the rights of solidarity make any problems in Poland where social rights have a long tradition? More over, if we accepted such limitation of the application of the Protocol, the same-sex unions would be enforceable in Poland under arts. 9 and 21 of the Charter which do not fall within the Title IV. Probably, this is why Poland annexed to the Final Act of the Conference which adopted the Lisbon Treaty two declarations. In the first one[18] relating to the Protocol, Poland declares that it fully respects social and labour rights described in Title IV of the Charter. It apparently intents to say that, even if Title IV is not applicable in Poland (according to the Protocol), Poland will respect rights specified in Title IV. The legal effect of this declaration is not clear – it could be perceived either as an enforceable international obligation or as a mere political proclamation. Nevertheless, establishing a power of the ECJ or national courts to review the compatibility of Polish law with Title IV of the Charter on such declaration could be difficult. It is not a direct part of the Lisbon Treaty (it is annexed to the Final Act of the Conference that adopted the Lisbon

[18] Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom, CELEX: 12007L/AFI/DCL/62: "Poland declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union."

Treaty), it does not expressly allow the ECJ or other courts to judicial review and moreover, the declaration is just one-sided (it is a declaration of Poland not of all Member States).

The second declaration states that "the Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity".[19] This declaration obviously aims at the issue of same-sex unions and the right of Poland to legislate on this matter without regard to the provisions of the Charter. Thus it is similar to art. 1 par. 2 of the Protocol since it describes the Polish reason for objecting the Charter. The question of legal binding force of this declaration has the same answer as in the case of the first declaration – it is unclear.

Nevertheless, we could conclude that the second paragraph of art. 1 of the Protocol just draws the attention to a part of the Charter which is (for the United Kingdom) the reason for the general ban set out in paragraph 1. Thus, this provision has just an illustrative or explanatory character. The same could be said about the two declarations in respect to Poland. Final word on this question then lies on national courts and, of course, on the ECJ.

According to article 2 of the Protocol "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom". This provision needs just two remarks. First, it is an unnecessary one regarding the fact that the Charter can not by applied as a whole to Poland and the United Kingdom according to art. 1 par. 1 of the Protocol. Second, it only repeats similar provisions contained in the Charter relating to all Member States (art. 52 pars. 4 and 6).

However, the idea of the Protocol that the Charter will not be applicable in Poland and the United Kingdom could be easily overcome by one important European actor – the ECJ. This statement does not mean that the ECJ would infringe the Protocol and apply the Charter directly to both states in question. But it can use another instruments to reach the same effect indirectly. As mentioned above, fundamental rights as a general principle of EU law are protected through the case law of the ECJ until now. This case law is then based on legal cultures and constitutional traditions of Member States, on European Convention on Human Rights and other international human rights instruments and of course on the

[19] Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, CELEX: 12007L/AFI/DCL/61.

case law of the European Court of Human Rights.[20] One could easily raise a question, whether the ECJ can continue in protecting the human rights through its case-law independently on the provisions of the Charter. And can the ECJ go even beyond the Charter and create new human rights or freedoms not included in this text? Although it is presumable that the ECJ will respect the provisions of the Charter and apply them, nothing can possibly prevent the court from adopting an extensive interpretation of the Charter and rule beyond its provisions. The Charter does not annul the existing case-law of the EJ concerning the protection of human rights - the ECJ is free in further developing it. We must also bear in mind that the scope of application of the Charter is limited only to EU institutions and to the Member States when applying the EU law. However, the case law of the ECJ on the field of human rights has no such limitation. More over, the ECJ is a well-known protector of the single market and the four freedoms. Thus if some human rights (particularly the solidarity rights) are more restricted in one Member State than in others, the ECJ could regard it as a hindrance to the single market or infringement of the said freedoms and promote the protection of such rights only on the basis of the provisions of the fundamental Treaties without any regard to the Charter. Thus, it need not be hard for the ECJ to apply human rights contained in the Charter through its case law – even towards the United Kingdom and Poland.

In Conclusion, the United Kingdom and Poland will not be formally bound by the Charter provisions. However, if the ECJ decides that a certain human right (e.g. right to strike or right to live in a same-sex union) form a human right which is inherent with the EU or whose restriction could threaten the single market, the United Kingdom and Poland will be bound by this decision – and indirectly by the Charter. Nevertheless, such decision of the ECJ would be a political one and it is hard to say whether the ECJ finds courage to rule in this sense.

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TERRITORIAL COOPERATION AFTER 2007

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Abstract

The territorial cooperation nowadays appears as one of the most important area of the EU' cohesion policy. In my study I look after the cohesion policy, after its reform in 2006. First, I deal with cooperations existing along the EU's internal borders, within the framework of the cohesion objevtive "european territorial cooperation". Following this, I examine in detail the cooperations, which can be form along the external borders. I also deal with the European Grouping of Territorial Cooperation (EGTC), which is a new cooperation possibility within the scope of the objective "european territorial cooperation". Finally, I look after briefly the IPA and ENPI neighbourhood policy instruments, which are available for the candidate and potential candidate countries.

Key words

European territorial cooperation, cohesion policy, EGTC, IPA, ENPI

Introduction

In the programming period 2007-2013 we face a really new form of the European Union's cohesion policy. The former few years has brought many changes: a never perceived sized enlargement has come on, which effects the growing of the territory and the population too. To manage the problems of the enlarged EU, it needed to reform the cohesion policy too. As a result of this reform, new objectives change the formers, and the existing supporting instruments, which has been working for many years has disappeared, and new and more efficient supporting structure supplant.

The Community has noticed, that economic and development differences, existing between regions, mean problems not only for the certain member state, but also for the whole Community and can endanger the competitiveness and cohesion. As a solution of this critical situation, on the basis of the experiences of the past programming periods, from 2007, the territorial cooperation appears as a single objective, by which the strengthening of economic and social cohesion can be realised more efficiently.

Nevertheless, the Commission has made a suggestion, to create a new legal instrument, the European Grouping of Territorial Cooperation (hereafter EGTC), which as a cross-border regional authority, is regulated in a separate regulation.

1. The European territorial cooperation

In this programming period (2007-2013), the Regulation 1083/2006/EC[1], the so called general cohesion regulation designates three main objectives: over the "convergence" and "regional competitiveness and employment", the "European territorial cooperation" appears as third cohesion objective, which – built on the experiences of the former INTERREG Community Initiative – puts the territorial dimension of the cohesion policy on the level of single cohesion objective.

The objective "European territorial cooperation" (henceforth ETC) covers "*regions having land or sea frontiers, the areas for transnational cooperation being defined with regard to actions promoting integrated territorial development and support for interregional cooperation and exchange of experience*."[2]

Under the objective ETC, bilateral cooperations can be create between EU member states, along the Community's internal borders. The ETC, which is financed by the European Regional Development Fund (hereafter ERDF), drifts to "*strengthen cross-border cooperation through joint local and regional initiatives, strengthening transnational cooperation by means of actions conducive to integrated territorial development linked to the Community priorities, and strengthening interregional cooperation and exchange of experience at the appropriate territorial level*."[3]

Although, the general cohesion regulation contains the basic provisions, there is also a separate regulation, which concerns to the ETC as a single objective. The pertinent Regulation 1082/2006/EC[4] distinguishes five different types of the territorial cooperations. Likewise the former programming periods, there are three variant dimensions: the (1) cross-border, the (2) transnational and (3) the interregional cooperations. In addition these categories, there are two complementary programs, (4)

[1] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31.7.2006, p. 25-78
[2] Regulation 1083/2006/EC, OJ L 210, 31.7.2006., Preamble, paragraph (19)
[3] Regulation 1083/2006/EC, OJ L 210, 31.7.2006, Article 3, paragraph (1) c)

[4] Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), OJ L 210, 31.7.2006, p. 19-24

the ESPON 2013 and (5) the INTERACT II. Considering, that the latter two forms also rest on interregional basic, practically, they can be regard as sub-branches of the cooperations existing between regions. Accordingly, on the next few pages I delineate in detail the recited five types of cooperations.

Cross-border cooperation

In Europe, the main goal of the cross-border cooperations is to integrate areas, which are facing with same problems, but they are separated by internal borders. In these areas it is simpler and more efficient to find solution together for common problems, like employment or development of infrastructural networks.[5]

Before 2007, in the „INTERREG – era" the cross-border cooperation was the most important dimension of the territorial cooperations. More than 80 % of the separated financial instruments were appropriated to support the component "A", the so called cross-border cooperations.[6] The role of cross-border cooperations does not decrease in the programming period 2007-2013: within territorial cooperations, the cross-border cooperations remain the most emphasised group, in point of the number of programmes and the financial background too. Two-third of the financial instruments, some 73,86 % can be allocate between the participants, beneficiaries of cross-border programmes.[7]

These cooperations primarily concentrate on developing competitiveness in border regions, but shall also approve the economic and social integration on both sides of the borders.[8] Participation is opened from the beginning for the twelve new member states; the only condition is, that these programmes shall consist of at least two partners, coming from different member states, i.e. from different sides of the border.

Transnational cooperation

As a type of territorial cooperations, under transnational cooperations strategically important questions, problems, challenges can be manage and solve.[9] The base of cooperations between the participating partners (cooperating member states) is not the nearness of the borders, like in the case of

[5] 2006/702/EC: Council Decision of 6 October 2006 on Community strategic guidelines on cohesion, OJ L 291, 21.10.2006, p. 11-32
[6] Katrin Böttger: Grenzüberschreitende Zusammenarbeit in Europa, Occasional Papers Nr. 32., Europäisches Zentrum für Föderalismums-Forschung, Tübingen, 2006, p.87
[7] Regulation 1083/2006/EC, OJ L 210, 31.7.2006, Article 21, paragraph (1) a)
[8] Council Decision 2006/702/EC, OJ L 291, 21.10.2006, p. 32.
[9] Council Decision 2006/702/EC, OJ L 291, 21.10.2006, p. 32.

cross-border and interregional cooperations, but the existing of a common problem, which needs handling. Accordingly, whole areas can pull together in transnational cooperation, for example, which "*share the same river basin or coastal zone, belonging to the same mountainous area or being crossed by a major transport corridor*."[10] Another linking point can be the common history, institutional structures or existing cooperation or Conventions.

In the programming period 2007-2013 – like in the past – there are 13 areas, which take part in transnational cooperations; 20,95 % of the separated financial instruments can be allocated for these programmes.[11]

Cooperation between regions

Cooperations between regions, the so called interregional cooperations primarily conform to the objectives of the renewed Lisbon Strategy: strengthening innovation, small- and medium enterprises, environment and risk-prevention also play a dominant role in creating interregional cooperations. 5,19 % of the financial sources can be turn for finance cooperation networks and changing experiences.[12]

As I have mentioned above, the complementary two programmes, i.e. the ESPON and INTERACT too, appear as separate program, but their roots can be look after in the interregional cooperations. Although this close linking, I review these two category under separate point in my study.

The ESPON 2013

Within the framework of the INTERREG III Community Initiative, the Commission has created the ESPON[13] programme. With the animation of this instrument, the Commission's main goal was to build an scientific community up in the field of regional development, and hereby to contribute to moderate the territorial imbalances, existing between the EU's regions.

The programme was available for the then twenty-five member states, and also could take part Norway and Switzerland. Under the programme, regional development researches were suppoprtable, which were realised with community and national co-financing. The main objective of the programme was to make more efficient the adoptation, application and enforcement of the European Development Plan at

[10] Council Decision 2006/702/EC, OJ L 291, 21.10.2006, p. 32.
[11] Regulation 1083/2006/EC, OJ L 210, 31.7.2006, Article 21, paragraph (1) b)
[12] Regulation 1083/2006/EC, OJ L 210, 31.7.2006, Article 21, paragraph (1) c)
[13] European Spatial Planning Observation Network, ESPON

national level. Moreover this, with the help of the ESPON programme, the Commission also has concentrated to build the regional dimension in other community policies.

In the last phase of the programme, the Comission has decided to maintain the ESPON programme in the future too. Between 2007-2013, the programme continues its work under the name ESPON 2013.[14] The programme's financial base is the ERDF, but it is also supportable from the amount, which is separated for the objective ETC.

In the introduction of the ESPON 2013 Operational Programme, we can read, that the ESPON 2013 aimes at strenghtening cohesion policy with collected information and studies, related to the working mechanism of the development policy.[15] An important novelty is, that in the present programming periode beside the member states, candidate, potential candidate and the EU's partner states also can take part.

Az INTERACT II

The INTERACT programme[16] – like the above mentioned ESPON – has appeared as a component of the INTERREG III Community Initiative. The main objective of the programme was, by summarising the experiences, to help to increase the efficiency in the third generation of this community initiative.

The programme, which has started its work in 2002, is aimed at increasing the quality of the INTERREG programmes and to help in sharing the experiences, which have accumulated in the field of cross-border, transnational and interregional cooperations. During the working of the INTERACT, tha main features – so the trengths and weaknesses – of the INTERREG were sized up by SWOT analysis. The priorities of the programme fit in with the goals of INTERREG. The INTERACT programme has proved to be succesful, so from 2007, it continues its work under the name INTERACT II, as the second generation of the programme.

The European Grouping of Territorial Cooperation (EGTC)

[14] „Common understanding on Orientations of an ESPON II", Presidency Conclusions, no. 2.4, EU Informal Ministerial Meeting on Territorial Cohesion, Luxembourg, 20/21 May 2005
[15] ESPON 2013 PROGRAMME, European observation network on territorial development and cohesion, European Commission Decision C(2007) 5313 of 7 November 2007, p. 5
[16] INTERREG Animation Cooperation and Transfer

The EGTC is the new cohesion policy's very new and important instrument in the programming period 2007-2013. It is a cooperation form having legal personality that Community law offers to partners involved in territorial cooperation.

This cooperation is built on the experiences of the former INTERREG III Community Initiative. The creation of this tool was motivated by many factors, like that some problem have arisen during the realisation of the INTERREG projects because of the differences are between the national legal systems.

With the creation of the EGTCs the cooperation between the states, coming from the other side of the borders, could be stronger and the realisation of the projects could be more efficient because of the single legal framework of the territorial cooperation. The objective of the EGTC is "*to facilitate and promote cross-border, transnational and/or interregional cooperation between its members [...] with the exclusive aim of strengthening economic and social cohesion.*"[17]

We can speak about some different types of the EGTCs.[18] From the point of view of the EGTC-participants we can make a distinction between groupings with homogeneous and heterogeneous structure. In a homogeneous structured EGTC all of the participants come from the same group, for example all of them are local authority. In the case of the heterogeneous EGTCs the participants do not come from the same category. Within the heterogeneous EGTCs we can make another distinction according to the number of the different participants equal or not, namely the structure symmetrical or asymmetrical.

From the point of view of the applicable law the fund of limitation is that the EGTCs are regulated by public or private law; moreover the liability of the members is limited or unlimited. Considering the EGTC's activity on the one hand we can speak about EGTCs with community financing or not-community financing, and on the other hand about EGTCs active on behalf of the members or help to coordination between the members.

2. Cooperation along the external borders of the EU

When we examine the different types of the territorial cooperations, we should notice, that not only inside the Community, but also along its external borders is there a possibility to build cooperations up.

[17] Article 1(2) of Regulation (EC) 1082/2006, OJ L 210., 31.7.2006., p. 19
[18] The European Grouping of Territorial Cooperation – EGTC, CdR 117/2007 (Study), Committee of the Regions, Brussels, January 2007, p. 141-142

As a result of the EU's enlargement in 2004 and in 2007, the length of external borders has increased, so the Community shall take into account lots better the problems, challenges and possibilities, which appear by the altering of the borders.

In the past few years, a recognition has strenghtened, in accordance with working for the cohesion of the EU can not be enough: cohesion policy and the territorial dimension shall be closely linked with the neighbourhood policy. The cohesion policy not can be hardly separated from the neighbourhood policy, what is more, with the help of the neighbourhood policy instruments, cooperations can be create more efficiently between member states and candidate, potential candidate and partner states.

Along the external borders, we can differ two types of the cooperations: some of them are creatable by EU member states and candidate (or potential candidate) countries, while others can build up with the EU's partner countries. However, this distinction is not so marked, because all of these cooperations are regulated under the EU's neighbourhood policy. Accordingly, the differentiation is justified because of the available financial instruments, i.e. the IPA and ENPI.

2.1. Cooperation with accessing countries

As I mentioned above, in consequence of the eastern enlargement of the EU, the importance of creating cooperations along the external borders has also inreased. The Community has emphasised, that cooperations between member and candidate countries have special role: they function as meditators, which bind Central-East-Europe and the Western Balkans with the European Union.

Cooperations, which are creatable along the external borders can be support by the IPA (Instrument for Pre-Accession Assistance) established by Council Regulation No 1085/2006/EC.[19] The assistance should support the candidate and potential candidate countries in their efforts to strengthen democratic institutions and the rule of law, reform public administration, carry out economic reforms, respect human as well as minority rights.[20]

As we can see, the instrument definitely concerns on the Western Balkans space, by taking its political, economic and social characteristics into account.

[19] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: „The European Consensus" (2006/C 46/01), OJ C 46, 26.2.2006., p. 1-19
[20] 2006/ C 46/01, in point 13

From the components of the IPA, the territorial cooperation is available for all countries on the Western Balkans, independently their candidate or potential candidate status. These cooperations appear as operational programmes, on the part of member states, and as action plans on the non-EU states.

In this programming period, 12 different IPA programmes start, which are supported by 11,47 billion €.

2.2. Cooperation with third countries

On the past few pages it could be seen, that the circle of the cooperations, which are creatable with the contribution of candidate or potential candidate countries, are very wide. However, it is interest to examine, what are the possibilities in the case of those neighbouring countries, which stay outside the EU in the foreseeable future.

It is undesirable, that the dividing lines, existing between theese countries and the Community, also function as political and economic boundaries, which share in a wider sense grasped European into two parts. To prevent this, the Community has cretaed a new assistance within the neighbourhood policy, which supports cross-border cooperation programmes between member and permanent outsider countries. "The European Consensus on Development"[21] draws up, that "*EU partnership and dialogue with third countries will promote common values of: respect for human rights, fundamental freedoms, peace, democracy, good governance, gender equality, the rule of law, solidarity and justice*."[22], therefore they play prominent role from the point of view of the Community.

The main instrument in creating cooperations with third countries is the ENPI (European Neighbourhood and Partnership Instrument) established by the European Parliament and Council Regulation 2006/1638/EC.[23] It integrates the former CARDS, TACIS and MEDA programmes under a single device, fore the sake of increasing efficiency in the appropriation of Community supports. The priorities are put down in country or operational programmes.

Community assistance shall promote enhanced cooperation and progressive economic integration between the European Union and the partner countries and, in particular, the implementation of

[21] Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ L 310, 9.11.2006, p. 1-14
[22] Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ L 210, 31.7.2006, p. 82-93
[23] Regulation 1085/2006/EC, in the recital 13

partnership and cooperation agreements, association agreements or other existing and future agreements.[24]

Similarly the programmes, which realise under the ETC objective, the ENPI also has all territorial, so cross-border, trans-national and interregional dimension. The largest part of the ENPI concerns on the interregional programmes, which are aimed at help in the partner countries to carry out the EU's neighbourhood policy and create efficient cooperation with Russia. The participants fix the provisions and regulations of these cooperations in bilateral agreements, so called action plans. In this programming periode, 12 billion € can be allocate within the framework of the ENPI, but the ERDF also co-finance these programmes from the side of the participant member states.

Closing remarks

After a short overview of the territorial cooperations, which are creatable along the internal and external borders of the EU, it can be seen, that practically, the two common policies, so the cohesion and neighbourhood policy mean the two different dimensions, two sides of the same instrument.

Considering that, lawmakers agree, that it is undesirable to handle these common policies separately; instead of this, connecting them can be a suitable solution in the future. The cooperations between the member states and non-member states should function as bridges, which link the eastern and western parts od Europe.

The above mentioned recognition has large importance: since based on this approach, with the help of integrated handle, the cooperations and the national appropriation of the supports, coming from the Community, can be more efficient and effective.

[24] Regulation 1638/2006/EC, Article 2, paragraph 1

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[4] Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), OJ L 210, 31.7.2006, p. 19-24

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[10] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: „The European Consensus" (2006/C 46/01), OJ C 46, 26.2.2006., p. 1-19

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AN OPINION ON ENVIRONMENTAL IMPACT ASSESSMENT IN THE LIGHT OF THE PRACTICES OF THE CZECH SUPREME ADMINISTRATIVE COURT AND THE EUROPEAN COURT OF JUSTICE, ESPECIALLY IN THE LIGHT OF PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

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Abstrakt

Životní prostředí a jeho ochrana získává v rámci spolupráce členských států Evropského společenství na důležitosti, přičemž bezprostřední význam je přikládán zejména prevenci. S touto snahou souvisí mimo jiné přijetí směrnice č. 85/337/EHS. Autor článku si klade za cíl zkonfrontovat stávající českou právní úpravu stanoviska k posouzení vlivů provedení záměru na životní prostředí s požadavky kladenými výše uvedenou směrnicí ve světle judikatury Nejvyššího správního soudu České republiky a Evropského soudního dvora, zejména pak jím judikované zásady efektivity a ekvivalence.

Klíčová slova

Životní prostředí, směrnice 85/337/EHS, Nejvyšší správní soud, princip ekvivalence, efektivity a loajality, stanovisko pro posouzení vlivů provedení záměru na životní prostředí, Evropský soudní dvůr

Abstract

The environment and its protection gain within the cooperation of the Member States of the European Communities on its relevance. The significance is attached to the prevention. This tendency is clearly illustrated by adopting the Directive 85/337/EEC. The aim of this author's paper is to confront the current Czech legal regulation of an opinion on the environmental impact assessment with the requirements posed by the above mentioned directive in the light of the practices of the Czech Supreme Administrative Court and the European Court of Justice, especially in the light of principles of equivalence and effectiveness.

Key words

Environment, Directive 85/337/EEC, Supreme Administrative Court, principle of equivalence, effectiveness and loyalty, opinion on the environmental impact assessment, European Court of Justice

Introduction

The objectives of the European Communities (EC) have changed during an ongoing integration process of the democratic European states. Their originally economical scope has been extended by an implementation of new areas of the EC Member States common interest. One of these fields, to which even more importance has been attached to, was the environment. This is on the one hand closely connected with living and health conditions of the Member States inhabitants and on the other hand with natural resources, i.e. with essential elements for establishing a common market (as one of the EC goals).

Since the former Treaties establishing the European Communities did not grant the Council of Ministers any express competences to act in this area by adopting any legally binding documents, a series of legally unbinding five-year action programmes of the EC on the environment came into the world commencing with the year 1973.[1] However, the gap, reflecting the lack of interest in the environmental matters when establishing the EC, was not remedied until the Single European Act (SEA)[2] came into force in 1987 due to which the environmental matters were incorporated within the scope of the Treaty establishing the European Economic Community (EEC Treaty). Since that time, the environmental protection requirements must be integrated into the definition and implementation of the EC policies. The importance of the environmental area was further stressed after the Treaty of Amsterdam amending the EC Treaties came into force in the year 1999, since *"a high level of protection and improvement of the quality of the environment"* has been incorporated among the EC objectives.[3] The environment protection itself shall be based on prevention.[4] As already mentioned in the first environmental action programme, the best environmental policy consists not in the subsequent counteracting of the undesirable effects of eventual pollution, but in the contrary in preventing[5] its creation of nuisances at source. For that purpose the Council adopted the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment on 27 June 1985[6] (EIA Directive).

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[1] Former rather informative character of the environmental action programmes changed and they became an important tool for safeguarding the environment and natural resources. Until now, almost 6th environmental action programme has been adopted. See also http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D1600:EN:NOT (last visited May 10, 2008).

[2] The Czech version of the SEA is available at http://www.euroskop.cz/admin/gallery/30/cfbf4da11eb727c76c0609d834222e01.pdf (last visited May 10, 2008).

[3] Art. 2 of the consolidated EEC Treaty.

[4] Art. 174 sec. 2 of the consolidated EEC Treaty.

[5] To the principle of prevention in Community law see de Sadeleer, N.: *Environmental Principles – From Political Slogans to Legal Rules,* New York: OXFORD University Press, 2005, ISBN 0-19-928092-4, p. 68-69.

[6] Since its adoption, the EIA Directive was amended twice - the Directive 97/11/EC of March 3, 1997 specified the impact assessment procedure terms whereas the main objective of the Directive 2003/35/EC of May 26, 2003 was to contribute to

EIA Directive and the Czech legal order

The overall purpose of the EIA Directive is to prevent any undesirable effects on the environment caused by the public and private projects. For that purpose the EIA Directive requires that *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects."* The projects covered by the EIA Directive are then identified in its annexes according to their effect they might have. The core of the EIA Directive[7] constitutes the opinion on the environmental impact assessment (Opinion) issued by the respective Member States authorities. No project which falls within the scope of the EIA Directive should be realized without prior consent reflecting the above mentioned Opinion.

In order to comply with Community law obligations regarding the environmental impact assessment, the Czech Republic adopted the Act No. 100/2001 Coll. on Environmental Impact Assessment (EIA Act). The legal regulation of the Opinion is contained in Art. 10 of the EIA Act. Pursuant to this article, the Opinion is an obligatory part of an administrative procedure which relates to projects that might have adverse impact on the environment. The Opinion constitutes a qualified basis for issuing a final decision in each single case and therefore no administrative decision may be issued without being provided with such Opinion. In respect to the crucial importance of the Opinion for the EIA procedure itself it should be expected that the Opinion will be of a decisive nature for the consideration whether the final consent of a administrative authority to the project's realization will be granted or not. In reality, however, the administrative authorities may pursuant to the EIA Act reject the requirements stipulated in this Opinion. The Opinion itself therefore does not constitute a legally binding document since the authority may adopt only a certain part thereof into the final decision or may not to take it in its consideration at all. In such cases the authority has to give reasons why it has been proceeded in this way. This subsequent clarification does not change anything on the fact that the process set up by the EIA Act could lead to an erosion of the main purpose of the EIA Act itself, i.e. to adopt the final decision

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the implementation of the obligations arising under the Aarhus Convention. For more information see http://www.unece.org/env/pp (last visited May 10, 2008) or Stec, S., Casey-Lefkowitz: *The Aarhus Convention: An Implementation Guide,* Geneva: United Nations Publications, 2000, ISBN 92-1-116745-0. Available at http://www.unece.org/env/pp/acig.pdf (last visited May 10, 2008).

[7] *Guidance on EIA – EIS Review (June 2001),* Luxembourg: Office for Official Publications of the European Communities, 2001, ISBN 92-894-1336-0. Available at http://www.mfcr.cz/cps/rde/xbcr/mfcr/EC_ENVIRO_EIA_EISreview.pdf (last visited May 10, 2008).

regarding the environmental projects upon an objective and qualified document,[8] or even to a breach of the prevention principle under Community law. The non binding character of the Opinion is, however, not the only problematic part of the Czech legal order dealing with EIA procedure. Other controversial issue is the judicial review of the Opinion.

Czech Supreme Administrative Court and the Opinion

As consequence of a signature of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) by the EC on 25 June 1998 and its expected approval,[9] the Directive 2003/35/EC amending the EIA Directive was adopted on 26 May 2003. In correspondence with a new amended Art. 10a of the EIA Directive *"Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned [...] have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."* The right to access to a review court hearing is not restricted only to individuals, but shall apply also towards any non-governmental organizations promoting environmental protection.

The Supreme Administrative Court (SAC) has, as far as the Opinion was concerned, dealt with the issue, whether the Opinion shall be reviewed separately or only in connection with the final decisions of the respective authority based upon this Opinion. The SAC repeatedly confirmed by its judgments[10] that the Opinion is not a decision[11] pursuant to the Art. 65 sec. 1 of Act No. 150/202 Coll., the Code of Administrative Justice (CAJ) since it itself does not interfere with the rights of individuals and therefore it cannot be reviewed separately,[12] but only in proceedings related to the decision upon the Opinion. The SAC argumentation was based on the thoughts that neither EIA Directive nor Aarhus Convention requires reviewing Opinions separately and furthermore, since the administrative authorities are not bound by the Opinion, it would be useless to review an Opinion separately if it is not eventually used by administrative authorities. This SAC argument, however, is at least disputable, since on the other hand

[8] Motzke, R.: *Životní prostředí ve správním soudnictví – postřehy ze setkání soudců a právníků neziskového sektoru,* In: VIA IURIS. Tábor: PILA, 2008. Available at http://www.viaiuris.cz/index.php?p=msg&id=199 (last visited May 10, 2008).
[9] EC approved the Aarhus Convention on 17 February 2005. The Aarhus Convention became thereby a part of Community law, whereas it is binding also towards the EC authorities. A list of contractual parties to the Aarhus Convention is available at http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm (last visited May 10, 2008).
[10] Judgment of June 14, 2006, No. 2 As 59/2005-136, judgment of June 14, 2007, No. 1 As 39/2006-55. Available at http://www.nssoud.cz/ (last visited May 10, 2008).
[11] The legal nature of a decision was dealt also with the Czech Constitutional Court finding of May 25, 1999, No. IV. ÚS 158/99 und Constitutional Court decision of November 11, 2006, No. I. ÚS 637/06. Available at http://www.concourt.cz/ (last visited May 10, 2008).
[12] This fact leads to an exclusion of the Opinion itself from a judicial review.

the SAC, when deciding about the contestability of the Opinion, referred to Art. 75 sec. 2 of the CAJ upon which *"[i]f the binding grounds for the decision under review were another act of the administrative authority, the court likewise reviews its lawfulness together with the complaint unless the court itself is bound by it and unless this law enables the complainant to contest such an act by means of an independent administrative justice complaint."* This would mean that the Opinion shall be of a binding nature, what, however, the SAC rejected at the same time. The unbinding character is obvious also from the wording of the Art. 10 sec. 3 of the EIA Act itself. The opinion constitutes only a special basis for the authority final decision. As regards the final decisions themselves, the SAC qualified in its judgment of June 14, 2007, No. 1 As 39/2006 - 55 some important conditions which the lower courts must take into account when the final administrative decision upon the Opinion is at issue – the administrative action must be granted a suspensive effect in order to secure fair, equitable and timely procedure as required by the EIA Directive as well as the Aarhus Convention.

Preliminary question

In later cases of June 26, 2007, No. 4 As 70/2006-72 and of August 29, 2007, No. 1 As 13/2007-63, the SAC must face the proposals to submit preliminary question to the European Court of Justice (ECJ) whether the complainants are entitled pursuant to Art. 10a of the EIA Directive and Art. 9 sec. 2, 3 and 4 of the Aarhus Convention to claim a separate review of the Opinion directly and immediately, i.e. not only in connection with the final administrative decision. The SAC, however, in none of these cases found the reason for submitting the preliminary question to the ECJ and the proposals rejected as causeless. The SAC made reference to its constant judicial practice regarding the Opinion, whereas it considered that *"the interpretation of Art. 10a of the Directive 85/337/EEC as well as Art. 9 sec. 2, 3 and 4 of the Aarhus Convention is absolutely obvious and clear and therefore without any reasonable doubts."*[13] The SAC based its reasoning on the fact that the laws of some of other Member States also do not allow separate contestability of the Opinion.[14] Furthermore the SAC referred the relevant part of Art. 10a of the EIA Directive which explicitly stipulates that: "*Member States shall* determine *at what stage the decisions, acts or omissions may be challenged.*" As consequence thereof, the SAC, applying the Community law doctrine of *act clair*,[15] found itself for not being obliged to refer the preliminary question to the ECJ. However, the doctrine of *act clair* having its origin in French administrative law and

[13] SAC judgment of June 26, 2007, No. 4 As 70/2006-72, p. 5. Available at http://www.nssoud.cz/ (last visited May 10, 2008).
[14] Rubel, R.: *General Report: National road planning and European environmental legislation – A Case Study*., Leipzig: Druckerei Roland Koch, 2006, p. 28. Available at http://www.juradmin.eu/colloquia/2006/Generalbericht-englisch.pdf (last visited May 10, 2008).
[15] Bobek, M., Komárek, J., Passer, J., Gillis, M.: *Předběžná otázka v komunitárním právu,* Praha: LINDE PRAHA, a.s., 2005, ISBN 80-7201-513-3, p. 227-231.

being implemented into Community law by ECJ[16] is not always as clear as it seems to be. This is caused due to the fact that the national courts of the Member States may not interpret it in the same way what subsequently *"may lead to an incorrect application of Community law and, for the individual concerned, a denial of justice."*[17] Moreover, the praxis of the national courts of the Member States and especially those of the ECJ is rather flexible, i.e. the interpretation of that what the *act clair* is considered to be is changing in time.[18] The omission to refer a preliminary question to the ECJ pursuant to Art. 234 EC Treaty may therefore cause a misinterpretation of Community law by the SAC and subsequently its breach and possible liability of the Czech Republic under infringement proceedings initiated[19] by the European Commission.[20]

Principles of equivalence and effectiveness

The principle of equivalence and effectiveness are closely connected with the principle of the procedural autonomy of the Member States and protection of the rights which individuals acquire under Community law. According to these principles, the principle of the procedural autonomy of the Member States will apply, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).[21] Both principles play therefore a key role by answering the question whether an acting of a Member State's authority, in particular the SAC, is in breach with Community law which is of a crucial importance in context of the ECJ judgments[22] focusing on the correct application of Community law by the national courts.

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[16] ECJ judgment of March 27, 1963 Da Costa en Schaake NV and Others (C 28-30/62) and ECJ judgment of October 6, 1982, CILFIT Srl. (C 283/81).

[17] Steiner, J., Woods, L., Twigg-Flesner, Ch.: *Textbook on EC Law,* 8th edition, New York: OXFORD University Press, 2003, ISBN 0-19-925874-0, p. 566.

[18] Bobek, M., Komárek, J.: Koho vážou rozhodnutí ESD o předběžných otázkách? Úvahy o úloze evropské judikatury v českém právním řádu, In: Právní rozhledy 19/2004 (pp. 697-706) and 20/2004 (pp. 752-757).

[19] See the case of Commission of the European Communities v. Italian Republic (C-129/00) initiated by the Commission due to the fact that a Member State's courts repeatedly decided a particular legal issue in conflict with Community law - ECJ judgment of December 9, 2003.

[20] The European Commission already addressed the Czech Republic a reasoned opinion as of June 27, 2007, No. 2006/2271, (2007)2927 concerning the implementation of the EIA Directive. Moreover, a Czech environmental organization Ekologický právní servis (Environmental Law Service) filed its own complaint to the European Commission against the Czech administrative authorities for breaking the EIA Directive. See http://www.eps.cz/ (last visited May 10, 2008). ON the other hand, the Czech Republic is not the only Member State which must face a reasoned opinion of the Commission for non-conformity of national measures with the EIA Directive. See Seventh Annual Survey an the implementation and enforcement of Community environmental law 2005, document is available at http://ec.europa.eu/environment/law/pdf/7th_en.pdf (last visited May 10, 2008)

[21] ECJ judgment of September 19, 2006, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04) v. Bundesrepublik Deutschland, para. 57.

[22] ECJ judgment of January 13, 2004, Kühne & Heitz v. Productschap voor Pluimvee en Eiren (C-453/00), ECJ judgment of September 19, 2006, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04) v. Bundesrepublik Deutschland, ECJ

A leading judgment in this context is that in case Kühne & Heitz.[23] In this judgment the ECJ decided that even if *"Legal certainty is one of a number of general principles recognized by Community law"* and therefore "*Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way"*[24] *"an administrative body [has] an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where*

- under national law, it has the power to reopen that decision;

- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court."[25]

The ECJ therewith explicitly recognized the possibility of re-opening of a final administrative decision which, notwithstanding that it was subsequently confirmed by a national court having failed to refer the issue to the ECJ, is in breach with Community law, provided that all conditions established by the ECJ are fulfilled[26] and the procedural rules of the particular Member States allow this re-opening proceedings at the same time.[27]

Conclusion

As mentioned above, the Czech EIA procedure pursuant to the EIA Act does not fully comply with the EIA Directive, since the prevention principle is diminished. The SAC, however, in the cases where the EIA procedure, in particular the Opinion and subsequently the prevention principle itself, was in

judgment of September 30, 2003, Gerhard Köbler v. Republik Österreich (C-224/01), ECJ judgment of March 16, 2006, Rosmarie Kapferer v. Schlank & Schick GmbH (C-234/04).

[23] ECJ judgment of January 13, 2004, Kühne & Heitz v. Productschap voor Pluimvee en Eiren (C-453/00).

[24] Ibid, para. 24.

[25] Ibid., para. 28.

[26] Critically Bobek, M.: *Consequences of Incompatibility with EC Law for Final Administrative Decisions and Final Judgments of Administrative Courts in the Member States*, the Colloquium of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, p. 20. Document is available at http://www.juradmin.eu/colloquia/2008/Czech_Republic.pdf (last visited May 10, 2008).

[27] The application of the conditions established in the judgment Kühne & Heitz are restricted by the principle of procedural autonomy of the Member States, since *"Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so enable it to remedy an infringement of Community law by the decision at issue."* See ECJ judgment of March 16, 2006, Rosmarie Kapferer v. Schlank & Schick GmbH (C-234/04), para. 21.

question, instead of referring the preliminary question to the ECJ, considered the cases as *actes claires*. However, as shows the ECJ practice, an interpretation of a particular case being held for an *act clair* is not unchangeable and may differ in time. The way how the SAC proceeded in respective situations may therefore be considered, with regard to the questionable legal nature of the Opinion as well as its contestability before the Czech national courts, as omission to refer the preliminary question to the ECJ, i.e. as breach of Community law which may lead to a liability of the Czech Republic under the infringement proceedings. Moreover, provided that the incorrect acting of the SAC would by confirmed (e.g. by the ECJ within infringement proceedings), i.e. the SAC failed to refer a question or decided in breach of the EIA Directive (eventually Aarhus Convention) even without breaching its obligation to refer, the principles of loyalty together with the principles of equivalence and effectiveness might apply. This would mean in the context of the current EIA procedure a potential uncertainty for the participants since, even if the consent of an administrative authority was granted and it became valid and effective, its finality might be under certain conditions contested in respect of the "appellate theory"[28] of the ECJ. A subsequent liability of the Czech Republic for the caused damages would be indisputable.

[28] Komárek, J.: *Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order,* In: Common Market Law Review 42, The Netherlands: Kluwer Law International, 2005, p. 9-34.

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[2] Judgment of June 14, 2007, No. 1 As 39/2006-55.
[3] Judgment of June 26, 2007, No. 4 As 70/2006-72.

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[10] www.unece.org/env/pp

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EU CITIZENSHIP

MAGDALÉNA KUDELOVÁ

EKONOMICKÁ FAKULTA, VŠB – TU OSTRAVA

Abstrakt

Příspěvek se zaměřuje na definici občana EU. Nyní je v pravomoci členských států rozhodnout kdo je jejich státním příslušníkem. Avšak tato situace občas vytváří rozdíly mezi postavením obyvatel Evropské unie. Příspěvek se zaměřuje na funkcionální přístup k definici občana EU, jako je tomu v případu Velké Británie. Také diskutuje statut ne-občanů a vyškrtnutých osob v Estonsku, Lotyšsku a Slovinsku. Cílem příspěvku je opět otevřít diskuzi na téma kdo by měl být občanem Evropské unie a kde je demos Evropské unie.

Klíčová slova

Občané EU, ne-občané, vymazané osoby

Abstract

The paper tries to focus on the definition of EU citizen. Nowadays, member states have in their discretion the decision on who is their state national. However, this situation sometimes creates discrepancies between the positions of inhabitants of the European Union. Paper focuses on the functionalist approach to definition of the EU citizen, such as in case of Great Britain. It also discusses the status of non-citizens and erased persons in Estonia, Latvia and Slovenia. Aim of the paper is to open again the discussion on who should be the European Union citizen and where is the demos of the European Union.

Key words

EU citizens, non-citizens, erased persons

European Union citizenship presents a new concept of relation between state and international organization. Declared by Maastricht Treaty, the citizenship assures existing rights of citizens such as right to move freely within the communities and supplements them by political rights.

Citizenship of the Union was largely discussed; German Constitutional Court in its famous Maastricht judgment stated the absence of people of Europe. Amsterdam Treaty stated the subsidiarity of EU citizenship. Rights of EU citizens are defined in primary law; there are no express duties of EU citizens. Some rights that are named as rights of EU citizens are in fact rights of persons with residence in the EU. EU citizenship may not be considered as nationality in the material sense. The concept of relation between citizens and state is being discussed, namely the no demos theory. We may state that citizenship of the EU is a set of rights granted to nationals of EU member states and doesn't represent nationality of the Union. The very content of the citizenship is not similar to content of nationality, e.g. the possibility to move freely is not unconditional; citizens have limited possibilities to participate in the political life of the Union. Member states decide independently on who is their citizen. Citizens of the EU don't have responsibilities adequate to those of state nationals. EU is a sui generis integration, many of its features are original and it is not possible to categorize them. Possibly, a new institute was created capable of creating a separate category.

From the character of European integration as well as from the rights and duties of EU citizens can be derived following characteristics of EU citizenship[1]:

- Derivativeness (citizenship is dependent on the citizenship of member states, the member states solely may decide on who is their citizen, with the exeption set in case Micheletti v. Delegacion del Gobierno en Cantabria[2]**),**
- content of the citizenship is limited by EU competences,
- mediateness,
- subsidiarity, proportionality (these principles must be kept when applying citizenship rules)
- connection to integration stage,
- inviolateness by flexibility principle , (see A. of the TEC
- interstate element, (the Court of justice stated several times that the citizenship rules cannot be applied to wholly internal situations, see e.g. C-148/02, p. 31)
- supremacy.

Fundamental right is to move freely within the Community (though the Treaty grants some exemptions). The Court of Justice set rules for expatriation. The Treaty defines political rights of EU citizens. These have right to vote and stand as candidate in municipal elections, states may however preserve the function of mayor for its nationals. Citizens have also right to vote and to stand as a

[1] See Kudelová, M. Občanství ČR a EU. Diploma Thesis. Brno: MAsarykUniversity, 2007.
[2] Judgment of the Court of 7 July 1992, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, Reference for a preliminary ruling: Case C-369/90.

candidate in elections to the European Parliament in the Member State, in which they reside, under the same conditions as nationals of that State. The Treaty however doesn't define subject of the right to vote in European Parliament elections. Among other rights are petition right, right to apply to the Ombudsman, right of access to documents, right of diplomatic and consular protection. Some rights were defined by the Court of Justice.

European Union sometimes affects spheres that are in competence of member states, if they influence the freedom to move freely within the community, as e.g. in case of granting surname. Reverse discrimination is however in some cases possible.

Genuine link between the citizen and the state is not necessarily permanent residence; condition of residence is unacceptable e.g. for restitution of property, or in case of retribution of war victims.

Who is EU citizen?

According to the Treaty, A 17, e*very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.*
It is the power of the member states to determine who their national is, and therefore the national of the European Union. There are however some limits set by the case Micheletti v. Delegacion del Gobierno en Cantabria[3]**.**

Some EU member states have a special, functional approach to the definition of EU citizens. Problematic is the position of member states citizens who reside in the overseas countries and territories. According to Mortelman a Temmik, these citizens don´t posses the freedom of movement. It has to be stated that, according to the Treaty, these citizens are EU citizens according to the Treaty as long as the state doesn´t distinguish between citizens of the continent and overseas citizens[4]. In the following text, we will focus on some of these states. In fact, lots of permanent inhabitants in the member states do not hold EU citizenship.

Great Britain

In the year of accession of Great Britain to the EU (1973), a declaration was made to interpret the term British Citizen for the purposes of the European Communities. The declaration was amended following

[3] Judgment of the Court of 7 July 1992, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, Reference for a preliminary ruling: Case C-369/90.
[4] see Torre, L. M. European Citizenship. An Institutional Challenge. Hague: Kluwer Law International. 1998, p. 134

the adoption of British Nationality Act and the Maastricht Treaty. The British Nationality Act 19815 abolished the status of citizenship of the United Kingdom and Colonies and divided those who held that status into three categories:

(a) British Citizens, including citizens of the United Kingdom and Colonies with the right of abode in the United Kingdom;

(b) 'British Dependent Territories Citizens, comprising citizens of the United Kingdom and Colonies who did not have the right of abode but satisfied certain conditions concerning connection with a British Dependent Territory deemed to confer on them immigration rights to that territory;

(c) 'British Overseas Citizens, comprising all citizens of the United Kingdom and Colonies who did not become British Citizens or British Dependent Territories Citizens. Having no connection with any British Dependent Territory, they may be refused any immigration rights[6].

Among those citizens didn´t belong British Dependent Territories Citizens and British Oveseas Citizens.

The case Kaur (C-192/99) tried to challenge the conception of British Overseas Citizens and British Dependent Territories Citizens as set in the British declarations. The main argument was the case Micheletti that stated that: *Member State can define the concept of 'national only if it has due regard to Community law and, consequently, only if it observes the fundamental rights which form an integral part of Community law.* However, the Court stated that: *In order to determine whether a person is a national of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law, it is necessary to refer to the 1982 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals which replaced the 1972 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals, annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities.*

The Federal Republic of Germany

In the year 1957 Germany made a declaration that not only Germans of German nationality in the sense of the German citizenship act but also Germans in the sense of the A. 116, i.e. ethnic Germans in Eastern Europe, Volga – Germans (Wolga Deutsche), are to be considered Citizens for the purposes of EC[7].

[5] Amended by British Overseas Territories Act 2002

[6] See C-192/99, 10

[7] see de Groot, G. The Nationality Legislation of the Member States of the European Union. In Torre, L. M. European Citizenship. An Institutional Challenge. Hague: Kluwer Law International. 1998str. 125

Thus Great Britain and Germany created a special, functionalist nationality for the purposes of the Communities.

Spain

Spain entered into several international Treaties that allow multiple nationality in case of Latin-Americans. If a Spain kingdom citizen acquires nationality of some of the contracted Latin-American countries, he doesn´t lose his Spanish nationality. Citizenship is just „en hibernacion" (dormant), and restores during the residence in Spain[8].

Different situation applies for Gibraltar that is nowadays a territory of the United Kingdom. Following the Mathews vs. United Kingdom judgement[9], the United Kingdom declared to assure the voters of Gibraltar the right to vote in European Parliament elections. Spain disagreed with this concept claiming mainly that only EU citizens have, according to the Treaty, right to vote to the European Parliament. The ECJ stated that, *as regards the Treaty's articles relating to citizenship of the Union, no principle can be derived from them that citizens of the Union are the only persons entitled under all the other provisions of the Treaty, which would imply that Articles 189 EC and 190 EC apply to those citizens* ***alone****.*

Other countries

We could continue the list of countries by naming other former colonial countries such as Belgium or The Netherland, but the focus of the paper should be on the other group of countries: those who - when trying to implement democracy and cope with the past, themselves breached the rule of law or at least didn´t keep the morals of the nowadays international human rights standards.

The case of Latvia and Estonia

Estonia and Latvia implemented in their legislation the term non-citizen. This approach is not based on international law rules. Over 600 000 persons (former Russians from the Soviet Union) lost their citizenship. The non-citizen status have inhabitants that came to Latvia and Estonia during the Soviet occupation. In Latvia, citizenship possess only 75% of inhabitants, the others are non-citizens or foreigners. Major part of non-citizens are nonethnic Latvians who came during the soviet occupation. After the decline of the Soviet era, those inhabitants lost their former soviet citizenship but didn´t acquire citizenship of other state[10]. The status of these citizens is described in the Law "On the Status of

[8] See cited document, s. 128
[9] See ECHR, Application no. 24833/94, http://www.legislationline.org/legislation.php?tid=57&lid=4937
[10] http://www.pobalti.cz/clanek.html?id=1080

Former USSR Citizens Who are not Citizens of Latvia or Any Other State". There exists a possibility of naturalisation.

Non-citizens have the right to live in the territory, but they don´t have any political rights and they may not work in the public service. They possess a special non-citizen passport and they cannot travel freely within the EU.
The situation was discussed in the European Court of Human Rights case Slivenko v. Latvia no. 48321/99. The Court decided the breach of A. 8 of ECHR (right to private and family life).

Slovenia - The Izbrisani (Erased residents)[11]

Similar problem occurred in Slovenia where some persons were erased in 1992 from the registry of permanent residents. These were over 18.000 people[12] from the former Yugoslavia, who were not Slovenian origin, but were so-called 'new minorities" including ethnic Serbs, ethnic Croats and ethnic Bosnian Muslims, ethnic Albanian Kosovars and ethnic Roma which the government sought to force out of the country. 'Old minorities' include ethnic Italians and ethnic Hungarians, specifically mentioned in the December 1991 Constitution[13]. Some sources call this measure as “soft genocide” or “administrative genocide”[14].
Later, Slovenian courts ruled that the erasure was unconstitutional, but the erased lived for about ten years as „outlaws”, without rights to social services, jobs or housing.

Conclusion

EU member states decide on who are their citizens. Some of them have even created a functionalist approach and classified different categories of citizens. Due to colonial history of some countries, such approach may be comprehensible. The case of Latvia or Estonia shows the perils of this approach: thousands of people living in the country, thus having a genuine link with the state, are not regarded as nationals and posses an unprecedental status that doesn´t allow them to take advantage from EU law. This concept shows us that nationals of member states enjoy often different rights.

According to the Fifth Report on Citizenship of the Union, the Commission is aware of these problems (mainly of non-citizens and the erased) and has received a *number of complaints, NGO reports, petitions and EP questions concerning problems in certain Member States linked to the acquisition and loss of*

[11] erase, red pencil, rub out, score out, scratch out, delete, expunge, obliterate
[12] Some sources declare them to be 30.000 – see http://www.preventgenocide.org/europe/slovenia/
[13] See http://www.preventgenocide.org/europe/slovenia/
[14] See Fussel, J. The Izbrisani Issue in Slovenia.

nationality. Though it is not in EU powers, the Commission has sought to contribute to solutions linked to this issue *by promoting integration and by using the Community instruments at its disposal such as ensuring that Member States strictly implement EC anti-discrimination legislation.* One of the proposed measures is granting the citizenship rights to persons who have possessed permanent residence in one of the member states for some period of time (e.g. 5 years).

There seems to be one solution of the problem that has already been proposed by the Commission but hasn´t found the necessary consensus among the member states to become a binding legal act: granting the EU citizenship rights to persons with permanent residence.

The idea is actually not as a major breakthrough as it would seem: some citizenship rights are in fact granted to persons with permanent residence (such as petition right), some rights – such as right to vote and stand as candidate in the European Parliament elections – are, as seen in the case of Spain vs. UK, not restricted strictly to nationals of member states.

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[10] ECHR, Application no. 24833/94,

http://www.legislationline.org/legislation.php?tid=57&lid=4937

[11] Fussel, J. The Izbrisani Issue in Slovenia.

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RECOGNITION OF QUALIFICATIONS: EU LAW

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Abstract

The contribution is concerned with the professional recognition of qualifications in the EU Law topic. It describes its importance for the internal market – free movement of persons and free movement of services. It mentions the Old System of recognition of qualifications created mostly in the 70's and 80's and deals with the New system created by the Directive 2005/36/EC on the recognition of professional qualifications. The only profession which is not included into the New Directive is the advocate's profession – also briefly mentioned. The last part of the paper describes how the New Directive is (not) transposed into the Czech law.

Key words

European Law, Recognition of Qualifications, Directive on the Recognition of Professional Qualifications

Abstrakt

Příspěvek se zabývá institutem profesního uznávání kvalifikací v právu Evropské unie. Popisuje jeho význam pro vnitřní trh, a to konkrétně pro volný pohyb obyvatel a volný pohyb služeb. Zabývá se jak původním systémem uznávání kvalifikací, který byl vytvořen zejména 70. a 80. letech, tak i současným systémem zavedeným směrnicí 2005/36/ES o uznávání odborných kvalifikací. Jedinou profesí, která nebyla nově upravena touto směrnicí je profese advokáta – i o ní je zmínka. Poslední část příspěvku popisuje, jakým způsobem (ne)došlo k transpozici zmíněné směrnice do českého práva.

Klíčová slova

Evropské právo, uznávání kvalifikací, směrnice o odborném uznávání kvalifikací

Introduction: the topic

There are two distinguishable types of recognition of qualifications – the academic recognition and the professional recognition.

The academic recognition means recognition of diplomas, qualifications or study periods of any (domestic or foreign) educational institution by another one, either in order to entrance to an advanced study, or in order to reduce the study duties duplication. It's a very important instrument for a student's mobility.

The professional recognition concerns in the evaluation knowledge and competence of the certain person. They can be proved by a diploma confirming successful completion of the educational level, by a document proving exercise of the regulated profession de facto or somehow else (by the compensatory measures). The result of the process is a decision whether the person is capable to practise the profession or not.

Even if the European Union is concerning about the education (inside its competences' boundaries), it is not concerned about the academic recognition at all. The professional recognition, on the other hand, is in the scope of view of the European Union.

Professional recognition of qualifications within the EU

Even if the movement of economically active persons was very advisable, in the past there were a few obstructions in access to certain working activities to those who posses the relevant qualifications. In the beginning the European Community accepted several directives to facilitate the recognition of professional qualifications.[1] Unfortunately they did not provide any protection for the recently qualified professionals, because they had not been aimed at the recognition of diplomas. They were based on the professional experience, which was , obviously, missing to those.[2] So that it became necessary to adopt a special legislation on the recognition of qualifications.

The Old System

The old system of professional recognition of qualifications which was growing up in the 1970's, 1980's and 1990's, consisted of the general system of the recognition of qualifications and the sector system.

The sector system consisted of the several sectoral directives, which represented the specific regulation on certain professions:

Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services;

[1] E.g. directive 77/92/EEC on insurance agents and brokers or directive 82/470 on transport and travel agencies.
[2] Apap. J. Freedom of Movement of Persons: A practitioner's handbook. Hague: Kluwer Law Publishing, 2002, p. 74.

Council Directive 77/452/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services;

Council Directive 78/686/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services;

Council Directive 78/1026/EEC 1978 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services;

Council Directive 80/154/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services;

Council Directive 85/384/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services;

Council Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy;

Council Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications; and

Directive 98/5/EC of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

These directives had fix minimum standards for training criteria such as access, length and contents of training and states that any diploma conforming to the criteria listed in the directive must be automatically recognized anywhere in the Community. Consequently, those successful in obtaining recognition are given the right to exercise that profession on the only condition that they will be registered by the competent authorities in the host state.[3]

All other professions, which were not covered by the sectoral directives, came under the directives of *the general system*:

Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration;

[3] Ibid, p. 78.

Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC; and
Directive 1999/42/EC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications.
The general system was being applied to professionals who have completed a minimum period of three years of post secondary education (the Directive 89/48/EEC) or a lower level of training, not at degree or necessarily diploma level.
The basic principle of the directives was the right of Member State authorities to refuse the right of entry and practice of a profession on the grounds that the holder does not acquire the appropriate national qualifications, but where qualifications were sufficient or different, a period of adaptation or a compensatory measure might be required.[4]

The new system

By the time, however, came up that the rules of such systems should be improved in the light of experience and the complicated system of several directives should be transferred in the single text. That happened in 2005 by the directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications (thereinafter "the New Directive"). The only profession whose regulation have not been transformed into the new directive is a lawyer's profession.
As mentioned, the old system of recognition of qualification including both the general system and the sector system has become complicated and unsatisfactory partially. Thus the New Directive on recognition of qualifications has been adopted. The mechanism of recognition established by the general system remains unchanged but in order to take into account all situations for which there is still no provision relating to the recognition of professional qualifications, the general system was extended to those cases which are not covered by a specific system, either where the profession is not covered by one of those systems or where, although the profession is covered by such a specific system, the applicant does not for some particular and exceptional reason meet the conditions to benefit from it.
It was also necessary to create the system of automatic recognition based on professional experience for industrial, commercial and craft activities if they have been pursued for a reasonable and sufficiently recent period of time in another Member State.

[4] Tillotson, J., Foster, N. Text, Cases and Materials on European Union Law, 4th edition, Coogee: Cavendish Publishing, 2003, p. 332 – 333.

In order to facilitate the temporary and occasional providing services has been set up, that any service providers may provide services on a temporary and occasional basis in another Member State under their professional title without applying for recognition of their qualifications.

General system

The new directive shall be applied to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis. The directive, however, is not applicable to citizens whose education is not recognized either in the domestic state[5] or to professions which are not regulated in the domestic state.[6]

If access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as applied to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory. Access to and pursuit of the profession, shall also be granted to applicants who have pursued the this profession on a full-time basis for two years during the previous ten years in another Member State which does not regulate that profession, providing they possess one or more attestations of competence or documents providing evidence of formal qualifications.

With certain circumstances the host Member State is allowed to require the applicant to complete an adaptation period of up to three years or to take an aptitude test. Anyway it must offer the applicant the choice between an adaptation period and an aptitude test.

Sectoral provisions

Most of the sectoral directives mentioned above were transferred into the new directive. The only directives which were not transferred are the Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services[7] and the Directive 98/5/EC of the European Parliament and

[5] Judgement T-16/90 Anastasia Panagiopoulou vs. European Parliament.
[6] Craig, P., De Búrca G. EU Law: Text, Cases and Materials, Fourth edition. Oxford: Oxford University Press, 2008, p. 840 – 841.
[7] The directive requests that practising lawyers from Member States must be accepted on the basis that the training of lawyers in the domestic state is as strict as in the host state.

of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.[8]

In the New Directive there are the minimum study requirements and the requested learning outcomes set up.

While the basic medical training for *doctor of medicine* shall comprise a total of at least six years of study or 5500 hours of theoretical and practical training provided by, or under the supervision of, a university, specialist medical training includes additional free to five years long theoretical and practical training at a university or medical teaching hospital or, where appropriate, a medical care establishment approved for that purpose by the competent authorities or bodies. The specific training in general medical practice shall be carried out on a full-time basis, under the supervision of the competent authorities or bodies. It shall be more practical than theoretical.

The training of *nurses responsible for general care* shall comprise at least three years of study or 4600 hours of theoretical and clinical training, the duration of the theoretical training representing at least one-third and the duration of the clinical training at least one half of the minimum duration of the training.

Basic *dental training* shall comprise a total of at least five years of full-time theoretical and practical study, comprising at least the programme described in the Directive.

The training of *veterinary surgeons* shall comprise a total of at least five years of full-time theoretical and practical study at a university or at a higher institute providing training recognised as being of an equivalent level, or under the supervision of a university, covering at least the study programme referred to in the Directive as well.

The training of *midwives* shall comprise a total of at least specific full-time training as a midwife comprising at least three years of theoretical and practical study or specific full-time training as a midwife of 18 months' duration (if the midwife is already qualified as a nurse responsible for general care), comprising at least the study programme described in the Directive.

Evidence of formal qualifications as a *pharmacist* shall attest to training of at least five years' duration, including at least four years of full-time theoretical and practical training at a university or at a higher institute of a level recognised as equivalent, or under the supervision of a university and six-month traineeship in a pharmacy which is opened to the public or in a hospital, under the supervision of that hospital's pharmaceutical department. That training cycle shall include at least the programme described in the Directive.

The last profession regulated by the sectoral provisions is the profession of *architect*. Training as an architect shall comprise a total of at least four years of full-time study or six years of study, at least three

[8] According the directive any lawyer shall be entitled to practise on a permanent basis, in any other Member State under his domestic state professional title, as an independent or salaried lawyer.

years of which on a full-time basis, at a university or comparable teaching institution. The training must lead to successful completion of a university-level examination.

The Transposition into the Czech Law

The Old System's directives were transposed into the Czech Law by the Act 18/2004 on the Recognition of Professional Qualifications (in force since 1.5.2004 – the accession of the Czech Republic to the EU). Unfortunately, as far as the New Directive is concerned,[9] the Czech Republic has not been able to fulfil its duties and transpose the New Directive into the Czech Law yet. So it is late with all the consequences which it entails.

The most actual progress: by today's date[10] the novel of the Act on the Recognition of Professional Qualifications is in the last phase stadium of the legislature process – it is waiting for the president's signature.

Conclusion

The mechanism of recognition of qualifications established by directives 89/48/EEC and 92/51/EEC has remained unchanged; it just tries to become a better system. The most of the sectoral directives were combined in a single text and the general system set up by the New Directive should subsidiarily cover also the professions regulated by the special provisions, if the applicants do not fulfil all the conditions to have their qualifications recognized by the sectoral provisions.

There have been no judgements on the New Directive until now, nevertheless the judgements passed on the Old System are still applicable.

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[2] Apap, J. *Freedom of Movement of Persons: A practitioner's handbook*. Hague: Kluwer Law Publishing, 2002.

[3] Craig, P., De Búrca G. *EU Law: Text, Cases and Materials*, Fourth edition. Oxford: Oxford University Press, 2008.

[4] Tillotson, J., Foster, N. *Text, Cases and Materials on European Union Law*, 4th edition, Coogee: Cavendish Publishing, 2003.

[9] The Member States should bring into force the laws, regulations and administrative provisions necessary to comply with it by 20 October 2007 at the latest.

[10] 5/11/2008.

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ETHICS IN THE EUROPEAN UNION

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FAKULTA MEZINÁRODNÍCH VZTAHŮ, VYSOKÁ ŠKOLA EKONOMICKÁ V PRAZE

Abstrakt

Proces harmonizace v rámci Evropské unie je bezpochyby doprovázen mnoho komplexnostmi. Navzdory tomu, že proces integrace je složitý a musí nevyhnutelně zahrnovat sladění celé škály zákonů členských států a ačkoliv některé oblasti práva vyžadují úzkostlivě podrobné definice, zdá se, že etika hraje mnohem méně významnou roli v celém procesu než by bylo nutno.

Klíčová slova

Etika, Evropská unie, právo, harmonizace, ekonomie

Abstract

There are undoubtedly many complexities which accompany the process of harmonization in terms of the European Union. Although the process of integration is complicated and must inevitably include a reconciliation of a range of laws of member states, and although some areas of law require meticulously detailed definitions, it seems that ethics play a much less significant role in the whole process than necessary.

Key words

Ethics, European Union, law, harmonization, economics.

Introduction

[1] The Study was prepared in the framework of the Research Program No. MSM 6138439909 "Governance v kontextu globalizované ekonomiky a společnosti"

There have indeed been many prolific thinkers throughout the history of mankind who have focused on the significance of ethics from various perspectives. The aim of this paper is to consider the extent to which ethics are taken into account in the process of legislation in the European Union.

While it is irrevocably true that at least in terms of its historical origin, law as such stems from ethical concepts, it is highly questionable whether modern legislation has remained faithful to the ethical heritage. It is indisputable that the practical applicability of ethics is hampered by the ambiguity of the concept and the scope of definition that it is susceptible to. The difficulties related to defining ethics as a concept are still extant in spite of the numerous previous attempts to explain the premise of the term. It is sufficient for the purpose of argumentation in this paper to only very briefly mention the intellectual contribution of John Locke and Immanuel Kant pertaining to ethics as a philosophical point of departure.

To put it quite simply, John Locke asserted that the mind is born a tabula rasa, therefore repudiating the concept of innate ideas. Consequently, whatever definition of ethics we arrive at, it will only be a construct of the human mind. It is therefore rather difficult to define ethics in terms of conventional terms such as morality, honesty, integrity etc., and yet it is simultaneously and paradoxically intuitively obvious that precisely these terms are most apt, albeit they require definition themselves. Conversely, Immanuel Kant attempted to synthesize rationalism and empiricism and in his *Critique of Practical Reason* (1788) and put forward a system of ethics based on the notion of what he termed "categorical imperative". Although the principle of categorical imperative is very helpful, it does not truly provide a definition of ethics. Nevertheless, it is a concept which is heavily referred to and indeed proves very useful even if looked at solely from a legal perspective. Whether we wish to refer to it as Kant's categorical imperative or basic principles of Christianity, few would disagree that the notion of reciprocity is crucial for any viable definition of ethics. Nevertheless, it is clear that despite having used generally known philosophical concepts only in a very simplified manner, the definition of ethics is still very challenging and indeed perhaps unattainable.

The entire matter becomes even more complex when cultural differences are factored into the definition of ethics. It is obviously possible to identify perceptible differences in the approach to morality, honesty and integrity when we compare such different approaches as that of Japan and the Czech Republic for example. However, although it is relatively fairly straightforward to identify the differences between to countries in terms of the approach to ethics, it is difficult to define the span and nature of different cultures per se. Furthermore, even if we were to content ourselves with a simplified approach and ignore the intricate aspects of the historical development of individual countries and

presume that there exists such a thing as “European culture”, it would be merely a geographical approach and even then it would be an intrinsically flawed premise. Consider the consequences if Turkey were to become a member state of the European Union. Would it still be viable to speak of a “European culture”? Consequently, it would be desirable to define ethics independently of cultural differences, which obviously greatly complicates the whole process. Nevertheless, for the purpose of this paper, it is not desirable to go into greater depth regarding the complexity of defining ethics. It is sufficient at this point to emphasize the existence of the problem of defining ethics in general terms as a concept and recourse to the simplified interpretation of Kant’s categorical imperative as the premise for argumentation in this paper.

Having established the working definition of ethics and having addressed the problems related to the ambiguity of the term, let us now look into the links between ethics and law from the perspective of the European Union.

The Intricacies of Ethics

Before we elaborate on the specificities of the connection between laws and ethics in the framework of the European Union, it is useful to at least briefly consider the significance of economics in this matter, even if it were only for the purpose of contrast. Although it might not appear so at first glance, the origins of economics are not entirely free of considerations on the relevance of ethics. In fact, Adam Smith himself believed that economics and ethics were inseparable, although his terminology was perhaps a little different, the concepts remain unaltered. The mere fact that his famous work *An Inquiry into the Nature and Causes of the Wealth of Nations* was preceded by his unfortunately less know *The Theory of Moral Sentiments* shows that Smith was not oblivious to the concept of ethics and certainly did not consider economics independent of it. It is therefore clear that the explicit connection between ethics and economics was made at least as early as the latter half of the eighteenth century, but this by no means represents the most distant historical connection that can be traced. Nonetheless, the aim of this brief diversion was not to determine the roots of this connection but rather to point out what alteration this connection has undergone, because the general preoccupation of economics nowadays is not linked so closely to ethics as could be expected. One would certainly have to try very hard to find a mention of ethics in the vast majority of economic axioms. Ethics are at best only mentioned as something that must be taken into consideration, but one would hardly find any link to ethics in maximizing utility under conditions of scarcity and under the constraints of a specific budget line…

However, although the link between ethics and economics might not be obvious at all times, it is safe to assert that the connection is not a case of wishful thinking. The need for relentless precision and the

overwhelming role of numbers in economics perhaps only overshadow the link between ethics and economics, yet at least on a theoretical level, the link still exists.
It is important to bear this in mind because it is quite difficult to separate economics and law, if not on a theoretical level, then at least in terms of the recent history of mankind. Many laws are being devised with their economic purpose in mind (this is most obvious in the case of laws related to issues such as taxes and other financial matters). With respect to the aforementioned connection between ethics and economics, it can be said, with a certain degree of simplification obviously, that even though law and ethics are not entirely independent of economics, the aspect of ethics remains relevant and is not overridden by the role of economics.

Law and ethics on the other hand enjoy an intrinsically much closer connection. This connection between law and ethics is undoubtedly more apparent than that between economics and ethics, and yet even this relationship is not absolute and despite the inherent link between law and ethics, the two are certainly not interchangeable. While there is a tacit presupposition in many societies that illegal actions are usually unethical, this certainly does not imply that all unethical actions are necessarily illegal. Indeed, it is not out of the ordinary to be legally unassailable but ethically at fault and it is not infrequent that the capabilities of a lawyer are assessed in terms of his ability to find a way around legal constraints in order to achieve a particular end. It would be interesting to consider why it is not uncommon for precisely those lawyers who are most adept at finding a way around legal constraints to be financially rewarded the most. However, we will not delve deeper into this economic intermission as the complicated nature of the relationship between law, ethics and economics is already patent at this point. All of these aspects of the relationship between law and ethics, economics and ethics and the influence of economics on the connection between law and ethics must be taken into account when we assess the significance of ethics in terms of the European Union.

In spite of the fact that the connection between ethics and law is indisputable, it would seem that the importance of ethics in the legislative process is diminishing, if indeed ethics were ever a major and conscious concern beyond the level of the aforementioned intrinsic link which undoubtedly exists between law and ethics. While it is true that ethics as an abstract concept is not susceptible to a clear-cut and unequivocal definition free of terms which are themselves beset by ambiguities, this certainly does not justify the subordinate position of ethics in the legislation process within the European Union.
Even if we were to consider laws as a manifestation of traditions and ethical concepts which have been evolving since the existence of mankind, it is simply not possible to rely on this theoretically perpetual link and take no notice of the potential of ethics as a unifying element in the process of legislation in the

European Union. It is only a matter of time until the sheer bulk of laws intertwining the relationships between the member states of the European Union becomes perplexing beyond repair. There are obviously many areas of legislation that can be taken into consideration and not all of them are in the same condition, but it is the general approach which must be considered alarming. The problem consists mainly in the unnecessary and rather counterproductive depth and detail of legislation, especially in some areas of law. Opinions will certainly differ on the specific areas, but it is beyond any doubt that excessive regulation is not a desirable trend.

This situation is made worse by the nature of the legislative process itself. One would have to look very leniently at the laws of individual member states of the European Union to arrive at the conclusion that they are entirely free of inaccuracies. Whether we take into consideration the Anglo-Saxon tradition which in its essence relies heavily on judges, or the tradition akin to the Napoleonic Code which is based at large on the legislative prerogative of a political authority, we inexorably reach the conclusion that laws devised in individual member states of the European Union cannot possibly aspire after perfection and will inevitably be flawed, regardless of the particular law at hand. The differences between statutory law and common law (unwritten law) are not of major significance because the European Union has evidently decided not to rely on common law and work with statutory law instead, yet it is interesting to realize that regarding only the origin of a law from the perspective of ethics, the two traditions do not differ to a major extent, as laws are propounded by an authority of some type which certainly cannot be deemed an infallible source. Since the laws of individual member states of the European Union unquestionably display a certain degree of imperfection, it is rather improbable that the laws passed in the framework of the legislative process in the European Union will be free of imperfections.

It is precisely for this reason, if not for any other, that ethics merit a more decisive function in the legislative process, at least with respect to the European Union. Even if one were to pay no attention to the moral aspect and look at this issue purely form a point of view of practicality and reasonableness, the inevitable conclusion would be that ethics are an indispensable factor if the European Union is to function effectively. It is clear that even a simple summation of the laws of individual member states of the European Union would be a complicated process and it would certainly not be a wise approach. While there undoubtedly exist many similarities connecting laws passed in individual member states of the European Union prior to the laws passed in the framework of the legislative process of the European Union, it would be difficult to achieve a summation which would not discriminate any of the member states, if any such summation would indeed be at all possible and desirable. It is therefore quite evident,

even on an intuitive level, that the reconciling of the laws of individual member states in the framework of integration within the European Union requires a broader perspective.

Any process of integration of such magnitude is inevitably susceptible to imperfection, especially when there is a certain level of intrinsic deficiency in all the individual elements which are a part of the integration. It is therefore extremely important to constantly take the origins of the creation of the European Union into consideration. One of the debatable and less relevant motivations behind the creation of what today is known as the European Union was the desire to prevent another war in Europe reaching or even surpassing the scale of the Second World War. Although this is also an interesting issue from an ethical point of view, let us concentrate on the more pertinent reason – increasing market accessibility. Although one should not diminish the importance of cultural and political cooperation in terms of the European Union (especially in view of the consequences of a possible full ratification of the Treaty of Lisbon), it is more than obvious that the endeavor was in essence driven by economic factors. If we take this notion even further, we arrive at the conclusion that the motivation behind the European Union of today was primordially one of enabling a greater degree of freedom, of facilitating economic cooperation and overcoming the tediousness of having to reconcile individual laws of the parties wishing to engage in business together. However, it would seem that somewhere along the path of providing greater freedom in general and simplifying economic cooperation in particular, the process took a wrong turn and backfired in the sense that what is happening now is actually getting in the way of the original intention of increasing market efficacy.

Incidentally, this is precisely why to ensure a sound relationship between law and ethics, it is absolutely essential to constantly have in mind the economic basis of the origin of the European Union. It would appear that this has been forgotten to some extent, for the process of reconciling the laws of individual member states of the European Union has been wavering between the necessity to endow each member state with a certain level of autonomy while simultaneously ensuring that individual member states do not digress disproportionately from the will of the majority in the framework of the European Union. This process of legal harmonization has become so engulfed by resolving the above-mentioned predicament of sovereignty that the original intention of providing greater freedom and facilitating economic cooperation has been almost forgotten.

Although the aim of the process of harmonization is to guarantee a certain level of equality in terms of the sound functioning of the market and just competition, it would appear that the concept of competition was misunderstood. To put it quite simply, allowing market access freely and without selective impediments is an entirely satisfactory precondition which ensures that all those involved have equal opportunities. However, the process of harmonization has unfortunately resulted in

excessive regulation which resulted in an overwhelming of the market with legal constraints which in turn actually discourages competition. This is a direct economic consequence of the insufficient role of ethics in the process of legislation.

Although it might not seem so at first, it is not so important whether directives or regulations are used as a means of granting ethics a more decisive role in the legislative process. The obvious advantage of directives is that they usually leave a certain amount of leeway as to the particular rules to be adopted as long as the desired result is achieved. Regulations on the other hand require absolutely flawless wording because they are self-executing and cannot be altered by implementing measures, which significantly decreases the danger of misinterpretation. However, the legal basis for the enactment of directives and regulations is article 249 of the Treaty establishing the European Community, which means that they only apply within the European Community pillar of the European Union. Furthermore, in view of the possibility that the Treaty of Lisbon will be fully ratified, there might be a problem with the cancellation of the pillar system. This only supports the argument that ethics as an underlying principle in legal harmonization is more valuable than the approach of meticulously defining every thinkable aspect of a particular legal area. Take for instance the recent problems related to corporate governance in banking[2] and the United States housing bubble connected to foreclosures which underpinned the subprime mortgage crisis. The automatic reaction in both the United States and Europe was to emphasize the necessity to further tighten legal regulation of the market to ensure that similar problems do not repeat themselves. It is obvious that in such specific matters a sufficient degree of precision is unavoidable and indeed advisable. However, it is clear that all complications in such convoluted matters cannot be fully accounted for unless a more general approach is also applied. The ultimate aim should be to find the right balance between ethical prerequisites and detailed descriptions of how to achieve them. It is indeed much easier to define such aspects of business as marketing and advertisement in general terms, but ethics should be considered more closely even in such intricate matters as financial services. “Hyping” stocks is a good example of the synthesis of ethics and law. Not only is “hyping” unethical, but it is also illegal. The general ethical principle behind this is quite simply that “hyping” constitutes unfair behavior, but it requires a fairly detailed definition of what actually constitutes this unfair behavior.

Conclusion

[2] Société Générale in Europe most recently.

The main aim of this paper was to point out the unsatisfactory role of ethics in the framework of the European Union. It is obvious that some areas of law require meticulous definition, but even in such cases, it is necessary to constantly have in mind that the ultimate aim of a law is to ensure reciprocal ethical behavior. The problem of the European Union seems to be that this concept has been forgotten in the process of excessively detailed legislation and redundant harmonization. The premise of ensuring equal opportunities and conditions on the market for all members of the European Union is undoubtedly correct. However, it is clear that the aim of law cannot be to fully describe and regulate every aspect of human interaction, but rather ensure a certain minimum of justice – to ensure a certain level of ethical standards if you will. To reconcile this notion across several sovereign states, harmonization is certainly a plausible approach. However, it is important to opt for the appropriate method of harmonization while taking into consideration the scale of integration and the underlying aim of a market free of unnecessary constraints.

Each market and the laws governing it would have to be analyzed in great detail in order to pinpoint the imperfections resulting from the insufficient role of ethics, but the ambition of this paper was simply to draw attention to the existence of the problem of the inadequate role of ethics in the legislative process of the European Union and the consequential excessive restrictions and counterproductive regulations.

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EXTERNAL TRADE RELATIONS OF THE EC AND ITS MEMBER STATES: ADMISSIBLE GENERAL EXCEPTIONS

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Key words

External trade, exclusive competence, restrictive measures, international trade, GATT

Abstract

This article reviews the legal regulation of international trade in the Community law. The problem is that competences of the EC in this area are mostly exclusive which excludes Member states. The question which is whether a Member states may legally adopt a protective measure in order to hinder imports of goods from third states if they have potential to harm some important interests of respective Member state like protection of public morality, public policy or public security, etc. The answer is that there is such possibility notwithstanding the exclusivity of competences of the EC in the sphere of common commercial policy.

1. Aim of the Article

The aim of this article is to review the legal regulation of international trade in the Community law and to give answers on following questions:

1. to what extent were Member states replaced by the EC in the sphere of external trade relations?
2. do Member states have a right to adopt protective measures against potentially harmful imports from third states also in the sphere of international trade where the competences of the EC are exclusive?
3. if the answer on the previous question is positive – which reasons may justify such restrictive measures – are they similar or even same as those which could be applied in case of discrepancies in internal trade based on Art. 30 of the EC Treaty?

2. Introduction

From the perspective of a Member state of the EC/EU trade relations can be classified as:

1. trade within the state;

2. trade within the EC/EU - with other Member states of the EC/EU;
3. trade with third states - non Member states of the EC/EU.

Only the trade within the EC/EU and with third states does have an international character. However, as the EC/EU established the single market, these trade relations must be examined separately. The current situation is such that single market in fact resembles a national market. For these reasons the trade with third states will be hereinafter referred to as the *external trade* whereas the first category (trade within the EC/EU) will be referred to as the *internal trade*. This differentiation is necessary as the legal regulation of international trade is contained in a number of provisions and acts of the EC/EU law and is separate for the external on one side and internal trade on the other side. Some of the most important provisions of the EC Treaty regulating the internal and external trade are listed in a table below.

EC/EU Legal Regulation of Int. Trade	
Internal trade	**External trade**
Art. 23 TEC: ES = Customs union ➔ ban on customs **Art. 25 TEC: prohibition of customs** **Art. 28 TEC: prohibition of quotas** **Art. 39 TEC: free movement of workers** **Art. 47 TEC: freedom of establishment** **Art. 49 TEC: free movement of services** **Art. 56 TEC: free movement of capital** **Art. 90 TEC: ban on tax discrimination**	Art. 23 TEC: ES = CU ➔ common customs tariff Art. 131 TEC: aims of the common commercial policy (CCP) Art. 132 TEC: harmonization of export subsidies Art. 133 TEC: Principles of the CCP Competences in the field of CCP Negotiation of the intl. treaties in the field of CCP

Table 1: Overview of the EC/EU Legal Regulation of Int. Trade

These provisions create just a general framework regulation for international trade. They are further specified and implemented by a number of regulations, directives and European court of Justice's case law as well. Important trade rules are also contained in international treaties, in particular those concluded within the WTO.

As it has been mentioned already, I am not going to further deal with the legal regulation of the internal trade in the EC/EU law in this article. It will be focused only on the legal regulation of the external trade.

3. Relationship between the EC and its Member states in the field of external trade

The common commercial policy is based on **uniform principles** from on Art. 131 TEC. It is important to note, that the uniformity is more a question of fact than law as the existence of the customs union is technically possible only if the approach itself is uniform. The demand of uniformity also implies that it is the EC that can adopt measures regarding in particular changes in tariff rates, the conclusion of tariff and trade agreements, the export policy and measures to protect trade such as those to be taken in case of dumping or subsidies. As this enumeration contained in Art. 131 TEC is only enumerative, the

European court of Justice held, that the EC is empowered to govern the common commercial policy from a wide point of view and not only with having regard to the administration of precise systems such as customs and quantitative restrictions. According to the European Court of Justice any restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.[1]

The current situation is such that the EC has replaced Member states in the field of common commercial policy. In many areas related to this policy it is the exclusive participant of the international trade. However, Member states have not fully lost their position in the field of international trade. They still can exercise some limited competence and fulfill some important functions.[2] Reasons are both legal and factual.

One of the most important factual reasons is that the EC does not have developed advanced repressive administration which would be responsible for everyday enforcement of the EC law in practice. The EC is not therefore nowadays able to independently and without the cooperation with Member states' administrations to ensure the application of the EC law against individuals and give sanctions in case these rules are breached. This has to be mostly administered by Member states and their administration. Member states and their administration are also responsible for administering of export/import duties and relevant licenses. In these case the administrations of Member states act within the sphere of competences of the EC, however they still remain a part national administrations. There is no such "federal" community structure.

It is also important to mention that not all issues of external trade fall within the scope of the common commercial policy. Some issues were not submitted to the EC and still remain at least partly within the competences of the Member states. We will discuss this problem later.

The fact that Member states have been replaced by the EC in the field of common commercial policy has some important consequences. International trade is regulated by a number of international trade agreements. Moreover, most of them are negotiated in international organizations. This created a lot of questions and fortunately, most have already been answered. Therefore, at this moment it is the EC which can within the scope of common commercial policy negotiate international agreements instead of

[1] See Sec. 45 of the Opinion 1/78.
[2] See Rozehnalová, N., Týč, V. Vnější obchodní vztahy Evropské unie. 1. vyd. Brno : Masarykova univerzita, 2006. 207 s. (Spisy PrF MU v Brně. Řada teoretická ; 299). p. 66, ISBN 8021040734.

Member states.[3] And of course it has also the competence to conclude them.[4] The EC can also be a member of international trade organization.[5]

4. The question of the exclusivity of the EC's competence

The question of a character of the EC's competence has been solved by the European court of Justice a number of times. One of the first rulings of the ECJ was its opinion 1/78 where the ECJ broadly interpreted the scope competence of the EC in the area of common commercial policy and also argued in favor of a mixed agreement format for negotiation and conclusion in cases where an agreement covers also some issues which do not fall within the scope of the common commercial policy.[6] The ECJ also held that where an international agreement forming part of the common commercial policy involves certain financial aspects, the powers of the EC to negotiate and conclude such an agreement may depend on the system of financing. If the financial burdens fall within the EC budget the powers will belong to the community; if the burdens are charged directly to the budgets of the member states their participation, together with the EC, will be necessary.[7]

The scope of rather vague provisions on the common commercial policy in the EC Treaty was also clarified by case law of the European court of Justice. Sara Dillon emphasizes in particular decision known as "ERTA" where the ECJ held that the EC enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the EC Treaty.[8] This authority arises not only from an express conferment by the treaty, but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the community institutions. In particular, each time the community, with a view to implementing a common policy envisaged by the EC Treaty, adopts provisions laying down common rules, whatever form they may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope. According to the Court, **the system of internal community measures may not be separated from that of external relations.**[9]

[3] It is necessary to note that according to the Art. 281 the EC has legal personality.
[4] See Art. 300 TEC and Art. 133 TEC.
[5] For further Info on this topic see .. Hendry D., Macleod I., Hyett Stephen. The External Relations of the European Communities. Clarendon Press, Oxford, 1996. p. 169, ISBN-0198259301.
[6] See International Trade and Economic Law and the European Union page 328.
[7] See Opinion 1/78.
[8] See Dillon, S. International Trade and Economic Law and The European Union, Hart Publishing, 2002. p. 329, ISBN: 1-84113-113-X.
[9] See judgment of the Court of 31 March 1971. Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport. Case 22-70.

Division of powers between the EC and the Member States were further examined by the European Court of justice in its opinion 1/94. This opinion was to give an answer on question whether the European Community has the competence to conclude all parts of the Agreement establishing the WTO and agreements annexed to this agreement.

In this opinion the Court has held differently from its opinion 1/76 that since the World Trade Organization is an international organization which has only an operating budget and not a financial policy instrument. The fact that the Member States will bear some of its expenses cannot of itself justify the participation of the Member States in the conclusion of the agreement.[10]

The Court of Justice also held, that following agreements can be can be concluded by the EC on the basis of Article 133 of the Treaty alone without the participation of Member states:

- the General Agreement on Tariffs and Trade (GATT)
- the Agreement on Agriculture
- the Agreement on the Application of Sanitary and Phytosanitary Measures
- the Agreement on Technical Barriers to Trade

In case of the General Agreement on Trade in Services (GATS) the exclusive competence of the EC was given only in the sphere of cross-frontier supplies not involving any movement of persons. On the other hand, according to the European Court of Justice the other modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons' are not covered by the common commercial policy.

In regard to intellectual property, the harmonization achieved within the Community in certain areas covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is either partial or non-existent. With regard to the measures to be adopted to secure the effective protection of intellectual property rights, the Community is competent to harmonize national rules only on those matters which directly affect the establishment or functioning of the common market. Therefore it follows that the EC and its Member States are jointly competent to conclude TRIPs.[11]

5. The scope of competence after Treaties of Amsterdam and Nice

The importance of the opinion 1/94 is however now days lessened as the EC Treaty provisions on common commercial policy have changed significantly since 1994. In regards to services, according to a

[10] See Sec. V. of the summary of the opinion 1/94.
[11] See Opinion 1/94.

new wording of the EC Treaty, the ES has now competence to negotiate and conclude agreements in the fields of trade in services and the commercial aspects of intellectual property.[12] This power is, however not absolute and does not cover all services at all. Agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, are excluded and fall within the shared competence of the EC and its Member States.[13] On the other hand, the scope of competences of the EC may be extended by the Council which acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the scope of exclusive competences to international negotiations and agreements on intellectual property.[14] To my best knowledge, I am not aware of existence of such a decision.

6. Regulation of the external trade

All that has been said so far implies that in the field of external trade, Members states have lost their position in favor of the EC. It is the EC who is in responsible for negotiation and conclusion of international agreements which fall within the scope of the common commercial policy. Such agreements are then one of the sources of the Community law binding on states and under certain conditions also on individuals.[15] Please note that the Member states still may conclude international agreements even within the field of common commercial policy as long as such agreements comply with the EC law and other relevant international agreements.[16]

At this moment, the external trade is governed by both international agreements (concluded by the EC) and by a set of autonomous regulations adopted by the EC.[17] One of our initial questions was whether there exists a possibility to protect certain interests and value against potentially harmful imports of goods from third states. As the autonomous measures of the EC must be in compliance with international treaties concluded by the EC, we will examine the later first.

General framework of the international trade in goods is given by the General Agreement on Tariffs and Trade (GATT). Article XX of GATT allows the EC to act on trade in order to protect certain important

[12] See Art. 133 Sec. 5.
[13] See Art. 133 Sec. 6.
[14] See Art. 133 Sec. 7.
[15] As effects of international will not be examined in this article, for more info on this topic see for example Herboczková, J. GATT/WTO and the European Court of Justice. In *Days of Public Law*. 2007. vyd. Brno : Masarykova univerzita Právnická fakulta, 2007. pp.. 986-997, ISBN 978-80-210-4430-2 or Valdhans, J., Myšáková, P. Přímý účinek práva WTO v ES z pohledu ESD. In Efektivnost právních předpisů pro zvýšení konkurenceschopnosti v ekonomice. Ostrava : Vysoká škola báňská - Technická univerzita Ostrava, 2007. od s. 174-181, 182 s. ISBN 978-80-248-1553-4
[16] See Art. 133 Sec. 5.
[17] See Rozehnalová, N., Týč, V. Vnější obchodní vztahy Evropské unie. 1. vyd. Brno : Masarykova univerzita, 2006. 207 s. (Spisy PrF MU v Brně. Řada teoretická ; 299). pp. 90 - 170, ISBN 8021040734 or Rozehnalová, N. Právo mezinárodního obchodu. Vyd. 2., aktualiz. a dopl. Praha : ASPI, 2006. 555 s. učebnice vysokých škol. p. 132 et sequential, ISBN 807357196X.

values, provided it does not discriminate foreign goods or use this as disguised protectionism. In addition, there are two specific WTO agreements dealing with food safety and animal and plant health and safety and with product standards in general.[18] Both try to identify how to meet the need to apply standards and at the same time avoid protectionism in disguise.[19]

According to the general exceptions listed in Article XX of GATT it is possible to adopt and/or enforce measures in particular to:

1. protect public morals;
2. protect human, animal or plant life or health;
3. measures relating to the importations or exportations of gold or silver;
4. necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
5. relating to the products of prison labor;
6. measures imposed for the protection of national treasures of artistic, historic or archaeological value; ...[20]

As the EC has only a limited capacity to eventually enforce and protect above mentioned interests, it will be the Member States that would have to actually take such measures. Please note, that their authority is most probably limited in this area by an autonomous measures of the EC law. In other words, any protective measure against the potentially dangerous import from a third country must be in compliance not only with GATT but with the secondary legislation as well.

General common rules on imports to the EC Member states are given by the Council regulation (EC) No 3285/94 on the common rules for imports and repealing Regulation (EC) No 518/94 (Hereinafter referred to as the "Regulation"). From the point of view of this article it is important the Article 24 of the Regulation which states that this Regulation shall not preclude the adoption or application by Member States of prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. This provision obviously reflects the Article XX of GATT.

[18] the Sanitary and Phytosanitary Measures Agreement and the Technical Barriers to Trade Agreement
[19] Standards and safety http://www.wto.org
20 For further Info on general exceptions under Art. XX of GATT see Van Houte H. The Law of International Trade. 2nd edition, London: Sweet & Maxwell. chapter 3.43, ISBN 0421 764 805.

It is not surprising that the wording of Article 24 of the Regulation is similar to the Article 30 of the EC Treaty which states a general exception from the prohibition of quantitative restrictions on imports and all measures having equivalent effect between Member States (in other words allows protective measures in internal trade). It would not be really logical, if the more integrated internal trade could be restricted under stricter conditions than less integrated external trade.

7. Examples of protective measures which can be adopted by Member states

A French Decree No. 96-1133 concerning asbestos and products containing asbestos (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) (hereinafter referred to as "the Decree"), which entered into force on 1 January 1997 set forth prohibitions on asbestos and on products containing asbestos fibres, followed by certain limited and temporary exceptions from those prohibitions. By these prohibitions (set by a national law), also imports from third states were affected. Canada claimed that this Decree is not compatible with the obligations arising from membership of France, or more precisely of the EC in the WTO. However, this French legislation banning asbestos was held to be in conformity with international trade law. The Appellate Body found that respective provisions of GATT 1994 were not violated, as among others, the French measures can be considered as measures necessary for the protection of human health within the meaning of Article XX(b) GATT 1994.[21]

Another example of a legal protective measure affecting imports from third states set by a national legislation can be found in the Czech Act No. 191/1999 Coll. on measures concerning export, import and re-export of goods which violate some intellectual property rights. This legislation concerning the protection of intellectual property rights which is complementary to the regulation 1383/2003, concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, covers a wider area of application than does the abovementioned EC Regulation. Under this act it is possible to detain or confiscate goods which infringe intellectual property rights. Also the Czech Act No. 634/1992 Coll. on protection of a consumer allows the Czech Customs Administration act against the import of illegal goods which is not under customs surveillance. All these measures may hinder the international trade and even though not adopted by the EC, yet they are compatible not only with EC law, but also with the WTO law.

[21] See WTO Environmental and related cases http://www.eel.nl or see Report of the Appellate Body - EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS, No. WT/DS135/AB/R

8. Conclusion

The European Community has replaced Member states to a great extent within the field of regulation of international trade. The legal basis of this competence in external relations can be found in several provisions of the EC Treaty. The most important are those contained in Chapter 2 labeled as Prohibition of quantitative restrictions between Member states.

The character of competence of the European Community in the sphere of international trade must be exclusive. Otherwise the system wouldn't work. This implies that it is the European Community and not Member states that is in charge in case of negotiation and conclusion of international trade agreements. The European Community has the power to act, speak and vote in international trade organizations.

The question of the division of powers between the European Community and Member states was of a high importance. As the EC Treaty was rather vague in this respect, it was the European Court of Justice that contributed to the solution of this problem. In its several opinions[22] the European Court of Justice helped to clarify this issue. However, the significance of these opinions is nowadays lessened as the Treaties of Amsterdam and Nice the provisions of the EC Treaty amended respective provisions on common commercial policy.

At this moment the European Community has the exclusive power to regulate import and export of goods and services (however some services are explicitly excluded and fall within the shared competence of the European Community and its Member States – namely agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services). The exclusive competence of the European Community covers also issues of the commercial aspects of intellectual property.

The above mentioned text implies that a vast amount of international trade agreements is negotiated and concluded by the European Community instead of Member states (where the competence is exclusive). Such international trade agreements are one of the sources of the Community law and their effects in the sphere of Member states is also given by the Community law. Member states, however, still have the right to maintain and conclude international trade agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

[22] According to the Art. 300 Sec. 6 6. the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

The question is whether Member states may independently on the European Community adopt any restrictive measures in order to protect some important values (eg. protection of human, animal or plant life or health, protection of public moral etc.).

The international trade law (for example Art. XX of GATT) generally allows such restrictions on import and/or exports of goods subject to condition that they are proportional to the aim which they shall pursue. However, the question still remains, because as the party to the GATT is the European Community and not Member states. The division of powers between the European Community and Member states may imply that since most of these issues fall within the area of exclusive competence of the European Community, any action of Member states is precluded. This is not, however, the truth.

Notwithstanding the exclusive character of the European Community competence in the sphere of international trade with goods, most of services and also in issues related to commercial aspects of intellectual property, Member states still may protect their interests. They are allowed to adopt restrictive measures which are justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.

According to my opinion such restrictive measures may only be adopted by Member states in the form of prohibitions on imports or other quantitative restrictions or surveillance measures. On the other hand, customs duties on imports and charges having equivalent effect which would be adopted solely by Member states are prohibited absolutely and cannot be justified under any condition.[23]

A different approach would be illogical and against the interests of Member states since even the more integrated internal trade within the European Community may be hindered under same conditions.

[23] For same opinion see Říhová, K. *Nástroje obchodní politiky ES týkající se ochranných opatření - 2. část* [online]. E-polis.cz, 22. duben 2006. [cit. 1. June 2008]. Available at: <http://www.e-polis.cz/mezinarodni-pravo/141-nastroje-obchodni-politiky-es-tykajici-se-ochrannych-opatreni-2-cast.html>. ISSN 1801-1438.

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THE GREEN PAPER ON THE REVISION OF CONSUMER ACQUIS: SOME OBSERVATIONS

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Abstrakt

Tento příspěvek se věnuje rozboru návrhů způsobu budoucí regulace ochrany spotřebitele v právu ES/EU, které představila Evropská komise v Zelené knize o přezkumu spotřebitelského acquis 8. 2. 2007. V centru zkoumání stojí především návrh Komise vytvořit tzv. horizontální nástroj, tj. jeden předpis představující základ spotřebitelského acquis. V příspěvku jsou kriticky rozebírány jednotlivé varianty podoby a působnosti nástroje a jsou navržena možná řešení.

Klíčová slova

Zelená kniha – spotřebitelské acquis – harmonizace – harmonizační nástroj – vnitřní trh

Abstract

This paper examines Commission proposals of means of future regulation of consumer protection in the law of the EC/EU presented on 8. 2. 2007 in the Green Paper on the Review of the Consumer Acquis. The main concern is focused on Commission proposal to create a so-called horizontal instrument – a single legal act which would form a basis of consumer acquis. This paper critically examines individual alternatives of the form and scope of applicability of the instrument and tries to propose possible solutions.

Keywords

Green Paper – consumer acquis – harmonization – horizontal instrument

Introduction

The need of revision of number of directives in the field of consumer protection in the European Community (so-called consumer acquis) has been known both to professionals and laymen already for

many years. The European Commission itself was calling for a change practically from the beginning of the 21st century when it became obvious that the rise of current number of member states of the European Community (EC) was leading to a principal change of the attitude towards not only consumer protection, but also towards the concept of the single (internal) market as a whole. In connection with the enlargement the Commission presented so-called *Strategy of the Internal Market – Priorities 2003 – 2006*[1], a document in which it presented its idea of a reform of different aspects of the internal market in such a way, that the free movement of the four freedoms would be fully functioning by 1. 5. 2004 and the EC would approach the goals set in the Lisbon Strategy. Subsequently, on 8. 2. 2007 the Commission presented *The Green Paper on the Revision of Consumer Acquis* both to institutions of the EC and to public. In the Green Paper, the Commission summarised existing state of consumer acquis (or better to say of the eight directives regulating consumer protection in the EC)[2], especially the absence of definition of elementary terms and principles of consumer acquis, and suggested three alternatives of future development of legal regulation of consumer protection in the EC law – vertical approach lying in the amendment of individual directives, mixed approach lying in the creation of a so-called horizontal instrument functioning as a general basis of harmonization for all revised directives and preservation of the existing state. Besides that – or independently on suggested approaches – the Commission warned that current state of harmonization in the field of consumer protection – based on minimum harmonization[3] - is not satisfactory, and that it is necessary to set the level of harmonization. Therefore, the Commission suggested three alternative solutions - revision of the acquis together with a complete harmonization, minimum harmonization connected with application of mutual recognition principle and minimum harmonization connected with application of country of origin principle. The aim of this paper is to analyze individual approaches towards the revision of consumer acquis and suggested alternatives of solution of minimum harmonization problem.

1. Alternatives of future regulation of consumer acquis

1. 1 Vertical approach

[1] COM (2003) 238 final, Brussels, 7. 5. 2003.

[2] These include Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises**,** Council Directive 90/314/EEC on package travel, package holidays and package tours, Council Directive 93/13/EEC on unfair terms in consumer contracts, Directive 94/47/EC of the European Parliament and the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts, Directive 98/6/EC of the European Parliament and the Council on consumer protection in the indication of the prices of products offered to the consumer, Directive 98/27/EC of the European Parliament and Council on injunctions for the protection of consumer interests, Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees. On the other hand, Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market is not supposed to be subject to the revision.

[3] Minimum harmonization is based on the idea that the directive sets only a minimum standard of protection while at the same time the member states are free to adopt a higher level of protection in case they consider it appropriate.

As indicated above, vertical approach is based on amendments of individual directives so that they comply with current state of the market and technological progress. In the Green Paper, the Commission supposes an individual revision of each directive. This approach ensures a quality revision of the directives. However, as warns the Commission itself – on the other hand application of this approach in practice would present breach of the principle of process economics. Another weak point of this approach lies in its impact on the practice – amendment of the directives one after another would enable their relative flexibility as the directives would be able to react to partial changes on the market and technological progress quite quickly, but at the same time this „individual approach" to the revision of the acquis would constitute a never-ending work of the EC/EU institutions in the legislative process and the improvement of the current situation would not be really substantial. Revision of the directives would be reached, but the substantial problem – a non-uniform level of consumer protection across the member states of the EC/EU – would remain as the member states themselves would retain the right to decide how much protection they grant to the consumer and in which way they implement the directive.

1. 2 Mixed approach

Content aspects of the horizontal instrument

At first sight, mixed approach offers the most suitable solution of current situation. However, also this approach is not problem-free. In case this approach to the revision of consumer acquis is chosen, a so-called horizontal instrument would be created. When giving reasons for creation of this instrument, the Commission states that one of the main problems of current directives on consumer protection is an ambiguous definition of crucial terms such as „consumer" and „professional"[4] in individual directives. Therefore, the Commission supposes that the directive on unfair terms[5] could provide basis for the instrument due to its „horizontal character"; second part of the instrument could be dedicated to purchase contracts as the most common types of consumer contracts. At the same time, the instrument would „remove" basic institutes of consumer law – such as the length of cooling-off periods or the possibility to exercise the right of withdrawal – from the individual directives.[6]

Let us try to think about the very idea of creating the horizontal instrument. We can surely agree with the Commission that currently there is no unambiguous definition of terms „consumer" or „professional" although these are crucial for regulation of consumer protection; actually, even in Czech

[4] I. e. entrepreneur or merchant on the other side of the contractual relation.
[5] Directive 93/13/EEC.
[6] P. 8 of the Green Paper.

law we can encounter unambiguous use of these terms.[7] It is therefore necessary to create one definition applicable to all eight revised directives. However, the question is whether the method suggested by the Commission – i. e. „incorporation" of above mentioned institutes from the directives – is the best one. On the one hand, the Commission states that *common problems might ... be systematically regulated by the horizontal instrument*[8]; on the other hand, if there is no real systematic processing of the instrument, this „incorporation" will not constitute any great change in comparison with current state. Another question arising here is how the directives would appear after having been „reduced" – it is quite clear that it would be necessary to rewrite their text to avoid practical problems of the member states while implementing the directives. The solution I suggest is to „remove" issues common to all directives (i. g. already mentioned right of withdrawal) from the directives and at the same time to revise them in such a way to make applicable to all directives. The alternative suggesting to regulate in the horizontal instrument e. g. the sample institute of withdrawal only for directives on consumer protection in respect of distance contracts or on unfair terms in consumer contracts, but not for directives on package travel, package holidays and package tours or on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis which would retain their own withdrawal regulation. I am aware that prospective critics might oppose this method of incorporation of basic institutes into the harmonization instrument, arguing that it resembles unification more than harmonization; on the other hand, such regulation would undoubtedly increase legal certainty of member states during implementation and – subsequently in the praxis – also of consumers and „professionals."

Another aspect of suggested method is incorporation of purchase contracts into the instrument. The Commission states in the Green Paper that – bearing in mind that the most common and widespread type of consumer contracts is the purchase contract – directive on sale to consumers[9] would be included in the instrument. The Commission further maintains that – while consumer directives would be partially or completely repealed - such method of revision would contribute to decrease of number of consumer acquis.[10] We can agree with the Commission to that extent that after the incorporation of directives concerning purchase contracts the volume of consumer acquis shall decrease.

[7] Compare e. g. different definitions of „spotřebitel" (= consumer) in the provision of § 53 paragraph 3 of the Czech Civil Code and in the provision of § 2 paragraph 1 letter a) of Act. No. 634/1992 Collection of Laws as amended – on consumer protection.
[8] P. 8 of the Green Paper.
[9] The directive in question is directive 1999/44/EC. For more detailed Commission proposal see p. 8 – 9 of the Green Paper.
[10] P. 10 of the Green Paper.

However, the suggested method contains some difficulty. If we take the above mentioned structure of the horizontal instrument – with the first part containing general institutes - as a basis for our critics, we can hardly imagine the second part being specialized purely in purchase contracts and the concerned directives completely or partially repealed. It is not quite clear which criterion would be the main one for the choice of directives concerning purchase contracts. The directive to protect the consumer in respect of contracts negotiated away from business premises, for instance, applies both to purchase contracts, entered into under the terms anticipated in the contract, and to contracts on provision of services. In the given case – following the proposal of the Commission – would be part of the directive concerning exclusively purchase contracts repealed (or actually moved into the horizontal instrument), while the part concerning contracts on service provision would be preserved. Another questionable phenomenon which might be influenced by the intention of the Commission to include purchase contract in the instrument is so-called timesharing which represents a combination of several contract types and it can not be subsumed under purely one contract type. At the same time, it is beyond any doubt that timesharing contains characteristics of a purchase contract; actually, directive 94/47/EC e. g. in Slovak language version uses terms „kupujúci" and „kúpe práva", the same applies to e. g. English language version using terms „purchaser" a „purchase of a right", which means both „acquirer/acquisition" and „purchaser/purchase" in its narrower sense.[11] The method proposed by the Commission would on the one hand decrease the number of the directives; however, it would not make their implementation easier for the member states as the legal regulation would be split into several secondary rules.

In my opinion there are two prospective solutions – either to repeal all eight revised directives completely and form the horizontal instrument into one umbrella directive regulating all issues so far regulated by individual directives (while such directive would contain apart from a general part common for all parts of legal regulations also specialised chapters due to individual directives so that it would gain structure of a typical national legal act), or to create the instrument only as a general basis for all eight directives (i. e. to preserve only the first part of the instrument proposed by the Commission) and rest of the issues leave in the directives. It is nevertheless clear that the second alternative would require also a vertical action to revise each directive individually if necessary.[12] It is therefore questionable whether such attitude would provide a substantial improvement in the practice when - in comparison to current state - the combination of a horizontal instrument with general basis

[11] However, one can not overestimate the argumentation based on above mentioned language versions. In the Czech language version, for instance, the directive uses terms „nabyvatel" and „nabytí práva", i. e. „acquirer/acquisition of the right." Therefore, even when different language versions of EC/EU regulations are supposed to be identical, practice shows significant differences.

[12] Also the Commission notes this – compare p. 9 of the Green Paper.

and a need of vertical actions would perhaps constitute a bigger burden both for the EC/EU and the member states.

Scope of the instrument

Let us think now about the scope of the instrument. The Commissioned proposed three prospective alternatives in the submitted Green Paper – the horizontal instrument could apply both to national and cross-border transactions, to purely cross-border transactions or to all distance contracts (no matter whether national or cross-border).

The idea a universal applicability of the instrument to all consumer transactions carried out within one or more of the eight revised directives seems appears to be the best one. However, the Commission itself warns that even in such case there will remain some areas (e. g. financial services or insurance sector) which will keep their specific rules without applicability of the instrument. This opinion is quite true; however, it is questionable whether the existence of those „independent" areas really constitutes an obstacle for an effective consumer protection within the EC/EU. One can not disagree that in every situation – no matter what the level of harmonization is – there will maintain areas not regulated by the consumer acquis. It seems therefore perhaps too ambitious to try to harmonize all acts somehow concerning the consumer – even laymen easily understand that such goal is unreachable. If the Commission is able to accept this idea, it is possible to consider the applicability of the instrument to all transactions (no matter whether national or cross-border) concluded in the framework of the eight directives constituting the revised acquis.

The proposal of the applicability of the instrument only to cross-border contracts is reasonable on the one hand, as the internal (single) market of the Communities is based exactly on the idea of a free movement of the four freedoms across the borders. However, one must ask whether such restriction would not cause deformation of the market – if the instrument grants more protection to consumers only in case of cross-border transactions, one can easily imagine the reluctance of the consumers to conclude riskier contracts (typically e. g. contracts negotiated away from business premises or timesharing contracts) in „his" state. With some amount of fantasy, one can imagine that - in case the instrument is applicable only to cross-border transactions – the volume of international trade would rise while the national market would become dependant on the external demand. I therefore believe that it is necessary to reject the idea of the applicability of the instrument only to cross-border contracts as inconvenient.

The proposal of universal applicability of the instrument to all distant contracts – no matter whether national or cross-border - seems interesting. If this alternative prevails, the problems with distinguishing between national and international (Community) market would be solved. At the same time, it is highly probable that legal certainty of all parties of consumer contractual relations would rise. However, such case would require a perfect and uniformly performed harmonization of the instrument in all member states so that consumer protection becomes really equal within the EC/EU. This, in my opinion, is impossible, and therefore the objection arises that such scope of applicability is suitable more for a regulation than for the horizontal instrument which is a means of harmonization. We can conclude here that the universal applicability of the instrument to all consumers´ transaction appears the most suitable – however, also the most difficult to realize.

1. 3 No legislative action (preservation of current state)

The last proposal was to preserve current state of the consumer acquis. It is clear that this alternative is neither clever nor desirable. As indicated in the introduction (and as the Commission itself emphasized in the first parts of the Green Paper), the current situation in the area of consumer protection based on the principle of minimum harmonization causes discriminatory and unbalanced consequences, when consumers and professionals have no certainty they are going to be treated equally across the member states. Therefore we must conclude that preservation of the current state would not only represent no improvement of a current state, but it would also represent a shift back.

2 Proposed levels of harmonization

2.1 Full harmonization thanks to revision of the acquis

According to the first proposal of the Commission, the acquis should be completely revised which would lead to full harmonization of consumer protection rules. As a consequence, member states would not be allowed to apply stricter rules in the area of consumer protection than the ones set of Community level. Such method leaves no space for manipulations of the member states, which ensures same level of consumer protection and the same requirements for professionals across the EC/EU. However, one might – quite correct – argue that full harmonization is just one step from unification which is according to the EC Treaty not allowed in the sphere of consumer protection. The main argument of full harmonization as such is, however, that it is contrary to current wording of Art. 153 par. 5 of the EC Treaty which enables member states to adopt stricter measures than the ones adopted by the

Community in case such measures are in accordance with the Treaty and notified to the Commission. We can see that full harmonization requires some amendments of the Treaty, on the other hand its impact on the practice seems – after some inconveniences – positive as it promises to remove discrimination and legal uncertainty of consumers and professionals.

2.2 Minimum harmonization and mutual recognition principle

Application of the principle of mutual recognition together with maintenance of minimum harmonization enables the member states to keep their own (national) higher level of protection (as compared to Community level). At the same time it requires that member states do not create unreasonable obstacles for entrepreneurs (professionals) from other member states when providing goods or services to consumers on their territory. Such level of harmonization is thus quite advantageous for those member states which wish to maintain high level of consumer protection; however, they are not allowed to impede foreign professionals to enter into contracts with national consumers without particular reason if the former ones fulfil requirements of the state they are established in. Some more critics shall follow in the following section of this paper.

2.3 Minimum harmonization and country of origin principle

Country of original principle combined with maintenance of minimum harmonization suppose – again – possibility for the member states to keep higher level of national consumer protection. At the same time professionals would be required to observe national rules of the country they are established in which the "host" member state would have to respect. As far as minimum harmonization combined either with mutual recognition principle or country of origin principle is concerned, its first weak point is the maintenance of minimum harmonization itself. As indicated above, minimum harmonization does not seem a suitable method in the field of consumer protection, as it causes non-equal position of consumers and professionals across the EC/EU. Furthermore, the conception of both mutual recognition and country of origin is in my opinion not applicable to consumer matters. We can hardly expect member states to refrain from creating obstacles to consumers or – especially – professionals from other member states to the access to their national markets. This applies especially to principle of country of origin, the big issue being here also the reluctance of more protectionist member states to accept professionals from other member states with less strict rules (stemming from the minimum standard set by Community rules). Therefore, the conception of full harmonization together with revision of the acquis appears to be the most suitable one, although one might argue that full

harmonization hardly leaves any space for the activity of member states and – if adopted – requires amendment of the EC Treaty.

Conclusion

I tried to present both strong and weak points of individual methods of solution of current situation. We can conclude that consumer acquis in its current version does not meet requirements of consumers and professionals entering into mutual relations on the common market. We have seen that vertical action, i. e. revision of individual directives, does not appear as a suitable solution. Neither does maintenance of current state – minimum harmonization and zero revision. Therefore I recommend choice of the so-called mixed approach and creation of horizontal instrument which shall form general definitions and institutes for all eight revised directives, which would at the same time included into special part of the instrument. The instrument should be universally applicable both for national and cross-border consumer transactions so that same level of protection in the EC/EU is ensured. As far as suitable level of harmonization is concerned, we have seen that minimum harmonization combined either with mutual recognition principle or country of origin principle do not deal with the weakest point of current state of consumer protection in Community law – minimum harmonization and reluctance of the member states to allow professionals from less strict member states to enter their markets. Therefore, full harmonization seems the best choice even when it requires amendment of the EC Treaty and leaves little space for the activity of the member states.

Literature, legal regulations:

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[2] Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises

[3] Council Directive 90/314/EEC on package travel, package holidays and package tours

[4] Council Directive 93/13/EEC on unfair terms in consumer contracts

[5] Directive 94/47/EC of the European Parliament and the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

[6] Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts

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PROTECTION OF MINORITIES BY THEIR KIN-STATES IN THE EU – THE CASE OF HUNGARY

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Abstract

The paper studies the case of the protection of the minority-rights by their kin-states. This issue can be discussed from the viewpoint of the non-discrimination principle of the EU, but the new Schengen borders and the unified visa-regime are also in question. The paper details the report of the Venice commission on the issue and the political debates in Hungary too. It concludes that the national means of minority protection are rather limited, the Hungarian government diverged from the status law (adopted in 2001) in order to comply with the EU-expectations just before the EU accession.

Key words

Minority rights, non-discrimination, Schengen, Venice commission, Hungarian minorities, status law, kin-state

1. Adopting and main provisions of the Act on the Hungarians living in the Neighbouring Countries

The amendment of the Hungarian Constitution in 1989, at the system change, included in Article 6 par. (3): *"The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary."* The question is still open among the Hungarian constitutional lawyers, whether this „responsibility clause" has a normative force or it is only an aim of the state.[1]

The Parliament of Hungary, carrying out this provision of the Constitution and also responding to the inquiries of the Hungarian organizations from the neighbouring countries – adopted the Act on

[1] See: *Commentary of the Constitution.* [*Az Alkotmány magyarázata.*] (Ed.: Balogh, Zs. et al.) Budapest, 2003. KjK., p. 158-159.

„Hungarians Living in Neighbouring Countries" only in 2001, at the time of rightist Fidesz-cabinet.[2] At the voting in the parliament on 19 June 2001, from the 386 MP's 309 voted 'yes', 17 voted 'no' and there were 8 abstentions. We can consider it as consent of 5 parties from 6 in the Parliament.[3]

This law, scheduled to step into force on 1 January 2002, provided several benefits and assistance basically for the "persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine" (Article 1). In some aspects, the act shall be applied to spouses and children of the mentioned persons.

Person falling within the scope of this Act were entitled to benefits and assistance on the territory of Hungary, as well as in the country of their residence (Article 2).

The Act provided mainly the following benefits and assistance:

A) Culture, science – the status law provided access and rights (identical to those of Hungarian citizens) to use Hungarian libraries and other collections: the right to use public cultural institutions and the opportunity to use their services they offer; access to cultural goods for the public and for research, access to monuments of historic value and the related documentation.

B) Social Security Provisions and Health Care – even who were not obliged to pay health insurance and pension contributions had the right to apply for reimbursement of the costs of self-pay health care services in advance. Applications shall be submitted to the public benefit organization established for this purpose.

C) Travel benefits – in Hungary on scheduled internal lines of public transport (on railways, to 2nd class fares). Unlimited number of journey provided free of charge for children up to 6, and persons over 65 years of age. A 90% travel discount was provided for the persons falling within the scope of the Act four times a year, and also for a group of at least 10 persons under 18 years of age and two accompanying adults once a year.

D) Education, student benefits, training for teachers – pursuing studies in the higher education institutions of the Republic of Hungary in the framework of state-financed training in a fixed number to be determined annually by the Minister of Education. Those who participate in programmes not financed by the state might apply for the reimbursement of their costs of stay and education in Hungary

[2] Hereafter sometimes I refer to this Act as „Status Law" as the act was called usually by the Hungarian public opinion, and sometimes by the researchers too, see: *The Hungarian Status Law: Nation Building and/or Minority Protection.* Edited by Zoltán Kántor et al., 2004, Slavic Research Center, Hokkaido University. Available at: http://src-home.slav.hokudai.ac.jp/coe21/publish/no4_ses/contents.html

[3] From the opposition, only the Alliance of Free Democrats (SZDSZ) refused the Act.

to the mentioned public benefit organization established for this end. Registered students of a public institution in a neighbouring country who were pursuing their studies in Hungarian language, or students of any higher education institution who are subject to the status law were entitled to benefits available to Hungarian students with relevant student identification documents. The law also provided training, benefits and assistance for Hungarian teachers falling within the scope of the Act.

The Act also aimed the preservation of the mother tongue, culture and national identity of Hungarians by supporting the establishment, organization and operation of affiliated Departments of accredited Hungarian higher education institutions in neighbouring countries.

The Act established two types of assistance available in the native country for education. First, for families who raised at least two children receiving education in Hungarian language. Secondly, persons falling within the scope of the Act might apply for assistance for their studies at higher education institutes of neighbouring countries (regardless of the language and the subject of the studies).

E) Employment – it was possible to be employed in the territory of the Republic of Hungary on the basis of a permit, which permit could be issued on the ground of a simplified procedure. The costs of the issuing might have been reimbursed.

F) Assistance of Organizations operating abroad – Hungary shall support such organizations, and promoting the goals of the Hungarian national communities living in neighbouring countries. These organizations may apply for assistance, if their goals include among others:

- the preservation, furtherance and fostering of Hungarian national traditions, language, literature, culture, folk arts,

- the promotion of higher education of Hungarian living abroad by facilitating the work of instructors from Hungary as visiting lecturers,

- the enhancement of the capacity of disadvantaged settlements in areas inhabited by Hungarian national communities living abroad to improve their ability to preserve their population and to develop rural tourism,

- the establishment and improvement of conditions of infrastructure for maintaining contacts with the Republic of Hungary.

These benefits and assistance may be received by presenting either the “Certificate of Hungarian Nationality” or the “Cerificate for Dependants of Persons of Hungarian Nationality”. These certificates might be requested from the Hungarian central public administration body (the “evaluating authority”) designated by the Hungarian Government. The evaluating authority issued the Certificate if the

applicant possessed a recommendation which has been issued by a recommending organization representing the Hungarian national community in the neighbouring country concerned, and being recognized by the Hungarian Government. The recommendation should certify – on the basis of a declaration made by the applicant –, that the applicant is of Hungarian nationality.

The Certificate contained the following personal data:

- family and given name
- date and place of birth, and gender
- mother's name
- passport photo, citizenship or reference to stateless status,
- signature in the hand of the entitled person's own hand,
- date of issue, period of validity, and number of the document.

The Act's further parts provided about the application procedures, the budget-issues, central registration of assistance, and empowering the Government and the ministers to regulate certain rules in decrees. It is important to note, that the final provisions of the status law, in Article 27, par. (2) declared: "From the date of accession of the Republic of Hungary to the European Union, the provisions of this Act shall be applied in accordance with the treaty of accession of the Republic of Hungary and with the law of the European Communities."

Regarding the international commitments of the Republic of Hungary, the preamble of the Act mentioned that the Parliament adopted the status law "considering the European integration endeavours of the Republic of Hungary and in-keeping with the basic principles espoused by international organizations, and in particular by the Council of Europe and the European Union, regarding the respect of human rights and the protection of minority rights; also having regard to the generally recognized rules of international law, as well as to obligations of the Republic of Hungary assumed under international law; having regard to the development of bilateral and multilateral relations of good neighbourhood and regional co-operation in the Central European area and to the strengthening of the stabilizing role of Hungary."

Despite these solemn forewords and declarations, the neighbour countries started to protest against the Act in the moment of its adoption.

2. The protest of the neighbouring countries and the international dispute

The Republic of Slovakia and Romania – where the biggest communities of Hungarian minorities live[4] – protested against the adoption of the Status Law. Romania was the first and the "spokesman" of the cause, its arguments were followed by Slovakia too. Below, I summarize the Romanian standpoint and objections.[5]

Extraterritoriality

The most frequently used argument against the Status Law is that it contains extraterritorial elements, i.e. that the effects of the law extend to another state's territory in ways that its sovereignty. In that case, argues Hungary, "it is true that the personal effect of the law relates to non-Hungarian citizens of Hungarian ethnic origin living in neighbouring countries in the sense that they may be granted certain benefits and grants on Hungarian territory, but this does not diminish the primary authority of the Romanian state at all, and the relevant persons remain under its jurisdiction."[6]

Discrimination

The law is discriminatory inasmuch as it makes a distinction among citizens of the Neighbouring States, in this case on an ethnic basis.

In an interesting context the 'accusation' of discrimination arose from a (deliberate or accidental) mistranslation, since 'facilities' was translated as 'preferences' and it was accordingly argued that the law violates the 1965 international Agreement on the Prohibition of All Forms of Racial Discrimination, which was also signed by Hungary. Similarly, the Romanian government interpreted the law as contradicting the 1995 Framework Convention for the Protection of National Minorities and also the 1992 United Nations Declaration

on National Minorities. The relevant government statement overlooks certain contradictions; it only declares that the Hungarian act provides benefits for certain people, which (the statement claims) is discriminatory and violates the above-mentioned international agreements. However, the exact

[4] In Slovakia in 2001, cca. 520.000 confessed themselves as Hungarians, 9,7% of the population of the country. In Romania in 2002, 1,44 Million, which is 6,6 % of the population of Romania.
[5] See in details and analysed: Varga, Attila: *Legislative Aspects and Political Excuses: Hungarian-Romanian Disagreements on the 'Act on Hungarians Living in Neighbouring Countries'.* In: *The Hungarian Status Law: Nation Building and/or Minority Protection.* Edited by Zoltán Kántor et al., 2004, Slavic Research Center, Hokkaido University. p. 461-474.
[6] Varga, Attila: op.c. p. 469.

Romanian translation of 'benefits' is 'facilități', and international legal documents do not question their raison d'être and do not characterise them as discriminatory at all.[7]

Specific Concrete Objections:

Objection to Benefits Going beyond Educational and Cultural Support

As we saw at the previous point, the Status Law provided benefits for example on the field of rural tourism and employment.

The Hungarian standpoint was that it is not possible to talk about national, linguistic and cultural survival if the members of the community have basic problems earning a living. Thus benefits and grants which help people to make a living, indirectly contribute to preserving and developing identity and may constitute a part of effective minority protection.[8] Similar reasoning could be used in case of the benefits provided for the students studying at higher educational institutes of their home country, regardless to their field or language of studies. In that case, the help for the intellectuals of the Hungarian communities may protect the elites and so the survival of minorities.

The Issue of the Hungarian Certificate

This is the most contentious aspect from the Romanian viewpoint. It makes up a disproportionately large part of the criticism, either consciously or through ignorance of the act, inasmuch as some speak cynically about the 'Act of the Hungarian Certificate', rather than using the (anyway erroneous) term 'Status Law'. (In fact, this is to invert the relationship between ends and means envisaged in the act. The Hungarian Certificate instituted by the act is no more than an administrative instrument for applying and implementing the law. Therefore, the Hungarian Certificate does not appear in the act as an objective in its own right but as an item of procedure.) The expression, said the Romanian argumentation, 'Hungarian Certificate' might be that it could be misleading, since it is not a document certifying and proving Hungarian national identity. It does not mean that only those who possess the certificates can be Hungarians, but it is a document whose owner is entitled to certain benefits in Hungary.[9]

Another objection mentioned that the certificate is very similar to the passport of Hungarian citizens. As we can see, the certificate holds the symbol of the Hungarian Holy Crown, which is actually only a part of the official Hungarian Coat of Arms.

[7] Varga, Attila: op.c. p. 470.
[8] Varga, Attila: op.c. p. 471.
[9] Varga, Attila: op.c. p. 472.

Picture 1. The Certificate of Hungarian Nationality

The Romanian delegation to the Council of Europe in June 2001 started to collect signatures in favor of the Romanian initiative protesting against the Hungarian Status Law. The Council finally decided that it will give a mandate to the Venice Commission study the case.

The Venice Commission in its report – detailed below – summarized the dispute leading to its procedure as follows:

> *"On 21 June 2001, Romania's Prime Minister, Mr A. Nastase, requested the Venice Commission to examine the compatibility of the Act on Hungarians living in neighbouring countries, adopted by the Hungarian Parliament on 19 June 2001, with the European standards and the norms and principles of contemporary public international law.*
> *On 2 July 2001, the Hungarian Minister of Foreign Affairs, Mr J Martonyi, requested the Venice Commission to carry out a comparative study of the recent tendencies of the legislations in Europe concerning the preferential treatment of persons belonging to national minorities living outside the borders of their country of citizenship.*
> *At its plenary session of 6-7 July 2001, the Venice Commission decided to undertake a study, based on the legislation and practice of certain member States of the Council of Europe, on the preferential treatment by a State of its kin-minorities abroad. The aim of the study would be to establish whether such treatment could be said to be compatible with the standards of the Council of Europe and with the principles of international law."*

3. The report of the Venice Commission[10]

As *László Sólyom*, Hungarian member of the Commission noticed, "the Romanian Government requested that the Venice Commission Report on the Hungarian preferential law, while the Hungarian government asked for a comprehensive study of European practice. The Commission put the latter request on its agenda, since it did not want to act as umpire in a Hungarian-Romanian dispute. The report examines

[10] European Commission For Democracy Through Law (Venice Commission): *Report On The Preferential Treatment Of National Minorities By Their Kin-State* (Venice, 19-20 October 2001) Cdl-Inf (2001) 19 – with related documents available at: http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp

the preferential treatment provided by Austria, Slovakia, Romania, the Russian Federation, Bulgaria, Italy, Hungary, Slovenia and Greece to 'national communities' living abroad and it consistently refrains from reporting on the approaches adopted by individual states."[11]

The report noticed that in addition to the multilateral and bilateral agreements and to the domestic legislation and regulations implementing them, a number of European States have enacted specific pieces of legislation or regulations, conferring special benefits, thus a preferential treatment, to the persons belonging to their kin-minorities.

The Commission declared that a new and original form of minority protection was emerging. "The Hungarian preferential law is not a unique and unprecedented phenomenon (as Romania described it) but is a part of a new, accepted and positive direction of minority protection. Thus the Commission evaluates the appearance of preferential laws as a positive phenomenon. However, it adds that the time that has passed since their adoption is not sufficient to enable us to speak about international customary law. Given that the time is insufficient to recognize them as a part of customary law, the Commission regards unilateral preferential laws of kin-states as realizable and legitimate, but with the condition that they comply with four principles. These are the following: the territorial sovereignty of the states, respect for treaties, respect for friendly relations between the states, and finally respect for human rights and fundamental freedoms, with special regard for the prohibition of discrimination. Nevertheless, the Commission declares that the system of bilateral and multilateral agreements remains the main tool of minority protection."[12]

As a conclusion, the Report stated that the responsibility for minority protection lies primarily with the home-States. The Commission notes that kin-States also play a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong. Europe has developed as a cultural unity based on a diversity of interconnected languages and cultural traditions; cultural diversity constitutes a richness, and acceptance of this diversity is a precondition to peace and stability in Europe.

Respect for these principles would seem to require that certain features of the measures in question be respected, in particular:

- A State may issue acts concerning foreign citizens inasmuch as the effects of these acts are to take place within its borders.

[11] Sólyom, László: *What Did the Venice Commission Actually Say?* In: *The Hungarian Status Law: Nation Building and/or Minority Protection.* Edited by Zoltán Kántor et al., 2004, Slavic Research Center, Hokkaido University. p. 365.
[12] Sólyom, László: op. c. p. 366.

- When these acts aim at deploying their effects on foreign citizens abroad, in fields that are not covered by treaties or international customs allowing the kin-State to assume the consent of the relevant home-states, such consent should be sought prior to the implementation of any measure.
- No quasi-official function may be assigned by a State to non-governmental associations registered in another State. Any form of certification *in situ* should be obtained through the consular authorities within the limits of their commonly accepted attributions. The laws or regulations in question should preferably list the exact criteria for falling within their scope of application. Associations could provide information concerning these criteria in the absence of formal supporting documents.
- Unilateral measures on the preferential treatment of kin-minorities should not touch upon areas demonstrably pre-empted by bilateral treaties without the express consent or the implicit but unambiguous acceptance of the home-State. In case of disputes on the implementation or interpretation of bilateral treaties, all the existing procedures for settling the dispute must be used in good faith, and such unilateral measures can only be taken by the kin-State if and after these procedures prove ineffective.
- An administrative document issued by the kin-State may only certify the entitlement of its bearer to the benefits provided for under the applicable laws and regulations.
- Preferential treatment may be granted to persons belonging to kin-minorities in the fields of education and culture, insofar as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim.
- Preferential treatment can not be granted in fields other than education and culture, save in exceptional cases and if it is shown to pursue a legitimate aim and to be proportionate to that aim.

4. The EU accession and the amendments of the Act

The accession to the European Union of Hungary and (from the neighbouring countries) Slovakia with respect to the status law, raised basically two problems. Firstly, the compatibility of the status law with the EU-law, secondly, the impact of the forthcoming enlargement of the *Schengen-area* on the relations of the minorities with their kin-states (prospective difficulties with their entry into Hungary).

The harmonization of the status law with the EU *acquis* – among other issues[13] – had been focused on the equal treatment of the EU-citizens. Regarding the EU human right protection, the report of the Venice Committee includes the most important and applicable reasoning on the principle of equal treatment. Later, this reasoning became valid also at assessing the Hungarian legal system in the light of the EU-accession of Hungary. The Committee's report laid down:

> *"The legislation and regulations that are the object of the present study aim at conferring a preferential treatment to certain individuals, i.e. foreign citizens with a specific national background. They thus create a difference in treatment (between these individuals and the citizens of the kin-State; between them and the other citizens of the home-State; between them and foreigners belonging to other minorities), which could constitute discrimination – based on essentially ethnic reasons - and be in breach of the principle of non-discrimination outlined above.*
>
> *[…] in the Commission's opinion the circumstance that part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group is not, of itself, discriminatory, nor contrary to the principles of international law. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship. The acceptability of this criterion will depend of course on the aim pursued. […] the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-State. However, in order to be acceptable, the preferences accorded must be genuinely linked with the culture of the State, and proportionate. In the Commission's view, for instance, the justification of a grant of educational benefits on the basis of purely ethnic criteria, independent of the nature of the studies pursued by the individual in question, would not be straightforward.*
>
> *In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State)."*

Referring to these statements, there were different approaches. The Hungarian Standing Conference – presenting the Hungarian main parties, government, and the organizations of the Hungarians living abroad – had the opinion, the amendment of the status law was unnecessary:

> *Pursuant to the provisions of Article 22 of the European Charter of Basic Human Rights, accepted in Nice, respect for linguistic, cultural and national diversity is a cornerstone of the European Union. Since the Act on Hungarians living in neighbouring countries intends to promote the preservation of the particularly diverse multicultural traditions in the Central and East European region, it is in line with the approach, principles and objectives of the European Union concerning cultural diversity. The support for the protection and fostering of the identity of minorities has the purpose of promoting equal opportunities for minorities and offsetting the disadvantages arising from the position of minorities.*

[13] Nagy Csongor István: *Státustörvény és EU csatlakozás, van-e helye a kedvezménytörvénynek az EU-ban? [Status Law and EU-accession, is there any place for the status law inside the EU?]* In: *Magyar kisebbség*. Kolozsvár. 2003. 4. (30.) 223-266 p.; see at: http://www.jakabffy.ro/magyarkisebbseg/pdf/mk%202003_4_1_nagy.pdf

Therefore, the Act on Hungarians living in neighbouring countries is a legal norm of a fundamentally non-discrimination nature.

After the starting consensus of the Hungarian parties inside the Parliament broke up during the international disputes in 2001, the issue of the Status Law became a part of the parliamentary election campaigns in 2002. In 2002, the opposition won the elections in Hungary, which resulted a clear situation for the Act in question. The new government endeavored to settle these international disputes, and cleared everything that could endanger the EU-accession. The Parliament of Hungary amended the Status Law, and abrogated and amended its provisions on several fields. The amendments not supported by the Hungarian Standing Conference were justified by the arguments and statements of the Venice Committee.

On that ground, for example, the benefits and support for the students not studying in Hungary are available only if they study in Hungarian or on the field of Hungarian culture. The benefits on the rural tourism and development were given up. The provisions on the employment on the territory of Hungary were amended too – now the regular procedure shall be applied for every foreign citizen. The organizations of Hungarians living in neighbouring countries got a different role in the issuing of the Certificate of Hungarian Nationality. In neighbouring countries, only the embassies or consulates may conduct the procedure of issuing, the organizations of the Hungarian communities may be as "recommending" organizations, in order to help the authorities in issuing the certificate (at assessing the applicant, his/her mother tongue, etc.).

Other amendments concerned "symbolic" provisions or, better to say, phrasings. The preamble of the Act in 2001 mentioned the "Hungarian nation as a whole" and the Hungarian communities. The commentary of the amendments in 2003 explained that this phrasing dangerously involves the potential intention of establishing a political bond between the kin-state and the Hungarian minorities living in neighbouring states – as the European Commission noticed.[14] Now, the preamble mentions 'only' the relations between Hungary and the Hungarians living in neighbouring countries, the importance of the national cultural heritage and the preserving of the Hungarian national identity.

Concerning the special issue of the discrimination, the "Communication from the Commission to the Council and the European Parliament The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"[15] does not mention the problem of the minorities and the enacted provisions of their kin-states. The

[14] Commentary to the Act Nr. 2001/LXII. on the Hungarians Living in Neighbouring Countries. In: *Jogtár*, Budapest, 2007, Complex, DVD-ROM.
[15] 30/10/2006, COM/2006/0643 final

situation of the national minorities occurs once in the paper, noticing only that for some of the new EU-members, „the idea of protecting individuals against discrimination on the grounds of 'racial or ethnic origin' was very different from their policies aimed at recognizing and protecting the rights of 'national' minorities." It may mean that sensitive issue of the protection of minorities by their kin-states is out of question – as regards the equal treatment…

This situation was quite controversial for the rightist parties in Hungary and the organizations/parties of the Hungarian communities in neighbouring countries. The president of Fidesz offended the amendments as "castration" of the Status Law.

The other problem, the Schengen-area and its new border-line became quite vital since 21 December 2007, as Hungary and Slovakia entered to that area. The Hungarians living in Austria and Slovakia can enter to Hungary freely, those who live in Romania – being EU citizens – can enter without any visa. There are more difficulties regarding the citizens of the Ukraine and Serbia. Due to the unitary Schengen visa-rules, Hungary cannot issue any free visa. Hungarian organizations in Eastern neighbouring countries proclaimed the new Schengen-borders as a new "iron curtain", between Hungary and its kin-minorities. In order to ease these problems, Hungary introduced the so called "national residency visa" in 2005, which can be issued free of charge, but the required conditions are strict (and because of that it is not popular among the Hungarians living in Serbia or Ukraine). The new special residency visa entitles the bearer to multiple entries, and makes possible a stay longer than three months to all those, who intend to stay in Hungary with the purpose of practicing the Hungarian language, maintaining their national identity, continuing studies in institutions other than the state higher education, and nurturing their family relations.[16]

Hungary also signed an agreement with Ukraine on the local border traffic regime.[17] Inside a limited area behind the borders, citizens of these states can enter into the other state, which may help to maintain relations across (and near to) the borders - in particular it is useable for social, cultural or family reasons, or substantiated economic reasons that are not to be considered as gainful activity according to national regulations. The local border traffic permit costs less than a regular visa.

5. The afterpiece in Hungarian politics

[16] http://www.mfa.gov.hu/kum/en/bal/actualities/spokesman_statements/051005_visa.htm
[17] Published in Hungary by the Act nr. 2007/153.

The above mentioned quarrel about the status law was based on views on the notions of nation and nationalism, and the front-lines were the same with the government-opposition separation. The issue of amending the status law lead to the Hungarian referendum on 5 December 2004. The citizens were asked to answer to question, the first about the health service system, and the second one about the Hungarians living in neighbouring countries. The complicated question was about to give citizenship by preferential way for those who ask for it and have the above mentioned "Hungarian Certificate"; word by word as follows:

> *Do you think Parliament should pass a law allowing Hungarian citizenship with preferential naturalization to be granted to those, at their request, who claim to have Hungarian nationality, do not live in Hungary and are not Hungarian citizens, and who prove their Hungarian nationality by means of a "Hungarian identity card" issued pursuant to Article 19 of Act LXII/2001 or in another way to be determined by the law which is to be passed?*

The referendum was not initiated within the Hungarian political system, but by the World Federation of Hungarians, an N.G.O. dedicated to the protection of the Hungarian diaspora and the nation-above-borders idea. The Federation was able to obtain the signatures of the 200,000 voters in Hungary necessary for putting its proposal on the ballot. The campaign before the referendum became an intent battle between the Hungarian Government (and its recently elected new Prime Minister, *Ferenc Gyurcsány*) and the rightist opposition (lead by Fidesz and *Viktor Orbán*).

Gyurcsány retaliated against nationalism with Europeanism, accusing Orbán of fomenting "nationalist populism" and offering in its place a vision of Hungary as an "island of modernism" that needed to abandon the past and proceed toward a future of full integration into the European community. He also estimated that 800,000 ethnic Hungarians might migrate to Hungary if the proposition passed, leading to an additional $2.9 billion in welfare expenditures each year that would preclude upgrading the country's health services.

The pro-naturalization camp inside and outside Hungary accused Gyurcsany of betrayal and exaggeration, revealing the atmosphere of partisanship, fractiousness and polarization that has characterized the closely divided Hungarian political forces.

The dual-citizenship proposal failed at the polls; with only 38 percent of voters turning out, the 51 percent of them voting in favor of the question was not sufficient to satisfy the requirement of approval by 25 percent of registered voters. Gyurcsany's strategy had carried the day, and analysts agreed that the public had responded to the Prime Minister's pocketbook appeals and had been left cold by Orban's call to unite all 15 million Hungarians, of which 10 million live in the Hungarian state.[18]

[18] Michael A. Weinstein: *Hungary's Referendum on Dual Citizenship: A Small Victory for Europeanism.* See at: http://www.pinr.com/report.php?ac=view_report&report_id=245

The failed referendum caused frustration widely in the opposition and especially among the Hungarians living abroad. The Government in order to show its commitment to the Hungarians living abroad, and to mitigate the frustration, announced in early 2005 the so called "*Motherland Programme*".[19] As the announcement of the Government said, „The ***Motherland Programme*** offers new means for the safeguarding of the Hungarian identity of the Hungarians living in neighbouring countries, with a new, more differentiated system to support their competitiveness in a pragmatic manner. Its aim is to enable the attachment to the Hungarian language and culture to be a simultaneous possibility to jointly live the European identity of the unified Hungarian nation."

The programme included the following means:

1. Motherland Fund: established a separate financial fund providing support for the development of entrepreneurship, as well as for regional and cross-border co-operation, and cultural and educational activities. The Government, with its Decree No. 1128/2004, has also launched an economic development and job creation framework programme. The programme builds on the existing institutional system, the key actors of which include for ex. the Hungarian Development Bank (MFB), Eximbank, Hungarian Export Credit Insurance, etc. The programme provides for the a possibility to spend HUF 25 billion on regional economic development, particularly on encouraging Hungarian companies to invest in the region.

2. National visa: We already discussed this special kind of visa to those, who wish to visit Hungary regularly, for longer periods of time, to safeguard their language, cultural and national identity or to cultivate their family relations. In order to achieve the goals identified in item 2 of the programme, the Government introduced a bill on the amendment of Act XXXIX of 2001 on the Entry and Stay of Foreign Nationals, which the National Assembly adopted on 6 June 2005.

3. Preferential naturalisation: Administrative deadlines will be shortened considerably (applications for naturalisation or re-naturalisation may be filed immediately upon entry, so that it is not necessary to wait one year, and citizenship may be obtained within 18 months starting from the filing of the application), the scope of those exempted from the obligation to take an examination on basic constitutional knowledge will be broadened, and the administrative burden falling on the clients will be reduced (it will be sufficient to make a declaration concerning the documents held ex officio by the authority, etc.).

4. **Autonomy:** The European integration of our region helps minority communities to live more and more with the means of self-government in numerous areas. Such means and forms, providing a framework for autonomous community existence, include the decentralisation of public administration, self-government, and the application of the basic European principle of subsidiarity. European examples show that autonomy is an efficient means and context of the co-existence of different peoples. The Government therefore firmly

[19] See: http://www.mfa.gov.hu/kum/en/bal/Archivum/Archives/nation_policy_affairs.htm

supports the quest for autonomy of the Hungarian communities living in neighbouring countries, in accordance with European practices and the spirit of international norms, as a means of regulating their situation on the basis of constitutional equality. The phrasing of concrete goals is influenced by the domestic political situation and the situation of the minorities in the given country, the openness of the majority nation, the weight of the Hungarian minority, the possibilities of applying solutions successfully utilised in other European countries, and the quality of bilateral relations.

We can conclude that the national means of minority protection are rather limited, the Hungarian government diverged from the status law in order to comply with the EU-expectations just before the EU accession. The above mentioned programme has weak budget background, and due to other political issues, the problem of Hungarians living in neighbouring countries come up only in international affairs (like together with Kosovo).

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CONSTITUTIONAL REVIEW OF THE LISBON TREATY – A COMPLAINT LODGED TO THE CZECH CONSTITUTIONAL COURT

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Abstrakt

Článek pojednává o stížnosti Senátu ČR k Ústavnímu soudu ohledně ústavní konformity Lisabonské smlouvy. Článek shrnuje hlavní argumenty Senátu a podává k nim krátký komentář. Zjišťuje, že většina z nich není dostatečně vyargumentována a tvrdí, že ve většině z nich Lisabonská smlouva reflektuje současný právní stav zejména s ohledem na judikaturu Evropského soudního dvora.

Klíčová slova:

Evropská unie, Lisabonská smlouva, kontrola ústavnosti, Senát ČR, Ústavní soud ČR

Abstract

The article deals with the complaint of the Czech Senate about the constitutional conformity of the Treaty of Lisbon lodged to the Czech Constitutional Court. It summarises the main arguments of the Senate and makes a short commentary to them. It finds out that most of the points are not properly supported by the arguments and asserts that the Treaty of Lisbon in most of the given arguments reflects the present state of law – especially the case-law of the Court of Justice.

Key words

European Union, Treaty of Lisbon, review of constitutionality, Czech Senate, Czech Constitutional Court

1. Introduction

The conformity of the Treaty of Lisbon (TL) with the Czech constitutional legal order has become a part of debates at the Czech political scene. The Czech government handled the TL to the Senate (the upper Chamber of the Czech Parliament) on 25 January 2008 and asked it for the consent with its ratification.

The discussions followed (especially in the Committee for EU Affairs of the Czech Senate) and, finally, led the Senate to lodge a complaint to the Czech Constitutional Court (further CCC).[1] At the beginning let us remind that the **preventive control** (that is before the ratification of the international agreement) of constitutionality is based on the art. 87 par. 2 of the Czech Constitution (further CC) according to which the CCC has the competence to decide on the conformity with the Czech constitutional order of an international agreement based on the art. 10a and art. 49 of the Czech Constitution. If this procedure is initiated, the contested international agreement may not be ratified until the CCC gives its ruling.[2]

The **art. 10a** concerns the transfer of certain powers of Czech state organs to international organisations or institutions – in practice this new article was put in the Czech Constitution in order to enable the accession of the Czech Republic to the European Communities. Consequently, the **art. 49** enumerates categories of international agreements the ratification of which requires the consent of both chambers of the Czech Parliament. Those include also agreements which establish a membership of the Czech Republic in an international organisation. This is also the case of the EC Treaty.

In the following we will go through the individual points which should be, according to the Senate, the main prism of the constitutionality review of the CCC in relation to the Treaty of Lisbon.

2. General review requirement

At first the Senate asserts that the TL brings fundamental amendments of the present state of law which touch the substantial features of the Czech statehood. Therefore, the Senate requires a general review of the constitutional conformity based on two reasons:

- whether the TL is in conformity with the constitutional characteristics of the Czech Republic – sovereign, unitary and democratic state governed by the rule of law (comp. art. 1/1 of the CC), and
- whether the TL does not change the essential attributes of a democratic state governed by the rule of law (comp. art. 9 par. 2 of the CC).[3]

It is evident that the reasons presented by the Senate reflect the case-law of the CCC as for the relation of the EU law and the Czech national law. In its case called "Sugar Quotas Judgement"[4] the CCC scrutinised the application of the EC legislation and its constitutional conformity based on these two articles. Therein, by application and interpretation of art. 10a, the CCC accepted the limitation of the powers of Czech authorities due to the accession to the EU and to the principle of EC law primacy. The

[1] The power to start this procedure is based on the par. 117b of the act no. 107/1999 on the rules of procedure of the Czech Senate; and on the par. 71a /1/a of the act 182/1993 on the Czech Constitutional Court.

[2] For more on the control of constitutionality see f.e. Kust, J., Pítrová, L.: „Lisabonská smlouva" a předběžná kontrola ústavnosti mezinárodních smluv, Právník 5/2008, s. 473-504.

[3] The issue has a constitutional-law dimension which concerns also whether the Senate might ask for a constitutional review of an international treaty generally or only in individual points/arguments. We will not analyze it in this paper.

[4] Decision of the Czech Constitutional Court in Pl. ÚS 50/04.

CCC found this conferral of a part of its powers only conditional; the original bearer of sovereignty still remains the Czech Republic - its sovereignty founded upon the above mentioned art. 1 par. 1 of the CC. Consequently, the CCC concluded that the delegation of powers persists only if these powers are exercised in a manner compatible with the preservation of the foundations of the state sovereignty and the very essence of the substantive law-based state (comp. art. 9 par. 2 of the CC). Clearly, the CCC as other supreme and constitutional courts of Members States[5] first based the authority of EC on the national constitutional rules and, second, it made a reservation to the full application of the EU law in case it breaches the very fundaments of the Czech constitutional legal order.[6]

3. Specific problematic points

This general constitutional review is supported by several arguments which are presented as being of a demonstrative character. In the following we will summarize them and we will make a few comments on them.

First, the Senate reflects the wording of the art. 10a of the Czech Constitution, under which it is possible to limit and transfer only **certain powers** of the Czech state organs. The Senate points out that the TL brings explicit classification and division of competence and, in its opinion, such a division of competence is characteristic for federal states.

Then, the TL distinguishes **exclusive EU competence** in the area of which according to the new art. 2A of the Treaty on the EU (further TEU) only the EU may legislate and adopt legally binding acts. The Member States are allowed to do it themselves only if so empowered by the Union or for the implementation of Union acts. The new article 2B TEU gives a closed list of the EU exclusive competence – this comprises customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the Euro; the conservation of marine biological resources under the common fisheries policy and common commercial policy. Moreover the EU has exclusive competence to conclude an international agreement in specific cases. According to the Senate the category of exclusive EU competence constitutes complex areas in which the competence will be transferred from the Czech Republic organs to the EU. This could be in breach of the wording of art. 10a of the Czech Constitution which allows transfer of only certain powers to the EU.

To make an assessment of this contention we suppose that the scope of exclusive EU competence as defined in the TL reflects the present case-law of the European Court of Justice and, thus, it does not bring much new. It is true that the case-law would newly be reflected expressly in founding treaties and this could be interpreted as another federal step in the European integration, but we do not share this

[5] For more see f.e. Craig, P., de Búrca G.: EU Law - Text, cases and materials, 4th ed., Oxford UP, Oxford 2008, p. 353-379.
[6] In the "Sugar Quota Judgement" the CCC found the EC legislation in conformity with the Czech constitutional order.

opinion; this change could be taken rather as in favour of EU citizens. It makes the EU more readable and transparent. We suppose that the federal-like and state-like apprehension of the EU will depend more on the acceptance of this idea by Member States, their national constitutions and decisions of their supreme courts, and, last but not least, by their citizens. We do not suppose that the enumeration of areas of exclusive competence of the EU would, by itself, change the national jurisprudence and judicial attitude and induce the national actors to cease to derive the EU legitimacy from national constitutions (that is the reservation shown above on the example of the CCC decision).

The Senate challenges the reglementation of the new art. 2C TEU which deals with the competences shared between the EU and its Members States. According to this article the **shared competence** will exist in the enumerated principal areas (such as the internal market, social policy, environment, consumer protection, etc.). The Senate alleges that the category is not a closed list but only a demonstrative as it talks about "principal" areas. This is supposed not to be in concordance with the art. 10a of the Czech Constitution because the scope of transfer of competence is not clearly identifiable.

In that respect we might note that the art. 2C does not primarily or solely deal with the extent of transfer of competence. The basic idea of art. 2C is that principally the shared competence exists where the EU does not have exclusive competence (art. 2B) or supportive, coordinative o supplementary competence (art. 2E). Still the individual competence to act in a certain area should be found in concrete provisions of the founding treaty (f.e. with individual politics) or in art. 308 (so called suppletive legal basis). This article, in reflection to its demonstrative enumeration, is not aimed to be used as a legal basis for potential extension of the EU competence in areas vested with the Member States. Therefore, in our opinion the clarity or definitiveness of transfer of competence from the Czech Republic to the EU is not endangered by the provision of art. 2C.[7]

Second, the Senate specifically suggested a review of the constitutionality of the provision of revised **art. 308 par. 1** Treaty on the Functioning of the EU (further TFEU) – so called suppletive legal basis.[8] According to this article if an action by the Union should prove necessary, within the framework of the policies defined in the Treaty, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Let us remind that this provision is contained also in the present wording of the founding

[7] The other forms of EU competence – that is the EU coordinative competence in economic and employment policies (comp. art. 2A par. 3, art. art. 2D); definition and implementation of a common foreign and security policy and progressive framing of a common defence policy (comp. art. 2A par. 3 and support, coordination and supplementation of the actions of Member States in certain areas defined in the Treaty (comp. art. 2A par. 5, art. 2E) - were not contested.

[8] Comp. Lenaerts, K, Nuffel, P., van: Constitutional Law of the European Union, 2nd ed., Thomson; Sweet and Maxwell, 2005, p. 87.

treaties and by means of teleological interpretation was used by the ECJ to allow the EU action and limit the principle of conferral of powers.[9]

The TL suggested to modify it slightly. At present the application of art. 308 is limited to the adoption of rules in the course of the operation of the common market; newly this article could be used without specific limits **in all policies** defined in the treaties. The Senate asserts that this provision creates a blank norm which enables to adopt measures outside the EU competence – this being in breach of art. 10a of the Czech Constitution. This may touch areas of cooperation in criminal matters and, thus, bring these areas in the exclusive jurisdiction of the Court of Justice with the contested lack of procedural guarantees for the protection of fundamental rights.We suppose that the use in practice of art. 308 should always reflect the existing aims of the EU which as such have been approved by Member States. Principally if the Member States set up any aim (by ratification of the founding treaties), they also presuppose that there will be sufficient competence to reach the aim. If it is not explicit, they agreed to use the procedure of the art. 308. Definitely the present change broadens the use of this article to all policies of the EU. However, crucial is that in case the Member States would like to use the suppletive competence of art. 308, they must do it **by unanimity**. Therefore all states, the Czech Republic included, must agree - if they would find it inadequate, they may stop the process of the adoption of the EU legislation.

Third, the Senate points out to the provision of new art. 48 par. 6 and 7. The art. 48 deals with the **revision procedures** of the founding treaties. It distinguishes the ordinary revision procedure which will be based either on the Convention method in case of extensive changes to the primary law[10] or on the Intergovernmental Conference method used now in case the changes are not substantial.[11] These changes should be welcome as the Convention method brings in play more actors and may help to reach the "all-European" consensus.

However, a completely new article 48 par. 6 and 7 suggests to introduce the **simplified revision procedure** (so called *passerelle*).

Paragraph 6 enables the government of any Member State, the European Parliament or the Commission to submit to the European Council proposals for revising all or part of the provisions of Part Three of the TEU on the TFEU relating to the internal policies and action of the Union. The European Council will decide unanimously after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area and also the approval by the

[9] Comp, ibid, p. 87.

[10] The Convention method was used for the creation of the EU Constitution; according to the TL the Convention will present the proposals of amendments to the conference of the representatives of governments of the Member States and the ratification in Member States will follow.

[11] According to the TL the European Council may decide by a simple majority not to convene a Convention; still the ratification in the Member States is required.

Member States in accordance with their respective constitutional requirements. This decision may not increase the competences conferred on the Union in the Treaties.

Article 48 par. 7 enables that in case the TFEU provides for legislative acts to be adopted unanimously, the European Council may unanimously decide that the acts will be adopted in an ordinary legislative procedure. Similarly, a shift from the special legislative procedure to the ordinary procedure is under specified conditions possible. If decisions according to par. 7 of art. 48 are done, national parliaments must be notified and they may oppose; if they do it within the period of six months, the decision of the European Council referred to above will not be adopted.

Fourth, the Senate complaints about the art. 216 of the TFEU which concerns the **conclusion of international agreements** by the EU. According to this article the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. These agreements are concluded by qualified majority by the Council and are binding both to the EU and its Member States. According to the Senate conclusion of this agreement will not require the consent of the Czech Republic; there is no ratification process and the review of the constitutionality of the agreement according to the Czech constitutional rules is excluded. In that respect we might note that in our opinion the provision of art. 216 consolidates the present state-of-law contained not only in the Treaties but also in the case-law of the ECJ[12] and does not bring much new. The qualified majority is used also at present (comp art. 300/2 of the EC Treaty).

Fifth and sixth, the Senate complains about the **single legal personality** of the European Union which would mean that the EU would gain legal personality also in the second and third pillar. In these areas the EU would adopt decisions also by qualified majority and thus potentionally more conflicts between the EU and national standards on the protection of human rights would appear. Further it is noted that the status of the **Charter of Fundamental Rights** of the EU was changed and also its content is disputed. Specifically it contains not only rights but also principals and aspirations without any clear system. In that context the Senate puts to the Constitutional Court a few questions on the application of the Charter and its relation especially to the European Conventions and to the European Court of Human rights.

Human rights are also a basis of the last point mentioned by the Senate – that is the **broadening of the scope of EU values** on which the EU is founded (art. 2 TEU) – they comprise respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which

[12] Comp. f.e. case 22/70 ERTA [1971] ECR 263.

pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. According to the Senate the problem is the interpretation of this provision as according to art. 7 TEU (contained also in the present TEU) in case of a serious breach of these values the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. The procedure in art. 7 TEU might lead to political pressures and to the change of the national political regime. In that respect the Senate asks about the compliance of this provision with the general constitutional characteristics of the Czech Republic (principle of sovereignty of people).

4. Conclusion

The aim of this paper was to summarize the basis of the Senate's proposal and to add a few comments. As could be seen in the text most of the changes reflect the existing state of law in the EU and the settled case-law of the Court of Justice. We would expect that the Senate's proposal would give more detailed argumentation. We do not suppose that in its content the complaint is well founded in comparison to the state of law at the date of the accession of the Czech Republic to the EU, though the TL brings some changes. It seems that it concerns more the general constitutional conformity of the very accession and membership of the Czech Republic to the EU. Still we suppose that a decision of the Czech Constitutional Court would be useful to clarify the present state and to eliminate the political dimension of the discussion.

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[4] Decision of the Czech Constitutional Court in Pl. ÚS 50/04

[5] 22/70 ERTA [1971] ECR 263

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COMMUNITARIZATION OF THE EU THIRD PILLAR TODAY AND ACCORDING TO THE LISBON TREATY

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Abstrakt

Práce se pokusí popsat a analyzovat současné projevy tzv. komunitarizace třetího pilíře EU, kterou autor chápe jako proces, kdy oblast policejní a justiční spolupráce v trestních věcech začíná být ovlivňována či dokonce podřizována komunitárním principům a mechanizmům (zásada loajality, nepřímého účinku, efektivity, role Komise a ESD), a to při začlenění do režimu mezivládní spolupráce. Ta má být překonána Lisabonskou smlouvou, která danou oblast podřizuje zásadně komunitárnímu režimu (hlasování kvalifikovanou většinou ve spolurozhodovaní proceduře s EP, podrobení se jurisdikci ESD, přímý účinek). Práce se pokusí srovnat a analyzovat výhody a nevýhody obou režimů v dané oblasti. Podtrhne přitom i specifika komunitárních mechanizmů v této oblasti dle Lisabonské smlouvy. Ambicí práce je rovněž upozornit na možnosti, ale i meze a rizika rozvoje komunitárního režimu v oblasti trestní politiky podle Lisabonské smlouvy.

Klíčová slova

třetí pilíř, první pilíř, mezivládní spolupráce, komunitární právní řád, policejní a justiční spolupráce v trestních věcech, obecné zásady, svěření pravomocí, sdílené pravomoci, subsidiarita, proporcionalita, přednost, přímý účinek, nepřímý účinek, odpovědnost za škodu (Francovich), hlasování kvalifikovanou většinou, záchranná brzda, posílená spolupráce, přeshraniční dvojí trestání (ne bis in idem), princip legality, Evropská Rada, Komise, Evropský parlament, Rada, Soudní dvůr (ESD), národní parlamenty, žlutá, oranžová, červená karta.

Abstract

This paper attempts to describe and analyze the current instances of the so-called communitarization of the third pillar of the EU, which the author considers to be a process, when the police and judicial cooperation in criminal matters starts to be influenced or even subjected to the Community principles and mechanisms (such as the principle of loyal cooperation, indirect effect, effectiveness, the role of the Commission and ECJ), while falling into the intergovernmental framework. However, this framework should be displaced by the Lisbon Treaty, which in principle subjects this area to the communitarian

regime (voting by the qualified majority in co-decision procedure with EP, jurisdiction of the ECJ, direct effect). The paper will try to compare and analyze both advantages and disadvantages of both (intergovernmental and communitarian) frameworks in the field of criminal matters. Specific characteristics of communitarian mechanisms under the Lisbon Treaty will be emphasized as well. The aim of the paper will be to show the possibilities and opportunities, but also limits and risks of further developments of communitarized criminal policy under the Lisbon Treaty.

Key word

rd pillar, first pillar, intergovernmental cooperation, Community legal order, police and judicial cooperation in criminal matters, general principles, conferral of powers, shared competence, subsidiarity, proportionality, supremacy (primacy), direct effect, indirect effect, liability for damages (Francovich), qualified majority voting, emergency break, enhanced cooperation, cross-border double jeopardy principle (*ne bis in idem*), substantive legality principle, European Council, Commission, European Parliament, Council, Court of Justice (ECJ), national parliaments, yellow, orange, red card.

Introduction

This paper will focus on developments and possible future prospects within the third pillar of the European Union (EU). First, I will briefly sum up the "constitutional" foundations of the third pillar, as regards both the role of the Union institutions and legal effects of the measures adopted under this framework as provided for in the Treaty on European Union (TEU), especially its Title VI, which governs police and judicial cooperation in criminal matters. Then I will show, how this area of criminal matters has been communitarized, especially by the case-law of the Court of Justice (ECJ). Turning to the new settlement of this area according to the Lisbon Treaty, especially Title V, chapters 1, 4 a 5 of the Treaty on the Functioning of the European Union (TFEU),[1] I will try to describe and analyze the most important novelties, which the new framework introduces. In principle all classical Community rules and principles should apply within the specified field of criminal matters. However, important specific characteristics applicable to this area (such as maintaining unanimity in certain matters, emergency break and enhanced cooperation) will be emphasized as well. Finally the paper will on the basis of attained experience and concrete examples attempt to point to the possible advantages, respectively disadvantages and risks, which the new framework may bring in contrast to the current state of affairs in the explored area of criminal matters.

[1] TFEU will replace the current Treaty establishing the European Community (TEC). The area of police and judicial cooperation will be transfered from TEU to the TFEU and included in Title V, with the heading "Area of freedom, security and justice," which will contain also chapters on general provisions, policies on border checks, asylum, immigration and judicial cooperation in civil matters.

The "constitutional" foundations of the third pillar compared to the first pillar

The third pillar, established by the Maastricht Treaty and limited to police and judicial cooperation in criminal matters by the Amsterdam Treaty, forms basically a distinct framework of intergovernmental cooperation, which is to be differentiated from the Community legal order, resting on the TEC and developed by the ECJ case-law[2]. First and foremost, the nature of the third pillar as laid down especially in the Title VI of the TEU resembles more the classical international regime (where, it seems, there is no room for a simple hierarchy or subordination, but the consent of each and every state is predominant) rather than the supranational one, which was developed under the first pillar, patterned by the primacy and direct applicability (and effectiveness) of adopted rules towards individual member states (even when outvoted) and their citizens. From the institutional point of view, similarly, the institutions such as the European Commission (Commission), European Parliament (EP) and the ECJ were not granted such broad powers, as is the case in the first pillar. By contrast, the Council of Ministers (the Council), which represents the individual member states, was given great external and legislative powers, including the veto right for each and single minister thanks to the unanimity voting, introduced as a rule for decision-making in this sensitive and with the sovereignty of the member states´ closely connected area of police and judicial cooperation in criminal matters. Moreover, the intergovernmental character of the third pillar seems to be strengthened by the legislative initiative of each member state (sharing this right with the Commission) and mainly by the weakening of both the EP, limited only to consultation within the legislative process, and the Commission, which is not allowed to pursue infringement procedure as is the case under the first pillar Community legal order. Also the limited jurisdiction of the ECJ, as compared to its role under the first pillar, is of great significance, when assessing the specific nature of the third pillar framework. Preliminary rulings, seemingly limited in its subject, are not obligatory at all at any stage and annulment actions are limited only to privileged applicants. Infringement procedure, as mentioned above, does not apply at all. As a result, the member states do not run any risk of being financially penalized by the ECJ, when infringing third pillar union law.

[2] See these crucial judgements of the ECJ: C- 26/62 *Van Gend en Loos*, 5.2.1963, (direct effect) a C- 6/64 *Costa v. ENEL*, 15.7.1964 (supremacy or primacy of EC law); and further elaboration on this as regards both direct and indirect effect: C-152/84 *Marshall*, 26.2.1986, C-14/83 *Von Colson a Kamman*, 10.4.1984, C-106/89 *Marleasing*, 13.11.1990, C-194/94*CIA Security v. Securitel*, 30.4.1996, and primacy of EC law, or even the emerging concept of pre-emption: C-11/70 *Internationale Handelsgesselschaft*, 17.12.1970; C-35/76, resp. C-106/77 *Simmenthal I, II*, 15.12.1976, resp. 9.3.1978; C-10-22/97 *Ministero delle Finanze v. IN.CO.GE´90 Srl*, 22.10.1998; C-148/78 *Ratti*, 5.4.1979; C- 31/78 *Bussone*, 30.11.1978; C-11/92 *Gallaher*, 22.6.1993; including liability for damages for infringement of Community law: C-6 & 9/90 *Francovich*, 19.11.1991; C-46/93 *Brasserie/Factortame*, 15.3.1996; C-178/94 and others point cases *Dillenkofer*, 8.10.1996; C-224/01 *Köbler*, 30.9.2003, which might be read also in conjunction with the judgement C-453/00 *Kühne & Heitz*, 13.1.2004; summarized In Craig, P., de Búrca, G. EU Law – Text, Cases and Materials. New York: Oxford University Press, 2003, s.178-228; 257-315.

As regards the legal effects of the measures adopted under the third pillar, the TEU explicitly abolishes direct effect of the decision and framework decision. The latter resembles by definition and aim in approximating national laws directive under the first pillar, however, without possessing a feature of *direct effect* loses much of its strength, because the particular provisions of the framework decision cannot be then directly invoked by individuals before the national authorities, and the courts particularly, with a view setting aside, if necessary, contrary national rule and applying directly effective one (in upwards vertical relations at least).

Although it might seem from all above mentioned that the intergovernmental framework of the third pillar absolutely prevails,[3] the next chapter will show, how especially the ECJ is ready to make use of some communitarian aspects involved in that framework and extend them to the maximum, while borrowing the concepts from the first pillar as well, in order to promote more uniform application of the union law in this field and guarantee at least some kind of judicial protection. It will be, however, also pointed to the extension of the community competence over criminal matters by the ECJ, revealing the potential of the first pillar for the purposes of criminal regulation.

Third pillar under attack – creeping communitarization

In general

In spite of the fact of intergovernmental characteristics of the third pillar, as briefly sketched above, I will try to illustrate, how this pillar has been communitarized, i.e. influenced by and subjected to the Community principles, rules and mechanisms.

Among the Union institutions it was mainly the ECJ which heavily supported this process by taking full advantage of its jurisdiction and pointing to the broad tasks and objectives of the Union and the necessity to ensure both the consistency within the Union framework as a whole and the effectiveness of the measures adopted within the third pillar particularly (see below, *Pupino*, *Segi*, *EAW* judgements of the ECJ). ECJ also promoted uniform application of crucial third pillar rules and principles, such as the prohibition of cross-border double jeopardy (see below, sketched case-law of the ECJ on *ne bis in idem*).

Furthermore, the potential of expansive growth of the communitarian control over criminal matters was also supported by the ECJ case-law on the possibility of implicit competence over criminal matters within the first pillar under certain conditions (see below, *Environmental crimes* and *Ship source pollution* judgements of the ECJ).

[3] However, there is a regular „bridge," enabling to transfer the respective areas of criminal matters to the first pillar entailed in Article 42 TEU. The cumbersome procedure which subjects such a unanimous decision of the Council to the constitutional procedures of member states makes this provision, however, practically ineffective.

Besides that, the process of communitarization was also boosted by the practice developed within the Council, where special negotiation techniques, political pressure, package deals seem to undermine *de iure* unanimity voting rule as well.[4]

Moreover, the active role of the Commission, coming up with legislative proposals, which seem not always to observe both the union and Community fundamental principles such as the subsidiarity principle[5] or even fundamental rights[6], contributed also a lot to the communitarization of this area.

The role of the ECJ in communitarization of the third pillar

In my view ***Pupino*** represents a leading case in this area. The ECJ was asked by the Italian court within the preliminary ruling procedure under article 35 TEU to give an interpretative ruling on a specific provision of the framework decision on the protection of victims, which related to the special criminal procedure in respect of vulnerable victims, respectively application of the procedural benefits towards maltreated children. After declaring its jurisdiction and its scope under the Article 46(b) TEU, in conj. with Article 35 TEU, the ECJ stressed the binding nature of framework decisions, inspired largely by the Article 234 TEC. Due to the fact that the TEU in this respect expressly excludes direct effect, the ECJ could only promote the effectiveness of the framework decisions by the so-called *indirect effect*, elaborated within the first pillar. And indeed, it did so, stating that the binding character of the framework decisions places on national authorities, and particularly national courts, an obligation to interpret national law in conformity[7].

Moreover, the ECJ added, that while having the jurisdiction in preliminary ruling procedure, this would be deprived of most of its useful effect, if individuals were not entitled to invoke framework decisions in order to obtain a confirming interpretation of national law before the courts of the member states[8]. Furthermore, the ECJ, without any reference in the text of the TEU (unlike Article 10 TEC), went further to pronounce the applicability of *the principle of loyal cooperation*[9] in this field as well, pointing to the aim of the Union to create an ever closer Union among the peoples of Europe and necessity to ensure

[4] See, more elaborated on this matter: Čakrt, F.: Nástin komunitarizace v rámci III. pilíře. Trestněprávní revue, 2007, č. 1, s. 4 – 12.

[5] See, ibid p. 7 as regards the critical reflection on this as exemplified by the Green book on the conflicts of jurisdictions and the principle *ne bis in idem* in criminal proceedings, KOM(2005) 696

[6] See, for instance the so-called data retention directive, where the protection of the fundamentals principle of protection of personal data might be interfered with disproportionately

[7] C-105/03, *„Pupino,"* 16. 6. 2005, para 34.

[8] C-105/03, *„Pupino,"* 16. 6. 2005, para 38.

[9] However, S. Peers notices that the ECJ makes, with exception of requirement to take measures to ensure fulfilment of obligations, no reference to other aspects of the principle of loyal cooperation, see Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the *Pupino* and *Segi* judgments. Common Market Law Review, 2007, č. 44, p. 916, 917.

that the Union may effectively fulfil its tasks.[10] The applicability of *the principle of loyal cooperation* within the third pillar gave rise to the debate on possible far-reaching implications this might bring. As we know, from the principle at stake important Community principles, rules, mechanisms were inferred, such as the principle of supremacy (primacy, precedence), the *Francovich* principle of liability for damages, the twin principles of effectiveness and equivalence, just to name the most important ones. And some authors indeed suggest the possible application of at least some of them, such as *Francovich principle of liability for damages* and *principles of effectiveness and equivalence*.[11] Finally, *Pupino* ruling itself, while setting limits to the application of the so-called *indirect effect* (cannot be *contra legem* and conflict the *principles of legal certainty* and *non-retroactivity* or establish and aggravate criminal liability)[12], in my view, implicitly suggests that general principles of Community law, or at least some of them, may and should be applied within the third pillar, as well. I agree with S. Peers that the general principles of Community law[13] (such as protection of human rights, legal certainty and of the protection of legitimate expectations, non-retroactivity, principle of equality and non-discrimination, principle of the right to defence and the rule against double jeopardy; principles governing the exercise of community powers such as principle of conferred powers, subsidiarity and proportionality) should apply in their entirety here as well.[14] However, the ECJ when ruling on the observance of these principles should, in my view, pay due respect to the principles of subsidiarity and the primary (or largely exclusive) responsibility of member states for maintaining public order and security on their territory and observing their human rights obligations under the European Convention for the protection of human rights and fundamental freedoms (ECHR), from which the ECJ itself should in no case depart as well[15]. Similarly, the ECJ, while interpreting, should not encroach upon legislative domain of the Council as well. The ECJ in my opinion should be very careful and restraint in using too much

[10] C-105/03, „Pupino," 16. 6. 2005, paras 41, 42: *„... treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.... It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions..."*

[11] See, for instance Spaventa, E.: Opening Pandora´s Box: Some reflections on the Constitutional Effects of the Decision in Pupino. European Constitutional Law Review, 2007, č. 3, s. 18 – 22 or Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the *Pupino* and *Segi* judgments. Common Market Law Review, 2007, č. 44, p. 921 – 924, where the author comes up with practical examples, for instance that the wrongful detention, prosecution and conviction connected to the double leopardy rules should be compensated in accordance with the principles established as regards Community damages liability.

[12] C-105/03, *„Pupino,"* 16. 6. 2005, paras 44, 45.

[13] For a systematic categorization of Community general principles see, Týč, V.: Působení práva Evropské unie ve sféře českého právního řádu In: Evropský kontext vývoje českého práva po roce 2004: sborník z workshopu konaného na Právnické fakultě MU v Brně dne 26.9.2006. 1. vyd. Brno: Masarykova univerzita, 2006, s. 22-27.

[14] See, Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the *Pupino* and *Segi* judgments. Common Market Law Review, 2007, č. 44, p. 926 – 928.

[15] Compare, Article 52(3) of the Charter of fundamentals rights of the Union, which shall be legally binding according to the Article 6(1) of the TEU, introduced by the Lisabon Treaty.

extensive interpretation which might run counter words and intent of drafters and legislators. I admit, there might be instances, where the court must decide on the merits and deliver the justice to individuals, even (if necessary and well justified) by going beyond the text and finding just solutions by systematic a teleological interpretation. However, in general and as a rule, the ECJ should, in my view, especially in this sensitive field of criminal affairs, be very cautious when trying to unify some of the controversial concepts, beyond the adopted legislative consensus reached. In this regard, the unifying case-law of the ECJ **on the principle against double jeopardy** (*ne bis in idem*)[16] seem to me (at least as regards some judgements) very ambitious and too extensive as well, and in some instances undermining criminal justice systems of individual member states.[17] I am hinting here at some kind of hidden communitarian mechanism, which might be activated through preliminary rulings, and which attributes the ECJ the role of *de facto* legislator, when interpreting the very broad and vague terms, adopted within the Council.

Finally, the ECJ affected heavily the criminal field, which was generally perceived to be the domain of member states or their cooperation within the third pillar,[18] by two its famous rulings on ***Environmental crimes***[19] and ***Ship source pollution***[20]. The ECJ delivered its judgement on *Environmental crimes* upon the respective action brought by the Commission, which asserted that the Council had encroached upon its competences under the TEC by adopting framework decision on the protection of environment through criminal law under the third pillar. The ECJ took the same view and annulled the challenged framework decision on grounds that it indeed encroached on the powers which Article 175 of the TEC in the area of environment confers on the Community[21]. As a starting point the ECJ stressed that Article 47 of the TEU provides that nothing in the TEU is to affect TEC.[22] Then the ECJ examined both the aim and content of the challenged framework decision and realized that indeed the main purpose of the adopted measure was the protection of the environment. As regards implied competence to criminal regulation within this field, the ECJ firstly stated that *as a general rule, neither*

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[16] See judgements: ; C-187/01, C-385/01, *Gozütok & Brügge,* 11.2.2003, C-288/05, *Kretzinger,* 18.7.2007,; C-367/05, *Kraajjenbrink,* 18.7. 2007; C-150/05, *Van Straaten,* 28.9.2006; C-467/04, *Gasparini,* 28.9.2006; C-436/04, *Van Esbroeck,* 9.3. 2006; C-469/03, *Miraglia,* 10.3.2006.

[17] For a brilliant reflection see, Komárek, J.: „Tentýž čin" v prostoru svobody, bezpečnosti a práva. Jurisprudence, 2006, č. 3, s. 51 – 57.

[18] However, also the previous case-law of the ECJ show form the 1980s, that even at that times the field of criminal policy was not completely immune from the operation of Community law, especially when the principle of effectiveness and equivalence or non-discrimination were at stake (see, judgement 68/88, *„Greek Maize,"* 21. 9. 1989 or judgement 186/87, *„Cowan,"* 2. 2. 1989) or when disproportionate (criminal) restrictions on freedom of movement arose (see, judgement C-118/75, "*Watson and Belmann,"* 14. 7. 1976 or judgement C-265/88, *"Messner,"* 12. 12. 1989), See very brilliant summary in: Kmec, J.: Evropské trestní právo. Mechanismy europeizace trestního práva a vytváření skutečného evropského trestního práva, Praha: C.H.Beck, 2006, s. 230.

[19] C-176/03, *„Environmental crimes,"* 13. 9. 2005

[20] C-440/05, *„Ship source pollution,"* 23. 10. 2007

[21] C-176/03, *„Environmental crimes,"* 13. 9. 2005, para 53.

[22] Ibid. at para 38.

criminal law nor the rules of criminal procedure fall within the Community's competence.[23] However, the ECJ did not stop here, but went further on to hold that the Community legislature is not prevented to adopt measures which relate to the criminal law of the member states 1) which it considers *necessary* in order to *ensure that the rules* which it lays down (on environmental protection) are *fully effective* and 2) where the application of *effective, proportionate and dissuasive criminal penalties* by the competent national authorities is an *essential measure* (for combating serious offences).[24]

This controversial judgement gave of course a strong weapon in the hands of Commission, which interpreted its implications very extensively both as regards the fields of Community policies to which it may be applied and the intensity of the criminal regulation itself[25] and as A. Dawes and O. Lynskey in their brilliant reflection of this case put it – some of its conclusions drawn (such as the power to decide under the first pillar policies on the choice of the criminal penalties to be applied) were even contradictory to the judgement itself[26].

The second judgement of the ECJ on *Ship source pollution*[27] was expected with hope that it will bring answers to the open questions which the ruling on *Environmental crimes* remained unresolved. However, the ECJ judgement seems to be rather disappointing in this respect. The answer to the question, whether the criminal competence under the first pillar should be derived from the necessity to ensure the effectiveness of the (crucial) Community policies, as the Advocate General Mazák suggested in his opinion[28], or is limited solely to the environmental policy, is somehow ambiguous. The ECJ confirmed that the challenged measure could have been validly adopted under the first pillar within the specific competence under the transport policy, however the ECJ emphasized the link with environmental protection in this case as well.[29] Fortunately, at least another issue on the intensity of criminal legislation within the first pillar was clearly resolved, by stating that under the first pillar the Community does not possess the power to impose *the type and level of criminal penalties*.[30] It should therefore limit itself to imposing effective, proportionate and dissuasive criminal penalties and leave it up to the member states to specify them in their respective criminal systems.[31]

To sum up the case-law of the ECJ in the third pillar it may be concluded that many Community principles, rules, mechanisms and concepts (such as indirect effect, principle of loyal cooperation,

[23] Ibid. at para 47.
[24] Ibid. at para 48.
[25] See doc. COM 2005 (583), dated 23.11.2005, Brussels, Communication from the Commission to the European Parliament and the Council, particularly para 10, where it states that the member states freedom to choose the penalties they apply may be limited by the Community legislature, if the effectiveness of community law so requires.
[26] See, Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of Community cometence into the field of criminal law. Common Market Law Review, 2008, č. 45, s. 138, 139.
[27] C-440/05, *„Ship source pollution,"* 23. 10. 2007
[28] Opinion of the Advocate General Mazák C-440/05, *„Ship source pollution,"* 23. 10. 2007, paras 88 – 102, especially 99.
[29] C-440/05, *„Ship source pollution,"* 23. 10. 2007, paras 66, 67, 69.
[30] Ibid. para 70
[31] See, brilliant reasoning in this respect in the Opinion of the Advocate General Mazák C-440/05, *„Ship source pollution,"* 23. 10. 2007, paras 106, 107, 108 and further.

principle of liability for damages, right to defence, principle against double jeopardy and general principles including human rights and legal certainty) developed under the first pillar were (some of them possibly) transposed within the third pillar by the creative case-law of the ECJ. The magic word of effectiveness played the most important role in its case-law as introduced in *Pupino* and confirmed in later ECJ judgements (besides those mentioned above *Segi*[32] and *European arrest warrant*[33] judgement of the ECJ may be added). Third pillar of the Union temple started to be progressively rebuilt by the ECJ. And the Lisbon Treaty accomplished this work in high style.

Third pillar "lisbonised" – communitarization with some specific characteristics accomplished

If the Lisbon Treaty is to be ratified by all of the member states and enters into force, then the third pillar will diminish and the institutional balance and functioning of the area of police and judicial cooperation in criminal matters will be largely transformed. This area will be "lisbonized," i.e. will be governed mostly and largely by supranational principles, rules and mechanisms, which are today called the Community ones.

The role of the institutional actors will change significantly. The Commission, the EP, the ECJ as well as national parliaments (NPs) will gain a lot of new power in this domain. By contrast, individual member states will lose their right to legislative initiative (only ¼ of them together will retain this right – see Article 76 TFEU) and more importantly, in principle, also the veto power in the decision making process, which will be newly subject to co-decision with the EP. Furthermore, member states will be subject to infringement procedure, where both the Commission and the ECJ will exercise their prerogatives (including supervising and penalizing ones) in order to ensure that the union law is observed.[34] The ECJ will be attributed by the full jurisdiction over this field at the same time (only with one exception: the ECJ will have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services with regard to the maintenance of law and order and the safeguarding of internal security[35]). Moreover, the ECJ may develop its human rights case-law, thanks to the binding force of the Charter of Fundamental Rights of the Union (see, Article 6 (1) TEU in conj. with the Charter itself). Especially in the field of criminal matters such a case-law may play a very important role. It will be seen how the relationship with ECHR Strasbourg Court but also national constitutional courts will develop in this respect.

[32] C-355/04 P, *„Segi,"* 27. 2. 2007
[33] C-303/05, *„European arrest warrant,"* (Advocaten voor de Wereld VZW), 3. 5. 2007
[34] However, according to the Protocol (No 36) on Transitional Provisions the infringement procedures and the new ECJ jurisdiction will apply (at the latest) after 5 years from the entry into force of the Lisabon Treaty, if the relevant measures will not be amended before.
[35] Article 276 of the TFEU

With the new Lisbon Treaty the Commission may turn to the real "engine" of the development of "European criminal area". Its strength and influence derives not only from its legislative monopoly (however, as mentioned above it will be shared with ¼ of members states), but mainly, in my view, from a firm and very broad legal bases for its activities in this field, as regards legislation in the field of substantive and procedural criminal law and cooperation and assistance in criminal matters (but also as regards operational and non-operational police cooperation). The concrete competences within these fields are defined with a certain precision. Compared to the current regulation in articles 29, 31, 34 of the TEU, they are more elaborated but much more extensive as well. They fall within the area of the so-called *shared competence* (see, Article 4(2)(j) TFEU), however, the modified version of pre-emption should apply in my view in this area (see, Article 2(2), read in conj. with Article 2(6) TFEU), because only minimum rules on certain aspects of procedural and substantive criminal law are allowed to be adopted (see, Article 82 (2) and 83 (1) TFEU), other aspects may be added upon the unanimous decision of the Council and consent of the EP. It should be, however, kept in mind that the substantive criminal competence is supposed to be potentially expanded also within the harmonized fields, where even the cross-border element is missing (see, Article 83 (2) TFEU). This competence reflects and develops the potential of the ECJ judgements on *Environmental crimes* and *Ship source pollution*, while making clear that this competence may go beyond the environmental policy and may extend to virtually all harmonized policies and contrary to the *Ship source pollution* may even impose specified criminal penalties, all this upon the condition if this proves to be *essential* to ensure the effective implementation of the particular Union policy.

It is supposed that the measures adopted under all above mentioned competences will be the *directives*.[36] Unlike the former TEU no exclusion of *direct effect* is provided for. As a result, direct effect will be applied in respective relations if classical conditions will be fulfilled (measure is clear, precise, unconditional). Of course, it must be assumed, in my view, that also other current Community (and future Union) principles (anyway largely transposed to the third pillar through the *Pupino* ruling and its implications) must apply, if no separate framework is provided for this area.

Finally, the crucial element of the new framework for police and judicial cooperation in criminal matters will be the introduction of co-decision procedure (EP and Council sharing legislative competence) and qualified majority voting within the Council in this field. However, some specific characteristics will apply as well. The so-called mechanism of emergency brake and enhanced cooperation shall apply in this context.[37]

[36] Only the measures under the article 82(1) TFEU within the field of criminal cooperation and assistance (recognition, conflict of jurisdiction, facilitation of criminal cooperation as regards proceedings in criminal matters and the enforcement of decisions) could be adopted even by *regulations* under the qualified majority voting.

[37] This will, however, not be the case of the competence under article 82(1) TFEU, see the previous note.

As regards the *emergency brake*, each member of the Council will be entitled to suspend the ordinary legislative procedure and refer the draft directive to the European Council, when it considers that fundamental aspects of its criminal justice system would be affected. Within the time limit of four months the European Council may find the consensus. If this procedure fails, nine member states will be able to establish *enhanced cooperation* among themselves on the basis of draft directive concerned (see Article, 82 (3) and 83 (3) TFEU), while no further approval is required.

A kind of modified mechanism shall apply in the context of the possible establishment of the European Public Prosecutor´s Office as well as in the sphere of operational police cooperation where unanimity is required. In these cases, a group of at least nine member states may refer the matter to the European Council. Again, if the consensus is not reached within four months in the European Council, at least nine member states, if they wish so, may establish enhanced cooperation among themselves in the particular matter, while no further approval is required (see Article 86(1) (2, 3), 87 (3) (2, 3) TFEU, enhanced cooperation, however, shall not apply to the development of schengen acquis).

As regards the strengthening of the role of the EP, it has already been mentioned that the EP will win much of the power in this field. First and foremost, when the ordinary legislative procedure shall be applied the EP should be treated on equal footing with the Council. It will be a striking change from the current state of affairs where its role is in principle limited only to consultation and giving non-binding opinions or issuing declarations. In cases where unanimity decisions will be taken its consent will be required. However, as some authors regret,[38] there will be still blind areas, where the EP shall not exercise its capacity, such as the area of defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice (Article 68 TFEU)[39].

Finally, the new role and powers of the national parliaments (NPs) should not be forgotten. The main new competence, they are granted, is that of the control of the principle of subsidiarity (and possibly proportionality as well).[40] In this area if ¼ of the NPs (each parliament holding two votes, in bicameral systems one for each chamber) claim breach of the subsidiarity principle within the 8 weeks from the submission of particular proposal, the challenged measure must be reviewed by the Commission and decision on maintaining, withdrawing or amending the measure must be explained. This procedure is called "yellow card" and as shown cannot block the legislation. Only if ½ of the votes of NPs claim the same, then first the proposal might be blocked by the majority of the EP or 55% of the Council. This so-called "orange card" seems to me, however, nearly useless because such a majority would anyway block the proposal. The "red card" is then used within the context of general passarelle,

[38] Weyembergh, A.: Approximation of criminal laws, the constitutional treaty and the Hague programme. Common Market Law Review, 2005, č. 42, p. 1595, 1596.

[39] See the Tampere programme, Hague programme and its Action Plan, accessible at: http://europa.eu/

[40] See Article 5 TEU, Article 69 TFEU, Articles, 6 a 7 of the Protocol on the application of the principles of subsidiarity and proportionality (2007) attached to the Lisbon Treaty.

or deepening clause, which enables each and every NP to veto the decision of the European Council to move from unanimity to qualified majority voting (or ordinary procedure) (see, Article 48(7) TEU)[41].

Pros and cons, opportunities and risks of the new framework

The most interesting and challenging issue, I will try to deal with now, is to point (on the basis of attained experience and concrete examples) to the possible advantages and disadvantages, as well as opportunities and risks, which the new framework may bring in contrast to the current state of affairs in the explored area of criminal matters.

In my opinion, the new legal framework may cut off some of the shortfalls inherent in the current system. The qualified majority voting within the Council may indeed contribute to attaining better and faster compromises (at least when the emergency breaks are not activated[42]) and replace the current prolonged negotiations which more importantly often lead to the vague and broad compromises, sometimes entailing special exemptions etc.. This "bad habit" has problematic repercussions both as substantive and procedural aspects are concerned. First, from a substantive point of view, vague and broad provisions within the criminal measures may run counter the substantive legality principle,[43] the fundamental principle of a particular importance especially within the criminal field (*nullum crimen sine lege, nulla poena sine lege*). Furthermore, the relevant provisions of adopted measures are often constructed in order to ensure that member states will not be forced to change their laws, however, then any regulation might become useless and practical added value might be missed. On the other hand, these vague and broad definitions may be "sent" to the ECJ, which then may give a more specific and controversial meaning to their words, also contrary to the intent of its drafters and legislators (see some judgements on *ne bis in idem*). Thus paradoxically the meant advantage may turn to be a great disadvantage for its creators as well.

On the other hand, there is no doubt that the introduction of *qualified majority voting* to a large area of substantive and procedural criminal law and certain aspects of both police and criminal cooperation might give rise to undue over-regulation, centralization and unification, which will not take into account legitimate national specifics arising from different environments and legal traditions. To find the blocking minority in the qualified majority environment will be much harder than it is in the current unanimity environment (indeed, practitioners argue that even in the environment of unanimity it is

[41] For me it is regretable that at least within the competences under Article 82(2(d) and 83 third par. This procedure is not envesiged. Such a regulation would support in my view the constitional conformity of these provisions.
Critically to this mechanism see Monar, J.: Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the ‚Area of Freedom, Security and Justice' ? European Constitutional Law Review, 2005, č. 1, p. 241..

[43] See, Weyembergh, A.: Approximation of criminal laws, the constitutional treaty and the Hague programme. Common Market Law Review, 2005, č. 42, p. 1588 – 1590.

practically necessary to find at least some other "co-fighters"). In this environment the Commission will be able to push ahead much more comfortably its proposals, even problematic ones. Let´ s mention two examples from the procedural and substantive criminal field – one abandoned, one still negotiated. The first was a *draft framework decision on certain procedural rights within the criminal proceedings*[44]. This draft was put to the ice, when one "big" (UK) and about four "small" states (including the Czech republic) effectively rejected it. There were good reasons for such a stance, in my view. Besides the unclear legal basis (which under the Lisbon Treaty will no longer be the case) there were among others reasonable objections as to the added value of this measure, in this field, which has already been well occupied by the ECHR rules and the Strasbourg case-law, which could be threatened or weakened through the possible divergent case-law of the ECJ. Another example of the problematic criminal law proposal of the Commission, in this case from the substantive criminal law field, both as regards legal basis (again with the Lisbon Treaty the competence will be also clearly established in this field and it will not be necessary to found it on extensive reading of the expansive ECJ case-law as introduced in *Environmental crimes* and *Ship source pollution*) but mainly as regards the lack of necessity of such a regulation, is the Commission proposal for a *directive on sanctioning of employers of illegally staying third country nationals*[45], which includes also the proposals for criminalizing the employers of third country nationals. This directive (among other objections) seems me to be both contrary to the principle of subsidiarity and proportionality, especially for the lack of a clear justification. It was not explained, if the member states are really not able to tackle the illegal immigration on their own. It was not shown that this proposal might serve its aim (really effective fight against illegal immigration). No statistics were delivered as regards the so-called secondary flows of illegal immigrants and so-called "nasty" employers, who are able to "count well" and "run their business with illegal migrant workers" if not harshly criminalized by the Community. Proportionality was not considered properly as well (should not it be left up to the member states to decide on criminal or administrative sanctioning). Also some of the concepts involved (e.g. exploiting working conditions) could be objected from the point they contradict the substantive legality principle and other elements for other reasons (proportionality of criminalizing 4 illegal migrants or repeated employment of illegal migrant workers). Last but not least the criminal law imperative of *ultima ratio* was not in my view well observed as well.[46]

[44] See, document 10287/07, Brussels, 5 June 2007, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.
[45] See, document COM(2007) 249 final Brussels, 16.5.2007, Proposal for a directive of the EP and of the Council providing for sanctions against employers of illegally staying third-country nationals, especially Art. 3, 10 – 13.
[46] I had an opportunity to take part in a partly negotiating of this instrument and preparing positions of the Czech republic as well. However, these are my personal remarks and reflections only. See also brilliant critical reflection on the same matter in: Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of Community competence into the field of criminal law. Common Market Law Review, 2008, č. 45, p. 147 – 151 and as regards the possible IP criminal area and competition area, 145 – 147, respectively 151 – 155.

I will stop here. I just wanted to illustrate, the problems, which occur in the criminal field nowadays and which may effectively be aggravated if the Lisbon Treaty comes into force. However, to be fair, it must be remembered that with the Lisbon framework not only *qualified majority* comes, but also *emergency brakes* and *enhanced cooperation*, as well as somehow strengthened *subsidiarity control* exercised by the NPs may be applied. If these brakes were not inserted in the Lisbon Treaty framework, I would probably argue without any hesitance, that the new framework creates a dangerous engine, which will produce possibly harmless (procedural rights) and unnecessary (criminalizing employers of illegal migrants) Union criminal legislation. Because, the brakes are there, I am cautious to absolutely reject the new framework. However, I admit, that it is the question, whether these brakes are sufficient, especially when considered in the whole context, where the ECJ gained the full jurisdiction over Union criminal matters, The Commission its infringement powers and the integrationistic-oriented EP gained in principle the equal legislative powers as the Council.

To sum up, the Lisbon treaty does form a kind of risk and a great deal of adventure at the same time. But maybe the actors will surprise, manage and pass the test somehow. Maybe, they will not.

Will the advantages or disadvantages prevail? The result of the play or the whole game will depend upon many variables. Will the ministers invoke fundamentals of their respective criminal systems? Will the European Council be able to come to consensus or will it start in fact enhanced cooperation? Will the enhanced cooperation be exercised? Will those states, which will abstain resist or be integrated? Will not be then the mutual trust (which seem to be a fiction in fact nowadays) even more undermined in the multi-speed criminal arena of enhanced cooperation and more confusing for the law enforcement authorities on the one side and more attractive for forum-shopping and safe havens-loving criminals on the other side? Will the NPs boldly take up their roles? Will they raise yellow and orange cards? How will the Commission and the respective ministers react? And what about the ECJ?

These are the open questions and challenges the Lisbon Treaty brings.

Lets´ come and see. No boring films, no soap operas, are expected. Drama, thriller will come. Welcome in new “lisbonized” criminal area!

Conclusion

In this paper I focused on describing and analyzing the main developments within the third pillar of the EU and beyond. I showed, how this intergovernmental pillar and criminal matters as such have been influenced and subjected to the Community principles, rules and mechanisms, especially by the expansive ECJ case-law, represented by the judgements such as *Pupino*, *Environmental Crimes* or *Ship*

source pollution. Then I turned my attention to the novelties introduced by the Lisbon framework in the explored area, both as regards institutional and functional aspects of the new order, while emphasizing some unique characteristics newly introduced (emergency brake, enhance cooperation). Finally I tried to sketch the future advantages, respectively disadvantages and risks of the new order in this field. I concluded my paper by raising questions as to the future prospects of this area under the Lisbon Treaty, which represents a true leap into the unknown in this respect.

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[2] C-176/03, *„Environmental crimes,“* 13. 9. 2005

[3] C-440/05, *„Ship source pollution,“* 23. 10. 2007

[4] C-355/04 P, *„Segi,“* 27. 2. 2007

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CELOŽIVOTNÍ VZDĚLÁVÁNÍ – PRÁVNÍ ÚPRAVA A VÝZNAM NEJEN Z HLEDISKA FINANCOVÁNÍ VYSOKÝCH ŠKOL

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Abstrakt

Příspěvek je věnován právní úpravě a významu celoživotního vzdělávání. V úvodu je vysvětlena souvislost s financováním veřejných vysokých škol. Vlastní pojednání poté tvoří dvě kapitoly, první se věnuje celoživotnímu učení, jehož je celoživotní vzdělávání součástí a druhá aktuální právní úpravě v kontextu souvisejících předpisů. V závěru je zdůrazněn další význam celoživotního vzdělávání a nastolena otázka jednotné právní úpravy.

Klíčová slova

Celoživotní vzdělávání, právní úprava, financování vysokých škol.

Abstract

The contribution deals with statutory regulation and importance of lifelong education. Connection to the funding of public higher education institutions is explained in the introduction. The exposition proper consists of two chapters; the first one dealing with lifelong learning, whose part lifelong education is, and the second chapter dealing with legislation in the context of related regulations. In conclusion, further importance of lifelong education is stressed and the issue of uniform statutory regulation is suggested.

Key words

Lifelong education, legislation, financing higher education institutions.

1. Úvod

Na význam celoživotního vzdělávání můžeme pohlížet z různých úhlů pohledu, například z pohledu ryze ekonomického je to možný významný zdroj financování veřejné vysoké školy nebo jiné instituce poskytující celoživotní vzdělávání. Tento příspěvek je věnován zejména celoživotnímu vzdělávání poskytovanému veřejnými vysokými školami, neboť jejich financování se systematicky věnuji. Velmi významný je také celospolečenský význam celoživotního vzdělávání. Jeho potřeba neustále roste a je odrazem rychle se měnícího morálního zastarávání získaných znalostí. Hnací silou budování celoživotního vzdělávání v zemích Evropské unie je poznatek, že růst národního blahobytu a konkurenční schopnosti jednotlivých zemí jsou závislé na lidské pracovní síle, jejím vzdělání a schopnosti přijímat a dále rozvíjet nové znalosti a novou techniku. Autoři Bílé knihy[1] se domnívají, že v celoživotním vzdělávání budou hrát dominantní úlohu nové formy studia založené zejména na využití nových informačních a komunikačních technologií, které významným způsobem zasáhnou do rozvoje celého terciárního systému vzdělávání. S tímto názorem nelze než souhlasit. Celoživotní vzdělávání má mnohdy ještě nedoceněný význam. Je proto úkolem vzdělávacích institucí reagovat na potřeby praxe a vytvořit široké spektrum programů a kurzů tohoto vzdělávání.

2. Strategie celoživotního učení ČR

Celoživotní vzdělávání poskytované vysokými školami je součástí celoživotního učení. Přesněji řečeno, pojem celoživotní vzdělávání je v této souvislosti užit poněkud nešťastně, jedná se spíše o další vzdělávání jak bude dále pojednáno. Avšak vzhledem k tomu, že související předpisy pojem celoživotní vzdělávání užívají, budu nadále tento pojem v uvedeném kontextu užívat i v této práci.

Vláda České republiky schválila nový strategický dokument Strategii celoživotního učení České republiky (usnesení č. 761 ze dne 11. července 2007). Tento dokument[2] mapuje oblast celoživotního učení v naší republice a především přichází s návrhy jak tuto oblast rozvíjet a podporovat. Podle citovaného dokumentu představuje celoživotní učení zásadní koncepční změnu v pojetí vzdělávání, jeho organizačního principu, kdy všechny možnosti učení – ať už v tradičních vzdělávacích institucích v rámci vzdělávacího systému či mimo ně – jsou chápány jako jediný propojený celek, který dovoluje rozmanité a četné přechody mezi vzděláváním a zaměstnáním a který umožňuje získávat stejné kvalifikace a kompetence různými cestami a kdykoli během života. Celoživotní učení lze členit do dvou základních etap, které označujeme jako počáteční a další vzdělávání.

[1] Národní program rozvoje vzdělávání v České republice : bílá kniha, Praha : Ústav pro informace ve vzdělávání – nakladatelství Tauris, 2001, 98 s.
[2] Strategie celoživotního učení ČR. [citováno 26. března 2008]. Dostupný z : http://www.msmt.cz/eu/strategie-celozivotniho-uceni-cr-1

Počáteční vzdělávání zahrnuje:

- základní vzdělávání, které má všeobecný charakter a kryje se zpravidla s dobou plnění povinné školní docházky,
- střední vzdělávání, které má všeobecný nebo odborný charakter, je ukončeno maturitní zkouškou, výučním listem nebo závěrečnou zkouškou,
- terciární vzdělávání, které zahrnuje široký sektor vzdělávací nabídky následující zpravidla po vykonání maturitní zkoušky. Náleží k němu vysokoškolské vzdělávání uskutečňované vysokými školami a vyšší odborné vzdělávání uskutečňované vyššími odbornými školami

Další vzdělávání probíhá po dosažení určitého stupně vzdělání, respektive po prvním vstupu vzdělávajícího se na trh práce. Další vzdělávání může být zaměřeno na různorodé spektrum vědomostí, dovedností a kompetencí důležitých pro uplatnění v pracovním, občanském i osobním životě. Důraz na obecný koncept celoživotního učení, s nímž nutně souvisí vytváření rozmanité a prostupné struktury nejen terciárního vzdělávání, ale celého vzdělávacího systému, je celosvětovým trendem.

Kurzy dalšího odborného vzdělávání reagujícího na konkrétní potřeby regionu v působnosti vysoké školy nebo ve vazbě na spolupráci s praxí – zaměstnavateli nebo přímo výrobními podniky – představují dosud spíše okruh menšího zájmu vysokých škol. Některé kurzy celoživotního vzdělávání jsou připravovány ve spolupráci s profesními komorami, firmami apod. Existuje však řada barier pro vzájemnou spolupráci pracovišť regionální, státní a veřejné správy, firem a dalších zaměstnavatelů s vysokými školami v regionu, které překonávají jen velmi pomalu.

Bohaté aktivity s velmi dobrou kvalitou vykazují téměř všechny veřejné vysoké školy v oblasti vzdělávání seniorů. Tzv. univerzity třetího věku jsou dnes již považovány za tradiční činnosti vysoké školy a je o ně velký zájem ze strany seniorů. Podpora vzdělávání starších osob má svůj význam i z hlediska jejich uplatnění na trhu práce. Stárnutí populace bude mít postupně za následek zapojení starších osob do pracovního procesu, respektive pozdější odchod do důchodu. Je zřejmé, že jejich efektivní uplatnění na trhu práce bude také vyžadovat rozšíření a diverzifikaci nabídky dalšího vzdělávání poskytovaného vzdělávacími institucemi terciárního sektoru. V současné době však převládá vzdělávání seniorů, které má spíše zájmový nebo občanský charakter bez vlivu na jejich pracovní uplatnění.

Masarykova univerzita, na které působím, nabízí tradičně široké spektrum programů a kurzů celoživotního vzdělávání i univerzitu třetího věku, o kterou je ze strany seniorů nebývalý zájem.

Společným jmenovatelem pro celou tuto oblast je garance, že vzdělávání zajišťují přední odborníci daných oborů.

3. Právní úprava celoživotního vzdělávání poskytovaného vysokými školami

Podle § 60 zákona o vysokých školách[3] může vysoká škola v rámci své vzdělávací činnosti poskytovat bezplatně nebo za úplatu programy celoživotního vzdělávání orientované na výkon povolání nebo zájmově. Bližší podmínky celoživotního vzdělávání stanoví vnitřní předpis, se kterým musí být účastníci celoživotního vzdělávání seznámeni předem. Účastníci celoživotního vzdělávání nejsou studenty podle zákona o vysokých školách. Pokud je však účastník celoživotního vzdělávání následně přijat ke studiu studijního programu, může mu být na základě novely zákona z roku 2001[4] uznáno až 60 % kreditů potřebných k řádnému ukončení studia získaných v rámci celoživotního vzdělávání. O absolvování studia v rámci celoživotního vzdělávání vydá vysoká škola jeho účastníkům osvědčení.

Vnitřní předpisy, k jejichž vydání zmocňuje § 60 zákona o vysokých školách, uvedu na konkrétních příkladech vnitřních předpisů Masarykovy univerzity a Právnické fakulty Masarykovy univerzity. Řád celoživotního vzdělávání Masarykovy univerzity[5] upravuje:

- bližší specifikaci programu celoživotního vzdělávání
- přijímání uchazečů ke studiu
- průběh studia
- organizaci studia
- ukončení studia
- úplatu
- matriku účastníků celoživotního vzdělávání

Řád celoživotního vzdělávání Právnické fakulty Masarykovy univerzity[6] upravuje:

- bližší specifikaci programu celoživotního vzdělávání
- vzdělávací řád celoživotního vzdělávání

[3] Zákon č. 111/1998 Sb., o vysokých školách a o změně a doplnění dalších zákonů (zákon o vysokých školách), v platném znění.
[4] Zákon č. 147/2001 Sb., kterým se mění zákon č. 111/1998 Sb., o vysokých školách a o změně a doplnění dalších zákonů (zákon o vysokých školách), ve znění zákona č. 210/2000 Sb., a zákon č. 451/1991 Sb., kterým se stanoví některé další předpoklady pro výkon některých funkcí ve státních orgánech a organizacích České a Slovenské Federativní republiky, České republiky a Slovenské republiky, ve znění pozdějších předpisů.
[5] Řád celoživotního vzdělávání Masarykovy univerzity. [citováno 26. března 2008]. Dostupný z : http://www.muni.cz/general/legal_standards/lifelong_regulations
[6] Řád celoživotního vzdělávání Právnické fakulty Masarykovy univerzity v Brně. [citováno 26. března 2008]. Dostupný z : http://www.law.muni.cz/czv/predpisy.php

- zkušební řád
- působení učitelů v celoživotním vzdělávání
- správu celoživotního vzdělávání
- úplatu
- využívání služeb účelových zařízení fakulty účastníky celoživotního vzdělávání

Celoživotní vzdělávání jako zdroj financování vysoké školy významně ovlivňuje daň z přidané hodnoty. Oblast výchovy a vzdělávání je upravena § 57 zákona o dani z přidané hodnoty.[7] Dovolím si na tomto místě krátce připomenout změny, kterými znění tohoto paragrafu od přijetí zákona č. 235/2004 Sb. prošlo. Podle odstavce 2 je od daně osvobozeno dodání zboží nebo poskytnutí služby uskutečňované v rámci výchovy a vzdělávání osobou uvedenou v odstavci 1. Právě znění odstavce 1 prošlo dle mého názoru v části týkající se vzdělávací činnosti poskytované na vysokých školách významnými změnami, jenž posilují význam celoživotního vzdělávání.

V původním znění § 57, odst. 1 byla pouze obecně definována výchova a vzdělávání pro účely tohoto zákona jako výchovná a vzdělávací činnost poskytovaná mimo jiné na vysokých školách s odkazem na zákon o vysokých školách. Významnou změnu přineslo přijetí novely zákona o dani z přidané hodnoty,[8] jenž v odstavci 1 citovaného paragrafu definuje pro účely tohoto zákona výchovu a vzdělávání pro oblast vysokých škol jako vzdělávací činnost poskytovanou na vysokých školách

1. v akreditovaných bakalářských, magisterských a doktorských studijních programech,
2. v programech celoživotního vzdělávání uskutečňovaných v rámci akreditovaných bakalářských, magisterských a doktorských studijních programů,
3. v programech celoživotního vzdělávání uskutečňovaných podle zvláštních právních předpisů,
4. v programech celoživotního vzdělávání uskutečňovaných jako Univerzita třetího věku.

Přijetím této právní úpravy došlo ke sjednocení podmínek vzdělávací činnosti poskytované v akreditovaných studijních programech a programech celoživotního vzdělávání. Za významné považuji i ustanovení bodu 3, které upravuje vzdělávací činnost poskytovanou na vysokých školách v programech celoživotního vzdělávání uskutečňovaných podle zvláštních právních předpisů. Zákonodárce uvedl jako příklad zvláštního právního předpisu zákon o pedagogických pracovnících.[9] Tento příklad je však možno rozšířit o další předpisy upravující vzdělávání v různých resortech.

[7] Zákon č. 235/2004 Sb., o dani z přidané hodnoty, v platném znění.
[8] Zákon č. 377/2005 Sb., o doplňkovém dohledu nad bankami, spořitelními a úvěrními družstvy, institucemi elektronických peněz, pojišťovnami a obchodníky s cennými papíry ve finančních konglomerátech a o změně některých dalších zákonů (zákon o finančních konglomerátech).
[9] Zákon č. 563/2004 Sb., o pedagogických pracovnících a o změně některých zákonů, v platném znění

S ohledem na rozsah příspěvku krátce pojednám o zmíněném zákonu o pedagogických pracovnících a dále o vybraných předpisech z resortů vnitra, práce a sociálních věcí a zdravotnictví.

Zákon o pedagogických pracovnících

Tento zákon upravuje předpoklady pro výkon činnosti pedagogických pracovníků, jejich další vzdělávání a kariérní růst. Další vzdělávání pedagogických pracovníků se uskutečňuje mimo jiné na vysokých školách, v zařízeních dalšího vzdělávání pedagogických pracovníků a v jiných zařízeních na základě akreditace udělené Ministerstvem školství, mládeže a tělovýchovy České republiky (dále jen ministerstvem školství). Ministerstvo školství akredituje pro účely tohoto zákona vzdělávací instituce a jejich vzdělávací programy zaměřené na další vzdělávání pedagogických pracovníků na základě žádosti fyzické nebo právnické osoby za podmínek stanovených tímto zákonem. Akreditace vzdělávací instituce se uděluje na dobu 6 let, akreditace vzdělávacího programu se uděluje na dobu 3 let. Akreditace vzdělávací instituce nebo akreditace vzdělávacího programu je nepřevoditelná a nepřechází na právní nástupce.

Zákon o úřednících územních samosprávných celků[10]

Tento zákon upravuje pracovní poměr úředníků územních samosprávných celků a jejich vzdělávání. Prohlubování kvalifikace může podle tohoto zákona poskytovat právnická nebo fyzická osoba oprávněná ke vzdělávací činnosti podle zvláštního předpisu, již byla udělena akreditace. Ministerstvo vnitra České republiky akredituje pro účely tohoto zákona vzdělávací instituce nebo vzdělávací programy na základě žádosti fyzické nebo právnické osoby za podmínek stanovených tímto zákonem. Akreditace vzdělávací instituce nebo akreditace vzdělávacího programu se uděluje na dobu 3 let. Akreditace vzdělávací instituce nebo akreditace vzdělávacího programu je nepřevoditelná a nepřechází na právní nástupce.

Zákon o sociálních službách[11]

Tento zákon upravuje mimo jiné předpoklady pro výkon povolání sociálního pracovníka, pokud vykonává činnost v sociálních službách nebo podle zvláštních právních předpisů při pomoci v hmotné nouzi, v sociálně-právní ochraně dětí, ve školách a školských zařízeních, ve zdravotnických zařízeních, ve věznicích, v zařízeních pro zajištění cizinců a v azylových zařízeních. Sociální pracovník má povinnost

[10] Zákon č. 312/2002 Sb., o úřednících územních samosprávných celků a o změně některých zákonů, v platném znění
[11] Zákon č. 108/2006 Sb., o sociálních službách, v platném znění

dalšího vzdělávání, kterým si obnovuje, upevňuje a doplňuje kvalifikaci. Další vzdělávání se uskutečňuje na základě akreditace vzdělávacích zařízení a vzdělávacích programů udělené Ministerstvem práce a sociálních věcí České republiky (dále jen ministerstvem práce a sociálních věcí) na vysokých školách, vyšších odborných školách a ve vzdělávacích zařízeních právnických a fyzických osob. Akreditace se uděluje na dobu 4 let, je nepřevoditelná a nepřechází na právního nástupce.

Zákon o podmínkách získávání a uznávání odborné způsobilosti a specializované způsobilosti k výkonu zdravotnického povolání lékaře, zubního lékaře a farmaceuta[12]

Tento zákon upravuje mimo jiné specializační vzdělávání a celoživotní vzdělávání lékařů, zubních lékařů a farmaceutů. Celoživotní vzdělávání organizují a pořádají zejména Ministerstvo zdravotnictví České republiky (dále jen ministerstvo zdravotnictví), vysoké školy připravující studenty k výkonu zdravotnického povolání, Česká lékařská komora, Česká stomatologická komora, Česká lékárnická komora a odborné lékařské společnosti ve spolupráci s akreditovanými vzdělávacími zařízeními, zdravotnickými zařízeními, Ministerstvem práce a sociálních věcí a Českou správou sociálního zabezpečení. Udělením akreditace se získává oprávnění k uskutečňování vzdělávacího programu, který je zveřejněn ve Věstníku Ministerstva zdravotnictví. Vzdělávací program uskutečňuje zdravotnické zařízení a právnická nebo fyzická osoba, kterým ministerstvo zdravotnictví udělilo akreditaci. Akreditace se uděluje nebo prodlužuje na dobu určitou, odpovídající nejméně délce vzdělávacího programu.

Zákon o nelékařských zdravotnických povoláních[13]

Tento zákon upravuje mimo jiné celoživotní vzdělávání zdravotnických pracovníků a vzdělávání jiných odborných pracovníků. Vybrané formy celoživotního vzdělávání (specializační vzdělávání a certifikované kurzy) uskutečňují akreditovaná zařízení, kterými mohou být zdravotnická zařízení a právnické nebo fyzické osoby, jimž ministerstvo zdravotnictví udělilo akreditaci, která se uděluje na dobu určitou odpovídající nejméně délce vzdělávacího programu.

4. Závěr

[12] Zákon č. 95/2004 Sb., o podmínkách získávání a uznávání odborné způsobilosti a specializované způsobilosti k výkonu zdravotnického povolání lékaře, zubního lékaře a farmaceuta, v platném znění

[13] Zákon č. 96/2004 Sb., o podmínkách získávání a uznávání způsobilosti k výkonu nelékařských zdravotnických povolání a k výkonu činností souvisejících s poskytováním zdravotní péče a o změně některých souvisejících zákonů (zákon o nelékařských zdravotnických povoláních), v platném znění.

Cílem předkládaného příspěvku bylo pojednat o celoživotním vzdělávání, jeho významu a právní úpravě. Příspěvek má poskytnout komplexní pohled na danou oblast činnosti vysoké školy. Snahou autora je k tématu se vrátit a dále ho rozpracovat. Jak bylo řečeno již v úvodu, na význam celoživotního vzdělávání můžeme pohlížet z různých úhlů pohledu. Je to nejen možný významný zdroj financování vysoké školy, ale též nástroj rozvoje společnosti. Význam celoživotního vzdělávání není dosud plně doceněn. Pokud se týká právní úpravy, je otázkou, zda by celoživotní vzdělávání nemělo být alespoň v základních principech upraveno jednotným předpisem. Vzhledem k výše uvedenému vzrůstajícímu významu a širokému spektru jak poskytovatelů tak účastníků, se domnívám, že by takto upraveno být mělo. Celoživotní vzdělávání má perspektivní budoucnost, na kterou musí reagovat náš legislativní proces.

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AKTUÁLNÍ OTÁZKY PRÁVNÍ ÚPRAVY FINANCOVÁNÍ VEŘEJNÝCH VÝZKUMNÝCH INSTITUCÍ

PETRA ADÁMKOVÁ

PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY V BRNĚ

Abstrakt

Na základě zákona č. 341/2005 Sb., o veřejných výzkumných institucích, přibyla ke stávajícím právnickým osobám, které zajišťují výzkumnou a vývojovou činnost, nová forma rozpočtové jednotky - veřejná výzkumná instituce. Přijetím uvedené legislativy došlo u vybraných subjektů zabývajících se výzkumem s účinností od 1.1.2007 k institucionální změně statutu. Transformací státních příspěvkových organizací na veřejnoprávní výzkumné instituce získaly tyto subjekty plnou právní subjektivitu, včetně možnosti vlastnit majetek. Rámec fungování nového typu instituce je upraven tak, aby nedocházelo k narušování rovných podmínek v porovnání s jiným typem subjektů podnikajících v oblasti vědy a výzkumu.

Klíčová slova

Veřejná výzkumná instituce, veřejnoprávní instituce, majetek, hospodaření

Abstract

On the basis of the Public Research Institution Act No. 341/2005, the current array of corporations responsible for research and development has been enriched by a new type of budgetary institution, namely, the Public Research Institution. The ratification of this Act has induced a change in institutional status of a number of entities engaged in research, effective from January 1, 2007. By way of their transformation from national budgetary institutions into public research institutions, these entities have obtained full corporate personality, including the right to own property. The legal terms, under which institutions of the new type stall operate, have been determined with a view to maintaining equality of conditions between these and other types of entities engaged in the area of science and research.

Key words

public research institution, statutory institution, property, management

Úvod do problematiky

S účinností od 1.1. 2007 se mezi jednotlivé typy rozpočtových jednotek existujících na území České republiky zařadila i nová právnická osoba veřejného práva – veřejná výzkumná instituce (dále jen VVI). Stalo se tak na základě zákona č. 341/2005 Sb., o veřejných výzkumných institucích, který byl přijat dne 28.7.2005 a nabyl účinnosti dnem svého vyhlášení 13.9.2005. Ve stejných termínech byl přijat i zákon č. 342/2005 Sb., kterým byl v souvislosti s přijetím zákona o veřejných institucích mj. pozměněn i zákon č. 283/1992 Sb., o Akademii věd České republiky (dále jen AV ČR). Zákon č. 341/2005 Sb., v § 31 odst.1 ustanovil, že státní příspěvkové organizace, které jsou v příloze č.1 tohoto zákona, se dnem 1.1.2007 staly veřejnými výzkumnými institucemi s evidencí v úředním rejstříku veřejných výzkumných institucí vedenou Ministerstvem školství, mládeže a tělovýchovy.

Důvodem přijetí nové formy právnické osoby v oblasti vědy a výzkumu byl zejména fakt, že do té doby převládající forma příspěvkové organizace nebyla pro výzkum a vývoj z dlouhodobého hlediska vhodná, a to zejména v závislosti na členství ČR v EU. V členských zemích Evropské unie mezi právnickými osobami zabývajícími se výzkumem a vývojem nemá příspěvková organizace analogický protějšek, neboť její právní subjektivita je omezena tím, že nevlastní majetek a není schopna ručit za své závazky (v zahraničí jde obvykle buď o samostatnou právnickou osobu se všemi s tím souvisejícími právy a povinnostmi, nebo o organizační složku příslušného státu). Neexistence subjektu s plnou právní subjektivitou činila překážky v přímé spolupráci se zahraničními vědeckými institucemi a v účasti v konsorciích při řešení projektů rámcových programů EU i v jiných aktivitách Evropského výzkumného prostoru, což ve svém důsledku snižovalo návratnost prostředků vložených Českou republikou. Nutnost vytvoření nové právnické osoby svého druhu koncipovala vláda svým usnesením ze dne 17.4.2002 č. 400, věcný záměr zákona pak schválila dne 7.4.2003 usnesením č. 331. Závazek předložit návrh zákona o veřejných výzkumných institucích však nevyplýval jen z výše uvedených usnesení vlády, ale i z požadavků EU. Již v Národní politice výzkumu a vývoje České republiky, předložené v rámci negociačních jednání Evropské unii, se vláda zavázala k dokončení transformace příspěvkových organizací výzkumu a vývoje a to na obdobných principech jako u veřejných vysokých škol.

Přijatou právní úpravou však nedošlo k transformaci všech resortních výzkumných ústavů. Příspěvkové organizace s malým podílem činnosti ve výzkumu a vývoji a některé příspěvkové organizace, provádějící výzkum zadávaný převážně formou veřejných zakázek, nebyly do návrhu zákona, resp. do přílohy č.1, zahrnuty. Dále výzkumné ústavy, které mají v současnosti formu organizační složky státu, nemohly být převedeny na novou formu podle citovaného zákona, neboť neměly právní subjektivitu.

(Změnit právní postavení těchto výzkumných institucí je možné za předpokladu, že organizační složka bude zrušena a zřizovatel na jejím základě zřídí jinou osobu s právní subjektivitou). Také zvláštnosti transformace ústavů Akademie věd ČR byly řešeny v novele zákona č. 283/1992 Sb., o Akademii věd ČR, kde je upraveno postavení Akademie věd ČR a jejích ústavů. Obecně však pro ústavy AV platí všechny podmínky stanovené pro veřejné výzkumné instituce.[1]

Veřejná výzkumná instituce se stala vhodnou variantou zejména pro přeměnu (transformaci) části resortních výzkumných ústavů, které do té doby měly formu státních příspěvkových organizací, kdy tyto byly koncipovány jako univerzální forma pro státní, později i pro veřejnoprávní zřizovatele, a to v zásadě pro všechny oblasti (vzdělávání, zdravotnictví, sociální věci) a proto byly omezeny v řadě práv a povinností. VVI je naopak koncipována jako účelová forma dovolující podrobnější právní úpravu pro specifickou oblast výzkumu a vývoje.

Rozbor právní úpravy

1. Vymezení veřejné výzkumné instituce

Zákon č. 341/2005 Sb., o veřejných výzkumných institucích, ve znění pozdějších novel, upravuje způsob zřízení, vznik, činnost, způsob zrušení a zánik VVI, postavení a působnost zřizovatele a orgánů, včetně přeměny příspěvkových organizací zabývajících se výzkumem na veřejné výzkumné instituce.

Veřejná výzkumná instituce je právnickou osobou, jejímž hlavním předmětem činnosti je výzkum, včetně zajišťování infrastruktury výzkumu, vymezený zákonem o podpoře výzkumu a vývoje[2]. Veřejná výzkumná instituce svou hlavní činností zajišťuje výzkum, podporovaný zejména z veřejných prostředků, v souladu s podmínkami pro poskytování veřejné podpory stanovenými právem Evropských společenství.[3] Je novým typem právnické osoby, jejíž hlavní činností je pouze výzkum (včetně jeho infrastruktury), nikoli vývoj. Důvodem je požadavek na transparentnost činnosti a jednoznačný veřejnoprávní charakter veřejné výzkumné instituce, který bude posuzován Evropskou komisí ve vztahu k výši veřejných prostředků. Pokud se bude veřejná instituce zabývat i vývojem, musí to činit v rámci „ jiné činnosti“ za podmínek stanovených zákonem.

VVI jako veřejnoprávní instituce může být zřízena pouze Českou republikou nebo územním samosprávným celkem. Jménem České republiky plní funkci zřizovatele ministerstvo, jiný ústřední správní orgán nebo Akademie věd České republiky v postavení organizační složky ČR. Informace o výsledcích výzkumné činnosti instituce musí být veřejně dostupné v informačním systému výzkumu a

[1] Čl.1. Stanov Akademie věd České republiky – stanovy byly schváleny usnesením vlády č. 614 s účinností od 1.1.2007

[2] §2 odst.1 písm.a) a §2 odst.2 písm.f) zákona 130/2002 Sb., o podpoře výzkumu a vývoje z veřejných prostředků a o změně některých souvisejících zákonů (zákon o podpoře výzkumu a vývoje)

[3] Čl. 87 a 89 Smlouvy o založení Evropského společenství , ve znění pozdějších smluv

vývoje [4] a ve výroční zprávě o činnosti a hospodaření. Zákon rovněž bez výhrad určuje, že závazkové vztahy mezi VVI navzájem a mezi VVI a státem, územními samosprávnými celky nebo VŠ na straně druhé při realizaci hlavní, další nebo jiné činnosti, jakož i závazkové vztahy mezi VVI a podnikateli při shora uvedených činnostech se ze zákona řídí obchodním zákoníkem**.**

Veřejná výzkumná instituce je zřízena dnem vydání zřizovací listiny zřizovatelem (to i v případě vzniku splynutím a rozdělením) a vzniká dnem, ke kterému je zapsána do rejstříku veřejných výzkumných institucí, veřejného seznamu vedeného Ministerstvem školství, mládeže a tělovýchovy. Návrh na zápis podává zřizovatel, který je oprávněn jednat za instituci v době od jejího zřízení do vzniku. Zákon vymezuje povinné náležitosti zřizovací listiny, kterými jsou kromě identifikačních údajů zejména stanovení účelu a předmětu hlavní činnosti, popřípadě činností, které nejsou výzkumem a vymezení majetku a závazků k tomuto majetku se vztahujících. Zřizovací listina musí obsahovat popis základní organizační struktury instituce, přičemž jeho bližší specifikace má být dále provedena vnitřním předpisem, k jehož vydání je VVI. zmocněna v §20 cit. zákona. Zákon stanovuje rovněž způsoby zrušení veřejné výzkumné instituce bez likvidace a s likvidací, přičemž principy jsou stanoveny obdobně jako v obchodním zákoníku, případně se na obecnou úpravu odkazuje. Je zde několik výjimek, které vyplývají ze zvláštností zaváděné právnické osoby, zejména s ohledem na její veřejnoprávní charakter.Veřejná výzkumná instituce zaniká dnem výmazu z rejstříku veřejných výzkumných institucí.

Jak již bylo shora uvedeno, jednotlivé veřejné výzkumné instituce jsou oprávněny přijímat **vnitřní předpisy**, přičemž je stanoven jejich minimální rozsah (volební řád, jednací řád, organizační řád, vnitřní mzdový předpis, pravidla pro hospodaření s fondy, jednací řád dozorčí rady). V případě potřeby lze přijmout vnitřní předpis nad rámec výčtu stanoveného v §20 odst.1 písm. a)-f). Pro zachování jednotného charakteru je však stanoven jednotný způsob schvalování interních předpisů tak, aby byl zachován samosprávný charakter veřejných výzkumných institucí. Výjimku tvoří jednací řád dozorčí rady, který schvaluje zřizovatel a nikoli rada VVI, což vyplývá z kontrolní povahy orgánu dozorčí rady vůči VVI a proto nemůže být v její pravomoci. K realizaci zákonů o veřejných výzkumných institucích a nových Stanov AV ČR a v zájmu maximálního usnadnění a kvalitního uskutečnění přeměny pracovišť AV ČR přijaly orgány AV ČR během roku 2006 a počátkem roku 2007 vnitřní předpisy, např. nový Statut Grantové agentury AV, vzorový jednací řád dozorčí rady pracoviště AV, vzorový organizační řád pracoviště AV, schvalování úkonů pracoviště AV ČR při nakládání s majetkem a majetkovými právy-směrnice č.2/2006, vzorový spisový a skartační řád pracovišť AV ČR – interní normy 7/2006, vzorová pravidla pro hospodaření pracovišť AV ČR částka č. 11/2006 a další.[5]

[4] §12 zákona o podpoře výzkumu a vývoje

[5] Akademická Rada AV ČR: Závěrečná zpráva o průběhu a výsledcích přeměny pracovišť AV ČR na veřejné výzkumné instituce, Akademický Bulletin, 1/2008, str. 16, ISSN 1210-9525

2. Působnost zřizovatele a jednotlivých orgánů

Působnost **zřizovatele** je vymezena tak, že na jedné straně nedovoluje přímé zasahování do činnosti veřejné výzkumné instituce, ale ve spojení s působností dozorčí rady, která je mimo jiné kontrolním orgánem zřizovatele, umožňuje zřizovateli dostatečnou kontrolu nad majetkem, který do instituce vložil, a nad dodržením účelu, ke kterému ji zřídil. Přímá působnost zřizovatele se soustřeďuje na zřizovací funkce a nakládání s majetkem, kde je třeba zdůraznit, že některé majetkové úkony jsou bez souhlasu zřizovatele, popřípadě též dozorčí rady, neplatné. Vliv na činnost může zřizovatel uplatnit cestou jmenování ředitele a členů dozorčí rady, včetně stanovení mzdy.

Co se týče jednotlivých orgánů instituce, tyto jsou vymezeny v § 16 citovaného zákona a jsou jimi **ředitel, rada instituce a dozorčí rada**. Mimo klasifikaci ustanovení §16 vytváří zákon právní rámec pro jednotný způsob řízení a vyvážením působností jednotlivých orgánů zajišťuje na straně jedné samosprávné řízení a vliv odborné veřejnosti, na druhé straně chrání oprávněné zájmy zřizovatele a poskytovatelů. Zejména je zajištěna ochrana vloženého majetku, aby pod veřejnou kontrolou sloužil k činnostem, pro jejichž zajištění jej do veřejné instituce zřizovatel vložil. Ve vztahu k unijnímu právu je třeba vyzdvihnout i ustanovení o způsobu úhrady nákladů na činnost orgánů z prostředků této instituce, která je plně v souladu se zákonem o podpoře výzkumu a vývoje a jeho prováděcími předpisy, které stanoví, jaké náklady lze uznat v rámci poskytnuté podpory z veřejných prostředků.

Působnost **ředitele** je vymezena tak, aby tento jednal samostatně v operativních věcech. Vybrané problémy, které se dotýkají hospodaření, rozpočtu nebo vnitřních předpisů, však musí řešit s dalším orgánem – radou instituce. Tím je zajištěn stálý dohled samosprávného orgánu na chod instituce a jeho vliv na vytváření dlouhodobých koncepcí a směrů rozvoje, současně ale není omezena pravomoc ředitele při jejím řízení. Ředitele jmenuje zřizovatel na návrh rady instituce, předložený na základě výběrového řízení.

Rada instituce v sobě slučuje prvky samosprávného vědeckého řídícího orgánu a správní rady. Samosprávný charakter je dán jejím složením a způsobem volby členů, neboť tito jsou voleni vlastními výzkumnými pracovníky. Rada instituce v rámci své působnosti mimo jiné dbá na zachování účelu, na uplatnění veřejného zájmu v její činnosti a na řádném hospodaření, stanovuje směry činnosti v souladu se zřizovací listinou, schvaluji rozpočet v.v.i., schvaluje vnitřní předpisy. Jak již bylo uvedeno, ředitel a rada instituce se podílejí na řízení a jejich působnosti se vzájemně doplňují. Tato provázanost kompetencí a zodpovědnosti je posílena tím, že ředitel může být členem rady instituce, její zasedání může svolávat a předsedat jim. Model tak zachovává operativnost statutárního orgánu (ředitele) a zaručuje přímou vazbu na samosprávný orgán s vymezenými pravomocemi (radu instituce).

Co se týče **dozorčí rady**, jejím prostřednictvím zajišťuje zřizovatel kontrolu nad majetkem, který převedl na veřejnou výzkumnou instituci, nad využíváním majetku a získaných finančních prostředků

k účelu, pro který byla instituce zřízena, a způsobem stanoveným platnými právními předpisy. Jedná se o úkony spojené s kontrolou a dohledem, nikoli o úkony řídícího či strategického charakteru. Proto je také stanoveno, že dozorčí rada je odpovědna zřizovateli. Pro zajištění srovnatelné úrovně činnosti dozorčí rady stanovuje zákon počet členů, způsob jmenování a odvolání zřizovatelem, délku funkčního období a požadavky na bezúhonnost. Co se týče vztahu dozorčí rady a ředitele, tito si nejsou vzájemně nadřízeni.

3. Materiální základ a pravidla hospodaření

Vlastnictví majetku je důležitým atributem, kterým se veřejná výzkumná instituce od státní příspěvkové organizace, která má pouze příslušnost hospodařit s majetkem, a od příspěvkové organizace územního samosprávného celku, která má majetek pouze ve správě. Úprava vychází ze zásady, že **veškerý hmotný a nehmotný majetek instituce musí sloužit především výzkumu**, popřípadě další nebo jiné činnosti. Majetek vkládá zřizovatel na základě zřizovací listiny, dokonce může na instituci převést i závazky související s vkládaným majetkem, nejvýše však do výše 20% hodnoty tohoto vkládaného majetku, a to z důvodu, aby závazky neznemožnily záhy další její činnost.[6] Je zajímavé, že k přechodu závazků souvisejících s vkládaným majetkem se ze zákona nevyžaduje souhlas věřitele, avšak zřizovatel ručí za splnění závazků, které na instituci přešly.

Aby veřejná výzkumná instituce nemohla bez kontroly majetek převedený na ni zřizovatelem zcizit, váže se právo nakládat s majetkem na splnění některých podmínek. Kontrolu nad nakládáním s majetkem zajišťuje předepsaný souhlas zřizovatele a dozorčí rady, bez kterých jsou stanovené právní úkony neplatné. Předchozího souhlasu dozorčí rady je tak třeba k právnímu úkonu, kterým hodlá instituce nabýt nebo zcizit nemovitý majetek, nabýt nebo zcizit movitý majetek, jehož hodnota je vyšší než dvousetnásobek částky, od níž jsou samostatné movité věci považovány podle zvl. práv.předpisu za hmotný majetek, zřídit zástavní nebo jiné věcné právo k majetku VVI, uzavřít nájemní smlouvu s dobou nájmu delší než 3. měsíce. Ze stejného důvodu se stanovují přísné podmínky pro zakládání jiných právnických osob a pro vklady majetku do těchto osob. Založení jiné právnické osoby institucí za stanovených podmínek zákon nevylučuje, zejména z důvodu srovnatelnosti s obdobnými institucemi EU, je umožněno operativní sdružování s jinými výzkumnými institucemi pro usnadnění realizace výsledků výzkumu.

Jak již bylo uvedeno, VVI je povinna majetek využívat k realizaci hlavní činnosti.(§21 zák. č. 341/2005 Sb.,). K další nebo jiné činnosti může majetek užívat jen stanoví-li tak tento zákon, přičemž další nebo jiná činnost nesmí být hrazena z veřejných prostředků určených na podporu výzkumu. Veřejná výzkumná instituce může provádět tzv. další činnost a jinou činnost, avšak pouze při splnění zde

[6] Toto omezení se vztahuje i na přeměnu stávajících příspěvkových organizací na VVI

stanovených podmínek pro provádění těchto činností. Stanovení podmínek pro provádění jiných než výzkumných činností je důležité nejen proto, aby zůstal zachován účel zřízení VVI, ale také proto, aby byl udržen charakter neziskové organizace, tj. organizace, která nebyla zřízena za účelem podnikání a dosahování zisku. Z tohoto důvodu je rovněž stanoveno, že zisk může být po úhradě ztráty z minulých let a po odvodech do fondů použit pouze k podpoře hlavní činnosti. Toto ustanovení zajišťuje také soulad s pravidly hospodářské soutěže a podmínkami pro poskytování veřejné podpory. Povinnost odděleného vedení nákladů a výnosů hlavní, vedlejší a jiné činnosti je stanoven z důvodu transparentnosti, která je u veřejných podniků v rámci EU požadována a umožní sledovat jednotlivé typy činností (tzn. činností financovaných z veřejných prostředků a činností komerčních). V odstavci 5 §21 cit. zákona je stanovena povinnost instituce ukončit další nebo jinou činnost jakmile jsou na konci účetního období ztrátové, což vychází z principu, že tyto činnosti mají být prováděny pouze za účelem účelnějšího využití majetku a lidských zdrojů a nesmí ohrozit hlavní činnost instituce. Prioritou je zachování neziskového charakteru. VVI tak není umožněno realizovat v rámci jiné nebo další činnosti víceleté akce, které budou ztrátové v prvním roce, neboť úhrada ztráty v prvních letech by mohla ohrozit hlavní činnost.

S ohledem na provedenou transformaci bylo nezbytné ošetřit způsob a dobu převedení majetku z příspěvkových organizací na VVI, včetně přechodu závazků a dalších aktiv a pasiv. Zákon umožnil zřizovateli rozhodnout se o majetku a závazcích, které nemají přejít do vlastnictví nově zřizovaných institucí, a to zejména z důvodu, aby tyto nebyly zatíženy majetkem nebo závazky s jejich činností nesouvisejícími nebo příliš zatěžujícími rozpočet. Odlišně se upravil postup pro transformaci příspěvkových organizací územních samosprávných celků, a to s ohledem na jejich ústavou zaručená práva. U těchto subjektů došlo k přeměně pouze v případě, že zřizovatel (územní samosprávný celek) v zákonem stanovené lhůtě o transformaci rozhodl, nedošlo tedy k transformaci ze zákona.

S hospodařením úzce souvisí problematika rozpočtu. Veřejná výzkumná instituce sestavuje **vyrovnaný rozpočet** na kalendářní rok (§ 22 zákona 341/2005 Sb.). Do svého rozpočtu zahrnuje náklady a výnosy související s hlavní, další a jinou činností, což znamená, že může provádět další činnost (zpravidla pro svého zřizovatele), která není výzkumem, ale přesto je financována (je na ni poskytnuta dotace) z veřejných prostředků. Jde např. o zpracování odborných stanovisek nebo zajištění školení, jinou veřejně prospěšnou činnost apod., realizovanou v rámci plnění veřejné zakázky nebo financování formou dotace podle příslušných právních předpisů.

Výnosy v.v.i jsou zejména finanční prostředky

- z podpory výzkumných záměrů nebo projektů výzkumu a vývoje podle zákona č. 130/2002 Sb.

- z podpory hlavní nebo další činnosti z jiných než veřejných prostředků
- z majetku
- z přijatých darů a dědictví
- z dotací na další činnost z veřejných prostředků
- z jiné činnosti.

Náklady jsou zejména náklady na hlavní činnost, náklady na další činnost a náklady na jinou činnost.

Veřejná výzkumná instituce je povinna ze zákona zřídit 4 **fondy** (rezervní, reprodukce majetku, účelově určených prostředků a sociální) a umožnit převod zůstatků všech fondů do následujících rozpočtových roků.
Co se týče **rezervního fondu**, který tvoří příděl finančních prostředků nejméně ve výši 5% ze zisku běžného účetního období po zdanění a peněžní dary s výjimkou darů účelově určených, tento lze použít k úhradě ztráty, sankcí, ke krytí dočasného nedostatku finančních prostředků, k úhradě nákladů hlavní činnosti nezajištěných výnosů, k doplnění fondu reprodukce popřípadě k jiným výdajům, které v mimořádných případech schválí zřizovatel a dozorčí rada.
Fond reprodukce je peněžní fond určený ke shromažďování prostředků na obnovu a pořízení majetku. Stanovuje se způsob jeho tvorby, který je vázán zejména na finanční prostředky přímo související s majetkem (odpisy, výnosy z prodeje majetku, dotace z veřejných prostředků, dary poskytnuté za účelem pořízení a technického zhodnocení majetku).
Ustanovení o **fondu účelově určených prostředků** umožňuje převést omezený objem účelově určených finančních prostředků poskytnutých na řešení výzkumného projektu nebo výzkumného záměru nebo na jinou činnost, nespotřebovaných v daném roce, do fondu účelově určených prostředků a efektivně je využít v následujícím roce. Cílem opatření je zabránit tomu, aby přidělené prostředky, které z nepředvídaných důvodů (odložená zahraniční služební cesta, nedodržení termínu dodávky objednaného zboží nebo zařízení) nebylo možné v daném roce použít v souladu s jejich určení, byly ke konci roku nehospodárně utráceny. Přesun je vázán na písemné oznámení poskytovateli. Účel **sociálního fondu** je obdobný fondu kulturních a sociálních služeb, jeho užití se ponechává na vnitřním předpisu instituce.

Nezastupitelnou úlohu v oblasti hospodaření s veřejnými prostředky hraje **kontrola hospodaření se svěřenými prostředky**. Kontrolní činnost není předmětným zákonem upravena a uskutečňuje se podle zákona č. 320/2001 Sb., o finanční kontrole ve veřejné správě, vyhlášky Ministerstva financí ČR č. 416/2004 Sb., kterou se provádí zákon o finanční kontrole, a podle usnesení vlády č. 1199/2006, o

Strategii vlády v boji proti korupci na období let 2006-2011. V případě Akademie věd ČR byl navíc po projednání na 29. zasedání AV ČR 6.3.2007 vydán příkaz o kontrolní činnosti v Akademii věd ČR při hospodaření s veřejnými prostředky, který stanovuje zásady kontrolního systému AV ČR a sjednocuje postup při realizaci vnitřního systému finanční kontroly ve smyslu uvedené právní úpravy.[7]

Stejně jako kontrolní činnost, nejsou výslovně cit. zákonem upraveny ani daňové otázky nebo rozpočtová pravidla, neboť se řídí obecně platnou právní úpravou, a to zejména zákonem č. 218/2000Sb., ve znění pozdějších novel (rozpočtová pravidla), zákonem č. 320/2001 Sb., o finanční kontrole ve veřejné správě a o změně některých dalších zákonů, ve znění pozdějších novel, zákonem č. 130/2002 Sb., o podpoře výzkumu a vývoje, zákonem č. 586/1992 sb., o daních z příjmů, ve znění pozdějších novel, zákonem č. 357/1992 Sb., o dani dědické, darovací a dani z převodu nemovitostí, ve znění pozdějších novel atd.

4. Kompatibilnost právní úpravy s právem ES

S ohledem na členství České republiky v Evropské unii je nutné zkoumat danou právní úpravu i ve vztahu ke komunitárnímu právu, resp. její slučitelnost s právními akty Evropského společenství (ES). V primárním komunitárním právu ES je výzkum a vývoj upraven v Hlavě XVIII (výzkum a technologický rozvoj) Smlouvy o založení ES (ve znění po přijetí Amsterodamské smlouvy) článek 163 – 173.[8] Vztahují se na něj i obecná ustanovení o veřejných podporách, tato však nepředpokládají sbližování legislativy členských zemí, pouze stanoví, že Společenství a členské státy koordinují svou činnost ve výzkumu a vývoji tak, aby zajišťovaly vzájemnou provázanost svých národních politik a politik Společenství (čl. 165).

Tendence dlouhodobého strategického usměrňování výzkumu a vývoje a orientace na integrované projekty zdůrazňují potřebu zavedení takové právní formy výzkumných institucí, jež budou otevřeny pro vnitrostátní i mezinárodní spolupráci. Z hlediska adresátů koordinované vědeckovýzkumné politiky ES platí nediskriminační přístup bez ohledu na právní formu výzkumné instituce, a to za podmínek, že jejich výzkumné aktivity jsou z hlediska cílů zakládací smlouvy ES nezbytné a jejich úsilí směřuje k dosažení vysoké úrovně v oblasti výzkumu a vývoje. Právo ES zároveň umožňuje, aby členské státy přiznaly zvláštní nebo výlučná práva veřejným ústavům, podnikům a zařízením. Tyto subjekty, ať

[7] Příkaz o kontrolní činnosti v Akademii věd ČR při hospodaření s veřejnými prostředky, Interní norma AV ČR, částka 6/2007

[8] Článek 163 Smlouvy ES stanoví, že „Společenství má za cíl posilovat vědecké a technické základy průmyslu Společenství a podporovat rozvoj mezinárodní konkurenceschopnosti, jakož i podporovat všechny výzkumné činnosti, které jsou pokládány za nezbytné“. V článcích 164 až 173 Smlouvy ES jsou vymezeny činnosti, které mají být v této souvislosti prováděny, a oblast působnosti a provádění víceletého rámcového programu - viz Ústřední věstník Evropské unie C 323/4: Rámec Společenství pro státní podporu vědy, výzkumu a inovací, část 1.1. Cíle státní podpory na výzkum, vývoj a inovace

již byly zřízeny na základě komunitárního či vnitrostátního práva, však musí mít plnou právní subjektivitu.

Přijatá právní úprava plně respektuje komunitární pravidla pro poskytování veřejné podpory, podle kterých veřejná podpora výzkumu a vývoje není předmětem žádné výjimky (článek 87 Smlouvy o založení ES, článek 64 Evropské dohody mezi ES a ČR a Rozhodnutí Rady přidružení mezi ES a ČR č.1/98 o přijetí prováděcích pravidel pro uplatnění ustanovení o státní podpoře). Na podpory poskytované veřejným institucím se vztahuje zákon č. 215/2004 Sb., o úpravě některých vztahů v oblasti veřejné podpory a o změně zákona o podpoře výzkumu a vývoje, stejně jako zákon č. 130/2002 Sb., o podpoře výzkumu a vývoje a zákon o veřejných zakázkách. Rovněž přijatá legislativní opatření vyhovují i směrnici Komise 80/723/EHS ve znění Směrnice Komise 2000/52/ES. Veřejné prostředky jsou veřejné výzkumné instituci zpřístupňovány přímo orgány veřejné správy (v souladu s dalšími právními předpisy ČR upravující tuto oblast), použití veřejných prostředků je jednoznačně dáno, finanční a organizační struktura VVI je stanovena jasně, včetně povinnosti vést oddělenou evidenci nákladů a příjmů spojených s různými činnostmi a určením metod stanovení nákladů a příjmů a povinnosti zveřejňovat výroční zprávu o činnosti a hospodaření se stanovením jejich povinných náležitostí.

Závěr

Závěrem lze konstatovat, že nová právní úprava umožní výzkumným institucím lépe a efektivněji využívat finanční prostředky a získávat i jiné zdroje pro financování výzkumu a vývoje např. dosažením zisku z další činnosti, spolufinancováním ze soukromých zdrojů, uvolněním nepotřebného majetku, úspor z lepší organizace, účastí v zahraničních programech apod. Rovněž přinesla zvýšenou samostatnost a odpovědnost výzkumných pracovišť zejména v ekonomické sféře, čehož je třeba využít pro zvýšení kvality a efektivity vědecké práce. Dle slov předsedy Akademie věd prof. Václava Pačese lze nyní udělat daleko více pro větší podporu a lepší odměňování excelentních vědců, pro oboustranně výhodnou spolupráci s vysokými školami, pro výrazné posílení přímé, vzájemně prospěšné spolupráce s podnikatelskou sférou, pro účelné rozvíjení i jiných činností pracovišť, pro budování spin-off firem a dalších institucí, které budou přispívat k lepšímu využívání výsledků vědecké práce, to však v souladu se zákonnými podmínkami a za podmínek, že nové aktivity nebudou narušovat volnou hospodářskou soutěž a dotace z veřejných rozpočtů nebudou použity pro komerční účely a nad rámec zákona.

Veřejné výzkumné instituce mají za sebou teprve první rok své existence, který byl ve znamení spíše organizačních a personálních opatření včetně úprav majetkových vztahů. Ve vztahu k předchozí právní úpravě se však jedná o úpravu, která bezesporu přispěje k efektivnějšímu využívání možných finančních zdrojů na poli výzkumu.

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THE ROLE OF FINANCIAL STANDARDS IN THE CONSTITUTIONS OF THE COUNTRIES OF THE VISEGRAD GROUP

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Abstract

The regional cooperation between the Czech Republic, Hungary, Poland and Slovakia goes back far in the past. One of the main goals of this cooperation is to link these countries on the score of economic development. The study argues that in order to achieve this goal, these four countries, first of all, need transparent, efficient and predictable public funds management. In the author's opinion, this objective could be realized if all the members of the Visegrad Group had a separate chapter in their constitutions concerning public finance, which would contain the fundamental principles of financial law. It is also important to fulfill the requirements of the rule of law in that particular field of law. The study seeks to sketch a model suitable for the specific purposes of the V4 countries and especially for Hungary.

Key words

Public funds management, constitutional regulation, Visegrad Group

„Money speaks sense in a language all nations understand."

/Aphra Behn/

Introduction:

Cooperation between people and nations is one of the oldest and most important things in the world. Many kinds of cooperations came into existence in the course of years, for example domesticities, economic, political, social and professional collaboration. Nevertheless, what does a state explicitely need to establish relations of this kind? In this highly globalised world, one of the most simple answer is money. We know naturally that common interest is the ground of every cooperation, but in general, these cannot work for a long time without money, moreover, they cannot start to work at all. That could

be one reason why states cannot help or support each other, or why they cannot cooperate. However, we also know that in order to preserve and develop competitiveness in our days it is a must.

On the grounds of what I have mentioned above, the first standpoint in my research was that all states have to manage their public finance with extraordinary diligence, which is not only a remarkable thing in a state's life, but a challenge at the same time, as well.
In my essay, I focused on the Visegrad Group's economic cooperation[1], and especially on their constitutional framework concerning public finance. The reason for this is that I think it is important to have a comprehensive constitutional regulation concerning public finance in every democratic country, just like in the countries I did my research on.

Actualities:

As a result of my research my statements are the following ones:

1. Poland has the most of public financial principles among the countries that I have studied. Poland has only two deficiencies, namely, its Constitution does not contain the rules concerning the equilibrium of budget and the referendum relative to budget.
2. Poland and Slovakia both have a separate chapter in their constitutions relating public finance (however the contents are not the same):
    - Poland: Chapter X.:Public Finances, and Section I, Chapter IX.: The Supreme Chamber of Control,
    - Slovakia: Chapter III.: The Economy of the Slovak Republic.
3. Regarding the Czech Republic and Hungary, we can tell that they only have partial constitutional chapters, which only include the organizations of public finance:
    - Czech Republic: Chapter V.: The Supreme Inspection Office, and Chapter VI.: The Czech National Bank,
    - Hungary: Chapter VI.: The State Audit Office and the National Bank of Hungary.

On the score of contents, I can tell that the common regulations are as follows:

1. The draft law on the state budget and the draft law on the state annual account is presented by the Government.[2] It is important because the state budget rests on the programme of the

[1] Czech Republic, Hungary, Poland and Slovakia.
[2] Paragraph 1, Article 42, Constitution of the Czech Republic; Pragraph 1, Article 35, Constitution of Hungary; Article 222, Constitution of Poland; Article 119, Constitution of Slovakia.

government, and it is also the government that has the most information and means concerning the budget implementation.

2. It is always the Parliament that shall adopt the state budget.[3] It is a crucial regulation too, because the Parliament's decisions can predominate the representation of people supremely.[4]
3. The National Bank is the central bank in each state that, first of all, is responsible for the currency stability.[5] Every country needs careful monetary policy and the best way to reach this is to establish a separate organization especially in order to to complete this task.
4. The State Audit Office is an independent organization, which executes inspections of the management of state property and the fulfillment of the state budget.[6]

This content is needed but, in my opinion, is not enough. I think that some other regulations must be inserted too.

Proposals:

These are the following.

1. The Parliament shall adopt, as a law, a budget **for all** state **income and expenditure** and **for each year**. On the one hand, it is important that the budget law should contain all incomes and expenditures, in a way that ensures long-term sustainability, by reason of the discipline of completeness. On the other hand, a one-year budget is recommended because it makes regular comparisons possible and in this case the competence of the Parliament is not reduced.[7]
2. The Parliament may adopt a **supplementary budget**, on the proposal by the Government, during the budget year. The reason of this rule is that there are some special circumstances when additional financial measures are needed.
3. Proposed amendments to the national budget or to its draft, which require a decrease in income, an increase of expenditures, or a re-distribution of expenditures, (as prescribed in the draft national budget), must be accompanied by the **necessary financial calculations**, prepared by the initiators, which indicate the sources of income to cover the proposed expenditures.

[3] Paragraph 2, Article 42, Constitutin of the Czech Republic; Paragraph 3, Article 19, Constitution of Hungary, Paragraph 1, Article 219, Constitution of Poland; Article 86, Constitution of Slovakia.
[4] It is obvious that citizens elect their representatives in the legislative and executive branches of state's to make decisisons on behalf of them.
[5] Paragraph 1, Article 98, Constitution of the Czech Republic; 1 Paragraph, Article 32/D, Constitution of Hungary; Paragraph 1, Article 227, Constitution of Poland; Article 56, Constitution of Slovakia.
[6] Paragraph 1, Article 97, Constitution of the Czech Republic, Paragraph 1, Article 32/C, Constitution of Hungary; Article 202 and 203, Constitution of Poland; Paragraph 1, Article 60, Constitution of Slovakia.
[7] These two disciplines are very significant principles concerning public finance management, especially concerning accountancy.

4. It is obvious that the national budget shall enter into force from the beginning of each budget year. However, if the Parliament does not adopt the national budget by the beginning of the budget year, it is better to adopt a **transitional budget law** for some months, but if it is not possible, at least, it shall be permitted to make expenditures each month up to one-twelfth of the expenditures of the previous budget year. My opinion is that it could not be allowed to govern without the authorization of people. Furthermore there is another substantial regulation beside this one:
5. If the Parliament has not adopted the proper budget within some (two or three) months of the beginning of the budget year, for example, the President of the Republic shall declare early elections for the Parliament.[8] I think it could be instrumental in political cooperation in the Parliament.
6. Another issue that is very actual in our days is **public debt**.[9] It should be the Parliament again that must have the right to decide on this question because it is concerned to the whole nation.
7. The most neglected part of budget law is the role of the **appropriation accounts**. It is true that every country shall adopt the law on the state's national account, but in my opinion it does not fulfill the function that it should. There must be a right (fiscal) contol over the function of the government, and if it is appropriate, the government should get exculpation. I think that nowadays the Parliament only accepts the execution of the budget, and it does not approve it.
8. Last but not least, the **referendum concerning public finance**s also has to be inserted into the Constitutions. The referendum must be prohibited in these topics, because as I have mentioned above, it is always the Parliament (the supreme body of the state power and popular representation) that decides upon these questions. I believe that one national-level decision is enough, a second acceptance not necessary, what is more, it is not possible. Namely, if the law gave the possibility to vote on this question, it would probably come true, that a statue which is appropriate for everyone, would never be accepted. The Hungarian Constitutional Court has also declared, concerning this question, that the constitution of a democratic country generally protects, for example, economic costitutionality and the right of the Parliament to accept the budget law.

Conclusion:

[8] This regulation is in the Constitution of Estonia (Article 119.) and it is unique in the European Union.
[9] It is important because of the EU, that monitor the public debt in the course of its excessive deficit procedure.

In my opinion, having viable international relationships among states, one of the most important things is to have a stable constitunional framework. However, in the member states of the Visegrad Group, this condition needs amendments concerning public finances.

Namely, I believe that there are some essential regulations concerning the field of financial law that should be deemed fundamental in every democratic country to have appropriate public funds management. That is why, in my research, my aim was to the make an international survey relative to the Central-European region, and as a result of this, to make a proposal concerning this topic.

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[3] László, Trócsányi – Attila, Badó (eds.): *Nemzeti Alkotmányok az Európai Unióban*, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó, 2005, 1065 p, ISBN: 963 224 841 4.

[4] 1949. évi XX. törvény, a Magyar Köztársaság Alkotmányának Indokolása (Motivation of the Constitution of the Republic of Hungary).

[5] 1992. évi XXXVIII. törvény az államháztartásról (Áht.) és Indokolása (Law about state budget and its motivation).

[6] http://www.servat.unibe.ch/law/icl/index.html

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ROMANIAN TAX PROVISIONS INCONSISTENT WITH THE RIGHT TO A FAIR TRIAL

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Abstract

In the last few years, a large number of tax provisions have been adopted in Romania and incorporated mainly in the new Fiscal Code. Unfortunately, in some cases the legislator did not pay attention to the relevant provisions of the European Convention of Human Rights, especially those enshrined in article 6, concerning the right to a fair trial. In this respect, at the time being we can conclude that a number of Romanian tax provisions are inconsistent with the right to a fair trial and may pose serious problems for the Romanian state before the European Court of Human Rights.

1. As the European Court of Human Rights (ECHR) has often said, the right of a fair trial enshrined in Article 6 of the European Convention of Human Rights[1] and in Article 21 par. 3 of the Romanian Constitution reflects the fundamental principle of the rule of law in a democratic society[2]. The right to a fair does not apply to proceedings referring to revenue law which concern the extent of the obligation to pay taxes[3], but it applies where a tax-related dispute involves civil rights[4] or when a fiscal penalty is imposed[5].

2. The Court held that an excessive impediment of the access to the court, such as the imposition of a fee for lodging an action to the amount of an average annual salary, is incompatible with Art. 6 par. 1 of the Convention[6]. This is particularly the point where Romania encounters serious problems, as it has

[1] For general considerations on the right to a fair trial, see Renucci, J.-F., *Traité de droit européen des droits de l'homme*, Paris: Librairie Générale de Droit et de Jurisprudence, 2007, 1135 pages, ISBN 978-2-275-02329-8, p. 351 - 478; Sudre, Fr., *Droit européen et international des droits de l'homme*, Paris: Presses Universitaires de France, 2006, 786 pages, ISBN 978-2-13-055880-4, p. 318-386; Ehlers, D. (ed.), *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht, 618 pages, ISBN 978-3-89949-446-4, p. 160-169; Chiriţă, R., *Convenţia europeană a drepturilor omului. Comentarii şi explicaţii*, volume I, Bucureşti: C.H. Beck, 2007, 505 pages, ISBN 978-973-115-047-5, p. 233-440.

[2] *Inter alia*, ECHR, Judgement of 26 April 1979, *Sunday Times v. United Kingdom*, par. 55.

[3] ECHR, Judgement of 12 July 2001, *Ferrazzini v. Italy*, par. 29.

[4] See, for example, ECHR, Judgement of 23 October 1997, *National and Provincial Building Society and others v. the Netherlands* (recovery of overpaid corporate income tax).

[5] In this respect, the leading case is ECHR, Judgement of 24 February 2004, *Bendedoun v. France*. For example, the right to a fair trial is applicable, considering its "criminal" side, for the surcharges imposed by the tax authorities amounting to some 10% of the tax liability (ECHR, Grand Chamber, Judgement of 23 November 2006, *Jussila v. Finland*, par. 38).

[6] ECHR, Judgement of 19 June 2001, *Kreuz v. Poland*, par. 61. For further thoughts on this case, see Kuty, Fr., *Justice pénale et procès équitable*, volume I, Bruxelles: Larcier, 2006, 849 pages, ISBN 978-2-8044-2249-3, p. 346-347.

suffered a number of convictions before the European Court. Of course, the leading case on that matter is *Weissman and others v. Romania*[7], where the Court held that a stamp duty of EUR 323,264 (approximately 1% of the value of the goods reclaimed) is an excessive obstacle for access to a court incompatible with Art. 6 par. 1. Although this was only the first case to be heard in Strasbourg[8], the Romanian Government did not provide any remedy for this particular inconsistency so far. Therefore, the Romanian legislation related to stamp duties is incompatible with the right to a fair trial as long as:

- the stamp duties are determined based on criteria which do not relate to the financial possibilities of the applicants and are particularly high for any litigant;
- although the claimant may apply for an exemption of the stamp duties to the tax authorities, there is no case-law able to suggest that such claims are successful;
- failure to pay the stamp duties results into annulement of the action brought before the Court;
- this particular mechanism impairs the very essence of the right of access to a court[9].

In our opinion, this matter can be brought to an end if one of the following solutions would be envisaged: all the costs and fees are to be determined at the end of the trial and are due by the party that eventually lost the trial; based on a thorough and effective investigation of the administrative authorities or of the court, parties that cannot pay their stamp duties are exempted from the payment of taxes; judges are entitled to grant exemption of stamp duties if there is a good chance of success for the claim brought before the court; a maximum ceiling for stamp duties is established for every type of litigation.

3. The right to a fair trial implies not only the right to a judge and the right to obtain a reasoned judicial decision, but also the right to the execution of such a judicial decision, as far as this decision is final and binding. As the European Court has often said, „the right to a court" would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party[10]. Therefore, states are required to take all the necessary steps in order to ensure the effective execution of final and binding judicial decisions, including those in the tax field or where financial consequences are involved.

At this point, one must notice that the Romanian legislation concerning the execution of judicial decisions concerning public authorities and institutions is problematic. To be more specific, according

[7] ECHR, Judgement of 24 May 2006, *Weissman and others v. Romania*.
[8] See also ECHR, Judgement of 25 January 2007, *Iorga v. Romania*; ECHR, Judgement of 11 October 2007, *Larco and others v. Romania* (failure to pay taxes of some 90,000 euros); ECHR, Judgment of 7 February 2008, *Beian v. Romania* (No. 2) – failure to pay taxes of some 330 euros, while the joint income of the plaintiff and his wife was approximately 119 euros.
[9] Minea, M. Şt., Costaş, C.F., *Dreptul finanţelor publice. Drept fiscal*, Bucureşti: Wolters Kluwer România, 2008, 484 pages, ISBN 978-973-1911-09-0, p. 368.
[10] For the leading decision, see ECHR, Judgement of 19 March 1997, *Hornsby v. Greece*, par. 40.

to the provisions of the Government Ordinance no. 22/2002[11], the party that obtained a final and binding judicial decision imposing on a public authority or institution to pay a sum of money could obtain the execution of such a decision only if the respective amount was contained in the budget of the public entity. In other words, such a party would have to wait for the execution of the judgment until the public entity approved a budget that contained enough money in order to satisfy the claim. Government Ordinance no. 22/2002 also provided that public authorities and institutions could not be subject to a forced execution for such claims, since the public goods and revenues are excepted from such an execution. Surprisingly, the Romanian Constitutional Court upheld this position[12].

Following the extensive criticism of the Romanian doctrine[13], Law no. 110/2007[14] introduced new rules on this matter. According to these rules, public authorities and entities are obliged to take all the necessary steps in order to pay the amounts claimed, as long as a final binding decision is presented. If the respective public entity fails to do so within a prescriped term of 6 months, the creditor is entitled to obtain the forced execution of the judicial decision, following the provisions of the Romanian Code of Civil Procedure.

Although such a regulation is a sure step ahead, we do believe that there is still no sufficient evidence that the new provisions offer an effective remedy for the execution of binding judicial decisions, where a public authority and institution is involved as debtor. In this respect, we find it necessary to provide for other mechanisms as well: the possibilty of the creditor to have his claim introduced in the next budget, without prior approval of the Parliament, the local authorities or the institution itself (as far as local budgets are concerned, this solution was possible in the 1940s); the imposition of a surcharge for the public authorities for the time elapsed before the moment when the claim is introduced and the moment when the judicial decision is executed; the possibility of the creditors to claim the non-fiscal revenues of the public authorities (revenues from civil or commercial contracts, from concession contracts and so on) in order to have their debts repaid.

It must be noted that some better solutions were found where the execution of judicial decisions of the administrative courts are concerned. According to the provisions of Law no. 554/2004[15], a binding decision of an administrative court must be complied with in the term established by the judge or no later than 30 days from the moment the decision became final (article 24 par. 1). If this obligation is not respected, anyone can ask the court to impose a fine of 20% of the minimum monthly wage per day on the head of the public authority or institution, up to the moment where the decision is executed entirely.

[11] Published in Official Journal no. 81 of 1 February 2002.

[12] Amongst many others, see Decision no. 202 of 4 July 2002, Official Journal no. 805 of 6 November 2002; Decision no. 444 of 20 November 2003, Official Journal no. 871 of 8 December 2003; Decision no. 529 of 11 October 2005, Official Journal no. 1025 of 18 November 2005.

[13] See, for example, Chiriță, R., *Convenția europeană a drepturilor omului. Comentarii și explicații*, p. 285-286.

[14] Published in Official Journal no. 300 of 5 May 2007.

[15] Published in Official Journal no. 1154 of 7 December 2004, with the subsequent changes.

Following such a decision, if the execution of the initial judicial decision is still pending, there is an offence of failure to comply with judicial decisions, which is punished by a fine of up to EUR 3,000 or by imprisonment of 6 months to 3 years.

4. A particular disposition of the Romanian Fiscal Code might pose additional problems as far as the right to obtain the execution of a judicial decision is concerned. In the case of the judicial apportionment of a building or land, the parties obtain a judicial decision recognising their right of property for the whole or for a portion of the respective good. Of course, if the good is entirely attributed to one party, the other party is generally entitled to a sum of money or to another equivalent compensation. In this case, according to article 77^1 of the Romanian Fiscal Code, the party that obtains the sum of money (assimilated to the seller of a building or of land) has to pay the tax on the income obtained from the transfer of property. Furthermore, the new owner of the building or land must register his right with the Land Register Authority, in order to have his right of property fully protected. At this point, a tricky tax provision helds that the Land Registed Authority is entitled to refuse such registration as long as the proof that income tax has been paid is not presented (article 77^1 par. 6 Romanian Fiscal Code, *in fine*). The purpose of such a provision is clearly that of ensuring the payment of income tax to the state budget.

In our view, such a provisions is clearly inconsistent with the right to a fair trial and also unconstitutional with reference to article 21 of the Romanian Constitution. At least two arguments can sustain this conclusion:

- the party that asks for the registration of the right of property asks for the execution of a final binding judicial decision; in this respect, according to the *Hornsby* jurisprudence, the state authorities must refrain from making such a judicial decision ineffective;

- the fact that income tax has not been paid is not attributable to the new owner, as he has no obligation to pay tax, while a proof of the payment is quite difficult to obtain by the party that did not pay the tax and had no obligation whatsoever to do so[16].

Therefore, we believe that the provision of article 77^1 par. 6 of the Romanian Fiscal Code must be abrogated at once.

5. The Romanian doctrine has often claimed that the obligation to comply with a previous and compulsory litigation procedure before the tax authorities (article 202 and the following of the Romanian Code of Fiscal Procedure), prior to having the case heard by a „court" within the meaning of

[16] See also Costaş, C.F., *Instanţa judecătorească - perceptor fiscal?*, in Dreptul no. 2/2007, p. 70 – 82; Minea, M. Şt., Costaş, C.F., *Dreptul finanţelor publice. Drept fiscal*, p. 36.

the European Convention of Human Rights, is contrary to the right of access to justice[17]. Despite the jurisprudence of the Romanian Constitutional Court on this matter[18], we believe that such a procedure is a clear and unjustified restriction of the right of access to justice, at least for the following reasons:

- based on the criteria established by the European Court of Human Rights, such procedures are to be considered special jurisdictions;

- article 21 par. 4 of the Romanian Constitution clearly states that such procedures are optional;

- there is little proof that the tax authorities are inclined to reform their decisions, in the favour of the taxpayer claiming that such decisions are illegal;

- the compulsory character of such procedures can also affect the right to a judgement within a reasonable time, also recognised by article 6 par. 1 of the European Convention and article 21 par. 3 of the Romanian Constitution.

Under these circumstances, we do agree with the majority of the Romanian doctrine on the fact that the Romanian legislator should make the necessary changes to the Code of Fiscal Procedure and eliminate this restriction as soon as possible.

6. Article 6 par. 2 and 3 of the European Convention of Human Rights grant to the persons facing a „criminal charge" special guarantees: recognition of the presomption of innocence, the right of silence, rights and facilities of the defense and so on. On the contrary, the relevant provisions of the Romanian Code of Fiscal Procedure are rather shy when it comes to the same solution.

In our view, this deficiency is caused by the fact that the Romanian legislator and the tax authorities do not consider fiscal procedure is covered by the right to a fair trial. On the contrary, based on the *Bendedoun* jurisprudence, we believe that the criteria are met in order to consider that there is a „criminal charge" involved[19] and that article 6 is applicable in certain cases (for example, as far as the tax surcharges of 0,1% for day of delay are concerned[20]). Therefore, the taxpayers should be granted the special guarantees provided for by the European Convention.

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[17] Deleanu, I., *Tratat de procedură civilă*, volume I, Bucureşti: C.H. Beck, 2007, 897 pages, ISBN 978-973-115-100-7, p. 87; Popescu, C.-L., *Frauda la Constituţie realizată de Legea nr. 174/2004 pentru aprobarea O.G. nr. 92/2003 privind Codul de procedură fiscală, prin calificarea expresă a procedurii fiscale drept procedură administrativă*, in Curierul judiciar no. 7-8/2004, p. 196-206; Dascălu, D., Alexandru, C., *Explicaţiile teoretice şi practice ale Codului de procedură fiscală,* Bucureşti: Rosetti, 2005, 581 pages, ISBN 973-8378-97-4, p. 496.

[18] Decision no. 409 of 12 October 2004, Official Journal no. 1063 of 16 November 2004; Decision no. 478 of 9 November 2004, Official Journal no. 69 of 20 January 2005.

[19] There are four criteria which are taken into account in order to decide whether article 6 is applicable: the tax provisions must concern all the citizens and not only a particular group; the surcharges are not meant to ensure the compensation of the losses incurred by the public budget, but to discourage a similar conduct; the fiscal sanctions are based on a general legal text with a repressive aim; the amount of the fiscal sanctions is considerable (ECHR, Judgment of 24 February 1994, *Bendedoun v. France*).

[20] As far as the tax surcharges are concerned, the French doctrine underlined the fact that certain difficulties might arise in respect of the right of the fair trial as long as the amount of the surcharges is greater than the amount of the legal interest rate (Flauss, J.-F., *Sanctions fiscales et Convention européenne des droits de l'homme*, in Revue Française des Finances

One example might prove helpful at this point. According to article 10 of the Romanian Code of Fiscal Procedure, the taxpayer has a general obligation to cooperate with the tax authorities. Further special provisions oblige the taxpayer to provide all the necessary information at the request of the tax authorities, free of charge (article 52 par. 1) or to facilitate the access of the authorities on the premises (article 57). These obligations are clearly at odds with the right not to contribute to the self-incrimination[21] or with the right of silence[22] recognised by the European Court of Human Rights within the context of the right to a fair trial.

For these reasons, we believe that the Romanian legislator should act quickly and provide for the guarantees enshrined in article 6 paragraphs 2 and 3 of the European Convention when a „criminal charge" in the tax field is involved. Especially, the above-mentioned guarantees should be granted in all cases where evidence collected in the administrative procedures (such as the tax procedures) is to be used in forthcoming criminal procedures[23].

7. Based on the examples highlighted above, we can conclude that the Romanian legislator has a lot of work to do in order to make certain tax provisions compatible with the right to a fair trial, as interpreted by the European Court of Human Rights. In this respect, particular consideration must be paid to the case-law of the European Court, while a comparative analysis of other states legislation might prove helpful as far as the chosen solutions are concerned. Of course, if the Romanian Government and Parliament fail to do so, it is for the judges to apply the European Convention directly, based on articles 11 and 20 of the Romanian Constitution, in order to protect the fundamental rights of taxpayers.

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Publiques, 1999, p. 77 – 100). The European Court of Human Rights reached a similar conclusion in some cases (for example, ECHR, Judgement of 3 December 2002, *Boofzheid v. France*; ECHR, Judgement of 15 October 2002, *Vieziez v. France*).

According to article 120 par. 7 of the Romanian Code of Fiscal Procedure, the level of the surcharges for failure to pay taxes within the prescribed time limit is set at 0,1% for every day of delay. Therefore, an annual surcharge of 36,5% is considerably greater than the legal interest rate of 10-14% and it is not solely meant to ensure the compensation of the losses incurred by the state or local budgets.

[21] ECHR, Judgement of 24 November 1993, *Imbrioscia v. Switzerland*.

[22] ECHR, Judgement of 17 December 1996, *Saunders v. United Kingdom*.

[23] See Kuty, Fr., *Justice pénale et procès équitable*, p. 525-558; Mateuţ, Gh., Ionescu, D., *Inadmisibilitatea utilizării ca mijloc de probă în procesul penal a proceselor-verbale şi a actelor de constatare obţinute în procedurile administrative de control,* in Caiete de drept penal no. 1/2005, p. 11-40.

EDITAČNÍ POVINNOST - KOMPARACE ČESKÉ A POLSKÉ ÚPRAVY

DAMIAN CZUDEK

PRÁVNICKÁ FAKULTA, MASARYKOVA UNIVERZITA

Abstrakt

Tento příspěvek se zabývá relativně novým institutem daňového práva majícího za cíl zvýšení právní jistoty daňových subjektů, a má pomoci při orientaci a výkladu daňových předpisů. Institut závazného posouzení správcem daně je součástí zákona o správě daní a poplatků, stěžejního předpisu upravujícího správu daní. Zaměřil jsem se na změny vyplývající ze zákona č.261/2007 Sb., o stabilizaci veřejných rozpočtů, a zákona č. 235/2004 Sb., o dani z přidané hodnoty, které rozšířily možnost žádat správce daně o závazné posouzení v dalších pěti případech. Pro komparaci a také možná řešení do budoucna je článek doplněn o polskou úpravu.

Klíčová slova

právní institut, interpretace, editační povinnost, závazné posouzení správcem daně

Abstract

The subject-matter of this paper is the issues of interpretation of Tax Legal Acts by the Tax Administration Bodies. I was trying to describe this institute in two legal regulations, as a part of the Czech Act on Administration of Taxes and Fees and Polish act called "Ordynacja podatkowa", which are regarded as backbone of tax administration and tax proceedings in both countries.

Key words

legal institute, interpretation, duty to edit, tax administrator’s binding examination

Úvod

Jednou ze základních zásad právního státu je *zásada právní jistoty*. Pokud se máme řídit zákony, aplikovat je sami na sobě, jak tomu je v daňovém procesu, musíme jim rozumět a především věřit. Najdeme zde také souvislost se *zásadou předvídatelnosti*. „*Tato zásada představuje garanci principu rovnosti v právech a v důstojnosti, rovnosti před zákonem.“*[1] Z této zásady vyplývá, ve vztahu ke správním aktům, povinnost odůvodňovat rozhodnutí týkající se práva a povinností jednotlivců, zejména když bylo rozhodnuto na základě správního uvážení. Tato zásada však ve *starém správním řádu*[2] absentovala.

Nepřehlednost zákonů a nutnost posílení jistoty daňových subjektů vyvolávalo tlaky na zavedení *institutu závazného posouzení*.

Práce vychází z aktuálního znění zákona č. 337/1992 Sb., o správě daní a poplatků, ve znění pozdějších předpisů a zákona ze dne 29 srpna 1997 r., „Ordynacja podatkowa“, ve znění pozdějších předpisů.

Institut závazného posouzení správcem daně

Závazné posouzení správcem daně, jinak také *editační povinnost*, je institutem relativně novým. Do našeho právního řádu byl zaveden k 1.1.2004. Editační povinnost lze zjednodušeně popsat „*jako povinnost finančního úřadu písemně a závazně se vyjádřit k problému zdanění, s nímž se na něj podnikatel obrátí.“*[3] Úpravu najdeme v § 34b ZSDP. Tento institut představuje právo daňového subjektu požádat místně a věcně příslušného správce daně o vydání rozhodnutí o závazném posouzení daňových důsledků, které pro něj vyplynou z daňově rozhodných skutečností, které již nastaly nebo jsou očekávány, ale pouze v případech stanovených zvláštním zákonem.

Řízení se zahajuje na žádost a to dnem, kdy je podána. Ukončeno může být podle § 27 ZSDP. Pro obecné *náležitosti* žádosti platí ustanovení § 21 odst. 6 ZSDP, zvláštní náležitosti si upravuje každý zvláštní daňový zákon sám. *Rozhodnutí* musí mít výslovné označení *„závazné posouzeni“* a kromě obecných náležitosti rozhodnutí i údaje, na jejichž základě bylo rozhodováno, odůvodnění a časově a věcný rozsah závaznosti vydaného rozhodnutí. Rozhodnutí je účinné pouze vůči správci, který jej vydal a pouze pokud je skutečný stav věci v době, kdy se rozhoduje o daňové povinnosti, totožný se stavem, na základě kterého bylo rozhodnutí vydáno. Dobu účinnosti rozhodnutí o závazném posouzení stanoví správce

[1] Taranda, P.,: Ještě jednou k možnostem aplikace správního řádu v daňovém řízení. Poradce, 2006, č.12.
[2] Zákon č. 71/1967 Sb., správní řád, ve znění pozdějších předpisů, zrušen zákonem č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů, dnem 1.1.2006
[3] Jaromír Drábek, prezident Hospodářské komory.

daně, nejdéle na dobu tří let po nabytí právní moci. Rozhodnutí pozbývá také účinnosti pokud došlo ke změně zákonných podmínek, na základě kterých bylo rozhodnutí vydáno. Toto považuji za podstatný zásah do právní jistoty daňového subjektu. Proti rozhodnutí o závazném posouzení se nelze ani odvolat, ani využít mimořádných opravných prostředků podle ZSDP a to proto, že předmětem posuzování není daň ani příslušenství daně.

Za problematické považuji, že dosud nebyly stanoveny lhůty pro vydání závazného posouzení správcem daně. Ministerstvo sice navrhuje v první fázi stanovit lhůty interním pokynem, obecně v délce maximálně 6 měsíců.[4] Takovéto určení lhůty mimo zákonnou úpravu považuji však za nedostatečné. Navrhovaná délka lhůty je nadto nepoměrná délce platnosti takového rozhodnutí (max. 3 roky). Jedinou možností, jak se může subjekt bránit, je využití § 34c ZSDP, podle něhož může daňový subjekt upozornit nejblíže nadřízeného správce daně na to, že správce daně nepostupuje v řízení bez zbytečných průtahů. Lze tak učinit až po uplynutí šesti měsíců od „perfektního podání". Toto ustanovení chrání subjekty před nečinností. Je to pokus o aplikaci obdobného institutu, jaký upravuje správní řád, do daňového řízení.[5]

[4] Seidl, R., Závazné posuzování daňových transakcí (tzv. editační povinnost), ze dne 9.3.2006, [citováno 14. března 2008]. Dostupný z: http://www.mpo.cz

[5] Kobík, J., Správa daní a poplatků s komentářem : komplexní pohled na problémy správy daní, 5.vydání. Olomouc: Anag, 2007, s.386.

Vývoj editační povinnosti

Od roku 2004 mohou daňové subjekty žádat o závazné posouzení pro případy odpočtů ztrát od základů daně z příjmu v obdobích po podstatné změně společníků.[6] Druhý okruh závazného posouzení nabyl účinnosti k 1.1.2006 a jednalo se o možnost požádat správce daně o závazné posouzení v případech, kdy poplatníkovi vznikají pochybnosti, zda jím sjednávána cena se spřízněnými osobami odpovídá *ceně obvyklé.*[7] Ustanovení navázalo na § 23 odst. 7 ZDP, který umožňuje za určitých podmínek možnost úpravy cen, které byly sjednány mezi nezávislými osobami v běžných obchodních vztazích. K 1.1.2008 byla do právního řádu bylo zakomponován pět dalších ustanovení upravujících editační povinnost správce daně. Zákon č. 261/2007 Sb., o stabilizaci veřejných rozpočtů, ve znění pozdějších předpisů, zavedl další čtyři ustanovení:

- závazné posouzení *způsobu rozdělení výdajů (nákladů), které nelze přiřadit pouze ke zdanitelným příjmům* - § 24a ZDP – Toto ustanovení dopadá především na fyzické a právnické osoby v neziskové sféře, které provádějí *„tzv. „klíčování nákladů" podle toho, zda tyto náklady souvisí nebo nesouvisí s činnostmi, z nichž dosahované příjmy jsou předmětem daně (§ 24 odst. 5 a § 24 odst. 3 ZDP)"*[8]
- závazné posouzení *poměru výdajů (nákladů) spojených s provozem nemovitosti používané zčásti k podnikatelské nebo jiné samostatné výdělečné činnosti anebo k pronájmu a zčásti k soukromým účelům, které lze uplatnit jako výdaj (náklad) na dosažení, zajištění a udržení příjmů* - nový § 24b ZDP
- závazné posouzení *skutečnosti, zda je zásah do majetku technickým zhodnocením* - nový § 33a ZDP
- závazné posouzení *skutečnosti, zda se jedná o výdaje (náklady) vynaložené při realizaci projektů výzkumu a vývoje* - § 34a ZDP

O jedno ustanovení byl také rozšířen zákon č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů, (dále jen ZDPH), který se týká *závazného posouzení správnosti zařazení zdanitelného plnění z hlediska sazby daně*. Podle tohoto ustanovení může kterákoliv osoba požádat *Ministerstvo financí* o vydání rozhodnutí o závazném posouzení, zda je zdanitelné plnění z hlediska sazby daně správně zařazeno do základní nebo snížené sazby daně podle § 47 odst. 1 ZDPH.

Zpoplatnění žádostí

[6] § 38na zákona č. 568/1992 Sb., o daních z příjmu, ve znění pozdějších předpisů.
[7] § 38nc zákona č. 568/1992 Sb., o daních z příjmu, ve znění pozdějších předpisů.
[8] Vlach, P., Rylová, Z., Reforma daní z příjmů od roku 2008 : zákon o daních z příjmů, zákon o rezervách : komentář ke změnám provedeným zákonem č. 261/2007 Sb., srovnávací znění 2007/2008. Ostrava : Sagit, 2007, s.

Podle Ministerstva financí má zpoplatnění žádostí zabránit zneužívání práva a podávání nekvalifikovaných a neodůvodněných žádostí. Vydání rozhodnutí je tak podmíněno složením nevratného poplatku. Zákon o stabilizaci veřejných rozpočtů novelizoval i zákon o správních poplatcích a zavedl poplatek ve stejné výši pro všechny žádosti o závazné posouzení, s výjimkou jedné. Zpoplatněn je tak každý předmět závazného posouzení samostatně a to poplatkem ve výši 10 000 Kč[9]. Správnímu poplatku nepodléhá žádost o závazné posouzení odečtu ztráty od základu daně (§ 38na ZDP). Způsob placení správních poplatků stanoví § 59 ZSDP.

Problematika interpretace práva v „Rzeczpospolitej Polskiej" - čl. 14 „Ordynacji podatkowej"

Ustanovení čl. 14 Daňového řádu[10] bylo mnohokrát novelizováno. Původně, pokud ministr financi zjistil rozpor mezi interpretaci a judikaturou soudů, měl informační povinnost směrem k soudům a orgánům, který mohl rozpor v interpretaci odstranit. Nebyli určení ani adresáti interpretace, ani stanovená její závaznost. Obsahoval pouze nekonkrétní ustanovení, že postup poplatníka v souladu s „interpretací daňového práva" *„nie może mu szkodzić"*[11]. Druhá verze výše zmíněného článku rezignovala na informační povinnost ministra. Zákonodárce dodal do ustanovení, že interpretace ministra financí jsou určeny orgánům správy daní a finanční kontrole, a jsou pro ně závazné. V květnu 2004 Ústavní soud rozsudkem zrušil čl. 14 § 2 Daňového řádu[12] jako protiústavní.[13] Problémem je, že na rozdíl od české ústavy obsahuje ústava polská taxativní výčet pramenů práva. Ministerská interpretace nemůže určovat práva a povinnosti občanům, je pouze „služebně" závazná. Zákonem o svobodě podnikání[14] nabyl k 1.1.2005 účinnosti novelizovaný institut „interpretace daňového práva"[15]. Nově se objevuje definice pojmu „interpretace" v § 1 bod 2 a také komu jsou určeny a že jsou vyhlašovány v „Finančním zpravodaji ministra financí"[16].

K 1.7.2007 došlo k mnoha změnám v oblasti vydávání interpretace daňového práva. Navržená řešení, oblasti vydávání interpretací daňového práva, odchází od zásady „opravování" přijatých zákonů a snaží se o systémové řešení této problematiky. Do zákona do II části byl včleněn hlava 1a *„Interpretacje*

[9] Položka 1., část 1., písm. r) až w), zákona č. 634/2004 Sb., o správních poplatcích, ve znění pozdějších předpisů,
[10] „Przepis art. 14 Ordynacji podatkowej"
[11] „... nemůže mu být na škodu."
[12] art. 14 § 2 ustawy z 29 sierpnia 1997 r. - Ordynacja podatkowa (Dz.U. nr 137, poz. 926 ze zm.)
[13] „Dziennik Ustaw z 31 maja 2004 r. nr 122, poz. 1288"
[14] „ustawa o swobodzie działalności gospodarczej"
[15] „Interpretacja prawa podatkowego"
[16] „Dziennik Urzędowy Ministra Finansów"

przepisów prawa podatkowego"[17]. Jsou zde mezi jinými definovány pojmy, druhy interpretace, normuje proceduru vydávání interpretací a také reguluje „zásadu neškodění". Zavádí nové dělení kompetence orgánů a také novou konstrukci stanovování subjektů oprávněných k podání zádosti o individuální interpretaci (posouzení).

Subjekt příslušný k vydání interpretace

Zásadní změny nalezneme v oblasti příslušnosti orgánů, které mají oprávnění vydávat interpretace daňového práva. Došlo ke snížení počtu orgánů majících oprávnění vydávat interpretace. Zákon za příslušné orgány v oblasti vydávání interpretace daňového práva považuje:

- ministra financí – co se týče *všeobecných i individuálních interpretací.*
- „wójta", „burmistrza" (prezydenta miasta), „starostę", „marszałka województwa", podle své příslušnosti – ve věcech *individuálních interpretací*.

Můžeme si všimnout, že dochází k centralizaci systému vydávání interpretací v oblasti administrativy podřízené ministru financí. Má to za cíl eliminovat rozdílnost rozhodování orgánů ve fakticky stejných případech. Centralizaci však může ohrozit ustanovení čl. 14b § 6, které opravňuje ministra financí k delegaci svých kompetencí v oblasti vydávání *individuálních interpretací* na mu podřízené orgány. Takže lze říci, že nyní je úspěšnost nově zavedeného centralizovaného systému vydávání individuální interpretace v rukou ministra. Pravomoc deleguje nařízením, které určuje věcnou a místní příslušnost orgánů. A tak od 1.7.2007 vydávají ve jménu ministra individuální interpretace ředitelé finančních ředitelství[18] v Bydgošti, Katovicích, Poznani a Varšavě.

Druhy interpretace

Nový systém vydávání interpretace daňového práva rozlišuje dva druhy interpretace, *všeobecnou* a *individuální interpretaci.*.

Z ustanovení čl. 14a vyplývá, že ***všeobecné interpretace*** jsou tak jako před novelizací, vydávány s cílem zajištění jednotné interpretace daňového práva. Úprava však neprecizuje, zda všeobecné interpretace budou vydávány ex officio nebo na žádost. Za hlavní adresáty všeobecných interpretací lze považovat orgány správy daní a orgány finanční kontroly. Zprostředkovaně jimi budou také občané. Žádost o všeobecnou interpretaci můžou podat jak orgány správy daní a finanční kontroly, tak i každý, komu je to

[17] „Výklad zákonů daňového práva"
[18] „Izba Skarbowa"

ku prospěchu. Všeobecné interpretace jsou zveřejňovány, bez zbytečných průtahů, ve „Finančním zpravodaji ministra financí“ a také umísťovány ve „Věstníku veřejných informací“[19].

Individuální interpretace (čl. 14b §1) jsou vydávány na žádost zájemců v jejích soukromých záležitostech. Měly by obsahovat návrh žadatele s jeho právním odůvodněním, které může být přehlédnuto v případě, že bude žádosti vyhověno v plném rozsahu. V případě záporného hodnocení návrhu žadatele interpretace musí obsahovat správný názor a jeho právní odůvodnění. Každá individuální interpretace, i ta, která potvrzuje návrh žadatele, i ta, které zaujímá záporné stanovisko, musí obsahovat poučení o právu odvolání ke správnímu soudu.

Individuální interpretace

Zákon nově stanovuje subjekty oprávněné k podání interpretace. Žádost tak může podat subjekt, který má na vydání interpretace ve své individuální věci zájem. Tím byl rozšířen okruh oprávněných subjektů

Proces vydávání individuálních interpretací je v zákoně upraven odlišně od daňového procesu. Mezi obecné zásady tohoto řízeni patří:

- zásada zákonnosti (čl. 120 daňového řádu) – orgány správy daní se řídí právními předpisy.
- zásada důvěryhodnosti orgánů v procesu vedení řízení (čl. 121 § 1 daňového řádu)
- zásada rychlosti a jednoduchosti řízení (čl. 125 daňového řádu)
- zásada veřejnosti řízení (čl. 125 daňového řádu) – řízení je veřejné pouze pro účastníky

V procesu vydávání individuálních interpretací se použijí také některá obecná ustanovení upravující daňové řízení, týkající se mezi jinými vyloučení pracovníků správce daně, určování právní způsobilosti a způsobilosti k právním úkonům, zastupování, doručování, předvolání, nahlížení do spisu a nákladů řízení, atd. Řízení se zahajuje na žádost subjektu, který je zainteresován jejím vydáním. Žádost se může týkat, tak jak je tomu v českém právu, skutečností nastalých nebo očekávaných[20]. Žádost by měla obsahovat přesné a důsledné vylíčení skutečností, nastalých nebo očekávaných, a také vlastní názor (postoj) žadatele v této věcí. Na žádosti bez těchto náležitostí nebude brán zřetel a nebudou vyřízeny. V tomto případě je vydáváno usnesení, proti kterému je možno podat stížnost.

Žádost o vydání individuální interpretace je zpoplatněna, a to pevnou částkou 75 zł. Musí být zaplacena do sedmi dnů od podání žádosti a je příjmem státního rozpočtu. Pokud poplatek nebude uhrazen, žádost

[19] „Biuletyn Informacji Publicznej“
[20] Art. 14b § 2 ustawy z 16 listopada 2006 r., o zmianie ustawy - Ordynacja podatkowa.

nebude vyřízená a subjekt nebude ani upozorněn, aby ho uhradil. Správce daně vydá usnesení, proti kterému je možno podat stížnost. Individuální interpretace mají být vydávány bezodkladně, nejpozději do tří měsíců od podání žádosti. Tato lhůta mi připadá, v porovnání se lhůtou šesti měsíců, navrhovanou Ministerstvem financí ČR, jako rozumná, přijatelná pro daňové subjekty a také dostatečná směrem ke správci daně, v případě nutnosti řešení složitějšího problému.

S cílem sjednotit formu žádosti zákon zavazuje ministra, aby vydal nařízení určující vzor žádosti o individuální interpretaci a určuje její obsah. Zákon přiznává ministrovi financí pravomoc ex officio měnit již vydanou všeobecnou, ale i individuální interpretaci, a to tehdy, pokud zjistí její nesprávnost hlavně v návaznosti na judikaturu soudů, Ústavního soudu nebo Evropského soudního dvora. V tomto případě je povinen informovat subjekt, kterému byla interpretace vydána. Toto oprávnění je, podle mého názoru, v hrubém rozporu se zásadou právní jistoty a také se zásadou předvídatelnosti postupů správních orgánů. Prezentovaná řešení se odklánějí od udělování individuálním interpretacím právní formy. Budou tak pouze dopisem (informací) orgánu oprávněného k jeho vydání určeným žadateli.

Zásada neškodění

Úprava tohoto institutu je obsažena v ustanovení čl. 14k – 14n novelizovaného Daňového řádu. Pokud se subjekt (žadatel) chová v souladu s individuální interpretací před tím, než je změněna, nebo před doručením daňovému orgánu opisu pravomocného rozhodnutí správního soudu, které ruší interpretaci, a také pokud není brána v potaz při daňovém procesu nemůže být na újmu žadatele. Naproti tomu, co se týče všeobecné interpretace, když se jí subjekt bude řídit, před její změnou nebo pokud bude opomíjena v daňovém procesu, nemůže být na škodu tomu, kdo se jí řídil. Tato ochrana nastává, pokud byla interpretace změněna, zrušena nebo nebyl brán na ni zřetel v daňovém procesu.

„Milczące interpretacje"

V porovnání s předchozím stavem bylo upraveno fungování tzv. „mlčících interpretací". Pomalost a zdlouhavost činnosti orgánu správy daní nemůže být důvodem pro zbavení žadatele ochrany, kterou mu právo přiznává, a proto byla zavedena *právní fikce*, že dnem, který následuje po dni, ve kterém marně uběhla lhůta pro vydání interpretace, byla vydána interpretace, která je v celém rozsahu potvrzuje správnost stanoviska žadatele.

Závěr

V dnešním světě nejasných a nepřehledných zákonů je nepochybně třeba hledat cesty jak posílit jistotu subjektů práva. Jednou z možností, kterou se vydal jak český, tak polský zákonodárce, je institut závazného posouzení správcem daně / urzędowe interpretacje. Podle mého názoru to řešení je, ale určitě se nepřikláním k tomu, jaká podoba byla zvolena a jakou cestou směřuje dnes. Další paskvil v právním řádu určitě nepřispěje k přehlednosti právního řádu a už vůbec nebude nástrojem zvýšení právní jistoty daňových subjektů. Troufám tvrdit, že subjekty oprávněné vydávat závazné posouzení nejsou k tomu způsobilé. A to především co se týče odborné způsobilosti pracovníků, jejich počtu na příslušných úřadech, kancelářského vybavení, atd. Může dojít k zahlcení finančních úřadů a tím i mnohem vyšším nákladům na správu daní. A v případě, že rozhodnutí bude nesprávné a následně přezkoumáváno soudem? Navíc soud nebude těmito posudky vázán. Zvýší se tak i počet žalob směřujících do správního soudnictví.

V Polsku po ne zcela pozitivních zkušenostech s tímto institutem došlo k zásadní změně a v porovnání s předchozím stavem, k systémovému řešení regulace problematiky vydávání interpretací. Avšak i zde lze vytknout několik nedostatků. Došlo sice na první pohled k podstatné centralizaci systému, ale z praktického hlediska však může ministr delegovat pravomoc na podřízené orgány a z centralizace se může stát pouze prázdny pojem. Jako pozitivní bych viděl stanovení přesné lhůty pro vydání interpretace.

Na závěr bych chtěl však zdůraznit jednu věc. Snažme se o jasné a přehledné zákony a nebudeme nuceni rozšiřovat právní řád o další zbytečný institut. Za nutnou považuji také větší centralizaci tohoto úseku daňové správy.

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ZMLUVA O DIELO NA REALIZÁCIU SYSTÉMOVEJ INTEGRÁCIE VYBRANÉ APLIKAČNÉ PROBLÉMY

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Abstrakt

Autorka analyzuje rôznorodosť a interdisciplinárnosť obchodno-právnych vzťahov, ktoré vynikajú pri realizácii projektov systémovej integrácie, definuje legislatívne možnosti a obchodné zvyklosti pri uzatváraní zmluvy o dielo na systémovú integráciu a osobitnú pozornosť venuje problematike vybraných aplikačných problémov – analýze dopytu objednávateľa systémovej integrácie, zrozumiteľnému určeniu predmetu zmluvy, kategorizácii vád a jej významu pre zmluvné strany. V závere autorka poukazuje na dôležtiosť tímovej práce IT špecialistov a právnikov v procese prípravy zmluvných vzťahov na projekty systémovej integrácie.

Kľúčové slová

systémová integrácia, zmluva o dielo, outsoursing, kategorizácia vád, implementácia, komplexné projekty, informačné technológie

Abstract

The author analyzes the variety and interdisciplinary nature of the commercial-technical relationships that arise when system integration projects are implemented, defining legislative possibilities and commercialism when a work contract on system integration is concluded and paying special attention to issues related to selected application problems: analyzing the system integration customer's demands, an understandable determination of the purpose of the contract, categorization of defects and their significance for the contracting parties. In conclusion, the author mentions the importance of team work between IT specialists and lawyers in the process of preparing contractual relationships for system integration projects.

Key words

System integration, work contract, outsourcing, categorization of defects, implementation, complex projects, information technology

I.
Všeobecné ustanovenia

Realizácia komplexných projektov v oblasti systémovej integrácie obsahuje rôznorodosť zložitých obchodno-právnych vzťahov medzi zúčastnenými subjektami. Z toho dôvodu je nevyhnutné, aby pri tvorbe koncepcie bola okrem iných náležitostí vecne a prehľadne zadefinovaná najmä celková analýza prostredia, funkčná špecifikácia s prehľadnou dokumentáciou a prílohami, proces a koordinácia plnenia jednotlivých realizačných etáp s jasným vymedzením rozdelenia rizík, súčinnosti a záruk, spôsob odovzdania, definícia vád a ich riešenia, možnosti používania a šírenia diela, cieľ projektu, podmienky uzatvárania vykonávacích zmlúv a následne tomu prispôsobený výber adekvátnych zmluvných partnerov a vhodných, jasne a dôsledne špecifikovaných zmluvných typov, ktoré budú garantovať odborné aj právne väzby.

Podnikateľské subjekty pre projekty v oblasti informačných technológii uprednosťňujú tzv. outsourcing, teda služby externých dodávateľov, resp. zhotoviteľov pred internými riešeniami. Externí dodávatelia, resp. zhotovitelia sú najčastejšie kontraktovaní na základe výberových konaní, výsledkov verejných obstarávaní, prípadne ako dcérske spoločnosti podnikateľského subjektu, resp. objednávateľa. Outsourcing je stále častejšie využívaný najmä pre praktické skúseností a know-how externých dodávateľov, resp. zhotoviteľov, úsporu prevádzkových nákladov, zo strategických ale aj organizačných dôvodov objednávateľov a v neposlednom rade aj z dôvodov zvýšenej zodpovednosti dodávateľa, resp. zhotoviteľa v porovnaní s mierou zodpovednosti zamestnancov za rovnakú činnosť vykonávanú v pracovno-právnom vzťahu. Je však nutné poukázať aj na možné riziká outsourcingu, ktoré môžu mať za následok predčasné ukončenie spolupráce, pričom najčastejšie dochádza k rizikám neadekvátnej súčinnosti a k neoprávneným využitiam dôverných informácií,

Keďže súčasná právna úprava v Slovenskej republike nedefinuje komplexne špecifiká, ktoré by v jednom právnom odvetví adekvátne regulovali všetky vzťahy vznikajúce v oblasti informačných technológii, pre projekty systémovej integrácie, ktorých zmyslom je vývoj, využívanie a rozvoj informačných systémov a informačných technológii s cieľom dosiahnutia optimálnych integrovaných kombinácii a integrácie vhodných produktov a služieb od rôznych dodávateľov do kompaktného a vzájomne funkčne prepojeného celku, v praxi je najčastejšie používaná tzv. inominátna, teda nepomenovaná zmluva podľa ustanovenia § 269 ods. 2 Obchodného zákonníka v platnom znení

(najčastejšie zmluva o poskytovaní služieb systémovej integrácie), alebo zmluva o dielo podľa ustanovenia § 536 Obchodného zákonníka, ktorá však upravuje iba všeobecné princípy a náležitostí spojené s realizáciou projektov systémovej integrácie a preto je nevyhnutné, aby bola dôsledne prispôsobená osobitostiam v oblasti informačných technológii a informačných systémov.

Vzhľadom na skutočnosť, že systémová integrácia zahŕňa aj dodanie počítačového programu, resp. softvéru, ktorý je predmetom autorského práva, súčasťou zmluvného vzťahu sú nevyhnutne aj ustanovenia, ktoré upravujú poskytovanie práv k softvérovým dielam (najmä počítačovým programom, databázam a pod.) v zmysle ktorých autor za odmenu udeľuje objednávateľovi oprávnenie na použitie prípadne aj na rozširovanie svojho diela dohodnutým spôsobom, vrátane akceptácie ostatných častí Autorského zákona.

V kontexte platnej právnej úpravy Slovenskej republiky možno teda konštatovať, že v ustanovení § 536 a násl. Obchodného zákonníka, ktoré upravuje zmluvu o dielo a tiež v platnom Autorskom zákone, sú dané základy právneho vnímania realizácie projektov systémovej integrácie. V prípade ak počítačový program, resp. softvér ktorý je súčasťou dodávky bol vytvorený ako predmet pracovnej činnosti, je potrebné pri príprave zmluvných vzťahov na realizáciu systémovej integrácie osobitnú pozornosť venovať aj úprave pracovných vzťahov v zmysle autorsko – právnej ochrany a oprávnenia na používanie a šírenie diela.

Napriek uvedenej základnej legislatívne podpore, pri praktickej realizácii systémovej integrácie je predmetná problematika z pohľadu výkladu a uplatňovania v praxi neustálym zdrojom odborných diskusii, ktoré môžu byť prínosom pre očakávané legislatívne iniciatívy v predmetnej oblasti. V zmysle uvedeného a najmä z dôvodu, že realizácia projektov systémovej integrácie je vysoko špecifickou oblasťou, mnohé činnosti v rámci komplexných riešení pri tvorbe záväzkových vzťahov sú v praxi realizované na základe zásady obchodných zvyklosti (napr. spôsob tvorby funkčnej špecifikácie, zmenové konania, úprava akceptačných testov a pod.).

Významným zdrojom pre nové aspekty vnímania podmienok a zásad realizácie projektov systémovej integrácie sú aj medzinárodné zmluvy a dohody, vrátane práva Európskej únie, ktoré sa Slovenská republika v rámci plnenia záväzkov vyplývajúcich jej z Dohody o pridružení č. 158/1997 Z. z., uzatvorenej medzi Európskymi spoločenstvami na jednej strane a ich členskými štátmi a Slovenskou republikou na strane druhej zaviazala plniť a tým postupne zladovať pravidlá, ktorými sa riadi ochrana práv duševného vlastníctva, s osobitným dôrazom na ochranu pri implementácii a používaní databáz,

počítačových programov a softvérových produktov, ktoré sú základnou súčasťou informačných systémov a nevyhnutným predpokladom priemyselného a technologického rozvoja.

Uvedené súvislosti prezentujú len veľmi stručné teoretické východiská, potrebné pri ďalšej analýze a komparácii vybranej problematiky - zmluvy o dielo s prihliadnutím na systémovú integráciu. Vybraným otázkam, ktoré spôsobujú najčastejšie aplikačné problémy v praxi sa budem podrobnejšie venovať v nasledujúcich častiach tohto príspevku.

II.
Analýza dopytu objednávateľa systémovej integrácie

Projekty systémovej integrácie analyzujú, koordinujú a zabezpečujú komplex prepojených špecializovaných činností a systémových procesov na interdisciplinárnej úrovni, ktorých cieľom je komplexný a integrovaný produkt, resp. informačný systém, rešpektujúci všetky zložky integrácie.

Prioritným predpokladom, aby bolo možné dosiahnúť požadovaný cieľ projektov systémovej integrácie, je schopnosť a dostatočná pripravenosť zmluvných strán jasne zadefinovať podmienky spolupráce, predovšetkým dopyt a ponuku tak, aby výsledkom bol skutočne integrovaný produkt, nie len izolované časti a čiastkové služby.

Aby mohol objednávateľ systémovej integrácie vybrať vhodného zmluvného partnera pre uzavretie zmluvy o dielo na systémovú integráciu, je nevyhnutné, aby si pred finálnym definovaním dopytu, následným zvažovaním ponuky zhotoviteľa a uzavretím zmluvy o dielo na realizáciu systémovej integrácie, upresnil projektové, procesné a organizačné požiadavky a to najmä v zmysle rozsahu projektu v oblasti procesov a služieb systémovej integrácie, aj v oblasti aplikácii, jasne zadefinoval očakávaný cieľ systémovej integrácie v zmysle obsahových a rozsahových náležitostí služieb, aj aplikácii a riešení systémovej integrácie. Ďalšou dôležitou súčasťou pred predložením finálneho dopytu objednávateľa je vymedzenie jednotlivých etáp projektu a zadefinovanie očakávaných výstupov a časových požiadaviek. Neopomenuteľnou náležitosťou je určenie jednoznačných kvalitatívnych, finančných a personálnych kritérii pre jednotlivé etapy plnenia a tiež definovanie súvisiacich väzieb na iných dodávateľov, iné projekty a úlohy objednávateľa. Už vo faze analýzy dopytu objednávateľa systémovej integrácie a výberu vhodného zhotoviteľa je potrebné pripraviť návrh pre organizáciu komplexného projektu a určiť vedúcich, resp. odborných garantov pre jednotlivé etapy pripravovaného projektu.

Len pri správnom a dostatočne určitom vypracovaní požiadaviek dopytu a hodnotiacich kritérii bude objednávateľ dostatočne pripravený vybrať vhodného zhotoviteľa s kompatibilnou metodológiou a predísť závažným realizačným nedostatkom.

III.
Vymedzenie predmetu zmluvy o dielo na realizáciu systémovej integrácie

Ustanovenie § 536 a následne Obchodného zákonníka v platnom znení definuje, že podstatnými náležitosťami zmluvy o dielo (ktorých absencia by zo zákona spôsobovala neplatnosť zmluvy) je vymedzenie diela a určenie ceny, resp. aspoň dohodnutý spôsob jej určenia, ak zmluvné strany neprejavia vôľu uzavrieť zmluvu bez tohto určenia. Dikcia predmetného právneho predpisu taktiež umožňuje, aby si zmluvné strany zvolili, či zmluvu uzatvoria ústne, alebo písomne.

Vzhľadom na komplikovanosť a rozsiahlosť projektov systémovej integrácie je v praxi nepredstaviteľné, aby sa zmluvné strany uspokojili s ústnym uzavretím zmluvného záväzku. Taktiež je nevyhnutné, aby sa neobmedzili len na povinné náležitosti predmetného zmluvného typu a v zmluve veľmi precízne a konkrétne dohodli jednotlivé postupy a riešenia.

Jednou z najpodstatnejších náležitostí zmluvy o dielo na realizáciu systémovej integrácie je detailne, vecne a zrozumiteľné určenie predmetu zmluvy. Práve táto časť zmluvy je v praxi častým základom problematických výkladov a nejasností.

Projekty systémovej integrácie sú zvyčajne realizované vo forme rámcovej zmluvy a vykonávacích zmlúv, ktoré na ňu nadväzujú. V čase uzatvárania rámcovej zmluvy ešte nie sú detailne zanalyzované špecifikácie integrovaného informačného systému. Analýza informačného systému a celkového prostredia kde sa bude uskutočňovať implementácia je jedným z prvých realizačných úkonov zmluvného vzťahu a až následne zmluvné strany upresňujú mnohé kritéria spolupráce vrátane priebehu realizácie projektu vo všetkých jeho etapách a tiež určenia základných kritérii funkčnosti diela.

Definícia, resp. bližšia konkretizácia komplexného predmetu zmluvy býva teda často uvedená v technických prílohách zmluvy (napr. vo funkčnej špecifikácii), po sfinalizovaní a akceptovaní analýzy informačného systému a predložení funkčnej špecifikácie. Z technického pohľadu možno označiť tento

postup za logický, no pri príprave návrhu zmluvy je nutné aspoň rámcovo vymedziť predmet zmluvy tak, aby bol jasný a dostatočne fixný, určiť kritéria pre flexibilitu definície predmetu zmluvy vo všetkých jej etapách a dbať na to, aby objednávateľ mal možnosť spolupracovať pri analýze informačného systému a funkčnej špecifikácie. Dôležitou podmienkou objednávateľa by mala byť možnosť pripomienkovania procesu analýzy informačného systému a funkčnej špecifikácie a tiež možnosť následného schvaľovania finálnych výstupov.

Z uvedeného dôvodu je potrebné už pri štruktúrovaní rámcovej zmluvy zadefinovať vzťah rámcovej zmluvy a jej príloh s nadväznosťou na vykonávacie zmluvy. Zmluvné strany môžu predísť možným intepretačným nejasnostiam tak, že v prílohe rámcovej zmluvy ešte pred sfinalizovaním funkčnej špecifikácie určia alternatívy riešenia pre jednotlvé funkcionality informačného systému.

III.
Vady diela a ich kategorizácia

Vadné dielo je charakteristické tým, že nezodpovedá výsledku určenému v zmluve (§ 560 ods. 1 Obchodného zákonníka). Vadnosť diela sa teda posudzuje podľa toho, ako je vymedzený predmet diela v zmluve. Aj z uvedených dôvodov sa odporúča čo najpodrobnejšie a najpresnejšie vymedziť predmet plnenia, aby nevznikli prípadne pochybnosti o tom, či dielo je vykonané riadne, alebo s vadami. Ak takéto podrobné a presné vymedzenie zmluva neobsahuje, vychádza sa vo všeobecnosti z povahy predmetu plnenia.

Realizácia systémovej integrácie je komplexným projektom, ktorý pozostáva z mnohých na seba nadväzujúcich etáp, pričom problematika vád je jednou z najdôležitejších častí celého zmluvného vzťahu. Ak si zmluvné strany nezadefinujú precízne čo možno považovať za vady diela v jednotlivých etapách realizácie, vystavujú sa riziku nejasného výkladu a tým aj možným problémom pri odovzdaní a prevzatí diela, čo môže mať za následok nedodržanie časového harmonogramu plnenia, neuhrádzanie ceny, uplatňovanie úrokov z omeškania, zmluvných pokút a podobne.

V obchodnej praxi, najmä pri realizácii kontinuálnych zmlúv o dielo, ktoré sú riešene etapovitým a dlhodobým spôsobom by sa pri uzatváraní záväzkových vzťahov mala venovať zvýšená a vyprecízovaná pozornosť najmä inštitútom odovzdávania a prevzatia diela a v tomto kontexte aj zárukám, záručným a pozáručným servisom a spôsobom odstráňovania vád. Pri inštitúte odstráňovania

vád je pre rýchlosť zásahov obvyklá tzv. kategorizácia vád, ktorá pre zmluvné strany znamená najmä sprehľadnenie termínov odstránenia vád. Obvykle sa delia vady diela nasledovne:

Ťažké vady - vady, ktoré spôsobujú, že ich aplikácia alebo primárne časti celej aplikácie sa nedajú využívať alebo spôsobujú zrútenie, resp. zablokovanie systému diela. Za ťažkú vadu sa tiež považuje veľké množstvo drobných a stredných vád. Ťažké vady na výkonoch majú za následok neprevzatie výkonov objednávateľom.

Stredne ťažké vady - vady, ktoré narušujú priebeh práce v rámci špecifikovanej funkčnosti nedostatkami v aplikácii, ale ďalší chod je možný.

Ľahké vady - vady, ak je funkcia v zmysle špecifikácie síce realizovaná odchylne, avšak vykonanie nie je podstatne ovplyvnené.

Z uvedených dôvodov je vhodným riešením zadefinovanie kategorizácie vád diela a tiež dôsledky vád, v zmysle určenia kritérií pre rozlíšenie nedostatkov, ktoré nemajú vplyv na celkovú funkčnosť diela a nedostatkov, ktoré fatálne ovplyvňujú použitie diela a určenie reakčnej doby, resp. lehôt na ich odstránenie.
Zhotoviteľ zodpovedá v zmysle § 560 ods. 2 Obchodného zákonníka za tie vady, ktoré má dielo v čase odovzdania predmetu plnenia (výnimku tvoria prípady, ak nebezpečenstvo náhodnej škody na diele prechádza na objednávateľa neskôr, potom je rozhodujúci tento čas). Ustanovenie § 562 ods. 1 ukladá objednávateľovi povinnosť skontrolovať predmet diela čo najskôr po jeho prevzatí. Pri tejto kontrole by mal objednávateľ odhaliť všetky zjavné vady diela. Nedodržanie tejto povinnosti nepostihuje zákon priamou sankciou, nesplnenie tejto povinnosti však môže byť príčinou, že objednávateľ sa nedomôže práv zo zodpovednosti za vady súdnou cestou. Po odovzdaní predmetu plnenia zhotoviteľ zodpovedá za vady, ktoré vzniknú v záručnej dobe, ak sa na jej poskytnutie zaviazal v zmluve a za vady, ktoré vznikli porušením jeho povinnosti. Takýmto porušením povinnosti môže byť prípad, ak vady vznikli v dôsledku nevhodného obalu pri odoslaní predmetu plnenia alebo jeho časti prepravcom (napríklad zaslanie projektovej dokumentácie poštou) alebo prípad, keď vady vznikli v dôsledku toho, že zhotoviteľ k nainštalovanému zariadeniu poskytol vadnú užívateľskú príručku.

Zmluvné strany často zabúdajú zmluvne upraviť obmedzenie zodpovednosti za vady, resp. okolnosti vylučujúce zodpovednosť. Následne veľmi často dochádza k sporom zmluvných strán v zmysle

nejasného výkladu špecifikácie predmetu plnenia, rozdelenia kompetencii a rozsahu poskytnutia súčinnosti.

IV.
Záver

Realizácia projektov systémovej integrácie je dlhodobým procesom, ktorý obsahuje množstvá špecifík z pohľadu odborného, aj právneho. Príprava zmluvných vzťahov pre tento typ realizácie je sťažená nedostatočne komplexnou legislatívnou úpravou a mnohokrát aj nejasne definovanými cieľmi projektu. Z uvedeného dôvodu je nevyhnutné chápať proces prípravy zmluvných vzťahov ako tímovú prácu IT špecialistov a právnikov. Pri nedostatočnej komunikácii obidvoch strán nie je možne pripraviť jasnú prehľadnú a kompatibilnú zmluvnú dokumentáciu, ktorá by cielene reagovala na potreby praxe. Dôležitou podmienkou vhodného výberu a obsahového spracovania zmluvného záväzku je oboznámenie právnika s príslušnou projektovou dokumentáciou, priebehom realizácie systémovej integrácie, aj v nadväznosti na ďalšie časti plnenia v zmysle poskytovania servisu, zmenových konaní, školení, komunikácie zmluvných strán a podobne. Nevyhnutným predpokladom dobre fungujúceho záväzkového vzťahu v procese realizácie systémovej integrácie je aj oboznámenie manažmentu, vedúcich projektov a ostatných IT špecialistov, ktorí sa podieľajú na realizácii plnenia s obsahom a interpretačným výkladom zmluvných dokumentov, aby v praxi nedochádzalo k porušovaniu prijatých pravidiel spolupráce.

Kvalitná príprava komplexnej zmluvy o dielo na realizáciu systémovej integrácie si vyžaduje dôkladnú analýzu požiadaviek zmluvných strán, dobrú znalosť aplikačného prostredia a legislatívnych podmienok a v neposlednom rade aj súčinnosť zainteresovaných subjektov. Účelom tohto príspevku nebolo podať vyčerpávajúci pohľad na vymedzenú problematiku, ale vo vymedzenom rozsahu poukázať na vybrané časti, ktoré v praxi spôsobujú najčastejšie aplikačné problémy.

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JEDNOTLIVÉ DRUHY CENNÝCH PAPÍRŮ

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Abstrakt

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Klíčová slova

cenné papíry, akcie, kapitálový trh, investiční instrumenty, instrumenty finančního trhu

Abstract

The aim of this article is to analyze various kinds of securities and their legal regulation as it is present in the Czech Law at the beginning of 21st century. The author will take into account the regulation of securities in the area of Capital Market Law and connected regulation in the area of Securities Law.

Key words

securities, share, capital market, investment instrument, financial market instruments

Úvod

Cenné papíry lze dělit z několika různých pohledů. Jednotlivé kategorie dělení mají právním řádem stanovená pojmenování, která nelze zaměňovat, protože každé dělení nazírá na cenné papíry z kompletně jiného úhlu pohledu. Cílem tohoto příspěvku je zanalyzovat různé kategorizace cenných papírů a upozornit na rozdíly mezi různými pojmy, jako například cenné papíry v obecném slova smyslu, cenné papíry ve smyslu speciálních zákonů, investičních nástrojů a nástrojů finančního trhu. Autor bude brát v úvahu několik různých způsobů rozdělení, jak je zná současné české právo a přihlédne i k teoretickým poznatkům v této oblasti. Kromě účinných právních předpisů bude pracovat i s odbornou literaturou a elektronickými prameny, které zpracuje za použití odborných metod a systematického výkladu.

Jak definovat cenné papíry?

Dědič cenné papíry vymezuje v jejich obecnějším slova smyslu, kdy k nim řadí jakékoli dokumenty, které dokládají vznik nějakého práva, jsou nutné k uplatnění nějakého práva případně jsou základem a integrální součástí (materií) některého práva.[1] Cenné papíry v tomto širším slova smyslu mohou zahrnovat i dokumenty, jako jsou například společenské smlouvy, jmenování, smlouvy o dílo a podobně.

Užší skupinou cenných papírů jsou cenné papíry pojaté způsobem, jak vystupují na kapitálovém trhu, tedy cenné papíry v užším slova smyslu. Zde se jedná již jen o cenné papíry inkorporující do sebe určité právo nebo práva a poskytující možnost jeho držiteli nebo majiteli tato práva užívat a požívat případně s nimi disponovat.

Jak lze nahlédnout níže, ve světle soudobé praxe se již vůbec nemusí jednat o dokumenty v listinné podobě, ale může jít i o datové záznamy tato práva obsahující jiným způsobem – pak se jedná o zaknihovanou podobu.

V ČR neexistuje všeobecná legální definice cenného papíru uvedená v zákoně. Existují definice partikulární použitelné pro jednotlivé zákony – konkrétně jde o partikulární legální definici v devizovém zákoně pouze pro účely tohoto zákona, která cenné papíry pojímá jako *listiny nebo je nahrazující zápisy, s nimiž je spojeno právo účasti na majetku nebo právo na peněžní plnění*.[2] Jak lze usoudit z této definice, počítá již s cennými papíry zaknihované podoby, které bychom zde podřadili pod zápisy nahrazující listiny.

Teoretickoprávní definice cenného papíru jej nahlíží jako objekt mající čtyři znaky – cenný papír je listina (1) o právu (2), se kterou je toto právo těsně spjato (3) a toto právo je soukromoprávní majetkové právo (4). Tato definice by ale nezahrnovala zaknihované cenné papíry tvořené položkami v centrální evidenci Střediska cenných papírů[3] nebo centrálního depozitáře. Tento definiční nedostatek

1 Viz Dědič, J. In Dědič, J., Pauly, J.: *Cenné papíry*, Praha: PROSPEKTRUM, 1994, 220 s., ISBN 80-85431-98-X, s. 17.
2 Srovnej § 1 písm. e) zákona č. 219/1995 Sb., devizový zákon, ve znění pozdějších předpisů.
3 Středisko cenných papírů dočasně zajišťuje centrální evidenci cenných papírů v zaknihované podobě pro české kapitálové trhy po dobu, kdy ještě není v provozu centrální depozitář (jeho založení nyní připravuje společnost UNIVYC, a.s., protože stále panují nejasnosti s oceněním existujících záznamů o zaknihovaných cenných papírech uchovávaných ve Středisku cenných papírů pro účely jejich převodu).

lze vyřešit nahrazením „listiny“ termínem „nosič“, po jehož použití by již definice zahrnovala jak listinné, tak i zaknihované cenné papíry.[4]

Účinný zákon o cenných papírech poskytuje demonstrativní výčet druhů cenných papírů (pro jeho uvození je užito slovo zejména). Z toho vyplývá, že i další instituty mohou být cennými papíry – dle Dědiče cennými papíry mohou být i jiné druhy, pokud splňují teoretickou definici cenného papíru.[5] Musí však být vydány na základě ustanovení právního řádu. V současnosti účinné české právo rozeznává následující druhy:

- *Akcie,*
- *Zatímní listy,*
- *Poukázky na akcie,*
- *Podílové listy,*
- *Dluhopisy,*
- *Investiční kupóny,*
- *Kupóny,*
- *Opční listy,*
- *Směnky,*
- *Šeky,*
- *Náložné listy,*
- *Skladištní listy,*
- *Zemědělské skladní listy*.[6]

Cenné papíry versus investiční nástroje versus instrumenty finančního trhu

Je důležité zdůraznit rozdíl mezi cennými papíry a investičními nástroji, který nemusí být na první pohled zjevný. Cenné papíry jsou v českém právu delší dobu existující institut, který nalezneme již v zákoně č. 67/1875 ř. z., jenž se týče organisace burs. Naproti tomu investiční nástroje byly do českého právního prostředí zavedeny až v rámci harmonizace s právem Evropského společenství zákonem o podnikání na kapitálovém trhu.[7] Primárně tedy pojem investičních nástrojů nalezeneme ve směrnicích Evropského společenství, odkud byl transponován do českých zákonů.

4 K této definici více v Vítek, J. In Kotásek, J. et al.: *Kurs obchodního práva: právo cenných papírů*, Praha, C. H. Beck, 2005, 728 s., ISBN 80-7179-855-X, s. 19 – 20.
5 Viz Dědič, J. In Dědič, J., Pauly, J.: *Cenné papíry*, Praha: PROSPEKTRUM, 1994, 220 s., ISBN 80-85431-98-X, s. 20.
6 Srovnej § 1 odst. 1 zákona č. 591/1992 Sb., o cenných papírech, ve znění pozdějších předpisů.
7 Zákon č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů.

Jako další příbuzný pojem Kotáb zavádí instrumenty finančního trhu jako „předměty obchodování na finančních trzích“.[8] Tento pojem je nejobecnější a zahrnuje všechny investiční nástroje i nástroje, které nejsou investičními nástroji, ale používají se při obchodování na finančních trzích.

Zmíněné tři skupiny nástrojů je nutné striktně rozlišovat, přičemž cenné papíry jsou pojmem nejužším, instrumenty finančního trhu nejširším a na pomezí mezi nimi se nacházejí investiční nástroje.

Zákon o podnikání na kapitálovém trhu naproti tomu definuje investičních nástroje kompletním výčtem, tedy jedná se o investiční cenné papíry, cenné papíry kolektivního investování, nástroje peněžního trhu a deriváty.[9]

Investiční cenné papíry jsou legálním výčtem dále děleny na:
- *akcie* (účastnické cenné papíry),
- *dluhopisy* (dluhové cenné papíry),
- *cenné papíry opravňující k nabytí akcií nebo dluhopisů s výjimkou platebních nástrojů,*
- *ostatní cenné papíry s výjimkou platebních nástrojů*.[10]

Cennými papíry kolektivního investování jsou *podílové listy podílového fondu a akcie investičního fondu.*[11]

Deriváty, což jsou odvozené investiční nástroje představující závazek k budoucímu nákupu, prodeji či platbě daného aktiva (cenného papíru nebo nástroje peněžního trhu, tedy i peněz nebo cizí měny), jsou vymezeny jako:
a) opce na investiční cenné papíry, cenné papíry kolektivního investování a nástroje peněžního trhu (opce dávají svému vlastníkovi právo prodat či koupit aktivum v dohodnutém čase za dohodnutou cenu),
b) finanční termínové smlouvy (zejména futures, forwardy a swapy) na investiční cenné papíry, cenné papíry kolektivního investování a nástroje peněžního trhu (futures zavazují učinit nebo převzít dodávku ze cenu určenou na burze veřejnou dražbou v dohodnutém termínu, forwardy zavazují učinit nebo převzít dodávku za cenu dohodnutou při sjednání forwardu v dohodnutém termínu, swapy zavazují k vzájemným budoucím platbám v dohodnutém termínu),
c) rozdílové smlouvy a obdobné nástroje pro přenos úrokového nebo kurzového rizika,

8 Citace z Kotáb, P. In Bakeš, M. et al.: *Finanční právo*, Praha: C. H. Beck, 2003, 721 s., ISBN 80-7179-667-0, s. 528.
9 Srovnej § 3 odst. 1 zákona č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů.
10 Citace z § 3 odst. 2 zákona č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů.
11 Citace z § 3 odst. 5 zákona č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů.

d) nástroje umožňující přenos úvěrového rizika,
e) jiné nástroje, ze kterých vyplývá právo na vypořádání v penězích a jejichž hodnota se odvozuje zejména z kurzu investičního cenného papíru, indexu, úrokové míry, kurzu měny nebo ceny komodity.[12]

Nástroje peněžního trhu již nejsou zákonem definovány, jejich demonstrativní výčet však poskytuje směrnice 93/22/EHS. Není podmínkou jejich existence, aby měly formu cenných papírů, i když ji mohou mít (např. státní pokladniční poukázky, tj. druh dluhopisu). Mezi nástroje peněžního trhu dále patří krátkodobé a dlouhodobé úvěry, komerční papíry, depozitní certifikáty, depozitní směnky. Běžné a kontokorentní účty u bank naopak nepatří mezi cenné papíry nepatří ani mezi investiční instrumenty, patří však mezi instrumenty finančního trhu.[13] Repo operace často zmiňované jako instrumenty finančního trhu také nejsou cennými papíry, nástroji peněžního trhu ani investičními nástroji, při svém průběhu však mohou využívat jiné cenné papíry.[14]

Rozdíl mezi investičními nástroji a cennými papíry tedy tvoří krátkodobé a dlouhodobé úvěry (nástroje peněžního trhu) a deriváty, které patří mezi investiční nástroje a nepatří mezi cenné papíry. Instrumenty finančního trhu jsou proti investičních nástrojů navíc také vklady u bank a družstevních záložen, ať už se jedná o běžné účty nebo o termínované vklady.

Na investiční nástroje lze přiměřeně použít ustanovení o smlouvách o cenných papírech, pokud z povahy těchto investičních nástrojů není toto analogické použití vyloučeno. Je zjevné, že např. běžný účet nelze zapůjčit použitím smlouvy o půjčce cenných papírů.[15] Investiční nástroje nepatřící mezi cenné papíry také nejsou evidovány v centrální evidenci cenných papírů, protože se jedná o soukromoprávní závazky, které byly založeny smlouvou mezi stranami (např. smlouva o vedení běžného účtu) a jejich centrální evidence nemá v tomto případě opodstatnění.

Zvláštním instrumentem finančního trhu, který není cenným papírem, je talón. Talón, který bývá začasté součástí kupónového archu, opravňuje k vydání nového kupónového archu.[16]

Druhy dluhopisů

12 Doplněná citace z § 3 odst. 3 zákona č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů.
13 Srovnej Husták, Z. In Kotásek, J. et al.: *Kurs obchodního práva: právo cenných papírů*, Praha, C. H. Beck, 2005, 728 s., ISBN 80-7179-855-X, s. 99.
14 Srovnej Komise pro cenné papíry: *Veřejná diskuze - Stanovisko (návrh) "Repo operace z hlediska investičních služeb, kolektivního investování"* [citováno 1. května 2008]. Dostupný z: http://www.cnb.cz/export/CZ/Informace_profesionalum/Verejna_diskuze/get_dms_file.do?FileId=2716.
15 Srovnej § 8a a § 16a zákona č. 591/1992 Sb., o cenných papírech, ve znění pozdějších předpisů.
16 Srovnej § 12 odst. 2 zákona č. 591/1992 Sb., o cenných papírech, ve znění pozdějších předpisů.

Dluhopisy, které jsou samostatným druhem cenných papírů, mají v českém právu nejpodrobnější další dělení, rozeznáváme následující druhy dluhopisů:[17]

- standardní dluhopisy dluhopisy nepatřící do žádného z následujících druhů, které zaručují právo na výnos a právo na splacení své nominální hodnoty,
- prioritní dluhopisy nesoucí spolu kromě výše uvedených práv právo na přednostní úpis akcií při zvýšení základního kapitálu emitenta,
- vyměnitelné dluhopisy s inkorporovaným právem na splacení jmenovité hodnoty dluhopisu nebo právem na výměnu dluhopisu za akcie,
- sběrné dluhopisy patřící více majitelům s určitým podílem z celého dluhopisu, aniž je určeno pořadí jednotlivých majitelů,
- hypoteční zástavní listy vydávané bankami, u nichž je proplacení jmenovité hodnoty dluhopisu zajištěno zástavním právem k nemovitosti, při nesplacení mohou jejich majitelé výtěžkem z prodeje daných nemovitostí uhradit své pohledávky,
- státní dluhopisy emitované státem, jejichž poddruh státní pokladniční poukázky jsou obchodované v Systému krátkodobých dluhopisů provozovaném Českou národní bankou,[18]
- komunální dluhopisy emitované obcemi nebo bankami za účelem poskytnutí úvěru obci,
- podřízené dluhopisy vydávané akcesoricky k jiným dluhopisům.

Druhy akcií

Akcie kmenová s sebou nese hlasovací práva, která nemohou být omezena. Pokud není na akcii (u listinné podoby) nebo v evidenci centrálního depozitáře či Střediska cenných papírů (u zaknihované podoby) uvedeno jinak, jedná se o tento typ akcie.[19]

Druhým druhem akcie je akcie prioritní, která může mít omezená hlasovací práva, ale má prioritní výplatu dividend. K výplatě dividend u akcie dochází i v případě, že emitent akcie zaznamenal účetní ztrátu, narozdíl od akcií kmenových.[20]

17 Srovnej Pihera, V. In Kotásek, J. et al.: *Kurs obchodního práva: právo cenných papírů*, Praha, C. H. Beck, 2005, 728 s., ISBN 80-7179-855-X, s. 447 a násl.
18 Srovnej Česká národní banka: *Systém krátkodobých dluhopisů - Česká národní banka* [citováno 1. května 2008]. Dostupný z: http://www.cnb.cz/cs/financni_trhy/skd/skd_popis.html.
19 Srovnej § 155 odst. 6 zákona č. 513/1991 Sb., Obchodní zákoník, ve znění pozdějších předpisů.
20 Viz § 159 zákona č. 513/1991 Sb., Obchodní zákoník, ve znění pozdějších předpisů.

Dle dřívější právní úpravy byla ještě speciálně vydělována akcie zlatá, která s sebou nesla právo veta případně více hlasů než by akcie normálně obnášela. Tento druh akcie je upraven v zákoně o podmínkách převodu majetku státu na jiné osoby. Tato úprava již není prakticky příliš používaná, protože práva spojená se zlatou akcií mohou vykonávat pouze Fond národního majetku ČR nebo Pozemkový fond ČR u jimi založených společností.[21]

Investiční kupóny

Jako investiční kupon zákon označuje cenný papír na jméno, který opravňuje ke koupi akcií určených k prodeji za kupóny. Je nepřevoditelný, pouze je způsobilý k přechodu v rámci dědictví, dále je též neumořitelný. Autor investiční kupóny pro jejich zajímavý historický význam - sloužily v 90. letech 20. století k převodům majetku státu na fyzické a právnické osoby při privatizaci. Jejich emitentem bylo Ministerstvo financí ČSFR a posléze ČR.

Byly platné po dobu 10 měsíců od data emise. Občan si zaregistroval kupónovou knížku mající určitý počet investičních bodů, které bylo možné použít k nákupu akcií v určených privatizačních vlnách.

Závěr

Autor v tomto příspěvku rozebral jednotlivé kategorizace cenných papírů. Český právní řád rozlišuje kategorizaci podle druhu, podoby a formy a také od samotných cenných papírů odlišuje pojem investičních nástrojů, který k nám byl přinesen implementací předpisů Evropského společenství. Odborným výzkumem v oblastech finančního práva a obchodního práva se došlo k dalším pojmům týkajícím se kapitálového trhu a teoretickým výkladem se dořešily otázky s absentující právní úpravou, které se autor pokusil v tomto článku stručně načrtnout. Právní úprava chybí např. u všeobecné definice cenného papíru, která v českém právu neexistuje a tudíž je doplňována právní teorií. Teoretickým přínosem tohoto příspěvku je mimo jiné porovnání různých zastřešujících pojmů pro objekty vztahů na finančním trhu, kdy autor rozebírá rozdíly mezi cennými papíry, investičními nástroji a instrumenty finančního trhu.

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[3] Dědič, J., Pauly, J.: *Cenné papíry*, Praha: PROSPEKTRUM, 1994, 220 s., ISBN 80-85431-98-X.
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[6] Zákon č. 92/1991 Sb., o podmínkách převodu majetku státu na jiné osoby, ve znění pozdějších předpisů.
[7] Zákon č. 513/1991 Sb., Obchodní zákoník, ve znění pozdějších předpisů.
[8] Zákon č. 591/1992 Sb., o cenných papírech, ve znění pozdějších předpisů.
[9] Zákon č. 219/1995 Sb., devizový zákon, ve znění pozdějších předpisů.
[10] Zákon č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů.

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ODPOWIEDZIALNOŚĆ ZA NARUSZENIE DYSCYPLINY FINANSÓW W POLSKIM SYSTEMIE ODPOWIEDZIALNOŚCI

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Abstract

Funkcjonujące w polskich finansach publicznych rodzaje odpowiedzialności mają do spełnienia wspólny częściowo cel – ochronę interesów finansowych Skarbu Państwa oraz jednostek samorządu terytorialnego. Cel ten realizowany jest przez system odpowiedzialności karnej i karnej skarbowej, cywilnej, pracowniczej oraz odpowiedzialności za naruszenie dyscypliny finansów publicznych. Przedmiotem niniejszego referatu jest próba umiejscowienie szczególnego rodzaju odpowiedzialności - za naruszenie dyscypliny finansów publicznych wśród innych systemów mających gwarantować legalność i poprawność gromadzenia dochodów publicznych, dokonywania wydatków, zaciągania zobowiązań.

Key Words

Odpowiedzialność za naruszenie dyscypliny finansów publicznych, prawo finansowe, finanse publiczne, budżet, zamówienia publiczne, rachunkowość, środki publiczne, dotacje, jednostka sektora finansów publicznych, inwentaryzacja, Skarb Państwa, jednostka samorządu terytorialnego, odpowiedzialność karna skarbowa, dysponent środków publicznych.

Abstract

The types of responsibilities which function in polish public finances have partly common goal to fulfil – protection of financial interests of the State Treasury as well as units of the local government. This goal is realized by a system of criminal responsibility and tax-criminal responsibility, civil responsibility, labour responsibility and responsibility for violating the discipline of public finances. The subject of this report is an attempt to place a particular type of responsibility - for violating the discipline of public finances among other systems that are to guarantee legality and correctness of collecting the public income, making expenses and taking out obligations.

Key words

Responsibility for violating the discipline of public finances, financial law, public finances, budget, competitive tendering, accounting, public resources, donation, a unit of public finances sector,

inventorying, State Treasury, a unit of the local government, tax-criminal responsibility, disposer of public resources.

Przedmiotem niniejszego referatu jest próba umiejscowienie szczególnego rodzaju odpowiedzialności - odpowiedzialności za naruszenie dyscypliny finansów publicznych, wśród innych systemów mających gwarantować legalność i poprawność gromadzenia dochodów publicznych, dokonywania wydatków, zaciągania zobowiązań angażujących środki publiczne. Funkcjonujące w polskich finansach publicznych rodzaje odpowiedzialności mają do spełnienia wspólny częściowo cel – ochronę interesów finansowych Skarbu Państwa oraz jednostek samorządu terytorialnego. Cel ten realizowany jest w szczególności przez system odpowiedzialności karnej i karnej skarbowej, odpowiedzialności cywilnej, odpowiedzialności pracowniczej oraz odpowiedzialności za naruszenie dyscypliny finansów publicznych.

Przez odpowiedzialność rozumie się w prawie zdolność do ponoszenia określonych przepisami ujemnych konsekwencji za zdarzenia lub stany rzeczy podlegające negatywnej kwalifikacji normatywnej[1]. Termin „dyscyplina" oznacza „podporządkowanie się przepisom regulującym stosunki wewnętrzne danej grupy ludzi, karność, rygor, ustalony porządek"[2]. W literaturze prawniczej przez dyscyplinę definiuje się jako karność, porządek lub obowiązek podporządkowania się określonym regułom. Wyróżnia się dwa rozumienia tego pojęcia. W ujęciu przedmiotowym przez dyscyplinę rozumie się system norm obowiązujących członków danej grupy adresatów. W znaczeniu podmiotowym dyscypliną jest obowiązek podporządkowania się określonym rygorom[3].

Desygnaty pojęcia „finanse publiczne" wylicza ustawa o finansach publicznych[4] w art. 3, a ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych[5] nakazuje przy wykładni jej przepisów przyjmować takie samo znaczenie jak nadane ustawą o finansach publicznych. Finanse publiczne obejmują procesy związane z gromadzeniem środków publicznych oraz ich rozdysponowaniem, a w szczególności:

1) gromadzenie dochodów i przychodów publicznych;
2) wydatkowanie środków publicznych;
3) finansowanie potrzeb pożyczkowych budżetu państwa;
4) finansowanie potrzeb pożyczkowych budżetu jednostki samorządu terytorialnego;
5) zaciąganie zobowiązań angażujących środki publiczne;
6) zarządzanie środkami publicznymi;

[1] W. Lang, *Struktura odpowiedzialności prawnej*, „Zeszyty Naukowe UMK", Prawo VIII, z. 31 z 1969 r., s. 12
[2] *Słownik języka polskiego,* t. I, red. M. Szymczak, Warszawa 1988, s. 487.
[3] Z. Leoński, *Odpowiedzialność dyscyplinarna w prawie Polski Ludowej*, Poznań 1959, s. 10.
[4] Ustawa z dnia 30 czerwca 2005 r. o finansach publicznych (Dz. U. Nr 249, poz. 2104 z późn. zm.).
[5] Ustawa z dnia 17 grudnia 2004 r. o odpowiedzialności za naruszenie dyscypliny finansów publicznych (Dz. U. z 2005 r. Nr 14, poz. 114 z późn. zm., dalej „uondfp").

7) zarządzanie długiem publicznym;
8) rozliczenia z budżetem Unii Europejskiej.

Celem ochrony przepisów ustawy o odpowiedzialności za naruszenie dyscypliny finansów publicznych jest prawidłowość procesów składających się na normatywny zwrot „finanse publiczne". Należy podkreślić, że reżim ten nie dotyczy należności celnych i podatkowych (art. 3 uondfp).

Dyscyplina finansów publicznych. Analiza pojęcia

Przepisy prawa nakładają na podmioty czynne i bierne prawa finansowego liczne obowiązki. Obejmują one gromadzenie i wydatkowanie (dysponowanie) środkami publicznymi (ustawa o finansach publicznych), zasady i tryb wydatkowania środków publicznych (prawo zamówień publicznych), prawidłowość gospodarowania mieniem jednostek sektora finansów publicznych oraz obowiązki sprawozdawcze (ustawa o rachunkowości), realizację zobowiązań publicznoprawnych (ustawa o systemie ubezpieczeń społecznych)[6]. Prawidłowość realizacji obowiązków nałożonych przez przepisy ustawy o finansach publicznych oraz inne przepisy prawa materialnego objęta jest szczególnym reżimem odpowiedzialności, tj. właśnie odpowiedzialnością za naruszenie dyscypliny finansów publicznych. Dyscyplina finansów publicznych w ujęciu pozytywnym oznacza taki system gospodarowania środkami publicznymi, który zgodny jest pod względem formalnym i materialnym z ustawą o finansach publicznych. Jeżeli system ten odbiega od narzuconego przez prawodawcę – mamy do czynienia z dyscypliną finansów publicznych w ujęciu negatywnym (nazywaną dyscypliną finansów publicznych *sensu stricto* lub w ujęciu wąskim), rozumianą jako katalog czynów, których popełnienie (w sposób czynny lub bierny, tj. działaniem lub zaniechaniem) ustawodawca uznał za na tyle naganny i szkodliwy dla finansów publicznych, że ich popełnienie postanowił obwarować sankcjami (upomnieniem, naganą, karą pieniężną albo zakazem pełnienia funkcji związanych z dysponowaniem środkami publicznymi do lat pięciu). Przedmiotowy zakres odpowiedzialności za naruszenie dyscypliny finansów publicznych „charakteryzuje jednorodność polegająca na powiązaniu czynów wyczerpujących znamiona tych naruszeń z normami prawnymi regulującymi ład finansów publicznych"[7].

Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych nie zawiera legalnej definicji pojęcia „dyscyplina finansów publicznych", zatem poszczególne elementy składające się na znamiona tej instytucji zrekonstruować należy z całokształtu regulacji samej ustawy oraz przepisów szczególnych. Dyscyplinę finansów publicznych rozumieć należy jako katalog zasad odnoszących się do prawidłowego gospodarowania środkami publicznymi sformułowanych w przepisach szczegółowych.

[6] O praktycznych aspektach funkcjonowania systemu odpowiedzialności za naruszenie dyscypliny finansów publicznych patrz: L. Lipiec-Warzecha, *Egzekwowanie odpowiedzialności za naruszenie dyscypliny finansów publicznych. Wybrane problemy*, Finanse Komunalne 2007, nr 9, s. 5-12.

[7] *Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych. Ustawa o finansach publicznych. Ustawa prawo zamówień publicznych*, Wprowadzenie: P. Kryczko, Kraków 2005 r., s. 19.

Chodzi tu nie tylko o prawo *stricte* finansowe, ale także o normy objęte prawem zamówień publicznych czy ustawą o rachunkowości[8]. Zakres przedmioty zachowań powodujących odpowiedzialność za naruszenie dyscypliny finansów publicznych obejmuje działania lub zaniechania niezgodne z przepisami regulującymi gospodarowanie mieniem i środkami publicznymi, szkodliwe dla finansów publicznych. Klasyfikacja naruszeń dyscypliny obejmuje następujące zasadnicze obszary: gromadzenie dochodów publicznych, wydatkowanie środków publicznych, zaciąganie zobowiązań, przeprowadzanie inwentaryzacji oraz obowiązki sprawozdawcze.

Dyscyplina finansów publicznych polega na przestrzeganiu zasad prawidłowej gospodarki finansowej związanej z gromadzeniem i wydatkowaniem środków publicznych. Jest to całokształt norm określających pożądane zachowanie osób odpowiedzialnych za jej zachowanie, obejmuje przestrzeganie prawa w zakresie budżetowania, a na jej stan oddziałuje w istotnym stopniu funkcjonowanie aparatu kontroli[9]. Instytucja dyscypliny budżetowej postrzegana była także jako ważny instrument mający zapewnić racjonalne i efektywne ekonomiczne planowanie budżetowe[10]. „Przez pojęcie dyscypliny budżetowej należy rozumieć przestrzeganie wszelkich norm prawnych i planów regulujących gospodarkę finansową państwa”[11].

Z kolei naruszeniem dyscypliny finansów publicznych jest czyn (działanie lub zaniechanie) osoby o statusie wyznaczonym w ustawie, określony w prawie jako naruszenie dyscypliny finansów publicznych, zawiniony, szkodliwy dla finansów publicznych. Czyn naruszenia dyscypliny finansów publicznych ma trzy główne znamiona. Stanowi:

- umyślne lub nieumyślne;
- działanie lub zaniechanie;
- odnoszące się do jednej z postaci zachowań wymienionych w ustawie[12].

Dyscyplina finansów publicznych obejmuje przestrzeganie prawnie wyznaczonych reguł ustalania, poboru i egzekucji należności stanowiących środki publiczne oraz gospodarowanie nimi w skali mikroekonomicznej, czyli w jednostkach sektora finansów publicznych i poza nimi, jeśli podmioty te korzystają ze środków publicznych. Pod względem przedmiotowym dyscyplina finansów publicznych

[8] Dla ustalenia zakresu podmiotowego i przedmiotowego odpowiedzialności za naruszenie dyscypliny finansów publicznych, oprócz ustawy o finansach publicznych, znaczenie podstawowe mają: ustawa z dnia 29 stycznia 2004 r. - Prawo zamówień publicznych (Dz. U. Nr 19, poz. 177, ustawa z dnia 29 września 1994 r. o rachunkowości (Dz. U. z 2002 r., Nr 76, poz. 694 z późn. zm.), ustawa z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych (Dz. U. Nr 137, poz. 887 z późn. zm.), z dnia 8 marca 1990 r. o samorządzie gminnym (Dz. U. z 2001 r. Nr 142, poz. 1591 z późn. zm.), ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (Dz. U. z 2001 r. Nr 142, poz. 1592, ustawa z dnia 5 maja 1998 r. o samorządzie województwa (Dz. U. z 2001 r. Nr 142, poz. 1590).

[9] M. Mazurkiewicz, *Dyscyplina budżetowa* (w:) *Instytucje prawno-finansowe PRL*, red. M. Weralski, t. 2, Ossolineum 1982, s. 576.

[10] J. Kaleta, *Dyscyplina budżetowa w planowaniu budżetowym*, PiP 1967, nr 4-5, s. 707.

[11] J. Harasimowicz, *Finanse i prawo finansowe*, Warszawa 1988, s. 98.

[12] C. Kosikowski, *Dyscyplina finansów publicznych oraz odpowiedzialność za jej naruszenie* (w:) *Finanse publiczne i prawo finansowe*, red. C. Kosikowski i E. Ruśkowski, Warszawa 2007, s. 852.

obejmuje te wymogi, których nieprzestrzeganie traktowane jest przez ustawodawcę jako popełnienie czynu stanowiącego naruszenie dyscypliny finansów publicznych[13].

Odpowiedzialność za naruszenie dyscypliny finansów publicznych a inne rodzaje odpowiedzialności

Odpowiedzialność za naruszenie dyscypliny finansów publicznych jest niezależna od odpowiedzialności określonej innymi przepisami prawa. W prawie finansowym, oprócz odpowiedzialności za naruszenie dyscypliny finansów publicznych, relewantna jest także odpowiedzialność karna i karna skarbowa oraz tzw. sankcje systemowe, zawarte w ustawie o finansach publicznych. Niewykluczona jest również odpowiedzialność oparta na przepisach prawa cywilnego (np. odszkodowawcza z tytułu czynu niedozwolonego lub sankcja nieważności - zawarcie umowy w sprawie zamówienia publicznego bez zachowania formy pisemnej) lub przepisach prawa pracy[14]. Do sankcji systemowych należy przede wszystkim instytucja blokowania planowanych wydatków budżetowych, stosowana w razie stwierdzenia niegospodarności, opóźnień w realizacji zadań, nadmiaru posiadanych środków lub naruszenia zasad gospodarki finansowej (art. 154 ust. 1 ustawy o finansach publicznych) oraz pozbawienie prawa korzystania z dotacji budżetowej na trzy lata, w razie wykorzystania dotacji niezgodnie z przeznaczeniem (art. 145 ust. 6 ufp). Odpowiedzialność za naruszenie dyscypliny finansów publicznych przewiduje 4 kary: upomnienie, naganę, karę pieniężną oraz karę zakazu pełnienia funkcji związanych z dysponowaniem środkami publicznymi[15].

Czyny określone przez ustawę o odpowiedzialności za naruszenie dyscypliny finansowej jako delikty finansowe mogą być przedmiotem penalizacji również przez inne przepisy. Zbieg odpowiedzialności za delikt finansowy możliwy jest przede wszystkim z odpowiedzialnością karną i karną skarbową, kiedy naruszenie dyscypliny finansów publicznych stanowi fragment czynu przestępnego ściganego na podstawie ustawy karnej. Regułę niezależności różnych rodzajów odpowiedzialności, obejmującej skutki ujawnionej „permanentnie nielegalnej gospodarki finansowej" akcentuje także orzecznictwo sądowe. W wyroku z dnia 6 sierpnia 2003 r. Naczelny Sąd Administracyjny podkreślił odrębność regulacji prawnofinansowych i wynikających z prawa pracy. Ani ustawa finansach publicznych, ani ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych „nie tworzy zakazu ponoszenia odpowiedzialności pracowniczej" (wyrok NSA z dnia 6 sierpnia 2003 r., III SA 3148/00). Odpowiedzialność oparta na przepisach prawa cywilnego dotyczy przede wszystkim wyrównania

[13] ibidem, s. 851.

[14] C. Kosikowski, Z. Szpringer, *Finanse publiczne. Komentarz do ustawy z dnia 26 listopada 1998 r.,* Zielona Góra 2000 r., s. 336 – 337.

[15] Skuteczność ostatniej z wymienionych kar w kontekście ustawowych przesłanek jej stosowania poddałam analizie w: L. Lipiec, *Zakaz pełnienia funkcji związanych z dysponowaniem środkami publicznymi – uwagi de lege lata*, [w:] *Problemy stanowienia i stosowania prawa finansowego w krajach europy środkowej i wschodniej. Materiały z konferencji naukowej w Grodnie w dniach 16-17 września 2006 r.,* Grodno 2006, s. 217-220.

uszczerbku środków publicznych powstałego wskutek naruszenia dyscypliny finansowej. Ukaranie osoby odpowiedzialnej za naruszenie dyscypliny finansów publicznych nie ogranicza praw Skarbu Państwa, jednostki samorządu terytorialnego lub innej jednostki sektora finansów publicznych do dochodzenia odszkodowania za poniesioną szkodę[16].

Naruszenia dyscypliny finansów publicznych wypełniające jednocześnie znamiona czynu zabronionego określonego w kodeksie karnym lub w ustawach karnych szczególnych zaklasyfikować można do trzech zasadniczych kategorii, tj.: przestępstw gospodarczych, przestępstw przeciwko działalności instytucji państwowych oraz samorządu terytorialnego oraz przestępstw przeciwko wiarygodności dokumentów.

Przestępstwa gospodarcze mogące pozostawać w zbiegu z o naruszeniami dyscypliny finansów publicznych są czynami godzącymi (lub zagrażającymi – przy przestępstwach z narażenia) dobrom o ponadindywidualnym charakterze, a ich przedmiotem ochrony są nie tyle pojedyncze osoby, ale szeroko rozumiany interes gospodarczy oraz naruszają zaufanie, będące podstawowym warunkiem funkcjonowania tej sfery[17]. Sprawcy tych przestępstw nie posługują się przemocą, ale mającymi pozory legalności machinacjami. Naruszenie dyscypliny finansów publicznych towarzyszyć może przede wszystkim przestępstwu karalnej niegospodarności (zwanym także przestępstwem nadużycia zaufania – art. 296 k.k.) oraz przestępstwu udaremnienia lub utrudnienia przetargu publicznego (art. 305 k.k.).

Przedmiotem ochrony przepisów prawnokarnych, których znamiona wypełniać mogą także czyny spenalizowane w art. 5 – art. 18 uondfp, dotyczących działalności instytucji państwowych lub samorządowych jest przede wszystkim prawidłowe i niezakłócone działanie organów władzy publicznej. Mowa tu przede wszystkim o przestępstwie urzędniczym (art. 231 k.k. – nadużycie uprawnień lub niedopełnienie obowiązków przez funkcjonariusza publicznego, ze szkodą dla interesu publicznego lub prywatnego), przestępstwie płatnej protekcji (art. 230 k.k. – płatne podjęcie się pośrednictwa w załatwieniu spraw w instytucji publicznej, z powołaniem się na swoje wpływy), a także o przestępstwie łapownictwa czynnego (art. 229 k.k., czyli udzielenia łapówki osobie pełniącej funkcję publiczną) lub łapownictwa biernego (art. 228 k.k. – przyjęcia korzyści majątkowej przez osobę pełniącą funkcję publiczną).

Zbieg naruszenia dyscypliny finansów publicznych z przepisami prawnokarnymi w zakresie ochrony wiarygodności dokumentów dotyczy przede wszystkim posłużenia się fałszywymi dokumentami i oświadczeniami w staraniach o kredyt, pożyczkę bankową, gwarancję kredytową, dotację, subwencję lub zamówienie publiczne (art. 297 k.k.), przestępstwie prowadzenia nierzetelnej dokumentacji działalności gospodarczej (art. 303 k.k.). W grę może wchodzić także fałszerstwo dokumentu (art. 270 k.k. - podrobienie lub przerobienie w celu użycia za autentyczny albo używanie takiego dokumentu jako

[16] C. Kosikowski, *Odpowiedzialność za naruszenie dyscypliny finansów publicznych. Komentarz i przepisy,* Warszawa 2000, s. 27-28. Patrz również komentarz do art. 30.

[17] O. Górniok, *Przestępczość gospodarcza i jej zwalczanie*, Warszawa 1994, s. 57 – 58, O. Górniok, *Przestępstwa gospodarcze. Rozdział XXXVI i XXXVII Kodeksu karnego. Komentarz,* Warszawa 2000, s. 13 i nast.

autentycznego), fałszerstwo intelektualne (urzędowe poświadczenie nieprawdy -art. 271 k.k.), np. w postaci zmian w treści uchwały budżetowej, dopisanie niezbędnego, lecz brakującego podpisu, antydatowanie dokumentu, jeżeli z datą wiążą się określone skutki prawne, wyłudzenie poświadczenia nieprawdy (art. 272 k.k.) oraz zniszczenie dokumentu (także uszkodzenie, czynienie bezużytecznym, ukrywanie lub usuwanie – art. 276 k.k.).

Z art. 25 wynika stosunek krzyżowania się zakresów odpowiedzialności za naruszenie dyscypliny finansów publicznych oraz odpowiedzialności karnej (karnej skarbowej), przy czym

Podkreślając wynikającą z ustawy niezależność podstaw prawnych odpowiedzialności za naruszenie dyscypliny finansów publicznych oraz odpowiedzialności wynikającej z przepisów szczególnych GKO stwierdziła, że „nie istnieje przepis, który dawałby podstawę do niewszczynania postępowania w sprawie o naruszenie dyscypliny finansów publicznych lub umorzenie postępowania już wszczętego, w sytuacji kiedy doszło do naruszenia dyscypliny finansów publicznych polegającego na zaniedbaniu obowiązków w zakresie nadzoru, w wyniku którego dopuszczono się zwłoki w regulowaniu zobowiązań jednostki sektora finansów publicznych powodującej uszczuplenie środków publicznych wskutek zapłaty odsetek za opóźnienie w zapłacie, a sprawca tego czynu – ze względu na odpowiedzialność materialną, jaką ponosi na mocy przepisu art. 114 Kodeksu pracy – naprawił powstałą szkodę przez wpłatę na rachunek pracodawcy (w tym przypadku – jednostki sektora finansów publicznych) kwoty odpowiadającej wartości powstałej szkody" (orzeczenie GKO z dnia 10 lutego 2003 r., DF/GKO/Odw.-133/169/2002, Lex nr 80067).

Zasady odpowiedzialności za naruszenie dyscypliny finansowej są w istocie podrzędne wobec odpowiedzialności karnej[18].

W razie wszczęcia postępowania w sprawie o przestępstwo, przestępstwo skarbowe, wykroczenie albo wykroczenie skarbowe, o czyn stanowiący równocześnie naruszenie dyscypliny finansów publicznych, postępowanie o naruszenie dyscypliny finansów publicznych zawiesza się do czasu zakończenia postępowania karnego lub postępowania w sprawie o wykroczenie (odpowiednio w sprawie o przestępstwo skarbowe albo wykroczenie skarbowe). Przed obligatoryjnym zawieszeniem postępowania z związku z przestępstwem stanowiącym równocześnie naruszenie dyscypliny finansów publicznych „należy bezwzględnie wyjaśnić czy przedmiot prowadzonego postępowania karnego jest zbieżny z przedmiotem postępowania o naruszenie dyscypliny finansów publicznych" (orzeczenie GKO z dnia 8 kwietnia 2002 r., DF/GKO/Odw.-27/35/2002, Lex nr 150153). „Przesłanką konieczną do zawieszenia postępowania w sprawie o naruszenie dyscypliny finansów publicznych jest wszczęcie postępowania karnego lub karnego skarbowego a nie prowadzenie czynności przygotowawczych do

[18] S. Huczek, *Dyscyplina finansów publicznych a przepisy karne,* „Finanse Komunalne" Nr 4 z 2005 r., s. 14.

takiego wszczęcia" (orzeczenie GKO z dnia 18 września 2000 r., DF/GKO/110/168-169/2000, Lex nr 52217).

W razie prawomocnego skazania za przestępstwo (wykroczenie) lub przestępstw skarbowe (wykroczenie skarbowe) będące jednocześnie deliktem finansowym, wszczęte postępowanie o naruszenie dyscypliny finansów publicznych podlega umorzeniu (art. 25 ust. 3). Odpowiedzialność o charakterze karnym konsumuje zatem odpowiedzialność za naruszenie dyscypliny finansów publicznych. Natomiast uniewinnienie obwinionego od zarzutu naruszenia dyscypliny finansowej publicznych wobec niestwierdzenia znamion takiego naruszenia nie wyklucza dochodzenia odpowiedzialności za ten czyn w innym trybie.

Wnioski końcowe

Ochrona interesów finansowych Skarbu Państwa oraz jednostek samorządu terytorialnego, gwarantowana przez różne systemy odpowiedzialności, posługujące się rozmaitymi sankcjami i stosujące różnorodne tryby postępowania, ma swoje uzasadnienie z punktu widzenia konieczności zagwarantowania finansowego bezpieczeństwa państwa. Funkcjonowanie jednostek sektora finansów publicznych nie opiera się na osiąganiu zysku z prowadzonej działalności, nie funkcjonują według mechanizmów rynkowych, nie podlegają zatem mechanizmom rynkowym i wynikającej stąd ocenie efektywności. Uzasadnia to konieczność wprowadzenia innych gwarancji respektowania przez te jednostki reguł gospodarności, celowości, efektywności i oszczędności w gospodarowaniu środkami publicznymi[19]. Nie bez znaczenia jest również działanie prawa rosnącej władzy organów finansowych, co oznacza, że wszelkie służby administracji, którym przyznano kompetencje finansowe, uzyskują z tego tytułu zwiększoną władzę w porównaniu do tej, która przysługiwałaby im normalnie według zasad organizacji administracji. Odrębne reżimy odpowiedzialności karnej, penalizującej szczególnie naganne dla finansów publicznych działania lub zaniechania, odpowiedzialności odszkodowawczej na podstawie prawa cywilnego oraz odpowiedzialności za naruszenie dyscypliny finansowej, z eliminacyjną sankcją zakazu pełnienia funkcji związanych z dysponowaniem środkami publicznymi, są zasadne ze względów natury ekonomicznej, prawnej i socjologicznej.

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[19] L. Lipiec-Warzecha, *Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych. Komentarz,* Warszawa 2008, w druku.

[3] L. Lipiec-Warzecha, *Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych. Komentarz,* Warszawa 2008, w druku.
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ECOLOGICAL FISCAL REFORM

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Abstrakt

Práce se zabývá koncepcí ekologické daňové reformy (EDR). Představuje nedávný krok směrem k tomuto konceptu představovaný třemi nově zavedenými druhy daní - daní ze zemního plynu, daní z pevných paliv a daní z elektrické energie. K zavedení těchto daní byla Česká republika vázána směrnicí evropské rady 2003/96/EC, přičemž tento legislativní krok má být prvním stupněm k celkové fiskální změně daňové soustavy k tzv. ekologické daňové reformě. Text představuje základní myšlenku EDR a analyzuje zmíněné nové druhy daní. Uzavírá poukazem na současné jednání a formy návrhů EDR na půdě EU.

Klíčová slova

Ekologická daňová reforma, daň ze zemního plynu, daň z pevných paliv, daň z elektřiny, strategie 20/20/20

Abstract

The paper concerns ecological fiscal reform and its contemporary form presented by three new taxes recently adopted into Czech legal system. Those are tax on natural and other gases, tax on solid fuels and tax on electricity, which are based on the Council Directive 2003/96/EC. These taxes are shortly analysed regarding its content and form. Then is generally summarised the idea of complex ecological fiscal reform.

Key words

Ecological fiscal reform, tax on electricity, tax on solid fuels, tax on natural and other gases, strategy 20/20/20

Recently the Czech legal system was changed by the legislative act number 261/2007 Sb. This act is called "*the act on stabilisation of the public budget*" and has changed many different acts and branches of law. I want to mention one of those that didn't change the existing legislation but constituted a new one. Those are the parts 45-47 of this act that concern the so called ecological fiscal reform.
This change is closely connected to the European legislation, particularly the Council Directive 2003/96/EC of 27 October 2003, restructuring the Community framework for the taxation of energy products and electricity. This directive obligates member states to transform their fiscal system into a form specified by this directive and entered into force on the day of its publication. For new member states, such as the Czech Republic, there was a transition period until the 31.12.2007.
So the Czech legislation implemented this directive and by 1 January 2008 provisions of this directive are forceable through the above mentioned act on stabilisation of the public budget.

This norm established three new forms of taxation:

[6] Tax on natural gas and other gases
[7] Tax on fossil fuels
[8] Tax on electricity

Taxes on fossil fuels and electricity were entirely new and had not been in the Czech legal system before. On the other hand, the tax on natural gas was a part of the former consumption tax and is now established as a separate tax.

All member states have to respect the full list of commodities (stated in the article 2[1] of the Directive) as well as the minimum rates of taxation applied on them. (The directive requires only a minimum

1 Council Directive 2003/96/EC: Article 2

1. For the purposes of this Directive, the term "energy products" shall apply to products:

(a) falling within CN codes 1507 to 1518, if these are intended for use as heating fuel or motor fuel;
(b) falling within CN codes 2701, 2702 and 2704 to 2715;
(c) falling within CN codes 2901 and 2902;
(d) falling within CN code 2905 11 00, which are not of synthetic origin, if these are intended for use as heating fuel or motor fuel;
(e) falling within CN code 3403;
(f) falling within CN code 3811;
(g) falling within CN code 3817;
(h) falling within CN code 3824 90 99 if these are intended for use as heating fuel or motor fuel.

2. This Directive shall also apply to:

Electricity falling within CN code 2716.

compulsory rate of taxation and every particular state can afterwards set a higher level, although e.g. the Czech Republic surprisingly stays at the minimum level.) This especially relates to leaded and unleaded fuel, gas, oil, liquid gas, paraffin oil, brown and black coal and electricity.

As stated above, the Act separated these commodities into three groups:

1) Tax on natural gas and other gases

Subject to this tax is consumption by the final consumer, so reselling among traders is not affected by the tax. Aside from this general obligation there are many important exceptions. The tax is not applied to the highly energetically demanding operations such as:

- Mineralogical processes
- Metallurgical processes
- Production of electricity etc.

These industry processes are exempt from taxation. This can be understood from the point of view of businesses for whom this would mean higher costs. But from the point of view of the object and purpose of the directive, the very purpose of the norm – that is the decrease in the level of pollution – cannot be fully accomplished, because the largest producers of pollutants are exempt from the tax. On the other hand, we have to see this in the context of the global market where higher costs implied by the tax would create a disadvantage, compared to businesses from the countries with lower environmental standards. In this light, these European energetic companies might fail, the production itself would be delocalized and the level of pollution as a whole would increase.
Still we can see it as an unfair persecution of ordinary citizens against the privilege of large businesses. It might also seem that this instrument does not motivate businesses in these industries towards a more effective and environmentally harmless approach to energy resources. The question is whether different form of protection of these energetically demanding industries shouldn't be used. E.g. lower taxation, which won't be destructive for the industry but will be motivating to develop new, less demanding and cleaner technologies and will be more equal towards ordinary citizens.
In numbers this new tax should increase the price for consumers by 4,2 % and should bring 1,8 billion of Czech crowns to the national treasury in 2008.

The two other taxes have also a similar content and form.

In short, the tax on solid fuels covers mainly black and brown coal and other hydrocarbons and its rate is calculated per gigajoules of burned heat (currently 8,50 Czech crowns per one gigajoule). The tax is also paid when the commodity is consumed and traders are not obliged to do so if they do not consume it. Exemptions from this general rule are again very important. Highly demanding processes (metallurgical and mineralogical industry) are excluded from taxation, and very important in its impact to the environment is an exclusion of electricity production, because thermal power stations, which are also excluded from this tax, have significant impact in terms of production of CO2 (carbon dioxide) and other contaminants.. We can object to this solid fuels tax in the same way as in the case of the gas tax: while small producers are taxed, the big ones are not.
The fiscal effect of this tax is predicted as 9,1% increase in the prise in comparison with the year 2005 and it should bring 1,7 billion of crowns to the national treasury in 2008.

The last of the so called environmental taxes is the electricity tax. This tax has a similar structure to other two. Taxation is applied on consumption and not on traders. The exemptions are important because all environmentally harmless forms of electricity production are excluded here. This covers the following:

- electricity produced by the use of solar, wind or geothermal energy
- electricity produced in hydraulic power plants
- electricity produced by the use of biomass or of biomass products
- electricity produced by the use of methane in closed mines or by the use of fuel elements

Also certain kinds of environmental consumption of electricity are excluded from taxation, such as the railway, tram, and trolley-bus transport. The predicted fiscal effect is 1% increase in electricity price and 1,1 billion of crowns to the national treasury.

The content of these new taxes as a whole is simply adopted from the EU directive and represents the consensus of EU countries on this topic. The Czech Republic had to transpose them in such a way that would not lead to too strong political tensions.
Another question is the form in which the new legislation was adopted and publicised. Usually a new form of legislation is carried out by a new separate normative act. This is a usual procedure based on the principle of a legally consistent state and on the certainty and transparency of the legal order.
However, a different method was applied in this particular case. These three new taxes were incorporated into a huge conglomerate of other paragraphs, thematically very wide – from Value Added Tax, through social insurance, payment of medical care, to income tax.

This norm as a whole is changing the existing legislation, rather than establishing a new one. So the question is whether it shouldn't have been executed through thematically precise laws rather than by adopting one extensive, summary act. The question is even less obvious regarding three new taxes. The fact these taxes are incorporated and not adopted separately is outrageous.
According to chief of the Czech Constitutional Court: parts concerning environmental taxes are separate tax laws and there is a doubt about the way they were adopted – whether it is in accord with Article 52 of the Czech Constitution and with the Code of Law Act[2].

This new environmental tax legislation should be a part of a complex environmental fiscal reform intended by the European Council. Next steps should concern income tax reform and transportation tax[3].
This intended project is a part of negotiations carried out by the European Council in March 2007 and of the strategy 20/20/20, based on these negotiations and developed by the European Commission and published as Green Paper on market-based instruments for environment and related policy purposes[4].
The objective of this strategy is to decrease the emissions of greenhouse gases and especially CO2 by 20% compared to its 1990 level, to increase level of renewable energy resources to 20% and to increase the energetic efficiency in Europe by 20%. This proposal was presented in March 2008 by the chairman of the European Commission, José Manuel Barrosa, and it is based on the European long-term strategy of decreasing environmental impacts in the EU. This ambitious plan has to have its impact on the fiscal sphere, primary in form of taxes, charges and tradable permit systems .
Among the instruments leading towards the objective of this plan is also a complex environmental fiscal reform. This is supposed to be in its general form based on shifting taxation from taxation on work to taxation on consumption, thereby changing the structure of taxation, which would be focused not on income tax of natural and legal persons, as it had been until now, but on relocating taxation to indirect taxes, such as VAT, energy taxes and taxes and charges on environmentally harmful activities. This type of taxation would take into account processes and products with high consumption of energy and resources and thus with stronger impact on the environment. Producers of such commodities should be more motivated to use processes that are energetically more efficient and demand less resources.
Among other instruments which should help to reach the objective of the 20/20/20 plan (or some other type of environmental change plan) are trading of CO2 emission permits and the extension of regulated polluters from stationary object to transport.

2 Statement of the chief of Czech Constitutional Court Pavel Rychetský made in decision: Pl. ÚS 24/07 published as č. 88/2008 Sb.
3 Cp. http://www.env.cz/AIS/web.nsf/pages/strategie
4 Cp. http://eur-lex.europa.eu/COMMonth.do?year=2007&month=03

Yet the negotiation and connivance of this 20/20/20 strategy is planned to be carried out during the Czech presidency in 2009[5]. So the ability of the Czech government to lead discussions and negotiations in relation to this topic could have a significant impact. Positions of individual European countries vary and also the opinion of the Czech government is quite sceptic. Anyway, the discussions on this topic (apart from the Lisbon treaty) will be quite challenging and it could show the ability of the Czech politics to deal with matters on the European level.

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5 Cp. http://www.env.cz/AIS/web-pub.nsf/$pid/MZPMCFO1XFS6

DORUČOVÁNÍ VE SPRÁVĚ DANÍ – KOMPARACE PROCESNÍCH PŘEDPISŮ

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Abstrakt

Příspěvek je věnován úpravě institutu doručování v zákoně č. 337/1992 Sb., o správě daní a poplatků a v dalších stěžejních procesních předpisech. Zaměřen je zejména na komparaci doručování v řízení daňovém, správním a občanském soudním, kde lze nalézt jak obdobnou regulaci, tak rozdíly vyplývající ze specifických odlišností těchto řízení. Vzhledem k tomu, že daný právní institut může mít závažný vliv na průběh řízení, je vhodné věnovat mu odpovídající pozornost.

Klíčová slova

Právní institut, doručování, náhradní doručení, daňové řízení, správní řízení, občanské soudní řízení

Abstract

The paper attends to the regulation of the legal institute of delivering in Act No. 337/1992 Coll., on Tax and Fees Administration and in further main procedural rules. Particularly is focused on comparison of delivering in tax, administrative and civil proceedings, where can be found similar regulation as well as differences resulting from specific nature of these procedures. Regarding serious influence, which delivering can have on the proceeding, is appropriate to pay to this institute adequate attention.

Key words

Legal institute, alternative delivery, delivering, tax procedure, administrative procedure, civil proceedings

Úvod

Doručování není právním institutem zcela novým, a přestože není často zmiňováno v odborné literatuře, považuji jej za více než hodné pozornosti pro závažné dopady, které může mít na průběh řízení.

Institut doručování je svým charakterem převážně institutem veřejného práva (tam, kde je upravena interakce soukromých subjektů a subjektů veřejné moci)[1] a inherentně institutem procesním, kdy je nedílnou součástí řízení před orgány veřejné moci.

Cílem doručování je vždy skutečné převzetí zásilky příjemcem. Doručení tedy musí být v rámci zvýšení právní jistoty a ochrany účastníků řízení vždy jednoznačně dokladováno a musí proběhnout dle zákonem stanovených postupů. Z tohoto důvodu lze ve všech procesních předpisech nalézt mnoho společných institutů, zejména pak v řízení daňovém, správním a občanském soudním. Přes obdobnou regulaci zde můžeme nalézt i rozdíly vyplývajících ze specifických odlišností těchto řízení.

Při analýze právního institutu doručování vycházím z hlavních procesních předpisů, kterými jsou zákon č. 337/1992 Sb., o správě daní a poplatků, ve znění pozdějších předpisů (dále jen ZSDP), zákon č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů (dále jen SŘ), a zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů (dále jen OSŘ). Kromě toho autor čerpá z komentářů k těmto zákonům, odborné literatury a judikatury.

Doručování dle zákona o správě daní a poplatků (§ 17-20 ZSDP)

Doručování ve správě daní je důležitou administrativní a správní činností[2] správce daně. V ZSDP je výslovně stanoveno, že v daňovém řízení lze subjektům přiznávat práva a ukládat povinnosti jedině rozhodnutím, které bylo řádně doručeno nebo sděleno.

Ustanovení § 17 ZSDP demonstrativně určuje kdo je oprávněn doručovat písemnosti správce daně. Zákon uvádí, že se doručuje zpravidla prostřednictvím pošty, nicméně dává prostor i k doručení pracovníky správce daně. Poštou je myšlen kterýkoliv držitel poštovní licence, nicméně nejvíce je využíváno České pošty s.p., která je při poskytování svých služeb regulována Českým telekomunikačním úřadem. Prostřednictvím pracovníka správce daně se doručuje především v situacích, kdy je účastník řízení přítomen vydání určité listiny a doručení prostřednictvím držitele poštovní licence by tak bylo

[1] Nicméně zasahuje i do oblasti práva soukromého (např. práva občanského), což je dáno hlavně tím, že oba podsystémy práva mezi sebou nemají jednoznačnou dělící linii a často se vzájemně prolínají
[2] Grossová, M. Doručování písemností v daňovém řízení. Daně, 2001, č.4, str. 10.

zbytečně zdlouhavé. Nebezpečí však spočívá v situaci, kdy pracovník správce daně doručuje mimo úřad či místo, kde probíhá šetření, kontrola atd. – nepodaří-li se doručit, není možné písemnost doručovanou pracovníkem správce daně u správce daně uložit a nelze využít institutu náhradního doručení (bude zmíněn níže).

Dále je upravena problematika místa, kde je možné příjemci úřední písemnost správce daně doručit. Doručovat lze v bytě, provozovně, obchodní místnosti, kanceláři nebo na pracovním místě, kde se příjemce zdržuje, tedy i na finančním úřadě. Nelze-li tato místa identifikovat, má doručovatel možnost doručit všude, kde příjemce zastihne. Pokud příjemce bezdůvodně odmítne danou písemnost přijmout, musí být doručovatelem poučen o tom, že tato písemnost bude považována za doručenou dnem, kdy bylo její přijmutí odmítnuto. Jiná úprava se týká doručování daňovému poradci (daňovým poradcem se ve smyslu ZSDP rozumí i advokát), kterému je doručováno v jeho kanceláři. Lze doručit i mimo tyto místnosti, ale pokud daňový poradce odmítne písemnost přijmout, není doručení platné.

Doručovat lze pouze adresátovi. Přesto existuje několik výjimek a to v podobě zástupce, opatrovníka, zaměstnanců PO a zaměstnanců daňového poradce. U všech těchto případů platí, že se na doručení těmto osobám hledí, jako by bylo doručeno příjemci rozhodnutí.

Zřetelně převládající formou doručování úředních listin je doručení do vlastních rukou (vzhledem k zásadám neveřejnosti a mlčenlivosti). Takto se doručují písemnosti, u kterých tak stanoví zákon, u kterých je den doručení rozhodný pro počátek běhu lhůty a u kterých tak stanoví správce daně. Ostatní písemnosti se zasílají dle uvážení správce daně doporučeně nebo obyčejně.
Institut náhradního doručení upravuje situaci, jak postupovat, nebyl-li příjemce zastižen (ačkoliv se na místě zdržuje). V tomto případě je písemnost uložena na poště nebo na obecním úřadě a příjemce je o tomto uložení vhodným způsobem vyrozuměn. Po 15 dnech uložení pak nastává fikce doručení – tzn. pokud není prokázán opak, pohlíží se na zásilku, jako by byla doručena, za předpokladu, že doručovatel dodržel zákonem stanovený postup a adresát se v daném místě v době doručení zdržuje (pouze nebyl zastižen). Fikce má motivovat adresáta k vyzvednutí zásilky. Účinky doručení tedy nastanou ex lege i vůči tomu, kdo písemnost fakticky nepřevzal.

Doručování na elektronickou adresu dovoluje správci daně doručovat prostřednictvím elektronické pošty. Tímto způsobem se doručuje pouze pokud o to adresát písemností požádá, z čehož vyplývá, že první krok musí směřovat od adresáta písemnosti k správci daně (princip dobrovolnosti). Využívání

této možnosti je prozatím málo frekventované, pokud by se stalo častějším, mohlo by to znamenat snížení nákladů řízení a částečné odlehčení státnímu rozpočtu.

Veřejnou vyhláškou je doručováno pouze v případě, kdy příjemci písemnost nelze doručit běžnou cestou (příjemce se nezdržuje v místě bydliště nebo sídla, nebo toto místo není známo). Veřejná vyhláška je vyvěšena na úřední desce správce daně a zároveň na úřední desce příslušného orgánu obce, ve které měl adresát naposledy bydliště nebo sídlo, či kde se příjemce naposledy zdržoval a oznamuje příjemci uložení zásilky na podatelně příslušného správce daně. I zde se uplatní fikce doručení, která je 15-ti denní.

Dalšími způsoby doručování jsou doručování do ciziny (přímo příjemci na mezinárodní doručenku nebo diplomatickou poštou prostřednictvím Ministerstva financí) a doručení hromadným předpisným seznamem (pokud je vyměřována stejná daňová povinnost většímu množství subjektů, jak tomu je například u daně z nemovitostí).

Doručování dle správního řádu (§ 19-26 SŘ)

Ve správním řádu nalezneme nejprve obecnou úpravu doručování, dále je podrobně rozebráno doručování fyzickým osobám, právnickým osobám, doručování do ciziny, uložení, překážky při doručování, doručování veřejnou vyhláškou a úřední deska.
Dle SŘ je nejrozšířenějším způsobem doručování využívání poštovních služeb. Dalšími doručovateli jsou vlastní doručovatelé správního úřadu, obecní úřad a ojediněle policejní orgán. Doručovatel má při úkonech spojených s doručováním postavení úřední osoby (je oprávněný zjišťovat totožnost adresáta a osob, které jsou za něj oprávněny písemnost převzít[3]) a povinnosti nositele poštovního tajemství.

Jsou rozlišovány tři základní formy doručování a to do vlastních rukou, doporučeně (s potvrzením) a obyčejně pro méně důležité zásilky. Zákonem jsou také určena prioritní místa pro doručování, které se liší dle toho, zda je doručováno FO nebo PO – po jejich vyčerpání je možné doručit kdekoliv, kde bude adresát zastižen.

[3] Skulová, S., Průcha, P., Havlan, P., Kadečka, S. Správní právo procesní. Praha: 2005, str. 97.

Nově je taxativně stanoveno, které písemnosti budou doručovány do vlastních rukou. Jedná se o předvolání, rozhodnutí, písemnosti, o kterých tak stanoví zákon, určí-li tak oprávněná osoba nebo hrozí-li nebezpečí doručení účastníkovi s protichůdným zájmem na výsledku řízení (doručení účastníkovi s protichůdným zájmem na výsledku řízení je platné, pokud jej adresát uzná tak, že na ni reaguje – například na žalobu protižalobou). Za advokáty, notáře a exekutory mohou zásilky nehledě na jejich formu přijímat koncipienti nebo jiní zaměstnanci. Dále SŘ dovoluje zmocnit k přebírání písemností do vlastních rukou třetí osobu. Úředně ověřený podpis není třeba, bylo-li zmocnění uděleno přímo před správním orgánem. Zmocnění se sděluje správnímu úřadu (nikoliv poště) a zásilka je adresována přímo zmocněnci.

Novinkou SŘ je možnost adresáta oznámit správnímu orgánu adresu pro doručování (odlišnou od trvalého bydliště) a možnost doručení na elektronickou adresu, které je považováno za doručování do vlastních rukou. Písemnost je doručena v okamžiku, kdy převzetí doručované písemnosti potvrdí adresát zprávou opatřenou jeho zaručeným elektronickým podpisem. Nepotvrdí-li adresát převzetí písemnosti nejpozději následující pracovní den po odeslání zprávy, která se nevrátila jako nedoručitelná, doručí správní orgán písemnost, jako by adresát o doručení na elektronickou adresu nepožádal.
Zvláštností SŘ je nevyvratitelná domněnka doručení, která se týká právnických osob – ty nemohou poukazovat na to, že se na adrese jejich sídla nebo sídla její organizační složky nikdo nezdržuje. Správní orgán však v případě, že na uvedené adrese nebyl nikdo zastižen, může písemnost doručit statutárnímu orgánu či osobě pověřené k přebírání písemností na jejich adresu.

Podobně jako ve správě daní se v SŘ objevuje institut náhradního doručení. Nebyl-li adresát zastižen, zanechá doručovatel vyrozumění o uložení zásilky u správního orgánu, který listinu vyhotovil, na poště nebo obecním úřadě. Adresát má možnost si zásilku vyzvednout v průběhu příštích 15 dnů, poté je vrácena správnímu úřadu jako nedoručitelná. Na rozdíl od ZSDP však ve SŘ nastává fikce doručení již desátým dnem.

Upraveno je také ediktální řízení (doručení veřejnou vyhláškou), kterého je užito na základě samostatných právních událostí – osoba je neznámá, není znám její pobyt, nebo se nezdržuje v místě pobytu a stanoví-li tak zákon. Proces vydání a vyvěšení je v SŘ a ZSDP obdobný, SŘ navíc stanoví povinnost zveřejnit veřejnou vyhlášku způsobem umožňujícím dálkový přístup.

Při doručování do ciziny se doručuje přímo na mezinárodní doručenku, nedoručuje-li země do vlastních rukou, pak se doručuje orgánem pověřeným k zasílání zásilek do zahraničí. Správní orgán však může adresátovi stanovit opatrovníka pro doručování.

Doručování dle soudního řádu správního OSŘ (§45-50i)

V občanském soudním řádu chybí obecná úprava doručování a naopak přímo oplývá množstvím speciálních ustanovení.

OSŘ opustil preferenci doručování prostřednictvím držitele poštovní licence a dal přednost tzv. přímému doručení (při jednání nebo jiném soudním úkonu), které se za splnění blíže stanovených náležitostí uvede do spisu a je považováno za typ doručení do vlastních rukou[4], kde nepřichází v úvahu náhradní doručení. Nedojde-li k přímému doručení nastupuje doručení nepřímé, kdy se doručuje doručujícími orgány a nebo prostřednictvím veřejné datové sítě. Doručujícími orgány, které jsou taxativně vymezeny, jsou soudní doručovatelé, orgány justiční stráže, soudní exekutoři, provozovatelé poštovních služeb, orgány Policie ČR, orgány vězeňské služby ČR, zařízení pro výkon ústavní nebo ochranné výchovy, území vojenské správy, Ministerstvo vnitra a Ministerstvo spravedlnosti. Doručovatelem nemůže být obec. Prostřednictvím datové sítě je doručováno na žádost a účastník řízení je vždy vyzván, aby přijetí do 3 dnů potvrdil. Vrátí-li se zpráva jako nedoručitelná nebo nebylo-li potvrzeno přijetí, je doručení neúčinné a doručuje se klasickým způsobem.

FO se doručuje do bytu, místa podnikání, pracoviště, nebo místa, kde se fyzická osoba zdržuje (a kde je možnost, že bude zastižena). Není-li adresát zastižen je zásilka buď uložena (následuje náhradní doručení a fikce doručení) nebo je předána vhodné osobě (soused, rodinný příslušník, atd.). Existují i zvláštní případy doručování FO (například vězni), kdy písemnost není ukládána, ale vrací se zpátky k soudu, který písemnost vyhotovil. PO se doručuje do místa sídla (zapsaného v OR) nebo na adresu skutečného sídla. Dále je stanoven taxativní výčet těch, kteří mohou za PO zásilky přijmout: statutární orgán, zaměstnanec, vedoucí odštěpného závodu, prokurista, zaměstnanci, jiné zmocněné FO atd. FO a PO si mohou podat žádost o doručení na adresu pro doručování, zvláštní je, že advokáti, kterým je doručováno často, takovou možnost nemají.

Další ustanovení se věnují doručování osobám a institucím, mezi které patří advokáti, notáři, soudní exekutoři, patentoví zástupci, právní poradci podle zvláštních předpisů, stát, Úřad pro zastupování státu

[4] Winterová, A. a kol. Civilní právo procesní: vysokoškolská učebnice. Praha: Linde, 2006, str. 198.

ve věcech majetkových, správní úřady, obce, vyšší územní samosprávné celky. Zákon zejména určuje, na která místa lze těmto osobám či institucím doručovat a kdo je oprávněn za tyto osoby či instituce zásilky přijímat.

Kvalifikované doručování (do vlastních rukou) je užito, stanoví-li zákon nebo tak určí předseda senátu – ten tak musí učinit, pokud by hrozilo nebezpečí, že by se zásilka dostala k osobě s protichůdným zájmem. V OSŘ je zakotvena možnost předsedy senátu účastníku uložit, aby si zvolil zmocněnce pro doručování, pokud by bylo doručování přímo účastníku spojeno s obtížemi nebo průtahy. Neučiní-li tak, jsou pro něj písemnosti ukládány u soudu s účinky doručení. Doručení se prokazuje pomocí doručenky, která je dle OSŘ vždy považována za veřejnou listinu. Pokud je adresátem přijetí odepřeno, nebo je-li příjemcem odmítnuto prokázat totožnost či poskytnout jinou součinnost při doručování, je po řádném poučení za den doručení považován den odmítnutí. Na rozdíl od ZSDP není v OSŘ zmíněna důvodnost takového odmítnutí.

OSŘ zná také institut náhradního doručení. Podmínkami pro uplatnění fikce doručení jsou neúspěšný pokus o doručení, uložení zásilky (u soudu nebo u držitele poštovní licence po dobu 15-ti dnů), řádná výzva k vyzvednutí a uplynutí dané lhůty, které je u obyčejné zásilky 3 dny, u zásilky do vlastních rukou 10 dnů.

Upraven je též způsob uveřejňování vyhlášek (povinnost soudu zveřejňovat údaje je stanovena zákonem) a vyvěšení na úřední desce v případě, že se na ní mají dle zákona vyvěsit listiny pro účastníky, kteří nejsou soudu známi nebo jejichž pobyt není znám anebo kterým se nepodařilo doručit na známou adresu v cizině, a zástupcům nebo opatrovníkům účastníků, jejichž pobyt není znám nebo kterým se nepodařilo doručit na známou adresu v cizině, popřípadě též dalším osobám, o nichž to stanoví zákon.

Závěr

Z výše uvedeného plyne, že na rozdíl od ZSDP pojal SŘ doručování zejména po systematické stránce odlišně. Jeho úprava je širší, zvlášť upravuje doručování FO a PO, podrobně se věnuje uložení zásilek a překážkám při doručování (nejpodstatnějším rozdílem je délka lhůty pro to, aby mohla nastat fikce doručení, která je v ZSDP 15 dnů a v SŘ pouze 10 dnů). Úprava SŘ se jeví jako pružnější, zejména proto, že si příjemce může zvolit i jinou adresu pro doručování, odlišnou od trvalého bydliště a dovoluje zmocnit k přebírání písemností do vlastních rukou třetí osobu. Rigidnější ZSDP obdobná ustanovení postrádá, což může působit komplikace, například pokud se adresát zdržuje delší dobu v cizině (např.

na dovolené) a nemá zástupce s generální plnou mocí, nemá tedy možnost se dovědět o obsahu listin zasílaných mu správcem daně do vlastních rukou na adresu jeho trvalého bydliště (i kdyby chtěl).

Občanský soudní řád obsahuje nejrozsáhlejší a nejpodrobnější úpravu doručování vůbec, nicméně právě její objemnost ji činí mírně nepřehlednou. OSŘ na rozdíl od ZSDP a SŘ, které nejčastěji doručují prostřednictvím držitele poštovní licence, upřednostňuje přímé doručování při jednání nebo jiném soudním úkonu. Systematickým členěním se OSŘ od ZSDP podstatně liší – OSŘ chybí obecná úprava a převážná část ustanovení odpovídá na otázky kterým subjektům a kam lze doručovat a kdo je oprávněn za ně zásilky přebírat. Daný výčet je více než vyčerpávající a nezdá se, že by přispíval k zjednodušení doručování. V tomto směru je ZSDP jednoduší a dá se říct, že i akce schopnější. OSŘ zná stejně tak jako ZSDP institut náhradního doručení, úprava je podobná a nejpodstatnějším rozdílem je délka lhůty pro fikci doručení, která jev ZSDP 15 dnů a v OSŘ u obyčejných zásilek jenom 3 dny a u zásilek do vlastních rukou pouze 10 dnů.

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[7] Winterová, A. et al.: *Civilní právo procesní: vysokoškolská učebnice*, Praha: Linde, 2006, 729 s., ISBN 8072015958.

[8] zákon č. 29/2000 Sb., o poštovních službách a o změně některých zákonů (zákon o poštovních službách), ve znění pozdějších předpisů

[9] zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů

[10] zákon č. 337/1992 Sb., o správě daní a poplatků, ve znění pozdějších předpisů

[11] zákon č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů

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Abstrakt

Příspěvek se zabývá institucionální reformou daňové správy v České republice, která byla představena Ministerstvem financí České republiky. V textu je poukázáno na problémy současné správy daní a cel, jsou naznačeny hlavní cíle reformy a představeny jsou dvě variantní řešení organizačních změn v oblasti správy daní, jejich výhody a možná rizika. V závěru je naznačeno i další možné sloučení nově vzniklé soustavy orgánů s úřady zabezpečujícími výběr pojistného na veřejné zdravotní pojištění, pojistného na sociální zabezpečení a příspěvku státní politiku zaměstnanosti.

Klíčová slova

Správa daní, finanční úřad, finanční ředitelství, organizace, správní úřad, celní správa, daňová správa, reforma.

Abstract

The paper deals with the institutional reform of the tax administration in the Czech Republic, which was prepared by the Ministry of Finance of the Czech Republic. The text shows the problems of the current tax and customs administration, indicates the main objectives of reform and presents two variant solutions of organization in the tax administration, their benefits and possible risks. In conclusion the possible mergers of state authorities in the field of taxes, duties and insurance premiums for public health insurance, social security and employment policies of the state is illustrated as well.

Key words

Tax administration, tax office, Financial Directorates, organization, administrative authority, customs administration, tax administration, reform.

Současný systém daňové a celní správy je možné označit za osvědčený a splňující požadavky, které byly stanoveny při jejich vzniku. Naproti tomu je ale nutné konstatovat, že ani daňová a celní správa se

nemohou vyhnout modernizaci, zvyšování efektivity a také v neposlední řadě změnám vyplývajícím ze zkušeností s jejich fungováním po dobu jejich existence.

V rámci vládní reformy veřejných financí má spolu se změnami v jednotlivých oblastech přijít i zásadní změna v struktuře a koncepci systému správy daní. V první fázi by mělo k 1. 1. 2010 dojít ke sloučení celní a daňové správy, kdy v této době již Ministerstvo financí České republiky připravuje samotné paragrafové znění návrhu zákona i doprovodného zákona, které by měly být předloženy vládě k projednání do konce roku 2008.

Cílem článku je poukázat problémy současné správy daní a cel, naznačit hlavní cíle reformy a představit dvě variantní řešení organizačních změn v oblasti správy daní, jejich výhody a možná rizika. V závěru bude naznačeno i další možné sloučení nově vzniklé soustavy orgánů s úřady zabezpečujícími výběr pojistného na veřejné zdravotní pojištění, pojistného na sociální zabezpečení a příspěvku státní politiku zaměstnanosti.

Současný stav orgánů daňové správy

V České republice je daňová správa tvořena trojstupňovou soustavou orgánů, kdy její vrcholnou složku tvoří Ministerstvo financí České republiky jako ústřední orgán státní správy pro daně, poplatky a cla. Současně se jedná o správní úřad s celostátní působností.

Správu daní dále vykonávají orgány veřejné správy, které mají oprávnění činit opatření potřebná ke správnému a úplnému zjištění, stanovení a splnění daňových povinností daňovými subjekty.[1] Správci daně jsou mimo celních orgánů a jiných správních úřadů zejména územními finančními orgány[2] – finančními ředitelstvím a finančními úřady. V České republice v současné době působí 8 finančních ředitelství,[3] které dohromady řídí 199 finančních úřadů. Územní působnost jednotlivých finančních úřadů je vymezena s odkazem na správní obvody obcí s rozšířenou působností. 76 finančních úřadů je umístěno v bývalých okresních městech, 12 v Praze, 4 v Brně, 3 v Ostravě a zbývající jsou umístěny ve významných centrech okresů.

[1] Mrkývka, P. In Mrkývka, P. a kol. Finanční právo a finanční správa, 2. díl. Brno: Masarykova univerzita, 2004. s. 10. ISBN 80-210-3579-X

[2] Zákon č. 531/1990 Sb., o územních finančních orgánech, ve znění pozdějších změn a předpisů.

[3] Sídelními městy jsou krajská města dle zákona č. 36/1960 Sb., o územním členění státu, ve znění pozdějších změn a předpisů.

Správa daní (s výjimkou spotřebních daní[4] a energetických daní[5]) podle zákona o správě daní a poplatků[6] je vykonávána v prvním stupni jednotlivými finančními úřady. Náplní činnosti finančních ředitelství je řízení finančních úřadů, výkon správy daní v rozsahu stanoveným zákonem a přezkum rozhodnutí finanční úřadů vydaných v rámci daňového řízení. Vnitřní struktura finančních ředitelství je odvozena od jednotlivých druhů daní, příp. jiných agend, naproti tomu vnitřní struktura finančních úřadů vychází z jednotlivých fází daňového řízení.

Současný stav struktury orgánů správy daní – tedy vč. oblasti cel – má v praxi mnoho nedostatků. Typickým příkladem nesystémového řešení oblasti daní a cel je nekompatibilnost vnitřních informačních systému daňové správy a celní správy, kdy díky této neslučitelnosti daňová správa nemá možnost kontrolovat nedoplatky daňového subjektu na clech, naopak celní správa nemá jakoukoliv reálnou možnost zjistit nedoplatky, příp. přeplatky daňového subjektu na daních. Tento stav je zcela jasně nežádoucí, provozování samostatných systémů vede nejen k problémům v uplatňování jednotlivých zákonů, současně ale také dochází ke zbytečnému zvyšování administrativní zátěže výběru cel a daní a tedy snižování efektivity zdanění. Pro daňové subjekty je oddělení správy daní a správy cel také velice zásadní, příkladem v této oblasti je situace povinnosti daňového subjektu předložit potvrzení bezdlužnosti. V danou chvíli totiž daňovému subjektu nezbývá než se se žádostí o potvrzení bezdlužnosti obrátit na celní správu a samostatně i na daňovou správu. Tento postup znamená nejen zbytečné výdaje pro daňový subjekt, ale současně i další zvýšené administrativní náklady pro správce daně.

Za negativum současného stavu je možné považovat i samotný koncept obecného rozdělení kompetence ke správě daní mezi daňovou a celní správu ve smyslu dvou samostatných soustav orgánů. Takové řešení je samozřejmým zdrojem duplicit a nedostatečného využití potenciálu, který by bylo možné náležitým způsobem využívat v případě koncentrace všech činností spojených se správou všech daní u jediného orgánu. Pro daňové subjekty současný stav znamená vyšší administrativní náklady spojené s jejich povinnostmi předkládat v podstatě shodná data u více orgánů.

[4] Zákon č. 353/2003 Sb., o spotřebních daní, ve znění pozdějších změn a předpisů.
[5] Někdy též „ekologické daně"; zákon č. 261/2007 Sb., o stabilizaci veřejných rozpočtů, ve znění pozdějších změn a předpisů.
[6] Zákon č. 337/1992 Sb., o správě daní a poplatků, ve znění pozdějších změn a předpisů.

Dalšími společnými kompetencemi celních úřadů a finančních úřadů jsou správa daně z přidané hodnoty, vymáhání nedoplatků cel a daní, oblast dělené správy a také kontrolní působnost podle zvláštních zákonů.[7]

Problémem současného stavu organizace správy daní a cel je i asymetrie mezi celní a daňovou správou. V rámci Ministerstva financí České republiky fakticky existuje Ústřední finanční a daňové ředitelství, které zabezpečuje výkon daňové správy. Fakt, že Ústřední finanční a daňové ředitelství je organizační součást Ministerstva financí jasně deklaruje, že daňová správa jako celek nemá potřebnou míru samostatnosti, která by umožnila potřebné zvýšení nezávislosti fungování daňových orgánů. V oblasti celní správy byl tento problém v minulosti vyřešen vyčleněním Generálního ředitelství cel z Ministerstva financí a vytvořením celní správy jako soustavy orgánů podřízené Ministerstvu financí. Analogický krok v oblasti daňové správy ale učiněn nebyl, navzdory nutnosti vzájemné spolupráce.

Nedostatek současné právní úpravy je nutné také vidět ve faktu, že zřizování pracovišť je možné výhradně na základě vyhlášky Ministerstva financí podle zákonného zmocnění.[8] Pracoviště, jako vnitřní organizační jednotka příslušného finančního úřadu, by měla být zřizována na základě vnitřního aktu řízení, tedy bez nutnosti reakce ústředního orgánu státní správy.

Cíle reformy

Výše uvedené příklady nedostatků, nesystémovosti, zbytečně vynakládaných administrativních nákladů v oblasti správy daní a další problémy by měla odstranit reforma struktury orgánů správy daní a cel. Hlavním cílem reformy je snížení administrativní zátěže pro poplatníky a veřejnou správu.[9]

Institucionální reforma by měla přinést v konečném stavu jedno konkrétní místo pro výběr daní, ale i sociálního a zdravotního pojištění, což v praxi odboural povinnost daňových subjektů podávat na čtyři různá místa daňová přiznání, a přinese ušetření nadbytečných nákladů na straně daňových subjektů i na straně státní správy.

Cílového stavu by mělo být dosaženo ve dvou základních krocích, které budou realizovány s několikaletým časovým odstupem. Jako první budou sloučeny územní finanční orgány s orgány Celní správy České republiky do jednotné Finanční a celní správy České republiky. Ministerstvo financí při

[7] Zejména zákon č. 353/2003 Sb., o spotřebních daních, ve znění pozdějších změn a předpisů, dále zákon č. 676/2004 Sb., o povinném značení lihu, ve znění pozdějších změn a předpisů, a nebo zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších změn a předpisů.
[8] § 7a zákona č. 531/1990 Sb., o územních finančních orgánech, ve znění pozdějších změn a předpisů.
[9] http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ref_verej_financ_dan_ref.html

přípravě návrhu zákona pracuje na dvou variantních řešeních tak, aby bylo možno vybrat z radikálnějšího a nebo mírnějšího řešení. Rozdílem je míra propojenosti dnešní daňové správy a celní správy a počtem jednotlivých orgánů v rámci daňové a celní správy. Druhým krokem reformy bude převedení správy zdravotního a sociálního pojištění na tuto nově vzniklou soustavu orgánů.

Reformou projde také samotná daňová správa s cílem snížit náklady na její činnost a zvýšit tak efektivnost zdanění. V mírnější variantě se uvažuje o nahrazení současných 199 finančních úřadů pouze 93 úřady, kdy jejich sídly by měly být bývalá okresní města. V obcích, kde v současné době funguje finanční úřad, by i nadále zůstalo sídlo správce daně, jednalo by se ale jen o pobočku finančního úřadu. Takové řešení by mělo umožnit koncentraci činností a tím by mělo dojít ke snížení nákladů. Radikálnější varianta počítá pouze se 14 finančními úřady v krajských městech.

Navrhované řešení

Navrhované řešení institucionální reformy daňové a celní správy, tak jak bylo připraveno Ministerstvem financí České republiky, není v Evropě ojedinělým řešením. V posledních letech se stejným směrem zreformovala soustava celních a daňových orgánů např. ve Velké Británii, Dánsku, Nizozemí, Rakousku nebo Lotyšsku, ve Slovenské republice se o shodném vyřešení stávajících problémů uvažuje v současné době také. Je přirozené, že není možné aplikovat veškeré zkušenosti z jednotlivých zemí při reformě v České republice, protože samotnou podobu ve výsledku výrazným způsobem ovlivňují místní specifika jednotlivých zemí.

I po reformě bude ústředním orgánem státní správy pro oblast daní a cel Ministerstvo financí České republiky. Ostatní části současné struktury orgánů budou nahrazeny nově zřízenou soustavou správních úřadů podřízených Ministerstvu financí. Finanční a celní správu České republiky tak bude tvořit:

- Generální finanční a celní ředitelství
- územní finanční orgány tvořené finančními ředitelstvími, finančními úřady a Specializovaným finančním úřadem
- Celní stráž tvořená Ředitelstvím celní stráže a inspektoráty celní stráže.

Vzájemné vztahy podřízenosti a nadřízenosti jsou jasně patrné z organizačního schématu:

Schéma 1: Organizační schéma Finanční a celní správy České republiky

Generální finanční a celní ředitelství bude správním úřadem s celostátní působností podřízeným Ministerstvu financí. Základem pro jeho vytvoření bude současné Ústřední finanční a daňové ředitelství a Generální ředitelství cel. Jako sídlo tohoto nově vzniklého úřadu se z logických důvodů navrhuje Praha.

Finanční ředitelství a *finanční úřady* budou správními úřady s regionální, resp. lokální působností, kdy jejich úkolem bude výkon správy daní a ostatní úkoly stanovené zákonem o finanční a celní správě, příp. dalšími zákony. V rámci reformy dojde k zachování počtu finančních ředitelství. Případné zvýšení počtu finančních ředitelství z 8 na 14 v souvislosti s jejich přizpůsobením současnému vnitřnímu členění České republiky na kraje by znamenalo zbytečné zvýšení finančních nákladů, na druhou stranu je ale nutné upozornit, že tento krok může být prosazován různými politickými stranami a zejména krajskými zájmovými a politickými skupinami. Současně dojde ke snížení počtu finančních úřadů ze současných 199 na 93, ostatní současné finanční úřady se stanou pobočkami finančních úřadů. V současné době existujících 22 pracovišť finančních úřadů bude zrušeno.

Náplní činnosti *Specializovaného finančního úřadu* bude kontrola velkých daňových subjektů (subjekty s obratem nad 1 mld. Kč), dále kontrola finančních institucí (banky, pojišťovny, penzijní fondy apod.), daňových subjektů s problematikou převodních cen, příp. dalších subjektů. Důvodem vytvoření

samostatného finančního úřadu pro tyto výše uvedené subjekty je nutnost vyčlenění a specializování vysoce kvalifikovaných týmů kontrolních pracovníků pod jedním koncepčním vedením v zájmu bezkonfliktní spolupráce daňových subjektů a pracovníků správce daně s ohledem na fakt, že velké daňové subjekty znamenají největší přínos do státního rozpočtu. Stejná koncepce se uplatňuje v mnoha Evropských zemích – např. Francie, Švédsko, Belgie, Dánsko, Německo atd. Specializovaný finanční úřad bude zřízen jako součást územních finančních orgánů a bude se jednat o finanční úřad s celostátní působností. Sídlem i tohoto úřadu bude Praha.

Výhodou tohoto řešení reformy je bezpochyby sjednocení metodického řízení a tím i výkonu správy daní a cel, úspory ekonomické, personální, zvýšení efektivnosti využívání informačních technologií, sjednocení výběru daní a cel do jednoho místa a tím snížení administrativní zátěže daňových subjektů a mnoho dalších. Na druhou stranu je ale nutné upozornit i na rizika spojená s navrženou reformou, mezi která musíme zařadit možný dočasný pokles kvality výkonu správy daní a cel a tedy i pokles příjmů státního rozpočtu, nutnost vybudovat jednotnou informační databázi a v neposlední řadě také problémy spojené se ztotožněním se se změnami na straně zaměstnanců správy daní.

Alternativní řešení

Ministerstvo financí při přípravě institucionální reformy vytvořilo ještě alternativní řešení, kdy by bylo možné sloučení daňové a celní správy ve vyšším stupni, které by spočívalo v důsledném integrování obou soustav do jedné na všech úrovních. Výsledkem by bylo sloučení „civilních“ územních finančních orgánů a celní správy jako ozbrojeného sboru do jedné soustavy.

Výsledkem reformy by v tomto případě byla Finanční správa České republiky jako soustava správních úřadů podřízená Ministerstvu financí České republiky. Finanční správu České republiky by tvořily:

- Finanční ředitelství
- územní finanční orgány, tvořené Vrchním finančním úřadem s celostátní působností, finančními úřady a Specializovaným finančním úřadem.

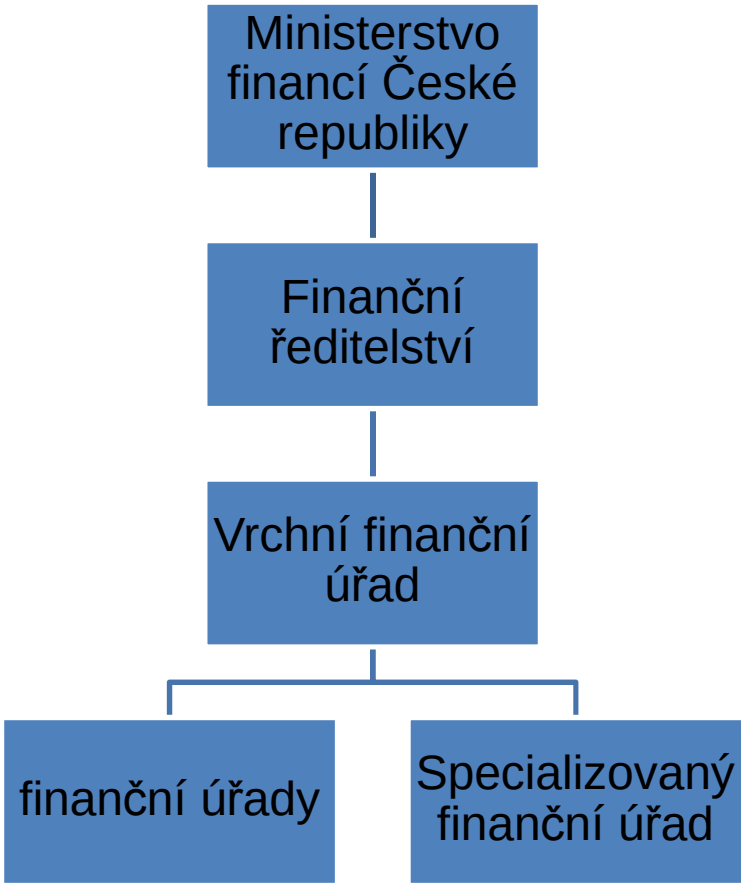

Schéma 2: Organizační schéma Finanční správy České republiky

Navrhované řešení zachovává i nadále princip dvouinstančnosti řízení, v případě přezkoumávání rozhodnutí a jiných činností dozoru ve věci bude konat správce daně třetího stupně, tedy správce daně nadřízený správci daně, který rozhodnutí vydal. Problematickým se ale jeví fungování Vrchního finančního úřadu, který by měl vykonávat druhoinstanční agendu v daňovém řízení. V první možnosti fungování se nabízí zřízení dekoncentrovaných pracovišť Vrchního finančního úřadu – toto řešení ale zcela popírá důvody vzniku jediného úřadu s celostátní působností. Druhou možností je nové koncipování odvolacího řízení (v rámci nového daňového řádu) a přechod z apelačního principu na princip kasační. Takové řešení by mohlo v praxi znamenat prodloužení daňového řízení jako celku a tedy bylo by zcela jasně proti základním principům dobré správy daní.

Výhodami tohoto řešení jsou mimo jiné odstranění možných rizik spojených s komunikací a spoluprací mezi jednotlivými větvemi správy daní (typicky při správě spotřebních daní), zvýšení operativnosti v činnosti finanční správy a další úspory spojené s nižším počtem správních úřadů.

Vize do budoucna

Výše uvedená variantní řešení institucionální reformy daňové a celní správy jsou pouze prvním krokem, který by měl být následován převedením kompetencí k výběru pojistného na veřejné zdravotní pojištění, pojistného na sociální zabezpečení a příspěvku státní politiku zaměstnanosti. Tento krok by měl být pojednán Parlamentem České republiky ve druhém roce fungování sloučené daňové a celní správy, v současné době se předpokládá předložení příslušného zákona do zákonodárného procesu v roce 2011. Ministerstvo financí předpokládá spuštění tohoto druhého kroku v roce 2012.

Navrhované řešení současných problémů v oblasti výběru daní a cel má, jak bylo naznačeno výše, mnoho otazníků, je ale možné říci, že institucionální reforma správy daní a cel je nezbytná. Je otázkou, jak se do navrhovaného stavu promítnou politické a jiné vlivy, jakým způsobem ovlivní případný druhý krok parlamentní volby a jaké tedy bude výsledné řešení.

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FLEXIBILITA A LISABONSKÁ SMLOUVA: POSÍLENÁ SPOLUPRÁCE V OBLASTI FINANČNÍHO PRÁVA?

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Abstrakt

Ve svém příspěvku se autoři krátce zamýšlejí nad problematikou tzv. posílené spolupráce. Na základě úpravy obsažené v Lisabonské smlouvě a dalších relevantních dokumentech podávají stručnou charakteristiku forem této spolupráce. V rámci textu je důraz kladen rovněž na možnosti využití daného institutu v oblasti finančního, resp. daňového práva.

Klíčová slova

Flexibilita, posílená spolupráce, vícerychlostní Evropa, Evropská unie, Lisabonská smlouva, správa daní.

Abstract

The authors are dealing with the regulation and history of enhance cooperation. This description is given from the perspective of relevant documents, especially the Treaty of Lisbon. Finally, the usage of this type of cooperation in financial law is analyzed.

Key words

Flexibility, enhance cooperation, multi-speed Europe, European Union, Treaty of Lisbon, tax administration.

S postupným rozšiřováním Evropské unie a společně se vstupem více politických otázek na agendu Společenství je velice těžké prosazovat integraci na jednotné úrovni mezi všemi členskými státy tak, jak bylo na počátku plánováno.

Pro řešení stále se zvětšující obtížnosti sjednotit více oblastí politiky, podpoření jednotné aplikace komunitárního práva na všechny členské státy a reagování také na rozšiřování členské základy bylo nezbytné vyvinutí nástroje pro diferenciaci práv a povinností v určitých oblastech společné politiky.

Princip posílené spolupráce[1] představuje výjimku ze zásadní obecné závaznosti komunitárního práva pro všechny členské státy, v podstatě se jedná o specifický způsob řešení problémů členských států Evropské unie s ohledem na jejich diverzifikovanost. Posílená spolupráce umožňuje, aby skupina členských států, která má v úmyslu v určitých věcech intenzivněji spolupracovat a provést užší integraci, mohla tento záměr provést, výhradně ale za předem jasně stanovených podmínek. Ostatní členské státy, které si nepřejí se této užší spolupráce z jakéhokoliv důvodu účastnit, se na takové spolupráci podílet nemusí, zároveň ale platí, že takový vývoj nemohou jednostranně blokovat.[2]

Díky institutu posílené spolupráce dochází k urychlení integrace mezi vyspělými členskými státy, naproti tomu je ale nutné vidět i negativní stránku, kdy díky této flexibilitě může postupně dojít k vytvoření členství druhé kategorie.

Posílená spolupráce může mít tři formy:[3]

- "vícerychlostní Evropa" ("Europe á plusieurs vitesses"), kdy všechny členské státy souhlasí s integračním opatřením, avšak nejsou způsobilé ho zavést ve stejnou dobu,
- "proměnné uspořádání" ("géometrie variable"), kdy některé členské státy integrační opatření zcela nebo zčásti principiálně odmítají,
- diferenciace výběrem podle vlastní vůle ("Europe á la carte"), která znamená z určitých závažných důvodů nepřijetí společné komunitární úpravy dané dílčí otázky a ponechání individuální úpravy vlastní.[4]

Jakákoliv spolupráce mezi členskými státy v oblastech nespadajících do působnosti ES/EU se řídí mezinárodním právem. Právní úprava posílené spolupráce je obsažena jak ve Smlouvě o Evropské unii, tak ve Smlouvě o založení Evropských společenství obsahující zvláštní ustanovení pro první, tedy komunitární pilíř EU.

Vývoj posílené spolupráce

Lisabonská smlouva je poslední, nikoliv novou úpravou posílené spolupráce v procesu Evropské integrace. Již v roce 1974 kancléř SRN Willy Brandt přichází s myšlenkou nutnosti různých stupňů integrace v závislosti na různorodých ekonomických silách tehdejších devíti členů Evropských společenství, jisté náznaky možností užší spolupráce byly obsaženy i v původní Smlouvě o založení

[1] Někdy se užívá také termín úzká/užší spolupráce, příp. flexibilita.
[2] Tichý, L. a kol. Evropské právo. 2. vyd. Praha: C.H.Beck, 2004, s. 72 a násl.
[3] http://www.sagit.cz/pages/lexikonheslatxt.asp?cd=156&typ=r&levelid=EU_197.HTM
[4] Čl. 95(4) Smlouvy ES

Evropského hospodářského společenství.[5] Členské státy se nicméně pustily i do několika pokusů mimo rámec Evropské unie, kdy se do této spolupráce zapojilo pouze několik členských států. V této souvislosti je nutné uvést Západoevropskou Unii, Schengenský prostor[6] apod.

Zásadním zlomem pro různé stupně integrace se stal ratifikační proces Smlouvy o Evropské unii. Maastrichtská smlouva, sjednaná dne 7. 2. 1992, mimo změn ve vymezení kompetencí institucí a změn v rozhodovacích procedurách zavádí i mechanismus tzv. užší spolupráce. Již přijetí samotné Maastrichtské smlouvy je příkladem flexibility, kdy s ohledem na nedostatek konsensu ve všech bodech smlouvy bylo ad hoc řešením tohoto problému přijetí principu opt out (někdy též opting out).[7]

Následný vývoj ukázal, že princip flexibility a užší spolupráce je řešením pro stále se rozšiřující počet členských států Evropské unie i když je nutné poznamenat, že názory na takový postup byly vždy velmi sporné. Zásadní názorové rozdíly panovaly v možnostech využívání těchto postupů k zajištění konkrétních snah jednotlivých států. Jádrem veškerých návrhů v této oblasti bylo určování dalšího vývoje ekonomicky a politicky silnými státy, které měly rozhodnout o opatřeních v určité oblasti; na ostatních členských státech pak mělo být, zda a kdy k těmto opatřením přistoupí. Proti těmto snahám zásadním způsobem vystupovaly ty státy, které si v minulosti uplatnily výjimku v některé oblasti a do budoucna nechtěly, aby se rozšiřoval počet režimů, které by nemusely odpovídat jejich zájmům, příp. se proti postupům stavěly i menší státy v domnění, že by postupem času mohly ztratit svůj vliv na rozhodovací procedury.

V obecné rovině lze říci, že ať již byl postoj členského státu pozitivní nebo negativní, docházelo ke shodě v tom, že připuštění možnosti přijetí principu flexibility musí být vyváženo silnými zárukami, aby nedošlo k ohrožení stávajícího stavu acquis a aby nebyla ohrožena solidarita mezi členskými státy.

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[5] Např. Protokoly k původní Smlouvě zakládající Evropské hospodářské společenství týkající se lucemburských zemědělských produktů na německém vnitřním trhu.

[6] Schengenská dohoda byla původně vytvořena jako mezinárodní dohoda mimo rámec struktur Evropské unie a až roku 1997 byla začleněna Amsterdamskou smlouvou do systému EU.

[7] Při podpisu Smlouvy EU 7. února 1992 si Velká Británie vyhradila na základě Dodatkového protokolu o určitých ustanoveních týkajících se Spojeného království Velké Británie a Severního Irska, že se na ni nevztahuje platnost ustanovení těch částí Smlouvy ES, týkajících se přechodu k měnové unii a zavedení společné měny včetně čl. 121. Optovala tedy, že zůstane vně měnové unie na základě principu "opting-out". Británie se rovněž zavázala, že v orgánech EU, v nichž se účastní, nebude hlasovat o otázkách týkajících se ustanovení těch článků, jejichž platnost si citovaným protokolem vyhradila.
Stejně tak Dánsko si v Dodatkovém protokolu o určitých ustanoveních týkajících se Dánska stanovilo, že Dánsko oznámí svůj postoj k měnové unii do zahájení její třetí etapy. Pokud tak neučiní, nebude se na ně hledět jako na stát, účastnící se této třetí etapy. Oba zmíněné státy si tedy sjednaly výjimku z účasti v měnové unii ještě před vstupem v účinnost ustanovení Smlouvy ES. Oba zmíněné státy si tedy sjednaly výjimku z účasti v měnové unii ještě před vstupem v účinnost ustanovení Smlouvy ES ve smyslu jejího čl. 122.
http://www.sagit.cz/pages/lexikonheslatxt.asp?cd=156&typ=r&refresh=yes&levelid=eu_181.htm.

Podmínkou také bylo definování určitého nejmenšího počtu států účastnících se této flexibility a další podmínkou bylo nezasahování do stávajících kompetencí ES/EU a tedy ohrožení acquis communitare.

Mnoho dotazů směrem k fungování jediného rámce pravidel a politik i po uvažovaném rozšíření EU o státy střední a východní Evropy, s ohledem na velké rozdíly mezi jednotlivými státy, byl základem změny, kdy Amsterdamskou smlouvou došlo k zavedení obecné normy užší spolupráce a skupině členských států tak bylo v obecné rovině dovoleno použít rámec Evropské unie k vytváření politik, které by byly aplikované a závazné jen pro ně. Došlo tedy ke změně z „výjimky" obsažené v Maastrichtské smlouvě na ústavní princip.[8]

Amsterdamská smlouva ovšem umožnila užší spolupráci jen v oblastech prvního a třetího pilíře, v oblasti zahraniční a bezpečností politiky bylo využití tohoto principu vyloučeno.

Postupem času se ukázalo přijaté znění v praxi nepoužitelné a ve druhé polovině roku 2000 se začíná uvažovat o reformě. Změny měly být vedeny třemi hlavními směry, kdy jako nejzásadnější požadavek se jeví snížení nejmenšího počtu členských států podílejících se na užší spolupráci z nadpolovičního na třetinový. Další změny měly nastat i v oblasti hlasování v rámci užší spolupráce a také umožnění za určitých podmínek i užší spolupráce i oblasti zahraniční a bezpečností politiky. Ne všechny státy s navrhovanými změnami souhlasily opírajíce se o tvrzení, že opatření jsou dostatečná a dokud nebudou vyzkoušena v praxi, není důvod je měnit.

Vysoké cíle stanovené v Amsterdamské smlouvě nebyly nikdy dosaženy a vzhledem k nutnosti reformy došlo k jejich přepracování ve Smlouvě z Nice v roce 2000. Zde dochází k nahrazení pojmu užší spolupráce pojmem posílená spolupráce a již je možné tento princip používat ve všech třech pilířích. Nově se musí posílené spolupráce účastnit minimálně osm členských států, musí být otevřena všem členským státům a může být použita pouze za předpokladu, že negativně neovlivní vnitřní trh, Schengenský prostor a existující politiky a programy.[9] Dalšími omezujícími podmínkami použitelnosti institutu posílené spolupráce je povinnost respektování kompetencí, práv a povinností nezúčastněných států,[10] musí prohlubovat cíle Evropské unie za současného dodržování smluv a institucionálního rámce Unie a použití posílené spolupráce je omezeno na oblasti sdílené, nikoliv výlučné, kompetence Evropské unie.[11]

[8] Dehousse, F. Coussens, W. Flexible integration: Potential applications? [21. 5. 2008] www.theepc.net
[9] Čl. 43(1)c, e, i SEU.
[10] Čl. 43(1)h SEU.
[11] Čl. 43(1)d SEU.

Dalším krokem byla úprava posílené spolupráce ve Smlouvě o ústavě pro Evropu.[12] Ústava EU obecně usilovala o zjednodušení a prohloubení procesu posílené spolupráce, obsahovala i úpravu, kdy by se mohlo (mimo společné zahraniční a bezpečností politiky) rozhodovat o založení podskupin většinovým hlasováním v Radě, dále dovolovala těmto podskupinám, aby uplatňovaly rozhodování na základě kvalifikované většiny i tam, kde Ústava EU předepisovala jednomyslné rozhodnutí. Tato úprava se stala společně s odmítnutím Ústavy EU ve Francii a v Nizozemí bezpředmětnou.

Zatím posledním krokem při úpravě posílené spolupráce je Lisabonská smlouva,[13] její znění ale nepřináší žádné zásadní změny. I nadále platí, že navázání posílené spolupráce je možné pouze v rámci nevýlučné pravomoci Unie, musí být zaměřena na podporu cílů Unie, chránit její zájmy a posilovat proces integrace. Rozhodnutí o povolení posílené spolupráce přijme Rada až jako poslední prostředek v případě, že cílů spolupráce nelze dosáhnout Unií v přiměřené lhůtě jako celkem. Akty přijímané v rámci posílené spolupráce zavazují pouze zúčastněné členské státy, nejsou pokládány za acquis a nemusí být tedy přijaty státy kandidujícími na přistoupení k Unii.[14]

Spolupráce je kdykoliv otevřena všem členským státům, nejmenší možný počet zúčastněných členských států na posílené spolupráci je nově stanoven na devět, tedy v současné době je toto rovno jedné třetině všech členských států. S ohledem na znění smlouvy, kdy se nehovoří o nejméně jedné třetině, ale o počtu nejméně devíti členských států je otázka, jakým způsobem bude docházet v budoucnosti k posunům v případě stanovení nejmenšího počtu zúčastněných států. Společně s rozšiřováním Evropské unie (země Balkánu, příp. Turecko) by tak počet devíti zemí reprezentoval méně než jednu třetinu členských států. V tom okamžiku lze očekávat revizi Lisabonské smlouvy (samozřejmě za předpokladu, že bude ratifikována všemi členskými státy EU) a stanovení buďto vyššího počtu zemí, nebo definování nejmenšího počtu zúčastněných členských zemí (např. nejméně jedna třetina), příp. zavedení zcela nového kritéria (lze uvažovat i o zavedení více kritérií např. podobně jako u hlasování v Radě, tedy nejméně jedna třetina států reprezentujících nejméně jednu třetinu obyvatel EU). Je tedy otázkou budoucího vývoje, kterým směrem bude Evropská unie směřovat.

Posílená spolupráce v oblasti finančního práva?

Užší spolupráce je jeví nejlogičtěji v oblastech daní, sociální politiky, životního prostředí a také ochrany spotřebitele a to z důvodu, že tato témata jsou stále podrobena jednomyslnému rozhodování. Flexibilita se ale zde jeví jako velice problematická a to z důvodu jejího zcela zásadního dopadu na jednotný trh.

[12] Dále jen Ústava EU.
[13] Hlava IV, čl. 20 Lisabonské smlouvy.
[14] Čl. 20(4) Lisabonské smlouvy.

Rozsah flexibility tak bude záležet na stupni deformace trhu, které budou jednotlivé státy ochotny tolerovat.

I po případném přijetí Lisabonské smlouvy budou nadále přetrvávat rozdílné finanční a zejména fiskální politiky. U států, které jsou součástí měnové unie, je určování vlastní fiskální politiky jedinou možností, jak zajistit fungování daného státu. Daňové systémy v jednotlivých členských státech jsou navíc zásadním způsobem ovlivňovány historickými tradicemi, zavedeným systémem finančních orgánů, sociologickými faktory a v neposlední řadě také ekonomickými podmínkami (např. daňová podpora bytové výstavby apod.).

V tomto ohledu je jasně patrné, že fiskální politika, tedy oblast daní, je velice specifická. Nepřímé daně, které mají obrovské možnosti deformovat jednotný trh, vytvářet anomálie a znevýhodňovat nebo naopak zvýhodňovat subjekty z určitých členských států, byly právě z těchto důvodů již harmonizovány. Je samozřejmé, že určitá ustanovení jednotlivých zákonů jsou národními úpravami, celková koncepce ale vychází ze snahy nastavit rovné podmínky ve všech členských státech. V současné době tak máme harmonizovánu úpravu daně z přidané hodnoty,[15] spotřební daně[16] a jako poslední byly v České republice zavedeny „energetické“, někdy nazývané „ekologické“, daně.[17] Postupně se začíná hovořit i o nutnosti harmonizovat přímé daně, jako první v této oblasti je uvažováno o dani z příjmu právnických osob.

Proti používání institutu posílené spolupráce v oblasti finančního práva je nutné uvést i možnost zneužití této spolupráce proti nezúčastněným členským státům. Pokud bude naplněno kvórum 9 států majících snahu společně upravit i fiskální politiky svého státu ve vztahu k ostatním státům následně může dojít k značnému znevýhodnění států, které z jakýchkoliv důvodů nemají na unifikaci, resp. užší spolupráci, zájem. Důvodů pro odmítání užší spolupráce může být několik a to v závislosti na ekonomické situaci jednotlivých států. Typickým důvodem pro odmítnutí užší spolupráce v oblasti daňové je recese ekonomiky členského státu EU, který pokud je členem měnové unie již nemá jakékoliv další možnosti reálně pomoct ekonomice k růstu. Na základě těchto důvodů lze předpokládat v budoucnosti užší spolupráci i v oblasti daní, ovšem nikoliv na rozsáhlejším území EU, ale spíše na menších územích, kdy státy jsou na přibližně stejné hospodářské úrovni. Lze předpokládat využití tohoto postupu např. na Balkánské země po jejich vstupu do EU, kdy Chorvatsko, Srbsko, Černá Hora, Kosovo, Bosna a Hercegovina, FRYM (Makedonie), Albánie, Bulharsko a Rumunsko – díky jejich

[15] Zákon č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů.
[16] Zákon č. 353/2003 Sb., o spotřebních daních, ve znění pozdějších předpisů.
[17] Daň z elektřiny, daň z plynu a daň z uhlí – část 45 až 47 zákona č. 261/2007 Sb., o stabilizaci veřejných rozpočtů, ve znění pozdějších předpisů.

historickým zkušenostem a blízkosti si zemí i jejich občanů se budou snažit institutu užší spolupráce využívat a i díky tomu nastartovat rozvoj ekonomiky ve svých státech.

V jedné oblasti by ale využití posílené spolupráce zcela jasně nedeformovalo trh, ale naopak by postupnou harmonizací bylo dosaženo zjednodušení a usnadnění jednotného trhu a bylo by tak pro občany EU i pro právnické osoby mnohem snazší využívat všech svobod, na kterých EU stojí. Touto oblastí je zcela nepochybně problematika správy daní. V současné době každý stát má svoji vlastní organizační i funkční strukturu správy daní a již samotná mezinárodní spolupráce je značně komplikovaná právě z důvodu rozdílnosti v jednotlivých členských státech. Naproti tomu v případě, že by došlo díky principu posílené spolupráce k postupné harmonizaci, každý občan EU, příp. každá právnická osoba, by pak mohl náležitým způsobem odhadovat náklady spojené se správou daní a tedy i působením na daném trhu. Pro členské země, které by se na postupné harmonizaci díky posílené spolupráci podílely by to ale neznamenalo opuštění jejich daňových zákonů a harmonizaci daní jako takových, jednalo by se výlučně o harmonizaci postupů správců daně a s tím spojené administrativy při zachování konkrétních specifik jednotlivých států.

Je otázkou, co v budoucnu institut užší spolupráce pro členské země EU přinese. Jeho využitelnost s ohledem na nutnost jeho použití při účasti nejméně 9 členských států bude v budoucnu stoupat společně s rozšiřováním počtu členských států EU. Věřme, že výsledkem užších spoluprací bude nikoliv vícerychlostní Evropa, ale spíše diferenciace výběrem dle vůle státu. Pokud by totiž skupina členských států, které jsou v určité oblasti politik vyspělejší než ostatní, oddělila od ostatních členských států, pak by mohla nastat situace, kdy by méně vyspělé státy již nikdy nedosáhly úrovně vyspělejších států. Tím by došlo k výraznému rozdělení a Evropská unie by tak ztratila původní cíl, kterým bylo, je a i v budoucnu by mělo být vytvoření jednotné Evropy.

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[8] Zákon č. 353/2003 Sb., o spotřebních daních, ve znění pozdějších předpisů.

[9] Daň z elektřiny, daň z plynu a daň z uhlí – část 45 až 47 zákona č. 261/2007 Sb., o stabilizaci veřejných rozpočtů, ve znění pozdějších předpisů.

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MÁ KRITÉRIUM ROZLOHY OBCE OPODSTATNĚNÍPRO PŘEZOZDĚLENÍ SDÍLENÝCH DANÍ?

MARTIN NETOLICKÝ

PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY

Abstrakt

Zákon o rozpočtovém určení daní doznal od počátku tohoto roku řady změn. Zcela zásadně byl změněn způsob výpočtu podílu jednotlivých obcí na sdílených daních. Byla doplněna nová kritéria pro přerozdělení daní, a to mimo jiné také výměra katastrálních území obce. Autor se v příspěvku zabývá, zda-li právě toto kritérium je dostatečně objektivní a vystihuje skutečné výdajové potřeby obcí. V závěru je formulován návrh, jak by bylo možné toto kritérium v budoucnu modifikovat.

Klíčová slova

Územní rozpočty, rozpočtové určení daní, sdílené daně, výměra katastrálních území

Abstract

The setting of budgetary determination of taxes was changed in the Czech Republic from the beginning of this year. Fundamentally was changed the calculation method for allocation of shared taxes which are determinated for a concrete municipality. There are some new criteria for redistribution of shared taxes. One of them is the acreage of cadastral unit. The author of this paper is engaged in this criterion and takes a think how the acreage of cadastral unit is objective for redistribution of shared taxes.

Key words

Local budgets, budgetary determination of taxes, shared taxes, acreage of cadastral units

Úvod

V loňském roce byla schválena novela zákona č. 243/2000 Sb., o rozpočtovém určení výnosů některých daní územním samosprávným celkům a některým státním fondům (zákon o rozpočtovém

určení daní), ve znění pozdějších předpisů, která byla publikována jako zákon č. 377/2007 Sb. s účinností od 1. ledna 2008. Od počátku budila velký zájem veřejnosti a její schvalování provázely debaty ohledně nastavení přerozdělování sdílených daní pro obce. Do diskuse se zapojili jak zástupci obecních samospráv, tak členové Parlamentu České republiky, ale také odborníci, kteří se financováním územních samosprávných celků v České republice zabývají. Ve svém příspěvku bych se chtěl zastavit nad problematikou zahrnutí nového (na první pohled nepodstatného) kritéria výměry katastrálních území obce pro přerozdělení stanovené části sdílených daní, tedy daně z přidané hodnoty, daně z příjmů fyzických osob a daně z příjmů právnických osob. Podle dosavadních analýz bude právě toto kritérium tím, které bude velmi pravděpodobně kritizováno.

Nejprve bych však chtěl alespoň stručně připomenout, jaké celkové změny přinesla zmíněná novela zákona o rozpočtovém určení daní od 1. ledna 2008. Zákon o rozpočtovém určení daní v České republice, na rozdíl od právní úpravy jiných států, obsahuje dvě hlavní části ve vztahu k územním samosprávám:

A) stanoví, výnos kterých daní plyne územním samosprávným celkům zcela (tzv. svěřené daně), a dále určuje procentuelní podíl na výnosu těch daní, jejichž inkaso je rozděleno mezi více veřejných rozpočtů (sdílené daně),

B) stanoví, jakým způsobem se daňové příjmy určené pro územní samosprávné celky dále přerozdělují mezi konkrétní obce a konkrétní kraje. Pro tento účel definuje kritéria, podle kterých se provádí výpočet konkrétního podílu.

Zákon o rozpočtovém určení daní je typickým politickým zákonem, který definuje především hospodářskou a finanční nezávislost územních samosprávných celků na státu, který se vzdává inkasa z některých daní (resp. části inkasa), aby tak vytvořil finanční autonomii územích samospráv na státu. Je plně na rozhodnutí státu, výnos kterých daní bude plynou do územních rozpočtů, obdobně je v čistě v jeho působnosti, jak dále tyto zdroje přerozdělí. Je třeba poznamenat, že k finanční autonomii územních samospráv jsme se jako Česká republika také zavázali přistoupením k Evropské chartě místní samosprávy, která byla publikována jako sdělení Ministerstva zahraničních věcí č. 181/1999 Sb., o přijetí Evropské charty místní samosprávy. Podle článku 9 této Charty mají místní společenství v rámci hospodářské politiky státu právo na přiměřené vlastní finanční zdroje, se kterými mohou v rámci svých pravomocí volně nakládat. Finanční zdroje místních společenství jsou podle Charty úměrné odpovědnosti stanovené ústavou a zákony.

Kritika zákona o rozpočtovém určení daní před jeho novelizací

Verze zákona o rozpočtovém určení daní, která byla účinná do 31. prosince loňského roku byla kritizována z několika důvodů :

- vysoká váha koeficientů velikostních kategorií při přerozdělování celkových daňových příjmů obcí,
- velký rozdíl v koeficientech velikostních kategorií mezi největšími a největšími obcemi,
- skokové přechody mezi velikostními kategoriemi, což v praxi znamenalo, že pokud obec dosáhla hraničního počtu obyvatel a přešla do kategorie s vyšším koeficientem, skokově jí v některých případech vzrostly příjmy ze sdílených daní. V opačném případě se jí tyto příjmy skokově snížily. Nejmarkantnější rozdíly byly při přechodu rozhraní 100, 10.000 a 100.000 obyvatel.

Účelem tohoto článku není hodnocení toho, zda dřívější způsob přerozdělení sdílených daní byl spravedlivý a z hlediska státu rozumný. Pouze zdůrazním, že Ústavní soud ve svém nálezu sp. Zn. Pl ÚS 50/06 konstatoval, že nižší koeficienty pro malé obce nejsou nijak diskriminační, protože situace a postavení obce příkladně do 100 obyvatel není srovnatelná s obcí mezi 10.001 a 20.000 obyvateli. Podle jeho názoru šlo o nestejné zacházení s nestejnými situacemi.

Nelze tedy připustit, že by byla změna zákona o rozpočtovém určení daní vyvolána pouze uvedenou kritikou, protože ta doprovázela se stejnými argumenty zákon od počátku jeho existence. Nutnost úpravy byla vyvolána hlavně přijetím zákona o stabilizaci veřejných rozpočtů, který výrazně zasáhl do sazeb daní, a to také těch, na jejichž výnosu se podílí obce (DPH, DPPO, DPFO). Očekávaný pokles inkasa daní pro územní samosprávné celky, zejména pro obce, vedl k intenzivnějšímu tlaku na úpravu zákona. Vzhledem k celospolečenské situaci a politickému konsensu došlo k poměrně zásadní úpravě zákona též v té jeho části, která se týkala způsobu výpočtu konkrétních podílů jednotlivých obcí.

Hlavní změny zákona o rozpočtovém určení daní

V čem spočívají změny účinné od 1. ledna letošního roku?

1.) Došlo k doplnění kritérií pro přerozdělení podílu obcí na sdílených daní o nová kritéria celkové výměry obce a tzv. prostého počtu obyvatel, přičemž každé z nich má stanovenou váhu 3%,
2.) stávající kritérium přepočteného počtu obyvatel bylo modifikováno, upraveny byly koeficienty velikostních kategorií na tzv. koeficienty postupných přechodů (progresivně klouzavý systém),

3.) bylo schváleno zvýšení podílu obcí na sdílených daních z 20,59% na 21,04% od roku 2008 jako kompenzace dopadů změny systému přerozdělení sdílených daní pro obce.

Přestože jde o novelu, která měla odstranit některé nesrovnalosti, zavedením kritéria výměry katastrálních území obce pro určení jejího podílu na sdílených daních lze očekávat další diskuse o opodstatněnosti tohoto kritéria. Podle výměry katastrálních území obce se přerozdělují pouhá 3% inkasa sdílených daní. Na první pohled jde o zanedbatelnou váhu, která při prvním pohledu nezpůsobí žádné výkyvy v příjmech. Opak je ovšem pravdou. Na přiložené tabulce dokladuji oficiální odhad Ministerstva financí pro obce, které na zahrnutí tohoto kritéria mají v roce 2008 nejvíce získat. Už s odkazem na níže uvedené údaje si dovolím stručnou úvahu nad tím, zda-li toto kritérium skutečně vystihuje potřeby obcí a je pro přerozdělení spravedlivé.

Tabulka č. 1 : Největší očekávané nárůsty daňových příjmů pro obce v roce 2008

KRAJ	OKRES	OBEC	Počet obyvatel	Výměra katastrálního území (ha)	Predikce 2008 bez změny RUD (v tis.Kč)	Predikce 2008 po změně RUD (v tis.Kč)	Nárůst %
Plzeňský	Klatovy	Modrava	55	8 163,47	265	4 193	1579,45%
Ústecký	Chomutov	Kryštofovy Hamry	56	6 842,20	270	3 578	1323,80%
Plzeňský	Klatovy	Prášily	155	11 227,85	954	6 280	658,59%
Ústecký	Most	Český Jiřetín	74	3 360,30	357	2 058	576,24%
Plzeňský	Klatovy	Horská Kvilda	70	2 991,41	338	1 859	550,20%
Jihočeský	České Budějovice	Vlkov	16	576,2381	77	374	484,57%
Karlovarský	Sokolov	Přebuz	87	2 978,89	420	1 963	467,57%
Jihočeský	Prachatice	Stožec	214	10 477,96	1 380	6 311	457,19%
Jihočeský	Prachatice	Nové Hutě	90	2 324,44	434	1 675	385,70%
Jihočeský	Český Krumlov	Přední Výtoň	214	7 783,03	1 380	5 045	365,47%

Výměra katastrálních území jako kritérium

Podíváme-li se do historie, s pojmem katastry se poprvé setkáváme v polovině 17. století, kdy byla nařízena evidence pozemků držených poddanými, resp. všech poddanských usedlostí, z nichž se platily berně (daně). Takto vznikaly katastry, tedy soupisy pozemků a poddaných k berním účelům. V době osvícenských reforem nechal v letech 1784 až 1788 Josef I. vypracovat nový katastr, v němž byla sepsána všechna půda bez rozdílu v rámci nových územních jednotek, které byly nazvány katastrální obce. Právě v této době můžeme hledat základ dnešních katastrálních území. Proč se

ovšem zmiňuji o historii katastrálních území? Jejich vznik je spojen se zdaněním majetku, tedy nikoliv s opačným jevem, tedy přerozdělením inkasa daní. Přestože došlo vzhledem k dalšímu historickému vývoji k určitým změnám v ohraničení těchto území, nelze je považovat za kritérium zcela objektivní, které by odráželo skutečné potřeby obcí.

Území obce je podle současné právní úpravy definováno zákonem č. 128/2000 Sb., o obcích (obecní zřízení), ve znění pozdějších předpisů v § 18, podle kterého je každá část území České republiky součástí území některé obce, není-li stanoveno jinak. Obec má jedno nebo více katastrálních území. Takto zákon stanoví jeden ze znaků samosprávy obcí, a to její územní základ. Samotný pojem katastrální území je upraven v zákoně 344/1992 Sb., o katastru nemovitostí České republiky (katastrální zákon), ve znění pozdějších předpisů. Podle § 27 písm. h) katastrálního zákona se katastrálním územím rozumí technická jednotka, kterou tvoří místopisně uzavřený a v katastru společně evidovaný soubor nemovitostí.

Na první pohled se může jevit, že kritérium výměry katastrálních území obce může být jedním z těch, která reflektují výdajové potřeby obcí v závislosti na velikosti jejich území. Praxe však ukazuje, že výdaje obcí jsou determinovány především výměrou zastavěného území obce, kde obec nejvíce investuje do údržby místních komunikací, technické infrastruktury, nemovitostí a dalších záležitostí. Intravilán se liší obec od obce a lze konstatovat, že dvě stejně velké obce co do počtu obyvatel, mají naprosto odlišně rozlehlé zastavěné území. Proto bych do budoucna považoval za rozumné, pokud by mohlo být zváženo, zda při příští změně zákona o rozpočtovém určení daní nezahrnout spíše toto kritérium pro přerozdělení sdílených daní. Výměra katastrálních území obce totiž může v některých případech, které jsem ostatně uvedl v tabulce, vést k neodůvodněnému zvýhodnění jedněch nad druhými. Výměra intravilánu mnohem více vystihuje nutnost výdajů každé obce. K tomuto názoru se připojují mnozí zástupci obecních samospráv.

Závěr

Již nyní, tedy čtyři měsíce po změně zákona o rozpočtovém určení daní, se schází na Ministerstvu financí pracovní skupina pro vznik zcela nového zákona, který by nahradil ten současný. Bylo zadáno zpracováno zpracování materiálu s pracovním názvem „Analýza financování výkonu státní správy a samosprávy územních samosprávných celků“, která by měla vnést obsahovat kritické zhodnocení nynějších kritérií pro přerozdělení sdílených daní. Předpokládám, že i popsané kritérium výměry

katastrálních území obce bude této kritice dostatečně podrobeno a napříště bude nahrazeno jiným, které bude více vystihovat výdajové potřeby obcí.

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[2] Průcha, P.: *Správní právo. Obecná část*, Brno: Masarykova univerzita, 2003, 224 s., ISBN 80-210-2763-0

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ON THE LEGAL STATUS OF THE PREFERENCES OF CUSTOMS IN THE EUROPEAN UNION

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Abstract

In our days – in Hungary especially from 01. 05. 2004 – the legal status of the law of customs could be a question which deserves special attention, considering in particular if it were not be reasonable to move the customs and the law of customs from financial law to commercial law, while emphasizing their role in economic policy – it is time to change paradigm.

Key words

Preferences of customs,contractual and autonomous preferencies, forms of appearance of preferences, General Agreement on Tariffs and Trade

I.

Preferences of customs mean a reduction of tariff items which produces a tariff reduction, therefore the preferences constitute a part of the customs facilitation system involving the same consequences. The elements of this system show, above all, the following structure:

- **customs preference defined by public acts of customs or customs preference according to the law of customs**: For this the duty-free goods importable in the area of the Union serve as an example, as defined in a special source of law, in the 918/83/EEC about the producing of communal system of the relief from duty. Thus for example – depending on the conditions – the goods obtained by marriage or inheritance, the goods of natural persons originating from a third country (the condition is the residing there at least for one year), the product-samples, promotion materials, medical instruments, therapeutic products, school supplies, research materials, travel belongings, bagatelle consigments (to the value of 22 Euro), state gifts, awards, seed grains etc. are duty-free.

- **special reliefs of duty on the evidence of international agreements** (e.g. the agreement on the importation of objects of educional, scientific and cultural nature from 22. 11. 1950 in Lake Success).

– **institutinal neutralization of customs**, when some defined organ is authorized to neutralize the customs according to the possibilities given by the public acts of customs, e.g. the Comittee is authorized to ascertain tariff quotas or tariff ceilings.

– **tariff customs preference**: If the degree of the tariff of import duties and - possibly – that of the export duties is 0 %, or a lower customs-consigment of the goods can be seen than in the case of goods from non-beneficiary countries, then we will find an example of the tariff preference. Here we can mention that the Tariff of the European Union makes the putting into practice of more than 40 tariff items possible, and among them only a few does not show customs preference (e.g.: the tariff items put into practice against the goods of the United States, Japan, South-Korea, Canada, Australia).

However, it does not turn out from the tariff itself, for what reason these preferences have got into the tariff, thus we have to search for the juridical background of them, and in doing so we can be orientated by the following:

– **customs facilitation given on the evidence of international agreements or unilaterally:** These customs facilitations used to be qualified as **preferences of customs.** Thus, their essential characteristic is that the customs facilitations which are to give to the partner states are determined by international agreements beside the sources of the general (global, communal, national) low of customs[1]. Respectively, the fact that some states can provide preferences of customs in a unilateral, autonomous way for the goods of other sate(s). Among the general characteristics of the preferencial agreements we can list the juridical status, the mode and the extent of customs preference and the rules of origin.

According to the juridical status of preferencies, we can differentiate between **contractual** (e.g. compacts entered into with the Mediterranean countries and the agreement with EU-European Economical Region) and **autonomous** preferencies (e.g. Lomé I-IV. Agreements), and the basis of this classification whether these preferencies are provided on the evidence of bi- or multilateral agreements or unilaterally.

[1] The European Union has made an international agreement with several states, which guarantees for them customs facilitation. For example: the Cotonou Agreement has been reached with the African, Caribbean and Pacific States and with Andorra, the Färöer-Isles, Croatia, Turkey, Switzerland, the European Economical Region, Bosnia-Hercegovina, Serbia-Montenegro, the Mediterranean countries.

The literature usually makes mention of the preferencial agreements among the regional agreements, however we can find among them such ones (the Cotonou Agreement), which break through the borders of regionality because their regional force touches upon more continents.

The agreements providing preferences of customs are of enormous economical importance, today they cover a significant part of the world trade and the parties can contribute to the increasing of the trade – so we have to look up in the prescriptions of the General Agreement on Tariffs and Trade. The developed countries have introduced their preferential customs concerning the industrial products of the developing countries from 1971. As these preferencies were new preferencies given in an autonomous way, that is, without the demand of reciprocity, they conflicted with the Article I of the GATT 1947 which put down the commitment of the general greatest preferential treatment. The GATT gave an exemption from this interdiction for ten years in 1971, so the enforce can of the preferential customs take place once again. In 1979 at the request of the developing countries the preferential treatment became an integrant part of GATT as a result of the GATT Tokyo-round-discussions (1973-1979) with the introduction of the „enabling clause" (Art. XXXVI)[2].
The Art. XXIV of the GATT 1994 acknowledges, but attaches conditions to customs unions, free trade areas or the interim agreements aimed at reaching such things. Today the GATT does not prohibit to provide customs preferences for the developing countries in an autonomous way by other states.

In Europe the founders have already defined the bases of customs preferences in 1957 with the signing of the Roman Treaty aimed at creating the EC. The member-states expressed their claims in the k) point of the Article 3 and the IV. part of the Treaty for the merging of the non-European countries and areas in order to increase the commercial trade and to facilitate the common economic and social development. Among these by-laws the Article 133 deserves stressed attention. The (1) paragraph of this prescribes as a burden the total abolishment of the tariffes in the case of importing goods from the Caribbean and the Pacific states to the member-states is.

From the secondary sources of law of the European Union we can directly conclude from the by-laws put in the d)-f) points of the (3) paragraph of the Article 20 of the Community Customs Code that the Union or its tariff acknowledges the preferences can be given on the evidence of contract or in an autonomous way.

Which are the forms of appearance of preferences?

[2] Helmuth Berndt: Die Präferenzabkommen der EU mit der MEDA-Zone in: Ehlers/Wolffgang/Lechleitner (Hrsg): Rechtsfragen des Zolls in globalen Märkten, Frankfurt am Main, 2005, Verlag Rechts und Wirtschaft p. 179.

1. **Preferential zones** are qualificated as areal preferencies. The main point is that the tariff item is ascertained in a lower degree than the one enforced for the customs section concerning goods of the third countries which are not given preferencies or in 0 %, and the provided preferencies embrace the whole intern circulation, first of all in the form of reduced customs.

If two or more states agree that they do not claim customs concerning the goods of each other, but each of the states enforces its own tariff and law of customs on the third countries which do not belong to the agreement, than we speak about **free trade area**. As an example we can cite the agreement between the European Union and the European Free Trade Agreement (EFTA), the free trade agreement between the USA and Israel, the Central European Free Trade Agreement (CEFTA) and the North-American Free Trade Agreement (NAFTA) or the free trade agreement between Australia and the USA (AUSFTA).

One can speak about **customs union**, if one custom district replaces two or more ones, in a way that the customs and other commercial measures are abated among the areas forming the union and each member of the union applies essentially the same tariffs and other commercial measures in its commerce with areas which do not belong to the union.
I think that after the above mentioned facts one can find that the free trade areas and especially the customs unions may show preferential characteristics, but they went beyond the conceptual bounds of the preferential zones and preferential agreements, thus, they must be treated as independent juridical-economical categories.

However, I think that the Cotonou Partnership Agreement in its system is a particular preferential agreement regarding the moving from the autonomous regulation to reciprocity, for its areal force concerning more continents, the number of participants and its economical effect, and which was signed on the one hand by the African, Caribbean and Pacific states and by the European Union and his member-states on the other in Cotonou, 23. 06. 2000. The African, Caribbean and Pacific states (in the following ACP states) represent a significant economic factor, 77 countries and more than 650 million people, so this partnership is very important for the Union in the respect of its quota from the international trade. On the basis of these data the Agreement can be seen as the greatest North-South directed financial and political agreement of the world.[3] The agreement changed the Lomé IV. Agreement, the characterictics of which – as that of its precendents, the Yaounde I., II, Lomé I-III. Agreements – were the preferencies of customs given in an autonomous way by the Union to the ACP

[3] The Lomé Convention http.//europa.eu.int/comm/development/body/cotonou/lome_history_en.htm p. 2.

states, just as the equality of the partners or the principle of respecting the sovereignty without the demand of reciprocity.
Although the Cotonou Agreement itself does not contain concrete preferencies, its regulation is frame-like; it wants to provide its preferencies of customs within the scope of the commercial agreements compatible with the WTO on the basis of mutuality and reciprocity. Agreement on the evidence of the conditions defined in Chapter V of the Agreement. The preferred cirle of products and the measure of the findable assimetry in the schedule of the reduction of customs must be registered in the newly fixed agreements.

After the preparatory period of the Cotonou Agreement the relief from duty remains – except the commerce with the countries developed least of all -, **but its juridical nature will transform, the relief from duty existing on the evidence of mutuality and reciprocity will replace the autonomous relief from duty.** From 01. 01. 2008 the European Union manages its commercial activity as a partial realization of what is included in the commercial chapter of the Cotonou Agreement (Part 3, II. title, Chapter 2) on the evidence of the Economic Partnership Agreements (EPA) compatible with the presciptions of the WTO within the scope of the region of the six African, Caribbean and Pacific states signing the Agreement, and this will advance the establishing of tariff unions among the states concerned.

2. Tarifal preferencies

These preferencies manifest themselves only in the effect produced on the customs items of tariffs. These can be contractual or autonomous advantages, but their main form of appearance is the autonomous reduction of tariffs in the scope of the GSP system.
The developed states of the world provide unilateral, tarifal customs preferencies for the goods of the countries developed least of all and for the developing countries within the scope of the Generalised System of Preferences, in short: GSP. GSP was introduced in 1971 as a result of the recommendations of the United Nations Conference of Trade and Developement (UNCTAD) and it has been renewed severeal times since then. The European Union adopts these rules on the evidence of the 980/2005/EEC today, which thus manifest themselves in reducing the tariffs and in procedural rules (attestation of origin) related to them. The Cotonou Agreement can be valued not only as an areal, but as a tariffal preference, however we have to underline that this is not an autonomous preference any more.

3. The common characteristic of the areal and the tariffal preferencies is that for the sake of a more advantageous treatment of customs showing themselves in the reducing of the amounts of tariff or while applying the tariff quotas and tariff ceilings it is necessery to examine the origin of the goods and to attest it in the required way as well. The origin of the goods is significant because the commodity - depending on its origin - can be treated by more favourable standards than it is determined in the column about the greatest preferential tariff titled „erga omnes" of the Tariff or duty free. For if a state would provide customs preferences for the products of another state independently from the origin of the commodity, then an exporter of a third state could take advantage from this situation in such a way that it would transport its commodity to the beneficiary state at first and after then - from there - to the state making reduction.[4] The applying of the rules of origin attempts to rule out this undesirable effect.

Speaking about the rules of origin we must follow with attention the definition of the concept of the „originating product", the operations, workings resulting the originating status, the cumulative rules, the „territorial principle" connecting to these and the way of attestation of the origin as well.

In a general sense we have to consider the country as the originating place of a commodity, where it was wholly and completely exploited, grown, dreeded or produced or that country, where the commodity or the materials used up for it were worked, prepared in a sufficient degree and where it is directly transported from to the importing countries.[5]

The concept of the originating product is generally defined in details by the preferential agreements. The detailedness and the exactness are particularly important because the Customs Code of the Union contains only the rules of the non-preferential origin, so it could not have been applied here.
Thus qualified as originating in general are:

a) products made or created in full in the beneficiary states;

b) products created in the beneficiary states which do not consist of materials wholly produced there, supposing that these kind of materials have gone through sufficient working or processing in the beneficiary states.

We have to regard products not wholly produced as sufficiently worked or prepared if the conditions defined in agreements or notes, Annexs belonging to them are realized, which indicates the working or

[4] The literature mentions this phenomenon as deflexial effect. Huszár Ernő: Nemzetközi kereskedelempolitika Budapest, Aula, 1994, p. 326.
[5] Pardavi László: Vám és biztosítás 2002, Budapest, 2002, Ligatura p. 60.

preparing that must be done on the used up non-originating materials and that concerns only this kind of materials.

Cumulation of origin

Several preferential agreements order that the production process proceeded in one or more states of the preferential area should be added in the respect of the status of origin. We know the full and the limited cumulation and the bilateral and multilateral versions of them.

In the case of full cumulation every working on the basic material in the preferential area is taken into account for the defining of the place of origin. The certain working phases thus do not need to result in a status of origin; the origin will be ascertained when the product goes to another cumulative country for further processing.

In the case of limited cumulation the operations done on the basic material the processes particularly defined in single agreements are added in the respect of origin.[6]

In the case of bilateral cumulation the principle of one country – one commodity is valid, that is, the originating state is the one where the last processing have been done with the commodity, while in the case of multilateral or regional cumulation, the processing also happens in another country or countries of the preferential area. Here, the originating state is the one, where the greatest value is added to the basic material.[7]

Territorial principle:

Every preferential agreement includes the conditition that the terms ascertained concerning the obtained originating status must be satisfied in the beneficiary states without a break. If the originating products exported are transported back, they must be seen as non-originating, except for if it is sufficiently provable for the Customs that

a) the products transported back are the same as the exported ones; and

b) they did not undergo processes necessary to exceed their preservation in a good condition in the given state or during their export.[8]

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[6] The V. Annex of the Cotonou Agreement ascertains cumulative rules - besides the cumulation with the offshore countries and areas and the Union – for the South-African and the neighbouring developing states as well. All the three regard the materials originating originally not from them essentially as originated from the ACP states, if they were worked in products produced there and if the materials go under a considerable working or processing in the ACP states, thus in this case the limited multilateral cumulative rules appear.

[7] Wolffgang: in: Witte-Wolffgang: Lehrbuch des Europäischen Zollrechts, Herne/Berlin Verlag Neue Wirtschafts-Briefe 2003 p. 449-450.

[8] For example, the preferential treatment ensured in the by-law concerning the commercial cooperation in the V. Annex of the Cotonou Agreement is related only to such products, which are delivered directly among the the ACP states, the Union, the offshore countries and territories or the South-African areas, without reaching any other areas. The products constituting a consistent freight, however, can be delivered through other areas, together with the transfer or temporary storing if it is

Attestation of origin

It is necessary for the requisition of the preferences provided by the international agreements to attest the origin. The origin of the commodity can be ascertained from the forwarding note and other avaliable conformed documents (account) first of all. The origin of the commodity must be acknowledged by certificate of origin (FORM A, EUR1, the announcement of the exporter made on an account) in the case of requisition of preferencies.

If a doubt arises during the customs (administration) regarding the origin, further evidence can be required after presenting the certificate of origin in order to ensure that the giving of the origin suits the conditions included in the public act.

Summary

As a conclusion it can be said that the juridical status of the preferences of customs may be examined from the viewpoint of the source of law and from that of reciprocity, mutuallity. From the viewpoint of source of law one can assume that the preferences can be provided in the course of multilateral or bilateral agreements, which can be either regional or global in territorial respect. Moreover, the preferences can be given on reciprocal, contractual grounds and in an autonomous way as well. We also find an example for the case (in the Cotonou Agreement) that the preferences given in an autonomous way are gradually succeded by preferences given and got on a reciprocal ground.

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[2] *The Lomé Convention,* http.//europa.eu.int/comm/development/body/cotonou/lome_history_en.htm.

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necessery, supposing that the commodities remain under the control of the customs authorities of the country of the transit or storage, and do not undergo other processes, as for example unloading, re-loading or any other process aiming their preservastion in a good condition.

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MOŽNOSTI OBCÍ OVLIVNIT DAŇ Z NEMOVITOSTÍ

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Abstrakt

Cílem tohoto článku je ukázat a popsat možnosti obcí v České republice ovlivnit daň z nemovitostí placenou vlastníky nemovitostí a dalšími poplatníky. Budou zmíněny dvě možnosti osvobození – osvobození nemovitostí dotčených přírodní pohromou a osvobození zemědělských pozemků – a tři koeficienty – polohová renta, obecní koeficient a místní koeficient.

Klíčová slova

Daň z nemovitostí, osvobození, polohová renta, obecní koeficient, místní koeficient

Abstract

Possibilities of Municipalities to Influence Real Estate Tax

The aim of this article to show and describe possibilities of municipalities in the Czech Republic to influence real estate tax paid by the owners and other taxpayers. There will be mentioned two possibilities of exemptions – exemption of real estate touched by natural disaster and exemption of agricultural lands – and three coefficients – location rent, municipal coefficient and local coefficient.

Key words

Real estate tax, exemption, location rent, municipal coefficient, local coefficient

Mnozí právní a daňoví teoretikové by jistě souhlasili s tvrzením, že výnos z místních daní plyne do obecních rozpočtů, respektive do rozpočtů dalších územních samosprávných celků. Na druhé straně další teoretikové poukazují na skutečnost, že rozpočtové určení není jediným kritériem pro definici místních daní, a dodávají, že právě obce a další územní samosprávné celky by měly mít možnost ovlivnit výši místních daní například stanovením daňové sazby či rovnou daňového základu. Z tohoto pohledu je daň z nemovitostí místní daní pouze částečně, neboť možnosti obcí jakožto beneficiářů daně jsou jen

omezené. A po pravdě řečeno, obce nevykonávají ani správu této daně; tímto úkolem jsou pověřeny územní finanční orgány.

Jaké jsou tedy možnosti obcí v České republice ovlivnit právní úpravu daně z nemovitostí? Nabízejí se všeho všudy dvě možnosti osvobození – osvobození nemovitostí dotčených přírodní (živelní) pohromou a osvobození zemědělských pozemků, a dále možnosti zavést či změnit koeficienty ovlivňující daňovou sazbu – polohová renta, obecní koeficient a místní koeficient.

Osvobození nemovitostí dotčených přírodní (živelní) pohromou

Obce mohou při řešení důsledků živelních pohrom zcela nebo částečně (procentem) osvobodit od daně z nemovitostí na svém území obecně závaznou vyhláškou nemovitosti dotčené živelní pohromou, a to nejdéle na dobu pěti let. Předmětná obecně závazná vyhláška musí být vydána tak, aby nabyla účinnosti do 31. března roku následujícího po zdaňovacím období, v němž k živelní pohromě došlo. S ohledem na skutečnost, že správu daně vykonávají finanční úřady, platí pro obce povinnost zaslat vyhlášku v jednom vyhotovení tomuto správci daně, a to do pěti kalendářních dnů ode dne nabytí její účinnosti.

Toto osvobození se přitom nemusí vztahovat pouze na rok, kdy k živelní pohromě došlo, a na roky následující, ale může být též retroaktivní, tj. účinné i na předchozí, již uplynulé zdaňovací období lze též stanovit za již uplynulé zdaňovací období. Takové řešení však způsobuje praktické problémy, neboť obecná lhůta pro podávání daňových přiznání k dani z nemovitostí je 31. leden zdaňovacího období. Proto musí podávat poplatník, který chce osvobození využít, dodatečné daňové přiznání.

Ve skutečnosti není tento způsob osvobození v praxi příliš využíván. V případě živelní pohromy si obce nemohou dovolit přijít o výnos daně z nemovitostí, neboť právě v této době potřebují peníze na odstranění škod vzniklých na obecním majetku, na infrastruktuře apod. Je navíc relativně obtížné stanovit, které nemovitosti byly živelní pohromou skutečně zasaženy (např. byt v prvním patře byl vytopen povodní, kdežto byt ve čtvrtém patře zůstal bez následků).

Osvobození zemědělských pozemků

Pozemky orné půdy, chmelnic, vinic, ovocných sadů a trvalých travních porostů mohou být od daně z nemovitostí osvobozeny obecně závaznou vyhláškou. Toto osvobození se nevztahuje na pozemky v

zastavěném území nebo v zastavitelné ploše obce, jestliže tak obec stanoví obecně závaznou vyhláškou, ve které současně vymezí tyto pozemky jejich parcelním číslem s uvedením názvu katastrálního území, ve kterém leží. Předmětnou obecně závaznou vyhlášku musí obce zaslat v jednom vyhotovení příslušnému správci daně (finančnímu úřadu) do pěti kalendářních dnů ode dne nabytí její platnosti, přičemž obecně závazná vyhláška musí nabýt platnosti nejpozději do 1. srpna předchozího zdaňovacího období a účinnosti nejpozději do 1. ledna následujícího zdaňovacího období. Samozřejmě pokud má vyhláška zpětnou účinnost, je neplatná.

Tato varianta osvobození je zcela nová a poprvé může být využita ve zdaňovacím období 2009. To znamená, že obce ji musí připravit tak, aby byla platná nejpozději 1. srpna 2008. Podle mnoha starostů a dalších představitelů obcí však nebude tato možnost osvobození příliš hojně využívána: malé obce, které mají na svém katastrálním území velké množství pozemků tohoto druhu, si nemohou dovolit ztratit jeden z relativně významných příjmů svých rozpočtů a ve velkých městech zase nenajdeme příliš zemědělských pozemků.

Polohová renta

Koeficient nazývaný polohová renta respektuje počet obyvatel v obci a je využíván pouze pro některé druhy nemovitostí: stavební pozemky, obytné domy, stavby tvořících příslušenství k obytným domům, byty a samostatné nebytové prostory nesloužící k podnikání nebo jako garáže.

Polohovou rentou se násobí základní sazby daně. Základní hodnota koeficientu je stanovena přímo zákonem, avšak obce mohou s tímto koeficientem disponovat: mohou jej pro jednotlivé části obce obecně závaznou vyhláškou zvýšit o jednu kategorii nebo snížit o jednu až tři kategorie v členění koeficientů (koeficient 4,5 lze zvýšit maximálně na koeficient 5,0):

Počet obyvatel / Obec	**Polohová renta**				
	Základní	**Snížená**			**Zvýšená**
≤ 1 000	1,0	–	–	–	1,4
> 1 000 ≤ 6 000	1,4	–	–	1,0	1,6
> 6 000 ≤ 10 000	1,6	–	1,0	1,4	2,0
> 10 000 ≤ 25 000	2,0	1,0	1,4	1,6	2,5
> 25 000 ≤ 50 000	2,5	1,4	1,6	2,0	3,5
> 50 000 + Františkovy Lázně, Luhačovice, Mariánské Lázně, Poděbrady	3,5	1,6	2,0	2,5	4,5
Praha	4,5	2,0	2,5	3,5	5,0

Tabulka 1: **Polohová renta**

Předmětnou obecně závaznou vyhlášku musí obce zaslat v jednom vyhotovení příslušnému správci daně (finančnímu úřadu) do pěti kalendářních dnů ode dne nabytí její platnosti, přičemž obecně závazná vyhláška musí nabýt platnosti nejpozději do 1. srpna předchozího zdaňovacího období a účinnosti nejpozději do 1. ledna následujícího zdaňovacího období. Opět platí, že pokud má vyhláška zpětnou účinnost, je neplatná. Koeficient polohové renty má v České republice již dlouhou tradici a je často využíván, zejména s ohledem na svoji fiskální funkci, v případě stavebních pozemků pak rovněž s ohledem na funkci regulační.

Obecní koeficient

Obecní koeficient může být použit pro některé budovy, pro které není možné využít koeficientu polohové renty, tzn. pro stavby pro individuální rekreaci a pro rodinné domy využívané pro individuální rekreaci, pro stavby, které plní doplňkovou funkci ke stavbám pro individuální rekreaci a k rodinným domům využívaným pro individuální rekreaci, pro garáže, pro stavby užívané pro podnikatelskou činnost a pro samostatné nebytové prostory užívané pro podnikatelskou činnost nebo jako garáže. Obce mají možnost zavést tento koeficient formou obecně závazné vyhlášky pro některé či pro všechny tyto objekty. Hodnota koeficientu je 1,5 a násobí se jím základní sazba daně.

Pro vydání obecně závazné vyhlášky platí stejná pravidla jako pro obecně závazné vyhlášky upravující polohovou rentu, tj. vyhlášku musí obce zaslat v jednom vyhotovení příslušnému správci daně do pěti kalendářních dnů ode dne nabytí její platnosti, přičemž obecně závazná vyhláška musí nabýt platnosti nejpozději do 1. srpna předchozího zdaňovacího období a účinnosti nejpozději do 1. ledna následujícího zdaňovacího období. I zde platí, že pokud má vyhláška zpětnou účinnost, je neplatná. Není výjimkou, že oba koeficienty jsou upraveny v rámci jedné vyhlášky. I obecní koeficient má v daňovém právu relativně dlouhou tradici, zejména díky svým funkcím fiskální a regulační.

Místní koeficient

Od počátku roku 2008 je obcím dána nová možnost zvýšit vybíranou daň z nemovitostí, a to díky zavedení nového – místního koeficientu. Pokud obec obecně závaznou vyhláškou místní koeficient zavede, budou majitelé nemovitostí a další poplatníci daně platit vyšší daň poprvé ve zdaňovacím období 2009. Obec takto může pro všechny nemovitosti na území celé obce stanovit jeden místní

koeficient ve výši 2, 3, 4 nebo 5, kterým se vynásobí daňová povinnost poplatníka za jednotlivé druhy pozemků, staveb, samostatných nebytových prostorů a za byty, popřípadě jejich soubory.

Je pochopitelné, že o vydání takové vyhlášky musí být spraven správce daně, a to do pěti kalendářních dnů ode dne nabytí její platnosti, přičemž obecně závazná vyhláška musí nabýt platnosti nejpozději do 1. srpna předchozího zdaňovacího období a účinnosti nejpozději do 1. ledna následujícího zdaňovacího období. Pochopitelně platí, že vyhláška se zpětnou účinností je neplatná. I z těchto důvodů je nasnadě, že mnohé obce upraví všechny tři koeficienty v rámci jediné vyhlášky.

Dle vyjádření představitelů obcí je velmi nepravděpodobné zavedení tohoto koeficientu. Podle jejich slov je daňová problematika otázkou politickou a oni by byli rádi znovu zvoleni, v případě menších obcí by i nadále „rádi chodili do místní hospůdky na jedno“. Z těchto důvodů nejsou příliš nakloněni tomu, že by se výsledná sazba zvýšila dvakrát, třikrát, čtyřikrát nebo dokonce pětkrát, byť by to nepochybně přineslo tolik potřebné příjmy do obecních rozpočtů.

Závěr

Jak je patrné z výše uvedeného textu, právní regulace zdanění nemovitého majetku není perfektní. Je třeba vyřešit mnohé problémy, které se netýkají pouze možností osvobození a koeficientů ovlivňujících daňové sazby. Zcela zásadním problémem, který by měl být vyřešen jako první, je způsob stanovení základu daně. Je třeba nahradit existující jednotkový způsob (daně jsou počítány podle jednotek základu daně, např. v m^2) systémem ad valorem (daně jsou počítány na základě hodnoty majetku, obvykle v národní měně v procentech). Základ daně by měl odpovídat skutečné tržní ceně nemovitosti. Hodnota by měla být stanovována obcemi, které mají nejlepší znalosti o cenách nemovitostí na jejich území, bez účasti znalců či odhadců. Takto stanovená hodnota by pak mohla sloužit i pro účely daní dědické a darovací (pakliže nebudou zcela zrušeny) a daně z převodu nemovitostí, není vyloučeno ani užití těchto cen v soukromoprávní oblasti, například při dědickém řízení. Obce mohou vytvořit mapy hodnotových zón pro účely určení základu daně z nemovitostí. Pokud by poplatník nebyl spokojen z výší daňového základu stanoveného obcí, měl by mít možnost odvolat se například k finančnímu úřadu podobně jako v Dánsku či v Irsku.

Obce by měly mít rovněž právo stanovovat sazbu daně, nikoli však neomezeně, ale v rámci určitého intervalu (např. 0,05 – 0,5 %) stanoveného zákonem. Odlišná, zřejmě vyšší sazba, by pak byla použita pro stavební pozemky a pro nemovitosti užívané v rámci podnikatelské činnosti. Naopak nižší sazba by

mohla být aplikována na rodinné domy a byty sloužící k bydlení. Je také nezbytné, aby se obce konečně staly správci daně z nemovitostí.

Takové řešení by znamenalo vytvoření moderního evropského systému zdaňování nemovitostí a snadnější orientaci poplatníků daně. Poplatník by v daňovém přiznání uvedl pouze údaje nezbytné pro správné stanovení základu daně. Správce daně by pak sám určil daňový základ, spočítal by daň a vyměřil ji. Výše zmíněný postup by znamenal naplnění jednoho ze základních principů daňového práva – principu efektivnosti: správce daně by neměl příliš zatěžovat poplatníka daně, přesto by mělo být dosaženo účelu daňového řízení, tzn. stanovit a vybrat daň tak, aby nebyly kráceny daňové příjmy. A co více, daň z nemovitostí by se tak stala skutečnou místní daní a Česká republika by respektovala ekonomickou autonomii v plném rozsahu a bez výjimek tak, jak to stanoví Evropská charta územní samosprávy.

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Abstrakt

Článek je věnován problematice sázení přes internet, na které jsou v prostředí ČR dva rozličné pohledy. Jeho zastánci – zahraniční společnosti provozující on line sázení - se hájí volným pohybem služeb v rámci EU a evropskou licencí k provozování, v ČR neplatí daně ani odvody a ročně jim plynou obrovské sumy od českých sázejících (kterým je mimochodem loterijním zákonem účast na sázkách v zahraničí zakázána). Naopak odpůrci, mezi které patří Ministerstvo financí ČR a „domácí" provozovatelé loterií, her a sázek, jsou striktně proti působení zahraničních provozovatelů sázek prostřednictvím internetu.

Klíčová slova

On line sázení, volný pohyb služeb, Ministerstvo financí ČR

Abstract

The main aim of the article is to look into a problem of betting on the Internet, where Czech Republic has two views at the moment. The betting supporters, the foreign companies that operate on line betting sites, are ‚hiding' behind the "free movement of services" within the European Union together with European license in order to run on line betting within Czech Republic. On the other hand the opposition, which includes Department of Finance of Czech Republic and "home" betting, games and gambling agencies, are strictly against on line betting provided by the foreign agencies.

Key words

On line betting, free movement of services,Department of Finance of Czech Republic

Sázky a hry v prostředí evropského práva

Právní úprava sázek a her v zemích Evropské unie je ovlivněna kulturním, společenským a také historickým vývojem, díky kterému se více či méně projevuje rozdílnost právních úprav členských států. Důsledkem vznikajícím z těchto rozdílů jsou překážky vnitřního trhu, kterým se snaží zabránit ustanovení Smlouvy o založení evropského společenství (dále také „SES“) o volném pohybu zboží, osob, služeb a kapitálu. Smlouva umožňuje výjimky z tohoto pravidla, kterými dle čl. 46 SES může být důvod veřejného pořádku, veřejná bezpečnost, ochrana zdraví, nebo také veřejný zájem, kterým je ochrana spotřebitelů, ochrana duševního vlastnictví, sociální hodnoty, důvody kulturního a politického významu.

Jelikož úprava hazardních her a účasti na nich není výslovně komunitárním právem upravena, je tato pravomoc zatím v rukou každého z členských států. Tyto usilují vhodnou vnitrostátní právní úpravou o vymezení přiměřené hranice a stanovení podmínek pro fungování herního průmyslu.

Z pohledu evropského práva je provozování hazardních her poskytováním služeb ve smyslu článku 49 a 50 SES a vztahují se na něj tudíž i ustanovení zakazující překážky volného poskytování služeb.

Evropský soudní dvůr definuje předmět svobody volného pohybu služeb tak, že jde o plnění, která jsou zpravidla poskytována za odměnu, pokud nepodléhají předpisům o volném pohybu zboží a kapitálu a o svobodě pohybu osob. Význam svobody poskytování služeb vzrůstá z důvodu ekonomického, hospodářského ale i právního a cílem smlouvy je také odstraňování omezení (prostřednictvím směrnic), které by této svobodě bránili.

Překážkou svobody poskytování služeb však může být právní úprava jednotlivých členských států, která omezuje nebo dokonce zakazuje hazardní hry, a to i v případě, že je uplatňována nediskriminačně. Tato překážka je však ospravedlnitelná v případě, že cílem státu zakazujícího (omezujícího) hazardní hry je prevence proti kriminalitě nebo ochrana veřejné morálky.

Jelikož ustanovení SES nejsou jednoznačná, mnoho členských států využívá institutu „předběžné otázky“ a to nejenom v oblasti loterijního, resp. herního práva. Navzdory tomu nelze, vzhledem k specifičnosti případů této právní oblasti, argumentovat konkrétními precedentními rozsudky Mezinárodního soudního dvora. Například ve sporu „Gambelli“ (sp. zn. C-243/01, rozsudek ESD, 6. listopadu 3003) bylo konstatováno, že záleží vždy na posouzení národních soudů, zda v tom či onom případě došlo k porušení norem primárního práva Evropského společenství či nikoliv. Ke každému případnému soudnímu sporu se musí přistupovat individuálně a soud bude muset zvažovat při svém rozhodování nejen samotný text SES, ale i další kritéria, jakými jsou veřejný pořádek, veřejné zdraví nebo ochrana veřejného zájmu státu.

Aktuální problém české právní úpravy v oblasti sázek a her – on line sázení bez hranic

Technický rozvoj spojený se vznikem her ve světě postupuje velmi rychle a příslušná právní úprava není schopna dostatečně reagovat. Na sázení na internetu se pohlíží jako na „šedou oblast“ práva. Názory odborné veřejnosti na on line sázení se diametrálně liší a právní normy (většinou zastaralé) na tento fenomén nepamatují. Veřejnosti je známé, že sázet on line není tak úplně právně v pořádku, nicméně v praxi možnosti on line sázení hojně využívá.

Na český trh vstoupili různé zahraniční společnosti (Interwetten, Bwin aj.) s úmyslem stát se zahraničním provozovatelem internetového sportovního sázení. Podle Ministerstva financí ČR (dále také „MF ČR“) je však internetové sázení nelegální (vyplývá to mimo jiné i diskuse na setkání Business Tuesday 2007, kde MF ČR bylo zastoupeno ředitelem odboru státního dozoru nad sázkovými hrami a loteriemi – Petrem Vrzáněm).

Zahraniční společnosti však odmítají nelegálnost podnikání s poukazem na svou evropskou licenci. Představitelé společnosti se hájí tím, že vlastní licenci udělenou členským státem, platí daně na území EU a dle jejich názorů jsou právní normy EU silnější než národní právní úprava, a proto mohou tedy na území ČR v tomto oboru podnikat. Tyto společnosti většinou sídlí na Maltě nebo na Gibraltaru, kde nemusejí platit žádné nebo, v porovnání s ČR, jen minimální odvody. Česká měna a česky komunikující sázkaři pro ně nepředstavují problém a navíc se jejich reklama objevuje na dresech českých sportovců a stejně tak na stadionech či v rámci sportovních přenosů českých televizních stanic.

Ministerstvo financí ČR považuje sázení po síti za nelegální, avšak zákon č. 202/1990 Sb., v platném znění (dále také „loterijní zákon“) uzavírání sázek prostřednictvím internetu či prostřednictvím jiné komunikační sítě výslovně nezakazuje. Na druhé straně nemožnost uzavírat kursové sázky prostřednictvím internetu pro české sázkové kanceláře však nepřímo vyplývá z ustanovení § 21 odst. 1 loterijního zákona, který stanoví podmínky provozování kursových sázek a schvaluje herní plán sázkových kanceláří. Ministerstvo financí ČR zatím žádnému subjektu neschválilo herní plán obsahující možnost přijímat sázky prostřednictvím internetu. Dále tvrdí, že zahraniční subjekty provozující kursové sázky bez tohoto povolení ve většině případů navíc nemají oprávnění k podnikání na území ČR. Dle ustanovení § 21 odst. 4 zákona č. 513/1991 Sb., v platném znění (obchodní zákoník), oprávnění zahraniční osobě podnikat na území České republiky vzniká ke dni zápisu této osoby, popřípadě organizační složky jejího podniku, v rozsahu předmětu podnikání zapsaném do obchodního rejstříku. Pokud mají tyto zahraniční subjekty v ČR hmotný a nehmotný majetek a pracovníky, jedná se z jejich strany o neoprávněné podnikání. Ministerstvo dále uvádí, že skutečnost, že server umožňující on line sázky je umístěn v zahraniční, není rozhodná ve vztahu k tomu, že provozovatel serveru vykonává v ČR podnikatelskou činnost.

V případě vstupu společnosti Interwetten na český trh již Ministerstvo financí ČR reagovalo. Hodlalo podat trestní oznámení, neboť dle názoru MF ČR je naplněná skutková podstata trestného činu neoprávněného provozování loterie a podobné sázkové hry podle § 118a zákona č. 140/1961 Sb., v platném znění (trestní zákon). Provozovatelem loterie nebo jiné podobné hry může být totiž jen právnická osoba se sídlem na území České republiky, které oprávněný orgán, tedy Ministerstvo financí ČR, vydal povolení k provozování loterie nebo jiné podobné hry.

Ministerstvo financí ČR vedlo již pár soudních sporů s obdobným předmětem sporu, všechny však byly odloženy.

Otázkou je, jestli skutečnost, že český občan navštíví webovou stránku, která je sice vedená i v češtině, ale registrována v jiném státe, lze považovat za podnikání na území ČR. Dle mého názoru tomu tak není.

Návrh nového „herního" zákona již obsahuje absolutní zákaz internetového sázení. Nejsem si jistá, zda v této „e-době" je zákaz on line sázení tím správným řešením. Bylo-li by povoleno jeho provozování i tuzemským sázkovým kancelářím, zamezilo by se alespoň současnému stavu, kdy jsou podmínky pro podnikání v této oblasti nerovné.

Jedním z dalších argumentů proti on line sázení je i ten, že při něm nelze určit, zda je sázející již plnoletý. Tento argument však nemá příliš velkou váhu u obhájců internetového sázení. Ti paradoxně tvrdí, že prostřednictvím internetu je schopnost zamezení sázení osobám mladším 18 let lépe zajištěna, protože ve většině online kanceláří se klient musí zaregistrovat, vložit finanční prostředky (nezbytný je bankovní účet či kreditní karta) a v případě výhry zaslat kopii pasu na centrálu společnosti. Společnosti zároveň poznamenávají, že pro neplnoleté osoby je možnost sázení daleko reálnější v případě návštěvy kamenných sázkových kanceláří. Když totiž sázející navštíví kamennou pobočku a podá tiket, nikdo se neptá na jméno, odkud je nebo kde vzal peníze.

Řešením transparentnosti pro věk hráčů by možná bylo zřízení jakési centrální evidence hráčů, kdy by jim dle elektronického průkazu totožnosti (který dříve či později bude nutností), bylo přiděleno heslo a kód pod kterým by měli možnost se přihlásit do kterékoliv sázkové provozovny na internetu. Tuto evidenci a přidělování registrace by vedla instituce (nejlépe zřízená Evropskou unií), která by měla přístup k průkazům totožnosti. Financována by byla částečně budoucími hráči a společnostmi provozující sázky. Případné zneužití průkazů totožnosti k sázení osobami mladšími 18-ti let by bylo tedy už jenom na zodpovědnosti osob, které jim tyto údaje poskytli.

Češi v minulém roce prosázeli na síti až čtyři miliardy korun, což značí, že on line sázení se i v Česku stává stále větším byznysem. Jelikož v tuzemsku nabízejí internetové sázení pouze zahraniční společnosti, všechny příjmy plynuly do zahraničí a zároveň se v Česku neplatily žádné odvody ani daně, což je trnem v oku Ministerstva financí ČR. Když to ale na druhé straně porovnáme s nákupem přes internet, nikdo se nezamýšlí nad koupí zboží prostřednictvím e-shopů, kdy daně plynou do státu,

kde je webová stránka, provozující prodej registrována. Důležitým prvkem jsou tedy zřejmě odvody. Jelikož však Ministerstvo financí ČR nevydalo žádnému provozovateli internetového sázení licenci, nemůže čekat, že některá z těchto společností odvody bude platit.

Nejdůležitější tedy asi zůstává otázka, jestli společnosti provozující internetové sázení *provozují*, nebo *neprovozují* svoji činnost na území ČR. Je společnost, která je registrovaná na území cizího státu, kterou prostřednictvím internetu „navštíví" český občan, který hraje za české peníze, povinna k licenci a odvodům na území ČR? Zřejmě ne. A když názor Ministerstva financí ČR je opačný a tvrdí, že se společnosti provozující on line sázení dopouští trestného činu nepovoleného podnikání nebo trestného činu neoprávněného provozování loterie a podobné sázkové hry, proč nepodnikají právní kroky ve směru k zrušení nebo zakázání této webové stránky? Zpoplatnění provozování internetových sázkových společností, když už se na nich nedá uplatnit odvodová povinnost, bych viděla v systému „dálničních známek". Provozovatel nákladní dopravy je také registrován v určitém státu, kde odvádí daně, ale pokud chce použít pozemní komunikace na území jiného státu musí zaplatit poplatek – a to v každém z nich. Poplatek by se platil buď paušálně, nebo za každého hráče. Evidence by byla zajištěná na základě registrace hráčů.

Otázkou také je, není-li diskriminační mít na trhu soukromé tuzemské komerční sázkové kanceláře a zároveň zakazovat, resp. neumožnit vstup na trh sázkovým kancelářím ze zahraničí? Jednou z možností by bylo vydat se cestou konzervativní Francie a Německa, kde existuje jedna státní sázková kancelář a žádná jiná soukromá, ať už zahraniční či tuzemská. To by ale v České republice znamenalo, že by zůstala třeba Sazka a například konkurenční TipSport, Chance, Synot nebo Fortuna by musely zaniknout. Z tohoto pohledu nelze říci, že sem zahraniční subjekty nesmí. Buďto tady bude pouze jedna státní loterie (státní monopol), která bude jako jediná poskytovat službu a bude financovat sport a další bohulibé zájmy v této republice anebo musí být připuštěny i cizozemské privátní subjekty.

Tuzemské sázkové kanceláře vyjádřily názor, že nejsou proti sázení přes internet a že jsou na něj připraveny, nebo se alespoň aktivně připravují, a čeká se jen na potřebné změny v zákoně. Z jejich pohledu jde také pravděpodobně o diskriminaci, jelikož zahraničním společnostem je „umožněno" podnikání formou, která jim není k dispozici. Právní úprava jim tuto možnost neposkytuje a stát není schopen zajistit, aby podnikání v této oblasti zaručilo stejné podmínky všem subjektům. Tuzemské sázkové kanceláře ale zároveň odmítají sázení přes hranice.

Než se nastanou potřebné změny legislativě, budou si muset zájemci vsadit české koruny u „papírově" zahraničních společností. Otázkou však je, jestli se tím i samotný sázkař nevystavuje riziku postihu. Sázející, který se účastí na sázkách v zahraničí, se trestného činu nedopouští. Může se však dopustit přestupku, neboť ustanovení § 4 odst. 11 loterijního zákona výslovně uvádí, že účast na sázkách v zahraničí je zakázána. Podle ustanovení § 48 odst. 1 písm. f) loterijního zákona uloží orgán státního

dozoru pokutu do výše 50.000,- Kč účastníku kursových sázek, pokud jednal v rozporu s tímto zákonem. V praxi jsme se zatím s uložením této pokuty nesetkali. Je poměrně zajímavé, že zákon č. 586/1992 Sb., v platném znění, o daních z příjmů s výhrami z loterií, sázek a podobných her provozovaných v zahraniční výslovně počítá, přičemž jsou osvobozeny od daně z příjmů.

Lze tedy říci že v oblasti sázení po internetu neexistuje státní kontrola, o zdanění a odvodech ani nemluvě.

Důležité je vyřešit tuto oblast transparentně, a to nejen v rámci hranic Evropské unie, jelikož hranice v internetovém světě je těžké či dokonce nemožné vymezit.

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VZNIK A ŘEŠENÍ MEZINÁRODNÍHO DVOJÍHO ZDANĚNÍ

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Abstrakt

Mezinárodní dvojí zdanění má od vnitrostátního odlišnou povahu. Jeho vznik není úmyslem zákonodárce a nemá přímé ekonomické ani fiskální důvody. Mezinárodní dvojí zdanění vyplývá z široce pojaté konstrukce daňového domicilu občanů a podniků v jednotlivých státech a z vymezení zdrojů zdanitelných příjmů daňových nerezidentů.

Kličová slova

Vznik dvojího zdanění a jeho členění, Opatření k zamezení dvojího zdanění, Vyloučení dvojího zdanění

Abstract

International double taxation has different inherit from domestic taxation. Its origination is not intendment of law and has not direct economic neither fiscal reasons. International double taxation results from widely conceived construction of tax domicile residents and concerns in particular states and limitation of taxable income of tax non-resident.

Key words

Origination of double taxation and its structuring, Take precautions against prevention of double taxation, Exclusion of double taxation

Úvod

Vznik dvojího zdanění a jeho členění

Dvojí zdanění se definuje jak situace, kdy se stejný předmět daně podrobuje dvojnásobnému či vícenásobnému zdanění stejnou daní nebo daní podobné povahy. Za dvojí zdanění se neoznačuje naopak případ, kdy je stejná transakce zatížena dvěma různými daněmi z důvodu vzniku dvou odlišných předmětů daně. O dvojí zdanění nejde tedy například u převodu nemovitosti, který je jako transakce zatížen transferní daní z převodu nemovitosti a zároveň daní z příjmu (ze zisku) u prodávajícího.

Daňové povinnosti jsou v každém státě stanoveny daňovými zákony, právními akty nejvyšší právní síly, které mohou být upraveny mezinárodními daňovými smlouvami.

Rozeznáváme dvojí zdanění:

- vnitrostátní,

- mezinárodní

Ke vnitrostátnímu dvojímu zdanění dochází zejména uvnitř jednoho státu v rámci jeho daňových předpisů. Příkladem může být zdanění zisku právnické osoby a následně i podílu na zisku (dividendy) vyplácené z již zdaněného zisku. I když daňové subjekty jsou rozdílné, z ekonomického hlediska se jedná o opakované zdanění téže částky.

Mezinárodní dvojí zdanění vzniká tehdy, jestliže lze tentýž příjem (popř. majetek) zdanit ve dvou státech, a to jak ve státě, v němž má příjem svůj zdroj (stát zdroje), tak i ve státě, kde má daňový domicil příjemce daného příjmu (stát příjemce).

Řešení mezinárodního dvojího zdanění nacházíme ve smlouvách o zamezení dvojího zdanění.

Smlouvy o zamezení dvojího zdanění jsou mezinárodní smlouvy, jejichž účelem je zabránit dvojímu zdanění téhož příjmu, popřípadě téhož majetku, jak ve státě zdroje, tak i ve státě příjemce. Také mají zabránit tomu, aby některý příjem nebyl zdaněn vůbec. Tyto smlouvy, oproti vnitrostátním předpisům, podrobněji definují pojem rezident, resp. daňový domicil, a upravují způsoby výměny informací mezi smluvními státy.

Smlouvy o zamezení dvojího zdanění u jednotlivých druhů příjmů stanoví, kterému ze smluvních států – zda státu zdroje nebo státu příjemce – přísluší zdanění.

Přestože je hlavním cílem uzavírání smluv o zamezení dvojího zdanění, jak vyplývá z názvu, zamezení dvojího zdanění osob, na které se smlouva vztahuje, nejedná se o cíl jediný. Dalšími jsou například podpora vzájemného obchodu a investic ve světle současných vývojových trendů pohybu osob a kapitálu, ale v neposlední řadě též zabránění vyhýbání se daňové povinnosti a zabránění daňovým únikům.

Dále můžeme dělit dvojí zdanění na :

o právní

o ekonomické

Právní dvojí zdanění je charakterizováno jako vymáhání srovnatelných daní od jednoho daňového poplatníka ze stejného předmětu zdanění a za stejné období ve dvou nebo více daňových jurisdikcích. Tento problém nastává v případech, kdy jeden stát zdaní příjmy z titulu jejich zdroje na svém území, druhý stát pak zdaní celosvětové příjmy daňového subjektu z toho titulu, že daňový subjekt je podle vnitrostátních zákonů daného státu jeho rezidentem.

Ekonomické dvojí zdanění vzniká tehdy, když různé státy uvalují daň na různé poplatníky, ale na základě stejného předmětu zdanění. K ekonomickému dvojímu zdanění dochází v případě, kdy daňové úřady různých států zdaňují stejný zisk různým daňovým subjektům.

Opatření k zamezení dvojího zdanění

Opatření k zamezení dvojího zdanění můžeme obecně rozdělit do tří kritérií:

- vnitrostátní,
- dvoustranná,
- mnohostranná.

Vnitrostátní opatření

Vnitrostátní zákon jednotlivých zemí může právní i ekonomické dvojí zdanění odstranit tím, že:

- rezidentům umožní na zajištěnou daňovou povinnost započítat daň, kterou ze svých zisků zaplatili v jiné jurisdikci,
- zahraniční příjmy, které byly v jiné jurisdikci dostatečně zdaněny, od daně osvobodí.

Některé země poskytují osvobození od daně z příjmů, které mají jejich rezidenti ze zahraničních zdrojů, automaticky.

Dvoustranná opatření

Jedná se o dvoustranné smlouvy o zamezení dvojího zdanění, které jsou nejvýznamnější v této problematice, neboť upravují vztahy mezi dvěma státy. Česká republika má v současné době uzavřených 73 platných smluv o zamezení dvojího zdanění. Smlouvy s dalšími státy jsou v jednání.

Dohody o dvojím zdanění jsou účinným způsobem, jak zohlednit konkrétní charakteristiky daňového zákonodárství v obou smlouvou dotčených zemích a konkrétní okolnosti jejich vzájemných

hospodářských vztahů tak, aby bylo úplně a účinně zabráněno právnímu a ekonomickému dvojímu zdanění. Určují se v nich přesná kritéria, podle kterých se právo na zdanění vyhradí buď jen jednomu ze smluvních států, nebo se přizná právo na zdanění daňových nerezidentů státu zdroje, čímž fakticky dojde k dohodě o rozdělení daňového výnosu mezi smluvní státy. Smlouvy přitom neumožňují, aby si poplatníci vybrali, ve kterém státě ke zdanění daného přijmu dojde. Tento častý omyl vyplývá z formulací smluv, které na řadě míst uvádějí, že jeden nebo druhý stát může zdanit určitý příjem. Dispozice zde platí vůči smluvnímu státu, nikoli vůči poplatníkovi samotnému.

Mnohostranná opatření

V této oblasti jsou aktivní zejména Organizace spojených národů (OSN) a její orgány, Organizace pro ekonomickou spolupráci a rozvoj (OECD), Evropská unie a další podobné instituce.

Vyloučení dvojího zdanění

V praxi jde o tři základní metody opatření k zamezení dvojího zdanění: zápočet daně, vynětí příjmů ze zdanění a zahrnutí daně zaplacené v zahraničí do daňově odčitatelných nákladů. Metoda zápočtu se dále dělí na zápočet prostý a zápočet úplný a metoda vynětí příjmů na metodu vynětí úplného a metodu vynětí s výhradou progrese. Všechny tyto metody popisuje i ZDP. Příslušnou metodu je třeba před její aplikací dobře pochopit, aby nedocházelo k nesprávným nebo pro poplatníka zbytečně nevýhodným výsledkům.

Metoda vynětí

Metoda vynětí zahraničních příjmů má dvě základní formy – vynětí úplné a vynětí s výhradou progrese. Tato metoda umožňuje vyjmout příjmy zdaněné v zahraničí ze základu daně, tzn. že příjem dosažený v zahraničí se vůbec nezahrne do daňového základu.

- vynětí s výhradou progrese

Ve státě příjemce se do základu daně nezahrne příjem podléhající zdanění v zahraničí, avšak pro výpočet daně se použije sazba, která odpovídá základu daně zvýšenému o tento vyňatý příjem, tedy souhrn všech příjmů i zahraničních. Tato metoda má význam v případech, kdy se daň vybírá za použití progresivní sazby.

V praxi se u této metody používá varianta tzv. „zprůměrování“, která spočívá v tom, že se vypočítá průměrné daňové zatížení připadající na souhrn veškerých dosažených příjmů (domácích i zahraničních) a takto zjištěné procento daně se použije na výpočet daně z domácích příjmů.

Méně častá varianta „nadečtení“ (označována také jako „metoda vrchního dílku“) znamená, že příjem dosažený v tuzemsku je fiktivně přičten na příjmy dosažené v zahraničí, tedy je na něj pohlíženo, jako by byl horním příjmem z celkového souhrnu příjmů. Procento daně, které vyplývá pro danou úroveň příjmů, se pak použije pro zdanění domácího příjmu.

Metodu použijí fyzické osoby – rezidenti v ČR.

- vynětí úplné

Metoda se použije způsobem, že se příjmy (výnosy), které plynou ze zdrojů v zahraničí (podléhající zdanění v zahraničí v souladu s uzavřenou mezinárodní smlouvou) se vyjmou ze zdanění. Možnost využití u tuzemských právnických osob na základ daně či daňovou ztrátu. U fyzických osob, které jsou rezidenty, na úhrn veškerých dílčích ZD snížený o úhrn ztrát před uplatněním nezdanitelných částí ZD a odčitatelných položek.

Metoda zápočtu

Daňová povinnost se sníží o daň z příjmů zaplacenou v zahraničí, a to i když je vyšší než daň vypočtená z příjmů v ČR z příjmů ze zdrojů v zahraničí. Zápočet je možné provést maximálně do výše vzniklé daňové povinnosti. Metoda tak preferuje rovné podmínky tuzemských podnikatelů bez ohledu na zdroj příjmů. Bohužel se ale prakticky nikde ve světě neuplatňuje. Důvod je zcela evidentní. Jestliže je totiž v zahraničí uplatňována vyšší sazba daně než v tuzemsku, pak by to znamenalo, že se stát vzdá části daně z tuzemských příjmů z důvodu, že jinde v zahraničí.

I tato metoda má své varianty, které se liší podle způsobu zápočtu daně zaplacené v zahraničí:

- zápočet plný

Od celkové daně vypočítané v tuzemsku se odečte celá částka daně zaplacená v zahraničí bez ohledu na to, jaká byla v zahraničí uplatněna sazba daně na dané příjmy. Tato metoda je jednodušší avšak ne příliš častá.

- zápočet prostý

Při tomto způsobu se daň zaplacená v zahraničí v souladu se zahraničními předpisy započte na daňovou povinnost v tuzemsku, maximálně však do výše daně, která by v tuzemsku připadala poměrně na zahraniční příjem.

<u>Daň zaplacená v zahraničí jako náklad snižující základ daně</u>

Zahrnutí daně do nákladů je třeba považovat spíše než za metodu zamezující dvojímu zdanění pouze za způsob, jak takové dvojnásobné zdanění zmírnit. Do nákladů nelze zásadně zahrnout daň, která byla

v zahraničí zaplacena v případě, že se podle smlouvy o zamezení dvojího zdanění vztahuje k příjmům, které podléhají metodě vynětí. Daňově uznatelnými náklady nejsou náklady, které byly vynaloženy na příjmy nezahrnované do základu daně.

Tato metoda se využívá v těchto případech:

- pokud s příslušným státem není uzavřena SZDZ
- situace, při které zahraniční daňová povinnost prošla metodou prostého zápočtu, ale částečně nemohla být od daně odečtena, protože byla vyšší než daň, která by připadala na tuzemské příjmy
- situace, kdy poplatník v přiznání z celosvětových příjmů vykázal daňovou ztrátu nebo kdy nulová celková daňová povinnost souvisela např. s uplatněním odčitatelných položek, včetně odečtu daňových ztrát za předchozí zdaňovací období.

Závěr

Poplatník si v praxi mezi metodami zamezení dvojího zdanění nemůže vybrat. Zákon nebo smlouva o zamezení dvojího zdanění vždy určují, kterou z nich musí v daném případě uplatnit. V některých případech však má poplatník možnost zdroj a charakter příjmů přizpůsobit tomu, co je pro něj výhodné a může mít tedy význam, která z metod zamezení dvojího zdanění je výhodnější.

Zkratky:

ČR - Česká republika

ZD - základ daně

ZDP - zákon o dani z příjmu

SZDZ - smlouva o zamezení dvojího zdanění

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[1] BAKEŠ, M. a kol. *Finanční právo*. 4. vyd. Praha: C.H. Beck, 2006. 741 s. ISBN 80-7179-431-7.

[2] RYLOVÁ, Z. *Mezinárodní dvojí zdanění.* 2.vyd. Anag, 2006. 261 s. ISBN 80-7263-354-6.

Právní předpisy:

Zákon č. 586/1992 Sb. o daních z příjmu ve znění pozdějších předpisů

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ZÁKLADNÉ VÝCHODISKÁ EURÓPSKEHO VPLYVU NA PRÁVNU REGULÁCIU FINANČNÉHO TRHU V SR

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Abstrakt

Článok sa zaoberá základnými východiskami európskeho vplyvu na právnu reguláciu finančného trhu v podmienkach Slovenskej republiky. Jeho zámerom je poukázať na vybrané východiská európskeho vplyvu a štrukturovať ich. Vzhľadom na rozsiahlosť problematiky len poukazuje na určité problémové oblasti vhodné pre diskusiu.

Kľúčové slová

dohľad nad finančným trhom v SR, právna regulácia, základné východiská európskeho vplyvu, právne východiská, inštitucionálne východiská.

Abstract

The article deals with the basic principles of impact of the European law on the law regulation of financial markets in conditions of Slovak republic. The aim is to mention on the selected principles of the European effect and to make a framework of them. In consideration of huge issue, the author as tried to approach only its specific questions suitable for discussion.

Key words

The supervision of financial market in the Slovak republic, the law regulation, the main principles of the European effect, the law principles, the institutional principles.

Výsledkom integračných procesov vychádzajúcich z princípu nadštátnosti bol vznik Európskej únie.

Jednou z jej základných požiadaviek bola kreácia jednotného vnútorného trhu[1] medzi členskými štátmi, ktorý je definovaný v Zmluve o založení Európskeho spoločenstva ako oblasť bez vnútorných hraníc, v ktorej je možný voľný pohyb tovarov, osôb, služieb a kapitálu. Významnou prioritou Európskej únie (ďalej len EÚ) bola a aj je integrácia európskych finančných trhov, ktorej perspektívy rozvoja tvoria prínos rôznych výhod výrobcom, podnikom a spotrebiteľom. V danom integrovanom trhu má a bude mať výsostné postavenie integrovaný dohľad. Národná banka Slovenska (ďalej len NBS) je koordinátorom vzťahov na finančných trhoch Slovenskej republiky (ďalej len SR) s EÚ, pričom v rámci plnenia jednotlivých článkov Európskej dohody o pridružení aktívne napomáha procesu harmonizácie a postupnej kompatibility právneho a ekonomického prostredia v rámci jednotlivých sektorov finančného trhu, ako aj dohľadu s legislatívnym rámcom platným v EÚ.

Pre správne pochopenie v krátkosti poukážem na pojem regulácie, resp. právnej regulácie finančného trhu. Je samozrejmé, že ide o rozsiahly pojem, ktorý v sebe subsumuje viacero definícií. V podmienkach SR vidieť výrazne regulačnú činnosť na finančnom trhu v postavení orgánu dohľadu pri medzinárodnej spolupráci na tvorbe vyspelejších systémov regulácie jednotlivých subjektov a návrhov smerníc. V nadväznosti na to sa vynára aj národná spolupráca s legislatívnymi orgánmi, spočívajúca aj v implementácií smerníc (najmä EÚ) do právnych predpisov SR, čo výrazne ovplyvňuje fungovanie finančných trhov. Z toho možno vyvodiť záver, že reguláciou sú stanovované pravidlá, po ktorých nasleduje aplikácia dohľadu, teda permanentnej kontroly ich dodržiavania, pričom v prípade zistenia nedostatkov má orgán dohľadu k dispozícii zákonom stanovené sankcie, ktoré buď musia alebo môžu voči dohliadanému subjektu uplatniť. Z celého komplexu informácií je otázne, či tvorí právnu reguláciu len normotvorná činnosť. Odpoveď vidieť práve v teoretickom vymedzení pojmu „právna regulácia“, resp. „regulácia“.

Vychádzajúc z analýzy jednotlivých odborných definícií[2], z právnej úpravy SR, z historického hľadiska a taktiež z iných odborných publikácií by som pre ujasnenie si terminológie abstrahovala definíciu „**regulácie**“, resp. „**právnej regulácie**“ finančného trhu v širšom a užšom chápaní prostredníctvom teoretickej syntézy. V **širšom ponímaní** zahŕňa v sebe uvedený pojem komplexné stanovovanie pravidiel správania sa jednotlivým subjektom, kontrolu ich dodržiavania a taktiež dohliadanie nad ich činnosťou. Tzn., že na jednej strane je tvorcom regulačných noriem, a to buď vo forme vydávania všeobecne záväzných právnych predpisov, na ktorú je splnomocňuje priamo Ústava SR alebo v rámci spolupráce na vytváraní právnych noriem v oblasti finančného trhu s Ministerstvom financií SR a Ministerstvom práce, sociálnych vecí a rodiny SR (pri príprave návrhov zákonov a iných všeobecne

[1] pozri Barnard, C., Scott, J. The law of the Single European Market. Oxford: Hart Publishing 2002.
[2] pozri napr. Králik, J., Jakubovič, D. Finančné právo. Bratislava: VEDA 2004, s. 385, Balko, L. Bankové právo. Bratislava: Elita 2000, s. 43, Revenda, Z. Centrální bankovnictví. Praha: Management Press 1999, s. 119.

záväzných právnych predpisov). Na druhej strane je náplňou uvedeného pojmu povoľovacia činnosť, vykonávanie kontroly dodržiavania zákonných a podzákonných právnych noriem, ktoré sa týkajú činnosti kontrolovaných subjektov, v prípade ich porušovania možnosť sankcionovania a taktiež vykonávanie úplnej dohliadacej činnosti. V **užšom chápaní** v rámci SR patrí do pojmu „regulácia" resp. „právna regulácia" finančného trhu vykonávanie dohľadu nad celým finančným trhom podľa zákona č. 747/2004 Z.z. o dohľade nad finančným trhom. Uvedený užší pojem sa vykryštalizoval najmä po významnej zmene v rámci vývoja dohľadu nad finančným trhom v SR, a to po jeho integrácií uskutočnenej v roku 2006. Pre potrebu daného článku budem používať chápanie daného pojmu len v užšom slova zmysle.

Základné východiská európskeho, ale aj medzinárodného vplyvu na právnu reguláciu jednotlivých segmentov finančného trhu v SR rozdelím na:

- **právne, resp. legislatívne,**
- **inštitucionálne**.

Vychádzajúc z **legislatívnej, resp. právnej bázy** efektívne fungujúci voľný pohyb služieb je založený na liberalizácií bankových, poisťovacích služieb a voľného pohybu kapitálu, konkurencii, pričom musí dodržiavať zásadu rovnakého zaobchádzania a zákazu diskriminácie. Na základe daného konštatovania je zamedzené obmedzovanie pohybu kapitálu a platieb medzi jednotlivými členskými štátmi[3]. Samotné primárne právo EÚ nemohlo zabezpečiť sformovanie vnútorného trhu. Z toho dôvodu bolo detailnejšie upravené sekundárnou legislatívou vytvorenou orgánmi Európskych spoločenstiev (ďalej len ES). Vzhľadom na rozsiahlosť zmien spôsobených implementáciou európskeho práva do finančných trhov zúžim analýzu európskych aspektov len na právnu reguláciu finančného trhu v podmienkach SR.

Za začiatok kreovania uvedeného dlhodobého procesu s cieľom tvorby spoločného jednotného európskeho trhu považujem vydanie ***Bielej knihy ES***[4] v roku 1985. Tou boli rozčlenené dôležité smernice EÚ v oblasti finančných služieb do dvoch skupín, pričom kritériom ich tvorby bola logická postupnosť ich prijímania v rámci harmonizácie právneho poriadku SR s právom EÚ. Smernice EÚ, ktoré spadajú do prvej etapy majú prevažne všeobecný charakter, pričom obsahujú bazálne princípy, podmienky a postupy, z ktorých vychádza vypracovanie a aplikovania podrobnejšej právnej úpravy. Smernice EÚ druhej etapy majú byť finálnymi v rámci procesu celkovej harmonizácie právnych predpisov pre oblasť finančných trhov. Z hľadiska ich implementácie v praxi SR vidíme, že uvedená časová postupnosť ich prijímania podľa rozčlenenia nie je dodržiavaná a teda sú zapracované niektoré z

[3] pozri čl. 56 Zmluvy o založení Európskych spoločenstiev

[4] Z hľadiska analýzy súčasného stavu budem ďalej vychádzať z European Commission. White paper: Financial service policy 2005-2010. {SEC(2005) 1574}. Brusel zo dňa 1.12.2005. KOM ES (2005) 629 v konečnom znení.

prvej a iné aj z druhej skupiny[5].

Ďalšími významnými rozsiahlymi dokumentmi je ***Zelená kniha*** o politike finančných služieb a na ne nadväzujúci ***Akčný plán pre finančné služby***. Zovšeobecnene možno za ich prvoradý cieľ na úseku dohľadu zaradiť zaistenie kontinuálnej stability európskych finančných trhov, na to v nadväznosti presadiť kooperáciu pri dohľade a podchytiť systematické a inštitucionálne riziká. Dohliadací, resp. regulačný orgán má primerane zvládať uvedené riziká, včas reagovať na vznik nových druhov rizík a vznikajúce formy trhov. Taktiež je potrebné rozvíjať v jeho pôsobnosti medzinárodnú a medzisegmentovú spoluprácu, informačné toky a aktuálne problémy konzultovať s inými orgánmi dohľadu. Pre ochranu investorov je dôležitá tvorba efektívneho a transparentného prostredia na finančných trhoch. V podmienkach SR vidíme výrazný posun v rámci implementácie uvedených, ako aj ostatných relevantných právnych úprav EÚ do národnej legislatívy, najmä pri vybraných formách výkonu dohľadu v SR a ich právnych normách, v ktorých sú zapracované.

Požiadavka EÚ na nezávislosť regulačného orgánu bola implementovaná priamo v Ústave SR, ako aj v zákone o NBS, čo hodnotím pozitívne. Taktiež bola zrealizovaná potreba EÚ objasniť a optimalizovať zodpovednosti domovských, resp. hostiteľských orgánov dohľadu a s tým súvisiace delegovanie jednotlivých úloh a zodpovedností pri súčasnom zabezpečení a to nielen vo všeobecnom zákone o dohľade nad finančným trhom, ale špecificky v jednotlivých osobitných právnych predpisoch. Komplexne možno konštatovať, že finančné trhy sa budú naďalej rozvíjať, a to najmä smerom nadnárodným až medzinárodným. Z toho vyplýva skutočnosť, že vplyv EÚ[6], resp. celkový proces harmonizácie bude výrazný a neustále aktuálny.Čo sa týka exportu finančných služieb, výrazne narastá. Od roku 1990 len do roku 2000 vzrástol v EÚ zhruba 3- násobne. V súčasnom období sa cezhranične poskytujú rôzne typy kľúčových finančných služieb, medzi ktoré patrí napríklad oblasť komerčného bankovníctva, investičného bankovníctva, hypotekárnych úverov, poistenia správy aktív, finančných informácií alebo lízingových služieb.

Celková integrácia celoeurópskych trhov s cennými papiermi, s medzibankovými depozitmi, ako aj integrácia trhu dlhopisov denominovaných v euro vedie k vytváraniu nových nadnárodných podnikov v EÚ, celoeurópskych indexov, ktoré sa používajú na finančných a kapitálových trhoch a k zrýchleniu procesu zjednotenia systému búrz.

V prvej fáze procesu integrácie hlavných európskych búrz išlo najmä o zjednotenie väčších búrz ako napríklad londýnskej, frankfurtskej, štokholmskej. Druhá fáza sa sústreďuje na integráciu menších búrz

[5] pozri začlenenie jednotlivých smerníc EÚ do spomenutých dvoch etáp: Fendeková, I., Hetteš, F. Európske bankové smernice a ich implementácia v Slovenskej republike. In Biatec č. 7/2000, s. 5 a nasl.

[6] Implementovanie jednotlivých smerníc EÚ v oblasti bankovníctva a finančných služieb v SR je rozsiahly. Pre podrobnejšie pochopenie pozri taxatívnych spôsobom vymedzené implementované smernice EÚ v problémovej oblasti - Balko, L., Babčák, V. et al.: Finančné právo. Bratislava: Poradca podnikateľa, s.r.o., 2006, s. 640 a nasl.

ako sú varšavská alebo viedenská. Tento proces vedie celkovo k významnej zmene úplného smerovania toku peňazí[7].

Napriek prebiehajúcej harmonizácií s právom EÚ, naďalej pretrvávajú určité charakteristické rozdiely z pohľadu toku peňazí, typické pre EÚ. Jednou z nich sú daňové rozdiely medzi jednotlivými členskými štátmi EÚ. Bolo to vidieť napr. na väčšine nemeckých dlhových cenných papieroch, ktoré boli emitované za pomoci zahraničných pobočiek, kde je zdanenie o tretinu nižšie. Taktiež možnosti daňových rajov sú neustále využívané veľkými, ale aj strednými firmami a to aj napriek smernici OECD (Organizácia pre hospodársku spoluprácu a rozvoj) z roku 2001 o boji proti daňovým rajom.

Vytvorením jednotného trhu finančných služieb, ktorý zahrňuje celú EÚ, sa vytvorili jednotné pravidlá pre každú oblasť podnikania na kapitálovom trhu, usmernila sa činnosť komerčných bánk, zohľadnila sa pozícia Európskej centrálnej banky a národných bánk v oblasti inflačného cieľa a zároveň sa vytvoril priestor na to, aby jednotné pravidlá emitentov akcií, účtovných štandardov, hodnotenia podnikov a hodnotenia bánk zabezpečili minimalizáciu rizík vyplývajúcich z otrasov na bankovom a kapitálovom trhu.

Do **inštitucionálneho východiska** európskeho vplyvu právnej regulácie finančných trhov v podmienkach SR patria jednotlivé subjekty, s ktorými NBS pri výkone dohľadu úzko spolupracuje, ale aj tie, ktoré majú výrazný dosah na zmeny našej právnej úpravy. Pre vymedzenie tých najdôležitejších ich rozdelím podľa značnej pôsobnosti v rámci určitého segmentu finančného trhu.

V oblasti ***bankového dohľadu*** a regulácie bankového sektora majú osobitné postavenie najmä Bazilejská banka pre medzinárodné zúčtovanie a jej Bazilejský výbor bankového dohľadu (Basel Committee on Banking Supervision), Európsky bankový výbor (European Banking Committee) a Výbor európskych orgánov bankového dohľadu (Committee of European Banking Supervisors). Na úseku ***dohľadu nad kapitálovým trhom*** pôsobia dva podstatné výbory, a to Výbor európskych regulátorov cenných papierov (Committee of European Securities Regulators) a Európsky výbor pre cenné papiere (European Securities Committee). Ako posledný uvediem inštitucionálny európsky vplyv na ***dohľad nad poistným trhom***, v rámci ktorého poukážeme najmä na dva výbory. Prvý vystupuje v pozícií poradného orgánu Európskej komisie, a tým je Európsky výbor pre poisťovníctvo a zamestnanecké penzijné fondy (European Insurance and Occupational Pensions Committee). Druhým je Výbor európskych orgánov dohľadu nad poisťovníctvom a zamestnaneckými penzijnými fondmi (Committee of European Insurance and Pensions Supervisors), ktorý je prevažne zameraný koordináciu dohliadacích orgánov v EÚ.

Komplexne vidieť, že vplyv EÚ je značný a neustále trvajúci. Diskutabilným ostáva, do akej miery bude

[7] viď BALKO L. a kol. Právna úprava finančného trhu v slovenskom právnom systéme- Právo finančného trhu. EPOS. 2003. s. 365

mať v budúcnosti záujem ovplyvňovať právny poriadok SR v oblasti finančných trhov a dohľadu nad nimi.

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[14] www.ecb.int

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DARCOVSTVO ĽUDSKÝCH ORGÁNOV A TRANSPLANTÁCIE Z POHĽADU NORIEM SPRÁVNEHO PRÁVA

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Abstrakt

V prvej časti príspevku sú objasnené rozdiely medzi slovenskou a českou právnou úpravou týkajúce sa používania pojmu transplantácia, v druhej časti je vysvetlená podstata základných predpokladov pre odber a následnú transplantáciu orgánov a tkanív z tela mŕtveho darcu, a to súhlas s odberom orgánov po smrti a určenie smrti organizmu. Sú v ňom priblížené aktuálne zmeny v právnych predpisoch, obsahom ktorých sú právne normy upravujúce uvedenú problematiku. Objasňuje sa v ňom vplyv uvedených predpokladov na transplantačnú aktivitu v Slovenskej republike.

Kľúčové slová

Zdravotnícke právo, darcovstvo, odber, transplantácia, transplantácia ex morturo, predpokladaný súhlas, určenie smrti mozgu, vplyv príbuzných zomretého na odber.

Abstract

In the first part of the article we are focusing mainly on differences between Czech and Slovak legislation related to the usage of the term ‚transplantation'; the second part of the article deals with basic predispositions for excision and the following transplantation of organs and tissues from a deceased donor, e.g. consent with excision of organs after death and stating death of the organism. The article points out the latest changes in legislation, dealing mainly with legal provisions regulating given issues. It clarifies the influence of the abovementioned predispositions to the transplant activities in the Slovak Republic.

Key words

Healthcare legislation, donation, excision, transplantation, transplantation ‚ex morturo', expected consent, stating of death of the brain, influence of relatives of the deceased to excision.

Významnou súčasťou správneho práva hmotného sú o. i. právne normy, predmetom úpravy ktorých sú právne vzťahy v oblasti zdravotníctva. Na označenie súboru, komplexu týchto právnych noriem sa v súčasnosti napriek tomu, že nemôžeme hovoriť kodifikácii, čoraz častejšie používa výraz zdravotnícke právo, resp. medicínske právo.[1] V odbornej literatúre sa vzhľadom na dopad európskeho medzinárodného i nadnárodného práva na vnútroštátne zdravotníctvo členských štátov Európskej únie používa aj výraz európske zdravotnícke právo.[2]

Uvedené právne normy sú obsiahnuté v množstve právnych predpisov rôznej právnej sily. Napriek skutočnosti, že väčšina z nich je prameňom správneho práva, medicínske právo má aj občianskoprávne prvky. Do tejto oblasti významne zasahujú aj právne predpisy z oblasti trestného práva hmotného i procesného a iné.

Takýto multidisciplinárny charakter má i špecifická súčasť zdravotníckeho práva, a to odoberanie a transplantácie orgánov, tkanív a buniek.

Multidisciplinárnosť nespočíva len v právnej úprave tejto problematiky právnymi normami viacerých právnych odvetví. Otázky, ktoré vznikajú v súvislosti odbermi a transplantáciami, sú nie len medicínskymi a právnymi ale i etickými, sú otázkami morálky i náboženstva.

Z právnych predpisov upravujúcich túto problematiku, z ich prepracovanosti a kvality je možné vyvodiť i zmýšľanie, názory a istý stupeň vyspelosti národa, ktorý daný právny predpis prijal.

Na kvalitu transplantačného programu teda vplýva i právne usporiadanie štátu a tradície toho ktorého národa. Okrem spomínaných okolností nemožno opomenúť verejnú mienku, a to vzhľadom na to, že žiadne iné problémy sa tak tesne nedotýkajú verejnej mienky ako práve odbery a transplantácie orgánov.

Netreba však zabudnúť na to, že práve verejná mienka je akýmsi zrkadlom, v ktorom nájdu svoj konečný odraz etika, morálka, náboženstvo, teda všetky tie oblasti, v ktorých sa kumulujú názory ľudí hlásiacich sa ku konkrétnemu národu a tvoriacich jeho myšlienkový základ.[3]

Darcovstvo, odoberanie, testovanie, spracovanie, konzervovanie, skladovanie, prenos alebo distribúcia tkanív alebo orgánov je v zmysle účinného zákona č. 576/2004 Z. z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov[4] (ďalej len zák. č. 576/2004 Z. z.) spolu s biomedicínskym výskumom a sterilizáciou považované za zdravotnú starostlivosť v osobitných prípadoch.[5]

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1 Pozn. autora.
2 KŘEPELKA, F.: *Evropské zdravotnické právo,* Praha: LexisNexis CZ s. r. o., 2004, s. 5.
3 Pozn. autora.
4 Porov.: § 35-39d zák. č. 576/2004 Z. z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov (ďalej len zák. č. 576/2004 Z. z.)
5 Porov.: 4. časť zák. č. 576/2004 Z. z.

Zákon síce pojem transplantácie používa,[6] no nedefinuje ho. Odborníci z oblasti medicíny však pojmovo pri jeho výklade rozlišujú medzi odberom a transplantáciou, pričom pojmom transplantácia nahrádzajú tzv. prenos, ktorý v zák. č. 576/2004 Z. z. definovaný je, a to ako proces, pri ktorom sa tkanivá, orgány alebo bunky prenášajú do tela príjemcu.[7] Významový rozdiel medzi transplantáciou a odberom vyplýva aj z používania pojmov zo strany odborníkov, a to transplantačná aktivita a odberová aktivita.[8]

V porovnaní s uvedeným zák. č. 285/2002 Sb. o darování, odberech a transplantaci tkání a orgánů a o změně některých zákonů (transplantační zákon) v znení neskorších predpisov (ďalej len zák. č. 285/2004 Z. z.) účinný v Českej republike pojem transplantácia vysvetľuje, a to ako proces smerujúci ku zachovaniu odobratého tkaniva alebo orgánu v stálej kvalite pre implantáciu a implantácia tkaniva alebo orgánu príjemcovi, vrátane všetkých postupov prípravy, preparovania a uchovania tkanív a orgánov.[9] Pri transplantácii teda ide o už odobraté tkanivo, resp. orgán.

Z hľadiska používania odborných výrazov tak, aby sa zachoval ich význam, možno preto zák. č. 285/2002 Sb. považovať za presnejší. Už v § 1 tohto zákona je uvedené rozlišovanie zrejmé, keďže hovorí, že „tento zákon upravuje podmienky darovania, odberov a transplantácií tkanív a orgánov ľudského pôvodu vykonávaných výhradne za účelom poskytovania zdravotnej starostlivosti." Definíciu transplantácií u nás neobsahujú ani ďalšie právne predpisy.[10]

Česká právna úprava je presnejšia aj v tom, že priamo v predmete úpravy zákona zdôrazňuje ľudský pôvod orgánov a tkanív, ktoré sa darujú, odoberajú a transplantujú.[11] Zák. č. 576/2004 Z. z. ľudský pôvod orgánov, tkanív alebo buniek uvádza len v definícii darcovstva.[12] Takéto upresnenie a definíciu darcovstva neobsahovalo ani pôvodné znenie zák. č. 576/2004 Z. z. ani zák. č. 277/1994 Z. z. o zdravotnej starostlivosti v znení neskorších predpisov (ďalej len zák. č. 277/1994 Z. z.), i keď pôvod ľudského orgánu a tkaniva bol jasný, vyplýval z definície darcu, pod ktorým sa rozumela živá alebo mŕtva osoba.[13]

Podľa môjho názoru, účelom upresnenia pôvodcu orgánu alebo tkaniva v zák. č. 576/2004 Z. z. aj zák. č. 285/2002 Sb. bolo zrejme zdôraznenie existencie aj iných druhov transplantácií, a to predovšetkým tzv.

6 Porov.: § 35 ods. 1 zák. č. 576/2004 Z. z.
7 Porov. § 35 ods. 2 zák. č. 576/2004 Z. z.
8 Porov.: KUBA, D.: *Transplantačná a odberová aktivita 2005.* In: Orgánové transplantácie: multidisciplinárny časopis pre transplantačnú problematiku. Martin: Transplantačné centrum, č. 1-2, 2006, s. 17.
9 Porov.: § 2 písm. a) zák. č. 285/2002 Sb. o darování, odberech a transplantaci tkání a orgánů a o změně některých zákonů (transplantační zákon) v znení neskorších predpisov (ďalej len zák. č. 285/2004 Z. z.).
10 Porov.: Nariadenie vlády č. 20/2007 Z. z. o podrobnostiach o odberoch, darcovstve tkanív a buniek; neobsahuje ju ani Odborné usmernenie Ministerstva zdravotníctva Slovenskej republiky o darcovstve, odberoch ľudských orgánov z tiel živých a mŕtvych darcov, o testovaní darcov a o prenose ľudských orgánov na príjemcu č. 28610/2006-OZSO (ďalej len odborné usmernenie z roku 2006).
11 Porov.: § 1 zák. č. 285/2002 Sb.
12 Porov.: § 35 ods. 2 písm. a) zák. č. 576/2004 Z. z.
13 Porov.: § 35 ods. 3 zák. č. 576/2004 Z. z. v pôvodnom znení.

xenotransplantácií, pri ktorých je darcom zviera.[14] Tieto nie sú upravené žiadnym právnym predpisom, prevažujú pri nich medicínske a etické aspekty nad právnymi.

Ďalším druhom transplantácií sú tzv. autotransplantácie, pri ktorých je darca súčasne príjemcom. Právne problémy pri nich v podstate nevznikajú.[15]

Podrobnosť zák. č. 285/2002 Sb. v uvedených súvislostiach považujem za vhodnú. Napriek tomu je mu uvedená črta vytýkaná, a to predovšetkým v časti týkajúcej sa pravidiel pre stanovenie smrti mozgu.

Napriek vysvetleniu významu pojmu transplantácia je tento v odbornej literatúre používaný aj vo význame odberu orgánu.[16] Príkladom toho je spojenie tzv. transplantácie ex vivo s odberom orgánov za života darcu a tzv. transplantácie ex morturo s odberom orgánov urobeným po smrti.[17]

Domnievam sa, že správnejšie je použitie výrazov ako napr. posmrtné odobratie orgánu za účelom transplantácie alebo odobratie orgánu z tela živého darcu za účelom transplantácie.[18] Zodpovedá tomu aj znenie zák. č. 576/2004 Z. z., podľa ktorého „odobrať orgány, tkanivá a bunky z tela živého darcu na účely ich prenosu do tela inej osoby...“.,[19] resp. znenie zák. č. 285/2002 Sb., podľa ktorého „odberom sa rozumejú všetky zákroky nutné pre odber ľudských tkanív alebo orgánov určených pre transplantáciu...“.[20] Aj v zmysle lekárskeho slovníka je transplantácia (lat. transplantatio) umelé prenesenie tkaniva z jedného miesta organizmu na iné alebo na iný organizmus.[21]

Príkladom spájania odberu a poskytnutia, prenosu orgánu či tkaniva príjemcovi je aj používanie pojmov explantácia a implantácia, ktoré sú označované ako dva úkony, ktoré v sebe zahŕňa transplantácia.[22] Explantácia je chápaná ako odber orgánu či tkaniva od darcu a implantácia ako poskytnutie orgánu či tkaniva príjemcovi.[23]

Predmetom tohto príspevku však nie je zaoberať sa pojmovým aparátom, ale vysvetlenie základných pojmov a rozdiely v ich zakotvení v právnej úprave Českej republiky a Slovenskej republiky považujem za základný predpoklad pre objasnenie problematiky transplantácií ex morturo, na ktoré je tento príspevok zameraný.[24]

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14 Pozn. autora.

15 Porov.: VLČEK, R.– HRUBEŠOVÁ, Z.: *Zdravotnícke právo*. Bratislava: Ing. Miroslav Mračko, EPOS, 2007, s. 163; Zák. č. 576/2004 Z. z. sa im podrobne nevenuje, napriek tomu ich podstata je vysvetlená, a to v rámci definície tzv. autológneho použitia (§ 35 ods. 2 písm. n), ktorým je odobratie tkanív alebo buniek jednej osobe a ich použitie u tej istej osoby.

16 Pozn. autora.

17 Porov.: BRYCHTOVÁ, K.: *Příspěvek k problematice transplantačního zákona.* In: Správní právo. Praha: Ministerstvo vnitra, č. 5-6, 2002, s. 301.

18 Pozn. autora.

19 Porov.: § 36 ods. 1 zák. č. 576/2004 Z. z.

20 Porov.: § 2 písm. h) zák. č. 285/2002 Sb.

21 Porov.: KÁBRT, V.-VALACH, V.: *Stručný lékařský slovník.* Praha: Avicenum, 1997.

22 Pozn. autora.

23 Porov.: BRYCHTOVÁ, K.: *Příspěvek k problematice transplantačního zákona.* In: Správní právo. Praha: Ministerstvo vnitra, č. 5-6, 2002, s. 307.

24 Pozn. autora.

Mnoho nie len právnych ale aj etických otázok je spojených predovšetkým s transplantáciami ex morturo. Tu je základným problémom predovšetkým problematika definície smrti jedinca, konkrétne vyriešenie otázky, čo sa považuje za smrť človeka, a síce, či ako smrť je uznávaná smrť mozgu, alebo je ňou zastavenie srdcovej akcie, a teda celého krvného obehu.[25]

Ďalším základným predpokladom je tu vyjadrenie súhlasu osoby s odberom po smrti, prípadne otázka nahradenia tohto súhlasu súhlasom iných osôb.[26]

Čo sa týka prvého okruhu problémov, súčasný právny stav je jasný. Je upravený zák. č. 576/2004 Z. z.[27] a odborným usmernením Ministerstva zdravotníctva SR o darcovstve, odberoch ľudských orgánov z tiel živých i mŕtvych darcov, o testovaní darcov a o prenose ľudských orgánov z tiel živých a mŕtvych darcov na príjemcu č. 28610/2006 OZSO (ďalej len odborné usmernenie z roku 2006, resp. účinné odborné usmernenie). Týmto odborným usmernením bolo zrušené odborné usmernenie Ministerstva zdravotníctva SR č. SZS-4391/1996-Po o odberoch orgánov z tiel mŕtvych darcov (ďalej len odborné usmernenie z roku 1996, resp. zrušené odborné usmernenie).[28] Zároveň bola Úradom pre dohľad nad zdravotnou starostlivosťou vydaná Smernica č. 8/2007 o postupe pri odberoch tkanív a buniek z tiel mŕtvych darcov.[29]

Podstatnou zmenou, ktorú zaviedlo účinné odborné usmernenie je tá, že predmetom jeho úpravy sú nie len odbery z tiel mŕtvych ale aj živých darcov. V zák. č. 576/2004 z. z. je uvedené, že „lekár je povinný zisťovať smrť v súlade so súčasnými poznatkami vedy.“[30] Podobné ustanovenie obsahoval v podstate aj zák. č. 277/1994 Z. z.[31] Konkrétne kritériá pre určenie smrti mozgu sú však už uvedené v účinnom odbornom usmernení.[32] Uvedené riešenie je považované za veľmi výhodné z toho hľadiska, že v prípade ak by sa v budúcnosti prípadne zmenili podmienky pre určenie smrti, samotné transplantácie by sa realizovali podľa poznatkov medicínskej vedy aktuálnych v danom období. Ak by v zákone bolo len ustanovenie, ktoré presne hovorí, kedy sa osoba považuje za mŕtvu, pričom by neobsahovalo dodatok, resp. usmernenie, že lekár je povinný zisťovať smrť v súlade so súčasnými poznatkami lekárskej vedy, brzdilo by to realizáciu transplantácií, teda muselo by sa vyčkať, kým sa zmení formulácia chápania zisťovania smrti v zákone, t. j. kým sa znenie zákona prispôsobí potrebám a poznatkom praxe, inak by bola realizácia transplantácií v praxi protiprávna.[33]

25 Porov.: LACA, Ľ.: *Právne a etické aspekty transplantácií.* In: Zdravotnícke noviny. Bratislava: Sanoma Magazines Slovakia s. r. o., č. 34-35, 1996, s. 2.
26 Pozn. autora.
27 Porov. § 43 zák. č. 576/2004 Z. z.
28 Uverejnené vo Vestníku MZ SR, čiastka 1-2/1997.
29 Pozn. autora.
30 Porov.: § 43 ods. 1 zák. č. 576/2004 Z. z.
31 Porov.: § 52 ods. 1, druhá veta zák. č. 277/1994 Z. z.
32 Porov.: čl. 7 odborného usmernenia z roku 2006.
33 Porov.: DRGONEC, J.-HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1998, s. 125.

Z tohto dôvodu je zák. č. 277/1994 Z. z. (vzhľadom na podobnú koncepciu to platí aj pre zák. č. 576/2004 Z. z.)[34] považovaný za jednu z najspoľahlivejších a najsilnejších právnych noriem na svete,[35] a to nie len čo sa týka určovania momentu smrti, ale aj z hľadiska transplantácií ex morturo.[36]

Výhoda uvedenej formulácie sa potvrdila v nedávnej dobe, keďže v zmysle účinného odborného usmernenia sa zdôrazňuje klinická diagnostika mozgovej smrti bez nevyhnutnosti jej potvrdenia tzv. mozgovou panangiografiou. Klinické vyšetrenie mozgovej smrti musí byť vykonané dvakrát s časovým odstupom v závislosti od toho, či ide o dieťa (tu sa rozlišuje aj jeho vek) alebo o dospelého. Len v prípade nejednoznačného klinického vyšetrenia alebo v prípade nemožnosti vylúčiť prítomnosť kontraindikácií odberu, je potrebné potvrdiť diagnózu mozgovej smrti konfirmačným testom. Ide o jedenkrát vykonanú sériografickú cerebrálnu panagiografiu alebo mozgovú perfúznu scintigrafiu ako dôkaz zastavenia mozgovej cirkulácie a EEG vyšetrenie alebo vyšetrenie sluchových kmeňových evokovaných potenciálov. Napriek tomu u detí do jedného roku veku sa musí jeden z týchto testov vykonať povinne.[37]

V zmysle zrušeného odborného usmernenia nezvratnosť mozgovej smrti však musela byť potvrdená jedenkrát vykonanou mozgovou panangiografiou, kde sa potvrdilo selektívne zastavenie cerebrálnej cirkulácie.[38]

Horeuvedené kritériá sú v súlade s legislatívou Európskej únie a smernicami Európskej dializačnej a transplantačnej spoločnosti a Európskej spoločnosti pre orgánové transplantácie.

Cieľom tejto zmeny je možnosť klinicky diagnostikovať mozgovú smrť aj u potenciálnych darcov, u ktorých aj pri ťažkom mozgovom poranení nezlučiteľnom so životom, nedochádza ku kompletnej zástave mozgovej cirkulácie.[39] Dôkazom selektívneho zastavenia mozgovej cirkulácie[40] je pritom práve sériografická panangiografia ako angiografické vyšetrenie, ktoré dokazuje skutočnosť, že mozgové cievy nie sú priechodné. Zmena v povinnosti potvrdenia nezvratnosti všetkých mozgových funkcií sa prejavila aj v pozmenenom obsahu tzv. zápisnice o smrti mozgu.[41]

Zák. č. 285/2002 Sb. je v tomto smere viac podrobnejší[42] a vzhľadom na právnu istotu osôb zúčastnených na transplantáciách považoval český zákonodarca za potrebné vymedziť bližšie

34 Pozn. autora.

35 Porov.: LACA, Ľ.: *Právne a etické aspekty transplantácií.* In: Zdravotnícke noviny. Bratislava: Sanoma Magazines Slovakia s.r.o., č. 34-35, 1996, s. 2.

36 Pozn. autora.

37 Porov.: čl. 7 ods. 2 a nasl. odborného usmernenia z roku 2006.

38 Pozn. autora.

39 Porov.: LACA, Ľ.: *Súčasná legislatíva transplantácií orgánov, tkanív a buniek.* In: Orgánové transplantácie: multidisciplinárny časopis pre transplantačnú problematiku. Martin: Transplantačné centrum, č. 2, 2005, s. 5.

40 Porov. čl. 1 ods. 3 odborného usmernenia Ministerstva zdravotníctva SR č. SZS-4391/1996-Po o odberoch orgánov z tiel mŕtvych darcov (ďalej len odborné usmernenie z roku 1996).

41 Porov.: Príloha č. 1 k odbornému usmerneniu z roku 2006; v zmysle § 52 ods. 4 zák. č. 277/1994 Z. z. a odborného usmernenia z roku 1996 išlo o tzv. zápisnicu o ireverzibilite mozgovej smrti.

42 Pozn. autora.

podmienky a postupy pri zisťovaní smrti priamo v zákone.[43] Tomuto zákonu bola už v čase jeho prijatia vytýkaná prílišná podrobnosť. Odôvodňovaná bola tým, že stanovenie smrti mozgu je vysoko špeciálny medicínsky úkon, preto fakt, že to, ako sa má správne stanoviť, nemá byť v zákone, lebo to nie je vecne správne. V zákone by malo byť len napísané, že sa musia dodržať všetky pravidlá, ale to, ako sa mozgová smrť stanoví, by malo byť vo vyhláške zákona.[44] Uvedená právna úprava neobsahuje rozoberané všeobecné pravidlo, ktoré je uvedené v zák. č. 576/2004 Z. z., čo by prispelo k jeho väčšej flexibilnosti.[45]
Zák. č. 285/2002 Sb. priniesol aj ďalšie zmeny, ktoré sa týkajú napr. času vykonania pitvy mŕtveho tela, ďalej tzv. Národného registra osôb nesúhlasiacich s posmrtným odberom tkanív a orgánov, alebo požiadavku na jasnú dokumentáciu, ktorá musí sprevádzať každý odobratý orgán.[46]
Čo sa týka druhého okruhu problémov, a to podmienok, za akých je možné odber od mŕtveho darcu vykonať, je ním tzv. predpokladaný súhlas. V súvislosti s touto problematiku treba zdôrazniť, že na vyjadrenie súhlasu s odberom napr. orgánu po smrti sa uplatňujú dva systémy, a to tzv. opting-in system a opting-out system.[47]
V krajinách, v ktorých platí opting-in system, majú právne zakotvenú potrebu súhlasu jedinca na odber orgánu po smrti, pričom ju potenciálny darca musí písomne alebo iným preukázateľným spôsobom vyjadriť, a to ešte počas svojho života. Ak takéto vyhlásenie neurobil, nie je možné odobrať orgány po jeho smrti, alebo inak povedané po jeho smrti mu možno niektorý z orgánov odobrať, ale len vtedy, ak s tým počas svojho života súhlasil. Čiže pokiaľ takéto vyhlásenie neurobí, predpokladá sa, že s odberom nesúhlasí. Preto sa tento systém nazýva aj predpokladaný nesúhlas.
Vo väčšine európskych krajín ale platí opačný systém, pretože je v nich zakotvený predpokladaný súhlas jedinca s odberom orgánov po jeho smrti.[48] Podstata tohto prístupu spočíva v tom, že ak osoba nesúhlasí s tým, aby jej bol po smrti odobratý orgán, musí to vyjadriť ešte počas svojho života, a to písomne alebo iným preukázateľným spôsobom.[49] V porovnaní so zák. č. 277/1994 Z. z. však zák. č. 576/2004 Z. z. akceptuje len písomné vyhlásenie.[50] Zák. č. 285/2002 Sb. naproti tomu vyžaduje tzv. preukázateľný nesúhlas. Nesúhlas sa považuje za preukázateľne vyslovený, nie len pokiaľ je zomretý evidovaný v tzv. Národnom registri osôb nesúhlasiacich s odberom orgánov a tkanív po smrti, ale aj keď

43 Porov.: BRYCHTOVÁ, K.: *Příspěvek k problematice transplantačního zákona.* In: Správní právo. Praha: Ministerstvo vnitra, č. 5-6, 2002, s. 309.
44 Porov.: *Zjištení nepochybné klinické smrti dárce postačí k transplantaci*, 2002, dostupné na: www.zdn.cz, (pristúpené 11.5.2008).
45 Pozn. autora.
46 Porov.: KUCHYŇOVÁ, Z.: *Nový transplantační zákon předpokládá vytvoření registru lidí, kteří odmítají darovat své orgány,* 2002, dostupné na: www.radio.cz, (pristúpené 14. 2. 2002); tieto zmeny si zasluhujú osobitnú pozornosť, preto sú v príspevku spomenuté len informatívne.
47 Pozn. autora: používajú sa aj výrazy contracting-in a contracting-out system..
48 Porov.: KOLLER, J.: *Transplantácie tkanív vo svete a u nás.* In: Zdravotnícke noviny. Bratislava: Sanoma Magazines Slovakia s. r. o., č. 34-35, 1996, s. 1.
49 Porov.: § 47 ods. 1 zák. č. 277/1994 Z. z.
50 Porov.: § 37 ods. 2 zák. č. 576/2004 Z. z.

zomretý ešte počas svojho života priamo v zdravotníckom zariadení pred ošetrujúcim lekárom a jedným svedkom prehlásil, že nesúhlasí s odberom v prípade svojej smrti.[51]

V Slovenskej republike sa takéto vyhlásenie s osvedčeným podpisom u notára posiela do registra osôb, ktoré vyjadrili počas svojho života nesúhlas s odbermi orgánov, tkanív a buniek po smrti. Uvedený register vedie Ministerstvo zdravotníctva SR.[52] Ministerstvo zdravotníctva vedením tohto registra[53] poverilo Slovenské centrum orgánových transplantácií.[54] Tlačivo vyhlásenia je možné získať priamo v centre alebo v tzv. regionálnych odberových a transplantačných centrách.[55] Adresa, na ktorú sa vyhlásenie zasiela, je uvedená priamo v tlačive.[56]

V súvislosti s princípom predpokladaného súhlasu je potrebné zdôrazniť predovšetkým jeho výhody. Jeho prednosťou je predovšetkým častejšia a rýchlejšia použiteľnosť pre transplantáciu, predstavuje zvýšenú šancu záchrany ľudských životov.[57] V prípade štátov s predpokladaným súhlasom napríklad je odberová aktivita hlavne pri pľúcach, srdciach a pečeni až dvojnásobná.[58]

Uplatnenie samotného princípu predpokladaného súhlasu však nestačí.[59] V súčasnosti u nás dominuje nedostatok vhodných darcov orgánov a tkanív na transplantácie. Preto bol vládou SR v marci 2008 schválený tzv. Národný transplantačný program, ktorého úlohou je o. i. napomôcť eliminovať straty vhodných mŕtvych darcov orgánov alebo tkanív. Toto môžu zabezpečiť tzv. transplantační koordinátori, a to nemocniční koordinátori, ktorých úlohou je vyhľadanie potenciálneho darcu a nahlásenie do regionálneho transplantačného centra.[60] Koordinátori majú byť z radov anesteziológov a internistov. Doteraz tieto aktivity boli realizované v nemocničných zariadeniach len na voluntaristickej báze, ktorej úspešnosť závisela od entuziazmu zainteresovaných.[61]

Predpokladaný súhlas má však podľa jeho odporcov aj nevýhody. Namieta sa, že je pri ňom porušená jedna zo základných právnych zásad, a síce, že mlčanie nemá dôsledky prejavu vôle, pokiaľ nie je

51 Porov.: § 16 ods. 1 písm. a) a b) zák. č. 285/2002 Sb.
52 Porov.: § 37 ods. 3 zák. č. 576/2004 Z. z.
53 Pozn. autora: ide o tzv. register osôb, ktoré odmietli darovať orgány a tkanivá (resp. tzv. register nedarcov).
54 Pozn. autora: v skratke SCOT.
55 Porov.: LACA, Ľ.: *Súčasná legislatíva transplantácií orgánov, tkanív a buniek.* In: Orgánové transplantácie: multidisciplinárny časopis pre transplantačnú problematiku. Martin: Transplantačné centrum, č. 2, 2005, s. 5;
Pozn. autora: v zmysle tzv. Národného transplantačného programu sú nimi transplantačné centrá pri jednotlivých Fakultných nemocniciach; Národný transplantačný program bol prerokovaný a schválený na rokovaní vlády SR dňa 26. 3. 2008.
56 Pozn. autora.
57 Porov.: BRYCHTOVÁ, K.: *Příspěvek k problematice transplantačního zákona.* In: Správní právo. Praha: Ministerstvo vnitra, č. 5-6, 2002, s. 309.
58 Porov.: LACA, Ľ et al.: *Odbery orgánov a transplantácie,* Bratislava: Katedra chirurgie, SPAM 2001, s. 16.
59 Pozn. autora.
60 Porov.: KUBA, D.: *Program orgánových transplantácií: transplantácie na Slovensku* . In: Zdravotnícke noviny. Bratislava: Sanoma Magazines Slovakia s. r. o., č. 12, 2008, s. 7.
61 Porov.: KUBA, D.: *Program orgánových transplantácií: transplantácie na Slovensku: vhodných darcov je nedostatok* . In: Zdravotnícke noviny. Bratislava: Sanoma Magazines Slovakia s. r. o , č. 12, 2008, s. 7.

stanovené inak. Model predpokladaného súhlasu preto musí mať dostatočnú podporu obyvateľstva, lebo vlastne nepriamo zavádza povinnosť k posmrtnému darcovstvu orgánov.[62]

Práve táto podmienka je zabezpečená cez transplantačného koordinátora, ktorého úlohou je o. i. informovanie verejnosti o postupoch pri získavaní a transplantovaní orgánov a tkanív, a to najčastejšie cez prednášky, semináre prípadne cez masmédiá. Ide tu vlastne aj o kladné ovplyvňovanie darcovského programu.[63]

Základnou otázkou pri transplantáciách ex morturo je aj tá, či pozostalí príbuzní majú alebo nemajú právo odmietnuť odber orgánu u potenciálneho darcu orgánu v prípade, keď zomretý nezanechal žiaden doklad o nesúhlase s odberom. Táto situácia je v súčasnosti riešená v dvoch právnych predpisoch. V zák. č. 576/2004 Z. z. a zák. č. 40/1964 Zb. Občianskom zákonníku v znení neskorších predpisov (ďalej len Občiansky zákonník). Pred prijatím odborného usmernenia z roku 2006 ním bolo aj odborné usmernenie z roku 1996, podľa ktorého, ak osoba počas svojho života urobila preukázateľnou formou vyhlásenie o tom, že s odberom orgánu alebo tkaniva zo svojho tela po smrti nesúhlasí, orgány nemožno odobrať.[64]

Zo znenia zrušeného odborného usmernenia aj zo znenia § 37 zák. č. 576/2004 Z. z. vyplýva, že ak zomretý nezanechal žiaden doklad, príbuzní nemajú právo odmietnuť odber orgánov.[65] Z toho následne vyplýva, že indikácia na odber sa riadi striktne medicínskymi kritériami.[66] K tomuto záveru by však bolo možné dôjsť aj tak, že v zrušenom odbornom usmernení nie je kogentne uvedené, že orgán z tela mŕtveho nemožno odobrať, ak odber odmietnu príbuzní zomretého.[67]

Ešte pred objasnením skutočnosti, že je tu právna norma, ktorá takýto stav spochybňuje, a to Občiansky zákonník, je potrebné z uvedených rozborov vyvodiť určitý záver. V podstate ide o to, že ak zomretý potrebný doklad nezanechal, práve spoločnosť musí právne definovať, kto rozhodne o odbere. Čiže spoločnosť musí právne definovať, či toto rozhodnutie ponechá najbližším príbuzným alebo právo rozhodnúť si ponechá sama prostredníctvom zdravotníckeho zariadenia, a teda príbuzných bude len konzultovať z dôvodu poslednej vôle zomretého, ale bez ich právneho nároku na odmietnutie odberu orgánov.

Ako už bolo skôr naznačené, v Slovenskej republike platí druhá možnosť, čo je veľmi správne a v čom je vidieť aj správne rozhodnutie v našej spoločnosti, teda je aj odpoveďou na nasledujúce otázky: 1. Je príbuzný schopný vo svojom ťažkom duševnom rozpoložení vnímať okrem svojho aj žiaľ iných a je

62 Porov.: BRYCHTOVÁ, K.: *Příspěvek k problematice transplantačního zákona.* In: Správní právo. Praha: Ministerstvo vnitra, č. 5-6, 2002, s. 302.

63 Porov.: LACA, Ľ et al.: *Odbery orgánov a transplantácie,* Bratislava: Katedra chirurgie, SPAM 2001, s. 87-88.

64 Pozn. autora: odborné usmernenie z roku 2006 takéto ustanovenie nemá, ale táto zásada (až na potrebu písomnej formy vyhlásenia) vlastne vyplýva z § 37 ods. 2 zák. č. 576/2004 Z. z.

65 Pozn. autora.

66 LACA, Ľ.: et al.: *Odbery orgánov a transplantácie,* Bratislava: Katedra chirurgie, SPAM 2001, s. 17.

67 Pozn. autora.

schopný urobiť primerané rozhodnutie? 2. Môže spoločnosť nechať príbuzného rozhodovať v jej mene o živote a smrti druhého človeka?

My a tiež viaceré krajiny, ktoré na tieto otázky odpovedali negatívne, teda že príbuzní nemajú právo odmietnuť odber, za splnenia podmienky, ktorá už bola spomenutá, teda keď zomretý počas svojho života neurobí písomné vyhlásenie o nesúhlase s odberom, sme pochopili, že na konci celej „transplantačnej reťaze solidarity" stojí človek čakajúci na orgán, ktorý je pre neho nevyhnutný na prežitie. Tým sme sa zaradili k spoločnostiam, ktorých hlavným hľadiskom je zabezpečiť všetkým svojim členom právo na život a zdravotnú starostlivosť, a to podľa najnovších poznatkov vedy.[68]

Názor v právnej literatúre staršieho dátumu pri obhajobe tohto systému zachádza ešte ďalej, keďže hovorí, že živý človek, ktorému sa transplantáciou môže zachrániť život, prípadne úplne navrátiť zdravie, je neporovnateľne cennejší, ako ten, ktorý je smrťou pre spoločnosť nenávratne stratený.[69] Tento názor je síce logický, ale celkom sa s ním nestotožňujem, ale len z toho pohľadu, že život každého človeka má rovnakú cenu a jeho hodnota po biologickej smrti nemôže byť a nie je nižšia. Daný názor má teda opodstatnenie jedine z hľadiska cieľa, ktorý podporuje.[70]

Ďalším dôvodom, ktorý nemožnosť rozhodovania príbuzných o tejto otázke obhajuje, je aj ten, že vzhľadom na to, že počas života potenciálneho darcu jeho telo patrilo výlučne do jeho osobnej dispozície a ani najbližší príbuzní nemali právo s ním nakladať, je preto prinajmenšom sporné, či vôbec môže mať niektorá z oprávnených osôb právo s takou hodnotou, akou je jeho telo, nakladať.[71] Čo sa týka právnych predpisov, odborné usmernenie i zák. č. 576/2004 Z. z. uvedené dôvody chápe, preto daný systém u nás môže platiť.[72]

Uvedené dôvody teda jasne hovoria, že právna úprava, ktorá oprávneným pozostalým priznáva právo udeľovať súhlas na odber transplantátu z tela ich mŕtveho príbuzného, nemôže byť vecne správa. Napriek tomu však takáto úprava u nás ešte stále platí, i keď jej obsah je odborníkmi v danej oblasti vykladaný tak, že existujú dôvody, ktoré účinnosť tohto ustanovenia pre odbery orgánov obmedzujú. Týmto ustanovením je § 15 Občianskeho zákonníka, podľa ktorého „po smrti fyzickej osoby patrí uplatňovať právo na ochranu jej osobnosti manželovi a deťom, a ak ich niet, jeho rodičom." Z tohto ustanovenia možno vyvodiť, že odber tkaniva či orgánu je možný iba so súhlasom osoby oprávnenej na ochranu jej osobnostných práv. Argument, ktorý však hovorí opak, je nasledovný.[73]

Paragraf 15 vlastne hovorí o ochrane telesnej integrity, teda o ochrane subjektívnych osobnostných práv osoby, ktorá už nie je na žive. No v tomto prípade, keďže ide o mŕtveho človeka, ochrana práva na

68 Porov.: LACA, Ľ.: *Právne a etické aspekty transplantácií.* In: Zdravotnícke noviny. Bratislava: Sanoma magazines Slovakia s. r. o., č. 34-35, 1996, s. 2.
69 Porov.: DRGONEC, J.-HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1998, s. 117-118.
70 Pozn. autora.
71 Porov.: DRGONEC, J.-HOLLÄNDER, P.: *Moderná medicína a právo*, Bratislava: Obzor, 1998, s. 117-118.
72 Pozn. autora.
73 Pozn. autora.

telesnú integritu uvedená v tomto paragrafe už nemôže smerovať k ochrane života a zdravia.[74] Právo na telesnú integritu a osobnostné právo tak smrťou zaniká.

Týmto okamihom ale zároveň vzniká originálne osobnostné právo osôb taxatívne vymedzených v § 15 Občianskeho zákonníka na občianskoprávnu ochranu osobnosti zomretej fyzickej osoby. Teda aj mŕtve telo je integrálnou súčasťou osobnosti, a to po celý čas, pokiaľ sú telesné pozostatky človeka individualizovateľné.[75]

Napriek tomu, že právny predpis nevyžaduje súhlas príbuzných zomretého pred vykonaním odberu, transplantačný koordinátor kontaktuje rodinu zomretého, pohovorí si s nimi a snaží sa ich súhlas k odberu získať. Prax je taká, že ho vo väčšine prípadov získa, a ak náhodu nie, odber sa neuskutoční, a to jednak pre vcítenie sa do pocitov príbuzných zomretého, ale vlastne aj kôli § 15.[76]

Podľa stanoviska odborníka v danej oblasti sa od vykonania odberu upúšťa pri jednoznačnom a ostrom nesúhlase príbuzných, a to z etického hľadiska.[77]

Nie len problematika darcovstva, odoberania ľudských orgánov a tkanív a ich následná transplantácia z tiel mŕtvych darcov ale i z tiel živých darcov prinášala a prináša mnoho otázok. Vzhľadom na svoju dôležitosť si však transplantácie ex vivo zasluhujú osobitnú pozornosť, preto sú v tomto príspevku spomenuté len okrajovo.[78]

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74 Pozn. autora.

75 Porov.: VLČEK, R.– HRUBEŠOVÁ, Z.: *Zdravotnícke právo*. Bratislava: Ing. Miroslav Mračko, EPOS, 2007, s. 168.

76 Pozn. autora: táto informácia je získaná v rámci osobného rozhovoru autorky s primárkou anesteziologicko-resuscitačného oddelenia, vykonávajúcej zároveň funkciu nemocničného transplantačného koordinátora.

77 Porov.: LACA, Ľ.: *Súčasná legislatíva transplantácií orgánov, tkanív a buniek.* In: Orgánové transplantácie: multidisciplinárny časopis pre transplantačnú problematiku. Martin: Transplantačné centrum, č. 2, 2005, s. 4.

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INSTITUCIONÁLNÍ PŘEDPOROZUMĚNÍ V PROCESU SPRÁVNÍHO ROZHODOVÁNÍ

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Abstrakt

Tento příspěvek se zabývá teoretickoprávní analýzou subjektivních předstruktur právního porozumění v procesu správněprávní aplikace práva, tj. v procesu správního rozhodování. Úvahy tvořící myšlenkový rámec tohoto příspěvku jsou součástí autorovy disertační práce, kterou zpracoval na téma „Teorie a realita právní interpretace“. Předmětem pozornosti jsou předporozumění a řídící ideje správních orgánů a konsekvence jejich působení na výsledky jejich rozhodovací činnosti ve veřejné správě. Z této analýzy jsou pak vyvozeny některé dílčí závěry vzhledem ke schopnosti správních orgánů řešit tzv. hard cases, tj. složité právní případy.

Klíčová slova

Správní orgán, předporozumění, aplikační proces, předvědění, řídící idea, účel, výklad, služební výklad, akty řízení, složité případy, právní hermeneutika.

Abstract

This article deals with a theoretical analysis of subjective structures of legal understanding in administrative decision making process. The main ideas of this article are a counterpart of author‘s doctoral thesis endowed to the topic of “Theory and Reality of Legal Interpretation”. The article is aimed at the role of pre-understanding and directive ideas of administrative bodies in the administrative decision-making process. As a result, some conclusions regarding the ability of an administrative bodies are presented, i. e. regarding solving so called “hard cases”.

Key words

Administrative body, pre-understanding, decision-making process, preknowledge, directive idea, interpretation, official interpretation, instructions, hard cases, legal hermeneutics.

Úvod

Cílem tohoto příspěvku je na základě teoretických a právně-filosofických východisek ukázat příčiny a důsledky specifik správněprávní aplikace práva, zejména se zřetelem k nalezení „správného" řešení právního případu. Těžištěm této úvahy je teoretický rozbor vztahu mezi institucionálními rysy správního orgánu a výsledkem jeho aplikační (rozhodovací) činnosti. K tomu účelu vychází tento příspěvek ze dvou základních teoretických pohledů: jednak právně-hermeneutického, který poskytuje potřebné pojmové instrumentárium k uchopení procesu právní interpretace a aplikace, a pohledu institucionalistického či normativně institucionalistického, který umožňuje zabývat se otázkou institucionální charakteristiky orgánu jako interpreta práva. Institucionální předporozumění správního orgánu tvoří klíčovou součást aplikační úvahy a tím zásadním způsobem determinuje výběr výkladové alternativy v procesu aplikace práva, která se stává zároveň součástí tzv. „živého práva" v rovině autoritativního stanovení práv a povinností konkrétním subjektům. Dalším cílem je zdůraznit důležitost právně hermeneutického zkoumání různých právních rozhodovacích procesů, zejména soudního a správního.

1) Pojem předporozumění

Předporozumění je považováno za centrální pojem právní hermeneutiky.[1] Je třeba říci, že jde o pojem pocházející již z klasické metodologické hermeneutiky, který však byl nově tematizován Gadamerovou filosofickou hermeneutikou,[2] jenž považoval předporozumění za nezbytnou součást každého rozumění.[3] Mluví o něm i rakouský právní filosof českého původu Ota Weinberger, jenž ho definuje jako *„...znalosti interpreta o předmětu sdělení a o způsobu a podstatě toho, jak interpret tento předmět chápe. ... Předporozumění je zčásti chápáno jako kategoriální rámec porozumění, zčásti jako předvídatelný přístup k interpretovanému projevu."*[4] Filosofická hermeneutika však neomezuje účinek předporozumění jen na řečové projevy, nýbrž vztahuje jeho působení k jakémukoliv objektu interpretace.

Z toho vychází i německý právní teoretik Josef Esser při svém detailním rozpracování pojmu předporozumění v právní hermeneutice.[5] Poukazuje na to, že interpret práva musí rozumět nejen právnímu textu, aby našel jeho smysl v konkrétním případě, ale i konkrétní situaci reálného světa

[1] Gizbert-Studnicki, T. Das hermeneutische Bewusstsein der Juristen. Rechtstheorie, 1987, č. 18, Duncker&Humblot, Berlin, s. 356.
[2] H.–G. Gadamer byl zakladatelem moderní filosofické hermeneutiky, přičemž věnoval část svého díla „Wahrheit und Methode" také výzkumu hermeneutiky právní. Srovnej ze sekundární literatury především Jœrgensen, S. Hermeneutik und Auslegung. Rechtstheorie, 1978, č. 1, s. 67.
[3] Esser, J. Vorverständnis und Methodenwahl in Rechtsfindung. Frankfurt am Main: Athenäum Verlag, 1970, s. 135.
[4] Weinberger, O. Norma a instituce. Brno: MU v Brně, 1995, s. 157 – 158.
[5] Esser, J. Vorverständnis und Methodenwahl in Rechtsfindung. Frankfurt am Main: Athenäum Verlag, 1970, s. 134 – 137.

(stavu věci).[6] Jedině tehdy může být proces aplikace práva správný, pokud interpret porozumí oběma těmto prvkům, jak faktické, tak právní stránce případu. Řeší se tu vlastně základní vztah mezi světem právních norem a světem sociální reality: tyto dva světy jsou ve vztahu jakéhosi „napětí" *(Spannung)*,[7] které mezi právní normou a stavem věci (skutkovým stavem) působí dialekticky.[8] Normativní právní text představuje podle právní hermeneutiky jakési „brýle", skrze něž je interpret teprve schopen porozumět právnímu případu jako právnímu. Právní hermeneutika tedy v tomto bodě překonává klasickou pozitivistickou tezi o oddělení světa právní normativity a světa empirického[9], což je ve svém důsledku významným přínosem pro chápání procesu aplikace práva.

Esser si je toho dobře vědom a v této souvislosti mluví o tzv. aplikativním předporozumění, tj. předporozumění interpreta práva (soudce, správního orgánu) v procesu aplikace práva směřujícího k vydání určitého individuálního právního aktu. Aplikační předporozumění je vlastně „očekáváním smyslu" *(Sinnerwartung)* možných řešení sporných otázek. Toto „očekávání smyslu" interpret má na základě svých dřívějších zkušeností a znalostí; racionální, ale i intuitivní úvahy nad právním případem. Předporozumění interpreta tedy do značné míry předurčuje výběr jednoho z možných interpretačních závěrů, které připadají v daném případě do úvahy.[10] Esser tedy chápe předporozumění nejen jako strukturní kategorii porozumění interpreta právnímu případu, nýbrž jako určitý řídící korektiv, který navádí interpreta (aplikační orgán) k výběru správné metody výkladu a tím i výslednému interpretačního závěru, k němuž tato metoda míří. Podobně jako Esser na věc nahlíží i Gizbert-Studnicki, který označuje předporozumění interpreta v aplikačním smyslu jako „očekávání smyslu." Do tohoto pojímání kategorie předporozumění se promítá Gadamerův náhled na text jako odpověď na otázku. Normativní text vyjeví svůj smysl pouze z pohledu určitým způsobem položené otázky. Modelem rozumění je zde v tradici Gadamerovy hermeneutiky dialog mezi normativním textem a jeho interpretem. Text totiž sám o sobě žádný smysl nemá, teprve až jako konkrétní právní odpověď na konkrétní zadanou právní otázku.[11] Při aplikaci práva je tedy nejprve třeba porozumět skutkovému stavu věci (tedy určitým dějinným skutečnostem) a zároveň pak hledat na otázky, které skutkový stav věci vyvolává, odpovědi v normativním textu.[12]

Hermeneutická kategorie předporozumění je zkoumána i ostatními právními filosofy především jako cesta k pochopení procesu právního (zejména soudcovského) rozhodování. Finský teoretik Aulis

[6] Nutno ovšem dodat, že při těchto děleních se vždy jedná o dělení určitým způsobem zjednodušující. Juristická interpretace totiž zahrnuje mnoho dalších objektů. Jak správně upozorňuje Weinberger, je do nich nutno započítat především individuální právní akty (rozhodnutí, smlouvy...), ale také konkludentní jednání postrádající právní formu. Srov. Weinberger, O. Norma a instituce, s. 160-161.
[7] Esser, J. Vorverständnis und Methodenwahl in Rechtsfindung, s. 32.
[8] Srov. Mastronardi, P. Juristisches Denken. UTB für Wissenschaft, Verlag Paul Haupt, Stuttgart, 2001, s. 34.
[9] V Kelsenově terminologii (recipované z filosofického díla I. Kanta) se jedná o dualitu světů *Sein* (bytí) a *Sollen* (mětí).
[10] Esser, J. Vorverständnis und Methodenwahl in Rechtsfindung, s. 136.
[11] Srovnej tamtéž, s. 357.
[12] Srovnej tamtéž, s. 135.

Aarnio mluví o předporozumění z pozice právního realisty především ve smyslu předporozumění interpreta aplikujícího právo sociální realitě, kterou má právo přetvářet. Velmi dobře si uvědomuje, že pouhý logicko-deduktivní pohled k pochopení předporozumění nedostačuje.[13] Podle jeho přesvědčení je předporozumění conditio sine qua non právní argumentace a interpretace, a tedy i rozhodování právních případů. Chceme-li tedy proniknout do struktury rozhodovacího procesu a pochopit mechanismus určování interpretačního závěru, který je interpretem - aplikačním orgánem - vybrán jako „správné řešení" případu, je nutno zkoumat právě předporozumění těchto interpretů práva.[14]

Předporozumění je proto důležitým prvkem právního rozumění, že představuje subjektivní vklad či východisko interpreta při interpretaci *questiones iuris* i *questiones facti.* V případě aplikačního porozumění představuje stadium porozumění právnímu případu, které se za určitých okolností v této obsahové podobě může stát i výsledkem procesu porozumění. Z tohoto důvodu je jeho vliv na výsledek této interpretace nesporný a ignorovat jej by znamenalo odsoudit interpretaci práva do role činnosti založené na fiktivním předpokladu stejné „objektivity" rozumění všech subjektů aplikujících právo. Předporozumění je chápáno jako východisko či podmínka stavu „očekávání smyslu", který je další dialektickou fází hermeneutického rozumění. Stručně řečeno, předporozumění subjektu tvoří součást a východisko tzv. hermeneutického kruhu.

2) Aplikační instituce a jejich předporozumění

Právo je nalézáno a dotvářeno na úroveň konkrétního právního vztahu v procesu aplikace práva. Subjektem, který je k této činnosti oprávněn, je orgán aplikace práva (či aplikační orgán). Z pohledu institucionalistické teorie zastávané Weinbergerem či také britským teoretikem Neilem MacCormickem je právo považováno za institucionální realitu, což znamená, že je jednak samo druhem instituce, a je institucemi vytvářeno a dotvářeno. Proto lze konstatovat, že z tohoto pohledu je aplikační orgán zároveň považován za aplikační instituci.

Instituce je dle Weinbergera *„funkcionální, účelovou jednotkou, která usiluje o uskutečnění plánovaného díla. Slouží určité vůdčí ideji, tj. myšlence instituci určující a institucí rozvíjené (idée directrice)."*[15] Řídící idea instituce tedy představuje jakýsi právně-politický pokyn k lidskému jednání

[13] Aarnio, A. On Legal Reasoning. Turku: Turun Yliopisto, 1977, s. 70.
[14] Tamtéž, s. 222.
[15] Tamtéž, s. 17.

v rámci dané instituce.[16] Weinberger rozděluje instituce na normativní a věcné, přičemž instituce věcného typu v sobě zahrnují instituce reálné.[17] Těmi jsou osoby nebo předměty, které se prostřednictvím pravidel a struktury instituce stávají osobami s určitou specifickou rolí. Právo samo je z tohoto pohledu společenskou institucí (věcného charakteru), která vytváří další instituce potřebné ke své vlastní realizaci (osobního i věcného charakteru).[18] Instituce aplikující právo jsou tedy v uvedeném dělení podřaditelné pod instituce osobní (jejich základem je určitý personální substrát, dále normativní systém organizačních pravidel instituce a konečně množina věcí, které slouží k činnosti aplikační instituce).

Z hermeneutického pohledu má pro další zkoumání procesu aplikační interpretace největší význam řídící (vůdčí) idea aplikační instituce. Reprezentuje v institucionální rovině to, co chápeme pojmem předporozumění u konkrétního interpreta práva. Interpret aplikující právo tak činí vždy jako součást určité reálné právní instituce, nikdy jako sám jednotlivec. Jeho předporozumění je tedy významně ovlivněno řídící ideou aplikační instituce, jíž je součástí. Vztah mezi předporozuměním interpreta a řídící ideou aplikační instituce nelze rozhodně popsat jako ekvivalenci, která by v podstatě pro interpreta znamenala úplné oproštění se od vlastních předstruktur poznání a ztotožnění se s řídící ideou instituce. Taková situace není podle mého názoru hermeneuticky možná. Nejpravděpodobnějším modelem vztahu těchto dvou předstruktur právního poznávání je inkluze, tedy inkluze řídící ideje instituce v předporozumění konkrétního interpreta. Fakticky je to totiž vždy jen a jen interpret jako myslící subjekt, nikoliv aplikační instituce, který je schopen rozhodovat právní případy a dotvářet právo na konkrétní úrovni jeho existence v podobě subjektivních práv a povinností jeho adresátů. Vycházím tedy z názoru, že mezi předporozuměním interpreta aplikujícího právo a aplikační institucí, v jejímž rámci interpret vykonává aplikační činnost, existuje právě vztah inkluze. Řídící idea je tak obsažena v předporozumění interpreta při rozhodování právních případů. Právní interpretace v rámci aplikace práva je tedy procesem subjektivně a institucionálně podmíněným, a to nejen v rovině zvoleného interpretačního závěru, ale konsekventně i v rovině jeho odůvodnění, tedy volby argumentů prokazujících a osvědčujících správnost či intersubjektivní platnost interpretačního závěru.

Konkretizujeme-li výše uvedenou obecnou úvahu na reálné podmínky našeho právního řádu, nalezneme v zásadě dvojí typ aplikačních institucí, a to orgány soudního a správního typu.[19]

[16] Samotná myšlenka řídících či vůdčích idejí není Weinbergerovým výtvorem. Objevila se již na konci 19. století v souvislosti s některými zájmovými, psychologickými či volnoprávními směry. Viz blíže Kallab, J. O novějších směrech v metodologii právní praxe. Brno: Barvič a Novotný, 1921, s. 64 - 65.
[17] Weinberger, O. Norma a instituce, s. 18.
[18] Tamtéž, s. 19.
[19] Vedle toho však nelze vyloučit aplikaci práva u orgánu moci zákonodárné. Lze uvést např. rozhodování jedné z komor Parlamentu ČR o vydání svého člena trestnímu stíhání. Srv. blíže ustanovení čl. 27 odst. 5 Ústavy ČR a § 12 zákona č. 90/1995

Specificky se v rámci našeho právního systému chovají instituce, které lze označit za instituce kontrolního charakteru, jejichž působení není klasickou aplikací práva (rozhodováním o právech a povinnostech subjektů), nicméně jinak má většinu jejích pojmových znaků.[20] Hlavní členění řídících idejí tedy lze odvodit od typu orgánu aplikujícího právo. Další, již podrobnější členění těchto idejí, pak přichází v úvahu v rámci těchto dvou hlavních kolejí aplikace práva, a to dle jednotlivých soudů či správních orgánů a jejich postavení v hierarchii soudnictví či exekutivy, dle druhu právních vztahů, které tyto aplikační orgány posuzují a o nichž rozhodují. V tomto příspěvku je pozornost věnována aplikačním orgánům správního typu.

3) Správní orgán a jeho řídící ideje

Všechny aplikační právní instituce jsou determinovány právním řádem, v důsledku jehož platnosti a účinnosti existují. Jsou tedy s právním řádem a jeho základními principy spjaty jak strukturálně, tak i funkcionálně. Všeobecnými obecnými řídícími ideami aplikačních institucí jsou vůdčí ideje právního řádu jako takového. Weinberger v této souvislosti hovoří o třech základních ideách (cílech) právního řádu:[21]

a) spravedlnost právního rozhodování

Právní řád má směřovat k naplnění ideje spravedlivého rozumění právních vztahů ve společnosti. Jelikož právní rozhodování je hlavním prostředkem pro realizace a garance práva, musí i ono směřovat a naplňovat ideu spravedlnosti.

b) právní jistota

Tato idea práva v sobě zahrnuje jednak požadavek seznatelnosti práva, a jednak jeho předvídatelnosti. Je chráněno očekávání adresátů práva o jeho racionálním obsahu a také racionálním rozhodnutí.

c) idea systému (řádu)

Pokud má právo plnit jako instituce funkce v něm obsažené, musí zachovávat strukturu a funkce určitého „řádu“ či „systému“, nikoliv nepředvídatelného chaosu. Weinberger v této souvislosti mluví především o autoritativním působení práva jako záruce jeho fungování jako řádu právě

Sb., o jednacím řádu Poslanecké sněmovny, ve znění pozdějších předpisů, a § 13 zákona č. 107/1999 Sb., o jednacím řádu Senátu, ve znění pozdějších předpisů.

[20] Mám na mysli zejména veřejného ochránce práv a Nejvyšší kontrolní úřad. Viz blíže čl. 97 Ústavy ČR, blíže upraven v zákoně 166/1993 Sb., o Nejvyšším kontrolním úřadu, ve znění pozdějších předpisů, a zákon č. 349/1999 Sb., o veřejném ochránci práv, ve znění pozdějších předpisů.

[21] Weinberger, O. Norma a instituce, s. 24 -25.

prostřednictvím právního rozhodování. Každé právní řízení má být dle jeho názoru ukončeno právoplatným rozhodnutím.[22]

Obdobně se k vymezení účelů (cílů) práva vyjadřuje německý právní filosof Gustav Radbruch, když za ně považuje *„obecné blaho, spravedlnost a právní jistotu."*[23] Radbruch definuje vztah těchto cílových idejí tak, že nejsou spolu ve vzájemném souladu, nýbrž v ostrém sporu mezi sebou navzájem.[24] To znamená, že každý z těchto účelů práva nabývá v konkrétních situacích jeho aplikace větší či menší váhu a důležitost. Obecné blaho představuje jakýsi poukaz na to, že kromě institucionálního charakteru má právo rovněž charakter veřejného statku. Aplikace práva je v tomto ohledu pak procesem, kterým se právo jako statek distribuuje svým příjemcům (adresátům). Důležité je, že na vymezení těchto cílů (vůdčích idejí práva) se shodují jak zastánci přirozenoprávního myšlení (či určité formy jeho renesance), tak i pozitivisticky orientovaní myslitelé.[25]

Z hlediska předporozumění interpreta jako součásti aplikační instituce proto lze konstatovat, že by tyto základní ideje práva měly být jeho součástí. Z pohledu strukturálního jsou implicitní součástí právního předporozumění aplikační instituce. Intenzita přítomnosti toho kterého účelu v právu se liší podle povahy toho kterého právního případu a je tak odvislá od volby argumentů k obhajobě interpretačního závěru. Tyto účely však nemusí být vždy implicitně uvedeny v argumentačním řetězci, někdy jsou přítomny pouze implicitně či v tacitní podobě. I v tomto případě však lze tyto účely, které byly při řešení právního případu v předporozumění přítomny, rekonstruovat a dopátrat se tak institucionálních hermeneutických východisek aktu aplikace práva. Zvláště v případech, kdy interpret aplikující právo přistupoval k textu teleologicky, tedy se snahou přímo nahlédnout účel práva v kontextu řešeného právního případu, bývá taková rekonstruktivní analýza velmi přínosná, neboť vyjasňuje celý proces interpretace a otevírá onu pověstnou „černou skříňku" *(black box)* právního rozhodování. Důležitost teleologického pojetí práva konstatuje i P. Holländer, když říká: *„Pro zákonodárce je účel motivem, důvodem přijetí právní normy, pro sociologa je účel právní normy cílem a výsledkem poznávání (např. v souvislosti se studiem efektivnosti právní regulace), pro soudce je*

[22] Ačkoliv se jedná o tradiční vymezení práva jako „řádu" s poukazem na jeho autoritativní působení, je nutno vnímat tuto ideu práva kriticky. Právní řád ani zdaleka nepřipomíná funkční systém s průhlednou strukturou a jasnými pravidly fungování, nýbrž v sobě nepochybně skrývá určité prvky chaosu. Právní řízení mnohdy vůbec nekončí právoplatným rozhodnutím s efektivním sociálním dopadem, nýbrž různými procesními způsoby ukončení, které řešení věci in meritum de facto nepřinášejí. Právo tedy ve své realitě může připomínat chaos, avšak jeho řídící ideou musí být systém a řád.

[23] Radbruch, G. Der Mensch im Recht. Göttingen: Vandenhoeck und Ruprecht, 1957, s. 88. K obsáhlému výkladu této problematiky viz blíže Holländer, P. Filosofie práva, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2006, s. 84 -85.

[24] Tamtéž.

[25] Pomíjím zde značný odpor aktuální právněteoretické doktríny k této kategorizaci právněteoretických směrů myšlení odůvodněný především tvrzením, že umírněné formy obou směrů spolu vesměs obsahově splývají, zatímco ty krajní (extrémní pozitivismus či iusnaturalismus) se reálně nevyskytují a nemají v současnosti žádné významnější zástupce. Blíže viz Kühn, Z. Aplikace práva ve složitých případech. K úloze právních principů v judikatuře, s. 65 an.

účel normativním momentem spoluurčujícím interpretaci práva, jenž hraje klíčovou roli při objasňování obsahu a smyslu práva."[26]

Správní orgány tedy sdílejí tento společný základ svých řídících idejí spolu s ostatními aplikačními institucemi, zejména soudy. Při konkrétnějším pohledu na jejich institucionální předporozumění ovšem musíme konstatovat, že v něm působí specifické řídící ideje a limity[27] vlastní právě jen pro instituce veřejnosprávního charakteru. Tato specifika pramení zejména ze dvou materiálních pramenů: jednak ze statusu správního orgánu jako orgánu moci výkonné, a jednak z hierarchického charakteru veřejnosprávních aplikačních institucí. Jedná se zejména o následující charakteristiky:

a) Závislost interpreta

Jde zřejmě o klíčovou charakteristiku správního orgánu, neboť subordinace je typickým principem, na kterém spočívá systém rozhodování ve veřejné správě. Správní orgán je článek v hierarchii vztahů nadřízenosti a podřízenosti. Není tedy, jako soud, vybaven nezávislostí,[28] právě naopak, je interpretem závislým. Z toho pak plyne, že úředníci rozhodující jako správní orgány musí respektovat především tzv. služební výklad právních předpisů,[29] který dostává od orgánů nadřízených především ve formě interních normativních instrukcí (aktů řízení).[30] Přesto, že normativní instrukce jsou s to ukládat jednotlivým správním orgánům povinnosti, nemohou nikdy jít nad rámec zákona, tj. uložit povinnost či oprávnění, které zákon neobsahuje. Z jejich povahy plyne, že jde o akty řízení, čili jejich působnost se týká pouze správních orgánů a jejich pracovníků. V žádném případě nemůže být normativní instrukce nikdy použita vůči subjektu nacházejícímu se vně systému orgánů veřejné správy. Proto také nejsou považovány za pramen práva, ale pouze za formu konkretizace. Každé odvolání se správního orgánu v jeho rozhodnutí proti adresátu jeho správního působení musí být proto hodnoceno jako právní vada takového aktu. Akty řízení (interní normy) představují tedy jakousi kontradikci: na jedné straně je jejich funkcí konkretizovat a ozřejmovat pro správní orgán, co je platným právem (tj. poskytovat služební výklad právních předpisů), na straně druhé samotné ovšem nejsou pramenem práva a explicitně nemohou být použity jako zdroj právních informací v aktu aplikace práva. Vzniká tím situace, kdy je předporozumění správního orgánu v konkrétním případu vážně ovlivněno a směrováno služebním výkladem, který vznáší nárok na správnost (je to výklad nadřízeného orgánu, typicky ústředního orgánu státní správy).

[26] Holländer, P. Filosofie práva, s. 84.

[27] O limitech rozhodování správního orgánu mluví správní věda. Domnívám se, že z hermeneutického lépe je hovořit o „předpokladech" správního rozhodování, než o jeho limitech. Blíže viz Skulová, S. Rozhodování ve veřejné správě. MU Brno, 1996, str. 95 a násl.

[28] Srovnej Hendrych, D. Správní právo. Obecná část. Praha: C.H. Beck, 2003, str. 5.

[29] Gerloch, A.: Teorie práva. Vydavatelství Aleš Čeněk, Praha, 2001, str. 122.

[30] Jako klasický příklad důležitosti služebního výkladu podávaného v interních aktech řízení z české správní praxe mohou sloužit kupř. tzv. D-pokyny Ministerstva financí ČR, které pro značnou komplikovanost zákonné úpravy finančního práva tvoří nejbližší zdroj výkladových informací pro orgány územní finanční správy.

Z hermeneutického pohledu tedy služební normativ hraje roli „přeloženého“ a „doplněného“ právního normativu, který správní orgán aplikuje místo právních normativů, jež má služební normativ vykládat. Tento hermeneutický poznatek je ovšem v evidentním rozporu se zásadou zákonnosti veřejné správy, která může být aplikací služebního výkladu v případě jeho nesprávnosti vážně ohrožena. Nesprávný výklad v takovém případě nelze přičítat jen vrub správního orgánu, který se jím řídil, nýbrž orgánu nadřízeného, který takovou výkladovou pozici zaujal. Závislost právního porozumění podřízeného správního orgánu zde může působit šíření chybné výkladové alternativy příslušnou hierarchickou strukturou správních orgánů. Nesprávný výklad se touto formou může multiplikovat do podoby mnoha dalších správních rozhodnutí vydaných na základě služební vázanosti takovým výkladem nadřízeného orgánu.

b) Účelovost, cílová zaměřenost výkonu veřejné správy*„Veřejná správa je prováděním zákonů nebo jinou činností ve veřejném zájmu...“,*[31] což mj. znamená, že vlastně provádí to, co jí stanoví orgány moci zákonodárné. Z toho vyplývá i účelovost jejího výkonu, která se samozřejmě odráží i v rozhodování. Tak např. úřad práce je při výkonu svých pravomocí dle zákona o zaměstnanosti veden mezi jinými i účelem kontrolovat dodržování pracovněprávních norem u jednotlivých zaměstnavatelů.

Dá se tedy říci, že právo je pro veřejnou správu v pozici prostředku k dosažení účelu té které její složky.[32] Jinak řečeno, veřejná správa je výkonem zákonů, kde jde o realizaci veřejných zájmů.[33] Účelovost má dle mého názoru klíčový vliv na pochopení celého právního případu řešeného správním orgánem.[34] Správní orgán při aplikaci práva se vždy (ať už uvědoměle či neuvědoměle) snaží najít ve skutkovém stavu to, co hledá (tedy např. inspektorát práce porušení norem bezpečnosti práce). Lze v tom spatřovat praktické osvědčení Gadamerovy koncepce motivovaného tázání, účelem motivovaného výkladu reality. Samozřejmě, že tato „účelová určení“, která správní orgány při aplikaci práva determinují, opět formují jejich předporozumění právním případům.

V soudnictví se přitom, na rozdíl od veřejné správy, mluví o nalézání práva v konkrétních případech.[35] Toto klasické vymezení soudcovského rozhodování vůči rozhodování správnímu se dnes dosti problematizuje. Jako argument pro toto tvrzení může sloužit i fakt, že správní orgány dnes

[31] Gerloch, A.: Teorie práva, str. 122.
[32] Hendrych, D.: Správní právo. Obecná část, str. 5.
[33] Tamtéž, str. 6.
[34] Bez toho, že si uvědomíme tuto účelovou zakotvenost správně-právní aplikace práva, můžeme jen těžko porozumět správním rozhodnutím. V této souvislosti lze připomenout již myšlenku německého filosofa 19. století Wilhelma Diltheye, že *„..bez účelu není rozumění.“* Citováno v Houbová, D. Standardní a nadstandardní metody interpretace právního textu a rétorika v soudcovské argumentaci. In: Gerloch, A., Maršálek, P. Problémy interpretace a argumentace v soudobé právní teorii a právní praxi. Eurolex Bohemia, 2003, str.72.
[35] Viz blíže k nalézání a dotváření právem soudy Pulkrábek, Z. K problému otevřenosti (psaného) práva a možnostem jeho dotváření. Právník, roč. 139, č.11/2000, str. 1025 – 1048.

rozhodují i v některých věcech soukromoprávního charakteru, o nichž by jinak rozhodovaly soudy. Důvod, proč o těchto věcech rozhodují správní orgány místo soudů, tkví ve vícero faktorech.[36] V každém případě platí, že správní rozhodování je rovněž pod soudní kontrolou.[37] Proto se domnívám, že tradiční odlišnost v charakteristice věcné působnosti soudů a správních orgánů se postupně smazává, avšak nadále zůstává jejich odlišná institucionální charakteristika, která dovoluje mluvit o tom, že soudy právo nalézají, zatímco správní orgány jako orgány moci výkonné právo pouze vykonávají.

c) Předvědění správních orgánů

Tento okruh faktorů je v jistém smyslu jakýmsi užším pojetím prvku subjektu interpretace. Je zde nutno říci, že svou nepominutelnou roli tu hraje zejména vzdělání interpreta (které ve veřejné správě bývá jak úplné středoškolské, tak úplné středoškolské odborné vzdělání, tak vzdělání vysokoškolské). Pro úředníky vykonávající správní agendu je zaveden systém odborných způsobilostí, které se ověřují zkouškou z konkrétních právních předpisů, s nimiž úředník má za povinnost pracovat.[38] Znovu je třeba podotknout, že vzdělávání úředníků je založeno mnohem účelověji než vzdělávání soudců (do vzdělávání úředníků se promítá princip efektivnosti výkonu správy, pragmatičtější zacházení s právními předpisy, snaha o jednoznačný výklad právního předpisu...).[39] Účelovým vnímáním právního řádu či jeho dílčích částí, které úřední osoba aplikuje při své rozhodovací činnosti, pak může vést k vytržení těchto právních norem z jejich širšího normativního rámce (v horizontální rovině zejména od souvisejících právních předpisů jiných odvětví, v rovině vertikální od vyšší právní síly, potažmo až norem ústavního pořádku). Docela zřejmě tu lze hovořit o „přivlastnění“ určitých normativů a jejich internalizace ze strany správního orgánu (ve smyslu lidového rčení „bližší košile, než kabát“), naproti tomu o odcizení se od ostatních právních norem, které přímo nedopadají na předmět činnosti správního orgánu. V kontextu právního státu ovšem orgány veřejné správy nemohou při aplikaci práva pominout základní právní hodnoty a principy, jakož zejména také metodologické instrumentárium právní interpretace.

[36] Příkladem takového rozhodování může být třeba řízení o vkladu vlastnického práva k nemovitosti do katastru nemovitostí upravené zákonem č. 265/1995 Sb. o zápisech vlastnických a jiných věcných práv k nemovitostem. V tomto řízení rozhoduje katastrální úřad, ačkoliv tím vlastně rozhoduje o nabytí či nenabytí vlastnického práva.

[37] Srovnej část V. zákona č. 99/1963 Sb., v platném znění, „Řízení o věcech, o nichž bylo rozhodnuto jiným orgánem“.

[38] V závislosti na tom, zda se jedná o úředníky územních samosprávných celků, nebo úředníky ve státní službě, nalézáme tuto úpravu v z.č. 218/2002 Sb. o státní službě, v platném znění, a z.č. 312/2002 Sb. o úřednících územních samosprávných celků (tj. obcí a krajů), v platném znění. Zákon o státní službě však dosud spíše hraje roli pouhého „příslibu“ zákonodárce, neboť jeho účinnost byla značně odložena. Některé zvláštní zákony (tzv. složkové předpisy správního práva) rovněž upravují kvalifikační předpoklady úředníků, např. zákon č. 108/2006 Sb., o sociálních službách, ve znění pozdějších předpisů upravuje požadavky pro výkon funkcí sociálních pracovníků působících ve veřejné správě.

[39] Průcha, P. Správní právo. Obecná část. MU Brno, 1998, str. 15

4) Konsekvence pro správní rozhodování

Závěrem je třeba uvést, jaké praktické konsekvence způsobují řídící ideje správních orgánů a jejich institucionální charakteristiky v praktickém právním rozhodování. Předně je zřejmé, že správní rozhodování má v zásadě subsumpční charakter založený na tzv. jednoduchém právním sylogismu.[40] Toto schéma v zásadě nedostačuje v situacích, kdy správní orgán aplikuje svou správní úvahu (diskreci), v níž musí aplikovat nejen subsumpční úvahy, ale rovněž složitější hodnotící mechanismus, který užívá obecné právní zásady a principy (zejména princip proporcionality). Stejně tak jednoduchá subsumpce nedostačuje při interpretaci neurčitých pojmů, které jsou součástí řešení právní otázky případu.

Správně-právní argumentace tvořící odůvodnění správních rozhodnutí (jsou-li a musejí-li být podle zákona odůvodněna) má co do své struktury lineární povahu, což znamená, že se nepouští do různých bočních úvah či odboček a je zacílena přímo k odůvodnění výroku rozhodnutí. Rovněž platí, že správní rozhodnutí obvykle neobsahuje žádné úvahy typu „obiter dictum". Správní rozhodnutí se co do zdrojů právních informací většinou neodkazují na jiné než tzv. povinné zdroje právních informací *(must sources)*,[41] tj. právní předpisy. Mnohem méně je správními orgány užívána judikatura a literatura jako zdroje vhodné *(should sources)*, i když v této oblasti lze zaznamenat trend k většímu využívání těchto zdrojů právních informací, a to zejména v souvislosti s judikatorní činností správních soudů v čele s Nejvyšším správním soudem.

Nejdůležitějším charakteristickým rysem podle mého názoru zůstává fixovanost na ideu zákonnosti a podzákonnosti fungování veřejné správy a podceňování či nedostatečné využívání ostatních pramenů práva. Závislost správního orgánu na právním názoru nadřízeného orgánu lze hermeneuticky vyložit jako nedostatek volnosti při nalézání práva (hermeneutické svobody), který se projevuje především nedostatkem možnosti kriticky hodnotit výkladovou alternativu zastávanou nadřízeným správním orgánem. Stejný nedostatek hermeneutické svobody lze spatřovat i při aplikaci normativních právních aktů podzákonných (zejména vyhlášek a nařízení vlády), neboť správní orgány nemají na rozdíl od soudu ze zákona možnost posoudit soulad těchto aktů se zákonem.[42]

Jsem toho názoru, že pojednané subjektivní struktury, kterými se každý správní orgán či úřední osoba v něm začleněná řídí, do značné míry ovlivňují a determinují aplikační proces správního rozhodování.

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[40] K analýze subsumpčního schématu aplikace práva srv. blíže Kühn, Z. Aplikace práva ve složitých případech. K úloze právních principů v judikatuře, str. 50 a násl.

[41] Využívám zde Peczenikovy koncepce zdrojů právních informací, kterou v české literatuře používá kupř. Z. Kühn. Podle ní se zdroje právních informací dělí na tzv. *must sources* (tj. zdroje, které interpret musí použít k poznání platného práva), dále *should sources* (zdroje, které by interpret měl použít k poznání platného práva) a konečně *may sources* (zdroje, jejichž použití záleží čistě na uvážení interpreta a potřebách řešení konkrétního případu). Viz blíže Kühn, Z.: Aplikace práva ve složitých případech. K úloze právních principů v judikatuře, str. 131.

[42] Viz blíže čl. 95 odst. 1 Ústavy ČR.

Tyto odlišnosti mají začasté za následek odlišné řešení právních případů správními orgány a soudy v proceduře soudního přezkumu správních aktů. Porozumění těmto strukturám a jejich klíčové roli při správním rozhodování proto považuji za základní východisko k definování výsledků této činnosti a jejich charakteristice, především hermeneutické kategorii „správnosti" a „přezkoumatelnosti" těchto rozhodnutí.

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VYBRANÉ PRÁVNÍ NÁSTROJE RADY EVROPY V OBLASTI OCHRANY OSOBNÍCH ÚDAJŮ

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Abstrakt

Rada Evropy je mezinárodní organizace zabývající se ochranou osob a lidských práv. Úmluva o ochraně osob se zřetelem na automatizované zpracování osobních dat (CETS No. 108) je klíčovým právním nástrojem na poli ochrany osobních údajů. Úmluva spolu s Dodatkovým protokolem je prvním funkčním nástrojem v ochraně dat, který zakotvuje základní principy ochrany a kontrolní mechanismy jejich naplňování v jednotlivých státech.

Klíčová slova

Rada Evropy, Úmluva CETS č. 108, osobní údaje, automatizované databanky, automatizovaný soubor dat, ochrana údajů, tok údajů přes hranice, základní principy, Dodatkový protokol, změna Úmluvy, Evropská společenství

Abstrakt

The Council of Europe is the international organization, which deals with the protection of individuals and human rights. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) is the key law in the field of personal data protection. Convention and also on Additional Protocol and Amandments to Convention, are the first real law means, which are focused on the basic principles in personal data protection and control mechanisms in member states.

Key Words

Council of Europe, Convention CETS No. 108, personal data, automated data banks, automated data file, data security, transborder data flows, basic principles, Additional Protocol, Amendment to Convention, European Communities

Rada Evropy je jednou z prvních mezinárodních organizací, které se začaly zabývat ochranou osobních údajů. Samozřejmě přijímá řadu opatření vedoucích k ochraně dat v jednotlivých oblastech, Rada ministrů přijímá doporučení a rezoluce, zvláštní komise zpracovávají studie a zprávy týkající se ochrany dat.

Klíčovým dokumentem přijatým na půdě Rady Evropy se stala Úmluva o ochraně osob se zřetelem na automatizované zpracování osobních dat (CETS No. 108)[1], která byla otevřena k podpisu v roce 1981 (dále jen „Úmluva"). Jejímu vzniku předcházelo několik kroků. V roce 1968 Parlamentní shromáždění Rady Evropy požádalo Výbor ministrů Rady Evropy (dále jen „Výbor ministrů") o informace týkající se způsobu zabezpečení ochrany soukromí a dotázalo se, zda současné právní prostředky ochrany soukromí, zejména Evropská úmluva o lidských právech[2] a vnitrostátní právní úprava v členských zemích Rady Evropy, jsou dostatečné. Po následující dva roky se touto problematikou zabývala Komise expertů při Radě Evropy a na základě její zprávy Výbor ministrů posléze zjistil, že právní úprava této oblasti je nedostačující a neodpovídá rychle se rozvíjející době a používání moderních technologií při sběru a uchovávání dat. Závěr šetření Komise expertů, která zkoumala zákonodárství členských státu Rady Evropy, byl jednoznačným signálem pro Výbor ministrů, aby začal intenzivně hledat řešení problémů. Jiná ochrana soukromí ani nebyla dříve požadována, protože teprve v 50. a 60. letech 20. století došlo k prudšímu zavádění nových technologií do běžného života. Postupným průmyslovým rozvojem a zaváděním důmyslnějších technik pro sběr a uchovávání informací, mohlo častěji dojít k selhání systému ochrany osobních údajů. Hrozba zneužití informací nebyla způsobena množstvím nových osobních údajů, které by byly zjišťovány. Hlavním důvodem se stalo jakési zjednodušení možnosti rozšířit data na velkou vzdálenost, rychlost, jakou se to může podařit a možnost přístupu k nim a také způsob, jak byla vůbec data uchovávána.

Evropská úmluva o lidských právech se problematice ochrany soukromí věnuje jen ve svém článku osm, ve kterém deklaruje právo každého na respektování jeho soukromého a rodinného života, domova a korespondence a zakazuje veřejné moci zasahovat do tohoto práva kromě zákonem stanovených případů. Problém tohoto znění článku osm spočívá v tom, že vůbec nepočítá s možností zásahu do zaručených práv soukromou osobou a dále je sporné, zda poskytuje článek ochranu i elektronické korespondenci[3], či zda chrání obecně veškerá osobní data.[4]

Právní úprava ve zkoumaných zemích na konci 60.let minulého století, vztahující se k ochraně soukromí, zaručovala především ochranu listovního tajemství, telekomunikací a nedotknutelnosti obydlí. Musíme opět vzít v úvahu, že nutnost ochrany dat se zvýšila právě s rozvojem nových technologií

[1] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005), někdy je též používán název „The European Human Rights Convention".
[3] Při tvorbě Evropské úmluvy o lidských právech se ochrana elektronické komunikaci výslovně uvést nemohla, vždyť ještě neexistovala.
[4] Evropský soud pro lidská práva postupně rozpracoval doktrínu, tato práva na ochranu osobních dat mají být chráněna nejen v rovině vertikální, ale i v rovině horizontální.

zejména v 60. letech, a proto ústavy přijímané dříve nemohly počítat s využíváním některých moderních technologií. Jen v některých státech existovala právní úprava ochrany dat jako samostatný právní předpis. Jednalo se o Švédsko, Belgii a Německou spolkovou republiku. V textech ústav jednotlivých států se ochrana osobních údajů začala objevovat až v pozdějších letech. Např. v nizozemské ústavě z roku 1983 v článku 10, který uznává právo každého na ochranu soukromí, se dále zakotvuje povinnost upravit zákonem pravidla týkající se uchovávání dat o osobě, jejich využití a možnosti jejich opravy.

V zájmu sjednocení roztříštěné legislativy členských států Rady Evropy a dostatečného zajištění ochrany dat, byla přijata Výborem ministrů v roce 1973 Rezoluce č. 22[5] zabývající se shromažďováním a uchováváním osobních informací v soukromém sektoru a v následujícím roce Rezoluce č. 29[6], která se týkala uchování osobních informací v automatických databankách[7] (lépe řečené „souborech dat“) veřejného sektoru. První rezoluce apelovala na vlády členských států Rady Evropy, aby podnikly kroky, které považují za nezbytné ke uplatnění deseti základních zásad ochrany údajů jmenovaných v této rezoluci. Jednalo se především o to, aby osoba, o které byly shromážděny informace, o nich věděla, měla být informována o účelu použití těchto dat, data neměla být zjišťována podvodnými prostředky, měla být uchovávána na nezbytnou dobu, neměla být poskytnuty třetí straně bez řádného souhlasu osoby a zejména informace intimního charakteru by neměly být zaznamenávány, případně rozšiřovány dále. Přístup k informacím měl být umožněn jen oprávněným osobám, které měly podléhat přísným pravidlům pro zacházení s údaji a mělo se použít všech prostředků k předejití zneužití shromážděných informací. Druhá rezoluce se týkala ochrany shromažďovaných informací ve veřejném sektoru. Mimo zásady uvedené již v Rezoluci č. 22, bylo jako obecné pravidlo stanoveno, že se má veřejnost vždy dozvědět o zavádění databank a informace intimního charakteru měly být shromažďovány jen na základě zákona spolu se stanovením přísných podmínek jejich získávání, podmínek, za kterých mají být uchovávány a k jakému účelu použity.

Už při přijímání těchto rezolucí bylo jasné, že je potřeba nová pravidla pro nakládání s osobními údaji potřeba zajistit i jinými prostředky, právně závaznými akty. Obě přijaté rezoluce ponechaly rozhodnutí o způsobu ochrany dat na vládách, každý stát se mohl rozhodnout, co pro něj bude výhodnější, např. zda přijmout novou zákonnou úpravu, či rozšířit stávající právní předpisy o ochranu soukromí ve smyslu ochrany osobních údajů v souvislosti s používáním nových technologií užívaných k uchovávání a přenosu těchto informací, nebo dosáhnout rezolucemi požadované ochrany jinými prostředky.

[5] Resolution (73) 22 on the protection of the privacy of individuals vis-á-vis electronic data banks in the private sector.
[6] Resolution (74) 29 on the protection of the privacy of individuals vis-á-vis electronic data banks in the public sector.
[7] V originále užívané spojení „automated data banks“.

Po přijetí rezolucí začaly členské státy přijímat potřebná opatření k naplnění jejich požadavků, zejména došlo k přijetí nové zákonné úpravy v oblasti ochrany dat v automatizovaných systémech a v některých případech byla ochrana dat vtělena i do národních ústav. Zároveň v Radě Evropy sílilo přesvědčení, že je nutné zajistit potřebnou ochranu dalším právním nástrojem. Státy sice přijímaly právní úpravu, která byla v klíčových bodech stejná ve všech zemích, nicméně vznikaly i nové problémy. Jak zajistit adekvátní ochranu datům, která mají být předána do jiného státu? Jaká právní úprava se bude vztahovat na tato data? Bude poskytnuta stejná míra ochrany datům v jednotlivých státech? V souladu s myšlenkou volného toku informací přes hranice státu musela být také nastolena pravidla pro zacházení s těmito daty. Nakonec zvítězila myšlenka vzniku mezinárodní úmluvy, která bude otevřena k podpisu i nečlenským státům Rady Evropy a jejímž hlavním principem bude aplikace jednotných principů při nakládání s osobními údaji ve všech státech, které Úmluvu přijmou.[8] Proto na její přípravě pracovali od roku 1978 spolu s Komisí expertů také zástupci Organizace pro hospodářskou spolupráci a rozvoj či zástupci Evropských společenství.

Dne 28. 1. 1981 byla Úmluva otevřena k podpisu, po ratifikaci pěti státy vstoupila v platnost k 1. 10. 1985.[9] V tomto mezinárodním dokumentu se podařilo především definovat základní pojmy na poli ochrany osobních údajů – osobní údaje, subjekt údajů, automatizovaný soubor dat[10], automatizované zpracování a správce souboru údajů. V jednotlivých vnitrostátních předpisech mohou vznikat rozdíly v definování pojmů nebo může dojít k pochybnostem, jak některá ustanovení vyložit nebo jak je právo daného státu definuje, proto bylo nutné přesně vymezit základní pojmy v ochraně dat. Tato terminologie navazovala na terminologii uváděnou zmíněnými rezolucemi č. 22 a 29. Úmluva zaručuje, že všechny osobní údaje osob musí být získávány a zpracovávány za jasných podmínek – být získávány poctivě, být shromažďovány k jistému účelu, být přesné, a musí být uchovávány jen po nezbytnou dobu.[11] Zvláštní pozornost je věnována osobním údajům týkajícím se rasy, politických názorů, náboženského přesvědčení, zdraví, pohlavního života, odsouzení za trestný čin dané osoby.

[8] Druhá ze zvažovaných možností úpravy ochrany dat byla teze, že každý stát bude aplikovat vlastní zákonodárství a principy ochrany. Toto bylo ale v rozporu s požadavkem stejných práv pro všechny osoby a přineslo by to jen další komplikace při předávání dat mezi státy a aplikační problémy.

[9] Česká republika Úmluvu podepsala 8. 9. 2000, po ratifikačním procesu pak vstoupila v platnost dne 1. 11. 2001.

[10] V Rezoluci č. 22 byla používán termín „automatizovaná databanka" tedy „automated data bank". V textu Úmluvy byt nově použit termín „automatizovaný soubor dat", neboli „automated data file".

[11] Úmluva a další právní předpisy zaručují subjektům údajů mnoho práv v ochraně osobních údajů. Subjektům údajů – fyzickým osobám nejsou Úmluvou ani zákonem č. 101/2000 Sb., o ochraně osobních údajů, žádné povinnosti explicitně ukládány. Někteří autoři ale hovoří o tzv. skrytých povinnostech. Blíže viz. Matoušová, M., Hejlík, L.: *Osobní údaje a jejich ochrana,* Praha: ASPI, a. s., 2008, s. 288.

Podle článku 3 Úmluvy jsou státy povinny uplatňovat tyto principy na automatizované soubory údajů a jejich zpracování jak ve veřejném tak v soukromém sektoru. Fakultativně si mohou signatářské státy působnost rozšířit i na soubory dat nezpracovávané automatizovaně a dále také je možné poskytnout ochranu osobním údajům nikoli jen fyzickým osobám, ale i jiným skupinám osob sdružujícím fyzické osoby (zejména tedy právnickým osobám). Důležitým bodem je ustanovení, které státy zavazuje k přijetí odpovídající právní úpravy ve vnitrostátním řádu, i když není přesně stanoveno, jakým způsobem tak státy mají učinit. Oproti ustanovením ze sedmdesátých let se již přímo požaduje zákonná úprava. Dalším problematickým okruhem, kterému se Úmluva věnuje, jsou záruky v ochraně dat. Především je potřeba zaručit osobám získání informací o existenci nějakého automatizovaného souboru dat a zjistit, zda jsou předmětem zpracování i data dané osoby, dále pak musí státy zaručit osobám možnost kontroly a opravy svých dat. Obsahem právních předpisů pak také musí být dostatečné možnosti postihu za porušení vnitrostátních předpisů a možnost použití opravných prostředků proti porušení práva.

Specifická pravidla se týkají i toku informací přes hranice[12]. Státy obecně nemohou zabraňovat toku informací mezi státy, které přistoupily k Úmluvě, protože sama Úmluva ve svých ustanoveních zakotvuje základní principy ochrany dat, které všechny státy musí dodržovat a plnit. Jakékoli restrikce ve smyslu omezování toku dat jsou povoleny jen proto, aby se zamezilo obcházení vnitrostátní legislativy nebo proto, že zvláštnímu souboru dat je státem, ze kterého informace pocházejí, poskytována zvláštní, tedy zvýšena ochrana oproti ochraně státu, kde mají být data předána.

Úmluva nezapomíná ani na spolupráci mezi smluvními stranami. Každý stát je povinen stanovit, který úřad bude pověřen poskytováním vzájemné pomoci mezi státy – v České republice se jím stal Úřad pro ochranu osobních údajů vytvořený v roce 2000. Ten má mimo jiné zajišťovat jednak pomoc a poskytování informací mezi pověřenými úřady jednotlivých států, zejména podávat informace o vnitrostátní legislativě či zabývat se výkladem Úmluvy, a dále také poskytovat pomoc osobám v zahraničí – subjektům informací, které o pomoc požádají (případně pomoc odmítnout). Speciálním zřízeným poradním orgánem je na základě Úmluvy Poradní výbor Rady Evropy, složený ze zástupců smluvních stran[13]. Tento výbor se zabývá funkčností Úmluvy, může podávat návrhy na změnu Úmluvy a podněty k zlepšení fungování. O svých závěrech informuje Výbor ministrů Rady Evropy.

Signatářské státy si zvolily různou cestu, jak dosáhnout cílů, ke kterým se zavázaly. Česká republika přijala zákon č. 101/2000 Sb., o ochraně osobních údajů, který nahradil již nevyhovující zákon č.

[12] V originále „transborder data flows".
[13] V případě České republiky je zástupcem předseda Úřadu pro ochranu osobních údajů.

256/1992 Sb., o ochraně osobních údajů v informačních systémech. Situace v dalších státech je různorodá. Některé členské státy Rady Evropy Úmluvu stále neratifikovaly (např. Rusko, Ukrajina, Turecko), i když ve svých ústavách ochranu osobních údajů zaručují. Většina států má speciální právní předpis vztahující se k ochraně dat, členské státy Evropské unie mají dokonce povinnost mít zvláštní zákon na ochranu osobních údajů. Ale existují i státy, které zaručují ochranu dat v ústavě a další konkrétní ochrana je upravena ve zvláštních právních předpisech.

Na tomto místě můžeme ještě poukázat na Doporučení Výboru ministrů 87/15 členským státům upravující používání dat v policejním sektoru[14]. Toto Doporučení doplňuje je silně ovlivněno Úmluvou a doplňuje podrobněji ochranu poskytovanou Úmluvou na další zájmovou oblast. Oblast působení policie je poměrně široká a zpracovávané údaje jsou takového charakteru, že by jejich zneužitím mohlo dojít k výraznému narušení práv fyzické osoby. Doporučení také odůvodňuje svou existenci článkem 9 Úmluvy, který umožňuje odchýlit se, mimo jiné z důvodu veřejné bezpečnosti státu, od některých požadavků Úmluvy na kvalitu údajů a záruky poskytované subjektům údajů. Členské státy by měly ve svých vnitrostátních právních předpisech dodržovat zásady týkající se shromažďování, používání a sdělování dat a dále by měly ustanovit nezávislý orgán, který by měl především dohlížet na dodržování ustanovení tohoto Doporučení.

Postupem času se ukázalo, že Úmluva je nástrojem užitečným a fungujícím. S rostoucím pokrokem a častějšími problémy při předávání informací vyšlo najevo, že je potřeba doplnit některé aspekty ochrany, které nebyly Úmluvou jednoznačně pokryty. Jednalo se o dva problémové okruhy. Jednak bylo potřeba vyjasnit, jakým způsobem mohou být osobní data předávána do států, které neratifikovaly Úmluvu, a druhým se ukázala nutnost zakotvit další kontrolní mechanismus. Dne 8. 11. 2001 byl k podpisu otevřen Dodatkový protokol k Úmluvě o ochraně osob se zřetelem na automatizované zpracování osobních dat o orgánech dozoru a toku dat přes hranice[15] (dále jen „Dodatkový protokol“). V platnost vstoupil dne 1. 7. 2004. Je dobrým signálem, že Česká republika se stala čtvrtým státem, který Dodatkový protokol ratifikoval, a demonstroval tím svůj zájem na odpovídající právní úpravě. Spolu s ratifikací tohoto Dodatkového protokolu se Česká republika rozhodla rozšířit působnost Úmluvy i na neautomatizované zpracování dat a přiřadila se tak k většině států s takovouto právní úpravou. K rozšíření působnosti na jiné než fyzické osoby, jak je tomu asi v polovině států, nedošlo.

[14] Recommendation No.R (87) 15 regulating the use of personal data in police sector.
[15] Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of personal Data regarding supervisory authorities and transborder data flows.

Tok informací do nesignatářských států podléhá jiným pravidlům. Do těchto států lze předat data jen v případě, že je zajištěna ochrana dat, která je adekvátní ochraně dat podle Úmluvy. V každém jednotlivém případě se budou zřejmě posuzovat konkrétní podmínky, které stát splňuje. Nepochybně bude také zkoumána povaha dat, která se poskytují, délka jejich poskytnutí a jejich odpovídající ochrana. Výjimky z tohoto pravidla za přesně daných podmínek Dodatkový protokol připouští.

Úmluva sice zakotvuje povinnost států umožnit osobám použít opravné prostředky k domáhání se svého práva a zavazuje státy, aby jejich legislativa trestala porušení práv vyplývajících z Úmluvy. Teprve Dodatkový protokol explicitně zavazuje státy vytvořit orgán či orgány, které se ochranou dat mají zabývat. Tyto orgány musí být nadány vyšetřovací pravomocí v oblasti ochrany dat, musí projednávat stížnosti občanů a musejí být na státu nezávislé. Dodatkový protokol se tedy stal významným nástrojem pro sjednocení kontrolních mechanismů používaných v signatářských státech a jednoznačným způsobem upravil pravidla pro přeshraniční tok dat.

Důležitost ochrany informací si uvědomují i Evropská společenství. Na jejich půdě byla přijata Směrnice 95/46 ES Evropského parlamentu a Rady o ochraně jednotlivců s ohledem na zpracování osobních údajů a o volném pohybu takovýchto údajů. Tato obecná směrnice se vztahuje k prvnímu pilíři Evropské unie. Dalším krokem k ochraně dat bylo také převzetí samotné Úmluvy do svého třetího pilíře. Dále Evropská společenství navázala dialog s Radou Evropy a chtěla by přistoupit k Úmluvě. Protože však Úmluva počítá s přistupujícími „státy“, bylo potřeba najít řešení vedoucí ke změně Úmluvy. Dne 15. 7. 1999 byl Radou Ministrů přijat dokument měnící Úmluvu[16]. Obsahem jsou jednak změny formální, tedy, pokud Úmluva přiznává právo státu, dojde k dodatku, že se může jednat o Evropská společenství. Další změnou v souvislosti s možným přistoupením Evropských společenství je možnost hlasování místo členských států, které přistoupily k Úmluvě a zároveň v dané oblasti přenesly pravomoc na Evropská společenství. Evropská společenství budou mít v tomto případě počet hlasů rovnající se počtu členských států ES, které přistoupily k Úmluvě a zároveň přenesly na ES svou pravomoc v dané problematické oblasti. Tato změna Úmluvy vstoupí v platnost, až ji ratifikují všechny signatářské státy.

Rada Evropy zareagovala na prudce se měnící dobu a na zavádění nových technologií do oblasti zpracování a uchovávání dat jako jedna z prvních mezinárodních organizací. Podařilo se jí díky několika přijatým dokumentům zavázat státy k ochraně údajů a zajistit kontrolní mechanismy přispívající k jistotě, že osobní údaje nebudou zneužívány k jiným než stanoveným účelům. Již od 70. let minulého století se tak ve vnitrostátních předpisech signatářských států setkáme s úpravou, kterou některé jiné

[16] Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

státy nemají dodnes. Rada Evropy průběžně monitoruje a hodnotí dodržování ustanovení Úmluvy a provádění příslušných legislativních kroků v jednotlivých státech. Dnešní doba ukazuje, že obezřetnost v nakládání s údaji byla na místě a je potřeba vyzdvihnout pozitivní dopad Úmluvy na vnitrostátní zákonodárství a nakládání s údaji nejen v rámci signatářských států, ale i na poskytování údajů do dalších států.

Literatura:

[1] Matoušová, M., M., Hejlík, L.: *Osobní údaje a jejich ochrana,* Praha: ASPI, a. s., 2008, stran 468, ISBN 978-80-7357-322-5

[2] Explanatory Report to Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108), dostupné na http//:www.coe.int

[3] Explanatory Report to Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of personal Data regarding supervisory authorities and transborder data flows, dostupné na http//:www.coe.int

[4] Explantory Memorandum to Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, dostupné na http//:www.coe.int

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SJEDNOCOVÁNÍ JUDIKATURY POHLEDEM ÚČASTNÍKA ŘÍZENÍ – ŘÍZENÍ PŘED ROZŠÍŘENÝM SENÁTEM NEJVYŠŠÍHO SPRÁVNÍHO SOUDU

ONDŘEJ MORAVEC

ADVOKÁTNÍ KANCELÁŘ HARTMANN, JELÍNEK, FRÁŇA A PARTNEŘI

Abstrakt

Příspěvek se zabývá problematikou mechanismů sjednocování judikatury vrcholných soudů pohledem účastníka řízení. Autor poukazuje, že se nejedná o pouhé interní mechanismy, které probíhají uvnitř soudu, ale o procedury, do nichž účastníci řízení mají možnost aktivně vstupovat a nabízet vlastní argumentaci. Dle autorova názoru by vyjádřením účastníkům měl být přikládán větší význam nejen z důvodu ochrany jejich subjektivních práv, ale také za účelem posílení stability judikatury.

Klíčová slova

Jednotnost judikatury, spravedlivý proces

Abstract

The paper deals with proceedings of unification of decision-making from parties' point of view. Author notices that these procedures are not only internal procedures which are to be run within courts, but also procedures which should be opened to parties and their submissions and arguments. In author's opinion it should be attached importance to parties submission not only because of protection their individual rights but also because of consolidation of decision-making.

Key words

Unity of decision-making, fair trial

Úvod

Přestože tato konference je určena především pro prezentaci výsledků teoretické práce, přičemž u doktorandů se automaticky předpokládá spojitost s disertační prací, rozhodl jsem se učinit výjimku a zvolil jsem téma, s nímž jsem se setkal ve své praxi advokátního koncipienta. Problematiku mechanismů sjednocování judikatury považuji za zásadní, zejména pak v kontextu současného trendu posilování normativního významu judikatury soudů vyššího stupně, a přesto v českých podmínkách značně opomíjenou. Tuto konferenci považuji za vhodné forum pro prezentaci několika poznámek dotýkající se jednotících mechanismů, přičemž se budu soustředit na vztah těchto mechanismů k účastníkům řízení a jejich subjektivním právům.

Obecně k procedurám sjednocování judikatury

Snaha o jednotný výkon soudní moci je právu vlastní a je přitom lhostejné, zda hovoříme o systému common law nebo o kontinentálním modelu. V pozadí této snahy můžeme spatřit tři úzce související hodnoty. Na prvním místě je to rovnost jednotlivců v právech vyjadřovaná pravidlem, že podobné případy mají být posuzovány podobně. S rovností úzce souvisí zásada předvídatelnosti soudního rozhodování, v jejímž duchu potenciální účastníci soudního řízení oprávněně očekávají, že právní otázka, která je předmětem sporu mezi nimi, bude soudy vyřešena obdobně jako byla řešena ve starších sporech jiných osob.[1] Třetím zájmem, který odůvodňuje pozornost věnovanou sjednocovacím mechanismům je posílení autority a důvěryhodnosti soudní moci tím, že její výkon je vnitřně konzistentní. Tyto tři zájmy je třeba mít na paměti jak při vytváření institucionálního rámce, v němž je judikatura sjednocována, tak při samotném výkonu sjednocovací činnosti.

Problematika normativního významu výsledků sjednocující činností vrcholných soudů je úzce spjata s otázkou precedentní závaznosti judikatury jako takové. Nepovažuji za nezbytné věnovat se této otázce podrobněji, omezím se pouze na konstatování, že i v kontinentálním systému práva judikatura svůj normativní význam má, byť se nejedná o závaznost odpovídající formálnímu prameni práva.[2] Nejvyšší soud a Nejvyšší správní soud mají sjednocování judikatury přímo v popisu práce. Je proto evidentní, že výsledky sjednocovací činnosti se promítají i do aplikace práva v budoucích sporech.

Náhled na procesy sjednocování judikatury se v poslední době vyvíjí. Po určité doktrinární kritice[3] obecných sjednocujících stanovisek dochází v praxi k jejich postupnému nahrazování jinými formami, kterými vrcholné soudy vykonávají svou funkci garanta jednotné judikatury, zejména pak cestou

[1] Srov. Šimíček, V.: Předvídatelnost soudního rozhodování, Jurisprudence roč. 2004, č. 5, s. 7.
[2] Odkázat lze zejména na četné práce Zdeňka Kühna, např. in: Kühn, Z., Bobek, M., Polčák, R. (eds.): Judikatura a právní argumentace, Auditorium, Praha, 2006, s. 6-11.
[3] Tamtéž, s. 49 a násl.

rozhodování o mimořádných opravných prostředcích. [4] Pravidla o řízení před těmito soudy a zejména pak podmínky přístupu k vrcholných soudů jsou touto změnou do značné míry ovlivněna. Na ústupu je ryze retrospektivní rozhodování nejvyšších soudů zaměřené na odstranění pochybení v předešlých řízeních ve prospěch rozhodování orientovaného prospektivně, jehož hlavním cílem je formulace zásadních právních názorů s potenciálem ovlivnit budoucí praxi.[5] Legislativním odrazem těchto změn jsou nejrůznější filtry nápadu nejvyšších soudů.[6] Je poměrně překvapující, jak malá pozornost je v současné době věnována druhé straně téže mince, kterou je dle mého názoru institucionalizace příslušných procedur, jimiž je prospektivně orientovaná judikatura vytvářena.[7] Filtrace nápadu totiž znamená méně judikatury nejvyšších soudů, která je však konzistentní a respektovaná. Existence efektivních sjednocovacích mechanismů je podle mého názoru jedním ze základních předpokladů konzistentnosti judikatury.

Zájem na elementární jednotě rozhodovací praxe je soudnímu rozhodování natolik vlastní, že se s jejím sjednocováním v nějaké podobě setkáme prakticky u jakéhokoli soudu, včetně soudů okresních. Za nejprimitivnější metody sjednocování můžeme považovat neformální konfrontaci názorů jednotlivých soudců a hledání společné praxe. Takové procesy jsou interní, právem nereglementované, často ovlivňované neformální autoritou a vnějšímu pozorovateli zcela skryté. Další nabízející se metodou je využití procesu, který sice je institucionalizován určitými formálními pravidly, která mohou mít v některých případech i formu právních norem, nicméně tyto procesy jsou součástí pomyslné černé skříňky příslušného soudu a jiné než soudní osoby se jich neúčastní. Konečně třetí představitelnou metodou je procedura formálně upravená procesním právem otevřená účastníkům řízení o mimořádných opravných prostředcích, či jiným osobám (např. s využitím actio popularis).

Soudy vykonávající sjednocující činnost mají v ideálním případě k dispozici vícero nástrojů, které mohou ke sjednocování judikatury sloužit. Využívání toho kterého nástroje je závislé na platném právu, resp. na zákonném vymezení procesních forem, jimiž soud může realizovat svou pravomoc. Nejvíce se nabízí sjednocování judikatury cestou rozhodování sporů, resp. určitým zobecňování jednotlivých

[4] Z poslední doby srov. tiskovou zprávu Nejvyššího soudu ze dne 29.2.2008, cit. dle www.nsoud.cz

[5] Srov. např. Bobek, M.: Několik poznámek k selekci nápadu před nejvyššími a ústavními soudy, In: Kysela, J. (ed.): Zákon o Ústavním soudu po třinácti letech, Eurolex Bohemia, Praha, 2006, s. 128 a n.

[6] Naposledy institut nepřijatelnosti kasační stížnosti ve věcech mezinárodní ochrany. Srov. Lavický, P., Šiškeová, S.: Nad novou úpravou řízení o kasační stížnosti, Právní rozhledy roč. 2005, č. 19, s. 693 a n., Šimíček, V.: Přijatelnost kasační stížnosti ve věcech azylu – jedna z cest k efektivitě práva, Soudní rozhledy, roč. 2006, č. 6, s. 201, Molek, P., Bobek, M.: Nepřijatelná nepřijatelnost ve věcech azylových; srovnávací pohled, roč. 2006, č. 6, s. 205.

[7] Předmětem teoretické diskuze je podobný institut jednotícího stanoviska pléna Ústavního soudu, srov. např. Malenovský, R.: K § 23 zákona o Ústavním soudu, Právní rozhledy, roč. 2007, č. 13, s. 486 a n., příp komentáře k zákonu o Ústavním soudu: Filip, J. In: Filip, J., Holländer, P., Šimíček, V.: Zákon o Ústavním soudu – komentář, 2. vydání, C. H. Beck, Praha, 2007, s. 98 a n. či Wagnerová, E. In: Wagnerová, E. a kol. Zákon o Ústavním soudu s komentářem, ASPI, Praha, 2007, s. 82 a n.. Všechny diskusní příspěvky se však soustředí na vnitřní aspekty procedury a postavení účastníků řízení opomíjejí.

závěrů formulovaných v rozhodnutích vydaných v konkrétních případech. Druhou možností je využívání abstraktních výkladových stanovisek, jejichž obsahem je zhodnocení aplikace právní normy před soudy nižších stupňů a názory sjednocujícího soudu na tuto interpretaci. Zmínit lze též sjednocování judikatury pomocí vydávání sbírky rozhodnutí, do níž jsou zařazována ta rozhodnutí, jimž soud přikládá precedentní význam a na nichž hodlá stavět svou budoucí rozhodovací praxi.

Domnívám se, že v kontextu naznačených probíhajících změn a současných trendů posilování precedentního významu judikatury, je vyjasnění charakteru jednotlivých mechanismů sjednocování judikatury, které právní řád zná, alfou a omegou předvídatelné a racionální aplikace práva. Ve svém příspěvku se pokusím podrobit analýze institut rozhodnutí rozšířeného senátu Nejvyššího správního soudu, resp. řízení před ním, a to z pohledu účastníka řízení.

Právní úprava řízení před rozšířeným senátem

Zákonné zakotvení řízení před rozšířeným senátem najdeme v ustanovení § 17 odst. 1 soudního řádu správního: *„Dospěl-li senát Nejvyššího správního soudu při svém rozhodování k právnímu názoru, který je odlišný od právního názoru již vyjádřeného v rozhodnutí Nejvyššího správního soudu postoupí věc k rozhodnutí rozšířenému senátu. Při postoupení svůj odlišný právní názor zdůvodní."* Přestože je zákonná úprava nanejvýš kusá, umožňuje formulaci charakteristických rysů řízení před rozšířeným senátem.

V prvé řadě lze z ust. § 17 odst. 1 soudního řádu správního dovodit, že judikatura je takto sjednocována cestou rozhodování o konkrétní věci v řízení o kasační stížnosti. Řízení před rozšířeným senátem je iniciováno senátem Nejvyššího správního soudu rozhodujícím o kasační stížností. Procesní formou (nástrojem) sjednocování je rozhodnutí v konkrétní věci (srov. dikce *postoupí věc*). V případě splnění zákonných předpokladů je založena působnost rozšířeného senátu k **rozhodnutí** sporné otázky nikoli toliko k vyjádření závazného právního názoru. Zde je třeba upozornit na zásadní odlišnost úpravy srovnatelného institutu v zákoně o Ústavním soudu, který v ust. § 23 hovoří o *předložení otázky.*[8] V krajním případě, je-li předmětem kasační stížnosti pouze otázka rozhodovaná rozšířeným senátem, může rozšířený senát rozhodnout rozsudkem ve věci samé. Řízení o kasační stížnosti je ve své dílčí otázce pouze přeneseno před rozšířený senát, z čehož vyplývá, že účastníci řízení o kasační stížnosti mohou uplatňovat svá procesní práva, včetně práva vyjádřit se ke všem rozhodným skutečnostem, i před rozšířeným senátem.

[8] Z tohoto důvodu označuje J. Filip jednotící stanovisko pléna Ústavního soudu za jediné prolomení zásady, že Ústavní soud nepodává abstraktní výkladová stanoviska. Srov. Filip, J.: cit. dílo, s. 51.

Řízení před rozšířeným senátem proto ze zákona není černou skříňkou, či toliko *vnitřním sjednocovacím mechanismem Nejvyššího správního soudu,* jak uvádí Molek,[9] nýbrž procedurou otevřenou účastníkům řízení o kasační stížnosti. Rozhodnutí rozšířeného senátu není abstraktním stanoviskem, nýbrž rozhodnutím o konkrétní věci vycházejícím ze skutkových okolností posuzovaného případu.

Z povinnosti senátu odůvodnit svůj právní názor ve spojení s otevřenou povahou sjednocující procedury lze dle mého názoru dovodit právo účastníků řízení o kasační stížnosti seznámit se s odůvodněním odlišného právního názoru rozhodujícího senátu. Z ust. § 17 odst. 1 soudního řádu správního lze rovněž dovodit precedentní závaznost rozhodnutí rozšířeného senátu, a to per argumentum a minori ad maius (je-li senát Nejvyššího správního soudu vázán právním názorem jiného senátu, který mu brání zaujmout právní názor odlišný bez předložení věci rozšířenému senátu, tím spíše není oprávněn samostatně rozhodnout v rozporu s rozhodnutím rozšířeného senátu).

Podrobnější úpravu procedury řízení před rozšířeným senátem nalezneme v jednacím řádu Nejvyššího správního soudu. Pro účely tohoto příspěvku je podstatné ust. § 69 JŘ, dle něhož senát Nejvyššího správního soudu rozhodne o postoupení věci rozšířenému senátu usnesením, v jehož odůvodnění vymezí spornou otázku, označí předešlé odlišné rozhodnutí a poučí účastníky řízení o možnosti namítat podjatost členů rozšířeného senátu. Usnesení se doručuje účastníkům řízení a osobám zúčastněným na řízení. Dle ust. § 70 JŘ předseda senátu postoupí spis rozšířenému senátu po nabytí právní moci usnesení o postoupení věci rozšířenému senátu. V ust. § 71 JŘ je pak upraven postup rozšířeného senátu pro případ, že sporná je věc sama a pro případ, že sporná je toliko dílčí otázka.

De lege lata je totožná procedura využívána jak pro odsunutí jediného staršího izolovaného (např. ne zcela domyšleného nebo i zcela chybného) rozhodnutí Nejvyššího správního soudu, tak pro zásadní změnu právního názoru vedoucí k přehodnocení judikatury, kterou je možno považovat za již ustálenou a ovlivňující nejen rozhodovací činnost krajských soudů, příp. správních orgánů, ale i chování jednotlivců.

Vztah rozhodnutí rozšířeného senátu a jednotlivce

Z popsaných charakteristik je zřejmé, že procedura řízení před rozšířeným senátem podstatným způsobem překračuje prosté sladění not jednotlivých soudců Nejvyššího správního soudu, které

[9] Molek, P. in dílo cit. sub 2, s. 205.

probíhá neveřejně tak, aby Nejvyšší správní soud zněl navenek jednotně. Účastníci řízení o kasační stížnosti se mohou na vzniku rozhodnutí rozšířeného senátu v mezích svých subjektivních procesních práv podílet a zároveň mohou legitimně očekávat kvalifikovaný způsob zacházení s rozhodnutími rozšířeného senátu v budoucí praxi Nejvyššího správního soudu i krajských soudů.

V zásadě můžeme identifikovat tři okruhy otázek:

1. možnosti vyvolat řízení před rozšířeným senátem a v tomto řízení aktivně vystupovat,
2. používání rozhodnutí rozšířeného senátu v pozdějších případech,
3. revize rozhodnutí rozšířeného senátu.

Právo na přístup k rozšířenému senátu

Jak již bylo uvedeno, řízení před rozšířeným senátem je zahajováno na popud senátu Nejvyššího správního soudu, který v řízení o kasační stížnosti dospěl k závěru, který je odlišný od názoru vyjádřeného ve starším rozhodnutí Nejvyššího správního soudu. Účastníci řízení nejsou povinni ani oprávněni takový návrh učinit, pokud navrhnou předložení věci rozšířenému senátu (např. již v kasační stížnosti avizují starší nepříznivé rozhodnutí Nejvyššího správního a přinesou argumenty pro odklon od tohoto rozhodnutí), nemusí být o tomto návrhu rozhodováno. Předložení věci rozšířenému senátu však není v diskreci senátu. Ten má ex lege pouze dvě možnosti: následovat starší právní názor nebo předložit věc rozšířenému senátu. Pokud dojde k odklonu od staršího rozhodnutí, aniž je věc předložena k posouzení rozšířenému senátu, je porušeno právo účastníků řízení na zákonného soudce chráněné čl. 38 Listiny. [10]

Pojem právní názor bývá v odborné literatuře ztotožňován s důvody vedoucími k vydání rozhodnutí. Názor vyslovený obiter dictum není z tohoto důvodu právním názorem způsobilým soud jakkoli zavazovat.[11] Domnívám se, že věc však tak jednoduše nestojí. Ratio decidendi není vždy jednoduše oddělitelné od tzv. obiter dicta, resp. odlišení bývá produktem až následné aplikace precedentu.[12] Tato skutečnost je neslučitelná s obligatorní působnosti rozšířeného senátu. Ta není založena jen za účelem odklonu od ustálené judikatorní praxe, nýbrž slouží i k překonání jediného izolovaného rozhodnutí, které se nemohlo stát precedentem. Striktní rozlišování závazného ratio decidendi a bezvýznamného

[10] Srov nález Ústavního soudu IV. ÚS 613/06 ze dne 18.4. 2007
[11] Filip, J.: cit. dílo, s. 100, Malenovský, R.: cit. dílo, s. 488 nebo Vopálka, V. a kol. : Soudní řád správní. Komentář, C. H. Beck, Praha, 2004 s. 28.
[12] Kühn in dílo cit. sub 2, s. 20.

obiter dicta postrádá zákonnou oporu,[13] odporuje zásadě předvídatelnosti soudního rozhodování, která stojí v pozadí celého procesu, a nevyhovuje ani vztahu rozšířeného senátu a tříčlenných senátů Nejvyššího správního soudu. Ten totiž není identický se vztahem prvostupňového a odvolacího soudu, v němž odvolací může dozírat na korektní aplikaci svých starších rozhodnutí nižšími soudy cestou přezkumu prvostupňových rozhodnutí. Smyslem obiter dicta nadto je právě vyjádření názoru na řešení určité otázky za účelem odstranění nejistoty.[14] Bylo by proto kontraproduktivní bagatelizovat takto mimochodem, ale zato výslovně, řečené. Uvedenou argumentaci lze doložit i na příkladu jednoho z nejnovějších rozhodnutí rozšířeného senátu týkajícího se problematiky prekluze práva vyměřit daň. Tímto rozhodnutím byl překonán rozsudek Nejvyššího správního soudu 1 Afs 108/2006-104 ze dne 21.3.2007,[15] resp. právní názor, že k prekluzi práva doměřit daň jsou správní soudy povinny přihlédnout z úřední povinnosti, v tomto rozsudku vyjádřený cestou obiter dicta. Domnívám se proto, že pro určení, zda se jedná o *právní názor* není relevantní vztah ke znění výroku rozhodnutí, nýbrž skutečnost, **zda se jedná o jednoznačně vyjádřenou interpretaci právní normy**.

Praktickým problémem je posouzení, zda starší odlišný právní názor vytváří pro senát překážku bránící jemu samotnému ve věci rozhodnout. Přestože to z ust. § 17 soudního řádu správního zcela jasně nevyplývá, je jednou z podmínek příslušnosti rozšířeného senátu existence *rozporu dvou právních názorů* a z ní vyplývající potřeba sjednotit přístup Nejvyššího správního soudu jako celku. Pojem rozporu však není zcela bezrozporný. Lze si představit tři situace:

a) senát hodlá použít interpretační alternativu odlišnou od interpretace téhož ustanovení vyjádřené ve starším rozhodnutí,
b) ve starším rozhodnutí Nejvyššího správního soudu je vyjádřen obecný právní názor vztahující se i na případ posuzovaný senátem, který dospěje k závěru, že skutkové a právní okolnosti vyžadují, aby byl tento případ z působnosti staršího obecného právního názoru vyňat
c) senát hodlá interpretovat právní normu jinak, než jak Nejvyšší správní soud učinil v případě skutkově a právně nikoli totožném, ale příbuzném

[13] K této otázce srov. debatu na jinepravo.blogspot.com.
[14] Obiter dictum dokonce někdy zajistí místo judikátu v tištěné sbírce – srov. např. rozsudek Nejvyššího správního soudu ze dne 2 As 89/2006-107 ze dne 12.7. 2007, publikovaný pod č. 1367 Sb. NSS, v němž Nejvyšší správní soud zrušil rozhodnutí Městského soudu v Praze vydané v řízení, v němž byla spornou otázka, zda je kancelář prezidenta republiky povinným subjektem ve smyslu zákona č. 106/1999 Sb., o svobodném přístupu k informacím. Rozhodnutí Městského soudu v Praze bylo zrušeno pro nepřezkoumatelnost, nicméně Nejvyšší správní soud se obiter dictim vyjádřil též k meritu věci. Je zřejmé, že odlišný názor Nejvyššího správního soudu na tuto otázku nebyl oním důvodem rozhodujícím pro vydání rozhodnutí, Nejvyšší správní soud však cítil potřebu vyjádřit se k ní, a to dokonce zařazením do tištěné sbírky. Domnívám se, že takto formulovaný názor do budoucna zakládá pro Nejvyšší správní soud překážku pro vydání rozhodnutí založeném na opačném právním názoru, aniž by byla využita procedura předvídaná § 17 soudního řádu správního.
[15] Cit. dle www.nssoud.cz.

Uvedené třídění víceméně kopíruje dvojí možný způsob odklonu od precedentu v systému common law – zatímco situace pod písm. a) odpovídá změny precedentu, další dvě kategorie odpovídají odklonu formou odlišení. Soudní řád správní výslovně nestanoví, jaká forma rozporu má být řešena před rozšířeným senátem. Z analýzy rozhodnutí rozšířeného senátu vydaných v posledních dvou letech a publikovaných se sbírce rozhodnutí Nejvyššího správního soudu lze dospět k závěru, že Nejvyšší správní soud užívá tuto kvalifikovanou unifikační proceduru spíše restriktivně, tj. zejm. v situacích uvedených pod písm. a). Rozpor principální,[16] který se projevuje v odlišném přístupu k obdobným institutům, zůstává pravidelně k vyřešení senátům. Většina rozhodnutí rozšířeného senátu je formulována tak, že poskytuje prostor pro odklon cestou odlišení, a to na úrovni senátu. Popsanou praxi Nejvyššího správního soudu již minimálně v jednom případě označil Ústavní soud za ústavně souladnou, a to v nálezu II. ÚS 192/05 ze dne 11.7.2007. Rozhodování rozšířeným senátem tedy slouží spíše k odstranění rozporu normativního, kdy vedle sebe nemohou logicky obstát oba právní názory, nikoli k dosažení konzistence judikatury v širokém smyslu.

Obligatorní povaha řízení před rozšířeným senátem opřená o právo na zákonného soudce vyvolává otázku, kdy vzniká účastníkům řízení před NSS právo, aby o jejich věci rozhodl rozšířený senát, zejména v situacích, kdy táž otázka je předmětem rozhodnutí Nejvyššího správního soudu ve vícero sporech různých účastníků. Formálně je tímto okamžikem moment, kdy senát dospěje k závěru odlišnému od již vysloveného právního názoru. Pokud se tedy porada uskuteční až poté, co rozšířený senát rozhodl v obdobné věci jiného stěžovatele, není již důvodu opakovaně věc rozšířenému senátu předkládat.

Takový závěr považuji za neudržitelný jak z důvodu subjektivních (práv účastníků řízení), tak objektivních (obecného zájmu na dosažení jednotného rozhodování Nejvyššího správního soudu). V předešlých částech příspěvku jsem poukázal, že účastník řízení o kasační stížnosti není pouhým pasivním dodavatelem příležitosti Nejvyššího správního soudu vyjádřit se k zásadní právní otázce a že může podobu rozhodnutí aktivně ovlivnit. Domnívám se proto, že účastníci řízení o kasační stížnosti, jejímž předmětem je táž sporná právní otázka, by měli být ve srovnatelném procesním postavení. Není obhajitelný závěr, že je věcí soudu jako celku, aby podle vlastních kritérií vybral případ, který bude předložen rozšířenému senátu. Argument, že v ostatních (nevyvolených) případech zřejmě nebyla existence rozporu známa, tudíž nebyly splněny podmínky pro předložení věci rozšířenému senátu, je z pohledu rovnosti účastníků řízení o kasační stížnosti bezvýznamný. Současná právní úprava umožňuje zaparkování spisu jednoho stěžovatele ve skříni příslušného soudce zpravodaje a neformální vyčkání rozhodnutí rozšířeného senátu v jiné věci. Takový stav potenciální libovůle (byť netvrdím, že se jedná o

[16] K rozlišení principiálního a normativního rozporu srov. Kühn, Z.: Konzistence judikatury jako problém právní kultury, in: Kysela, J. (ed.): Zákon o Ústavním soudu po třinácti letech, Eurolex Bohemia, Praha, 2006, s. 111-115.

libovůli vykonávanou s úmyslem upřít účastníkům řízení jakákoli práva) považuji z pohledu účastníka řízení za zcela nepřijatelný. Právo na předložení věci rozšířenému senátu v případě, že senát, jemuž věc napadla, se hodlá odchýlit od názoru již vyjádřeného podle mého názoru nutně musí vzniknout v okamžiku podání kasační stížnosti, resp. uplatnění příslušné námitky v doplňujícím podání.

De lege ferenda považuji za vhodné přijetí takové zákonné úpravy, která řízení před rozšířeným senátem otevře nejen účastníkům řízení o kasační stížnosti, jímž bylo řízení před rozšířeným senátem vyvoláno, ale i účastníkům ostatních řízení, v nichž je sporná otázka řešena.[17] Vedle znatelného a zároveň legitimního posílení subjektivních procesních práv by taková změna byla přínosná též objektivně. Již při letmém nahlédnutí do tzv. průměrného usnesení rozšířeného senátu zjistíme, že bývá argumentačně značně propracované, pracuje s poznatky právní teorie i četnou judikaturou, vyrovnává se s ústavními otázkami a je výrazně prospektivně orientované.[18] Má zkrátka ve vínku stát se precedentem. Kvalitě a životaschopnosti vzniklého precedentu by však výrazně prospělo, byl-li by konfrontován nejen se skutkovými okolnostmi jednoho případu a právními argumenty účastníků jednoho řízení, resp. předkládajícího senátu, ale též se skutkovými okolnostmi a argumentací uplatněnou v jiných řízeních. Věřím tomu, že i účastníci řízení (resp. jejich právní zástupci) jsou v některých případech schopni pozitivně ovlivnit některá zásadní rozhodnutí a přispět tak ke kultivaci právní krajiny.

Nabízející se racionální námitku, že není v silách Nejvyššího správního soudu udržet si zcela přehled o všech sporných otázkách, lze odstranit přenesením odpovědnosti na účastníky řízení, resp. jejich právní zástupce. Řízení o kasační stížnosti je advokátským procesem, přičemž úloha advokáta se dnes zpravidla vyčerpává sepsáním kasační stížnosti. Považoval bych za odůvodněné požadovat po advokátovi, aby sledoval vývoj judikatury Nejvyššího správního soudu a v řízení před ním aktivně vystupoval. Za optimální bych považoval zveřejnění sdělení, že je zahajováno řízení před rozšířeným senátem, v němž by byla vymezena otázka, o níž bude Nejvyšší správní soud rozhodovat. Ve stanovené přiměřené prekluzivní lhůtě by se pak účastník řízení o kasační stížnosti mohl ujmout příslušných procesních práv.

Zveřejnění usnesení o zahájení řízení před rozšířeným senátem by mělo výrazně pozitivní dopad i pro bezprostředně nezaujaté osoby. Touto cestou je totiž signalizováno, že může dojít k judikatornímu

[17] Jako určitý vzor by mohla posloužit úprava vedlejšího účastenství v řízení před Ústavním soudem o kontrole norem. Mechanickému převzetí však brání principiální odlišnost řízení před rozšířeným senátem Nejvyššího správního soudu.
[18] Jako ilustrativní příklad může posloužit usnesení rozšířeného senátu 2 Afs 155/2004-110, č. 735 Sb. NSS, které zásadním způsobem ovlivnilo aplikační praxi ve věcech daňové kontroly nebo rozsudek Nejvyššího správního soudu ze dne 22.7. 2005, čj. 6 A 76/2001-96, analyzující institut nicotnosti správního rozhodnutí.

odklonu v některé otázce, což může mít (zejména v daňové oblasti) zcela zásadní dopady. Lze důvodně předpokládat existenci určitého podílu rozhodnutí, která jsou již po svém vydání uvnitř Nejvyššího správního soudu považována za kontroverzní a u nichž lze očekávat jejich překonání při nejbližší příležitosti. Bylo by korektní, pokud by zahájení příslušné procedury bylo co nejdříve zveřejněno, jinak hrozí, že adresáti práva založí své chování na takto ohroženém rozhodnutí Nejvyššího správního soudu. Domnívám se, že by bylo nanejvýš vhodné, kdyby tato procedura byla dostatečně institucionalizována.

Aplikace rozhodnutí rozšířeného senátu

Dle ustanovení § 17 soudního řádu správního je rozhodnutí rozšířeného senátu o řešené otázce pro předkládající senát závazné. Vedle toho je však třeba předpokládat precedentní význam rozhodnutí rozšířeného senátu i pro budoucí spory, v nichž je řešena táž otázka. Problematika normativní účinnosti soudního rozhodnutí není z pochopitelných důvodů v České republice dostatečně zpracována. Představa o významu soudního rozhodnutí toliko inter partes podobné úvahy v podstatě vylučovala. V poslední době se situace postupně mění. Z prostředí common law byla do české doktríny přenesena teorie incidentní retrospektivy, dle níž se precedent uplatní na případ, v němž byl vytvořen, a dále na všechny případy v budoucnu řešené.[19]

Při aplikaci uvedeného pravidla je však třeba postupovat obezřetně a respektovat, že ani dnes není soudní rozhodnutí chápáno jako formální pramen práva, a proto je jeho normativní síla ve srovnání se systémem common law kvalitativně odlišná. I rozhodnutí rozšířeného senátu, byť vzhledem ke své formulaci výrazně prospektivně orientované, zůstává formálně soudním rozhodnutím. Při aplikaci práva v budoucích případech vyjadřuje odkaz na soudní rozhodnutí názor vrcholné soudní instance na řešení určité otázky. Pokud se jedná o rozhodnutí rozšířeného senátu, stalo se tak kvalifikovanou procedurou a jsou stanoveny přísnější podmínky na přehodnocení takto formulovaného právního názoru. Prostý odkaz na rozhodnutí rozšířeného senátu a argumentaci jeho autoritou lze proto považovat za dostatečné odůvodnění pouze tehdy, jsou-li takto vyvráceny veškeré relevantní námitky účastníků řízení. Pokud jsou uplatněny argumenty, s nimiž rozšířený senát nepracuje, domnívám se, že je na místě, aby na ně orgán aplikující právo našel vlastní odpověď. Pokud tak neučiní, je třeba uvažovat o tom, zda závěr rozšířeného senátu ve světle uplatněných argumentů obstojí, či zda je na danou věc aplikovatelný.

[19] Kühn, Z. in dílo cit. sub 2, s. 48.

Závěry rozšířeného senátu jsou často formulovány značně obecně. Vedle toho znění ust. § 17 soudního řádu správního, praxe Nejvyššího správního soudu i judikatura Ústavního soudu nasvědčují tomu, že tato procedura slouží k odstranění přímých rozporů. Obě podmínky vytvářejí pro správní orgány, ale zejména pro krajské soudy a senáty Nejvyššího správního soudu poměrně značný prostor k vymezení se proti závěrům rozšířeného senátu cestou odlišení. Tato možnost iniciace změny judikatury je tradičně v rukou nižších soudů i v systému common law s tím, že je následně na vyšším soudu, zda iniciativu akceptuje.[20] Mechanické přenesení této koncepce je však problematické, neboť rozšířený senát není nadán právem přezkoumávat rozhodnutí tříčlenných senátů a ty se, alespoň v individuální kauze, mohou odlišovat zdánlivě nekontrolovaně. Nesprávnost odlišení může být na úrovni obecných soudů zhojena až cestou dalšího řízení před rozšířeným senátem, kterým rozšířený senát svůj obecně formulovaný právní názor vzešlý z obdobné (nikoli však totožné otázky) vztáhne i na později projednávaný skutkový stav. Je proto třeba apelovat na Ústavní soud, aby byl v těchto otázkách dostatečně bdělý a alespoň v obecné rovině z pozic orgánu ochrany ústavnosti formuloval pravidla pro aplikaci závěrů rozšířeného senátu tříčlennými senáty a důsledně vyžadoval jejich plnění.

Samozřejmostí aplikace závěrů vzešlých z rozhodnutí Nejvyššího správního soudu je, aby se jednalo o rozhodnutí publikované, byť třeba jen na webu. Nepřijatelný by proto byl postup, kterým by Nejvyšší správní soud odmítl námitky stěžovatele s odůvodněním, že právní otázka byla již vyřešena rozšířeným senátem, pokud stěžovatel neměl možnost se s tímto rozhodnutím seznámit.

Revize rozhodnutí rozšířeného senátu

Zatímco odklon cestou odlišení je v diskreci senátů, přímé nahrazení (overrulling) senátem je pochopitelně vyloučeno. Otázkou zůstává, zda i sám rozšířený senát je svým rozhodnutím vázán, či zda je oprávněn své závěry přehodnotit, aniž by existovaly zvláštní skutkové okolnosti pro změnu názory nebo změna relevantní právní úpravy. Na úrovni Ústavního soudu je tato změna právního názoru pléna bez příslušných změn skutkových či právních některými autory zpochybňována jakožto racionálně nezdůvodnitelná.[21]

[20] Kühn, Z. in dílo cit. sub 2, s. 20-22.
[21] Např. Wagnerová, E.: cit. dílo, s. 61. Nutno však jedním dechem dodat, že autorka hovoří pouze o změně názoru bez změny v referenčním prostředí, tj. že není přípustné prosté opravení se. Opačný názor zastává Filip, srov. Filip, J.: cit. dílo. s 102.

V případě řízení před rozšířeným senátem Nejvyššího správního soudu je třeba rovněž počítat s možností změny názoru pod tíhou nálezu Ústavního soudu, který rozhodnutí rozšířeného senátu označí za protiústavní, jinak však zní položená shodně.[22]

Domnívám se, že změnu právního názoru spojenou se změnou rozhodovací praxe Nejvyššího správního soudu není možné a priori zavrhovat, byť je samozřejmě nežádoucí. V případě Nejvyššího správního soudu chybí obdobná opora, jakou je čl. 89 Ústavy. Při přijetí závěru o absolutní nezměnitelnosti názoru rozšířeného senátu Nejvyššího správního soudu by výrok rozhodnutí rozšířeného senátu fungoval shodně jako zákon.

Podoba rozhodnutí rozšířeného senátu je výrazně ovlivněna skutkovými okolnostmi případu, který řízení vyvolal, a rozsahem právní argumentace účastníků řízení. Není možné očekávat, že by rozšířený senát byl schopen předjímat veškeré možné námitky účastníků budoucích řízení tak, aby jejich polemiku s rozhodnutím rozšířeného senátu bylo možné vyřešit odkazem na odůvodnění rozhodnutí rozšířeného senátu. Nižší soudy nebo tříčlenné senáty se proto musejí s relevantními námitkami jdoucími nad rámec rozhodnutí rozšířeného senátu vypořádat samy. Považuji za zcela nepřijatelné, aby se soudní rozhodování v takovém případě zvrhlo v usilovné hledání argumentů, s nimiž by bylo možné rozhodnutí rozšířeného senátu obhájit. Z toho vyplývá, že již na úrovni obecných soudů je třeba připustit revizi rozhodnutí rozšířeného senátu. Jediným možným řešením je opětovné rozhodnutí rozšířeného senátu. Je však třeba důsledně vážit, zda přehodnocení právního názoru je obhájitelné z pohledu právní jistoty a předvídatelnosti soudního rozhodování.

Závěr

Závěrem se odvážím vyslovit optimistické tvrzení, že i účastníci řízení, resp. jejich právní zástupci, jsou schopni pozitivně ovlivnit podobu právní krajiny, byť jejich snaha je samozřejmě motivována zájmy klienta. Podání účastníků mohou posloužit nejen jako vytýčení bojiště cestou uplatněných argumentů, ale i jako alternativa korektního řešení sporné právní otázky. Bylo by proto škoda redukovat jejich roli na provedení čestného výkopu, po němž je rozehrána hra justičního aparátu.

Reálné, nikoli toliko formální, posílení pozice účastníků spojené s rozšířením odpovědnosti advokátů za výsledek řízení by mohlo být přínosné v následujících jednotlivostech:

[22] Zde se nepochybně jedná o změnu referenčního rámce ve smyslu shora uvedeném.

- posílení ochrany subjektivních práv, resp. práva účinně svá hmotná práva hájit,
- konfrontace rozšířeného senátu s vícero variantami skutkových okolností,
- rozšíření škály relevantních argumentů,
- větší odolnost rozhodnutí rozšířeného senátu vůči budoucím atakům, a to nejen před Ústavním soudem,
- posílení autority rozhodnutí
- transparentnější proces

Úplným závěrem jedno obecné postesknutí: Je s podivem, že moderní trendy, vycházející z diskurzivní podstaty práva, zvyšující procesní odpovědnost jednotlivce v řízení před soudem se projevují především na nižších úrovních, kdy existuje největší riziko úplného zabloudění ve spleti paragrafů (rozkazní řízení, kontumace, koncentrace). Tyto instituty jsou nadto často aplikovány značně formálně a bezmyšlenkovitě.[23] Jak stoupáme do vyšších sfér advokátských procesů, jsou účastníci paradoxně odsunuti stranou. Od odborníka, jehož jsou nuceni si najmout, dostanou službu omezeného významu. Jsem pevně přesvědčen, že institut povinného právního zastoupení neslouží k odbřemenění soudů od nesrozumitelných podání osob práva neznalých, nýbrž k zajištění efektivní ochrany subjektivních práv těchto osob v právních oblastech, které vyžadují specializované odborné znalosti. Aby advokát mohl tento svůj úkol splnit, musí mít sílu něco změnit. Jinak povinné zastoupení zrušme a posílejme na vrcholné soudní instance spisy nižších soudů se stručnou předkládací zprávou a ponechme vrcholné soudy nerušeně zkoumat, hodnotit a sjednocovat.

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[2] Filip, J., Holländer, P., Šimíček, V.: *Zákon o Ústavním soudu – komentář*, Praha: C. H. Beck, 2007, 929 stran, ISBN 978-80-7179-599-5.

[3] Kysela, J. (ed.): *Zákon o Ústavním soudu po třinácti letech, Praha*: Eurolex Bohemia, 2006, 189 stran, ISBN 80-86861-57-0

[4] Wagnerová, E. et al.: *Zákon o Ústavním soudu s komentářem*, Praha: ASPI, 2007, 636 stran, ISBN 978-80-7357-305-8..

[23] Obzvlášť patrné je to na rozsudku pro zmeškání.

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NÁJEM PODNIKU(JE MOŽNÝ V PŘÍPADĚ PŘÍSPĚVKOVÉ ORGANIZACE ÚZEMNÍHO SAMOSPRÁVNÉHO CELKU?)

PETR POSPÍŠIL

PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY, KATEDRA SPRÁVNÍ VĚDY, SPRÁVNÍHO PRÁVA A FINANČNÍHO PRÁVA

Abstrakt

Předmětem předkládaného příspěvku je nájem podniku s cílem stručně nastínit některé problémy vyplývající z platné právní úpravy a spojené s řešením základní otázky možnosti a legálnosti pronájmu zdravotnického zařízení fungujícího v právní formě příspěvkové organizace územního samosprávného celku. Základním východiskem prezentovaných úvah je přitom jednak platná správněprávní úprava, která nastavuje vztah krajů a obcí k jimi zřizovaným příspěvkovým organizacím, a jednak platná obchodněprávní úprava vymezující pojmy podnik, podnikání, podnikatel a náležitosti smlouvy o nájmu podniku.

Klíčová slova

územní samosprávný celek, kraj, obec, příspěvková organizace, veřejné neziskové ústavní zdravotnické zařízení, zdravotnické zařízení, nemocnice, podnik, podnikatel, podnikání, smlouva o nájmu podniku, hlavní činnost, doplňková činnost

Abstract

The subject of proposed contribution is a lease of works with a purpose to briefly outline some problems of legal regulation in force related to the basic question of possibility and legality of lease of a health service in a legal form of an allowance organization of self-governing territorial units. The main starting points of presented ideas are the current legal regulation of Czech administrative law defining the relation of regions and municipalities to their allowance organizations and also the current legal regulation of Czech business law defining the legal concept of works, undertaker, business activities and legal essentials of the contract on the lease of works.

Key words

self-governing territorial units, municipality, region, allowance organization, public non-profit institutional health service, health service, hospital, works, undertaker, business activities, contract on the lease of works, main activities, additional activities

ÚVODEM

Z rozhodnutí státu byl k 1. lednu 2003 zákonem č. 290/2002 Sb., o přechodu některých dalších věcí, práv a závazků České republiky na kraje a obce, občanská sdružení působící v oblasti tělovýchovy a sportu a o souvisejících změnách a o změně zákona č. 157/2000 Sb., o přechodu některých věcí, práv a závazků z majetku České republiky ve znění zákona č. 10/2001 Sb., a zákona č. 20/1966 Sb., o péči o zdraví lidu, ve znění pozdějších předpisů (dále jen „zákon č. 290/2002 Sb."), uskutečněn přechod státních zdravotnických zařízení (samozřejmě vedle organizací působících v jiných odvětvích) do správy krajů.[1)]

V ust. § 2 odst. 2 větě 1. zákona č. 290/2002 Sb. je jednoznačně uvedeno, že dnem 1. ledna 2003 se stávají státní příspěvkové organizace, u nichž funkci zřizovatele vykonávaly k 31. prosinci 2002 okresní úřady, příspěvkovými organizacemi krajů. Pokud jde o právní formu organizací – právnických osob[2)], které byly předmětem zákonného přechodu, byl tak k 1. lednu 2003 výchozí stav všech zdravotnických zařízení stejný – právní forma příspěvkové organizace byla zákonem jednoznačně dána.

První roky fungování zdravotnických zařízení pod správou krajů přinesly množství problémů vyvolaných zejména absencí jasně definované státní či chcete-li národní koncepce zdravotnictví. V tomto „shůry daném" prostředí ekonomické i právní nejistoty, bylo přirozené, že jednotlivé kraje v rolích zřizovatelů klíčových zdravotnických zařízení v regionech hledaly a stále hledají po své linii samy nejrůznější zákonné cesty, jak zabezpečit jejich budoucí fungování, a zejména jak stabilizovat a zlepšit jejich hospodaření. V této souvislosti je dlouhodobě vedena i debata o vhodnosti či nutnosti nahrazení právní formy příspěvkové organizace jinou, životnější, akceschopnější a konkurenceschopnější právní formou. Zejména jsou v rámci těchto debat zdůrazňovány výhody

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1) srov. **Mach J. a kol.** – Zdravotnictví a právo – komentované předpisy, Praha: Nakladatelství Orac s.r.o., 2003, str. 76: *Se zavedením krajského územního uspořádání v České republice došlo ke zrušení okresních úřadů a od 1. ledna 2003 většina dosud státních zdravotnických zařízení, jejichž zřizovatelem byl okresní úřad, přejde do působnosti krajů v jejich samostatné působnosti.*

2) srov. **Hurdík J.** Právnické osoby a jejich typologie, Praha: C. H. Beck, 2003, str. VIII: *Tímto fascinujícím fenoménem je právnická osoba - přes mnoho pokusů nedefinovatelný právní institut, současně však nezbytný průvodní jev a nástroj posledních dvou staletí globalizujícího se světa kapitalismu.*

obchodních společností, zmiňuje se i forma obecně prospěšné společnosti a otevřeně se diskutuje o možnosti nájmu či prodeje podniku.[3)]

Specifickým způsobem reagoval na výše zmíněné hledání optimální (nebo alespoň ze všech momentálně možných nevhodných té nejméně nevhodné) právní formy stát. Nejprve byl do zákona č. 258/2000 Sb., o ochraně veřejného zdraví a o změně některých souvisejících zákonů, ve znění pozdějších předpisů, zcela nesystémově včleněn tzv. blokační § 99a zakazující územním samosprávným celkům do přijetí zákona o veřejných neziskových ústavních zdravotnických zařízeních převést toto zdravotnické zařízení do formy obchodní společnosti anebo svěřit jeho provozování obchodní společnosti jinak vytvořené. Zjevným výsledkem překotné snahy státu zabránit územním samosprávám v legitimním rozhodnutí o budoucnosti jimi spravovaných zařízení pak bylo vydání zákona č. 245/2006 Sb., o veřejných neziskových ústavních zdravotnických zařízeních a o změně některých zákonů. Značně kriticky se v širších souvislostech systému zdravotní péče a vztahu státní správy a samosprávy k tomuto zákonu postavil Ústavní soud ve svém nálezu publikovaném pod č. 483/2006 Sb., kterým byla některá jeho ustanovení zrušena.[4)] O praktické nepoužitelnosti takto uměle vytvořené právní formy svědčí mj. skutečnost, že žádné „veřejné neziskové ústavní zdravotnické zařízení" za dva roky účinnosti zákona nevzniklo a jejich rejstřík vedený Ministerstvem zdravotnictví tak zůstává prázdný (resp. jakýkoliv odkaz na tento rejstřík nelze na webových stránkách Ministerstva zdravotnictví dohledat).[5)]

CÍLE PŘÍSPĚVKU

[3)] srov. **Havlan P.** Majetek obcí a krajů v platné právní úpravě, Praha, Linde Praha a.s., 2004, str. 61-65: … *V kontextu s tím pak lze vyslovit názor, že jde-li o potřebu stoprocentní majetkové účasti obce (kraje) na zajištění nějaké hospodářské (podnikatelské) činnosti, nebylo by od věci uvažovat o legislativním zakotvení institutu veřejného podniku tak říkajíc v nejužším smyslu.*

[4)] srov. **Boguszak J. a kol.** Teorie práva, Praha: ASPI Publishing, 2004, str. 155: *Činnost státních orgánů ve všech úrovních a směrech činnosti může do značné míry ovlivňovat efekt společenského působení práva. Je nesporné, že prvním předpokladem adekvátního výsledku působení právních norem je dostatečná úroveň jejich obsahové i formální kvality. Právní normy musí především mít vysokou obsahovou kvalitu, musí upravovat společenské vztahy z hlediska aprobovaných hodnot a cílů společnosti.*

[5)] Zjevně tak není naplňováno ust. § 27 odst. 7 zákona č. 245/2006 Sb., o veřejných neziskových ústavních zdravotnických zařízeních a o změně některých zákonů, ve znění pozdějších předpisů: *Ministerstvo zdravotnictví je povinno zpřístupnit rejstřík veřejných zdravotnických zařízení též v elektronické podobě způsobem umožňujícím dálkový přístup.*

Cílem tohoto příspěvku není komplexní pohled na problematiku příspěvkových organizací územních samosprávných celků, ani jakýkoliv rozbor výhod či nevýhod této zvláštní formy právnické osoby. Řada otázek spojených s fungováním příspěvkových organizací územních samosprávných celků jako např.:

- nejednotný přístup k jejich vlastnické způsobilosti,
- nemožnost daňově odepisovat svěřený majetek (na rozdíl od příspěvkových organizací státu),
- zákonná limitace odměňování zaměstnanců (včetně vrcholných manažerů),

představuje teoreticky i prakticky zajímavá a odborně často zpracovávaná témata. Z těchto otázek svým způsobem vychází i tento můj příspěvek, a to i přesto, že jim nebudu věnovat další pozornost.

V tomto příspěvku chci dále podrobněji komentovat nájem podniku s cílem stručně nastínit některé výkladové problémy vyplývající z platné právní úpravy a spojené s řešením samotné základní otázky možnosti a legálnosti pronájmu zdravotnického zařízení fungujícího v právní formě příspěvkové organizace kraje (příp. obce, neboť podstata problému je u obou úrovní územních samosprávných celků shodná). Za základní východisko dalších úvah přitom považuji současnou zákonnou úpravu, která nastavuje vztah krajů k jimi zřizovaným příspěvkovým organizacím.[6)]

K PLATNÉ PRÁVNÍ ÚPRAVĚ VE SPRÁVNÍM PRÁVU

Zákon č. 129/2000 Sb., o krajích (krajské zřízení), ve znění pozdějších předpisů, v ust. § 14 odst. 3 dává kraji možnost pro výkon samostatné působnosti zakládat a zřizovat právnické osoby a organizační složky kraje. V souladu s ust. § 35 odst. 2 písm. j) uvedeného zákona je zastupitelstvu kraje vyhrazeno zřizovat a rušit příspěvkové organizace a organizační složky kraje; k tomu schvalovat jejich zřizovací listiny. Dle ust. § 59 odst. 1 písm. i) citovaného zákona je radě kraje vyhrazeno vykonávat zakladatelské a zřizovatelské funkce ve vztahu k právnickým osobám, organizačním složkám, které byly zřízeny nebo založeny krajem nebo které byly na kraj převedeny zvláštním zákonem.

6) srov. **Radbruch G.** Filozofie práva (citováno dle **Hattenhauer H.** Evropské dějiny práva, Praha: C.H.Beck, 1998, str. 547): *Jistota práva vyžaduje pozitivitu práva: nelze-li zjistit, co je spravedlivé, musí být stanoveno, co má spravedlivým být, a to instancí, která je schopná to, co stanovila, také prosadit. Pozitivita práva se tak nanejvýš zvláštním způsobem stává předpokladem jeho správnosti: patří stejně tak k pojetí správného práva, aby bylo pozitivní, jako je úkolem pozitivního práva, aby bylo správné.*

Druhý z platných právních předpisů, které řeší vztah kraje k příspěvkovým organizacím, zákon č. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, ve znění pozdějších předpisů, v ust. § 27 odst. 1 stanoví, že územní samosprávný celek zřizuje příspěvkové organizace pro takové činnosti ve své působnosti, které jsou zpravidla neziskové a jejichž rozsah, struktura a složitost vyžadují samostatnou právní subjektivitu. V odst. 3. téhož zákonného ustanovení se ve vztahu k příspěvkovým organizacím dává dále zřizovateli možnost realizovat rozdělení, sloučení, splynutí nebo zrušení organizace.

Pokud jde o vztah kraje přímo ke zdravotnickým zařízením, je lakonicky řešen v zákoně č. 20/1966 Sb., o péči o zdraví lidu, ve znění pozdějších předpisů, kde se v ust. § 39 odst. 1 stanoví, že zdravotnická zařízení zřizují ministerstvo zdravotnictví, kraje v samostatné působnosti, obce, fyzické a právnické osoby. Kromě toho také stojí za zmínku ust. § 33 uvedeného zákona stanovící, že zařízení a organizace zdravotnické soustavy zřízené ministerstvem zdravotnictví, kraji v samostatné působnosti nebo obcemi jsou řízeny svými zřizovateli.

Platná právní úprava možnost nájmu příspěvkové organizace jako podniku třetímu subjektu nepředpokládá; na druhou stranu je však třeba uvést, že uvedené (ani jiné) právní předpisy tuto možnost výslovně nevylučují. Kraje jako vyšší územní samosprávné celky jsou nedílnou organizační součástí systému veřejné správy České republiky, jenž nutně musí vykazovat určitou míru právní jistoty.[7] **Proto se přikláním spíše k názoru, že výčet možností zřizovatele, jak naložit s příspěvkovou organizací, vyplývající z platné právní úpravy je třeba považovat za taxativní.**

K PLATNÉ PRÁVNÍ ÚPRAVĚ V OBCHODNÍM PRÁVU

Pokud by v konkrétním případě v rámci výkonu své samostatné působnosti některý z krajů (či některá obec) chtěl postupovat cestou nájmu podniku, musel by se nutně před uzavřením smlouvy o nájmu podniku zabývat otázkou, zda zdravotnické zařízení jako příspěvková organizace územního samosprávného celku může vůbec být považována za podnik ve smyslu obchodního zákoníku a z tohoto titulu být předmětem smlouvy o nájmu podniku (resp. otázkou, zda příspěvková organizace má podnik).

[7] srov. **Hattenhauer H.** Evropské dějiny práva, Praha: C.H.Beck, 1998, str. 320: *Právo žije z ideálů, které jsou přítomnosti dávány jako měřítko. Jakkoli jsou nedosažitelné a v praxi jenom částečně poznatelné, musí k nim právo směřovat, jestliže nechce zaniknout v politické libovůli.*

Podle ust. § 488b zákona č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů, se smlouvou o nájmu podniku pronajímatel zavazuje přenechat svůj podnik nájemci, aby jej samostatně provozoval a řídil na vlastní náklad a nebezpečí a aby z něj pobíral užitky. Nájemce se zavazuje zaplatit pronajímateli nájemné. V souladu s ust. § 5 obchodního zákoníku se podnikem pro účely tohoto zákona rozumí soubor hmotných, jakož i osobních a nehmotných složek podnikání. K podniku náleží věci, práva a jiné majetkové hodnoty, které patří podnikateli a slouží k provozování podniku nebo vzhledem ke své povaze mají tomuto účelu sloužit. Stěžejním znakem podniku je podnikání, které obchodní zákoník v ust. § 2 odst. 1 definuje jako soustavnou činnost prováděnou samostatně podnikatelem vlastním jménem a na vlastní odpovědnost za účelem dosažení zisku. Odst. 2 téhož ustanovení pak v písm. a) vymezuje, že podnikatelem pro účely tohoto zákona se rozumí mimo jiné i osoba zapsaná v obchodním rejstříku.

Názor, že zdravotnické zařízení jako příspěvková organizace kraje snad může být považováno za podnik či podnikatele, je zákonně podepřen pouze faktem, že příspěvkové organizace územních samosprávných celků se v souladu s ust. § 27 odst. 6 zákona č. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, ve znění pozdějších předpisů, zapisují do obchodního rejstříku.

K NEPODNIKATELSKÉMU CHARAKTERU PŘÍSPĚVKOVÝCH ORGANIZACÍ

Ust. § 23 zákona č. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, ve znění pozdějších předpisů, stanoví, že územní samosprávný celek může ve své pravomoci k plnění svých úkolů, zejména k hospodářskému využívání svého majetku a k zabezpečení veřejně prospěšných činností zřizovat příspěvkové organizace jako právnické osoby, které zpravidla ve své činnosti nevytvářejí zisk. „Nepodnikatelský“ charakter příspěvkových organizací je zřejmý také z již výše citovaného ust. § 27 odst. 1 stejného zákona (*územní samosprávný celek zřizuje příspěvkové organizace pro takové činnosti ve své působnosti, které jsou zpravidla neziskové a jejichž rozsah, struktura a složitost vyžadují samostatnou právní subjektivitu*).

Nemocnice fungující v právní formě příspěvkové organizace nesplňují ze samotné své podstaty základní znak podnikatelské činnosti, neboť předmětem jejich hlavní činnosti je poskytování zdravotní péče na území kraje jeho občanům, tj. veřejně prospěšná nevýdělečná činnost a nikoli podnikání provozované za účelem dosažení zisku.[8)] Vyjdu-li přímo ze zákonné definice podniku jako souboru hmotných,

[8)] srov. **Hurdík J.** Právnické osoby a jejich typologie, Praha: C. H. Beck, 2003, str. 86: *Zatímco právnické osoby soukromého práva budou zpravidla sledovat zájem soukromý, který se však nesmí příčit zájmu veřejnému, avšak současně mohou sledovat i zájem veřejný (obecně prospěšné právnické osoby soukromého práva), právnické osoby veřejného práva sledují svým účelem více či méně specificky definovaný veřejný zájem.*

jakož i osobních a nehmotných složek podnikání, směřuji k závěru, že v případě příspěvkové organizace kraje – zdravotnického zařízení, jehož hlavním předmětem činnosti je poskytování zdravotní péče, podnik vůbec neexistuje, neboť hlavní činnost nemocnice nenaplňuje znaky podnikání. Striktně vzato, pokud jde o hlavní předmět činnosti nemocnice – příspěvkové organizace kraje, smlouva o nájmu podniku nemůže být uzavřena, neboť zde není, co by tvořilo předmět takové smlouvy.

Podnikatelská činnost může v konkrétních případech tvořit doplňkovou činnost nemocnic – příspěvkových organizací kraje. Ve smyslu ust. § 27 odst. 2 písm. g) zákona č. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, ve znění pozdějších předpisů, vymezuje kraj ve zřizovací listině příspěvkové organizace okruhy doplňkové činnosti navazující na hlavní účel příspěvkové organizace, kterou jí zřizovatel povolí k tomu, aby mohla lépe využívat všechny své hospodářské možnosti a odbornost svých zaměstnanců; tato činnost nesmí narušovat plnění hlavních účelů organizace a sleduje se odděleně. Tyto doplňkové činnosti jsou zpravidla vykonávány na základě živnostenského oprávnění nebo na základě jiného než živnostenského oprávnění podle zvláštních předpisů, a proto lze dovodit, že při jejich výkonu je nemocnice – příspěvková organizace kraje, považována za podnikatele (viz ust. § 2 odst. 2 písm. b) a c) obchodního zákoníku). Domnívám se, že v případě uzavření smlouvy o nájmu podniku by se, v případě nemocnice – příspěvkové organizace kraje, mohla taková smlouva týkat pouze souboru hmotných, jakož i osobních a nehmotných složek podnikání, využívaných v rámci doplňkové činnosti organizace.

ZÁVĚR

Z provedeného zcela základního rozboru platné právní úpravy vychází můj skeptický závěr k zákonnosti případně uzavřené smlouvy o nájmu nemocnice – příspěvkové organizace kraje (s výše zmíněnou výhradou možnosti pronájmu v souvislosti doplňkovou činností organizace). Jelikož neakceptuji možnost a legálnost nájmu příspěvkové organizace kraje, nebudu se dále zaobírat dalšími souvisejícími právními i odbornými otázkami jako je problém zajištění rozsahu a dostupnosti zdravotní péče, otázka další opodstatněnosti existence příspěvkové organizace a s tím spojený problém ručení kr za závazky zrušených příspěvkových organizací, otázka doby nájmu, otázka smluvních stran ad.

Jsem si vědom toho, že na problémy mnou nastíněné v tomto příspěvku existuje odlišný právní názor, a že ve zcela konkrétních případech byly uzavřeny smlouvy o nájmu podniku mezi soukromými společnostmi a obcemi, jejichž předmětem jsou právě nemocnice zřízené ve formě příspěvkové organizace obce.

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INDIVIDUÁLNÍ SPRÁVNÍ AKTY

LUKÁŠ POTĚŠIL

MASARYKOVA UNIVERZITA, KATEDRA SPRÁVNÍ VĚDY, SPRÁVNÍHO PRÁVA A FINANČNÍHO PRÁVA

Abstrakt

Tento příspěvek je věnován problematice veřejné správy v materiálním (činnostním) pojetí, neboli tzv. správní činnosti, a jejím právním formám. Věnuje se charakteristice správního aktu, jeho členění a poukazuje rovněž na možné třídění právních forem realizace činnosti veřejné správy a správního práva, z nichž nejvýznamnější jsou normativní správní akty, individuální správní akty a opatření obecné povahy.

Klíčová slova

Veřejná správa, správní právo, správní akt, činnost veřejné správy, nařízení, normativní správní akt, individuální správní akt, opatření obecné povahy.

Abstract

This entry deals with legal forms of activities of public administration and its bodies. Focuses on the characteristic of the so called “administrative act” and shows its possible division between normative administrative act (legal enactment issued by administrative bodies), individual administrative act (namely administrative decision) and measure of a general nature.

Key words

Public administration, Administrative Law, Administrative act, Activities of public administration, Normative administrative act, Individual administrative act, Measure of a general nature.

Ve svém příspěvku se hodlám zabývat problematikou tzv. individuálních správních aktů, a to v souvislosti s tím, že jsou výsledkem a právní formou realizace činnosti veřejné správy a správního práva.

Veřejná správa je ústředním pojmem[1] správního práva a současně je jeho předmětem. Správní právo je, stručně a zjednodušeně řečeno, významným odvětvím českého právního řádu, které se věnuje problematice veřejné správy a právně ji upravuje. Jedná se o soubor právních norem, které jsou především uskutečňovány cestou jejich aplikace veřejnou správou, resp. jejími orgány.[2] P. Průcha[3] veřejnou správu definuje jako *správu veřejných záležitostí ve veřejném zájmu a subjekty, které ji vykonávají, ji realizují jako právem uloženou povinnost, a to z titulu svého postavení jako veřejnoprávních subjektů*.

Na veřejnou správu lze z hlediska teorie správního práva, ale i správní vědy, v zásadě nazírat ze dvou úhlů pohledu, které jsou spolu vzájemně propojeny. Proto se hovoří o tzv. duálním pojetí veřejné správy. Jak ale kriticky poznamenává M. Kindl[4] *samotný výraz veřejná správa jakožto výraz veřejné výkonné moci a samosprávy, případně i správy ostatní … je používán v obou pojetích, a to dosti promiskuitně a ne vždy logicky, takže podle povahy věci se jím buď rozumí orgány veřejné správy, ať již státní nebo orgány samosprávy, případně správy jiné, stejně jako jindy zase výkon veřejné správy, tedy určitá správní činnost (tj. realizace výkonné moci). Jednou tedy jde o označení vykonavatele veřejné moci, jednou zase o označení výkonu (vykonávání) této moci.*

Veřejná správa tedy, jak je patrno ze shora uvedeného, představuje ucelenou soustavu a strukturu správních orgánů, vykonavatelů veřejné správy. Toto pojetí představuje chápání veřejné správy jako organizace a hovoří se proto o jejím organizačním, či formálním pojetí. Veřejná správa v organizačním pojetí podává odpověď na otázku, kdo realizuje, neboli kdo vykonává veřejnou správu (veřejnou správu jako činnost). Výše zmíněné organizační uspořádání není v žádném případě bezúčelné, nýbrž, jak v této souvislosti příhodně uvádí P. Průcha,[5] *veřejná správa v organizačním pojetí představuje účelově zaměřený systém, zřízený, resp. vybudovaný za účelem zabezpečení činnosti výkonné moci ve státě ve sféře veřejné správy, za účelem realizace veřejné správy jako činnosti zvláštního druhu*. Na základě toho lze shrnout, že takto vybudovaná organizace slouží k zabezpečení výkonu veřejné správy jako činnosti (v jejím druhém pojetí). Sama o sobě, bez obsahové náplně (činnosti) by její existence postrádala smysl.

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[1] Jak uvádí J. Pošvář, pojem veřejné správy se skládá ze dvou částí: jednak ze základního pojmu „správa, jednak z bližší charakteristiky „veřejná“. Správou v obecném smyslu rozumí lidskou činnost sledující záměrně nějaký cíl, veřejnou správu pak označuje jako správu veřejných záležitostí. Srov. Pošvář, J. Obecné pojmy správního práva. Brno : ČSAS Právník, 1946, s. 24 – 26.

[2] Méně častější je jejich přímá realizace, kdy se adresáti těchto norem chovají bez dalšího v souladu s nimi. Nicméně celá řada činností a aktivit nelze realizovat pouhým jednáním v souladu s právními normami, nýbrž je třeba vstoupit do kontaktu (právního vztahu) s konkrétním správním orgánem, který cestou autoritativní aplikace uvádí příslušné správněprávní normy v život.

[3] Průcha, P. Správní právo. Obecná část. 7., doplněné a aktualizované vydání. Brno : Masarykova univerzita, 2007, s. 53.

[4] Kindl, M. in Kindl, M. a kol. Základy správního práva. Plzeň : Aleš Čeněk, 2006, s. 32.

[5] Průcha, P. in Skulová, S. a kol. Správní právo procesní. Praha : Eurolex Bohemia, 2005, s. 15.

Veřejná správa jako činnost je druhým z projevů veřejné správy. Jedná se o pojetí materiální, resp. funkcionální, o obsah, který naplňuje formu v podobě organizační soustavy. Veřejná správa jako činnost bývá teorií[6] definována pomocí zbytkového (odčítacího) vymezení, a to ještě navíc v kombinaci pozitivního a negativního vymezení. Podle něj veřejná správa představuje takovou činnost, která svým obsahem není ani soudnictvím, ani zákonodárstvím. Z hlediska zmíněných aspektů tzv. trojdělby moci je třeba doplnit, že veřejná správa je součástí moci výkonné. V této souvislosti odkazuji na stručný, a přesto výstižný závěr D. Hendrycha,[7] podle něhož *zákonodárství je stanovení obecných abstraktních právních norem, vláda je základní politické vedení správy, veřejná správa je činnost podzákonná a výkonná a soudnictví představuje právní hodnocení stavu věcí za použití platného práva, přičemž toto hodnocení vede k závaznému rozhodnutí.*

Převážně z hlediska činnosti lze na veřejnou správu dále nazírat buď jako na činnost, která je svou povahou státní správou, nebo samosprávou. Zatímco jejím subjektem je na místě prvém stát (u státní správy) a veřejnoprávněprávní korporace (u samosprávy), vykonavateli státní správy nebo samosprávy jsou pak vždy konkrétní orgány jejich subjektu, neboli orgány státu a orgány veřejnoprávních korporací. Dlužno podotknout, že na výkonu veřejné správy rovněž participují subjekty soukromoprávního charakteru. Společným znakem pro obě složky veřejné správy v materiálním pojetí je, že se jedná o činnost výkonného, nařizovacího a podzákonného charakteru. V obou zmíněných případech nicméně jde o výkon veřejné správy, který je realizován z mocenských pozic a jejichž vykonavatelé disponují veřejnou mocí.

Činnost veřejné správy, která v sobě skýtá funkci realizace obsahu norem správního práva, je díky tomu označována jako správní činnost.[8] Veřejná správa a správní právo jsou proto pomyslné spojené nádoby. Správní činnost je uskutečňována v určitých formách, které jsou finálním vyjádřením činnosti veřejné správy a jejích orgánů. Tyto formy jsou právními proto, že je to právě správní právo, které jim propůjčuje právní formu a závaznost s příslušnými právními následky. Díky těmto formám lze správní činnost snáze popsat a charakterizovat, neboť pro její jednotlivé formy lze vyabstrahovat společné a pojmové znaky. Právní formy jsou vymezeným typem správní činnosti. Podle P. Průchy,[9] *formami realizace činnosti veřejné správy tak rozumíme cílené zprostředkování obsahu činnosti veřejné správy do*

[6] Srov. např. Hendrych, D. in Hendrych, D. a kol. Správní právo. Obecná část. 6. vydání. Praha : C. H. Beck, 2006, s. 5; Sládeček, V. Obecné správní právo. Praha : ASPI, a. s., 2005, s. 19; Kindl, M. in Kindl, M. a kol. Základy správního práva. Plzeň : Aleš Čeněk, 2006, s. 23; Pošvář, J. Obecné pojmy správního práva. Brno : ČSAS Právník, 1946, s. 31; Hoetzel, J. Československé správní právo. Část všeobecná. Praha : Melentrich a. s. v Praze, 1934, s. 12.
[7] Hendrych, D. in Hendrych, D. a kol. Správní právo. Obecná část. 6. vydání. Praha : C. H. Beck, 2006, s. 10.
[8] Hendrych, D. in Hendrych, D. a kol. Správní právo. Obecná část. 6. vydání. Praha : C. H. Beck, 2006, s. 173. Je to i důsledek jejího výkonného charakteru, orgány veřejné správy uskutečňují výkon obsahu norem správního práva, tedy jej vykonávají.
[9] Průcha, P. in Skulová, S. a kol. Správní právo procesní. Praha : Eurolex Bohemia, 2005, s. 15 - 16.

jejího vnějšího projevu, zprostředkování obsahu činnosti veřejné správy od požadavku a představy ve výsledek sám. Formy činnosti se člení podle celé řady hledisek,[10] a to především podle jejich směřování, tedy zda jsou zaměřeny bezprostředně vůči adresátům veřejněmocenského působení (jde o činnost zaměřenou navenek, tzv. vnější formy realizace), nebo jsou zaměřeny do organizačního systému veřejné správy samotné a ve vztahu k vnějším formám mají spíše podpůrný charakter (jedná se o činnost upravující interní poměry v rámci veřejné správy, tzv. vnitřní formy realizace). Formy realizace činnosti veřejné správy a správního práva, s ohledem na shora naznačená kritéria, je možno třídit na:

1) vnější formy, kterými jsou

- normativní správní akty
- individuální správní akty
- správní akty smíšené povahy (podle § 171 a násl. spr. ř. jde o opatření obecné povahy)
- dohody správně právního charakteru (ve smyslu § 160 a násl. spr. ř. jsou to veřejnoprávní smlouvy)
- faktické úkony s přímými právními důsledky

2) vnitřní formy, které slouží k zabezpečení chodu a fungování veřejné správy. Skýtají v sobě podpůrný charakter, představují přípravnou a zabezpečovací část sloužící vnějším formám správních činností. Jedná se o

- interní normativní akty
- interní individuální pokyny (individuální služební akty).

Nejčastější formou realizace činnosti veřejné správy, ale i správního práva, vycházejíce z tohoto členění, je správní akt. V souladu s terminologií uplatňovanou např. v Doporučení (2004)20 Výboru ministrů Rady Evropy o soudním přezkoumávání správních úkonů lze poukázat na totožný pojem „správní úkon“, který je podle tohoto dokumentu právním úkonem s účinky individuálními i normativními, je realizován při výkonu veřejné moci, přičemž může ovlivnit práva či zájmy fyzických či právnických osob. Z teoretického hlediska je správní akt výsledkem buď aplikačních procesů uskutečňovaných v konkrétních případech, kdy je omezený a jednoznačně určený okruh adresátů a řešené věci, nebo představuje výsledek normotvorné činnosti veřejné správy. V obou případech se však jedná o jednostranné veřejněmocenské akty. Správní akty tak mají dvojí podobu.

[10] Srov. např. Průcha, P. Správní právo. Obecná část. 7., doplněné a aktualizované vydání. Brno : Masarykova univerzita, 2007, s. 264 - 267.

Jednak je to normativní (abstraktní) správní akt, představující výsledek normotvorné činnosti a současně i pramen správního práva samotného. V. Sládeček[11] k němu uvádí, že *je správním pramenem správního práva, protože nejen normy správního práva obsahuje, ale zároveň jeho obsah sama veřejná správa vytváří.* Jde o právní předpis. Veřejná správa si svou vlastní (nikoli však libovolnou a neomezenou[12]) produkcí vytváří další pravidla chování. Normativní správní akt dále může mít povahu interního normativního aktu jako interní normativní instrukce, a to tehdy, pokud je zaměřen vůči instančně podřízeným pracovníkům a podřízeným organizačním jednotkám toho správního orgánu, který jej vydal. Ten již právním předpisem není, neboť nemá jeho znaky v podobě obecně vymezeného okruhu adresátů, nepůsobí vůči mocensky podřazeným, nýbrž podřízeným subjektům. Představuje akt řízení uplatňovaný v příslušném organizačním systému či soustavě. Normativní správní akt je obecný a souhrnný pojem pro právní předpisy vydávané veřejnou správou. Ty mají různou právní sílu i pojmenování.

Druhou podobou správních aktů je individuální (konkrétní) správní akt. Individuální správní akt je aktem aplikace norem správního práva v konkrétních situacích a na konkrétní případy. *Individuální správní akty směřují vždy ke zcela konkrétním, tj. individualizovaným subjektům správního práva, nepředstavují tedy právní normy, ale naopak obecně závazné předpisy aplikují na konkrétné individualizované případy. Svou povahou je každý individuální správní akt výsledkem jednostranné činnosti správního orgánu, konkrétně navazujícím na obsah norem správního práva,* jak dodává P. Průcha.[13] Individuálními správními akty se v konkrétním případě řeší právní poměry jmenovitě určených osob. Pro individuální správní akt jsou pojmově určující znaky v podobě jednání příslušného správního orgánu na základě zákona, jednostranný autoritativní výrok o právech a povinnostech nepodřízených subjektů (tzv. vnější působnost), bezprostřední právní závaznost a konkrétnost věci, jakož i subjektů, jimž je správní akt určen.

Vzhledem k tomu, že si nelze vystačit toliko se správními akty individuálním a normativními, což ukázala i správní praxe, zákonodárce výslovně upravil další formu správního aktu, a to institut nazvaný „opatření obecné povahy".[14] Opatření obecné povahy de lege lata v sobě zahrnuje znaky jak

[11] Sládeček, V. Obecné správní právo. Praha : ASPI, a. s., 2005, s. 49.
[12] Srov. čl. 78, čl. 79 odst. 3 a čl. 104 odst. 3 Ústavy ČR.
[13] Průcha, P. Správní právo. Obecná část. 5., doplněné a aktualizované vydání. Brno : Masarykova univerzita, 2003, s. 155.
[14] Tento institut není v našem právním řádu převratnou novinkou (v minulosti se vedly diskuze, zda pod tento institut nelze zařadit např. dopravní značení) a není cizí ani zahraničním právním úpravám, zejména rakouské a švýcarské, které znají tzv. všeobecné opatření. Pojem „opatření obecné povahy" je třeba odlišit od pojmu „opatření", který používal zákon č. 36/1876 ř. z., o zřízení správního soudu, ve znění pozdějších předpisů (zejména zákona č. 164/1937 Sb. z. a n.). V tomto ohledu bylo „opatření" blízké tomu, pod čím dnes rozumíme konstitutivní rozhodnutí.

normativního, tak individuálního správního aktu, ale není ani právním předpisem a ani rozhodnutím.[15] V obecné rovině je upraveno ve správním řádu, který obsahuje proces jeho vydání, soudnímu přezkumu se věnují příslušná ustanovení soudního řádu správního. Podle judikatury správních soudů, která musela, pro nedostatečnou a navíc i negativní definici, k tomuto institutu zaujmout právní názor, je opatření obecné povahy správním aktem s konkrétně určeným předmětem (vztahuje se tedy k určité konkrétní situaci) a s obecně vymezeným okruhem adresátů.[16]

Nejvyšší správní soud dále uvedl, že opatření obecné povahy nemůže nahrazovat podzákonnou normotvorbu ani nad rámec zákona stanovovat nové povinnosti. Slouží toliko ke konkretizaci již existujících povinností, vyplývajících ze zákona, a nikoliv k ukládání nových povinností, které zákon neobsahuje. Judikatura se zabýval i algoritmem jeho soudního přezkumu. Ten podle ní spočívá v pěti krocích: 1) v přezkumu pravomoci správního orgánu vydat opatření obecné povahy; 2) v přezkumu otázky, zda správní orgán při vydávání opatření obecné povahy nepřekročil meze zákonem vymezené působnosti (jednání ultra vires); 3) v přezkumu otázky, zda opatření obecné povahy bylo vydáno zákonem stanoveným postupem; 4) v přezkumu obsahu opatření obecné povahy z hlediska rozporu opatření obecné povahy (nebo jeho části) se zákonem (materiální kritérium) a konečně 5) v přezkumu obsahu vydaného opatření obecné povahy z hlediska jeho proporcionality. Nejvyšší správní soud se rovněž nejprve vyslovil pro preferenci tzv. materiálního pojetí, které však bylo překonáno jiným právním názorem vyjádřeným rozšířeným senátem Nejvyššího správního soudu.[17]

Z hlediska de lege lata s institutem opatření obecné povahy pracuje ustanovení § 80 zákona č. 20/1966 Sb., o péči o zdraví lidu, ve znění pozdějších předpisů. Z dalších zákonů je to § 15 odst. 5 zákona č. 48/1997 Sb., o veřejném zdravotním pojištění, ve znění pozdějších předpisů. Ustanovení § 3 písm. a) zákona č. 121/2000 Sb., autorský zákon, ve znění pozdějších předpisů, zase zmiňuje opatření obecné povahy, které je podle něj úřední dílem, na které se nevztahuje autorskoprávní ochrana. O právní úpravě obsažené jak ve správním řádu (zákon č. 500/2004 Sb.) a soudním řádu správním (zákon č. 150/2002 Sb.) jsem se zmínil, sic stručně, výše. Ve značné míře je institut opatření obecné povahy obsažen v zákoně č. 127/2005 Sb., o elektronických komunikacích, ve znění pozdějších předpisů.[18] Rovněž i nový stavební zákon[19] opatření obecné povahy ve velké míře využívá.

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[15] Srov. ustanovení § 171 a násl. zákona č. 500/2004 Sb., správního řádu, ve znění pozdějších předpisů

[16] Podle rozsudku Nejvyššího správního soudu ze dne 27. 9. 2005, čj. 1 Ao 1/2005-98, publikovaném pod č. 740/2006 Sb. NSS.

[17] Podle usnesení rozšířeného senátu Nejvyššího správního soudu ze dne 13. 3. 2007, čj. 3 Ao 1/2007-44, publikovaného pod č. 1246/2007 Sb. NSS.

[18] Není jistě bez zajímavosti, že právě tímto zákonem byla do soudního řádu správního včleněna možnost jeho soudního přezkumu.

[19] Zákon č. 183/2006 Sb., stavební zákon, ve znění pozdějších předpisů,.

Z hlediska terminologie uplatněné shora je třeba zmínit tu skutečnost, že se jedná o pojetí blízké tzv. brněnské škole správního práva. Prvorepubliková teorie, pod vlivem německé doktríny správního práva používala odlišný terminologický aparát, který je dodnes patrný v současných dílech autorů tzv. pražské školy správního práva. Zastavme se proto u těchto pojmů a zejména jejich vývoji poněkud podrobněji. F. Vavřínek[20] používal pojem „správní akt" jako výsledek správní činnosti, jako projev veřejné moci, který se podle svých účinků a zaměření člení na správní akt abstraktní a správní akt konkrétní. Rozlišujícím kritériem pak byla skutečnost, zda správní akt upravuje celou řadu případů sobě podobných směrem pro futuro, nebo se vztahuje pouze na jediný případ. A. Merkl[21] označil správní akt za výsledek správního jednání. Jeho nejvýznamnějšími druhy bylo nařízení, které označil jako právotvorný správní akt, kterým správa vytváří právo pro větší počet případů a dále individuální správní akt, který oproti tomu vytváří právo pro jediný případ, zjišťuje právo v konkrétním případě a je aplikací abstraktního právního pravidla. Obdobně to uváděl i J. Pošvář.[22] Pro abstraktní správní akty nicméně teorie volila pojem „nařízení". Nařízení bylo závazným právním předpisem vydávaným veřejnou správou, na jejich základě mohly být vydávány konkrétní akty. Mělo abstraktně obecnou povahu. Zmíněné konkrétní správní akty, neboli individuální pravidla chování teorie členila podle jejich účinků na rozhodnutí (deklaratorní rozhodnutí) a opatření (konstitutivní rozhodnutí), což vycházelo z tehdejší pozitivněprávní úpravy zákona o Nejvyšším správním soudu.[23] I jeho judikatura proto pod pojmem „správní akt" spíše rozuměla individualizovaný výsledek aplikace práva na konkrétní případ.

M. Máša[24] oproti tomu za základní výsledek správní činnosti označil „správní akt" jako takový, jehož nejvýznamnějšími druhy jsou normativní a individuální správní akt. Normativním správním aktem podle něj je obecný jednostranný akt adresovaný blíže neurčenému okruhu adresátů, obsahující v sobě obecná pravidla chování. Jde o pramen správního práva veřejnou správou tvořený. Individuální správní akt (neboli správní akt v užším smyslu) je výsledkem rovněž jednostranné činnosti veřejné správy, která spočívá v uložení povinnosti nebo založení práva konkrétně určenému subjektu v individuálně označené věci.

[20] Vavřínek, F. Stručný přehled zřízení správního. Praha: Všehrd, 1928, s. 74.
[21] Jisté správní akty vyznačují se totiž tím, že jsou pouhým výkonem práva, tj. samy právo nevytvářejí, na rozdíl od aktů, které, aplikujíce vyšší normy, vytvářejí zároveň normy nižší, platné buď pro větší počet případů – nařízení – nebo jen pro jediný případ konkrétní – rozhodnutí, opatření nebo rozkazy. Srov. Merkl. A. Obecné správní právo. Díl druhý. Praha – Brno : Nakladatelství Orbis, akciová společnost, 1932, s. 2.
[22] Pošvář, J. Obecné pojmy správního práva. Brno : ČSAS Právník, 1946, s. 76 a násl.
[23] Srov. § 2 zákona č. 36/1876 ř. z., o zřízení správního soudu, ve znění pozdějších předpisů (zejména zákona č. 164/1937 Sb. z. a n.). Obdobně též v rozhodnutí Nejvyššího správního soudu ze dne 10. 3. 1925, čj. 4413/25, Boh. A 4501/1925.
[24] Máša, M. Správní právo. (Obecná část), Brno: Univerzita J. E. Purkyně, 1971, s. 39 – 41.

Současná teorie správního práva, představovaná zejména díly D. Hendrycha a V. Sládečka navazují na prvorepublikové členění. Správní činnost se podle nich člení převážně na abstraktní a konkrétní úkony správních orgánů. Pro abstraktní formy správní činnosti je typická jejich abstraktnost, obecnost, jednostrannost a závaznost. Používají pojem „nařízení", který označuje výsledek normotvorné činnosti veřejné správy v oblasti státní správy. Jedná se o prováděcí právní předpisy, slouží k provedení zákona. Vzhledem k tomu, že takto pojatý pojem v sobě nereflektuje normotvorbu orgánů veřejnoprávních korporací, druhým typem abstraktních aktů jsou, což je tradičně traktováno, statutární předpisy, jako výraz oprávnění územních veřejnoprávních korporací vydávat prostřednictvím svých orgánů vlastní pravidla chování a regulovat tím vlastní záležitosti v oblasti jejich samostatné působnosti.[25] Lze se však setkat i s názory, že pojem „nařízení" jako pojem teoretický zahrnuje všechny formy právních předpisů vydávaných veřejnou správou.[26] Pojem „správní akt" pak pojímají totožně jako „individuální správní akt". Jak nařízení, statutární předpisy, tak i (individuální) správní akty mají společný znak v podobě jednostrannosti, vrchnostenského charakteru a zákonného základu. Rozdílným znakem je abstraktnost nebo konkrétnost.

Tomuto pojetí odpovídalo znění vládního návrhu správního řádu,[27] který volil jako zastřešující pojem „správní akt", jehož druhy mělo být rozhodnutí, usnesení a příkaz. V textu zákona č. 500/204 Sb., správního řádu, ve znění pozdějších předpisů, toto členění, ani pojem „správní akt" nenalezneme. Ani judikatura, zdá se, není zcela jednotná. Judikatura ústavního soudu, používá pojem „správní akt" jako synonymum pro „individuální správní akt"[28] a „normativní akt"[29] pro označení normativního správního aktu (nařízení). Je to právě ústavní soudnictví a jeho judikatura, která k vyjasnění problematiky do jisté míry může přispět, neboť činnost Ústavního soudu se nevyčerpává kontrolou ústavnosti právních předpisů (objektivního práva), neboli aktů s účinky abstraktními, ale spadá pod ni i kontrola aktů s účinky individuálními. Oproti tomu správní soudnictví, které je primárně zaměřeno na ochranu veřejných subjektivních práv, a jeho judikatura, se věnuje především (individuálním) správním

[25] V rámci členění správních aktů na normativní a individuální statutární předpisy územních samosprávných celků můžeme zařadit mezi normativní správní akty, a to společně a akty označovanými jako „nařízení".
[26] Pojem nařízení, který aspiruje na souhrnné označení právních předpisů vydávaných správními orgány v oblasti veřejné správy podle mého názoru devalvuje skutečnost, že je legálním pojmem pro některé z právních předpisů vydávaných v oblasti státní správy. Proto je třeba vždy rozlišovat mezi nařízením jako takovým, nařízením vlády, nařízením obcí a krajů, či nařízením, které je oprávněn podle jednotlivých zvláštních právních předpisů vydat další orgán veřejné správy (například správa národního parku, krajská hygienická stanice, atd.). Zmínit je třeba i nařízení, jako pramen (sekundárního) práva EU.
[27] Srov. sněmovní tisk č. 201/0, dostupný na www.psp.cz., kde je uvedeno, že „správní akt je úkon správního orgánu v určité věci učiněný při výkonu veřejné správy, jímž se zakládají, mění nebo ruší práva nebo povinnosti jmenovitě určené osoby, prohlašuje, že jmenovitě určená osoba má nebo nemá určitá práva nebo povinnosti, nebo v zákonem stanovených případech rozhoduje o vedení řízení a o jiných procesních otázkách.
Správní akt se označuje jako rozhodnutí, pokud tento zákon nestanoví, že se označuje jako příkaz nebo usnesení.
[28] Zcela výslovně je to uvedeno např. v nálezu Ústavního soudu ze dne 20. 2. 1997, sp. zn. III. ÚS 225/96 (rozhodnutí Ústavního soudu jsou dostupná na nalus.usoud.cz).
[29] Srov. nález pléna Ústavního soudu ze dne 11. 6. 1996, sp. zn. Pl. ÚS 45/95.

aktům. I přesto v jeho judikatuře nalezneme pojem „abstraktní akt normativní povahy".[30] Jádrem přezkumné činnosti správního soudnictví je tedy kontrola správních aktů, [31] neboli individuálních správních aktů,[32] přičemž judikatura mezi těmito pojmy nerozlišuje.

Vzhledem k tomu, že dosud nebylo dosaženo jednoznačné terminologické shody, nezbývá než shodně M.Kindlem[33] konstatovat, že *jednostranným správním úkonům se říká jen „správní akty", to totiž tam, kde abstraktní správní úkony se nazývají buď jen abstraktními správnímu úkony nebo „nařízeními a jinými abstraktnímu formami správní činnosti" … Můžeme se ale setkat i s označením individuální správní akt, totiž tam, kde abstraktní jednostranné správní úkony se nazývají normativními správními akty.*

Individuální správní akt, nebo krátce „správní akt" je výsledkem správní činnosti v daném konkrétním případě s právními účinky vztahujícími se toliko k jednoznačně vymezeným adresátům veřejněmocenského působení, kteří se na procesu jejich vydávání, což je třeba při porovnání s normativními správními akty (nařízeními) zdůraznit, výrazně podílejí. Nejde o výsledek normotvorné činnosti, nýbrž o výsledek činnosti aplikační. Pokud jsou individuální správní akty zaměřeny na internum veřejné správy, označují se jako individuální služební akty. Jsou výsledkem praktického uplatnění instančních vztahů nadřízenosti a podřízenosti a směřují tudíž vůči konkrétním podřízeným subjektům v rámci příslušného organizačního systému veřejné správy.

Individuální správní akty lze dále členit do dvou další kategorií. Jednak, a to zpravidla nejčastěji, představují výsledek rozhodovacích procesů správního orgánu v rámci správního řízení, kdy jde o správní rozhodnutí[34]. Druhou kategorií individuálních správních aktů, tedy vedle správního rozhodnutí, jsou akty, představující nikoli výsledky správního řízení, nýbrž výsledky dalších procedurálních postupů, které upravuje ve své části čtvrté v § 154 až § 158 v obecném režimu správní řád. Ustanovení § 154 spr. ř. se výslovně zmiňuje o vyjádření, osvědčení, ověření a sdělení, přičemž to mohou být i další úkony, které správní řád výslovně nepojmenovává, ale díky § 177 odst. 2 spr. ř. se na proces jejich vydání použije obdobně právě část čtvrtá. Jedná se o tzv. jiné úkony správních orgánů, ne o správní rozhodnutí, byť se na ně s ohledem na znění § 177 odst. 2 a § 154 užijí mj. i ta ustanovení (ne všechna a

[30] K tomu viz rozsudky Nejvyššího správního soudu ze dne 30. 11. 2007, čj. 5 As 34/2006-118, publikovaný pod č. 1503/2008 Sb. NSS, nebo rozsudek ze dne 18. 5. 2005, čj. 2 As 4/2004-138, dostupný na www.nssoud.cz

[31] Pojem „správní akt" je judikaturou hojně používán např. v souvislosti s institutem nicotnosti. Srov. rozsudek Nejvyššího správního soudu ze dne 18. 11. 2003, čj. 2 Afs 12/2003-216, publikovaný pod č. 212/2004 Sb. NSS, nebo rozsudek rozšířeného senátu Nejvyššího správního soudu ze dne 22. 7. 2005, čj. 6 A 76/2001-96, publikovaný pod č. 793/2006 Sb. NSS.

[32] Srov. rozsudek Nejvyššího správního soudu ze dne 29. 11. 2007, čj. 5 Afs 75/2007-161, publikovaný pod č. 1492/2008 Sb. NSS.

[33] Kindl, M. in. Kindl, M. a kol. Základy správního práva. Plzeň : Aleš Čeněk, 2006, s. 156 – 157.

[34] Podle § 67 odst. 1 správního řádu rozhodnutím správní orgán v určité věci zakládá, mní nebo ruší anebo povinnosti jmenovitě určené osoby nebo v určité věci prohlašuje, že taková osoba práva nebo povinnosti má anebo nemá.

ne ve stejné míře) správního řádu, která upravují správní řízení. J. Staša[35] je charakterizuje jako *úkony, jejichž prostřednictvím vykonavatelé veřejné správy plní úkoly veřejné správy, a které přímo nezasahují do ničích práv.*

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[4] Máša, M.: *Správní právo. (Obecná část)*, Brno: Univerzita J. E. Purkyně, 1971, 166 s.

[5] Merkl, A.: *Obecné správní právo*. Díl druhý. Praha – Brno : Nakladatelství Orbis, akciová společnost, 1932, s. 1 – 46.

[6] Pošvář, J.: *Obecné pojmy správního práva*. Brno : ČSAS Právník v Brně, 1946, 103 s.

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[8] Skulová, S. a kol.: *Správní právo procesní*. Praha : Eurolex Bohemia, s. r. o., 2005, 279 s., ISBN 80-86861-54-6.

[9] Sládeček, V.: *Obecné správní právo*. Praha : ASPI, a. s., 2005, 380 s., ISBN 80-7357-060-2.

[10] Vavřínek, F.: *Stručný přehled zřízení správního*. Praha: Všehrd, 1928, 253 s.

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[35] Staša, J. in Hendrych, D. a kol. Správní právo. Obecná část. 6. vydání. Praha : C. H. Beck, 2006, s. 265.

PRÁVNICKÉ OSOBY CIRKVÍ VO SVETLE POVAHY CIRKEVNÝCH PREDPISOV V ČR

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Abstrakt

Vo svojom príspevku sa zaoberám nasledujúcimi otázkami: akú povahu má cirkev ako právnická osoba, či ju môžeme považovať za samosprávnu korporáciu a v tomto rámci tvrdiť, že cirkevné normy sú štatutárnymi predpismi. Ak pripustíme, že cirkev je samosprávnou korporáciou a jej normy sú štatutárnymi predpismi, má táto ich povaha nejaký vplyv na možnosť cirkvi, aby ňou zriaďované právnické osoby vybavovala právnou subjektivitou bez zásahu štátu?

Kľúčové slová

Cirkev, samosprávna korporácia, štatutárne predpisy, cirkevné normy, právnické osoby cirkví, evidencia, registrácia

Abstract

My entry deals with these questions: what is the nature of church as a legal entity, may we consider it as a self-governing corporation and on this field may we say that church regulations are the same as statutory regulations? If we admit that a church is a self-governing corporation and that church regulations are the statutory regulations, may we say that such a nature of regulations gives church an opportunity to make spiritual corporations full of legal personality without interference of the state?

Key words

Church, Self-governing Corporation, Statutory regulations, Church regulations, Spiritual corporations, Evidence, Registration

Cirkvi[1] a cirkevné normy

[1] Pojem cirkvi v tomto príspevku používam ako označenie pre cirkvi a náboženské spoločnosti.

Ak chceme nájsť odpoveď na otázku, či právnické osoby, zriaďované cirkvami vznikajú nadané právnou subjektivitou už na základe cirkevných noriem, musíme objasniť tri aspekty: povahu cirkví, povahu cirkevných noriem a pojem právnickej osoby cirkví.

Podľa zákona č. 3/2002 Sb., (zákon o církvích a náboženských společnostech ve znění pozdějších předpisů), §-u 3 je cirkvou a náboženskou spoločnosťou „dobrovoľné spoločenstvo osôb s vlastnou štruktúrou, orgánmi, vnútornými predpismi, náboženskými obradmi a prejavmi viery, založené za účelom vyznávania určitej náboženskej viery či verejne alebo súkromne a predovšetkým s tým spojeného zhromažďovania, bohoslužby, vyučovania a duchovnej služby.“ K postaveniu cirkví ďalej hovorí § 4 citovaného zákona: „Cirkev a náboženská spoločnosť vzniká dobrovoľným združovaním fyzických osôb a svojbytne rozhoduje o veciach spojených s vyznávaním viery, o organizácii náboženského spoločenstva a o vytváraní k tomu určených inštitúcií.“ „Cirkev a náboženská spoločnosť sa stáva právnickou osobou registráciou (...)“ (§ 6 odst. 1). Z vyššie uvedeného sa dá konštatovať, že vznik cirkví a ich následná povaha sa dá rozdeliť do troch úrovní. Na prvej úrovni cirkev vzniká už samotným združením fyzických osôb. Na tejto prvej úrovni má cirkev oprávnenia uvedené vyššie v § 4 citovaného zákona. Na druhú úroveň sa cirkev dostáva, keď je vrchnostenským aktom ministerstva kultúry zaregistrovaná. Registrácia má v tomto zmysle konštitutívne účinky, pretože zaregistrovaním sa cirkev stáva právnickou osobou ku dňu registrácie (nie so spätnou účinnosťou). Treťoúrovňovou sa cirkev stáva splnením podmienok uvedených v citovanom zákone (splnením početného cenzu osôb hlásiacich sa k nej, predstavujúceho 1 ‰ obyvateľstva a riadnym predkladaním výročných správ posledných 10 rokov od registrácie). Týmto má cirkev právo vykonávať tzv. zvláštne práva, ktoré sú jej po splnení vyššie uvedených podmienok priznané.

Nás však zaujíma právna povaha cirkví. Zaregistrovaním sa cirkev stáva právnickou osobou, teda nadobúda právnu subjektivitu a spôsobilosť k právnym úkonom. Typovo sa cirkev radí medzi korporácie, teda združenia osôb. V teórii sa korporácie delia na verejnoprávne a korporácie súkromného práva. Existujú rôzne názory na to, či je cirkev verejnoprávnou korporáciou. Ja sa prikláňam k tvrdeniu, že priznaním zvláštnych práv cirkvi jej štát prepožičiava výkon verejných úloh, preto je možné v tomto smere cirkev za verejnoprávnu korporáciu považovať.[2]

S pojmom verejnoprávnej korporácie je spojený ďalší pojem a tým je samospráva. K. Klíma[3] uvádza ako jeden z druhov samosprávy aj samosprávu religióznu. Ďalej rozdeľuje samosprávu na verejnú

[2] Viac k argumentácii o verejnoprávnosti cirkví viď Rentková, L.: *Cirkvi ako verejnoprávne korporácie,* In: Míľniky práva v stredoeurópskom priestore, Bratislava: UK
[3] Klíma, K.: *Teorie veřejné moci (vládnutí)*, Praha: Aspi, 2003, s. 64-65

a súkromnú podľa podielu na uplatňovaní verejnej moci. O súkromnoprávnej samospráve hovorí, že sa zaoberá len vnútornými problémami a cieľmi. Otázkou je, do ktorej z dvoch skupín (verejnoprávna – súkromnoprávna) cirkev zaradíme. Opýtajme sa, či sa cirkev zaoberá len vnútornými problémami a cieľmi? Náboženstvo sa môžu učiť aj deti, ktoré nie sú členmi tej ktorej cirkvi, taktiež v cirkevných školách nie sú len žiaci konkrétnej konfesie. V praxi českých cirkví je možné pred oltárom zosobášiť aj neveriaci pár. Tieto možnosti nepovažujem za prejav súkromnoprávnosti cirkevnej samosprávy, naopak, ide o charakteristiky verejnoprávnosti.

Ak je cirkev samosprávnou korporáciou a je jej právnym poriadkom priznaná autonómia[4], potom je oprávnená vydávať tzv. štatutárne predpisy, ktorými upravuje svoje vlastné záležitosti. K štatutárnym predpisom Sládeček uvádza: „(...) statutární předpisy vycházejí z ústavou či zákonem garantované autonomie, tj. pravomoci upravovat určité otázky. Statutární předpisy nemohou zasahovat do veřejnoprávních vztahů, jejich účinky směřují toliko vůči členům konkrétního samosprávného společenství.“[5] Štatutárne predpisy však nie sú právnymi predpismi (okrem niektorých predpisov obcí a krajov), ale len vnútornými normami tej ktorej verejnoprávnej korporácie. Ide o špecifickú formu predpisov verejnoprávnej korporácie.[6]

Ak ďalej hovoríme o štatutárnych predpisoch ako o vnútorných normách, treba ozrejmiť pojem interných normatívnych inštrukcií. Podľa nálezu Ústavného súdu je „vydávanie inštrukcií len realizáciou oprávnenia riadiť činnosť podriadených a ich plnenie je zachovávaním právnej povinnosti riadiť sa v služobnej činnosti príkazmi nadriadených. Tieto oprávnenia a povinnosti vyplývajú z právnej normy, ktorá stanoví vzťah nadriadenosti a podriadenosti. Internými inštrukciami sa preto len konkretizujú úlohy a povinnosti podriadených zložiek a pracovníkov.“[7] Takto sme vydelili z obecnej skupiny vnútorných noriem štatutárne predpisy a interné inštrukcie.

Hendrych[8] však štatutárne predpisy nepovažuje vôbec za vnútorné normy. Štatutárne predpisy a vnútorné normy sú podľa neho úplne odlišné pojmy, ktoré netreba zamieňať. Vnútorná norma sa podľa neho viaže na vzťahy nadriadenosti a podriadenosti. Vnútorné normy nepovažuje za právne predpisy. Štatutárny predpis je potom výrazom autonómie určitého spoločenstva smerujúci voči členom

[4] Ku rozdielu pojmov samospráva a autonómia viď napr. Sládeček, V.: *Obecné správní právo,* Praha: Aspi, 2004. s. 244 Autonómia sa podľa Sládečka týka predovšetkým autonómie v oblasti normotvorby. Ak však požívame pojem autonómia v súvislosti s cirkvami, išlo by o príliš zužujúci výklad cirkevnej autonómie len na cirkevnú normotvorbu.
[5] Sládeček, V.: *Obecné správní právo. Praha*, Aspi, 2004. s. 54
[6] Tamtiež, s. 56
[7] Rozhodnutie IV. ÚS 42/94, dostupné na www.usoud.cz
[8] Hendrych, D.: *Autonomní normotvorba v českém správním právu,* In: Musil, J., Vanduchová, M. (eds.): *Pocta prof. Otovi Novotnému k 70. narozeninám*, Praha: Codex Bohemia, 1997. s. 14

tohto spoločenstva, ktoré má korporatívny charakter. Aby samosprávna korporácia mohla vydať štatutárny predpis, musí byť splnených niekoľko podmienok:

- Právomoc k vydávaniu štatutárneho predpisu je založená štátnou delegáciou. Nevyžaduje sa špeciálne zákonné zmocnenie;
- Prepožičaním právomoci ku štatutárnej normotvorbe sa prenáša na korporáciu verejného práva alebo na inú právnickú osobu kompetencia tvoriť právne predpisy;
- Obmedzenia sú nasledovné:
  - vecné – dané zákonným určením úloh,
  - personálne – dané ohraničením oprávnenia na členov korporácie a
  - zákonodarca si vyhradzuje vykonať sám určitú reguláciu.

Ďalšou dôležitou skutočnosťou, ktorú Hendrych uvádza je to, že štatutárne predpisy síce majú zvláštne postavenie, ale ich forma nespĺňa požiadavky stanovené pre právny predpis, preto štatutárne predpisy nie sú – rovnako ako vnútorné predpisy - podľa neho právnymi predpismi, teda prameňmi práva.[9, 10] Základnou vlastnosťou právneho predpisu je jeho všeobecnosť, teda schopnosť zaväzovať neurčitý počet adresátov normy. Cirkevné normy však zaväzujú len svojich veriacich.[11] Ďalším argumentom proti tvrdeniu, že cirkevné normy sú právnymi predpismi, je vynútiteľnosť štátnou mocou. Tým, že cirkev je autonómna korporácia, spravuje si svoje záležitosti sama, bez ingerencie štátu. Vynútiteľnosť jej noriem prostredníctvom štátu je preto nemožná. Touto otázkou sa zaoberali aj slovenské súdy, keď konštatovali, že cirkvi sú pri výkone svojich práv nezávislé na štátnych orgánoch, avšak musia dodržiavať okrem svojich noriem aj normy štátne. Preskúmavanie cirkevných noriem však nie je v kompetencii štátnych súdov.[12]

Nie všetci autori sa však na povahe štatutárnych predpisov zhodnú. Opačný názor než Sládeček a Hendrych zaujíma totiž Koudelka, keď tvrdí, že stavovské predpisy charakter právneho predpisu majú.[13]

V českej právnej teórii teda existujú dva tábory. Prví tvrdia, že vnútorné normy zahŕňajú jednak normy, ktoré sa uplatňujú vo vzťahoch nadriadenosti a podriadenosti a ďalej štatutárne predpisy (tzv.

[9] Hendrych, D.: *Správní právo: Obecná část*, Praha: C. H. Beck, 2006. s. 188

[10] Názor, že cirkevné normy nie sú právnymi predpismi zastáva aj slovenská literatúra. Viď napr. Čeplíková, M.: *Štát, cirkvi a právo na Slovensku: História a súčasnosť*, Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2005. 190 s. ISBN 80-7097-586-5

[11] Viď napr.: Boguszak, J., Čapek, J., Gerloch, A.: *Teorie práva*, Praha: Aspi, 2004. s. 78

[12] Viď rozhodnutie Ústavného súdu Slovenskej republiky III. ÚS 64/00 a rozhodnutie Najvyššiwho súdu Slovenskej republiky 3 Sž 25/94. Dostupné na http://jaspi.justice.gov.sk

[13] Viď Koudelka, Z.: *Je stavovská organizace a stavovská předpis neústavní?*, Bulletin advokacie, č. 4, r. 2000, s. 33. Podotýkam však, že tento názor je menšinový.

autonómne právo). Druhí zastávajú názor, že štatutárne predpisy a vnútorné normy netreba stotožňovať, pretože ich účinky sa odlišujú. Prikláňam sa k názoru druhej skupiny.

Je možné podľa uvedených kritérií tvrdiť, že cirkevné normy sú štatutárnymi predpismi? „Právo autonómnej normotvorby (...) spočíva v tom, že zákon výslovne pripúšťa, aby určitý subjekt mohol v medziach zákona vydávať predpisy a *nimi priamo v rámci samostatnej pôsobnosti reguloval verejnoprávne záležitosti*."[14] Treba sa preto opýtať: je vytvorenie (cirkevnej) právnickej osoby, ktorá vykonáva verejné úlohy (konkrétne napríklad charity) *regulovaním verejnoprávnych záležitostí*? Ja odpovedám: áno.

Právnické osoby cirkví a ich vznik

V početných polemikách k možnosti vytvárať vlastné právnické osoby, k povinnosti ich evidencie, či registrácie sa často vyskytuje jeden základný problém. Treba odlišovať orgány cirkví od právnických osôb vytváraných cirkvami. Je zrejmé, že orgány akejkoľvek právnickej osoby zásadne nenadobúdajú právnu subjektivitu, sú – v pojmoch správneho práva – len vykonávateľmi právnej subjektivity jej nositeľa (samotnej právnickej osoby). Nemôžeme preto tvrdiť, že „občianske združenia (...) môžu svoje orgány vytvárať bez toho, aby ich museli mať niekde schválené (a) keď to chcú cirkvi, narážajú na zriaďovacie obtiaže."[15] Ako bolo vyššie uvedené, už cirkev na prvej úrovni svojbytne rozhoduje o organizácii náboženského spoločenstva (§ 4 cit. zákona). Cirkev teda rovnako ako iné združenia a právnické osoby (aj obchodné spoločnosti) vytvárajú samostatne svoje orgány. Tie však nikdy právnu subjektivitu nenadobudnú. Spory sa vedú o právnej subjektivite inštitúcií, ktoré cirkvi vytvárajú. Opýtajme sa teda, či a ako vytvárajú iné právnické osoby svoje samostatné inštitúcie. V náleze Ústavného súdu publikovaného v Sbírce zákonů pod č. 4/2003 sa dozvedáme, že „ ‚běžná' sdružení mají podle zákona č. 83/1990 Sb. právo zřizovat své organizační složky jako tzv. vedlejší právnické osoby, odvozené od spolku jako celku a disponující právní subjektivitou a ke zřízení těchto právnických osob v zásadě postačuje úprava ve stanovách spolku tuto možnost připouštějící. (…) rovněž způsob právního vzniku odborové organizace, k němuž dochází ex lege již dnem následujícím poté, co byl ministerstvu doručen návrh na evidenci." Ak potom Ústavný súd považuje cirkvi za zvláštne korporácie, použijeme výkladové pravidlo ad minori a maius a musím pripustiť, že právnické osoby cirkví musia byť zaevidované už vzniknuté.

[14] Hendrych, cit. dielo s. 187

[15] Jandourek, J.: *Víra, církev, dějiny a majetky*, MF Dnes, říjen 2006. Dostupné na http://www.cs-magazin.com/2006-10/view.php?article=articles/cs061025.htm, cit. k 16. 10. 2006

Listina základných práv a slobôd upravuje základné práva cirkví v čl. 16 odst. 2 takto: „Cirkvi a náboženské spoločnosti majú právo spravovať svoje záležitosti a to predovšetkým ustanovovať svoje orgány (...) a zriaďovať rehoľné a iné cirkevné inštitúcie nezávisle na štátnych orgánoch.“ Hrdina[16] k tomu dodáva, že toto právo nenáleží len cirkvám registrovaným, ale všetkým bez rozdielu. Môžeme teda povedať, že patrí už cirkvám na prvej úrovni. Obsahom tohto práva je taktiež v širšom zmysle vydávanie vnútorných predpisov, ktoré nie sú v rozpore s všeobecne záväznými právnymi predpismi.[17] Ak majú totiž cirkvi „ustanovovať“, „zriaďovať“ a „spravovať“, musíme predpokladať, že tak činia pomocou určitých noriem.

Podľa zákona[18], ktorý platil do nadobudnutia účinnosti zákona č. 3/2002 Sb., samotné cirkvi prepožičiavali svojim právnickým osobám subjektivitu a ministerstvo kultúry ich iba evidovalo v registri, ktorý bol neverejný.[19] Nový zákon však túto prax zmenil. Na to reagovala skupina senátorov, ktorá podala návrh na Ústavný súd o zrušenie celého nového zákona, prípadne jeho niektorých ustanovení. S týmto návrhom sa Ústavný súd vysporiadal v náleze, ktorý bol publikovaný v Sbírce zákonů pod č. 4/2003. Okrem iného v ňom Ústavný súd posudzoval aj ústavnosť postupu pri evidencii právnických osôb cirkví. Dospel k nasledujúcim záverom: „Evidence totiž svojí podstatou (na rozdíl od registrace) nepředstavuje konstitutivní, nýbrž toliko deklaratorní právní akt. Proto také může být k evidenci navrhována již ‚založená instituce‘ a účinky evidence se zásadně datují zpětně. (…) Z faktického a aplikačního hlediska však nelze přehlédnout, že mezi evidencí a registrací tak, jak je upravena v napadeném zákoně, neexistuje výraznější rozdíl (…)“ Ústavný súd však ustanovenie zákona o evidencii právnických osôb cirkví nezrušil s poukazom na možnosť preklenúť jeho problematickosť výkladom.

Zhrňme teda situáciu a opýtajme sa ešte raz: má povaha cirkevných noriem ako štatutárnych predpisov nejaký vplyv na možnosť získať právnu subjektivitu pre právnickú osobu cirkví už pri jej vzniku na základe cirkevných noriem? Ak štatutárne predpisy regulujú verejnoprávne záležitosti a povieme, že zriadenie právnickej osoby cirkvi s poslaním vykonávať verejné úlohy je reguláciou verejnoprávnych záležitostí, potom „cirkevné právnické osoby“ vznikajú už na základe cirkevných noriem, majú určité oprávnenia, pričom účinky úkonov v rámci svojich oprávnení nastávajú spätne až evidenciou takejto osoby ministerstvom kultúry. Autonómia cirkví, ich nezávislosť na štátnych orgánoch pri regulácii

[16] Hrdina, A. I.: *Náboženská svoboda v právu české republiky*, Praha: Eurolex Bohemia, 2004. s. 143
[17] Pavlíček, V. citované podľa: Hrdina, A. I.: *Náboženská svoboda v právu české republiky*, Praha: Eurolex Bohemia, 2004. s. 145
[18] Ide o zákon č. 308/1991 Sb., o svobodě náboženské víry a postavení církví a náboženských společností, v znení neskorších predpisov
[19] Bližšie viď Hrdina, A. I.: *Náboženská svoboda v právu české republiky*, Praha: Eurolex Bohemia, 2004. s. 147

vnútorných záležitostí a za určitých podmienok ich zabezpečovanie verejných úloh robia z cirkví zvláštne korporácie verejnoprávneho charakteru.

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[2] Beran, K.: *Právnické osoby veřejného práva,* Praha: Linde, 2006, 191, ISBN 80-7201-598-2

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[4] Weirer, R.: *Stát a církev,* Praha – Brno: Nakladatelství Orbis, 1932, 185

[5] Čeplíková, M.: *Štát, cirkvi a právo na Slovensku,* Univerzita Pavla Jozefa Šafárika v Košiciach: Košice, 2005, 190, ISBN 80-7097-586-5

[6] Šrámek, A.: *Tvorba právních norem ve veřejné správě,* Praha: Právnická fakulta Univerzity Karlovy, 1995, ISBN 80-85889-04-8

[7] Boguszak, J. et al.: *Teorie práva,* Praha: Aspi, 2004, ISBN 80-7357-030-0

[8] Weyr, F.: *Teorie práva,* Brno – Praha: Nakladatelství Orbis, 1939

[9] Minnerath, R.: *Autonomie církví v Evropě,* Revue cirkevního práva 3/99

[10] Jandourek, J.: *Víra, církev, dějiny a majetky,* MF Dnes, Říjen 2006

[11] Hendrych, D.: *Správní právo – Obecná část,* Praha: C. H. Beck, 2006

[12] Musil, J., Vanduchová, M. (eds.): *Pocta prof. Otovi Novotnému k 70. narozeninám,* Praha: Codex Bohemia, 1997

[13] Sládeček, V.: *Obecné správní právo,* Praha: Aspi, 2004

[14] Koudelka, Z.: *Je stavovská organizace a stavovský předpis neústavní?,* Bulletin Advokacie 4/2000

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PLATNOST A ZÁVAZNOST ROZHODNUTÍ V MÍSTNÍM REFERENDU VE SVĚTLE ZKUŠENOSTÍ Z PRAXE

FILIP RIGEL

NEJVYŠŠÍ SPRÁVNÍ SOUD

Abstrakt

Příspěvek pojednává o nejrozšířenější a nejdůležitější formě přímé demokracie v České republice – o místním referendu. Zvláštní pozornost je věnována otázce jeho platnosti a závaznosti. Rozhodnutí v místním referendu je platné, pokud se jej zúčastní přinejmenším polovina oprávněných osob. Toto vysoké kvórum způsobuje, že místní referenda jsou často neplatná, což oslabuje motivaci osob účastnit se na této formě politického života v obci.

Klíčová slova

Místní referendum, platnost a závaznost

Abstract

The paper deals with the topic of both the most widespread and the most important form of direct democracy in the Czech Republic – local referendum. Special attention is paid to the question of its validity and liability. The decision of the referendum is valid if, at least, one half of the persons with right to vote cast a ballot. The high turnout quorum means that local referendums are often declared invalid, which indeed tends to weaken citizens´ motivation to participate in political life of the municipality.

Key words

Local referendum, validity and liability

Místní referendum je jediným, zato však stále využívanějším instrumentem přímé demokracie v České republice. Otázka jeho platnosti a závaznosti je pak nejzávažnějším důsledkem, který z místního referenda plyne.

Definice platnosti

Platnost rozhodnutí v místním referendu je polysémantickým pojmem. Skrývá se pod ním jak to, že nebyla soudem vyslovena neplatnost rozhodnutí v místním referendu, tak to, že bylo dosaženo potřebné hranice účasti při místním referendu. Příspěvek se věnuje pouze druhému z uvedených významů.

K platnosti rozhodnutí v místním referendu je podle § 48 odst. 1 zákona č. 22/2004 Sb., o místním referendu a o změně některých zákonů, třeba účasti alespoň poloviny oprávněných osob zapsaných v seznamech oprávněných osob. Zákon o místním referendu přitom pojem *účast* neosvětluje. Domnívám se, že *účastí* je třeba rozumět počet vydaných úředních obálek, nikoliv počet odevzdaných úředních obálek ani celkový počet platných hlasů (stejně je účast interpretována v případě volebního procesu, kde je ovšem toliko statistickým údajem). Tvrzení, že osoba, která si řádně vyzvedla úřední obálku, avšak do ní např. vložila neplatný hlasovací lístek, se hlasování v místním referendu vůbec nezúčastnila, je jistě absurdní. Pokud by takové jednání bylo považováno za neúčast v místním referendu, šlo by pak bizarně namítnout, že oprávněná osoba si může vyzvednout ještě jednu úřední obálku, aby do ní mohla vložit platný a platně upravený hlasovací lístek, a konečně se tak hlasování zúčastnit.

Zajímavé je, že zákon vyžaduje k platnosti rozhodnutí v místním referendu účast **nejméně poloviční**ho počtu oprávněných osob (50 %), nikoliv nadpoloviční (50 % + 1 hlas), který by se mohl jevit jako teoreticky lépe odůvodnitelný, neboť by se opíral o to, že vůli účastnit se místního referenda projevila **většina** oprávněných osob.[1]

Padesátiprocentní meta je zbraní, která je nabroušená na obou stranách. Na straně jedné nepřiměřeně posiluje tábor odpůrců otázky navržené v referendu, na straně druhé tuto skupinu osob staví před kardinální dilema, zda si vyzvednout obálku. Pokud tak učiní, riskují, že tím přispějí k platnosti referenda. Pokud tak neučiní, riskují, že referendum bude platné i bez nich, a oni sami tak svou neúčastí oslabí počet osob hlasujících pro tu či onu variantu. Zkušenosti ukazují, že k dosažení hranice platnosti několika referend přispěli právě zavilí odpůrci konání referenda v dané věci, tedy zejména tam, kde hlasování slouží jako kontrolní mechanismus.

Faktory ovlivňující účast

Účast na hlasování je ovlivňována širokou škálou faktorů. Jedním z těch významných je i samotná **právní úprava** místního referenda. Pozitivní vliv má zcela určitě to, že se oprávněné osoby – s výjimkou

[1] Nejde jen o teoretickou hříčku. Místního referenda ve Vidnavě se z celkového počtu 1 116 oprávněných osob zúčastnilo místního referenda 558, tedy zcela přesně 50 %. Referendum bylo platné.

cizinců – nemusí nikterak registrovat, jejich právo hlasovat tedy plyne přímo *ex lege*. Účast může (byť jen lehce) zvýšit i zavedení institutu hlasovacího průkazu, jehož význam je však při místním referendu relativizován. Zcela zásadní vliv na výši účasti by pochopitelně mělo zavedení povinnosti hlasovat.

Význam nepochybně má i **termín a čas hlasování**. Z tohoto pohledu je varující, že den a doba hlasování jsou odvislé od rozhodnutí zastupitelstva, které tak drží významný obstrukční nástroj, kterak zamezit dosažení mety platnosti rozhodnutí v místním referendu. Větší naději na vyšší účast mají víkendové termíny, svůj vliv může mít i roční období. Důležité z tohoto hlediska je i to, aby doba určená pro hlasování byla pokud možno co nejdelší a zahrnovala dopoledne i odpoledne. Vyšší participace osob na hlasování je také možné dosáhnout v případech, kdy se místní referendum koná ve stejném termínu jako některé z voleb.

Dobrým příkladem, jaký vliv má termín hlasování na účast, je město Tábor. V roce 2000 a též v roce 2006 se v Táboře konala místní referenda, obě o otázkách dopravy ve městě. První bylo uspořádáno současně s volbami, druhé nikoliv. Rozdíl v počtu oprávněných osob, které si vyzvedly úřední obálky, byl závratný. Prvního referenda se zúčastnila více než třetina oprávněných, druhého již jen asi desetina. V období od účinnosti stávajícího zákona o místním referendu se současně s volbami konalo 11 místních referend, všechna přesáhla potřebnou padesátiprocentní metu! Obzvláště pozoruhodné to je v případě Brušperku, který je jednou z největších komunit, v níž se kdy podařilo překročit hranici platnosti rozhodnutí v místním referendu podle stávajícího zákona.

Účast v referendu může být snižována také vysokou **frekvencí referend nebo voleb**. Dalším činitelem, který ovlivňuje výši účasti při místním referendu, je **průběh kampaně** a různé **doprovodné akce přípravného výboru**.[2] Nezpochybnitelně působí na participaci oprávněných osob také **atraktivita otázky**, o níž se hlasuje. Nejvyšší účasti se obvykle těší referenda, která se zabývají životním prostředím.

Mezi další činitele s významným vlivem na účast v místním referendu patří také **počasí**, **sociální a demografická struktura v dané obci**, **celospolečenské klima**, **politická situace** nebo to, jaká **cesta** vedla k jeho **vyhlášení**, tedy zda je místní referendum vyhlašováno z iniciativy přípravného výboru nebo z prostého rozhodnutí zastupitelstva bez dalšího.

Vliv velikosti obce

[2] Např. v Opatovicích nad Labem jezdil po obci autobus, který zdarma svážel oprávněné osoby do hlasovací místnosti.

Všechny vypočtené faktory mají svůj vliv, tu větší, tu menší, avšak empirické poznatky zřetelně ukazují, že v místním referendu je nejdůležitějším faktorem **velikost obce co do počtu obyvatel**. Rovněž americký politolog R. Dahl zastává stanovisko, že efektivita přímé demokracie značně závisí na velikosti jednotky co do počtu obyvatel i co do rozsahu jejího území. Čím je politická jednotka menší, tím více nabízí prostoru pro přímé zapojení do procesu správy veřejných záležitostí, tím více je možné řešit otázky, které místní obyvatelé považují za zásadní.[3] Nejde zdaleka jen o vlastní proces rozhodování, ten může být docela dobře nahrazen elektronickými prostředky, nikterak nahraditelná není především předchozí všeobecná diskuze o problému. Platí, že čím větší obec, tím hůře je možné najít téma, které se dotýká skutečně všech osob v daném místě. Čím větší obec, tím také menší váha jednotlivého hlasu, což může mít za následek demotivaci na místním referendu participovat. Svůj vliv má rovněž vyšší míra formalizace sousedských a vnitroobecních vztahů ve velkých jednotkách.

Obce jsou tak v jednom smyslu skupinou homogenní, jiný úhel pohledu ovšem odkryje mimořádnou pestrobarevnost obcí. V politické rovině je tato mnohost vyjádřitelná zcela prostým schématem: menší jednotky, vyšší participace – a naopak. V případě stanovení hranice platnosti místního referenda si však zákonodárce tuto úměru neuvědomil. Tím ovšem položil zdaleka největší překážku na cestu možnosti konat místní referenda na území České republiky.

Platná rozhodnutí v místním referendu se tak týkají jen samých malých obcí. Ve velkých městech je většinou obtížné referendum byť jen konat, bývá složité obstarat potřebný počet podpisů a zastupitelstva velkých měst ze své vůle referenda nevypisují. Toto tvrzení dokládá následující tabulka:

Počet oprávněných osob v komunitě	Průměrná účast	Počet referend (platných)
do 250	71,5 %	30 (30)
251 až 1000	54,5 %	32 (23)
1 001 až 2 000	51,1 %	18 (13)
2 001 až 10 000	34,1 %	10 (2)
10 001 a výše	24%	6 (0)

Tabulka 1: Vztah průměrné účasti a velikosti obce u místních referend konaných na území ČR mezi 1. 2. 2004 a 1. 2. 2008; zdroj: výzkum autora.

Velká Bíteš, která nemá ani 4 000 oprávněných osob, zůstává největším městem, kde se podařilo přesáhnout padesátiprocentní hranici. Můžeme konstatovat, že ve velkých obcích prakticky není možné v podmínkách stávající právní úpravy místního referenda dosáhnout na překročení hranice platnosti přijatého rozhodnutí. Statistiky přitom ukazují, že v obcích nad 5 000 obyvatel žije asi 63 % všech

[3] DAHL, R. A.: *On Democracy*. 1st ed. New Haven and London: Yale University Press, 1998, p. 103–118. Autor vtipně boří staré klišé, když podotýká, že na velikosti rozhodně záleží (*size matters*).

obyvatel ČR.[4] Těmto obyvatelům je tak *de facto* znemožněno cokoliv v místním referendu platně (a následně závazně) rozhodnout.

Závěry o nepřímé úměře mezi účastí a počtem oprávněných osob v komunitě lze podpořit i poznatky ze zahraničí. Tabulka ukazuje údaje zjištěné o 750 místních referendech v Bavorsku, která se v této spolkové zemi konala mezi listopadem 1995 a zářím 2005.

Počet obyvatel v komunitě	Průměrná účast	Počet referend
Do 2000	64,8 %	100
2001 až 5 000	56,2 %	212
5 001 až 10 000	50,8 %	177
10 001 až 30 000	40,9 %	145
30 001 až 50 000	41,3 %	47
50 001 až 100 000	28,5 %	26
100 001 až 500 000	28, 5 %	35
500 001 a výše	23,2 %	8

Tabulka 2: Vztah průměrné účasti a velikosti obce u místních referend konaných na území Bavorska mezi listopadem 1995 a zářím 2005.[5]

Shora jsme uvedli, že vedle velikosti obce konající místní referendum má na účast vliv řada dalších faktorů. Vliv těchto činitelů bude ale dramaticky omezen v případě, kdy se referenda konají o téže otázce, na území více obcí v jediném regionu, s více méně obdobně vedenou kampaní, v průběhu relativně krátké doby, během níž nedochází ke změnám celospolečenského klimatu apod. Velmi dobrým příkladem jsou referenda konaná v roce 2007 ohledně výstavby radarové základny v Brdech. Vliv velikosti obce na účast při místním referendu se tak ukazuje ve své čisté podobě.

Počet oprávněných osob v komunitě	Průměrná účast	Počet referend (platných)
do 150	81,5 %	5 (5)
151 až 500	63,3 %	7 (7)
501 až 1 500	56,8 %	4 (3)
1 501 až 3 636	45,5 %	3 (1)

Tabulka 3: Vztah průměrné účasti a velikosti obce u místních referend týkajících se výstavby radarové základny v Brdech; zdroj: výzkum autora.

Stanovení padesátiprocentní hranice pro platnost rozhodnutí v místním referendu v ČR je o to smutnější, že předchozí právní úprava obsahovala kvórum poloviční, přičemž důvodová zpráva k současnému zákonu se hned na několika místech chlubí tím, že návrh zákona vychází z dosavadní praxe a zkušeností.[6] Jsou to ale právě zkušenosti, které nás učí, že požadavek na překročení padesátiprocentního prahu se ve větších obcích jeví být likvidačním. Sám zákon v této věci zůstal v půli cesty, když na jedné straně přiznává, že ve větších městech bude obtížnější sesbírat procentuálně stejné

[4] Údaje Českého statistického úřadu jsou přístupné na http://www.czso.cz.
[5] Tabulka viz REHMET, F., WENISCH, S.: *Zehn–Jahres–Bericht bayerischer Bürgerbegehren und Bürgerentscheide*. [stav ke dni 1. února 2008]. Dostupný z http://www.democracy-international.org/fileadmin/di/pdf/md/bavarian-report.pdf.
[6] Sněmovní tisk č. 255/0, Vládní návrh na vydání zákona o místním referendu a o změně některých zákonů, IV. volební období.

množství podpisů než v těch menších, na straně druhé totéž okázale ignoruje unifikující konstrukcí platnosti.

Je sice pravda, že právní platnost a závaznost hlasování a politická váha referenda mohou být jiné, nicméně ani to nestačí, uvědomíme-li si důležitou kontrolní funkci místního referenda. Přestože k referendu přijde 49 % oprávněných osob a 99 % z nich se vysloví pro jednu z variant, může zastupitelstvo rozhodnout, jak chce. Politická reprezentace se leckdy místního referenda dovolává, přičemž jeho výsledky interpretuje po svém, když tvrdí, že k urnám nepřišly všechny ty oprávněné osoby, které souhlasily s tím, aby ve věci rozhodlo zastupitelstvo samo. Výsledek, který jsme výše zkonstruovali, dokáží v této logice zcela vážně interpretovat jako své vítězství.

Vzhledem k závaznosti místního referenda však nelze hranici snížit na symbolické minimum nebo zrušit úplně. Místní referendum není všelékem na problémy místní samosprávy, ne vždy je vhodné vzhledem k tomu, že rozhodování prostřednictvím jedné z forem přímé demokracie trpí rigiditou, obtížnou změnitelností a nízkou efektivitou rozhodování (mnohdy mohou referendum nahradit ankety či sociologické výzkumy garantované např. regionálními univerzitami). Občanům obce by zastupitelstvem měly být předkládány otázky povýtce principálního rázu. K rozhodnutí ostatních otázek (byť nepopulárních) by mělo zastupitelstvo najít sdostatek odvahy samo, přičemž pokud by občané cestou lidové iniciativy místní referendum chtěli vyhlásit, pak by jim obec měla být nápomocna, nikoliv klást překážky.

Platnost – úvahy *de lege ferenda*

Jak tedy stanovit práh platnosti místního referenda, když jsme dospěli ke stanovisku, že nulová hranice je stejně tak špatná jako destruující padesátiprocentní hranice ve velkých městech?

První možností je nechat se inspirovat v některé ze zahraničních právních úprav. Jako patrně nejvhodnější se nám jeví bavorský model, který stanovuje práh platnosti hlasování v závislosti na velikosti obce. V Bavorsku je hranice platnosti pro jednotky pod 50 000 obyvatel stanovena na 20 %, pro jednotky mezi 50 001 a 100 000 obyvateli na 15 % a pro ještě větší komunity na 10 %. Požadované mety nedosahuje 16 % lidových hlasování, nejčastěji v obcích, které mají těsně pod 50 000 obyvatel. Odstupňované hranice zde byly zavedeny v roce 1999, po čtyřleté zkušenosti s konáním místních referend (v Bavorsku před rokem 1995 nebylo přímé hlasování na místní úrovni upraveno, v letech

1995–1999 neexistovala žádná hranice platnosti, to však v jednom ze svých rozhodnutí kritizoval zemský ústavní soud, přičemž stanovil lhůtu pro nápravu takového stavu).[7]

I v České republice by bylo toto řešení možné. Hranice platnosti by mohla být – v závislosti na velikostní kategorii obcí – odstupňována např. na 50, 40 a 30 %. Ještě lepší by bylo respektovat důsledněji velikost obcí stanovením hranice platnosti rozhodnutí v místním referendu např. na 50 % pro obce menší než *x* obyvatel, pro obce s počtem obyvatel *x* + *y* na 50 % z počtu do *x* obyvatel a nad tento počet na 40 % a pro obce s počtem obyvatel *x* + *y* + *z* obyvatel na 50 % počtu do *x* obyvatel, 40 % do *y* obyvatel a 30 % nad *y* obyvatel apod.

Druhé řešení nespočívá ve stanovení prahu platnosti místního referenda pevným číslem ani neřadí obce do velikostních kategorií, nýbrž odvozuje platnost rozhodnutí v místním referendu od účasti při posledních volbách do zastupitelstev obcí, které se v daném místě konaly. Výhoda takové konstrukce tkví v individuálním posuzování každé obce. Logika věci je dána i tím, že rozhodnutí oprávněných osob by mělo zcela stejný mandát jako případné rozhodování zastupitelů. Může-li v dané otázce rozhodnout zastupitelstvo, které zvolila např. třetina voličů, může tím spíše tato třetina rozhodnout o dané věci přímo (takové řešení není prolomením zastupitelského principu, stále je třeba mít na paměti dlouhou řadu otázek, o nichž se místní referendum konat nesmí – viz negativní definice předmětu místního referenda v § 7 zákona o místním referendu).

Takové řešení, pokud jej použijeme na všechny obce bez výjimky, sice usnadňuje možnost konat místní referenda ve velkých obcích (*de facto* totiž snižuje kvórum), naopak ovšem likviduje (či ztěžuje) možnost konat místní referendum v obcích malých a menších, kde bývá zvykem mimořádně vysoká účast při komunálních volbách, jelikož všem voličům jsou všichni kandidáti osobně známi (voliče s kandidátem pojí často příbuzenské nebo alespoň přátelské vazby). K tomu musíme připočíst, že se hlasování ve volbách koná ve dvou dnech, výsledkem tak bývá účast většinou lehce převyšující počty oprávněných osob, které se zúčastnily hlasování v místním referendu. Jako ideální se tedy jeví řešení, kde k platnosti rozhodnutí v místním referendu postačí překročit mez 50 % (z logiky většiny hlasujících), teprve nebude-li tato překročena, pak lze platnosti rozhodnutí v místním referendu dosáhnout i za naplnění alternativní podmínky – překročení hranice počtu osob (ať již stanoveného absolutním číslem či procentem), které se účastnily posledních voleb do místního zastupitelstva. Ústavní pořádek by takovému řešení nikterak nebránil.

[7] REHMET, F., WENISCH, S.: *Zehn–Jahres–Bericht bayerischer Bürgerbegehren und Bürgerentscheide*. [stav ke dni 1. února 2008]. Dostupný z http://www.democracy-international.org/fileadmin/di/pdf/md/bavarian-report.pdf.

Navržené řešení si umí poradit i tam, kde mezi volbami a referendem dojde ke sloučení či rozdělení obcí. Při slučování obcí se zcela prostě sečte počet vydaných úředních obálek v obou obcích a vydělí se celkovým počtem oprávněných osob v obou obcích, výsledek se vynásobí stem procent. Potíž může nastat při rozdělování obcí, pokud nebudou okrsky při komunálních volbách zcela korelovat s částí obce, která se oddělila. V těchto raritních případech lze ovšem stanovit padesátiprocentní práh platnosti rozhodnutí, případně nižší u obcí větších velikostních kategorií.

Námi navrhovaná řešení by se netýkala jen jediného případu – rozhodování o rozdělování obce. V takovém případě totiž považuji tvrdé podmínky platnosti rozhodnutí, jak je stanovuje současná právní úprava, za vyhovující (viz níže v textu).

Závaznost

Závaznost rozhodnutí v místním referendu je druhým zásadním důsledkem hlasování. Je odvislá od nadpoloviční většiny z těch oprávněných osob, které se místního referenda zúčastnily. Již bylo uvedeno, že účastí je míněn celkový počet vydaných úředních obálek, zahrnuje tedy i neodevzdané obálky, neplatné hlasy či hlasy osob, které se hlasování zdržely. Má-li být rozhodnutí závazné, musí tedy počet hlasů pro tu či onu odpověď přesáhnout počet hlasů pro odpověď kontradiktorní, k níž se připočtou hlasy nevalidní a hlasy osob, které nehlasovaly pro žádnou odpověď, takže se zdržely hlasování.

V krajním důsledku to může vést k tomu, že rozhodnutí v místním referendu bude sice platné, avšak nikoliv závazné. To se stalo v obci Řepeč, kde z celkového počtu 156 oprávněných osob (účast 73,9 %), které se místního referenda zúčastnily, hlasovalo pro odpověď *ne* 77 osob. Pro odpověď *ano* hlasovalo 73 a pro žádnou z odpovědí 3, tj. dohromady 76 osob. Platí, že 77 je více než 76, referendum však závazné pro variantu *ne* není, neboť 3 další lístky byly neplatné. Varianta *ne*, ač byla nejfrekventovanější odpovědí, získala pouze 49,4 % z celkového počtu vydaných úředních obálek. Je tedy namístě zamyslet se nad tím, zda závaznost místního referenda nemá být spíše odvislá od celkového počtu platných hlasů, který je dán součtem hlasů pro variantu *ano*, pro variantu *ne* a pro žádnou z variant (zdržení se).

Je-li rozhodnutí v místním referendu platné a závazné či je-li rozhodnutí v místním referendu o oddělení obce, sloučení obcí nebo připojení obce přijato, pak zavazuje zastupitelstvo a jiné orgány obce či statutárního města ve smyslu legislativních zkratek (§ 49 zákona o místním referendu). Pokud by tyto orgány rozhodnutí vzešlá z místního referenda nerespektovaly, vyzve podle § 89 odst. 2 zákona č. 128/2000 Sb., o obcích (obecní zřízení), resp. podle § 67 odst. 2 či § 92 odst. 4 zákona č. 131/2000 Sb., o

hlavním městě Praze, Ministerstvo vnitra (v případě městské části hlavního města Prahy primátor hlavního města Prahy) příslušné zastupitelstvo, aby do 2 měsíců zjednalo nápravu. Jestliže tak zastupitelstvo v této lhůtě neučiní, Ministerstvo vnitra (resp. zastupitelstvo hlavního města Prahy v případě pražské městské části) je rozpustí. Rozhodnutí o rozpuštění nelze zvrátit tím, že rozpuštěné zastupitelstvo nebo jiný orgán obce začne místní referendum po realizaci této sankce respektovat. Zastupitelstvo je možné naplnit jen novými volbami. Pokud by i nově zvolené zastupitelstvo odmítalo postupovat v souladu s rozhodnutím přijatým v místním referendu, celý postup se opakuje.

Proti rozhodnutí o rozpuštění může územní samosprávný celek podat žalobu k soudu podle § 67 písm. b) zákona č. 150/2002 Sb., soudní řád správní, který ideově vychází z čl. 11 Evropské charty místní samosprávy. Tato tzv. *žaloba ve věcech samosprávy* nemá automaticky suspenzívní účinek, nicméně podle § 73 odst. 2 soudního řádu správního soud žalobě takový účinek přizná, jestliže by výkon nebo jiné právní následky rozhodnutí způsobily žalobci nenahraditelnou újmu za podmínky, že se přiznání odkladného účinku nedotkne nepřiměřeným způsobem nabytých práv třetích osob a není v rozporu s veřejným zájmem. Této podmínce soudního řádu správního bude vyhovovat situace, kdy bude pravděpodobné, že nové volby proběhnou dříve, než soud rozhodne o žalobě. V takovém případě totiž nelze mandát zastupitelstva nijak obnovit.[8]

Místní referendum není závazné pro státní orgány ani pro orgány kraje. Tyto orgány by z právního hlediska měly k výsledku hlasování přihlédnout jako ke každému dalšímu stanovisku, nemusí se jím však povinně řídit. Přesto nelze výsledku místního referenda upřít vysokou politickou váhu.

Otázkou, která však není literou zákona zodpovězena, je to, po jak dlouhou dobu je rozhodnutí pro orgány obce závazné. Domnívám se, že nelze dospět k jinému závěru, než že závazné rozhodnutí, které z místního referenda vzejde, bude změnitelné či zrušitelné opět pouze novým referendem, to však bude možné ve stejné věci konat až po uplynutí 24 měsíců [§ 7 písm. h) zákona o místním referendu]. Takové řešení stěží naplňuje požadavky flexibility. Nebylo by od věci uvažovat nad jinou konstrukcí závaznosti, např. nad takovou, kdy by rozhodnutí zavazovalo orgány obce po dobu 4 let (tedy aby se během té doby jistě konaly volby do zastupitelstva) a posléze by bylo změnitelné kvalifikovanou (např. třípětinovou) většinou členů zastupitelstva.

Referenda o změnách hranic obcí

[8] MORAVEC, O., RIGEL, F.: *Zánik mandátu člena zastupitelstva obce*. Časopis pro právní vědu a praxi, 2004, č. 1, s. 68.

Konstrukce platnosti a závaznosti je zpřísněna v případě místního referenda, v němž se rozhoduje o oddělení části obce (obligatorní referendum) nebo o sloučení obcí, resp. o připojení obce k jiné obci. Takové **rozhodnutí** je v místním referendu **přijato**, jestliže pro ně hlasovala více než polovina ze všech oprávněných osob zapsaných v seznamu oprávněných osob, tedy nikoliv pouze z příchozích. Nutná většina se počítá z oprávněných osob:

- v případě oddělení, v té části obce, popřípadě částech obce, která se má oddělit,
- v případě sloučení obcí nebo připojení obce v té obci, ve které byl návrh přípravného výboru podán.

Zpřísnění požadavku na oddělování obcí je způsobeno pravděpodobně tím, že za deset let po roce 1990 stoupl počet obcí o více než dva tisíce a překročil tak hranici šesti tisíc. V evropském kontextu se jedná o počet v přepočtu na obyvatele takřka bezprecedentní.

I český zákonodárce se tedy snaží trend rozdělování obcí co možná nejvíce přibrzdit. Je totiž otázkou, nakolik mohou velmi malé obce zvládat některé úkoly. Menší počet obcí šetří náklady na provoz místního aparátu a umožňuje spravedlivější alokaci veřejných financí v rámci rozpočtové soustavy.[9] Oddělení obce tak mnohdy neřeší problémy obyvatel, kvůli nimž přistoupili k místnímu referendu, naopak *„drobí ekonomický potenciál nezbytný pro zajištění občanské vybavenosti."*[10] V malých obcích leckdy také chybí dostatek lidí, kteří by se chtěli angažovat v orgánech místní samosprávy, ve volbách pak není možno vybírat z dostatečného množství kandidátů.

Závěrem

Hranice platnosti a závaznosti je v různých zemích upravena rozličně. Např. v Belgii je hranice platnosti stanovena na 40 %. Zvláštností zůstává to, že není-li této mety dosaženo, hlasy se vůbec nepočítají a hlasovací lístky jsou ihned spáleny. Místní referendum v Belgii navíc není závazné.[11] V Bulharsku je rozhodnutí vzešlé z hlasování závazné, hranice platnosti je stanovena na 50 %.[12] Ve Francii je práh platnosti 50 % a referendum je závazné, stejná konstrukce platí i na Slovensku.[13] V Polsku je hranice

[9] Srov. některé závěry, k nimž dochází PEKOVÁ, J.: *Unifikovaný model neexistuje. Některé problémy územní samosprávy a místních financí v intencích integrace do EU*. Veřejná správa, 1999, č. 25, s. 12, 21–22.
[10] Cit. MAŠEK, J.: *Místní referendum a rozdělení obce*. Moderní obec, 1995, č. 8, s. 9.
[11] VERHULST, J.: *Country-by-Country Overview: Belgium*. In KAUFMANN, B., WATERS, M. D. (eds.): *Direct Democracy in Europe.* 1st ed. Durham: Carolina Academic Press, 2004, p. 38.
[12] DRUMEVA, E.: *Local Government in Bulgaria* [stav ke dni 1. února 2008]. Dostupný z http://lgi.osi.hu/publications/2001/81/Stab-Bulgaria.pdf.
[13] FILKO, J.: *K otázkam petičného práva a miestneho referenda v územnej samospráve v Slovenskej republike*. Správní právo, 2005, č. 6, s. 390.

platnosti stanovena na 30 % oprávněných osob, referendum je rovněž závazné.[14] Z našeho pohledu se jako nejrozumnější jeví výše popsaný bavorský model.

I český zákonodárce si patrně uvědomuje, že stávající konstrukce platnosti a závaznosti místního referenda není plně vyhovující (z důvodů vyložených v příspěvku). Jím zamýšlená nová úprava v době uzávěrky tohoto příspěvku čeká na schválení.[15] Pokud k tomu dojde, bude zajímavé sledovat, nakolik se novela poučila z dosavadních zkušeností.

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[3] Izdebski, H.: *Samorząd terytorialny. Podstawy ustroju i działalności*. Warszawa: Wydawnictwo prawnicze, 2001, ISBN 83-88296-92-2.

[4] Mašek, J.: *Místní referendum a rozdělení obce*, Moderní obec, 1995, č. 8, s. 9.

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[6] Peková, J.: *Unifikovaný model neexistuje. Některé problémy územní samosprávy a místních financí v intencích integrace do EU*, Veřejná správa, 1999, č. 25, s. 12, 21–22.

[7] Verhulst, J.: *Country-by-Country Overview: Belgium*. In Kaufmann, B., Waters, M. D. (eds.): *Direct Democracy in Europe*, Durham: Carolina Academic Press, 2004, p 36–38, ISBN 0-89089-262-8.

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[15] Sněmovní tisk č. 323, Vládní návrh na vydání zákona, kterým se mění zákon o místním referendu, zákon o obcích a zákon o hlavním městě Praze, V. volební období.

EVROPSKÝ ROZMĚR LEPŠÍ REGULACE

RUDOLF RYS

MINISTERSTVO VNITRA

Abstrakt

Příspěvek pojednává o aktuální problematice lepší regulace, konkrétně se zaměřuje na evropský rozměr lepší regulace. Je zde stručně shrnuta daná problematika a zdůrazněny zajímavé odlišnosti i podobnosti ve srovnání s českým právním stavem. Situace v Evropské unii je zde zastoupena především širokým náhledem na problematiku implementace Lisabonské strategie. Situace v České republice je omezena pouze na stručný popis rozdílu pojmů lepší legislativní proces a lepší regulace za pomoci příkladu poslední novely Legislativních pravidel vlády. Příspěvek lze bezpochyby využít jako inspiraci zahraničními – evropskými zkušenostmi.

Klíčová slova

Lepší regulace, lepší legislativní proces, Meta – Governance, legislativní smršť, přeregulovanost, legislativní pravidla vlády, normotvorba, hodnocení dopadů regulace (RIA), politiky, Sunset - Legislation, Gold – Plating, Mandelkernova zpráva, Lisabonská agenda, Úřad pro informace a regulatorní záležitosti (OIRA) /USA/, hodnocení nákladů vymáhání regulace.

Abstract

This paper deals with the problems of Better Regulation abroad, particularly is focusing on European dimension of Better Regulation, briefly summarises existing problems and points out interesting diversities and similarities in comparision with the Czech legal state. The situation in the European Union is here represented especially by a wide insight into problems of implementation of the Lisbon strategy. The situation in the Czech Republic is reduced on a brief description of difference of terms „Better Lawmaking“ and „Better Regulation“ with help of an example of the last amendment of Legislative Rules of Government. The paper can be used without doubts as an inspiration with foreign – European experience.

Key words

Better Regulation, Better Lawmaking, Meta – Governance, Legislative flood, Legislative overflow, Legislative rules of government, rule-making, Regulatory impact assessment (RIA), Policies, Sunset -

Legislation, Gold – Plating, Mandelkern Report, Lisbon agenda, Office of Information and Regulatory Affairs (OIRA) /USA/, Compliance Cost Assessment.

Úvodem

Ve svém příspěvku se chci věnovat především problematice lepší regulace („Better Regulation“) a tématům souvisejícím, konkrétně pak problematice lepší regulace na úrovni EU/ES. Je totiž velmi vhodné vzhledem k současnému dění v našem státě podat nyní retrospektivně laděný výklad k této aktuální problematice. Již předem se bohužel musím omluvit za velmi stručné pojetí tohoto příspěvku. Politiku lepší regulace lze v kontextu jejího působení na veřejnou správu chápat jako jednu z dalších etap reformy veřejné správy. V některých odborných statích bývá lepší regulace, zkoumaná z pohledu politologie, označována díky svému významu též jako jedna z forem tzv. Meta - Governance[1]. Jedna z obecných definic charakterizuje pojem „Meta - Governance“ jako „institucionální řízení institucionálního řízení“. V případě lepší regulace (a opatření, postupů a institucionalizace s tím spojené) se jedná o Meta - Governance, protože: 1) Normotvorba je jednou z forem institucionálního řízení. 2) Legislativní proces se díky obecným opatřením zajišťujícím kvalitu regulace sám řídí (pochopitelně jen do jisté míry)[2].

Pojem Better Regulation

V celém západoevropském prostoru je znát od poloviny devadesátých let tendence prosazovat především na politické úrovni debatu o možnostech kvalitativního zlepšení a kvantitativní redukce státní regulace. Jde především o to, jak zastavit „legislativní smršť“[3] a jak odstranit „přeregulovanost“[4] spojenou s přehnaným sebeomezováním státu a s větší orientací směrem k výstupům stanovených politických cílů, přičemž větší pozornost je věnována i nezamýšleným a neplánovaným vedlejším účinkům – dopadům regulace a celkovým nákladům státních politik. Jak bývá poněkud pragmaticky uváděno především v německé odborné literatuře, na pozadí všeho lze hledat jedině nedostatek

[1] Tento pojem byl definován R. Jessopem /Department of Sociology, Lancaster University/ v Review of International Political Economy 4 jako „protisměrný proces vládnutí (governance) pomocí něhož je dosahována ekonomická a politická koordinace nehledě na omezení vlád, států, firem, vládnutí a klanů“, in: http://www.answers.com/topic/metagovernance?cat=technology

[2] dle Veit, S.: Meta-Governance: Die Rolle von Cognitive Maps im Kontext von „Better Regulation“, Universität Potsdam, přednáška ze dne 17. ledna 2005

[3] Pozn.: Tento pojem z období vlády premiéra M. Zemana je lze najít pod jinými názvy i v jiných státech, kde značí v podstatě stejnou situaci, jako byla tehdy u nás. Např. v německé právní terminologii je znám jako tzv. „Normenflut“ tj. „záplava norem“.

[4] Pozn.: V německé právní terminologii existuje pro tuto situaci pojem tzv „Regulierungskaskade“, což lze velmi volně přeložit též jako „stupňovité regulační soustrojí“, což myslím velmi dobře vystihuje danou situaci.

finančních prostředků ve veřejném sektoru a z toho plynoucí snahu činit úsporná opatření jakéhokoliv druhu, jen pokud přinášejí (i nepřímo) alespoň nějaké viditelné výsledky.

Co máme rozumět pod pojmy lepší regulace (Better Regulation)[5] a lepší legislativní proces (Better Lawmaking)[6] ? Nepříliš známý pojem lepšího legislativního procesu[7] se vztahuje z hlediska právní teorie především na ta opatření, která podporují v legislativním procesu kvalitativně lepší výstupy. Při pohledu na český legislativní proces je bezesporu zajímavý vývoj znění textu čl. 2 Legislativních pravidel vlády, který upravuje „Obecné požadavky na tvorbu právních předpisů". V původním znění čl. 2 odst. 1 (Usnesení vlády ze dne 19. března 1998 č. 188) obsahoval „*Přípravě každého právního předpisu musí předcházet podrobná analýza právního a skutkového stavu. Její součástí je i zhodnocení nezbytnosti změny právního stavu, a nejsou-li určité vztahy právním předpisem dosud upraveny, zhodnocení nezbytnosti rozšíření právní regulace i na tyto vztahy.*" lze zde hovořit zcela jednoznačně o prvcích Better Lawmaking. S nástupem Better Regulation a zavedením používání RIA (Regulatory Impact Assessment, Hodnocení dopadů regulace) byla k původnímu znění textu čl. 2 odst. 1 plynule doplněna (Usnesením vlády ze dne 18. července 2007 č. 816) následující část: „ , *včetně zhodnocení dopadů předpokládané změny právního stavu nebo dopadů právní regulace, která má být rozšířena na právní vztahy právem neupravené; při tomto hodnocení se postupuje podle Obecných zásad pro hodnocení dopadů regulace (dále jen „obecné zásady).*" V tomto aktuálním znění se již samozřejmě jedná o zavedení ryzích prvků Better Regulation.

Lepší regulace je mnohem širším pojmem, který přesahuje oblast samotného legislativního procesu, samotnou oblast normotvorby jako takové. Sem patří téměř nerozlučně takové pojmy z regulatorní terminologie jako je deregulace či snižování administrativní zátěže podnikatelů. Pokládám však za důležité zdůraznit, že lepší regulace se v žádném případě nerovná deregulaci, neboť regulovat lépe neznamená vždy pouze regulovat méně. Pod Better Regulation spadá především proces formulace politických cílů a proces uplatňování jednotlivých politik (Policies). Tento širší pojem se vztahuje na všechny druhy státních pravidel chování – předpisů.[8]

Regulace zde není rozuměna pouze ve smyslu regulativních instrukcí (zákazy, příkazy, ohlašovací povinnosti, schvalovací povinnosti), nýbrž poněkud široce jako jednota státních předpisů (pravidel

[5] Pojem Better Regulation lze dle příslušné odborné literatury zcela jednoduše definovat jako „politiku hledající zlepšení a zjednodušení regulačního prostředí".

[6] Tento pojem lze opravdu velmi zjednodušeně definovat jako snahu o větší systematizaci a racionalizaci legislativního procesu, srov. především materiál COM (2002) 275 final (European Governance: Better Lawmaking).

[7] Pozn.: V Německu sem není /na rozdíl od širšího pojmu lepší regulace/ , jak je výslovně zdůrazňováno, zahrnuta tvorba vnitřních (interních organizačních) předpisů veřejné správy, poněvadž tyto předpisy neobsahují obecně závazné právní normy a působí pouze uvnitř veřejné správy. Vzhledem ke známé působnosti Legislativních pravidel vlády ČR uvádím pouze pro informaci, neboť se zde jedná o předpisy neprávní povahy.

[8] Blíže viz: Konzendorf, G.: Better Regulation at the European Union Level, Milestones on the way to Better Regulation, Study for the 44th meeting of the Directors general responsible for Public administration of the EU member states, Luxemburg 2005, str. 5

chování): „ the promulgation of a binding set of rules to be applied by a body devoted to this purpose.“ /“vyhlášení závazného souboru pravidel aplikovaných orgánem určeným k tomuto účelu“/.[9]

Diskuse na téma zlepšování kvality právní regulace není v západní Evropě nic nového. Například v Německu byly známy již v sedmdesátých a osmdesátých letech aktivity tzv. deregulačních komisí používajících metodu pročišťování práva („Rechtsbereinigung“).[10] Jednou z dalších metod bylo i předem dané ohraničení platnosti právních předpisů („Sunset-Legislation“)[11].

V posledních letech je ovšem nejčastěji diskutovaná problematika vlivu právní regulace produkované na úrovni EU/ ES a její transpozice na národní právní řády. Sem spadá tzv. „Gold – Plating[12]“. Tento pojem patrně oprávněně nahání hrůzu všem euroskeptikům, neboť jej lze definovat jako „ přehnané plnění (či přesněji příliš horlivá implementace) evropských směrnic díky vytvoření – přidání dalších požadavků na národní úrovni jdoucích v náročnosti nad požadavky stanovené v příslušné původní směrnici“.[13] Tímto způsobem často škodí národní právní řády svým adresátům, neboť pro ně vytvářejí horší podmínky nežli mají srovnatelné subjekty práva v okolních zemích EU, což je chování, které je jistě v našich podmínkách již důvěrně známo.[14]

Počátky politiky lepší regulace v Evropské unii – Lisabonská agenda

V první polovině devadesátých let nemůžeme hovořit o žádném systematickém úsilí o lepší regulaci. Snad jedině můžeme zmínit setkání Evropské rady v r. 1992 v Edinburghu, kdy byl stanoven cíl zjednodušit a zlepšit regulatorní prostředí jako jedna z hlavních priorit společenství. Lepší regulace je také výslovně uváděna v protokolu připojeném k Amsterodamské smlouvě. Teprve po setkání EU v Lisabonu v roce 2000 bylo odstartováno množství ambiciózních reforem. Jedním z praktických opatření k realizaci těchto politik na poli lepší regulace bylo v listopadu 2000 zřízení pracovní skupiny složené ze zástupců členských států pod předsednictvím správního soudce francouzské Státní rady Dieudonné Mandelkerna za účelem prozkoumání toho co by mělo býti zlepšeno – jak při tvorbě politik, tak při navrhování nové regulace v institucích EU. Závěrečná zpráva skupiny byla vydána v listopadu 2001[15]. Tato zpráva se setkala s všeobecným pochvalným souhlasem na setkání Evropské rady v prosinci 2001 v Laeken a její doporučení byla ve velké míře přijata institucemi EU. Tato pracovní

[9] Baldwin, R., Cave, M.: Understanding Regulation: Theory, Strategy, and Practice. , Oxford 1999, str. 2

[10] srov. např.: Jann, W.,Wegrich, K.: Governance und Verwaltungspolitik, in: Benz, A. (ed.): Governance – Regieren in komplexen Regelsystemen. Governance, Band 1, Wiesbaden 2004

[11] V současné době srov. např. aktivity Spolkové země Sársko v oblasti tvorby zemských právních předpisů.

[12] Jedna z německých definic zní i takto: „Vznik zbytečné byrokracie v souvislosti s kaskádou právních předpisů“/in: Veit, S.: Entpolitisierung staatlicher Regulierungsprozesse durch Gesetzesfolgenabschätzungen ?, FoJus Nr. 3/2005, str. 3/

[13] Viz např. definice pojmu obsažená in: Kolektiv: Mandelkern Group on Better Regulation, Final Report, 13 November 2001, EU, str. 82

[14] Jako příklad dotýkající se i běžných občanů lze uvést třeba pověstnou „koblihovou“ vyhlášku ministryně zdravotnictví Součkové, která byla náročnější, nežli bylo nutné.

[15] Kolektiv: Mandelkern Group on Better Regulation, Final Report, 13 November 2001, EU

skupina pracovala s mnoha zdroji, včetně zpráv o regulatorní reformě v téměř dvaceti zemích OECD.[16] Mezi hlavní závěry patřilo, že k dosažení a prosazení lepší regulace je zapotřebí vysoká úroveň politické podpory napříč vládami členských států, přidělení přiměřených zdrojů a jednoznačná politika lepší regulace. Tato politika by přitom měla užívat nástroje jako je hodnocení dopadů regulace (impact assessment), zjednodušování regulace (simplification) a konzultace s veřejností /adresáty regulace/ (consultation). Politika lepší regulace by měla způsobit především změnu kultury formulování obecných politik a přijímání nové regulace.

Kvalita regulace - Mandelkernova zpráva

Mandelkernova zpráva navrhla akční plán, který byl úzce následován institucemi EU a stanovila pro tento účel těchto sedm základních principů lepší regulace:

1) Nezbytnost (necessity)

Tento princip požaduje před uvedením nové právní úpravy v účinnost posouzení odpovědných orgánů veřejné správy, zdali je potřebné k řešení dané problematiky vydat novou právní úpravu. Tento požadavek implikuje srovnání relativní účinnosti a legitimity různých nástrojů (zákonodárství, zabezpečení informací pro postižené, finanční pobídky a smlouvy mezi státními úřady a ekonomickými či sociálními partnery) ve světle předsevzatých cílů.

2) Přiměřenost (proportionality)

Každý právní předpis musí mít vyvážený vztah mezi výhodami, které přináší a s tím spojenými omezeními. Různé nástroje právní regulace (zákonodárství na úrovni primárního a sekundárního práva, rámcových úprav, koregulace atd.) umožňuje orgánům veřejné správy konat různými způsoby, v závislosti na cílech, které chtějí dosáhnout.

Členské státy a Komise mají úlohu se při výběru použitelných zákonodárných nástrojů rozhodnout pro takové nástroje, jež jsou nejvíce přiměřené cílům, které chtějí dosáhnout.

3) Subsidiarita (subsidiarity)

V rámci EU a jejich smluv má princip subsidiarity zaručit, že všechna rozhodnutí by měla být přijímána na úrovni co nejblíže občanům, přičemž musí být vždy zaručeno, že každé rozhodnutí přijaté na evropské úrovni je ospravedlnitelné při srovnání s možnostmi dostupnými na národní úrovni. To konkrétně znamená, že musí být prověřováno, zda cíle plánovaných akcí skutečně nemohou být dostatečným způsobem dosaženy opatřeními členských států v rámci jejich stávajícího ústavního pořádku a zda by tyto cíle nebyly lépe dosaženy opatřeními společenství.

4) Transparentnost (transparency)

[16] Viz blíže na www.oecd.org

S ohledem na zlepšování kvality zákonodárství díky zvyšování efektivity při zjišťování nepředvídaných následků některého opatření, při zohlednění úhlů pohledu všech zúčastněných stran na rozhodování, by se neměl proces příprav nové právní regulace omezovat jen úzkými hranicemi vnitřního prostoru orgánů veřejné správy. Participace a konzultace se všemi dotčenými či zainteresovanými stranami již před počáteční fázi návrhu je prvním požadavkem principu transparentnosti.

Participace by sama měla také splňovat kriteria transparentnosti. To znamená, že by měla být organizována takovým způsobem, aby byl všem zaručen široký a rovný přístup ke konzultacím. Podstatné části konzultací by měly být zveřejněny.

5) Předvídatelnost (accountability)

Orgány veřejné správy odpovědné za právní regulaci a legislativu musí zohlednit aplikovatelnost regulace.

Všichni dotčení účastníci by měli být schopni jasně identifikovat orgány veřejné správy, které jsou původcem jednotlivých politik a právní regulace na ně aplikovatelné. Tam, kde je to vhodné, by měla být dána všem dotčeným možnost informovat orgány veřejné správy o potížích při zavádění a používání těchto politik a z nich plynoucích právních předpisů, aby tyto byly změněny či novelizovány.

6) Přístupnost (accessibility)

Konzistentní a srozumitelná právní regulace, která je přístupná pro každého, jemuž je adresována, je nezbytností, pokud má být implementována a používána náležitě.

Přístupnost by měla být zkoumána ve vazbě na každý jednotlivý právní předpis, ale zároveň by na ni mělo být nahlíženo jako na všeobecnou zásadu, že uživatelé vždy dostanou k dispozici kompletní komplexní právní úpravu.

Zásada přístupnosti může vyžadovat zvláštní úsilí od příslušného orgánu veřejné správy, například při zaměření na takové osoby, které mají na základě své situace potíže s uplatňováním svých práv.

7) Jednoduchost (simplicity)

Cílem je, aby každý právní předpis byl jednoduše použitelný a snadno srozumitelný. Toto je podstatným předpokladem, aby občané mohli efektivně užívat práv, která jsou jim poskytována. Právní regulace by měla být jen natolik podrobná jak je nezbytně nutné a zároveň tak jednoduchá, jak je jen možné.

Jednoduchost právní regulace je hlavním zdrojem úspor pro podniky, tak pro zprostředkovatelské agentury, které jsou aplikací těchto prvních předpisů dotčeny, i pro samotné orgány veřejné správy.

Princip jednoduchosti vyžaduje aktivní úsilí k zabránění výskytu přebytečných podrobností od samého počátku procesu přijímání nové právní regulace a též v procesu revize již existujících textů.

Lepší regulace a komunitární právo

Způsob, jak dosáhnout lepší regulace na úrovni společenství, má jistá specifika. Následujících sedm principů obsahuje zpráva pracovní skupiny „Lepší regulace“ z května 2001.[17] Tato pracovní skupina, která při své práci zohledňovala doporučení přijatá Skupinou pro kvalitu regulace vedenou D. Mandelkernem, došla k jednoznačnému závěru, že právní regulace na komunitární úrovni by měla odpovídat přinejmenším těmto následujícím principům, aby mohla býti považována za lepší regulaci:

1) **Přiměřenost**

Regulace, která dosahuje deklarovaných cílů veřejných politik, aniž by ukládala nadbytečná, nebo nepřiměřená regulatorní břemena.

2) **Blízkost**

Regulace, která je rozpoznatelná a uznávaná subjekty majícími vliv[18] (investory) v oblastech politik, které se jich týkají (poněvadž se tito podíleli na procesu vzniku regulace, mohou tedy plně porozumět textu a vidět jeho relevanci pro specifické problémy, kterým čelí anebo cítit i nějakou tu odpovědnost za vzniklou regulaci a její následné vymáhání).

3) **Soudržnost**

Regulace, která dobře zapadne do jiných částí regulace v rámci regulatorní krajiny,[19] a to nejen v tom samém odvětví, nýbrž napříč celou regulací, produkujíc přitom soulad spíše nežli konflikty.

4) **Právní jistota**

Regulace, která je jasná a věrohodná (solidní) ve svých právních účincích (která např. nepotřebuje soudní rozhodování /judikaturu/ ke své interpretaci a vysvětlení) – která však neříká, že všechno musí být předmětem právní jistoty: tohle by totiž bylo v rozporu s přiměřeností a bylo jedním ze zdrojů přílišné komplexity regulace.

5) **Včasnost**

Regulace, která je přijata ve správný čas a která může být efektivně uzpůsobena takovým způsobem, že není překonána technologickým vývojem ani jinými událostmi.

6) **Vysoké standardy**

Komunitární regulace, která přebírá řešení problémů, by měla sázet na nabídku nejlepší (nejvyšší) ochrany veřejného zájmu, nikoliv takové, která představuje nejnižší společný jmenovatel ochrany ve srovnání s pozicemi členských států.

7) **Vymahatelnost**

[17] Kolektiv: Report of the Working Group „Better Regulation“ (Group 2c), White Paper on European Governance, Work Area no. 2, May 2001, EU

[18] Doslova „stakeholders“, tento pojem je užíván především v managementu, většinou se do češtiny nepřekládá.

[19] Doslova „regulatory picture“.

Regulace, která je schopná dosáhnout vysoké úrovně vymahatelnosti, která není pouze otázkou vytvoření kontrolních mechanismů a sankcí, nýbrž výsledkem správné aplikace principů přiměřenosti a blízkosti.

Hodnocení dopadů regulace

Úsilí o dosažení lepší regulace většinou nastupuje v případě nedostatečné kvality regulace existující. Ohledně práva EU/ES stále přežívá široce rozšířený předsudek, že je příliš komplexní, příliš komplikované a proto nepřehledné natolik, aby s tím šlo cokoliv udělat. Hodnocení dopadů regulace přitom pochází původně z USA, kde je produkováno nezávislými regulačními agenturami a sledováno Úřadem pro informace a regulatorní záležitosti (Office of Information and Regulatory Affairs /OIRA/). Hodnocení dopadů regulace nicméně nabývá na významu zejména v posledních letech v Evropě, a to jak v rámci OECD, EU či jednotlivých evropských států.[20] Charakteristický je přitom ve srovnání s USA rozdílný institucionální kontext. Při hodnocení dopadů v USA je hlavní součástí diskuse úroveň regulačních agentur a sektorových sítí tvorby politik, zatímco v Evropě je samotný nástroj hodnocení dopadů chápán jako komunikační prostředek mezi vládou a parlamentem stejně tak jako mezi vládou a občanem.[21] Pro evropské státy a EU je typická existence tří proudů hodnocení dopadů s ohledem na silnější zohledňování následků státních regulací v procesu formulace politik[22]:

1) **Hodnocení /snižování/ administrativních nákladů**

Spočívá především ve snižování současné administrativní zátěže, která vzniká na základě státních právních předpisů pro jisté adresáty regulace, především pro podnikatele, ale i třeba pro veřejnou správu samotnou. Administrativní náklady podnikání jsou definovány jako „the costs imposed on businesses, when complying with information obligations stemming from government regulation. (..) An information obligation is a duty to procure or prepare information and subsequently make it available to either a public authority or a third party. It is an obligation businesses cannot decline without coming into conflict with the law.“ /“ náklady uložené podnikání, pokud se shodují s informačními povinnostmi pocházejícími z vládní regulace. (..) Informační povinnost je závazek opatřit nebo připravit informaci a následně ji zpřístupnit buď orgánu veřejné správy nebo třetí osobě. Je to povinnost, kterou podnikatel nemůže odepřít, aniž by přišel do konfliktu s platným právem.“/ [23]

2) **Analýza vlivu regulace na malé a střední podniky**

[20] blíže viz in: Veit, S.: Entpolitisierung staatlicher Regulierungsprozesse durch Gesetzesfolgenabschätzungen ?, FoJus Nr. 3/2005, str. 5

[21] Radaelli, C.: How Context Matters: Regulatory in the European Union, Paper prepared for PSA Conference, Lincoln, 5-8 April 2004, str. 11

[22] K vývojovým proudům hodnocení dopadů regulace především viz in: Veit, S.: Entpolitisierung staatlicher Regulierungsprozesse durch Gesetzesfolgenabschätzungen ?, FoJus Nr. 3/2005, str. 5 a násl.

[23] kolektiv (OECD): Government Capacity to Assure High Quality Regulation. OECD Reviews of Regulatory Reform. Regulatory reform in Germany, Paris 2004, str. 8 a násl.

Důvodem vedoucím k této analýze je skutečnost, že informační povinnosti mají zvláště tvrdé účinky na malé a střední podniky, neboť velké podniky disponují rozsáhlým a specializovaným úřednickým aparátem, který zvládá tyto požadavky bez větších problémů. Rovněž i jiné následky (dopady) regulace nežli je administrativní zátěž způsobená informačními povinnostmi můžou postihnout malé a střední podniky a omezit jejich konkurenceschopnost v hospodářské soutěži. Například ve Švýcarsku je od roku 1999 prováděn státním sekretariátem (ministerstvem) hospodářství při důležitých změnách zákonů a nařízení „test snesitelnosti", tj. zde konkrétně je dotazována vybraná malá skupina podniků s ohledem na očekávané následky změn právní regulace[24].

3) Hodnocení dopadů regulace jako integrovaný nástroj analýzy všech relevantních následků regulace

Při hodnocení dopadů regulace nejde pouze o hodnocení určité části následků regulace nebo dopadů na určitou konkrétní skupinu adresátů regulace, nýbrž jsou analyzovány velmi široce všechny možné úmyslné i neúmyslné dopady regulace. V dnešní době velmi často zmiňované administrativní náklady podnikatelů jsou při tomto náhledu na věc pouze částečným aspektem všech následků regulace a měly by být sice v rámci hodnocení dopadů zohledňovány, ale ne jako jednotlivý element hodnocení nákladů regulace. Hodnocení dopadů slouží rovněž ke zjištění alternativ regulace a k posouzení efektivity některých opatření, ale také k odhadnutí proveditelnosti a přijetí adresáty regulace. Všechny zde potřebné informace jsou získávány především dotazováním u adresátů regulace a jejich za pomoci vědeckých metod jako je například analýza užitných hodnot.[25]

Hodnocení dopadů regulace hraje v dnešní době důležitou roli téměř ve všech evropských státech a též na úrovni EU. Stěžejní body a rozsah použití dopadů regulace však často liší. V některých evropských státech a na úrovni EU je hodnocení dopadů regulace standardní složkou legislativního procesu, v některých státech je tento nástroj teprve ve zkušební fázi. Mnohdy lze objevit velkou variabilitu tohoto nástroje: „IA /Impact Assessment/ means quite different things in different countries"(„Hodnocení dopadů znamená úplně rozdílné věci v různých zemích.")[26] Takže v praxi částečně nepřekračuje hodnocení dopadů regulace rámec Compliance Cost Assessment (hodnocení nákladů dodržování /vymáhání/ regulace) [27], přičemž například v Německu a na úrovni EU je hodnocení dopadů regulace chápáno jako obsáhlé a integrované řízení v rámci legislativního procesu[28].

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[24] viz in: Veit, S.: Entpolitisierung staatlicher Regulierungsprozesse durch Gesetzesfolgenabschätzungen ?, FoJus Nr. 3/2005, str. 6

[25] Blíže viz např. obsáhlý přehled metod hodnocení dopadů regulace in: Böhret, C., Konzendorf, G.: Handbuch Gesetzesfolgenabschätzung (GFA). Gesetze, Verordnungen, Verwaltungsvorschriften, Baden-Baden 2001

[26] blíže viz: Centre for European Studies on the University of Bradford (ed.): Project on Indicators of Regulatory Quality . Final Report, Bradford 2004, str. 216

[27] srov. např.: DEBR (Directors of Better Regulation Group): A comparative analysis of Regulatory Impact Assessment in ten EU countries, Dublin 2004

[28] viz in: Veit, S.: Entpolitisierung staatlicher Regulierungsprozesse durch Gesetzesfolgenabschätzungen ?, FoJus Nr. 3/2005, str. 7

Na úrovni EU je znát v souvislosti s tzv. Lisabonskou agendou[29] jistý posun priorit. Integrovaný postup hodnocení dopadů regulace je nadále dodržován, nicméně vyváženost analýzy jak ekonomických tak sociálních a ekologických dopadů, je více vychylována směrem ke zlepšení hodnocení především ekonomických dopadů regulace, se zaměřením na konkurenceschopnost a administrativní náklady podnikání.

Závěr

Evropská komise razí již několik let heslo Better Regulation, zvláště pak od nástupu nového předsedy José Manuela Barrosa v r. 2004. Přímo odpovědným je však místopředseda a komisař průmyslu Günter Verheugen. Better Regulation je součást v roce 2000 iniciované Lisabonské strategie pro větší konkurenceschopnost, hospodářský růst a pracovní místa. Cílem této strategie bylo především osvobodit evropské podnikatele od zbytečných administrativních nákladů. Program je zacílen na modernizaci platného práva[30]. Opatření k tomuto cíli zahrnují přizpůsobení, rušení a kodifikaci práva EU, nahrazení směrnic nařízeními a rovněž akční plán k omezení nákladů veřejné správy. Mimo jiné je Better Regulation zaměřena na zlepšení nové legislativy. K tomuto účelu přezkoumává Evropská komise již zahájené normotvorné iniciativy a tyto případně nechává přepracovat nebo stáhnout[31]. Kromě toho je zde zvýšený zájem vkládat tzv. evaluační a sunset klauzule do nových právních předpisů, starší právní akty pojmout nověji a celkově rozšiřovat hodnocení dopadů regulace v normotvorném procesu.[32]

Na vrcholném setkání 8. a 9. března 2007 představitelé vlád členských států požehnali akčnímu plánu Evropské komise, kterým má být docíleno snížení nákladů veřejné správy na základě evropského práva do roku 2012 o jednu čtvrtinu. Současně však byla poněkud oslabena iniciativa G. Verheugena, která ukládala stejné cíle pro národní právo členských států. Četní kritici Evropské komisi během německého předsednictví předhazovali, že pod pláštíkem snižovaní byrokracie se skrývá jenom snižování standardů v oblasti životního prostředí, v sociální oblasti a v oblasti bezpečnostních předpisů. Evropská komise a Evropská rada se proto snažily vždy zdůrazňovat, že v případě Better Regulation se nejedná o program pouze deregulačního charakteru.[33]

[29] Význam Better Regulation pro implementaci Lisabonské strategie se odráží v mnoha oficiálních dokumentech EU, např. in: Integrated Guidelines for Growth and Jobs (Guideline No. 14 for period 2005-08).
[30] Viz COM (2002) 278 final (Action plan „Simplifying and improving the regulatory environment“)
[31] Viz COM (2005) 462 final („Outcome of the screening of legislative proposals pending before the Legislator“)
[32] Paul, J.: Langwieriges Ringen um bessere Gesetze, Bertelsmann Forschungsgruppe Politik, München 2007, str. 4
[33] viz tamtéž

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[3] Veit, S.: Entpolitisierung staatlicher Regulierungsprozesse durch Gesetzesfolgenabschätzungen ?, FoJus Nr. 3/2005, http://users.ox.ac.uk/~polf0035/

[4] Kolektiv: Mandelkern Group on Better Regulation, Final Report, 13 November 2001, EU, http: ec.europa.eu

[5] Kolektiv: Report of the Working Group „Better Regulation" (Group 2c), White Paper on European Governance, Work Area no. 2, May 2001, EU, http: ec.europa.eu

[6] COM (2002) 275 final („European Governance: Better Lawmaking"), http: ec.europa.eu

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[8] COM (2005) 462 final („Outcome of the screening of legislative proposals pending before the Legislator"), http: ec.europa.eu

[9] http:www.oecd.org

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POZNÁMKY K VYŠŠÍ ÚZEMNÍ SAMOSPRÁVĚ V ČR A POLSKU

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Abstrakt

Článek shrnuje a porovnává ústavní zakotvení vyšších územních samosprávných celků v Česku a v Polsku. Tento ústavní základ je velmi obdobný, ostatně jak Česká republika, tak Polsko jsou unitárními státy. Dále popisuje provedení reformy veřejné správy v Polsku a vytvoření vyšších samosprávných jednotek – okresů (powiaty) a vojvodstev (województwa). Závěrem je srovnání těchto jednotek se situací v ČR.

Klíčová slova

Veřejná správa, samospráva, kraje, Polsko

Abstract

The paper summarizes and compares the constitutional basis of high-level local government in Czech Republic and Poland. This constitutional basis is very similar, both Czech Republic and Poland are unitary states. Next topic is the description of the reform of public administration in Poland and creation of high-level units of local government there – districts (powiaty) and voivodships (województwa). Comparison with the situation in Czech Republic is the last statement.

Key words

Public administration, local government, regions, Poland

Ústavní zakotvení

Právní základ územních samosprávných celků v Česku a Polsku je obdobný. Stejně jako česká ústava říká v čl. 8, že samospráva územních samosprávných celků se zaručuje, Ústava Polské republiky ze dne 2. dubna 1997 (Dziennik ustaw Nr 78 z 16 lipca 1997 r., poz. 483) stanoví existenci územní samosprávy v úvodních ustanoveních o republice, konkrétně v čl. 15 a 16. Nutno podotknout, že polská ústava je

v tomto ústavním zakotvení podrobnější a konkrétnější, než ústava česká. Především říká, že územní dělení zaručuje decentralizaci veřejné moci. Ústava výslovně říká, že územní samospráva se podílí na výkonu veřejné moci; záležitosti svěřené zákonem vykonává vlastním jménem a na vlastní odpovědnost.

Územní samospráva je potom konkretizována v Oddílu VII polské ústavy (*Samorząd terytorialny*), opět je tu tedy podobnost s českou ústavní úpravou. Dále se ale zaměřme výhradně na vyšší územní samosprávné celky. Jejich existenci předpokládala česká ústava od začátku, realizace byla ale provedena až ústavním zákonem č. 347/1997 Sb. o zřízení vyšších územních samosprávných celků. V polské ústavě je výslovně upravena jako základní jednotka územní samosprávy obec (*gmina*) s tím, že jiné jednotky regionální nebo místní samosprávy upraví zákon. Obci náleží všechny náležitosti samosprávy, nejsou-li svěřeny jiným jednotkám. Přestože tento text je v zásadě věnován vyšším jednotkám územní samosprávy, stojí za to na tomto místě připomenout, že pojetí samosprávné obce v Polsku je zejména svou velikostí odlišné od pojetí českého; v Polsku existuje 2 478 obcí, v Česku 6 249 obcí. Gmina tedy odpovídá vždy spíše městu nebo městečku, pod které spadají i okolní vesnice, které tedy nemají vlastní samosprávu.

Vyšší jednotky územní samosprávy nejsou tedy v Polsku výslovně zakotveny v ústavě. Zřízení těchto jednotek bylo ve své době – po přijetí polské ústavy v roce 1997 – předmětem mnoha diskuzí. Zřizování těchto jednotek se tedy časově přibližně shoduje se zřízením krajů v České republice. Je třeba připomenout čl. 236 polské ústavy, který říká, že návrhy zákonů k provedení ústavy musí Rada ministrů (vláda) předložit do dvou let od účinnosti ústavy.

Reforma veřejné správy v Polsku

Zatímco v Česku máme dvoustupňovou územní samosprávu (obce a kraje), polská územní samospráva je třístupňová. Kromě obcí (*gminy*) existují v Polsku dále samosprávné okresy (*powiaty*) a vojvodství (*województwa*). To je asi nejpodstatnějším rozdílem mezi územní samosprávou v Česku a Polsku. Ještě je třeba připomenout, že přestože každá vyšší jednotka územní samosprávy zahrnuje vždy určitý počet jednotek nižších (s výjimkou gmin se statusem powiatu), neexistuje mezi nimi vztah nadřízenosti a podřízenosti. Každá úroveň samosprávy má své nezávislé kompetence.

První etapou ve vytváření systému územní samosprávy bylo vytvoření samosprávy v gminách v roce 1990. Druhá etapa zahrnovala obnovení powiatů zrušených v roce 1975 a snížení počtu vojvodství

ze 49 na 16 v roce 1998. Třetí etapa znamenala vytvoření samosprávných orgánů na úrovni powiatů a vojvodství k 1. lednu 1999.

Příprava reformy veřejné správy na úrovni vyšších samospráv probíhala v Polsku prakticky již od roku 1993. Různé vládní týmy se zabývaly jednotlivými úrovněmi územní samosprávy. Panovala tedy již shoda – alespoň v odborných kruzích – na nutnosti vytvořit lokální (*powiaty*) a regionální (*województwa*) územní samosprávu. Gminy jakožto základní samosprávné jednotky existovaly již od počátku 90. let. Vládním programem se tato reforma stala až v roce 1997, po nástupu Jerzyho Buzka do úřadu Předsedy Rady ministrů (předsedy vlády). Provedení reformy se stalo součástí vládního programu koalice Volební akce Solidarita (AWS – Akcyja Wyborowa Solidarność) a Unie Svobody (Unia Wolnośći).

Impulsem k realizaci reformy byla samozřejmě nová ústava přijatá v dubnu 1997. Nutno ještě zmínit, že v té době existovala určitá obava o jednotnost státu, proto je v čl. 3 výslovně definováno Polsko jako jednotný (unitární) stát, ostatně stejně jako Česká republika v čl. 1 Ústavy. Přesto polská ústava obsahuje poměrně silné garance územní samosprávy. Důležitý je v tomto ohledu především čl. 163, který stanoví, že územní samospráva plní úkoly, které nejsou ústavou nebo zákonem svěřeny do působnosti jiných orgánů veřejné moci.

Powiaty

Při tvorbě powiatů existovala v zásadě od počátku shoda na tom, že jejich počet by se měl pohybovat okolo 300, ostatně první návrh mapy powiatů s přibližně 300 jednotkami se objevil již v roce 1993. Tento počet vychází z tradičních historických regionálních center. Jediným protinávrhem byla koncepce profesora Jerzyho Kołodziejského (státního tajemníka pro veřejnou správu), která obsahovala 180 administrativních jednotek. Nicméně i on byl na základě tlaku jednotlivých tradičních center nucen zvýšit počet jednotek ve svém návrhu na 267. Zásadní změna počtu powiatů proto nebyla patrně ani možná, powiaty bylo třeba vytvořit kolem přirozených center s existencí a dostupností veřejných služeb. Samozřejmě, patrně při žádném počtu navržených powiatů by neustaly návrhy a stížnosti dalších míst. V současnosti tedy existuje 379 powiatů, včetně 64 městských gmin se statusem powiatu. Počet se v průběhu let měnil v řádu jednotek.

Právní úprava powiatů je provedena zákonem z 5. června 1998 o samosprávě powiatů (Dz.U. z 1998 r., Nr 91, poz. 578 z pozm. zm.).

Województwa

Počet vojvodství vyvolával v Polsku při jejich vytváření větší emoce. Především proto, že do té doby existovala malá vojvodství, kterých bylo 49, proto celá řada větších či středních měst měla status vojvodského města. Cílem reformy veřejné správy bylo tento počet radikálně zredukovat a vytvořit velké, přirozené regiony, které budou schopny plnit všechny své funkce. Proto byl vypracován návrh na vytvoření 12 vojvodství.

Další velká centra si ale chtěla také udržet svůj vojvodský status. Proto byly vytvářeny protinávrhy obsahující vytvoření 14-17 vojvodstev. Protestů proti 12 vojvodstvím využila zejména levicová opozice (SLD – Sojusz Lewicjy Demokratycznej), která aktivně podporovala vytvoření dalších vojvodství. Šlo o vojvodství Kujawsko-Pomorskie (Bydgoszcz/Toruń), Lubuskie (Gorzów Wielkopolski/Zielona Góra), Świętokrzyskie (Kielce), Opolskie (Opole) a Środkowo-Pomorskie (Koszalin) O Parlamentem nakonec prošel návrh obsahující 15 vojvodství. S odvoláním na společenské protesty odmítl tehdejší prezident Alexander Kwaśniewski zákon podepsat. Na druhé straně existoval i politický odpor proti vytvoření 17 vojvodstev, a to ze dvou důvodů. Prvním by byl symbolický návrat k 17 vojvodstvím existujícím v časech Polské lidové republiky, druhým slabost „17. vojvodství" – Středního Pomořanska se sídlem v Koszalinu a z toho plynoucí obava, že tato slabost by narušila celou regionální strukturu státu.

Nakonec bylo tedy v Polsku vytvořeno 16 vojvodství, a to zákonem z 5. června 1998 o samosprávě vojvodstev (Dz.U. z 1998 r., Nr 91, poz. 576 z poźm. zm.).

Srovnání s ČR

Je zajímavé, že powiaty svou velikostí a počtem obyvatel přibližně odpovídají českým okresům. Ty však samosprávu a dnes již až na výjimky ani státní správu nevykonávají, přestože i v Česku lze okresní města považovat většinou za hospodářská a kulturní centra regionu. Osobně bych považoval výkon samosprávy (ale i státní správy) na této úrovni za vhodný. Způsob provedení reformy veřejné správy v České republice nepokládám za povedený, už jen pro obrovskou nepřehlednost územního členění, a to v zásadě na všech úrovních. Na druhé straně je třeba vzít v úvahu, že územní členění státu z roku 1960 bylo vytvořeno především za účelem řízení ekonomiky a také nepředstavuje ideální řešení.

Z porovnání s českými kraji, kterých je 14, je patrné, že polské regiony jsou větší a tím i silnější. 16 polským regionům by velikostí odpovídalo spíše vytvoření 4-5 krajů v ČR, což lze asi jen těžko považovat za reálné. Na druhou stranu, jak v Polsku, tak v Česku existují velké rozdíly mezi počtem obyvatel jednotlivých regionů. To je nicméně nevyhnutelné.

Proto považuji reformu veřejné správy za ztracenou příležitost. Nejprve měla být vytvořeny nejnižší jednotky, tedy mikroregiony s přirozeným spádovým centrem, většinou městem, mohlo by jít o obdobu současných pověřených obcí. Teprve potom mohly být tyto jednotky integrovány do větších celků, přičemž na základě polských zkušeností bych považoval za vhodné dva stupně vyšší samosprávy – okresy s přibližně 100 000 obyvateli vytvářené kolem lokálních center a kraje. S tím související otázkou, která ale již přesahuje rámec tohoto článku, je otázka respektování či nerespektování zemské hranice při administrativním členění.

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ROZHODOVACIA ČINNOSŤ OBCE V RÁMCI STAROSTLIVOSTI O ŽIVOTNÉ PROSTREDIE

JOZEF TEKELI

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Abstrakt

Cieľ práce: Poukázať na pôsobnosť obce, ako základu územnej samosprávy, v rámci starostlivosti o životné prostredie a poskytnúť tak obciam vhodnú pomôcku pri praktickej realizácií ich kompetencií v predmetnej oblasti spoločenských vzťahov.

Poznatky: Obec v rámci starostlivosti o životné prostredie uskutočňuje svoju právomoc normotvornou činnosťou, uzatváraním tzv. verejnoprávnych zmlúv, rozhodovaním o právach a povinnostiach osôb v správnom konaní, iných verejnoprávnych úkonov.

Záver: Častá neschopnosť obcí napĺňať svoju rozhodovaciu pôsobnosť na úseku starostlivosti o životné prostredie.

Kľúčové slová

životné prostredie, územná samospráva, obec, starostlivosť o životné prostredie, protiprávne konanie, poškodzovanie životného prostredia, rozhodnutia obce v rámci starostlivosti o životné prostredie, miestne komunikácie ako umelo vytvorená zložka životného prostredia, zodpovednosť za škodu**,** náhrada škody, administratívnoprávna zodpovednosť, exekučný titul

Abstract

The aim of work is to: point out the activity of municipality, as the base of territorial self-government, within the frame of environmental maintenance and provide the municipalities with suitable aid by practical realization of their competences in the field of social relations.

Knowledge: Municipality realizes its competence within the frame of environmental maintenance by normative activities, signing up the public legal agreements, decision-making on rights and duties of persons in administrative procedure and other public acts.

Conclusion: often inability of municipalities to fulfil their decision-making competence in the field of environmental maintenance.

Key words

environment, territorial self-government, municipality, environmental maintenance, unlawful act, environmental damage, decision-making of municipality within the frame of environmental maintenance, local roads as artificial part of environment, responsibility for damage, compensation of damage, administrative-legal responsibility, executive title

Vlastný text príspevku

Chalíl Džibrán známy libanonský básnik, prozaik a výtvarník v lyrickej próze o vzťahu človeka k prírode Prorokova záhrada uvádza podobenstvo: „Jedného dňa, keď sa Grék Pardros prechádzal po záhrade, zakopol o kameň a nahneval sa. Otočil sa, zdvihol kameň a povedal: *Ó ty mŕtva vecička na mojej ceste* a odhodil ho. A Mustafa, múdry a vznešený, riekol: *Prečo vravíš, ó mŕtva vecička? Tak dlho si v tejto záhrade a stále nevieš, že tu nie je nič mŕtve? Všetky veci majú svoj život.*"1

Takýmto krátkym príbehom chcem poukázať na smutný vzťah súčasnej spoločnosti k životnému prostrediu. Dnešný „moderný človek" si už úplne prirodzene zvykol likvidovať takmer všetky jeho zložky, ktoré mu ležia na jeho ceste, a to len za jedným cieľom.. aby bol „ešte modernejší." Jedná sa o globálny spoločenský problém, ktorého dôsledky však môžeme sledovať na každej regionálnej úrovni, tú miestnu, občanovi najbližšiu nevynímajúc.

Územná samospráva sa na mnohých miestach potýka s takým správaním, ktoré možno bez pochýb subsumovať pod niektorú z foriem protiprávneho konania.2 To je jedným so štyroch predpokladov vzniku právnej zodpovednosti právnických osôb a fyzických osôb v oblasti ochrany životného prostredia (spolu s protiprávnym následkom, príčinnou súvislosťou medzi protiprávnym správaním a protiprávnym správaním a zavinením3). Slovenské obce zápasia predovšetkým s neúmerným rozširovaním „čiernych skládok odpadov." Medzi ďalšie problematické oblasti patrí najmä poškodzovanie miestnych komunikácií a účelových komunikácií vo vlastníctve obce, ktorých správu vykonávajú obce, ako i vypúšťanie odpadových vôd do povrchových vôd alebo do podzemných vôd bez povolenia orgánu štátnej vodnej správy alebo v rozpore s ním, umývanie motorových vozidiel a mechanizmov v povrchových vodách alebo v odkrytých podzemných vodách, alebo na miestach, z ktorých by uniknuté pohonné látky mohli vniknúť do povrchových vôd alebo do podzemných vôd, etc. V prípade takéhoto, resp. obdobného protiprávneho správania vo vzťahu k ochrane životného prostredia sa jedná o konanie, ktoré zákon č. 17 / 1992 Zb. o životnom prostredí v znení neskorších predpisov / ďalej len „zákon o životnom prostredí" / definuje ako poškodzovanie životného prostredia,

1 Chalíl Džibrán.: Prorok. Proroková záhrada, Bratislava: Gardenia, 2006, s. 141
2 Pozn. autora: Najmä vo forme priestupkov na úseku ochrany životného prostredia, resp. iných správnych deliktov, prípadne vo forme naplnenia niektorej zo skutkových podstát trestných činov proti životnému prostrediu.
3 Košičiarová, S.: Právo životného prostredia, Žilina: Poradca podnikateľa, 2006, s. 185

ktorým rozumie „zhoršovanie stavu životného prostredia znečisťovaním alebo inou ľudskou činnosťou nad mieru ustanovenú osobitnými predpismi.“

Obce plnia na úseku ochrany životného prostredia nezastupiteľnú úlohu. Obec pri výkone samosprávy podľa § 4 ods. 3 zákona č. 369 / 1990 Zb. o obecnom zriadení v znení neskorších predpisov / ďalej len „zákon o obecnom zriadení“ / utvára a chráni zdravé podmienky a zdravý spôsob života a práce obyvateľov obce, chráni životné prostredie, zabezpečuje výstavbu a údržbu a vykonáva správu miestnych komunikácií, verejných priestranstiev, obecného cintorína, kultúrnych, športových a ďalších obecných zariadení, kultúrnych pamiatok, pamiatkových území a pamätihodností obce, zabezpečuje verejnoprospešné služby, najmä nakladanie s komunálnym odpadom a drobným stavebným odpadom, udržiavanie čistoty v obci, správu a údržbu verejnej zelene a verejného osvetlenia, zásobovanie vodou, odvádzanie odpadových vôd, nakladanie s odpadovými vodami zo žúmp.

Sotolář, J. rozlišuje úlohy obecnej samosprávy na :

a) fakultatívne – dobrovoľné – úlohy: predstavujú prvok obecnej samosprávy, ktorý ponecháva na vôli samotnej obce, či bude alebo nebude určité záležitosti vykonávať a zabezpečovať

b) obligatórne – povinné – úlohy: predstavujú prvok obecnej samosprávy, ktorý sa prejavuje v povinnosti obce zabezpečovať určité úlohy a činnosti. Vôbec nie je podstatné, či obec disponuje materiálnymi alebo personálnymi podmienkami na zabezpečenie týchto úloh. Obec sa nemôže povinnosti plniť právne významným spôsobom zbaviť.4

Do oblasti obligatórnej pôsobnosti obce patria o. i. vyššie uvedené povinnosti a úlohy obce pri zabezpečovaní starostlivosti o životné prostredie. Obec prirodzene vykonáva samosprávnu pôsobnosť, prípadne i prenesenú pôsobnosť štátnej správy, v rámci starostlivosti o životné prostredie nielen podľa zákona o obecnom zriadení, ale taktiež podľa osobitných predpisov, napr. zákona č. 50 / 1976 Zb. o územnom plánovaní a stavebnom poriadku v znení neskorších predpisov, zákona č. 543 / 2002 Z. z. o ochrane prírody a krajiny v znení neskorších predpisov, zákona č. 223 / 2001 Z. z. o odpadoch v znení neskorších predpisov, zákona č. 23/ 1962 Zb. o poľovníctve v znení neskorších predpisov, etc.

Na obdobné kompetencie obce môžeme s využitím komparatívnej metódy poukázať i v okolitých štátoch; napr. v susednej Českej republike sa v rámci reformy v roku 2003 zriadilo asi 200 obecných úradov s rozšíreným okruhom pôsobnosti (malé okresy). Tieto vykonávajú o. i. štátnu správu v prenesenej pôsobnosti i na mnohých úsekoch ochrany životného prostredia. Jej výkon vymedzujú obci jednotlivé osobitné zákony. Vedľa prenesenej pôsobnosti majú orgány obcí i samostatnú pôsobnosť, v ktorej rámci rozhodujú o rôznych záležitostiach týkajúcich sa životného prostredia. Obec sa stará o všestranný rozvoj svojho územia a potreby svojich občanov. Obce tak okrem iného rozhodujú a zaisťujú veci týkajúce sa čistoty obce, odvozu a odstraňovania komunálneho odpadu, zásobovania

4 Sotolář, J.: Zákon o obecnom zriadení. Komentár., Košice: SOTAC, 2003, s. 74 - 75

pitnou vodou, odvádzania a čistenia odpadových vôd či verejnej zelene, etc.5 Generálne je pôsobnosť obce v predmetnej oblasti upravená zákonom č. 128 / 2000 Sb. o obcích (obecní zřízení).

Obec v rámci starostlivosti o životné prostredie uskutočňuje svoju právomoc prostredníctvom:

a) normotvornej činnosti – vydávaním všeobecne záväzných nariadení,

b) uzatváraním tzv. verejnoprávnych zmlúv – najmä zmlúv o zriadení združenia obcí,

c) rozhodovaním o právach a povinnostiach právnických a fyzických osôb v správnom konaní – rozhodnutiami starostu obce,

d) iných verejnoprávnych úkonov – najmä vydávaním stanovísk a vyjadrení, schvaľovaním koncepčných nástrojov.6

Našu pozornosť chcem v tomto článku upriamiť na právomoci obce v oblasti vydávania individuálnych právnych aktov pri zabezpečovaní starostlivosti o životné prostredie, t. z. na rozhodnutia obce podpisované starostom obce. Moje empirické skúsenosti preukazujú, že najmä obce a menšie mestá sa častokrát nedokážu dostatočným spôsobom vysporiadať s realizáciou svojich kompetencií v rovine individuálnej aplikácie práva vo vzťahu k starostlivosti o životné prostredie, v dôsledku čoho obce samé doplácajú na činnosť poškodzujúcu alebo ohrozujúcu životné prostredie vykonávanú ako spoločensky neprispôsobivými skupinami občanov, tak i tými občanmi, ktorí pred všeobecným záujmom na ochrane životného prostredia uprednostňujú vlastný ekonomický prospech. Pokúsim sa predostrieť modelovú situáciu, ktorá poukáže na možnosti obce vlastnými rozhodnutiami zabezpečovať plnenie úloh na úseku starostlivosti o životné prostredie, konkrétne vo vzťahu k miestnym komunikáciám ako antropickej (umelo vytvorenej) zložke životného prostredia; a predovšetkým na možnosti núteným spôsobom tieto rozhodnutia obce v danej oblasti spoločenských vzťahov vykonať.

V zmysle § 3 ods. 2 zákona č. 135 / 1961 Zb. o pozemných komunikáciách v znení neskorších predpisov / ďalej len „cestný zákon“ /: „Miestnu štátnu správu vo veciach miestnych komunikácií a účelových komunikácií vykonávajú obce ako prenesený výkon štátnej správy... Obce v rámci preneseného výkonu štátnej správy prejednávajú priestupky podľa § 22c na úseku miestnych komunikácií a účelových komunikácií.“ Cestný zákon následne v § 22c ods. 1 písm. d) stanovuje: „Priestupku na úseku pozemných komunikácií sa dopustí ten, kto v prípade opravy porúch na podzemných vedeniach uložených v miestnej komunikácii nesplní ohlasovaciu povinnosť alebo nesplní podmienky určené cestným správnym orgánom na vykonanie prác súvisiacich s uvedením komunikácie do pôvodného stavu.“ Za takýto priestupok možno uložiť pokutu do 10 000 SK. V rámci administratívnoprávnej zodpovednosti prichádza za takéto konanie do úvahy aj postih právnickej osoby alebo fyzickej osoby oprávnenej na podnikanie za iný správny delikt, v prípade ktorého cestný správny orgán a obec v rozsahu svojej pôsobnosti uložia za takéto protiprávne správanie pokutu do 1 000 000 Sk právnickej

5 Damohorský, M. et al.: Právo životního prostředí. 2. vydání. Praha: C.H.Beck, 2007, s. 63 - 64

6 Košičiarová, S.: Právo životného prostredia, Žilina: Poradca podnikateľa, 2006, s. 79

osobe alebo fyzickej osobe oprávnenej na podnikanie podľa osobitných predpisov. Z tejto dikcie o sankčnej zodpovednosti za iný správny delikt jasne vyplýva, že uloženie sankcie je obligatórne.

V menších obciach a mestách sa je možné pomerne často stretnúť so situáciou, keď súkromná osoba v súlade so zákonnými podmienkami ukladá7, prípadne vykonáva opravy na podzemných vedeniach v miestnej komunikácii alebo v účelovej komunikácii, no opomenie zákonnú povinnosť na vykonanie prác súvisiacich s uvedením komunikácie do pôvodného stavu za podmienok určených cestným správnym orgánom.8 V dôsledku takéhoto protiprávneho konania, vznikajú obciam zákonné povinnosti a v ekonomickej rovine tomu zodpovedajúce náklady, s uplatnením refundácie ktorých sa však vo vzťahu k porušiteľovi práva nevedia častokrát v praxi vysporiadať.

Obec síce vo vzťahu k miestnym komunikáciám a účelovým komunikáciám vystupuje v pozícií štátneho odborného dozoru v rámci ktorého dozerá, či sa dodržiavajú povinnosti a podmienky užívania týchto komunikácií ustanovené cestným zákonom, predpismi vydanými na jeho vykonanie, ako aj opatrenia obce ako cestného správneho orgánu.9 Ak zistí obec závadu, vyzve právnickú osobu alebo fyzickú osobu zodpovednú za dodržiavanie ustanovených povinností, aby sa postarali o nápravu; pri výkone dozoru môže dávať príkazy a zákazy, ako aj robiť vhodné dočasné opatrenia na odstránenie závad. Ak nebude postarané o nápravu, vydá obec rozhodnutie, v ktorom nariadi postarať sa o nápravu. V našej modelovej situácii teda obec vydá rozhodnutie, ktorým uloží osobe povinnosť uvedenia komunikácie do pôvodného stavu. Na druhej strane však nemožno obísť ani skutočnosť, že rozhodnutím zaviazaná osoba ani túto rozhodnutím určenú povinnosť nesplní. V takomto prípade obec ako správca miestnych a účelových komunikácií vo vlastníctve obce je nepochybne povinná splniť generálnu povinnosť, ktorá je jej uložená cestným zákonom, t. j. povinnosť udržiavať pozemné komunikácie v stave zodpovedajúcom účelu, na ktorý sú určené. Ide o tradičnú povinnosť, ktorá bola precizovaná už v staršej judikatúre: „Starostlivosť o udržiavanie komunikácie zahŕňa všetky práce, ktoré sú potrebné, aby komunikácia bola v takom stave, aby ju bolo možné podľa jej určenia bezpečne užívať.“10

Ak sa vrátim k našej modelovej situácii, keď osoba po vykonaní prekopávky komunikácie za účelom uloženia, prípadne vykonania opravy na podzemných vedeniach v miestnej komunikácii alebo v účelovej komunikácii opomenie zákonnú povinnosť na vykonanie prác súvisiacich s uvedením komunikácie do pôvodného stavu a nerešpektuje ani následné rozhodnutie obce ako orgánu štátneho odborného dozoru, ktorým uloží osobe povinnosť uvedenia komunikácie do pôvodného stavu, čím

7 V zmysle § 18 ods. 6 cestného zákona: „Na spôsob umiestnenia vedenia na miestnych komunikáciách alebo v ich telese, na vykonanie plánovaných opráv a údržby týchto vedení, ako aj na ich odstránenie, je potrebný súhlas príslušného cestného správneho orgánu. Na udelenie súhlasu sa nevzťahujú všeobecné predpisy o správnom konaní.“

8 Pozn. autora: Teda v tomto prípade obcou, keďže podľa § 3d ods. 5 písm. d): „Správu pozemných komunikácií vykonávajú, ak ide o prejazdné úseky ciest vo vlastníctve obce, o miestne komunikácie a účelové komunikácie vo vlastníctve obce - obce, prípadne právnické osoby nimi na tento účel založené alebo zriadené“.

9 Pozn. autora: V nami skúmanom prípade povinnosti osoby na vykonanie prác súvisiacich s uvedením komunikácie do pôvodného stavu, po umiestnení alebo oprave podzemných vedení.

10 Nález NSS ČSR č. 18718 / 27 zo dňa 30. 9. 1929

nepochybne spôsobí závadu v zjazdnosti, tak nadväzne na to, je obec ako správca týchto komunikácií povinná odstrániť bez prieťahov závady v ich zjazdnosti.

Samozrejme, realizácia takejto povinnosti obcou má vo vzťahu k nej nepriaznivý hospodársky efekt. Jednoducho obec dopláca na spoločensky neprispôsobivú osobu, ktorá si nesplní svoju povinnosť vo vzťahu k príslušnej zložke životného prostredia.11 Na zamedzenie toho cestný zákon v § 9 ods. 6 stanovuje: „Pri poškodení komunikácie12, ktoré spôsobí alebo môže spôsobiť závadu v zjazdnosti, je povinný ten, kto poškodenie spôsobil, uhradiť správcovi komunikácie náklady spojené s odstránením poškodenia a s uvedením komunikácie do pôvodného stavu.“ A práve tu však pre obce a menšie mestá nastupuje skutočný problém. Keďže uvedeného protiprávneho konania sa dopúšťajú pomerne často neprispôsobivé osoby je len prirodzené, že ak nesplnili zákonnú i následne rozhodnutím obce uloženú povinnosť uvedenia komunikácie do pôvodného stavu, nebudú mať ani najmenšiu vôľu uhradiť obci jej náklady vynaložené na uvedenie komunikácie do pôvodného stavu. Navyše nemožno obísť ani ďalšiu zákonnú povinnosť uloženú obci ako správcovi uvedených komunikácií, v zmysle ktorej správca zodpovedá za škody, ktoré vznikli užívateľom týchto komunikácií a ktorých príčinou boli závady v zjazdnosti. Medzi liberačné dôvody, ktorými by sa obec mohla tejto zodpovednosti za škodu zbaviť zákon nezaradzuje prípady, keď závada vznikla v dôsledku protiprávneho konania inej osoby. Túto skutočnosť potvrdzuje aj rozhodovacia činnosť súdov, v zmysle ktorej: „Starostlivosť o bezpečnú a jednoduchú jazdu po ceste uložená obci, je povinnosťou uloženou obci ako správcovi príslušných typov komunikácií. Za škodu vzniknutú z opomenutia tejto povinnosti ručí13 obec.14

Otvorenou teda ostáva otázka, s ktorou sa často mnohé obce a menšie mestá nevedia vysporiadať, akým spôsobom má obec vo vzťahu k porušiteľovi práva uplatniť svoje nároky na náhradu jej nákladov, ktoré ako správca príslušných komunikácií vynaložila v dôsledku protiprávneho konania tejto osoby.

Ťažiskovým problémom je to, či je obec oprávnená sama vydať rozhodnutie, ktorým by uložila porušiteľovi povinnosť nahradiť škodu, ktorá obci vznikla v dôsledku splnenia povinnosti, ktorú obci ako správcovi miestnych komunikácií ukladá zákon - t. j. ekonomické náklady obce spojené s uvedením týchto komunikácií do pôvodného stavu, prípadne i náklady na úhradu za škody, ktoré vznikli užívateľom týchto komunikácií a ktorých príčinou boli závady v zjazdnosti. K tomuto pristupuje otázka, či takéto rozhodnutie obce, v prípade ak by zo strany porušiteľa práva nedošlo k jeho k dobrovoľnému plneniu, je spôsobilé stať sa exekučným titulom v zmysle § 41 ods. 2 písm. f) zákona č. 233 / 1995 Z. z. o súdnych exekútoroch a exekučnej činnosti v znení neskorších predpisov / ďalej len „Exekučný

11 Pozn. autora: V našom modelovom prípade pozemnej komunikácii.

12 Pozn. autora: Pod ktoré môžeme subsumovať aj nami spomínanú prekopávku komunikácie za účelom uloženia, prípadne vykonania opravy na podzemných vedeniach v miestnej komunikácii alebo v účelovej komunikácii za nesplnenia zákonnej povinnosti na vykonanie prác súvisiacich s uvedením komunikácie do pôvodného stavu.

13 Sotolář, J. upresňuje tento judikát, keď slovo „ručí“ nahrádza slovom „zodpovedá“. Sotolář, J.: Zákon o obecnom zriadení. Komentár., Košice: SOTAC, 2003, s. 67

14 Nález NSS ČSR č. 7692 zo dňa 26. 11. 1925

poriadok“ /,15 resp. v zmysle § 71 a nasl. zákona č. 71 / 1967 Zb. o správnom konaní v znení neskorších predpisov / ďalej len „Správny poriadok“ /.16 Protikladným riešením je to, že obec sa v takejto situácií musí obrátiť na všeobecný súd so žalobou o náhradu škody spôsobenej porušením právnej povinnosti, ktorá jej vznikla v dôsledku protiprávneho konania osoby, ktorá komunikáciu neuviedla do pôvodného stavu, v dôsledku čoho obec ako správca príslušnej komunikácie vynaložila ekonomické náklady spojené s uvedením tejto komunikácie do pôvodného stavu, prípadne i náklady na úhradu za škody, ktoré vznikli užívateľom tejto komunikácie a ktorých príčinou boli závady v zjazdnosti. Pri takomto riešení je samozrejme spôsobilým exekučným titulom až vykonateľné rozhodnutie súdu, ktoré zaväzuje k povinnosti alebo postihuje majetok.

Napriek dikcii § 41 ods. 2 písm. f) Exekučného poriadku, podľa ktorého možno vykonať exekúciu aj na podklade vykonateľných rozhodnutí orgánov verejnej správy a územnej samosprávy17, sa jednoznačne musím prikloniť k druhej forme riešenia našej modelovej situácie. Mazák, J. uvádza, že ako exekučné tituly slúžia aj rozhodnutia nejustičných orgánov, za predpokladu, že ukladajú povinnosť, priznávajú právo, alebo postihujú majetok a sú vykonateľné.18 Musíme však upresniť, že takéto rozhodnutia sú spôsobilým exekučným titulom len za predpokladu, že sú vydané orgánom oprávneným na jeho vydanie. Tento názor potvrdzuje aj Tomašovič, M., podľa ktorého: „Exekučný súd nie je oprávnený preskúmať vecnú správnosť exekučného titulu, teda zaoberať sa správnosťou skutkových a právnych záverov orgánu, ktorý ho vydal. Rozsah prieskumnej činnosti súdu je obmedzený na to,19 či je exekučný titul vydaný orgánom oprávneným na jeho vydanie.20

Pre účely vykonateľnosti rozhodnutí orgánov verejnej správy je síce irelevantné, či ide o rozhodnutie vydané v rámci výkonu štátnej správy, alebo samosprávy21, no musíme upozorniť, že ak nenájdeme hmotnoprávne ustanovenie, ktoré by oprávňovalo orgán verejnej správy vydať predmetné rozhodnutie (v našom modelovom prípade rozhodnutie obce, ktorým by uložila porušiteľovi povinnosť nahradiť škodu, ktorá obci vznikla v dôsledku splnenia povinnosti, ktorú obci ako správcovi miestnych komunikácií ukladá zákon), nemôže byť takýto akt orgánu verejnej správy spôsobilým exekučným titulom a exekučný súd je povinný už pri rozhodovaní o prípadnej žiadosti exekútora o vydanie poverenia na vykonanie exekúcie na základe takéhoto aktu uznesením žiadosť zamietnuť. Obci teda neostáva iná možnosť ako obrátiť sa na všeobecný súd so žalobou o náhradu škody spôsobenej

15 V zmysle § 41 ods. 2 písm. f) Exekučného poriadku: „Podľa tohto zákona možno vykonať exekúciu aj na podklade vykonateľných rozhodnutí orgánov verejnej správy a územnej samosprávy vrátane blokov na pokutu nezaplatenú na mieste.“

16 V zmysle § 71 ods. 1 Správneho poriadku: „Ak účastník konania nesplní v určenej lehote dobrovoľne povinnosť uloženú mu rozhodnutím, ktoré je vykonateľné, jeho výkon sa uskutoční.“

17 Pozn. autora: V našom modelovom prípade rozhodnutia obce.

18 Mazák, J. a kol.: Základy občianskeho procesného práva, Bratislava: Iura Edition, 2007, s. 532

19 Pozn. autora: Samozrejme popri preskúmaní, či sú oprávnený a povinný hmotnoprávne legitimovaný z exekučného titulu a či je exekučný titul materiálne a formálne vykonateľný.

20 Tomašovič, M.: Exekučný poriadok s komentárom, Žilina: Poradca podnikateľa, 2006, s. 69

21 Tomašovič, M.: Exekučný poriadok s komentárom, Žilina: Poradca podnikateľa, 2006, s. 73

porušením právnej povinnosti, ktorá jej vznikla v dôsledku protiprávneho konania osoby, ktorá komunikáciu neuviedla do pôvodného stavu, v dôsledku čoho obec ako správca príslušnej komunikácie vynaložila ekonomické náklady spojené s uvedením tejto komunikácie do pôvodného stavu, prípadne i náklady na úhradu za škody, ktoré vznikli užívateľom tejto komunikácie a ktorých príčinou boli závady v zjazdnosti. Spôsobilým exekučným titulom je teda až k povinnosti zaväzujúce vykonateľné rozhodnutie súdu.

Samozrejme však nemôžeme obísť súbeh právnej zodpovednosti za škodu a administratívnoprávnej zodpovednosti založenej v prípade porušenia povinností ustanovených v predpisoch na úseku ochrany životného prostredia. Poukazuje na to už § 29 zákona č. 17 / 1992 Zb. o životnom prostredí v znení neskorších predpisov, podľa ktorého „za porušenie povinností ustanovených osobitnými predpismi o ochrane životného prostredia sa ukladajú pokuty alebo iné opatrenia podľa týchto predpisov; tým nie sú dotknuté prípadná trestná zodpovednosť ani zodpovednosť za škodu podľa všeobecných právnych predpisov.“Podľa dikcie vyššie spomínaného § 3 ods. 2 a § 22a cestného zákona, obce v rámci preneseného výkonu štátnej správy prejednávajú priestupky podľa § 22c na úseku miestnych komunikácií a účelových komunikácií a navyše v rozsahu svojej pôsobnosti ukladajú pokuty právnickej osobe alebo fyzickej osobe oprávnenej na podnikanie pri naplnení skutkovej podstaty niektorého z iných správnych deliktov uvedených v tomto zákone.22

Obec teda popri tom, že bude uplatňovať náhradu škody v občianskoprávnom konaní, môže uložiť, resp. pri inom správnom delikte uloží za toto protiprávne konanie pokutu do výšky ustanovenej zákonom. Keďže takéto rozhodnutie obce má už svoj legálny hmotnoprávny podklad, v prípade že zo strany porušiteľa nedôjde k dobrovoľnému splneniu povinnosti uloženej rozhodnutím obce o uložení pokuty za priestupok alebo iný správny delikt, po tom čo sa toto rozhodnutie stane vykonateľným nadobudne rozhodnutie kvalitu spôsobilého exekučného titulu podľa § 41 ods. 2 písm. f) Exekučného poriadku ako i podľa § 71 a nasl. Správneho poriadku. Uskutočniť výkon rozhodnutia obce možno podľa Správneho poriadku alebo podať návrh na vykonanie exekúcie súdnemu exekútorovi.

Znamená to, že právna úprava výkonu správnych rozhodnutí je dvojkoľajná, možný je výkon podľa Správneho poriadku alebo podľa Exekučného poriadku. Správny orgán, ktorý rozhodnutie vydal v prvom stupni má možnosť voľby, či sám začne konanie o výkon podľa Správneho poriadku, alebo či podá návrh súdnemu exekútorovi na vykonanie exekúcie. Orgány verejnej správy by nemali využívať možnosť podať návrh na vykonanie exekúcie v prípadoch, kedy je z dôvodov ohrozenia práv účastníka konania nevyhnutné, aby bol výkon uskutočnený okamžite.23

22 V našom modelovom prípade ide o naplnenie skutkovej podstaty priestupku podľa § 22c ods. 1 písm. d), resp. iného správneho deliktu podľa § 22a písm. d), teda: „V prípade opravy porúch na podzemných vedeniach uložených v miestnej komunikácii nesplnenie ohlasovacej povinnosti alebo nesplnenie podmienok určených cestným správnym orgánom na vykonanie prác súvisiacich s uvedením komunikácie do pôvodného stavu.“

23 Tomašovič, M.: Exekučný poriadok s komentárom, Žilina: Poradca podnikateľa, 2006, s. 73 - 74

Na základe uvedeného môžeme konštatovať, že pôsobnosť obce, ako základu územnej samosprávy, v rámci starostlivosti o životné prostredie je pomerne rozsiahla. Obec je taktiež vybavená značným množstvom inštitútov, prostredníctvom ktorých môže efektívne prispievať k ochrane a tvorbe životného prostredia. Problém nastáva na úseku presadzovania práva, keď sa obce s nedostatočným kvalifikačno - personálnym obsadením nedokážu vhodným spôsobom orientovať v rozsiahlej hmotnoprávnej a procesnoprávnej verejnoprávnej i súkromnoprávnej úprave a následne nedokážu správne interpretovať príslušné právne ustanovenia, čím vznikajú vážne defekty na úseku starostlivosti o životné prostredie na samosprávnej úrovni.

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[2] Chalíl Džibrán.: Prorok. Proroková záhrada, Bratislava: Gardenia, 2006, 175 s., ISBN 808566240X

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THE MATTER OF PUBLICITY AND PROCESS OF MAKING INFORMATION AVAILABLE IN SLOVAK INFORMATION ACCESS ACT

PATRÍCIA TOMÁŠOVÁ

KATEDRA ÚSTAVNÉHO PRÁVA A SPRÁVNEHO PRÁVA, PRÁVNICKÁ FAKULTA UNIVERZITA PAVLA JOZEFA ŠAFÁRIKA V KOŠICIACH

Abstrakt

Problematiku zverejnenia a sprístupnenia informácií upravuje Zákon o slobodnom prístupe k informáciám č. 211/2000 Z.z. v znení neskorších predpisov. Účelom a zmyslom tohto zákona je realizovať a napomáhať plnej realizácii ústavného práva na informácie. Zákon nie je možné interpretovať inak ako takým spôsobom, ktorý plnú realizáciu ústavou garantovaných práv na informácie umožní.

Kľúčové slová

Právo na informácie, prístup k informáciám, obchodné tajomstvo, dôverné informácie

Abstract

The matter of publicity and process of making information available is regulated by Free Information Access Act No. 211/2000 Coll. The purpose and meaning of the act is to realize and help to realize the constitutional right to information in full. It is not possible to interpret the act in other way than which enables realisation of constitutionally guaranted rights to information in full.

Key words

Right to information, access to information, trade secret, confidential information

Základná právna úprava

Právo šíriť informácie je deklarované základným zákonom štátu Slovenskej republiky v čl. 26 Ústavy Slovenskej republiky zák. č. 460/1992 Zb..

Obsah práva na informácie Ústavný súd Slovenskej republiky vymedzil tak, že „prostredníctvom práva prijímať, vyhľadávať a rozširovať idey a informácie sa každému umožňuje dozvedieť sa informáciu a získať ju do svojej dispozičnej sféry a v nej informáciu spracovať pre svoju potrebu i potrebu iných, keďže v súlade s ústavou k nemu patrí aj právo informáciu ďalej rozširovať. Právo prijímať, vyhľadávať a rozširovať idey a informácie zaručuje možnosť získať informáciu priamo zo známeho zdroja na vopred známy účel, ak existuje možnosť informáciu vyhľadať, ako aj príležitosť vyhľadať informácie, ktoré oprávnená osoba bezprostredne nepotrebuje na vopred známy účel, ale dá sa predpokladať, že očakávaná informácia bude pre túto osobu užitočná. Právo prijímať, vyhľadávať a rozširovať idey a informácie chráni možnosť dostať informácie *pasívnym správaním* oprávnenej osoby aj možnosť získať informácie *aktívnym správaním* oprávnenej osoby“[1].

Z vyššie uvedeného možno vyvodiť, že z dôvodu ústavného spôsobu zakotvenia práva na informácie, má ktokoľvek právo vlastným pričinením získať informáciu (napr. žiadosťou o sprístupnenie) a získanú informáciu môže ďalej aktívne šíriť iným osobám neurčitého počtu (zverejnením), čím sa realizuje ich ústavná možnosť získať informácie pasívnym spôsobom.

Zákonom, ktorý bližšie upravuje právo a obmedzenia prístupu k informáciám je zákon č. 211/2000 Z.z. o slobodnom prístupe k informáciám a o zmene a doplnení niektorých zákonov (zákon o slobode informácií), účinný od 1.1.2001.

A. Povinné osoby

Podľa ustanovenia § 2 zákona o slobode informácií osobou povinnou sprístupňovať informácie podľa tohto zákona sú štátne orgány, obce, právnické a fyzické osoby, ktorým zákon zveruje právomoc rozhodovať o právach a povinnostiach fyzických alebo právnických osôb v oblasti verejnej správy. Ďalšími osobami povinnými sprístupňovať informácie sú právnické osoby zriadené zákonom, štátnym orgánom, vyšším územným celkom alebo obcou a všetky právnické osoby založené vyššie uvedenými orgánmi resp. osobami. Okrem týchto osôb môže osobitný zákon ustanoviť informačnú povinnosť aj inej fyzickej alebo právnickej osobe.

B. Povinne zverejňované informácie

[1] II. ÚS 28/96

Zákon o slobode informácií ukladá povinným osobám povinnosť zverejňovania určitého typu informácií, ktoré sa týkajú organizácie, možnosti prístupu k informáciám, postupov vybavovania žiadostí atď.
Vyššie uvedené informácie sa zverejňujú tak, aby bol umožnený hromadný prístup k týmto informáciám (teda bez potreby podania žiadosti o sprístupnenie informácie).
Okrem povinne zverejňovaných informácií je povinná osoba oprávnená zverejniť aj iné informácie. Zákon o slobode informácií v prípade dobrovoľne zverejnených informácií nestanovuje spôsob ich zverejnenia (hromadný alebo na žiadosť, a teda je možné usudzovať o zverejnení akýmkoľvek dovoleným spôsobom podľa rozhodnutia povinnej osoby).

C. Obmedzenia prístupu k informáciám

Právo na informácie v zmysle čl. 26 ods. 4 Ústavy nie je absolútne. Možno ho obmedziť zákonom, ak ide o opatrenia v demokratickej spoločnosti nevyhnutné na ochranu práv a slobôd iných, bezpečnosť štátu, verejného poriadku, ochranu verejného zdravia a mravnosti (čl. 26 ods. 4 Ústavy).

Ústavný súd Slovenskej republiky zdôrazňuje, že pri aplikácii zákonných obmedzení Ústavou garantovaných práv je potrebné si tieto obmedzenia vykladať prísne reštriktívne. Tak napr. Ústavný súd konštatoval v rozhodnutí II. ÚS 10/99, že zásah do práva podľa čl. 26 ods. 1 a 2 Ústavy nemožno vykonať preventívne, bez riadneho zistenia okolností prípadu odôvodňujúcich jeho uplatnenie ani bez identifikácie účelu, kvôli ktorému sa obmedzí právo zaručené čl. 26 ods. 1 a 2 v konkrétnom prípade.

V rozhodnutí sp. zn. PL. ÚS 15/98 Ústavný súd vyslovil, že „obmedzenie práva na informácie v súlade s Ústavou je dovolené len vtedy, ak sa splní formálna podmienka zákona a dve kumulatívne materiálne podmienky (...)“.
Orgány verejnej moci môžu zasiahnuť do práva na informácie zaručeného v čl. 26 Ústavy Slovenskej republiky za súčasného splnenia troch podmienok: zásah je ustanovený zákonom, zodpovedá niektorému legitímnemu cieľu ustanovenému v Ústave Slovenskej republiky (čl. 26 ods. 4) a je nevyhnutný v demokratickej spoločnosti na dosiahnutie sledovaného cieľa, t. j. ospravedlňuje ho existencia naliehavej spoločenskej potreby a primerane (spravodlivo) vyvážený vzťah medzi použitými prostriedkami a sledovaným cieľom.
Ak by neboli súčasne naplnené všetky tri podmienky obmedzenia, nesmie osoba povinná na zverejnenie resp. sprístupnenie informácie znemožniť akejkoľvek osobe jej ústavné právo na informácie. Ak napríklad nebude splnená 1 z podmienok, že obmedzenie práva na informácie je formulované v zákone (napr. bude formulované len zmluvne), nie je povinná osoba oprávnená obmedziť právo na informácie.

Obdobné kritériá pre obmedzenie slobody prejavu a práva na informácie obsahuje aj judikatúra Európskeho súdu pre ľudské práva k čl. 10 Dohovoru o ľudských právach a slobodách (ktorým je Slovenská republika ako jedna zo zmluvných strán viazaná).
Podľa čl. 10 Dohovoru každý má právo na slobodu prejavu. Toto právo zahŕňa slobodu zastávať názory a prijímať a rozširovať informácie alebo myšlienky bez zasahovania štátnych orgánov a bez ohľadu na hranice (...) (ods. 1). Výkon týchto slobôd, pretože zahŕňa aj povinnosti, aj zodpovednosť, môže podliehať takým formalitám, podmienkam obmedzeniam alebo sankciám, ktoré ustanovuje zákon a ktoré sú nevyhnutné v demokratickej spoločnosti v záujme národnej bezpečnosti, územnej celistvosti, predchádzania nepokojom a zločinnosti, ochrany zdravia alebo morálky, ochrany povesti alebo práv iných, zabráneniu úniku dôverných informácií alebo zachovania autority a nestrannosti súdnej moci (ods. 2).

Sloboda prejavu, ktorá v sebe v zmysle čl. 10 ods. 1 Dohovoru obsahuje aj právo na informácie, je judikatúrou Európskeho súdu pre ľudské práva chápaná pomerne široko a pritom jednoznačne zdôrazňuje, že dôvody pre obmedzenie slobody slova je nevyhnutné interpretovať prísne reštriktívne[2].

Povinná osoba má teda povinnosť sprístupniť všetky informácie, ktoré má k dispozícii, okrem tých informácií, ktoré sú vymedzené v § 8 až 11 zákona o slobode informácií – ide o "obmedzenia prístupu k informáciám". Táto kategória neprístupných informácií alebo prístupných len za určitých stanovených podmienok a predpokladov suspenduje právo na informácie a môžme ju rozdeliť na 2 subkategórie:

a. Predovšetkým do tejto kategórie patria: utajované skutočnosti, štátne tajomstvo, obchodné tajomstvo (zúžené o prípady uvedené v § 10 ods. 2 zákona o slobodnom prístupe k informáciám), bankové, daňové tajomstvo, informácie týkajúce sa osobnosti, osobných údajov fyzických osôb. Výnimkou z obmedzenia prístupu k tejto kategórii informácií je obchodné tajomstvo (teda informácia, ktorá spĺňa znaky ustanovené v § 17 zák. č. 513/1991 Zb. Obchodného zákonníka – viď nižšie), ktorého zverejnenie zákon o slobode informácií umožňuje, ak zverejnenie informácie (obchodného tajomstva[3]) sa má uskutočniť za účelom verejne prospešným (v zákone o slobode informácií sú konkrétne prípady explicitne ustanovené). Podľa § 10 ods. 2 písm c) zákona sa za porušenie alebo ohrozenie obchodného tajomstva nebude považovať sprístupnenie informácie, ktorá sa získala za verejné financie alebo sa týka používania verejných financií

[2] *(z rozhodnutia vo veci Sunday Times, 1979, A-30, z rozhodnutia vo veci Observer a Guardian, 1991,A-216)*

[3] Podľa znenia § 17 Obchodného zákonníka: *Obchodné tajomstvo tvoria všetky skutočnosti obchodnej, výrobnej alebo technickej povahy súvisiace s podnikom, ktoré majú skutočnú alebo aspoň potenciálnu materiálnu alebo nemateriálnu hodnotu, nie sú v príslušných obchodných kruhoch bežne dostupné, majú byť podľa vôle podnikateľa utajené a podnikateľ zodpovedajúcim spôsobom ich utajenie zabezpečuje.*

alebo nakladania s majetkom štátu alebo majetkom obce.

Možno konštatovať, že ak by povinná osoba zverejnila informáciu, ktorá napĺňa znaky obchodného tajomstva a zároveň by bola splnená podmienka "verejných financií", nedošlo by k porušeniu zákona o slobode informácií a následným sankčným optreniam voči povinnej osobe.

Podľa znenia § 17 Obchodného zákonníka: Obchodné tajomstvo tvoria všetky skutočnosti obchodnej, výrobnej alebo technickej povahy súvisiace s podnikom, ktoré majú skutočnú alebo aspoň potenciálnu materiálnu alebo nemateriálnu hodnotu, nie sú v príslušných obchodných kruhoch bežne dostupné, majú byť podľa vôle podnikateľa utajené a podnikateľ zodpovedajúcim spôsobom ich utajenie zabezpečuje.

Či je informácia obchodným tajomstvom alebo nie, povinná osoba pri zverejnení informácie neskúma. Povinná osoba v konaní o sprístupnenie informácií neskúma, či niečo môže byť alebo nemôže byť obchodným tajomstvom, skúma len, či informácia je alebo nie je označená ako obchodné tajomstvo. Otázku, či požadovaná informácia má alebo nemá skutočnú alebo potenciálnu hodnotu pre podnikanie, nie je oprávnený riešiť ani žiadateľ, ani povinná osoba. V prípade pochybnosti alebo sporu môže o tom záväzne rozhodnúť iba súd[4].

b. Osobitnú skupinu tvoria informácie uvedené v cit. zákone v § 11 s názvom „Ďalšie obmedzenia prístupu k informáciám", a to v jeho odseku 1. Informácie vymenované v tomto ustanovení sú vylúčené zo zverejnenia bez ohľadu na to, či požívajú ochranu pred zverejnením z dôvodu, že patria do vyššie uvedenej subkategórie. Teda nie je rozhodujúce, že takáto informácia (nie) je predmetom štátneho alebo iného tajomstva alebo chráneným osobným údajom. Podľa § 11 ods. 1 písm. a) zákona povinná osoba obmedzí sprístupnenie informácie alebo informáciu nesprístupní, ak jej bola odovzdaná osobou, ktorej takúto povinnosť zákon neukladá a ktorá na výzvu povinnej osoby písomne oznámila, že so sprístupnením informácie nesúhlasí. Ak na výzvu povinnej osoby neodpovie osoba oprávnená udeliť súhlas na sprístupnenie informácie do siedmich dní, predpokladá sa, že so sprístupnením súhlasí. Na tieto následky musí byť povinná osoba upozornená. Podobne uvádza Ústavný súd: Z tohto ustanovenia vyplýva, že informácie, ktoré má dožiadaná osoba k dispozícii, treba rozlišovať podľa pôvodu, teda či ide o informáciu, ktorá je jej vlastným produktom, alebo o informáciu, ktorú prevzala od inej osoby. Ak ide o informáciu prevzatú od osoby, ktorá nemá informačnú povinnosť, nie je na zvážení dožiadanej osoby, či túto informáciu poskytne, ak oprávnená osoba vysloví nesúhlas. Dožiadaná osoba, hoci má konať v režime správneho konania, je nesúhlasom oprávnenej osoby viazaná. Toto platí bez ohľadu na to, či informácia má alebo nemá

[4] Z nálezu Ústavného súdu ÚS 59/04-42

charakter štátneho, obchodného alebo iného tajomstva[5].

Aj z tejto subkategórie obmedzení existuje výnimka. Rovnako ako možno zverejniť obchodné tajomstvo, možno zverejniť aj informáciu, ktorú tretia osoba dobrovoľne odovzdala povinnej osobe, a to aj napriek tomu, že zverejnenie tejto informácie vopred alebo na výzvu povinnej osoboy s vyjadrením súhlasu zverejnenia, vylúčila. A to za podmienky uvedenej v § 11 ods. 2 zákona o slobode informácií: "ak ide o informácie, ktoré sa získali za verejné financie, alebo ak sú to informácie týkajúce sa použitia takých prostriedkov, alebo ak ide o informácie o nakladaní s majetkom štátu alebo majetkom obce".

E. Možnosť zverejnenia obchodného tajomstva a dôvernej informácie

Pojem dôverné informácie je terminus technicus používaný v obchodných vzťahoch predovšetkým Obchodným zákonníkom, ale vyskytuje sa aj v práve cenných papierov (napríklad Zákon č. 566/2001 o cenných papieroch Z.z. v znení neskorších predpisov uvedený pojem aj obsiahlo definuje). Pre riešený problém je smerodajný tak význam dôverných informácií, ako aj ich ochrana v obchodných vzťahoch, preto sa v stručnosti zmienim o ich právnej úprave a ich ochrane v Obchodnom zákonníku. Ustanovenie § 271 znie:

„Ak si strany pri rokovaní o uzavretí zmluvy navzájom poskytnú informácie označené ako dôverné, nesmie strana, ktorej sa tieto informácie poskytli, prezradiť ich tretej osobe a ani ich použiť v rozpore s ich účelom pre svoje potreby, a to bez ohľadu na to, či dôjde k uzavretiu zmluvy, alebo nie. Kto poruší tuto povinnosť, je povinný na náhradu škody, obdobne podl'a ustanovenia § 373 a nasl.".

Pojem dôverné informácie Obchodný zákonník nedefinuje. Ide totiž o široký okruh informácii, spravidla o informácie výrobnej, technickej alebo obchodnej povahy, ktoré majú pre zmluvnú stranu osobitnú informačnú hodnotu a mohli by byť využité proti záujmom podnikateľa, a to tým, že sa sprístupnia iným osobám, alebo sa použijú na iné ciele než tie, na ktoré boli poskytnuté. Aby sme mohli hovoriť o dôverných informáciách v zmysle § 271 Obchodného zákonníka, tieto musia spĺňať zákonné požiadavky.

Musí ísť o také informácie, ktoré jedna zo strán označí za dôverné. Označenie informácii za dôverné je úplne v dispozícii zmluvnej strany a záleží na jej subjektívnom rozhodnutí. Nevyžaduje sa tu žiadne objektívne kritérium pre posúdenie potreby takejto ochrany. Je však prirodzené, že o dôverné

[5] ÚS 59/04-42

informácie nepôjde v prípade informácii, ktoré sú všeobecné známe. Pre formu označenia informácie ako dôvernej zákon nevyžaduje žiadnu osobitnú formu, nemusí byť teda bezpodmienečne takéto označenie písomné. Spravidla sa však označenie informácií ako dôverných robí v písomnej forme, v záujme zabezpečenia dôkazu. Musí isť o označenie jasné, nevzbudzujúce žiadne pochybnosti. Ak informácie spĺňajú uvedené podmienky, zákon im poskytuje osobitnú ochranu.

Dôverné informácie sú chránené v dvoch rovinách: v období rokovania pred uzavretím zmluvy v rámci predzmluvnej zodpovednosti; po uzavretí zmluvy v rámci zmluvnej zodpovednosti.
V rámci rokovania o uzavretí zmluvy zákon prostredníctvom ustanovenia § 271 Obchodný zákonník ukladá povinnosť každej strane, ktorá sa zúčastňuje na rokovaní o uzavretí zmluvy chrániť dôverné informácie, ktoré sa pri rokovaní dozvedela, a to tak, že ich nesmie zneužiť. Strana, ktorej sa dôverné informácie poskytli, nesmie ich prezradiť' tretej osobe a ani ich použiť v rozpore s ich účelom pre svoje potreby. Pritom nie je rozhodujúce, či dôjde k uzavretiu zmluvy alebo nie. Ide tu o kategóriu predzmluvnej zodpovednosti, ktorú musel zákonodarca osobitne konštruovať pre obdobie, keď zmluva ešte nie je uzavretá, prípadne k uzavretiu zmluvy ani nedôjde, a porušenie zmluvnej povinnosti neprichádza do úvahy. V prípade, že dôjde k uzavretiu zmluvy, zmluvné strany spravidla ochranu dôverných informácií zakomponujú do zmluvy, kde podrobne upravia podmienky ochrany dôverných informácií. To znamená, že zmluvné strany zabezpečia ochranu dôverných informácií, ktoré vyplývajú zo samotnej zmluvy tým, že zákaz ich zneužitia upravia ako zmluvnú povinnosť. Ide o zmluvnú ochranu dôverných informácii z vôle zmluvných strán. Spravidla ako zmluvnú povinnosť upravia aj ochranu dôverných informácií vyplývajúcich z rokovania o zmluve. Tým ochranu dôverných informácií z obdobia rokovania o uzavretí zmluvy, ak bola zmluva uzavretá, chránia aj ako povinnosť vyplývajúcu zo samotnej zmluvy.

Zákon neustanovuje dobu, počas ktorej je dôverným informáciám poskytnutá ochrana. Vo všeobecnosti platí, že tento časový horizont je potrebné posudzovať z hľadiska účelu takejto ochrany, predovšetkým bude rozhodujúce, čí konkrétne dôverné informácie ešte majú dôverný charakter. Strana, ktorá označila určité informácie za dôverné, môže kedykoľvek túto ich povahu odvolať, a tým aj ukončiť ich ochranu. Taktiež je možné v zmluve určiť dobu, počas ktorej sú informácie chránené ako dôverné.

Dôverným informáciám poskytnutým v štádiu rokovania o uzavretí zmluvy, ktoré sĺňajú požiadavky ustanovené v § 271 Obchodného zákonníka, poskytuje Obchodný zákonník osobitnú ochranu. Táto spočíva v tom, že pokiaľ dôjde k ich prezradeniu alebo zneužitiu a v dôsledku toho vznikne škoda, vzniká povinnosť ju nahradiť. Ochrana dôverných informácií sa neviaže na uzavretie zmluvy. Zákaz

zneužitia dôverných informácií platí tak v prípade, že nedošlo k uzavretiu zmluvy, ako aj v prípade, že zmluva bola uzavretá. Ustanovenie § 271 Obchodného zákonníka má kogentnú povahu, to znamená, že pre strany je záväzné a dohodou ho nemožno ani vylúčiť, ani obmedziť. Ide o ochranu dôverných informácií *ex lege*.

Dôležité je rozhraničiť vzt'ah medzi dôvernými informáciami a obchodným tajomstvom, pretože oba pojmy nemožno stotožniť.
Na to, aby určitá skutočnosť tvorila predmet obchodného tajomstva, musia byť zároveň (kumulatívne) splnené nasledujúce podmienky:
a) musí ísť o skutočnosti obchodnej, výrobnej či technickej povahy súvisiace s podnikom,
b) tieto skutočnosti majú skutočnú alebo aspoň potencionálnu materiálnu či nemateriálnu hodnotu,
c) v príslušných obchodných kruhoch nie sú bežne dostupné,
d) majú byť podľa vôle podnikatel'a utajené,
e) podnikateľ zodpovedajúcim spôsobom ich utajenie zabezpečuje.

Pokiaľ by chýbala čo i len jediná z týchto podmienok, nešlo by o obchodné tajomstvo v zmysle ustanovenia § 17 Obchodného zákonníka. Tak judikoval aj Najvyšší súd Slovenskej republiky:
„Dojednanie zmluvných strán o tom, že určité náležitosti zmluvy tvoria predmet obchodného tajomstva, nepostačuje na to, aby sa tieto skutočnosti stali obchodným tajomstvom, pokiaľ nenapĺňajú pojmové znaky vymedzené ust. §17 Obchodného zákonníka."
Ochrana obchodného tajomstva trvá, pokiaľ trvajú všetky skutočnosti vyžadované zákonom, t. j. jeho zákonné pojmové znaky.

Rozdiel medzi dôvernými informáciami a obchodným tajomstvom spočíva v nasledovnom:
Osobitné ustanovenie § 271 Obchodného zákonníka chráni informácie poskytnuté pri rokovaní o uzavretí zmluvy označené ako dôverné; tým dochádza k určitej ochrane aj tých poznatkov, ktoré nedosahujú intenzitu ochrany obchodného tajomstva, pretože nespĺňajú niektoré zákonom požadované znaky. Rozsah dôverných informácií je preto širší, lebo ide nad rámec obchodného tajomstva vymedzeného v § 17 Obchodného zakonníka. Dôverné informácie nemusia mať charakter obchodného tajomstva. t. j. nemusia spĺňať všetky jeho znaky stanovené zákonom, hoci nemožno vylúčiť, že v určitých prípadoch sa budú celkom alebo len sčasti s obchodným tajomstvom prekrývať. Nie je však vylúčené, aby sa pri uzavieraní zmlúv určité navzájom poskytnuté informácie kvalifikovali ako obchodné tajomstvo, ak spĺňajú zákonom požadované podmienky. Na rozdiel od dôverných informácií, ktoré musia byť v zmysle Obchodného zákonníka za také označené, pri skutočnostiach tvoriacich

obchodné tajomstvo Obchodný zákonník takéto označenie nepožaduje. Podstatné je, že sú splnené požiadavky § 17. Ochrana poskytnutá obchodnému tajomstvu podl'a § 17 až 20 Obchodného zákonníka je všeobecná a najširšia. Je širšia než ochrana poskytovaná dôverným informáciám, pri ktorej sa uvažuje najmä s prípadným záväzkom na náhradu škody.

Zrejme aj z vyššie uvedeného dôvodu zákonodarca v zákone o slobodnom prístupe k informáciám neuvádza dôverné informácie ako osobitnú kategóriu údajov (ako je tomu pri obchodnom tajomstve), ku ktorým je možné prístup obmedziť. Tým, že obchodné tajomstvo tvorí osobitnú kategóriu informácii, prístup ku ktorým je v zmysle zákona o slobode informácií obmedzený, sa im poskytuje iná úroveň ochrany ako dôverným informáciám, to najmä z pohľadu výnimiek z obmedzenia prístupu (napr. z dôvodu vyššie uvedených verejných financií), v zákone o slobode informácií zakotvených. Na druhej strane, nemožno vylúčiť obmedzenie prístupu k informáciám, ktoré sú zmluvnými stranami označené ako dôverné, a to z len dôvodu, že nie sú ako osobitná kategória vymedzené v zákone o slobode informácií. V spojitosti s Obchodným zákonníkom možno konštatovať, že obmedzenie prístupu k dôverným informáciám poskytuje čl. 26 ods. 4 Ústavy, ak sú naplnené všetky podmienky v článku obsiahnuté. Na rozdiel od obchodného tajomstva, sa však už na dôverné informácie nebudú vzťahovať tie výnimky obmedzenia prístupu k dôverným údajom, ktoré uvádza zákon o slobode informácií.

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VYDÁVÁNÍ OVĚŘENÝCH VÝSTUPŮ Z INFORMAČNÍCH SYSTÉMŮ VEŘEJNÉ SPRÁVY – CZECHPOINT

LENKA TUŠEROVÁ

PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY

Abstrakt

Tento příspěvek se zabývá především problematikou vydávání ověřených výstupů z informačních systémů veřejné správy, kterou jako nový institut zavedl zákon č. 365/2000 Sb., o informačních systémech veřejné správy, ve znění pozdějších předpisů. Vyznané místo je rovněž věnováno projektu „Czechpoint“, který novinky v oblasti elektronické komunikace s veřejnou správou zastřešuje.

Klíčová slova

Zákon o informačních systémech veřejné správy, vydávání ověřených výstupů z informačních systémů veřejné správy, Czechpoint, e-Government, zpřístupněné registry, pověřené subjekty.

Abstract

This paper deals with the matter of issuing of verified statements from public administration information systems, that was introduced by the Act No., 365/2000 Coll., on Public Administration Information Systems. Important accent is laid on the project “Czechpoint” which covers all innovations in electronic communication with the Public Administration.

Key words

Act on Public Administration Information Systems, Issuing of Verified Statements from Public Administration Information Systems, Czechpoint, e-Government, Available Registers, Authorised Subjects.

Dosud nejvýraznějších změn doznal zákona č. 365/2000 Sb., o informačních systémech veřejné správy a o změně některých dalších zákonů, ve znění pozdějších zákonů (dále též „zákon o informačních systémech veřejné správy“), jenž vznikl z důvodu potřeby právní úpravy vedení a řízení informačních a komunikačních technologií a systémů ve veřejné správě, vlivem své novely provedené zákonem č.

81/2006 Sb.[1] Předmětná novela rozšířila působnost zákona mimo jiné i na oblast vydávání ověřených výstupů z informačních systémů veřejné správy. Nejdůležitějším podnětem, který vedl zákonodárce k pokrytí této oblasti byl podle našeho názoru rychlý rozvoj informačních a komunikačních technologií, které umožňují dálkový přístup k datům (informacím), a to za současného zaručení originality a integrity poskytovaných dat. Vydávání těchto ověřených výstupů z informačních systémů veřejné správy hodnotí důvodová zpráva[2] jako podstatný posun směrem ke zpřístupnění informací z veřejné správy širokému okruhu osob jednoduchým a co nejméně byrokratickým způsobem.

Jako více než přínosné lze rovněž hodnotit zavedení povinnosti přizpůsobit webové stránky institucí státní správy a samosprávy tak, aby byly přístupné i pro osoby zdravotně postižené, které bylo spolu s výše uvedeným institutem vydávání ověřených výstupů zavedeno do zákona o informačních systémech veřejné správy. Důvodová zpráva odůvodňuje tuto povinnost zejména tím, že *„v prostředí veřejné správy není možné, aby byly skupiny hendikepovaných uživatelů při poskytování informací prostřednictvím webových stránek jakkoliv diskriminovány. Internetové stránky by měly být přístupné jakýmkoliv uživatelům, například i těm, kteří nevidí nebo nemohou používat horní končetiny. Tito uživatelé totiž mají k dispozici různé pomocné technologie, jako např. hlasové výstupy, braillské řádky atp., které jim informace z webových stránek zprostředkují. Pro fungování těchto pomůcek je však třeba, aby byly webové stránky vyrobeny podle pravidel a zásad přístupného webu. Přitom správně přístupné webové stránky navíc slouží nejen zdravotně postiženým. Vedle osob hendikepovaných mohou takto uzpůsobený web bez obtíží používat také uživatelé s méně obvyklými zobrazovacími zařízeními, operačními systémy, softwarovým vybavením apod. nebo i běžní uživatelé.“*[3]

Vydávání ověřených výstupů z informačních systémů veřejné správy

Ust. § 9 a násl. zákona o informačních systémech veřejné správy zavedlo do českého právního řádu nový institut, kterým je již několikrát zmiňované vydávání ověřených výstupů z informačních systémů veřejné správy.

V souladu s ust. § 9 odst. 1 citovaného zákona vydávají orgány veřejné správy, které jsou správci nebo provozovateli informačních systémů veřejné správy nebo jejich částí, na požádání úplný nebo částečný

[1] Zákon č. 81/2006 Sb., kterým se mění zákon č. 365/2000 Sb., o informačních systémech veřejné správy a o změně některých dalších zákonů, ve znění pozdějších předpisů, a další související zákony.
[2] Viz Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 27. 1. 2005, PSP tisk 837/0. Obecná část, bod 2. (Identifikační číslo ASPI LIT 25714CZ)
[3] Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 27. 1. 2005, PSP tisk 837/0. Obecná část, bod 2. (Identifikační číslo ASPI LIT 25714CZ)

výpis ze zápisu vedeného v elektronické podobě v tomto informačním systému. U těchto informačních systémů veřejné správy nebo jejich částí, však musí být splněna podmínka, že se jedná o evidence, rejstříky nebo seznamy. To znamená, že podle citovaného zákona má každý provozovatel nebo správce informačního systému veřejné správy, příp. jejich části, který je veden elektronicky a je seznamem, rejstříkem nebo evidencí, povinnost na požádání poskytovat z tohoto informačního systému výpisy.

Správce informačního systému veřejné správy nebo jejich částí, tj. subjekt, který podle zákona určuje účel a prostředky zpracování informací a za informační systém odpovídá[4], či provozovatele[5] takového systému, tedy subjekt, který provádí alespoň některé informační činnosti související s informačním systémem, a to bez ohledu na to, zda se jedná o veřejné nebo neveřejné evidence, rejstříky nebo seznamy, označuje zákonodárce legislativní zkratkou *„správci"*.

Jak již bylo naznačeno, citovaný zákon rozděluje výše uvedené informační systémy, tj. ty, jež splňují podmínku elektronického vedení a současně jsou seznamem, rejstříkem nebo evidencí, na veřejné a neveřejné. Toto rozlišování je důležité nejenom z hlediska povinnosti, resp. oprávněnosti správců vydávat ověřené výstupy z takovýchto informačních systémů, ale též z hlediska osob, jež jsou oprávněny vydání příslušného výstupu požadovat.

Zatímco u informačních systémů veřejné správy, které jsou podle svého určení nebo podle zvláštního zákona veřejné, má právo požádat o výstup kdokoliv, vydávají z informačních systémů veřejné správy nebo jejich částí, které jsou neveřejnými evidencemi, rejstříky nebo seznamy, správci výstupy pouze, pokud tak stanoví zvláštní právní předpis, a to toliko na požádání osoby, které se zápis přímo týká, nebo která je podle zvláštního právního předpisu oprávněna žádat informaci uvedenou v zápisu, a to v rozsahu tímto zvláštním právním předpisem stanoveném.

Úpravu obsaženou v zákoně o informačních systémech veřejné správy tak lze zcela jednoznačně považovat za obecnou procesní úpravu. Tato právní úprava je proto esenciálně závislá na jednotlivých zvláštních zákonech upravujících ten který seznam, rejstřík nebo evidenci veřejné správy, neboť právě tyto speciální zákony musí umožnit vydávání ověřených výstupů z předmětných registrů veřejné správy, a to s přihlédnutím ke konkrétním požadavkům a podmínkám.

Zpřístupněné registry

[4] Viz ust. § 2 písm. c) zákona o informačních systémech veřejné správy.
[5] Viz ust. § 2 písm. d) zákona o informačních systémech veřejné správy.

V návaznosti na výše uvedené je vhodné na tomto místě zmínit usnesení vlády ze dne 20. 9. 2006, č. 1085, kterým vláda schválila soubor opatření pro urychlení rozvoje eGovernmentu v České republice. Citované usnesení mimo jiné uložilo ministrovi vnitra a informatiky zpracovat návrh zákona, který navrhne vytvoření jednotného univerzálního kontaktního místa občana s úřady a v počáteční fázi umožní občanům získat na tomto místě výpis z katastru nemovitostí, obchodního rejstříku, rejstříku trestů a živnostenského rejstříku (projekt CZECH POINT). Podstatou tohoto projektu je vytvoření *„sítě CZECH POINTů - Český Podací Ověřovací Informační Národní Terminál, tedy základních kontaktních míst, kde občan bude moci získat veškeré údaje, opisy a výpisy, které jsou vedeny v centrálních veřejných evidencích a registrech, získat veškeré údaje, opisy a výpisy, které jsou vedeny v centrálních neveřejných evidencích a registrech ke své osobě, věcem a právům, mít možnost ověřit dokumenty, listiny, podpisy a také provést konverzi dokumentů do elektronické formy, mít možnost podat jakékoli podání ke kterémukoli úřadu státní správy, mít možnost získat informace o průběhu řízení ve všech věcech, které k jeho osobě vede stát či jiné orgány veřejné moci.“*[6] Hlavním cílem tohoto projektu je především zjednodušení komunikace právnických a fyzických osob s orgány veřejné správy

Vládním usnesením požadovaný legislativní návrh byl vypracován, a to jako návrh zákona, kterým se mění zákon o informačních systémech veřejné správy. Tento návrh byl schválen jako zákon č. 269/2007 Sb. a v praxi představuje druhou velkou novelu zákona o informačních systémech veřejné správy, která se týká oblasti vydávání ověřených výstupů. Předmětný zákon pak v souladu s první fází projektu CZECH POINT zavedl vydávání ověřených výstupů z obchodního rejstříku, katastru nemovitostí, živnostenského rejstříku a z evidence Rejstříku trestů, tedy ze základních a v praxi nejvyužívanějších registrů veřejné správy.

V tomto směru bylo nezbytné doplnit příslušné zákony upravující poskytování údajů ze shora uvedených registrů veřejné správy o ustanovení, jež by umožňovala vydávání ověřených výstupů ve smyslu zákona o informačních systémech veřejné správy. Součástí navrhovaného zákona proto byly i novely čtyř dalších zákonů, které bezprostředně souvisí se změnami danými novelou zákona o informačních systémech veřejné správy. V případě obchodního rejstříku je tímto zákonem zákon č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů[7], poskytování údajů z živnostenského rejstříku upravuje zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění

[6] Viz Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 1. 3. 2007, PSP tisk 158/0. Obecná část. Bod 1. (Identifikační číslo ASPI LIT 29081CZ)
[7] Viz ust. § 28a zákona č. 513/1991 Sb., obchodního zákoníku, ve znění pozdějších předpisů.

pozdějších předpisů[8], dále se jednalo o zákon č. 344/1992 Sb., o katastru nemovitostí České republiky (katastrální zákon), ve znění pozdějších předpisů[9].

Mezi registry, z nichž jsou poskytovány ověřené výstupy figuruje též Rejstřík trestů jako typický neveřejný rejstřík. Do zákona č. 269/1994 Sb., o Rejstříku trestů, ve znění pozdějších předpisů, bylo nově vloženo ust. § 11a, které umožňuje předávání výpisů z Rejstříku trestů též subjektům oprávněným podle ust. § 9 odst. 2 zákona o informačních systémech veřejné správy k vydání ověřeného výstupu z informačního systému veřejné správy (tzv. „pověřené orgány")[10]. Výjimku v tomto směru tvoří držitel poštovní licence spolu s Hospodářskou komorou České republiky, neboť tito nejsou prozatím oprávněni vydávat ověřené výstupy z evidence Rejstříku trestů. Důvodem této výjimky je zejména citlivý charakter údajů poskytovaných z evidence Rejstříku trestů a požadavek na určitou nezbytnou úroveň jejich ochrany.

V souvislosti s touto novou právní úpravou, jejímž největším přínosem je podstatné rozšíření okruhu subjektů oprávněných k vydávání ověřených výstupů z evidence Rejstříku trestů, bylo s účinností od 1. 1. 2008 vyhověno návrhu, aby *„okresní státní zastupitelství nadále nebyla příslušná k dosavadní činnosti podle ust. § 11 zákona o Rejstříku trestů, tj. aby již neověřovala žádosti o výpis z evidence Rejstříku trestů za účelem přeposlání takové žádosti Rejstříku trestů k přímému vyřízení."* Důvodem byly zejména námitky státních zastupitelství o nesystémovosti výkonu této agendy, kdy poukazovaly na skutečnost, že primárně by státní zastupitelství mělo působit jako orgán veřejné žaloby v trestním řízení. Podle důvodové zprávy byla dále tato změna navržena s ohledem na skutečnost, že počet případů, kdy žadatel podá žádost u okresního státního zastupitelství za účelem jejího přeposlání Rejstříku trestů rapidně poklesne vzhledem k novým možnostem získat výpis u řady jiných subjektů přímo, a to v převážné většině případů na počkání. Důvodová zpráva v tomto směru taktéž zdůrazňovala, že je zapotřebí rovněž zohlednit tzv. „záměr snižování administrativní zátěže fyzických osob při řízeních nebo činnostech, při nichž je vyžadován výpis z evidence Rejstříku trestů za účelem doložení bezúhonnosti", který byl schválen usnesením vlády č. 855 ze dne 12. července 2006 a nalezl svůj odraz v návrhu zákona, kterým se mění zákon č. 269/1994 Sb., o Rejstříku trestů, ve znění pozdějších předpisů, jenž by měl nabýt účinnosti 1. 7. 2008. *„Cílem předkládané právní úpravy je, aby byl odstraněn dlouhodobě*

[8] Viz ust. § 60 odst. 7 zákona č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů.
[9] Viz ust. § 22a zákona č. 344/1992 Sb., o katastru nemovitostí České republiky (katastrální zákon), ve znění pozdějších předpisů.
[10] Podle ust. § 11a odst. 1 zákona o Rejstříku trestů je-li písemná žádost o výpis podle § 11 odst. 1 podána u notáře, krajského úřadu, obecního úřadu, matričního úřadu nebo zastupitelského úřadu, které jsou oprávněny podle zvláštního zákona k vydání ověřeného výstupu z informačního systému veřejné správy (dále jen "pověřený orgán"), ten, kdo žádost podal, obdrží výpis na počkání, pokud výslovně nepožádá o vyřízení žádosti postupem podle § 11 nebo není-li dále stanoveno jinak.

nepřijatelný stav, kdy fyzické osoby samy žádají o výpis z evidence Rejstříku trestů za účelem doložení bezúhonnosti pro účely správního řízení ve formě originálu výpisu nebo jeho ověřené kopie. Základním principem navrhované úpravy je legislativní zajištění přesunu povinnosti z fyzické osoby, která je účastníkem správního řízení, ve kterém je výpis vyžadován, na správní orgán, který vede příslušné správní řízení. Tak bude naplňována jedna ze základních zásad činnosti správních orgánů uvedená v ustanovení § 4 zákona č. 500/2004 Sb., správního řádu, že veřejná správa je službou veřejnosti. Pro jiné účely, např. kdy se fyzická osoba uchází o zaměstnání a prokazuje svou bezúhonnost výpisem před vznikem pracovněprávního vztahu nebo obdobného vztahu, zůstává tato povinnost na fyzické osobě opatřit si dosavadním způsobem výpis z evidence Rejstříku trestů. Vedle odbřemenění fyzické osoby coby účastníka správního řízení se projeví další nezanedbatelný efekt, a to je nemožnost padělání výpisů z evidence Rejstříku trestů. Snížení možnosti vzniku padělků je velkým sekundárním přínosem navrhované právní úpravy s ohledem na skutečnost, že výpis z Rejstříku trestů je jedním z nejčastěji požadovaných dokladů a Rejstřík trestů jich ročně vydá téměř jeden milion. S rozvojem úrovně xerografických technologií a jejich snadnou dostupností v posledních letech prudce stoupá i počet padělků. Vedle preventivní funkce, kdy se zamezí možnosti padělání, se zároveň zamezí i možnosti vzniku a fungování korupčního prostředí a v neposlední řadě dojde i k vyloučení zneužití ztracených nebo odcizených dokladů při podávání žádosti o výpis z evidence Rejstříku trestů."[11]

Pověřené subjekty

Bližší vymezení subjektů, které ověřují a ověřené výstupy z informačních systémů veřejné správy[12] na žádost vydávají lze nalézt v ust. § 9 odst. 2 zákona o informačních systémech veřejné správy. *„Kromě orgánů veřejné správy, které jsou správci nebo provozovateli příslušných informačních systémů veřejné správy, vstupují do procesu vydávání důležitých dat z informačních systémů veřejné správy také jiné subjekty za účelem přiblížení těchto činností co nejvíce k občanovi."*[13] Patří mezi ně:

- krajské úřady (tj. 14 krajských úřadů),
- matriční úřady[14],
- obecní úřady, úřady městských částí nebo městských obvodů územně členěných statutárních měst a úřady městských částí hlavního města Prahy, jejichž seznam stanoví prováděcí právní

[11] Důvodová zpráva k návrhu zákona, kterým se mění zákon č. 269/1994 Sb., o Rejstříku trestů, ve znění pozdějších předpisů ze dne 18. 7. 2007, PSP 281/0. Obecná část.

[12] Na tomto místě je vhodné poznamenat, že výstupem z informačního systému veřejné správy není pouze výpis podle ust. § 9 odst. 1 citovaného zákona, ale také potvrzení o tom, že určitý údaj v informačním systému veřejné správy není v elektronické podobě označené elektronickou značkou správce.

[13] Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 27. 1. 2005, PSP tisk 837/0. Zvláštní část, k bodu 45 a 46. (Identifikační číslo ASPI LIT 25714CZ)

[14] Seznam matričních úřadů je obsažen ve vyhlášce Ministerstva vnitra č. 207/2001 Sb., kterou se provádí zákon č. 301/2000 Sb., o matrikách, jménu a příjmení a o změně některých souvisejících předpisů, ve znění pozdějších předpisů.

předpis, ale také

- zastupitelské úřady stanovené prováděcím právním předpisem,
- notáři,
- držitel poštovní licence podle zákona č. 29/2000 Sb., o poštovních službách a o změně některých zákonů, ve znění pozdějších předpisů, (tj. státní podnik Česká pošta a jeho pracoviště) a
- Hospodářská komora České republiky (tj. 43 kontaktních míst).[15]

V této souvislosti považujeme za nezbytné zdůraznit, že původní okruh subjektů, které mohly vydávat ověřené výstupy z informačních systémů veřejné správy, byl novelou provedenou zákonem č. 81/2006 Sb. omezen toliko na poslední tři jmenované subjekty, a dále na obecní úřady obcí s rozšířenou působností a obecní úřady, úřady městských částí nebo městských obvodů územně členěných statutárních měst a úřady městských částí hlavního města Prahy, jejichž seznam stanovil prováděcí právní předpis, konkrétně prováděcí vyhláška vydaná Ministerstvem vnitra. Celkem se jednalo o zhruba 400 obecních úřadů. Tento stav byl však hodnocen negativně, neboť velmi nízký počet zejména zapojených obecních úřadů nebyl schopen umožnit žadatelům snadný přístup k ověřeným výstupům z informačních systémů veřejné správy[16] a ztrácel se proto smysl spočívající v jednoduché dostupnosti těchto výstupů.

Tento nežádoucí stav byl však odstraněn, stalo se tak prostřednictvím zákona č. 269/2007 Sb., který okruh subjektů příslušných k ověřování a vydávání ověřených výstupů z informačních systémů veřejné správy rozšířil či jak uvádí jeho důvodová zpráva[17] „redefinoval“. Kromě původních subjektů, kterými i nadále zůstali notáři, držitel poštovní licence a Hospodářská komora České republiky, byla úprava rozšířena o všechny krajské úřady a matriční úřady; obecní úřady, úřady městských částí nebo městských obvodů územně členěných statutárních měst a úřady městských částí hlavního města Prahy, jejichž seznam stanoví prováděcí právní předpis; a dále o zastupitelské úřady stanovené rovněž prováděcím právním předpisem.

Tímto prováděcím právním předpisem je v současnosti vyhláška Ministerstva vnitra č. 388/2007 Sb., kterou se stanoví seznam obecních úřadů a seznam zastupitelských úřadů, které vydávají ověřené

[15] Aktuální přehled zapojených obecních úřadů lze nalézt na webových stránkách www.czechpoint.cz, jakož i příslušná pracoviště Hospodářské komory České republiky a České pošty, s. p.
[16] Viz Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 1. 3. 2007, PSP tisk 158/0. Obecná část. (Identifikační číslo ASPI LIT 29081CZ)
[17] Viz Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 1. 3. 2007, PSP tisk 158/0. Obecná část. Bod 2. (Identifikační číslo ASPI LIT 29081CZ)

výstupy z informačních systémů veřejné správy, ve znění pozdějších předpisů. Jak již z názvu této vyhlášky vyplývá, byla zvolena cesta jediného prováděcího předpisu, který současně stanoví seznam obecních úřadů a úřadů městských částí nebo městských obvodů územně členěných statutárních měst a seznam zastupitelských úřadů, které vydávají ověřené výstupy z informačních systémů veřejné správy. V případě zastupitelských úřadů se v současnosti jedná pouze o velvyslanectví v Berlíně, Bratislavě, Tel Avivu, Varšavě, Vídni a ve Washingtonu a generální konzulát v Drážďanech.

V souladu se smyslem vydávání ověřených výstupů z informačních systémů veřejné správy prostřednictvím obecních úřadů a dalších subjektů vymezených shora citovaným zákonem a s cíli sledovanými usnesením vlády ze dne 20. 9. 2006, č. 1085, kterým vláda schválila soubor opatření pro urychlení rozvoje eGovernmentu v České republice, se tak podle důvodové zprávy významným způsobem rozšířil počet úřadů, u nichž je možné si vyžádat ověřené výstupy z informačních systémů veřejné správy.[18]

O tom, že projekt Czechpoint a s ním spojené vydávání ověřených výstupů z informačních systémů veřejné správy, nezůstal nepovšimnut ze strany široké veřejnosti svědčí zejména počty vydaných výstupů. Zatímco bylo během zkušebního a počátečního provozu v průběhu roku 2007 vydáno celkem 53 861 ověřených výstupů, byl počet vydaných výstupů za první tři měsíce roku 2008 (tj. od počátku doku 2008 do 26. 3. 2008) několikanásobně vyšší. Konkrétně se jednalo o 201 258 ověřených výstupů, z nichž největší část tvoří výstupy z evidence Rejstříku trestů (cca 60% z celkového počtu vydaných výstupů).

Zda se se zájmem veřejnosti setkají i další novinky projektu Czechpoint plánované na rok 2008, jako například žádosti o živnosti, výpisy z registru bodů řidiče či hlášení matričních událostí do evidence obyvatel, zůstává prozatím otázkou. Cesta k hlavnímu cíli projektu, který výstižně vyjadřuje heslo „Obíhat musí data, ne občan!“, byla proto teprve započata.

Literatura:

[1] Zákon č. 365/2000 Sb., o informačních systémech veřejné správy a o změně některých dalších zákonů, ve znění pozdějších zákonů (dále též „zákon o informačních systémech veřejné správy“).

[2] Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 27. 1. 2005, PSP tisk 837/0. (Identifikační číslo ASPI LIT 25714CZ)

[18] Srovnej Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 1. 3. 2007, PSP tisk 158/0. Obecná část. Bod 2. (Identifikační číslo ASPI LIT 29081CZ)

[3] Důvodová zpráva k návrhu zákona, kterým se mění zákon o informačních systémech veřejné správy ze dne 1. 3. 2007, PSP tisk 158/0. (Identifikační číslo ASPI LIT 29081CZ)

[4] Důvodová zpráva k návrhu zákona, kterým se mění zákon č. 269/1994 Sb., o Rejstříku trestů, ve znění pozdějších předpisů ze dne 18. 7. 2007, PSP 281/0.

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THE INSTITUTION OF GOOD ADMINISTRATION IN THE COUNCIL OF EUROPE

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"The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."[1] "Greater unity between its members" – the aim of the Council of Europe may be furthered in a range of different ways. Article 1 of the Statute of the Organization makes specific reference to the Council of Europe's mission in maintaining and promoting human rights and fundamental freedoms as a way of achieving this "greater unity". Administrative procedure requires common European regulation by all means, as this is that special field of law by which the administrative body directly meets the citizens. Consequently these cases carry danger that fundamental rights of citizens may be impaired – its occurrence in a constitutional state is undeniably not desirable by any means. Considering the present national administrative systems, the administrative official procedural law is being emphasized. Main tendencies in practice are to constrain the executive power of the state within constitutional frame of law and to guarantee gradually expand the fundamental rights of citizens, establishing the "good administration". Regarding the European administrative law, does European administrative procedural law exist at all? What forms and levels of standardization can be expected? The answer can be given through the documents of the Council of Europe achieved in this field of law.

Before turning our attention to this process, we have to clarify the meaning of good administration. The expression has become somewhat fashionable and appears in various instruments both in European and in national level, but different authors give different definitions. According to Theodor Fortsakis, "the principle of good administration is at once a long-standing idea and a ground-breaking one. Its specific content has gradually been nurtured within the framework of the long-established concept of user protection and this principle, enshrined and elaborated on in various instruments and European case-law, now stands as one of the cornerstones of modern administrative law."[2] Good administration (some call as useful administration) means that "administrative bodies have a duty to exercise the powers and responsibilities vested in them by existing laws and regulations, by drawing on the

[1] Statute of the Council of Europe, Chapter I, Article 1.
[2] Theodore Fortsakis: Principles governing good administration. European Public Law, Volume 11, Issue 2. Kluwer Law International, 2005. p. 207.

prevailing concept of law, in such a way as to avoid an overly rigid application of the statutory provisions. In other words, not only must they avoid any unfair doctrinal approach but they must also endeavor to adapt the legal rules to social and economical realities."[3] The principle has an ambivalent function, "on the one hand, it acts as an umbrella, under which separate rules are clustered together around a common, guiding idea, namely the idea of good administration; […] on the other hand, it can itself serve as a springboard for specific new rules relating to the same idea."[4] The first interpretation is affirmed by Klara Kanska, who says that "the notion 'good administration' developed as an umbrella principle, comprising an open-ended source of rights and obligations".[5]

The way to good administration

The Council of Europe started its work in the sphere of administrative law quite early, in 1977 when its first resolution on protection of the individual in relation to the acts of administrative authorities was issued.[6] The ideological basis of the document was the ever-increasing importance of public administrative activities. Public authorities, in addition to their traditional task of safeguarding law and order, have been increasingly engaged in a vast variety of actions aimed at ensuring the well-being of the citizens and promoting the social and physical conditions of society. This development resulted in the individual being more frequently affected by administrative procedures. Consequently, efforts were undertaken in the various states to improve the individual's procedural position vis-à-vis the administration with a view to adopting rules which would ensure fairness in the relations between the citizen and the administrative authorities.

For this reason, in its resolution the Council of Europe worked out five principles: right to be heard, access to information, assistance and representation, statement of reasons and indication of remedies. These five principles can be considered as the very first step towards good administration which means a part of the protection of the individual's fundamental rights and freedoms, which is one of the principal tasks conferred on the Council of Europe by its Statute. The resolution was later followed by many other resolutions and recommendations by the Council of Europe defining more and more substantial requirements regarding administration and administrative law, but the result of the systematic work was not gathered into one document.[7]

[3] Fortsakis, p. 209.
[4] Fortsakis, p. 211.
[5] Klara Kanska: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. European Law Journal, Vol. 10. No. 3. Blackwell Publishing Ltd. 2004. p. 305.
[6] Resolution (77) 31 on protection of the individual in relation to the acts of administrative authorities (Adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies)
[7] See for example:

In 2003, Parliamentary Assembly carried out a recommendation[8] in which it urged the member states to create the institution of ombudsman at national level where it does not already exist. In this document the Parliamentary Assembly stated that the governments of Council of Europe member states should adopt at constitutional level an individual right to good administration following the drafting of a model text by the Committee of Ministers and they also should adopt and implement fully a code of good administration, to be effectively publicized so as to inform the public of their rights and legitimate expectations. The Assembly further recommended that the Committee of Ministers draft a model text for a basic individual right to good administration as well as draft a single, comprehensive, consolidated model code of good administration, deriving in particular from Committee of Ministers Recommendation No. R (80) 2 and Resolution (77) 31 and the European Code of Good Administrative Behaviour, with the involvement of the appropriate organs of the Council of Europe – in particular the Commissioner for Human Rights and the European Commission for Democracy through Law, as well as the Assembly – and in consultation with the European Ombudsman, thus providing elaboration of the basic right to good administration so as to facilitate its effective implementation in practice.

The Committee of Ministers fortunately took this advice and began to drift a model code of good administration. Finally, in 2007 this process led to a substantive document declaring the necessity of the institution of good administration and ruling its regulations. In the foreword the document refers to all the other recommendations made by the Council of Europe on the field of European administrative law mentioned above, and not only mentioned them but successfully incorporated their achievements as well.

The recommendation on good administration[9]

In its preamble the Recommendation underlines the facts that the administration exercises its prerogative of public power to carry out the tasks required of it; these powers might however, if used in

- Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities (Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies)
- Recommendation No. R (84) 15 of the Committee of Ministers to member states relating to public liability (Adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers' Deputies)
- Recommendation Rec (2003) 16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (Adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
- Recommendation Rec (2004) 20 of the Committee of Ministers to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

[8] Recommendation 1615 (2003) The institution of ombudsman

[9] Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration (Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies) (hereafter referred as "Recommendation")

an inappropriate or excessive manner, infringe the rights of private persons. That is why it is desirable to combine the various recognized rights with regard to the public authorities into a right to good administration and to clarify its content, following the example of the Charter of Fundamental Rights of the European Union. Good administration must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible. On this basis, the Council of Europe recommends that the governments of the member states promote good administration within the framework of the principles of the rule of law and democracy and through the organisation and functioning of public authorities ensuring efficiency, effectiveness and value for money. The Assembly considered that the requirements of a right to good administration may be reinforced by a general legal instrument; that these requirements stem from the fundamental principles of the rule of law. For this reason, an appendix was attached to the Recommendation, called the Code of good administration which contains a number of important principles. Now, turn our attention to the principles listed in the Recommendation! The Code is divided into three sections as seen in the followings.

Section I – Principles of good administration

In this section, the Recommendation deals with the very basic principles of law, such as lawfulness, equality before the law, impartiality, proportionality, legal certainty, reasonable time, participation, respect for privacy and transparency. According to the Recommendation, public authorities shall act *in accordance with the law*. Public authorities shall act in accordance with rules defining their powers and procedures laid down in their governing rules and exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred. The Recommendation declares that public authorities shall act in accordance with the *principle of equality*. They shall treat private persons who are in the same situation in the same way and not discriminate between private persons on grounds such as sex, ethnic origin, religious belief or other conviction. Any difference in treatment shall be objectively justified. Public authorities shall act in accordance with the principle of *impartiality*. They shall act objectively, having regard to relevant matters only and not act in a biased manner. They also shall ensure that their public officials carry out their duties in an impartial manner, irrespective of their personal beliefs and interests. According to the Recommendation, public authorities shall act in accordance with the principle of *proportionality*. They shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued. When exercising their discretion, they shall maintain a proper balance between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive.

Public authorities shall act in accordance with the principle of *legal certainty*. They may not take any retroactive measures except in legally justified circumstances and shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest. It may be necessary in certain cases, in particular where new obligations are imposed, to provide for transitional provisions or to allow a reasonable time for the entry into force of these obligations.

Public authorities shall act and perform their duties within a *reasonable time*. Unless action needs to be taken urgently, public authorities shall provide private persons with the opportunity through appropriate means to *participate* in the preparation and implementation of administrative decisions which affect their rights or interests. The Recommendation states that public authorities shall have *respect for privacy*, particularly when processing personal data. When public authorities are authorized to process personal data or files, particularly by electronic means, they shall take all necessary measures to guarantee privacy. The Recommendation declares that public authorities shall act in accordance with the principle of *transparency*. They shall ensure that private persons are informed, by appropriate means, of their actions and decisions which may include the publication of official documents; they shall respect the rights of access to official documents according to the rules relating to personal data protection. The principle of transparency does not prejudice secrets protected by law.

Section II – Rules governing administrative decisions

In this section, we can find principles relating only to administrative law and administrative decisions, as right to be heard, form and publication of administrative decisions or execution of administrative decisions. As for the Recommendation, administrative decisions can be taken by public authorities either on their own initiative or upon *request* from private persons. Private persons have the right to request public authorities to *take individual decisions* which lie within their competence. When such a request is made to an authority lacking the relevant competence, the recipient shall forward it to the competent authority where possible and advise the applicant that it has done so. All requests for individual decisions made to public authorities shall be acknowledged with an indication of the expected time within which the decision will be taken, and of the legal remedies that exist if the decision is not taken. If a public authority intends to take an individual decision that will directly and adversely affect the rights of private persons, and provided that an opportunity to express their views has not been given, such persons shall, unless this is manifestly unnecessary, have an *opportunity to express their views* within a reasonable time and in the manner provided for by national law, and if necessary with the assistance of a person of their choice. If a public authority proposes to take a non-regulatory

decision that may affect an indeterminate number of people, it shall set out procedures allowing for their *participation in the decision-making process*, such as written observations, hearings, representation in an advisory body of the competent authority, consultations and public enquiries. Those concerned in these procedures shall be clearly informed of the proposals in question and given the opportunity to express their views fully.

According to the Recommendation, administrative decisions shall be *phrased* in a simple, clear and understandable manner. Appropriate reasons shall be given for any individual decision taken, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights. Administrative decisions shall be *published* in order to allow those concerned by these decisions to have an exact and comprehensive knowledge of them. Publication may be through personal notification or it may be general in nature. Those concerned by individual decisions shall be personally notified except in exceptional circumstances where only general publication methods are possible. In all cases, appeal procedures including time limits shall be indicated. Administrative decisions *shall not take effect retroactively* with regard to a date prior to their adoption or publication, except in legally justified circumstances. Except in urgent cases, administrative decisions shall not be operative until they have been appropriately published. Public authorities shall be responsible for the *execution of administrative decisions* falling within their competence. Public authorities shall allow private persons a reasonable time to perform the obligations imposed on them, except in urgent cases where they shall duly state the reasons for this. Enforced execution by public authorities shall be expressly prescribed by law. Private persons subject to the execution of a decision are informed of the procedure and of the reasons for it. Enforced execution measures shall be proportionate.

Section III – Appeals

Private persons shall be entitled to seek, directly or by way of exception, a *judicial review* of an administrative decision which directly affects their rights and interests. Administrative appeals, prior to a judicial review, shall, in principle, be possible. They may, in certain cases, be compulsory. They may concern an appeal on merits or an appeal on the legality of an administrative decision. Private persons shall not suffer any prejudice from public authorities for appealing against an administrative decision. Public authorities shall provide a remedy to private persons who suffer damages through unlawful administrative decisions or negligence on the part of the administration or its officials. Before bringing actions for *compensation* against public authorities in the courts, private persons may first be required to submit their case to the authorities concerned. Court orders against public authorities to provide

compensation for damages suffered shall be executed within a reasonable time. It shall be possible, where appropriate, for public authorities or private persons adversely affected to issue legal proceedings against public officials in their personal capacity.

Conclusions

Having subscribed to the European Convention on Human Rights, Council of Europe member states have agreed to respect certain principles which therefore govern the relationship of their authorities with private persons, including in the branch of administrative law. Those principles have been further refined in several conventions and various recommendations and resolutions which were adopted unanimously by the Council of Europe Committee of Ministers and which, thus, reflect the standards applicable in member states in pursuance of their devotion to the Rule of Law as expressed in the Statute of the Organisation. As regards the significance and practical impact of Council of Europe Recommendations and Resolutions, it is important to observe the following: contrary to conventions which states may have ratified, recommendations and resolutions have no legally binding effect on the states and governments. They do have, however, a moral and political effect on them. This effect stems from two facts: first of all, it is difficult, albeit possible, for a government to totally ignore for a long period of time certain standards to which all or most of the other democratic states of the region pledge commitment; moreover, there can be an obvious problem with a government's good faith in case a government itself is among those who have not only participated in the negotiations of a text, but also voted for its adaptation in the form of a recommendation, if such government later on refuses to conform to its own appeal.[10]

Fortunately, it seems so that the European legislator now focuses "not just on specific administrative acts, but also on the administrative procedures themselves. In other words, there has been a shift in emphasis from the outcome of administrative action (result) to the administrative behavior (functioning)."[11] And at the end of this process, "the principle of good administration could be to administrative law what 'good governance' and 'good legislation' are to international law."[12]

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NÁLEŽITOSTI A SPECIFIKA PRACOVNÍ SMLOUVY V NĚMECKU

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Abstrakt

Příspěvek pojednává především o podstatných náležitostech a specifících německé pracovní smlouvy a seznamuje čtenáře s její právní úpravou s ohledem na právo EU. Rovněž se zabývá porovnáním české právní úpravy pracovní smlouvy s německou a poukazuje na nejpodstatnější a nejdůležitější vzájemné odchylky. Závěrem nastiňuje největší problémy a nedostatky z oblasti pracovněprávních vztahů, které je třeba v Německu v této oblasti řešit.

Klíčová slova

Pracovní smlouva, pracovní právo, smluvní volnost, pracovněprávní vztahy, zaměstnanec, zaměstnavatel, zákon, zákoník práce, zákon, směrnice, kolektivní smlouva, podniková dohoda, pracovní trh, pracovní doba, práce přesčas, odměna za práci, zkušební doba, výpověď, výpovědní lhůta, výpovědní důvod, princip subsidiarity.

Abstract

The contribution deals with the essential terms and specifics of german employment contract and informs readers about its legal regulations with regard to EU law. It is also concerned with the comparison of czech employment contract with the german one and shows the most essential and important mutual changes and divergences. Last it outlines the biggest main drawbacks and problems from the area of labour-law regulations which should be solved in Germany.

Key words

Employment contract, labour law, liberty of contract, labour-law regulations, employee, employer, law, codex of law, directive, collective agreement, company agreement, labour market, working time, overtime work, remuneration for work, probation, notice, terms of notice, reasons of notice, principle of subsidiarity**.**

Pracovní právo má obzvláště dnes v době globalizace a rozsáhlé liberalizaci trhů důležitou funkci pro volbu místa podnikání a místa výkonu povolání. Z pohledu zaměstnavatele i zaměstnance je Evropa jeden velký pracovní trh, který poskytuje možnosti realizace a uplatnění na různých úrovních. Vztahy mezi zaměstnavatelem a zaměstnancem v rámci pracovního trhu musí však být nějakým způsobem právně regulovány. Evropské pracovní právo není však prostředkem, který by komplexně oblast pracovněprávních vztahů reguloval. Evropské pracovní právo není dosud ustálený standardní pojem a tvoří ho do určité míry právo základních svobod. Je třeba ho však chápat také i jako součást sociální politiky. Hlavním posláním evropského zákonodárství je harmonizace obsahů jednotlivých úprav pracovního práva. Jedná se o tvorbu směrnic, které obsahují jakási pravidla pro zajištění samostatných národních úprav stanovením minimálního standardu, nad jehož rámec mají jednotlivé členské státy volnost v tvorbě právních úprav, jen pokud jsou tyto pro zaměstnance vhodnější. Evropská unie vychází sice z ochranné funkce pracovního práva a stanoví jakýsi základní rámec pro fungování pracovněprávních vztahů, *pracovní právo* je však především *v působnosti členských států* a *sociálních partnerů* a mezi státy navzájem se *výrazně liší.* Pracovní právo EU rovněž neupravuje *vznik, změnu ani skončení pracovního poměru* a ponechává tuto oblast kompetenci jednotlivých členských států.

Zvláštní postavení pak v oblasti pracovního zákonodárství bezesporu zaujímá právo zaměstnance na *obdržení informací souvisejících s jeho pracovním poměrem.* Z tohoto důvodu dne 14.10.1991 byla přijata směrnici Rady č. 91/533/EC, která stanoví zaměstnavatelům povinnost informovat zaměstnance o podmínkách souvisejících s pracovní smlouvou nebo pracovněprávním vztahem, a která byla přejata do právních řádů jednotlivých členských států EU. [1] V jednotlivých členských státech Evropské Unie lze tedy v současné době najít požadavek na minimální obsahové náležitosti, které musí být uvedeny v pracovních smlouvách, a pokud jde o ostatní pracovněprávní pojmy, ty jsou pak jejich interní záležitostí.

V návaznosti na minimální jednotné obsahové požadavky je tedy v souladu s právem EU zaměstnavateli stanovena povinnost písemně sdělit zaměstnanci ve lhůtě 1 měsíce od vzniku pracovního poměru *podstatné podmínky pracovního poměru*, k nimž náleží především uvedení :

- *Jména a adresy (sídla) smluvních stran*
- *Místo, kde bude práce vykonávána,*
- *Popis pracovní pozice*
- *Datum vzniku pracovního poměru a ustanovení o tom, zda se jedná o pracovní poměr na dobu určitou nebo neurčitou*

[1] Neumann, Daniela. Europäisches Arbeitsrecht. München : Sellier. European Law Publishers, 2003, s. 386-396 ISBN 3-935808-16-x

- *Ustanovení týkající se pracovní doby a mzdové podmínky, včetně lhůty splatnosti*
- *Výpovědní doba.*

Samotná úprava pracovněprávních vztahů je tedy v kompetenci každého jednotlivého členského státu EU dle vlastních specifických požadavků a potřeb a může se odlišovat ve způsobu regulace, a to již tím, že existují země jako je Česká republika, Slovensko, Polsko, Maďarsko apod., kde oblast pracovního práva je regulována jednotným zákoníkem práce a naopak země jako Velká Británie a Irsko, kde takový jednotný právní předpis neexistuje. A právě i ***Německo,*** jehož *právní úpravě pracovní smlouvy* je tento příspěvek věnován, patří ke druhé výše zmiňované skupině zemí vzhledem k tomu, že zde do dnešního dne neexistuje jednotný zákoník práce, který by komplexně reguloval oblast pracovního práva. V důsledku toho právní úprava ***německé*** *pracovní smlouvy* vychází poněkud z jiného základu než je tomu u české pracovní smlouvy. Německé pracovní právo na rozdíl od práva českého je upraveno řadou zákonů (např. *Zákonem o pracovní době, Zákonem o domácí práci, Zákonem na ochranu mladistvých při zaměstnání, Občanským zákoníkem – BGB, Zákonem na ochranu matek, Spolkovým zákonem o dovolené* apod.) a pracovněprávní ustanovení lze najít v mnoha zákonech v rámci spolkové a zemské legislativy. Pracovní smlouvy nejsou v této zemi uzavírány na základě pracovněprávních předpisů jako je tomu v *České republice*, nýbrž na základě německého *občanského zákoníku* (§ 611 a násl. BGB), a to konkrétně dle ustanovení týkající se tzv. *služební smlouvy*. [2] Vznik pracovní smlouvy je pak vázán souhlasným projevem obou smluvních stran o výkonu práce zaměstnance a jejím počátku pro zaměstnavatele. Zaměstnavatelem mohou být fyzické osoby i právnické osoby. Právo pak rozlišuje právnické osoby soukromého práva a právnické osoby veřejného práva. Ústředním pojmem pracovního práva nicméně zůstává zaměstnanec, neboť jen ten, kdo je zaměstnancem spadá do rozsahu platnosti pracovního práva. Pojem *zaměstnance* je tedy v *německé* právní úpravě pojímán poněkud jinak než v *české*, protože za zaměstnance nejsou zde považováni důchodci, školu navštěvující mládež a studenti, osoby konající svobodná povolání, živnostníci, úředníci, vojáci, soudci, jejich postavení je totiž předmětem úpravy veřejného práva. Zaměstnanci mohou být pak dělníci (Arbeiter) a zaměstnanci (Angestellter). Zaměstnancem (Angestellter) je ten, kdo vykonává převážně duševní činnosti, dělníkem (Arbeiter) pak ten, kdo vykonává převážně činnost tělesnou. Základem pracovního vztahu je *soukromoprávní smlouva*, na jejímž základě vzniká pracovní vztah. Irrelevantní je z tohoto pohledu datum skutečného nástupu do práce. Pro pracovní smlouvy v Německu obecně platí, že *nemusí* mít určitou *formu*, takže mohou být uzavřeny i *ústně.* K uzavření platné německé pracovní smlouvy *není tedy vyžadována písemná forma*, nicméně je však kladen požadavek na to, aby nejpozději ve lhůtě jednoho měsíce od vzniku pracovního poměru byly v písemné formě zaznamenány podstatné

[2] Arbeitsgesetze. München : DT Verlag GmbH & Co. KG, 2002, s. 38-39 ISBN 3-423-05006-3

podmínky vzniklého pracovního poměru, což je v souladu s právem EU. V tarifních smlouvách je však písemná forma (§ 127 BGB) často předepsána, přičemž některé tarifní smlouvy jsou pravidelně prohlašovány za všeobecně závazné. Obzvláště pokud je podnik členem svazu zaměstnavatelů, je nutné tuto tarifní smlouvu převzít. Další podmínkou platnosti pracovní smlouvy v této zemi ještě je, aby v zásadě neodporovala dobrým mravům.

I když dispoziční volnost smluvních stran pracovněprávního vztahu je v Německu omezena řadou zákonů a předpisů pracovního práva (*Zákon o ochraně práce z 7. 8. 1996 - Arbeitsschutzgesetz, Zákon o pracovní době z 6. 6. 1994 „Arbeitszeitgesetzt"* [3] apod.), samotná konečná podoba pracovní smlouvy je ponechána na vůli smluvních stran pracovněprávního vztahu, neboť neexistuje zde žádný závazný právní předpis, který by ji upravoval (§ 105 GewO). Dispoziční volnost je pak omezená např. v takových případech jako je přesčasová práce, kdy zaměstnavatel je oprávněn zaměstnanci nařídit nejvíce 10 hodin práce přesčas týdně, a to za předpokladu dodržení dostatečného časového předstihu (čtyři dny před jejím počátkem, ve výjimečných případech nejméně dvě hodiny). Obecně lze tedy říci, že povolený obsah pracovní smlouvy nachází tedy své hranice v kogentních ustanoveních platných právních předpisů a tarifních smlouvách. V ostatním může být obsah pracovní smlouvy pak upraven svobodně.

Německé pracovní právo vyžaduje, aby v pracovní smlouvě byla vymezena doba, na kterou má být tato uzavřena. Pracovní smlouvu lze pak uzavřít jak na dobu *neurčitou,* tak na dobu *určitou*, přičemž sjednání doby určité musí být vždy natolik jednoznačné, aby nevedlo k pochybnostem. V případě, že by totiž tomu tak nebylo, byl by tento pracovní poměr pokládán za pracovní poměr na dobu neurčitou. Zároveň pro pracovní poměry na dobu určitou je především typická písemná forma, která je bezesporu vhodnější již z hlediska průkaznosti. Pracovní smlouvu na dobu určitou je zde možné uzavřít až na dobu dvou let a odůvodnění takového časového omezení není vyžadováno. Pracovní smlouvy uzavřené na dobu určitou mohou pak být uzavřeny jak z hlediska věcného důvodu anebo bez věcného důvodu. Pro pracovní poměr uzavřený na dobu určitou v Německu dále platí, že pokračuje-li zaměstnanec po uplynutí sjednané doby i nadále v pracovní činnosti s vědomím zaměstnavatele (§ 625 BGB), je tento pracovní poměr změněn na pracovní poměr na dobu neurčitou. Německé právní předpisy rovněž nepřipouští, aby bylo uzavíráno několik pracovních smluv na dobu určitou po sobě, aby pak každá z nich splňovala podmínky na maximální délku doby trvání 2 let. Pro počáteční běh pracovního poměru v *Německu* je běžně sjednávána *zkušební doba*, která činí maximálně šest měsíců, přičemž není v rozporu s právními předpisy, pokud je i kratší. Dle mnoha tarifních smluv je většinou

[3] Arbeitsschutzgesetze 2004. München : Verlag C.H.Beck, 2004, s. 1-15, 201-212, ISBN 3-406-51624-6

kratší doby trvání. Ve zkušební době může být pak pracovní poměr vypovězen během dvou týdnů, což je specifikum, které česká právní úprava nezná.

V *německé* pracovní smlouvě musí být tedy každopádně uvedena i pracovní doba, přičemž konkrétní úpravu pracovní doby stanoví *tarifní smlouva*, *podniková dohoda* nebo *individuální pracovní smlouva*. *Tarifní smlouvu* v Německu upravuje samostatný zákon (Tarifvertragsgesetzt z 25.8.1969, TVG) [4] a představuje smlouvu uzavřenou mezi stranami tarifní smlouvy, jejímž obsahem jsou právní normy, které upravují obsah, uzavření a skončení pracovního poměru, jakož i podnikové otázky a otázky týkající se statutu podniku (normativní část). Obsahem této smlouvy jsou i právní normy, které vymezují také i práva a povinnosti jejich smluvních stran (závazková část). Tarifní smlouvy tedy obsahují taková ustanovení, která upravují mzdu/plat a jejich výši, pracovní dobu, nárok na dovolenou, pracovní podmínky, vznik a skončení pracovního poměru, odchylné výpovědní lhůty, konkretizaci pracovněprávních dodatečných povinností, oznámení a prokázání pracovní neschopnosti apod. Ke smluvním stranám tarifní smlouvy náleží především zaměstnavatel, svazy zaměstnavatelů na straně jedné a odbory (zájmu zaměstnanců) na straně druhé. Tarifní smlouva je v Německu použitelná na pracovní poměr jen tehdy, patří-li podnik do příslušného sektoru (svazu) co do oboru a oblasti a pokud obě smluvní strany tarifní smlouvy jsou členy jednoho takového svazu (zaměstnavatel členem svazu zaměstnavatelů, zaměstnanec členem odpovídajících odborů). Tarifní smlouvy vyžadují ke své platnosti vždy písemnou formu. V Německu tarifní smlouvou vázaní zaměstnavatelé zacházejí se svými zaměstnanci stejně bez ohledu na skutečnost, zda jsou členy odborů či ne. Všechny tarifní smlouvy jsou v Německu registrovány v příslušném registru těchto smluv. Ve Švýcarsku jsou tyto smlouvy označovány jako *Gesamtarbeitsvertag* a v Rakousku jako *Kollektivvertag*, přičemž v Německu za smlouvu s tímto označením jsou většinou označovány ujednání mezi zákonnými zdravotními pojišťovnami a asociací sdružující smluvní lékaře pojišťoven, jejichž předmětem je odměňování smluvních lékařů. Pokud jde o *podnikové dohody*, tak ty na rozdíl od tarifních smluv, jsou uzavírány jako podniková ujednání podnikovými smluvními stranami, podnikovou radou a jednotlivým zaměstnavatelem v případě absence tarifní smlouvy anebo v případě, kdy určitá ustanovení nejsou v tarifní smlouvě upravena (např. pracovní podmínky, odměňování), popř. mohou i mimo jiné konkretizovat její úpravu. Nutno však podotknout, že pracovní doba není v Německu koncipována jako stanovená týdenní pracovní doba, zákon (Arbeitszeitgesetz z 6.6.1994, ArbZG) [5] pouze stanoví, že pracovní doba zaměstnance nesmí překročit 8 hodin denně, může však být prodloužena až na 10 hodin denně, pokud v rámci 6 kalendářních měsíců nebo v rámci 24 týdnů nepřekročí v průměru 8 hodin

[4] Arbeitsgesetze. München : DT Verlag GmbH & Co. KG, 2002, s. 548-552, ISBN 3-423-05006-3

[5] Arbeitsgesetze. Arbeitszeitgesetz vom 6. Juni 1994. München: Beck-texte im dtv. 2002, s. 330-333 ISBN 3-423-05006-3

denně. Prodloužení pracovní doby na 10 hodin denně je možné pouze prostřednictvím tarifní smlouvy, podnikové dohody nebo kde takové úpravy dosud chybí, pak na základě povolení příslušného úřadu živnostenského dozoru. K práci přesčas je zaměstnanec zásadně povinen pouze byla-li tato předtím předmětem dohody se zaměstnavatelem. Výjimečně musí zaměstnanec konat práce přesčas i při neexistenci takové dohody, pokud je výkon této práce nezbytně nutný v zájmu podniku. Rovněž však platí, že zájmy zaměstnance nesmí být v rozporu s výkonem přesčasové práce. Zaměstnanec nemusí konat žádnou práci přesčas například v situaci, kdy by jí mělo být nějakým způsobem ohroženo jeho zdraví.

Další podstatnou náležitostí pracovní smlouvy v *německé* právní úpravě je sjednání odměny za vykonanou práci. Jelikož pracovní smlouva je vzájemný závazkový vztah, je v Německu dostačující, pokud se strany dohodnou na činnosti za úplatu prováděné zaměstnancem. Zaměstnavatel může dle ustanovení § 612 BGB konkretizovat jak odměnu, tak i přesnou činnost zaměstnance. Odměna může být stanovena buď individuálně nebo tzv. tarifní smlouvou uzavřenou během jednání zástupců a zaměstnavatelů nebo tripartity, přičemž individuálně stanovená odměna musí být vyšší než sedmdesát procent srovnatelné tarifní odměny na srovnatelném pracovním místě, pokud by však byla nižší, jednalo by se o tzv. platovou lichvu. Rovněž není možný extrémní nepoměr mezi pracovním výkonem zaměstnance na jedné straně a výší odměny za vykonanou práci na straně druhé, neboť by to mělo za důsledek neplatnost německé pracovní smlouvy. Pokud by však nastal případ, že výše odměny za vykonanou práci by nebyla určena, je německému zaměstnavateli stanovena povinnost, aby pak vyplatil zaměstnanci odměnu obvyklou pro daný obor a danou oblast. Při stanovení odměny za vykonanou práci je zaměstnavatel v Německu vázán minimální mzdou, která není stanovena zákonem, nýbrž je určena v příslušných tarifních smlouvách pro každý sektor. Většina pracovníků je tedy chráněna tarifními smlouvami, které stanoví minimální mzdu a mají závazný charakter, a to i tehdy, není-li zaměstnanec odborově organizován..

Tak jak by zaměstnanec měl znát skutečnosti týkající se vzniku svého pracovního poměru, měl by znát i podmínky, které souvisí s jeho *skončením.* Nejdůležitějším důvodem ukončení pracovního poměru v *Německu* je výpověď, přičemž právní úprava rozlišuje mezi *řádnou, mimořádnou* a *přeměnou výpovědí*. Pracovní vztah udělením řádné výpovědi nekončí ihned, nýbrž po uplynutí určité časové lhůty. Tyto zákonem stanovené výpovědní lhůty nejsou rovněž předmětem úpravy německého zákoníku práce, nýbrž jsou opět upraveny *německým občanským zákoníkem* (§ 621 a násl. BGB). Minimální zákonná výpovědní lhůta představuje *čtyři týdny* a je možné ji podat vždy k 15. dni příslušného kalendářního měsíce nebo k jeho konci. Samotná délka výpovědní lhůty je odvislá od celkové doby trvání pracovního poměru u zaměstnavatele. U pracovního poměru trvajícího alespoň 2 roky je pak délka výpovědní doby 1 měsíc, u pracovního poměru nad 10 let pak 4 měsíce a u pracovního poměru nad 20 let je už 7 měsíců.

Výpovědní lhůty mohou být stanoveny i delší, nicméně v rámci takových ujednání musí být dohodnuto, že tyto výpovědní lhůty platí pro případ výpovědi ze strany zaměstnance tak i zaměstnavatele. V případě neexistence takového smluvního ujednání o výpovědních lhůtách platí zákonem stanovené výpovědní lhůty. [6]

I když úmluva Mezinárodní organizace práce č. 158 z roku 1982, *o skončení pracovního poměru z podnětu zaměstnavatele* stanoví, že propuštění zaměstnance musí být plně nebo zčásti založeno na některém z důvodů, které jsou v ní obsaženy a uznává jako důvody propuštění zaměstnance pouze takové, které souvisí se způsobilostí nebo chováním zaměstnance nebo se zakládají na provozních potřebách zaměstnavatele, v Německu obecně platí, že ve výpovědi *není nutno uvádět výpovědní důvod*. Jsou však zde *zákonem na ochranu před výpovědí* (Kündigungsschutzgesetz z 25.8.1969, KSchG)[7] stanoveny případy, kdy takové uvedení důvodu je zcela nezbytné. Jedná se o případy, kdy podnik má více než 5 zaměstnanců a pracovní poměr zaměstnance k podniku trval déle než 6 měsíců. Tento zákon pak dále rozlišuje mezi důvody podmíněnými *osobními vlastnostmi* a *možnostmi zaměstnance*, dále *jednáním zaměstnance souvisejícím s porušováním svých povinností* či *podmíněnými podnikovými důvody*. Zákon umožňuje ukončit pracovní poměr i bez dodržení zákonem stanovené výpovědní lhůty (mimořádná výpověď), ale pouze za předpokladu *existence důležitého výpovědního důvodu*. Takovými důvody jsou důvody z oblasti *důvěry* nebo z oblasti *výkonu zaměstnance* (předložení falešných vysvědčení, neplnění přidělené práce apod.). Posledním druhem výpovědi je pak tzv. přeměnná výpověď, která sice pracovní poměr zaměstnance ukončí, ale současně dává zaměstnanci *možnost pokračovat* v pracovním poměru za jiných podmínek. I zde však musí být dodrženy podmínky pro řádnou výpověď. Platná právní úprava v Německu současně poskytuje zvláštní ochranu před výpovědí pro určité skupiny osob, mezi které náleží především těhotné a matky v šestinedělí, matky na mateřské dovolené, osoby těžce postižené, učni apod.

Z výše uvedeného lze konstatovat, že pro uzavření pracovního poměru v *Německu* platí podstatně široká smluvní volnost a pracovní smlouvu lze uzavřít za určitých podmínek i ústně. Zaměstnavatelé jsou však vázáni určitými omezeními - např. směrnici Rady č. 91/533/EC, která zavedla povinnost zaměstnavatele vydat zaměstnanci písemné potvrzení o podstatných pracovních podmínkách smlouvy, což vytváří a posiluje právní jistotu a průhlednost pracovního poměru. Toto ustanovení směrnice bylo přijato do německého právního řádu prostřednictvím *zákona o důkazu o podstatných platných podmínkách pracovního poměru z roku 1995 (800-25, NachwG)* a stanovilo zaměstnavateli povinnost zaznamenat podstatné smluvní podmínky pracovního poměru při jeho vzniku i případných možných

[6] Arbeitsgesetze. München : DT Verlag GmbH & Co. KG, 2002, s. 41-45 ISBN 3-423-05006-3

[7] Henssler, Martin., Braun, Axel. Arbeitsrecht in Europa. Köln: Verlag Dr. Otto Schmidt, 2003. s. 21-36, 65-81, ISBN 3-504-42643-8

změnách. Na základě ustanovení § 2 a 3 zákona o důkazu vzniká zaměstnanci pak samostatný žalovatelný nárok, který lze uplatnit po uplynutí jednoho měsíce od vzniku pracovního poměru, ve kterém měl zaměstnavatel povinnost sdělit zaměstnanci podstatné podmínky za nichž má konat práci v rámci pracovního poměru. Nesplní-li zaměstnavatel svoji povinnost, je i přesto pracovní smlouva platná. V důsledku porušení této povinnosti se však zaměstnavatel dostává do prodlení a ručí zaměstnanci za škodu vzniklou v souvislosti s tímto prodlením (§ 280 BGB).

I přesto, že v Německu je poměrně široká smluvní volnost co se týče uzavření pracovní smlouvy, dle vyskytujících se názorů působí současné německé platné zákony a judikatura v této zemi na pracovní trh jako brzda. Přílišná regulace vede k silné nejistotě v podnikání a přes 40 % podnikatelů-zaměstnavatelů vidí v pracovním právu zátěž pro jejich podnikání. *Náklady na byrokracii, přísná formální ustanovení a komplikované právo na ochranu před výpovědí* odrazují zaměstnavatele v zaměstnávání nových pracovníků. Mnohdy je vytýkána i přílišná *nejednotnost-roztříštěnost* regulace pracovněprávního předpisů a *přílišná* harmonizace německého práva s právem EU a je zdůrazňováno, že při zavádění dalších evropských ustanovení do německého pracovního práva je nutno klást důraz na bezpodmínečné respektování *principu subsidiarity*, tzn. aby *jednotná EU regulace* byla zavedena jen tam, kde pro ni v zájmu pracovního trhu překračujícího hranice existuje potřeba a současně aby byly stanoveny *minimální standardy*, které členským státům ponechají další prostor ke zvážení.

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VYSÍLÁNÍ ZAMĚSTNANCŮ V RÁMCI EVROPSKÝCH SPOLEČENTSVÍ

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Abstrakt

Tento příspěvek se zabývá otázkou dočasného vysílání zaměstnanců jejich zaměstnavateli – podniky usazenými v některém členském státě na území jiného členského státu Evropských společenství (dále jen „ES“ nebo „Společenství“) za účelem poskytnutí služeb. Po obecném seznámení s touto problematikou se příspěvek věnuje směrnici 96/71/ES o vysílání pracovníků v rámci poskytování služeb, a to včetně souvisejících rozsudků Soudního dvora ES. V návaznosti na úpravu vyplývající z práva ES popisuje příspěvek rovněž současnou právní úpravu vysílání zaměstnanců v České republice a hodnotí její soulad s právem ES.

Klíčová slova

volný pohyb služeb, vysílání zaměstnanců, směrnice 96/71/ES, pracovní podmínky

Abstract

This contribution dwells on the question of temporary posting of employees by their employers – companies established in a Member State to the territory of another Member State of the European Communities („EC“) in order to provide services. After general identification with this problem the paper deals with the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, including relevant judgements of the Court of Justice of the European Communities. In the context of legal framework resulting from the law of the EC this article describes also the contemporary legal framework of posting of employees in the Czech Republic and evaluates its compliance with the law of the EC.

Key words

Free movement of services, posting of workers, directive 96/71/EC, work conditions

Úvod

Členské státy ES jsou na základě článku 49 Smlouvy o založení Evropského společenství (dále jen „SES“) povinny zajistit volný pohyb služeb, který představuje jednu ze čtyř základních svobod garantovaných v rámci jednotného vnitřního trhu. Podle ustálené judikatury Soudního dvora Evropských společenství (dále jen „Soudní dvůr“) se podle tohoto článku SES vyžaduje nejen odstranění jakékoli diskriminace poskytovatele služeb usazeného v jiném členském státě z důvodu jeho státní příslušnosti, ale rovněž odstranění každého omezení, i když se uplatňuje bez rozdílu vůči poskytovatelům služeb na vnitrostátní úrovni i vůči poskytovatelům z jiných členských států, jestliže brání činnostem poskytovatele služeb usazeného v jiném členském státě, ve kterém legálně poskytuje podobné služby, nebo tyto činnosti omezuje či snižuje jejich atraktivitu.[1]

Součástí svobody poskytovat služby je i právo poskytovatele služby usazeného v členském státě ES dočasně vyslat svého pracovníka[2] k výkonu práce na území jiného členského státu, než ve kterém svou práci vykonává obvykle. Přestože neexistují přesné údaje o počtu vysílaných pracovníků v Evropské unii (dále jen „EU“), odhaduje se jejich celkový počet v roce 2005 na téměř 1 milion nebo přibližně 0,4 % populace EU v produktivním věku.[3]

Jak se postupně rozvíjel vnitřní trh ES, nabývalo vysílání pracovníků k nadnárodnímu poskytování služeb na významu a vznikala též celá řada otázek, jež bylo nutno řešit. Z tohoto důvodu byla dne 16. prosince 1996 přijata směrnice 96/71/ES o vysílání pracovníků v rámci poskytování služeb[4] (dále jen „směrnice“ nebo „směrnice o vysílání pracovníků“), jejímž cílem bylo vyřešit některé sporné aspekty dočasného vysílání pracovníků k výkonu práce do jiných členských států Společenství.

Tato směrnice je v současné době provedena ustanovením § 319 zákona č. 262/2006 Sb., zákoníku práce, ve znění pozdějších předpisů (dále jen „zákoník práce“), který v zásadě převzal předchozí právní úpravu.

1. Směrnice 96/71/ES o vysílání pracovníků v rámci poskytování služeb

[1] Viz rozsudek Soudního dvora ze dne 9. 8. 1994, spis. zn. C-43/93 (Raymond Vander Elst), bod 14 nebo rozsudek Soudního dvora ze dne 23. 11. 1999, spojené věci spis. zn. C-369/96 (Jean-Claude Arblade) a C-376/96 (Bernard Leloup), bod 33 nebo rozsudek ze dne 24. 1. 2002 spis. zn. C-164/99 (Portugaia Construcoes), bod 16.

[2] Vzhledem k tomu, že primární právo ES pojem „pracovník“ nedefinuje, je nezbytné zohlednit judikaturu Soudního dvora při vymezení tohoto termínu. Český zákoník práce naopak s účinností od 1. 6. 1994 používá pojmu „zaměstnanec“. Pro účely tohoto příspěvku budeme používat pojem „pracovník“ pro komunitární rovinu zkoumané problematiky a pojem „zaměstnanec“ pro rovinu právního řádu České republiky.

[3] Sdělení Komise Radě, Evropskému parlamentu, Evropskému hospodářskému a sociálnímu výboru a Výboru regionů ze dne 13. 6. 2007 – Vysílání pracovníků v rámci poskytování služeb – co nejlepší využití výhod a příležitostí a současné zajištění ochrany pracovníků, KOM(2007) 304 v konečném znění, s. 3.

[4] Směrnice Evropského parlamentu a Rady 96/71/ES ze dne 16. prosince 1996 o vysílání pracovníků v rámci poskytování služeb, Úř. věst. L 18, 21. 1. 1997, s. 1-6.

Před přijetím směrnice docházelo v praxi často k tomu, že poskytovatelé služeb usazení v členském státě ES, kde minimální mzdové náklady byly nižší než v jiném členském státě, vysílali své pracovníky do tohoto státu k výkonu práce a vypláceli jim minimální mzdu podle práva svého členského státu. Tato mzda však ani zdaleka nedosahovala výše minimální mzdy stanovené v členském státě, na jehož území byli pracovníci vysláni. To vedlo k porušení potřebného konkurenčního prostředí mezi poskytovateli služeb a k sociálnímu dumpingu. Vzniklé situaci se členské státy Společenství snažily zabránit mimo jiné zaváděním různých administrativních a kontrolních opatření, která mnohdy byla v rozporu s článkem 49 SES.

Cílem směrnice, jak se můžeme dočíst ve sdělení Evropské komise ze dne 4. 4. 2006, je dosáhnout souladu mezi právem podniků poskytovat přeshraniční služby podle článku 49 SES na straně jedné a právy pracovníků, kteří jsou dočasně vysláni do zahraničí za účelem poskytování těchto služeb, na straně druhé.[5]

1. 1. Oblast působnosti směrnice o vysílání pracovníků

Soudní dvůr ještě před přijetím směrnice upozornil na nutnost rozlišování mezi vysílanými pracovníky a migrujícími pracovníky, když konstatoval, že pracovníci zaměstnávaní podnikem v určitém členském státě, kteří jsou vysíláni do jiného členského státu za účelem, aby tam poskytli služby, neusilují o vstup na pracovní trh tohoto druhého členského státu, neboť se po splnění svého úkolu vracejí do státu původu nebo svého pobytu.[6]

Určení osobní působnosti nalezneme v článku 1 odst. 1 a 2 a v článku 2 zkoumané směrnice. Ustanovení článku 1 odst. 1 směrnice uvádí, že se vztahuje na podniky usazené v některém členském státě, které v rámci nadnárodního poskytování služeb vysílají pracovníky na území jiného členského státu v souladu s podmínkami ve směrnici uvedenými. Negativní vymezení osobní působnosti pak nabízí odstavec 2 téhož článku, podle něhož se tato směrnice nevztahuje na podniky obchodního loďstva a jejich posádky. Podle článku 2 odst. 1 směrnice se „vyslaným pracovníkem“ rozumí pracovník, který po omezenou dobu vykonává práci na území jiného členského státu než státu, ve kterém obvykle pracuje, přičemž není stanovena podmínka občanství některého z členských států Společenství. Vysílaným pracovníkem pro účely této směrnice tak může být i občan třetího státu. Pro vymezení pojmu pracovník odkazuje

[5] Srov. Sdělení Komise ze dne 4. 4. 2006 – Pokyny pro vysílání pracovníků v rámci poskytování služeb, KOM(2006) 159 v konečném znění, s. 2.
[6] Rozsudek Soudního dvora ze dne 27. 3. 1990, spis. zn. C-113/89 (Rush Portuguesa), bod 15.

směrnice v odstavci 2 téhož článku na právní předpisy členského státu, na jehož území byl pracovník vyslán.

Věcnou působnost upravuje článek 1 odst. 3 směrnice, který počítá se třemi způsoby dočasného vyslání pracovníků podniky usazenými v některém členském státě do jiného členského státu ES v rámci nadnárodního poskytování služeb, a sice

a) „klasické“ vyslání pracovníka na území členského státu na vlastní účet a pod svým vedením na základě smlouvy uzavřené mezi vysílajícím podnikem a stranou, pro kterou jsou služby určeny, činnou v tomto členském státě,
b) vyslání pracovníka v rámci holdingu – do provozovny nebo podniku náležejícího ke skupině podniků na území členského státu,
c) vyslání pracovníka v rámci agenturního zaměstnávání – terminologií směrnice vyslání „podnikem pro dočasnou práci či podnikem poskytujícím pracovníky“ do podniku, který pracovníka využije a který má sídlo nebo vykonává svou činnost na území některého členského státu,

a to vždy za podmínky, že mezi vysílajícím podnikem a vysílaným pracovníkem existuje pracovní poměr. Za povšimnutí stojí, že směrnice u podniků přijímajících služby nepožaduje, aby byly usazeny na území jednoho z členských států Společenství. Pro účely směrnice postačí, když strana přijímající služby skutečně vykonává svou činnost na území některého členského státu ES.

Pokud jde o podniky usazené mimo Společenství, směrnice stanovuje, že jim nesmí být poskytnuto lepší zacházení než podnikům usazeným v některém členském státě ES[7] a kromě toho uvádí, že směrnicí nejsou dotčeny dohody uzavřené Společenstvím se třetími zeměmi, ani právní předpisy členských států o přístupu poskytovatelů služeb ze třetích zemí na jejich území.[8] Na takové dohody nebo vnitrostátní předpisy členských států se podmínky uvedené ve směrnici nevztahují a členským státům Společenství je tak dána možnost chránit svůj pracovní trh před levnější pracovní silou ze třetích zemí.

Z výše uvedeného vymezení osobní a věcné působnosti směrnice vyplývají dva pojmové znaky vysílání pracovníků, a sice dočasnost vyslání k výkonu práce do jiného členského státu a spjatost s nadnárodním

[7] Článek 1 odst. 4 směrnice o vysílání pracovníků.
[8] Bod 20 preambule směrnice o vysílání pracovníků.

poskytováním služeb.[9]

Pokud jde o časovou působnost směrnice, jako poslední den lhůty k jejímu provedení byl určen 16. prosinec 1999.

1. 2. Minimální standard ochrany vysílaných pracovníků

Směrnice vymezuje minimální standard pracovních a mzdových podmínek pro pracovníky, kteří byli dočasně vysláni svým zaměstnavatelem – podnikem usazeným v některém členském státě ES na území jiného členského státu ES k výkonu práce za účelem poskytnutí služeb.

V článku 3 odst. 1 směrnice ukládá členským státům ES povinnost zajistit, aby podniky vysílající své pracovníky k poskytování služeb na jejich území zaručovaly těmto pracovníkům minimální úroveň pracovních a mzdových podmínek (tzv. tvrdé jádro minimálních ochranných ustanovení[10]), jež musí být dodržovány bez ohledu na právo rozhodné pro pracovní poměr.[11]

Směrnice výčtem minimálních pracovních a mzdových podmínek dle článku 3 odst. 1 definovala, které právní normy přijímacího státu se budou aplikovat na pracovní poměr bez ohledu na právo rozhodné pro pracovní smlouvu a které je tudíž třeba považovat za nutně použitelné normy[12] v souladu s článkem 7 Římské úmluvy [13].

K zaručeným minimálním pracovním a mzdovým podmínkám, jež byly stanoveny „právními či správními předpisy anebo kolektivními smlouvami nebo rozhodčími nálezy, které byly prohlášeny za všeobecně použitelné“[14] a týkají-li se činností uvedených v příloze směrnice[15], patří:

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[9] Blíže např. Dobřichovský, T. Vysílání zaměstnanců do zemí Evropské unie v kontextu zákoníku práce a evropského práva. Právo a zaměstnání, 2004, č. 7-8, s. 11 a násl., ISSN 1211-1139.

[10] Viz Mitteilung der Kommission an den Rat, das Europäische Parlament, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen vom 25. 7. 2003 – Die Durchführung der Richtlinie 96/71/EG in den Mitgliedstaaten, KOM(2003), 458 endgültig, s. 5.

[11] České znění směrnice používá v článku 3 odst. 1 termín „pracovní poměr“, stejně tak jako znění německé („Arbeitsverhältnis“), anglické („employment relationship“) nebo francouzské („relation de travail“). Slovenské znění naopak užívá pojem „pracovněprávní vztahy“.

[12] K problematice kolizní úpravy pracovněprávních vztahů srov. např. Štefko, M. Římská úmluva a připravované nařízení „Řím I.“ Práce a mzda, 2008, č. 4, s. 37-40, ISSN 0032-6208.

[13] Úmluva o právu rozhodném pro smluvní závazkové vztahy, otevřená k podpisu v Římě dne 19. června 1980, Úř. věst. L 266, 9. 10. 1980, s. 1-19.

[14] Viz článek 3 odst. 1 směrnice o vysílání pracovníků. Otázkou všeobecně použitelných rozhodčích nálezů nebo kolektivních smluv se mimo jiné ve svých článcích zabývali např. Tomáš Dobřichovský a Tereza Řihošková (Dobřichovký, T. Vysílání

a) maximální délka pracovní doby a minimální doby odpočinku,
b) minimální délka dovolené za kalendářní rok,
c) minimální mzda, včetně sazeb za přesčasy,
d) podmínky poskytování pracovníků, zejména prostřednictvím podniků pro dočasnou práci,
e) ochrana zdraví, bezpečnosti a hygieny při práci,
f) ochranná opatření týkající se pracovních podmínek těhotných žen nebo žen krátce po porodu, dětí a mladistvých,
g) rovné zacházení pro muže a ženy a ostatní ustanovení o nediskriminaci.[16]

Pro účely směrnice vymezují pojem „minimální mzda" vnitrostátní právní předpisy anebo zvyklosti členského státu, na jehož území je pracovník vyslán.[17] Směrnice dále výslovně uvádí, že zvláštní příplatky za vyslání se považují za součást minimální mzdy tehdy, pokud se nevyplácejí jako náhrada výdajů skutečně vynaložených v důsledku vyslání, například výdaje za cestovné, ubytování nebo stravu.[18] Jako součást minimální mzdy je nezbytné posuzovat také navýšení a příplatky, které nemění vztah mezi plněním pracovníka a protihodnotou, kterou obdrží.[19]

Příkladem, na který by směrnice dopadala, může být vyslání pracovníka zaměstnaného u podniku se sídlem v České republice k dočasnému výkonu práce na území Spolkové republiky Německo v rámci nadnárodního poskytování služeb. Na tohoto zaměstnance se po dobu jeho vyslání budou vztahovat právní předpisy a kolektivní smlouvy platné ve Spolkové republice Německo, jež stanovují minimální pracovní a mzdové podmínky v souladu se směrnicí. Podnik sídlící v ČR tak bude na základě této úpravy povinen mimo jiné vyplácet vyslanému pracovníku minimální mzdu stanovenou kolektivními smlouvami platnými pro dané odvětví ve Spolkové republice Německo, která bude (s ohledem na rozdílnou mzdovou hladinu) vyšší než minimální mzda stanovená právními předpisy České republiky.

Podle článku 3 odstavce 10 směrnice není vyloučeno, aby členské státy na základě rovného zacházení uplatňovaly na vnitrostátní podniky a podniky ostatních členských států pracovní podmínky týkající se i jiných záležitostí, jestliže jsou dodržovány předpisy o veřejném pořádku. Směrnice rovněž nebrání

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zaměstnanců do zemí Evropské unie v kontextu zákoníku práce a evropského práva. Právo a zaměstnání, 2004, č. 7-8, s. 10, ISSN 1211-1139. Řihošková, T. Nadnárodní poskytování služeb – vysílání zaměstnanců v rámci Evropského společenství. Právník, 2007, č. 10, s. 1115, ISSN 0231-6625).

[15] Podle přílohy směrnice patří mezi tyto činnosti všechny stavební práce týkající se výstavby, oprav, údržby, přestavby nebo střežení budov, přičemž příloha uvádí též demonstrativní výčet těchto činností.

[16] Srov. článek 3 odst. 1 směrnice o vysílání pracovníků.

[17] Článek 3 odst. 2 směrnice o vysílání pracovníků.

[18] Článek 3 odst. 7 směrnice o vysílání pracovníků.

[19] Rozsudek Soudního dvora ze dne 14. 4. 2005, spis. zn. C-341/02 (Komise proti Spolkové republice Německo), bod 43.

použití pracovních podmínek, které jsou pro pracovníky výhodnější.[20]

Jako výjimku z použití zaručených pracovních podmínek týkající se minimální délky dovolené za kalendářní rok a minimální mzdy směrnice připouští případ první montáže nebo první instalace zboží, pokud doba vyslání nepřesáhne 8 dnů a pokud tvoří podstatnou součást smlouvy o dodávce zboží a jsou nezbytné pro uvedení dodaného zboží do provozu a provádějí je zkušení nebo specializovaní pracovníci dodavatelského podniku.[21] Další odchylku z aplikace představují „práce malého rozsahu", přičemž je ponecháno na vůli členských států ES, aby stanovily kritéria, která taková práce musí splňovat.[22] Kromě toho mohou členské státy též vyloučit užití ustanovení o minimální mzdě, pokud za splnění dalších podmínek ve směrnici uvedených doba vyslání pracovníka nepřesáhne 1 měsíc.[23]

1. 3. Spolupráce v oblasti poskytování informací

Členské státy ES jsou povinny dle článku 4 směrnice určit jedno nebo více kontaktních míst nebo jeden nebo více příslušných vnitrostátních orgánů pro účely provádění směrnice, upravit spolupráci mezi těmito orgány a učinit vhodná opatření, aby všeobecně zpřístupnily informace o pracovních podmínkách, na než se směrnice vztahuje. Právě oblast vzájemné spolupráce v oblasti informací o pracovních a mzdových podmínkách[24] se při provádění směrnice ukázala (vedle zavádění nevhodných kontrolních opatření členskými státy) jako velmi problematická. Evropská komise z tohoto důvodu několikrát poukazovala na nezbytnost řádného fungování této spolupráce a dospěla k závěru, že její praktická neexistence vysvětluje, proč se členské státy ES uchylují ke kontrolním opatřením, která se zdají být nepotřebná anebo nepřiměřená ve smyslu výkladu článku 49 SES.[25] Snahou členských států ES by proto mělo být zavedení elektronického systému pro výměnu informací o vnitřním trhu („IMI" – z anglického „Internal Market Information System"), který by poskytování informací o minimálních pracovních podmínkách usnadnil.[26]

1. 4. Kontrolní opatření k ochraně práv vysílaných pracovníků

[20] Článek 3 odst. 7 směrnice o vysílání pracovníků.
[21] Článek 3 odst. 2 směrnice o vysílání pracovníků.
[22] Článek 3 odst. 5 směrnice o vysílání pracovníků.
[23] Srov. článek 3 odst. 3 a 4 směrnice o vysílání pracovníků.
[24] Řadu informací o vysílání pracovníků včetně odkazů na webové stránky členských států ES nalezneme na stránkách Evropské komise: http://ec.europa.eu/employment_social/labour_law/postingofworkers_en.htm.
[25] Srov. Sdělení Komise Radě, Evropskému parlamentu, Evropskému hospodářskému a sociálnímu výboru a Výboru regionů ze dne 13. 6. 2007 – Vysílání pracovníků v rámci poskytování služeb – co nejlepší využití výhod a příležitostí a současné zajištění ochrany pracovníků, KOM(2007) 304 v konečném znění, s. 9.
[26] Blíže viz Doporučení Komise ze dne 3. dubna 2008 o větší správní spolupráci v souvislosti s vysíláním pracovníků v rámci poskytování služeb, 2008/C 85/01, Úř. věst. C 85, 4. 4. 2008, s. 1-4.

Směrnice počítá na úrovni vnitrostátního práva jednak s přijetím vhodných opatření pro případ jejího nedodržení[27] a jednak zajištěním možnosti domáhat se uplatnění práva na pracovní podmínky u soudu členského státu, na jehož území byl pracovník dočasně vyslán.[28]

Řada členských států ES zavedla v rámci provádění směrnice kontrolní opatření, a to jak obecné[29], tak speciální[30] (vztahující se na vyslané pracovníky, kteří jsou státními příslušníky třetích zemí), z nichž velká část byla Soudním dvorem následně označena za neodůvodněná a nepřiměřená.

Soudní dvůr ve svých rozsudcích[31] stanovil, že vnitrostátní právní úprava oblasti, která nebyla na úrovni Společenství harmonizována a která se použije na jakoukoli osobu nebo podnik vykonávající činnost na území přijímajícího členského státu, může být odůvodněna, pokud odpovídá naléhavým důvodům obecného zájmu, které zahrnují též ochranu pracovníků. Další podmínkou pro odůvodnění takové úpravy je situace, kdy tento zájem není chráněn pravidly, kterým poskytovatel podléhá v členském státě, ve kterém je usazen, a pokud je tato právní úprava způsobilá zaručit uskutečnění cíle, který sleduje, a nepřekračuje meze toho, co je k dosažení tohoto cíle nezbytné.[32] Jako omezení svobody poskytovat služby podle článku 49 SES označil Soudní dvůr podmínku vydání správního povolení orgány přijímajícího členského státu,[33] povinnost zahraničních podniků pro dočasnou práci hlásit příslušným orgánům nejen poskytnutí pracovníka podniku, který jej využívá, ale rovněž každou změnu přidělení tohoto pracovníka, zatímco taková povinnost není uložena podnikům pro dočasnou práci usazeným v přijímajícím členském státě[34] a rovněž i požadavek, podle něhož podniky pro dočasnou práci musí zřídit v přijímajícím členském státě své sídlo nebo pobočku.[35]

Ve vztahu ke státním příslušníkům třetích států Soudní dvůr přiznal členským státům možnost ověřit,

[27] Článek 5 směrnice o vysílání pracovníků.
[28] Článek 6 směrnice o vysílání pracovníků.
[29] Např. požadavek mít zástupce na území přijímajícího členského sátu, požadavek získat povolení od příslušných orgánů přijímajícího členského státu nebo být u nich zaregistrován, požadavek učinit prohlášení nebo požadavek vést a uchovávat dokumenty týkající se sociálních a pracovních podmínek na území přijímajícího členského státu. Blíže viz Sdělení Komise ze dne 4. 4. 2006 – Pokyny pro vysílání pracovníků v rámci poskytování služeb, KOM(2006) 159 v konečném znění, s. 3-7.
[30] Např. požadavek předchozí doby zaměstnání v délce 6 měsíců u vysílajícího podniku nebo požadavek pracovního poměru na dobu neurčitou. Blíže srov. Sdělení Komise ze dne 4. 4. 2006 – Pokyny pro vysílání pracovníků v rámci poskytování služeb, KOM(2006) 159 v konečném znění, s. 7-8.
[31] Rozsudek Soudního dvora dne 24. 1. 2002, spis. zn. C-164/99 (Portugaia Construcoes), bod 19 a 20 nebo rozsudek ze dne 12. 10. 2004, spis. zn. C-60/03 (Wolff & Müller GmbH), bod 34 a 35.
[32] Tamtéž.
[33] Rozsudek Soudního dvora ze dne 9. 8. 1994, spis. zn. C-43/93 (Raymond Vander Elst), bod 15.
[34] Rozsudek Soudního dvora ze dne 18. 7. 2007, spis. zn. C-490/04 (Komise proti Spolkové republice Německo), bod 81 a 89.
[35] Rozsudek Soudního dvora ze dne 7. 2. 2002, spis. zn. C-279/00 (Komise proti Italské republice), bod 18.

zda vyslaní pracovníci, kteří jsou státními příslušníky třetího státu, mají legální a obvyklé zaměstnání v členském státě, ve kterém je usazen jejich zaměstnavatel.[36] Členské státy však musí při zavádění kontrolních opatření respektovat dříve vyslovenou zásadu, že tato opatření nesmí znemožňovat, znesnadňovat nebo činit méně přitažlivým zamýšlené vysílání pracovníků tím, že přináší další administrativní zatížení a hospodářské náklady[37] ani nesmí činit svobodu poskytování služeb iluzorní a nesmí podléhat správnímu uvážení.[38] Jako nepřípustné byly též shledány požadavky, aby byli vysílaní pracovníci zaměstnáni u zaměstnavatele v pracovním poměru na dobu neurčitou a po dobu nejméně 6 měsíců, případně 1 roku,[39] požadavek na poskytnutí bankovní záruky na případnou repatriaci vysílaného pracovníka, formální a zdlouhavý proces vydávání pracovního povolení[40] nebo požadavek učinit předběžné prohlášení.[41]

1. 5. Soudní pravomoc

Určení pravomoci soudů členského státu Společentsví, na jehož území byl pracovník dočasně vyslán, v případech, kdy se domáhá nároků vyplývajících ze směrnice (tj. minimálního standardu pracovních a mzdových podmínek vypočtených v článku 3 odst. 1 směrnice), představuje ve smyslu článku 67 nařízení Rady ES č. 44/2001 ze dne 22. prosince 2000 o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech[42] speciální právní úpravu k článku 19 tohoto nařízení.[43] Bude tedy záležet jen na vyslaném pracovníkovi, zda svého zaměstnavatele bude žalovat dle zmíněného nařízení nebo využije možnosti dané vnitrostátními právními předpisy přijímajícího členského státu,

[36] Rozsudek Soudního dvora ze dne 9. 8. 1994, spis. zn. C-43/93 (Raymond Vander Elst), bod 26.
[37] Rozsudek Soudního dvora ze dne 15. 3. 2001, spis. zn. C-165/98 (André Mazzoleni), bod 24.
[38] Rozsudek Soudního dvora ze dne 27. 3. 1990, spis. zn. C-113/89 (Rush Portuguesa), bod 17.
[39] Rozsudek Soudního dvora ze dne 21. 10. 2004, spis. zn. C-445/03 (Komise proti Lucemburskému velkovévodství), bod 32 nebo rozsudek ze dne 21. 9. 2006, spis. zn. C-168/04 (Komise proti Rakouské republice), bod 68.
[40] Rozsudek Soudního dvora ze dne 21. 10. 2004, spis. zn. C-445/03 (Komise proti Lucemburskému velkovévodství, bod 30 a 31.
[41] Rozsudek Soudního dvora za dne 19. 1. 2006, spis. zn. C-244/04 (Komise proti Spolkové republice Německo), bod 45 a 46.
[42] Článek 67 nařízení Rady ES č. 44/2001 2001 ze dne 22. prosince 2000 o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech zní: „Tímto nařízením není dotčeno uplatňování ustanovení, kterými se upravuje příslušnost a uznání a výkon rozhodnutí ve zvláštních věcech a která jsou obsažena v právních aktech Společenství nebo ve vnitrostátních právních předpisech harmonizovaných k provedení těchto aktů."
[43] Článek 19 nařízení Rady ES č. 44/2001 2001 ze dne 22. prosince 2000 o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech zní:
„Zaměstnavatel, který má bydliště na území některého členského státu, může být žalován:
1. u soudů členského státu, v němž má bydliště nebo
2. v jiném členském státě:
   a) u soudu místa, kde zaměstnanec obvykle vykonává svou práci, nebo u soudu místa, kde svou práci obvykle vykonával naposledy, nebo
   b) jestliže zaměstnanec obvykle nevykonává nebo nevykonával svou práci v jediné zemi, u soudu místa, kde se nachází nebo nacházela provozovna, která zaměstnance přijala do zaměstnání."

které byly přijaty k provedení směrnice.[44]

2. Provedení směrnice o vysílání pracovníků do právního řádu České republiky

2. 1. Dřívější právní úprava

K provedení směrnice došlo zákonem č. 155/2000 Sb., který s účinností ke dni přístupu ČR k EU, tj. ke dni 1. 5. 2004 změnil ustanovení § 6 odst. 2 až 4 zákona č. 65/1965 Sb., zákoníku práce, ve zkoumaném znění (dále jen „ZP 1965“).

Tato úprava se týkala nejen zaměstnanců vyslaných z jiného členského státu ES k výkonu práce na území České republiky, ale i zaměstnanců tuzemských zaměstnavatelů vyslaných k výkonu práce do jiného členského státu ES. Na tyto zaměstnance se podle ustanovení § 6 odst. 2 ZP 1965 vztahovala minimální úprava pracovních a mzdových podmínek členského státu, na jehož území je práce konána, nebyla-li právní úprava dle českých právních předpisů pro vysílaného zaměstnance výhodnější.[45] Výhodnost právní úpravy se u každého pracovněprávního nároku posuzovala samostatně.[46]

Pokud porovnáme výčet pracovních a mzdových podmínek uvedených v ustanovení § 6 odst. 2 předchozího zákoníku práce a znění článku 3 odst. 1 směrnice, dospějeme k závěru, že zákonodárce do tohoto výčtu nezahrnul pracovní podmínky při agenturním zaměstnávání[47]. V souladu se směrnicí byly stanoveny 2 výjimky z aplikace tohoto ustanovení. První se týkala minimální mzdy, minimálních mzdových tarifů a příplatků za práci přesčas, jestliže doba vyslání zaměstnance nepřesáhla celkově dobu 1 měsíce v období posledních 12 měsíců od počátku vyslání.[48] Stejná výjimka a navíc i výjimka z minimální délky dovolené se vztahovala na „práce malého rozsahu“, u nichž předchozí zákoník práce požadoval, aby nepřesáhly 22 dnů v období posledních 12 měsíců od počátku vyslání.[49]

[44] Blíže např. Mitteilung der Kommission an den Rat, das Europäische Parlament, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen vom 25. 7. 2003 – Die Durchführung der Richtlinie 96/71/EG in den Mitgliedstaaten, KOM(2003), 458 endgültig, s. 7.

[45] Srov. ust. § 6 odst. 2 ZP 1965.
[46] Tamtéž.
[47] Srov. ustanovení § 6 odst. 2 ZP 1965 a článku 3 odst. 1 směrnice o vysílání pracovníků.
[48] Srov. ustanovení § 6 odst. 3 ZP 1965 a článku 3 odst. 3 směrnice o vysílání pracovníků.
[49] Srov. ustanovení § 6 odst. 4 ZP 1965 a článku 3 odst. 5 směrnice o vysílání pracovníků.

Odborná veřejnost[50] poukazovala v souvislosti s implementací směrnice na scházející vymezení pojmu vysílaný zaměstnanec, chybějící vazbu na nadnárodní poskytování služeb i na dočasný charakter vysílání. M. Bělina i T. Dobřichovský při hodnocení tehdejší úpravy dospěli k závěru, že pojem vysílaný zaměstnanec je třeba ve světle právní úpravy obsažené v ustanovení § 6 odst. 2 až 4 ZP 1965 vykládat šířeji než jej chápe směrnice, a sice tak, že tento pojem zahrnuje i situace, kdy je zaměstnanec vyslán k výkonu práce do jiného členského státu i za jiným účelem, než poskytnutí služby třetímu subjektu (např. pracovní cesta za účelem nákupu zboží).[51] Svůj závěr autoři opírali o možnost předpokládanou směrnicí stanovit pro vysílané zaměstnance ve vnitrostátním právu příznivější podmínky než je minimální standard.

Uplatnění druhého pojmového znaku, a sice dočasnosti vysílání zaměstnance k výkonu práce do jiného členského státu je poněkud problematické. Výše uvedení autoři při zkoumání tohoto znaku upozornili na skutečnost, že jeho použití by vedlo k vyloučení výhod pro zaměstnance s pravidelným pracovištěm v zahraničí.[52] Domníváme se, že takový výklad by sice chránil tyto zaměstnance, ale opomíjel by komunitární aspekty pojmu vysílaný pracovník, plynoucí jak z příslušné judikatury Soudního dvora,[53] tak ze směrnice, která v článku 2 výslovně uvádí, že vyslaným pracovníkem se rozumí pracovník, který po omezenou dobu vykonává práci na území jiného členského státu než státu, ve kterém obvykle pracuje.

2. 2. Současná právní úprava

Současná právní úprava minimálního standardu pracovních a mzdových podmínek, která směrnici provádí, je obsažena v kogentním ustanovení § 319 zákoníku práce. Tato právní úprava vycházela ze ZP 1965, přičemž do velké míry odstranila nedostatky vytýkané předchozí úpravě.

Toto ustanovení se vztahuje pouze na situace, kdy byl zaměstnanec zaměstnavatele z jiného členského státu EU vyslán k výkonu práce[54] v rámci nadnárodního poskytování služeb na území České republiky,

[50] Např. Bělina, M. In Součková, M. a kol. Zákoník práce. Komentář. 4. vydání. Praha: C. H. Beck, 2004, s. 17, ISBN 80-7179-868-1 nebo Dobřichovský, T. Vysílání zaměstnanců do zemí Evropské unie v kontextu zákoníku práce a evropského práva. Právo a zaměstnání, 2004, č. 7-8, s. 11 a násl., ISSN 1211-1139.
[51] Tamtéž.
[52] Tamtéž.
[53] Soudní dvůr rozlišuje mezi pojmy vysílaný a migrující pracovník (k tomu srov. rozsudek Soudního dvora ze dne 27. 3. 1990, spis. zn. C-113/89 (Rush Portuguesa), bod 15).
[54] Z hlediska stávajícího zákoníku práce můžeme právní základ vysílání zaměstnanců spatřovat ve vyslání zaměstnance na pracovní cestu, v přeložení zaměstnance, přidělení zaměstnance agenturou práce k dočasnému výkonu práce u uživatele

není-li pro něj právní úprava členského státu, z něhož byl vyslán, výhodnější, přičemž výhodnost se posuzuje u každého práva vyplývajícího z pracovněprávního vztahu samostatně.[55]

Narozdíl od svého předchůdce současný zákoník práce výslovně uvádí jeden z pojmových znaků vysílání zaměstnanců, a to spjatost s nadnárodním poskytováním služeb, čímž vylučuje širší chápaní pojmu vysílaný zaměstnanec. Druhý pojmový znak, časová omezenost vyslání zaměstnance, v zákoníku práce výslovně stanoven není. S ohledem na výše zmíněné a právní jistotu účastníků pracovněprávních vztahů by však bylo velmi vhodné výslovně zakotvit i tento znak ve vnitrostátní právní úpravě.

Další vytýkaný nedostatek, a to neuvedení pracovních podmínek při agenturním zaměstnávání ve výčtu minimální úrovně ochrany vysílaného zaměstnance, byl novou právní úpravou rovněž odstraněn.[56] Výčet minimálního standardu pracovních a mzdových podmínek vymezených v ustanovení § 319 zákoníku práce tak odpovídá článku 3 odst. 1 směrnice, jelikož Česká republika nevyužila možnosti zahrnout mezi tyto podmínky i jiné záležitosti v souladu s článkem 3 odst. 10 směrnice.

Výjimky z aplikace zkoumaného ustanovení zaznamenaly taktéž změnu, když zákoník práce zavedl jedinou výjimku týkající se minimální mzdy, minimálních mzdových tarifů, příplatků za práci přesčas a minimální délky dovolené, pokud doba vyslání zaměstnance v rámci nadnárodního poskytování služeb nepřesáhla celkově 30 dnů v kalendářním roce. Tato výjimka se ovšem nevztahuje na případ, kdy zaměstnanec byl vyslán k výkonu práce v rámci nadnárodního poskytování služeb agenturou práce.[57]

V oblasti spolupráce při poskytování informací o pracovních a mzdových podmínkách vysílaných zaměstnanců, je příslušným orgánem Ministerstvo práce a sociálních věcí ČR, které je též povinno tyto informace zveřejňovat.[58]

Kontrolu dodržování povinností vyplývajících ze směrnice provádějí inspektoráty práce na základě

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nebo v dočasném přidělení zaměstnance k výkonu práce k jinému zaměstnavateli za účelem prohlubování nebo zvyšování kvalifikace zaměstnance.

[55] Ustanovení § 319 odst. 1 zákoníku práce.

[56] Srov. ustanovení § 319 odst. 1 písm. g) zákoníku práce.

[57] Ustanovení § 319 odst. 2 zákoníku práce.

[58] Informace o pracovních podmínkách vysílaných zaměstnanců můžeme nalézt na stránkách Ministerstva práce a sociálních věcí ČR (http://www.mpsv.cz), ale také na např. stránkách Ministerstva průmyslu a obchodu ČR (http://www.mpo.cz/cz/eu-a-vnitrni-trh/vysilani-pracovniku).

zákona č. 251/2005 Sb., o inspekci práce, ve znění pozdějších předpisů.

Ohledně oprávnění dočasně vyslaného zaměstnance zahájit v ČR soudní řízení a domáhat se zde svých práv na pracovní podmínky garantované směrnicí, bylo v odborných periodicích[59] upozorňováno na nedostatek tuzemské právní úpravy spočívající v tom, že není-li dána pravomoc českých soudů podle nařízení Rady ES č. 44/2001 ze dne 22. prosince 2000 o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech, může být proti zaměstnavateli usazenému v jiném členském státě ES dle ustanovení § 86 zákona č. 99/1963 Sb., občanského soudního řádu, ve znění pozdějších předpisů, podána žaloba pouze pokud má tento zaměstnavatel na území ČR majetek, podnik nebo organizační složku podniku.

Závěr

Směrnice o vysílání pracovníků byla do českého právního řádu provedena ke dni 1. 5. 2004 v ustanovení § 6 odst. 2 až 4 ZP 1965. Z této úpravy vycházelo ustanovení § 319 zákoníku práce, které částečně odstranilo nedostatky předchozí právní úpravy. Přesto i v současné době můžeme nalézt určité nepřesnosti, které nasvědčují tomu, že tato směrnice nebyla provedena řádně.

Jedním z nich je scházející vymezení, že zaměstnanci jsou v rámci nadnárodního poskytování služeb k výkonu práce do jiných členských států ES vysíláni pouze dočasně.

Dalším nedostatkem je chybějící pravomoc soudů České republiky rozhodnout o právu vysílaných zaměstnanců na minimální úroveň pracovních a mzdových podmínek garantovaných směrnicí za situace, kdy není dána jejich příslušnost podle nařízení Rady ES č. 44/2001 ze dne 22. prosince 2000 o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech a zaměstnavatel vysílající své zaměstnance k výkonu práce do České republiky zde nemá majetek, podnik nebo organizační složku podniku.

Takový deficit soudní pravomoci bychom mohli hodnotit jako porušení povinnosti členského státu ES náležitě provést směrnici a mohli bychom zvažovat, zda by v tomto případě mělo ustanovení článku 6

[59] Např. Řihošková, T. Nadnárodní poskytování služeb – vysílání zaměstnanců v rámci Evropského společenství. Právník, 2007, č. 10, s. 1122, ISSN 0231-6625.

směrnice přímý účinek. V případě, že by se vyslaný zaměstnanec domáhal vůči zaměstnavateli aplikace tohoto ustanovení směrnice u národního soudu členského státu, na jehož území dočasně koná práci, zamýšlel by tím vyvolat horizontální přímý účinek směrnice, tzn. že by směrnice přímo stanovovala práva a povinnosti jednotlivcům. Podle judikatury Soudního dvora[60] však takový účinek nelze směrnici přiznat. U neprovedené směrnice, u níž uplynula lhůta k implementaci, je v souladu se závěry Soudního dvora přípustný pouze přímý vertikální vzestupný účinek, tzn. že se jednotlivci mohou dovolat svých práv vůči státu, což ovšem není tento případ. Z tohoto důvodu máme za to, že ustanovení článku 6 směrnice přímý účinek nemá. Nehledě na skutečnost, že možnost daná směrnicí žalovat svého zaměstnavatele v členském státě, na jehož území byl zaměstnanec vyslán, se jeví jako poměrně nepraktická s ohledem na neznalost právního řádu přijímajícího státu a přípustnost podání žaloby u soudu členského státu, z něhož byl zaměstnanec vyslán.

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[2] Řihošková, T. Nadnárodní poskytování služeb – vysílání zaměstnanců v rámci Evropského společenství. Právník, 2007, č. 10, s. 1110-1131, ISSN 0231-6625.

[3] Součková, M. a kol. Zákoník práce. Komentář. 4. vydání. Praha: C. H. Beck, 2004, 964 s., ISBN 80-7179-868-1.

[4] Štefko, M. Římská úmluva a připravované nařízení „Řím I." Práce a mzda, 2008, č. 4, s. 37-40, ISSN 0032-6208.

[5] Doporučení Komise ze dne 3. dubna 2008 o větší správní spolupráci v souvislosti s vysíláním pracovníků v rámci poskytování služeb, 2008/C 85/01, Úř. věst. C 85, 4. 4. 2008, s. 1-4.

[6] Mitteilung der Kommission an den Rat, das Europäische Parlament, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen vom 25. 7. 2003 – Die Durchführung der Richtlinie 96/71/EG in den Mitgliedstaaten, KOM(2003), 458 endgültig.

[7] Sdělení Komise Radě, Evropskému parlamentu, Evropskému hospodářskému a sociálnímu výboru a Výboru regionů ze dne 13. 6. 2007 – Vysílání pracovníků v rámci poskytování služeb – co nejlepší využití výhod a příležitostí a současné zajištění ochrany pracovníků, KOM(2007) 304 v konečném znění.

[8] Sdělení Komise ze dne 4. 4. 2006 – Pokyny pro vysílání pracovníků v rámci poskytování služeb, KOM(2006) 159 v konečném znění.

[60] Např. rozsudek Soudního dvora ze dne 14. 7. 1994, spis. zn. C-91/92 (Paola Faccini Dori), bod 20.

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EVROPSKÝ ROK ROVNÝCH PŘÍLEŽITOSTÍA IMPLEMENTACE SMĚRNIC RADY 2000/43/ES A 2000/78/ES

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Abstrakt

Rok 2007 byl Evropskou unií prohlášen za rok rovných příležitostí, což ostatně podtrhuje důraz, který orgány Evropských společenství na tuto oblast kladou. V rámci Evropské unie již byla přijata celá řada dokumentů (primárním právem počínaje). K nejzásadnějším dokumentům sekundárního práva pak, vedle směrnic upravujících genderovou problematiku, patří směrnice Rady 2000/43/ES zakazující diskriminaci založenou na rase či etnickém původu, a směrnice Rady 2000/78/ES stanovící obecný rámec pro rovné zacházení v zaměstnání a povolání, neboť zaměstnání a povolání představují klíčové aspekty k zakotvení rovných příležitostí pro všechny. Nicméně efektivní implementace uvedených směrnic v členských státech není jednoduchá, což si ukážeme právě v tomto příspěvku, a to především na příkladu České republiky a Slovenska.

Klíčová slova

Rovné zacházení, diskriminace, rovné příležitosti, směrnice Rady 2000/43/ES, směrnice Rady 2000/78/ES, implementace, antidiskriminační zákon v České republice, antidiskriminačný zákon na Slovensku, pracovní právo

Abstract

The year 2007 was declared by the European Union as the year of equal opportunities which underlines accentuating focus on this sphere by the bodies of European Communities. In terms of European Union were already adopted many documents (primarily in the sphere of primary law). To the most important documents of secondary legislation belong, regardless of directives which regulate gender equality, Council directive 2000/43/EC prohibiting discrimination on grounds of race and ethnic origin and Council directive 2000/78/EC establishing general framework for equality of treatment in employment and occupation, because employment and occupation are key elements in guaranteeing equal opportunities for all. Nevertheless effective implemantation of these directives in the member states is not so easy which will be shown in this contribution, especially on example of the Czech republic and Slovakia.

Key words

Equality of treatment, discrimination, equal opportunities, Council Directive 2000/43/EC, Council Directive 2000/78/EC, implementation, Antidiscrimination Act in Czech Republic, Antidiscrimination Act in Slovakia, labour law

Rok 2007 byl Radou a Evropským parlamentem prohlášený za rok rovných příležitostí. Evropská komise k tomu na svých webových stránkách uvádí: „*Evropská unie má veškeré důvody být hrdá na svou antidiskriminační legislativu, která patří k nejrozsáhlejším na světě. V roce 2000 přijala Evropská unie dva významné zákony zakazující diskriminaci založenou na rasovém a etnickém původu, náboženství nebo víře, zdravotním postižení, věku nebo sexuální orientaci na pracovišti a v ostatních oblastech života. Následující texty jsou založené na obsáhlých opatřeních Evropské unie na podporu rovnosti mužů a žen. Prosazování rovných práv a přijímání zákonů, které je budou garantovat, však nedostačuje pro praktické zajištění rovných příležitostí pro všechny. K uskutečnění změny v chování a myšlení musí být lidé dostatečně motivováni. Musí být také učiněna opatření, díky kterým se vypořádáme se složitými vzorci nerovnoprávnosti, jimiž trpí určité evropské skupiny a komunity, jako například Romové, zároveň však musíme zkoumat kořeny těchto problémů. Nakonec je nutno si přiznat, že naše společnosti se mění. Jako příklad je možné uvést stárnoucí populace v zemích Evropské unie a jejich stále vzrůstající mnohonárodnostní složení. Prohlubující se rozmanitost s sebou přináší nové výzvy, kterým musíme efektivněji čelit, a zároveň nabízí nesčetné možnosti, jichž se musíme chopit. Evropský rok rovných*

příležitostí je iniciativou, která stojí v čele úsilí směřujícímu k odvážné strategii urychlující boj proti diskriminaci v Evropské unii tak, jak to Komise vysvětlila v dokumentu vydaném v červnu 2005 nazvaném ´Rámcová strategie proti diskriminaci a za rovné příležitosti pro všechny´. Během Roku 2007 je nutno vyváženě ošetřit všechny důvody diskriminace, zároveň s různými způsoby diskriminace, kterou zakoušejí ženy i muži z důvodů pohlaví, rasového nebo etnického původu, náboženství či víry, zdravotního postižení, věku nebo sexuální orientace.".[1]

Cílem roku 2007 tedy bylo především zvýšit povědomí lidí o jejich právech na rovné zacházení a na život bez diskriminace – bez ohledu na pohlaví, rasový či etnický původ, vyznání či víru, zdravotní postižení, věk nebo sexuální orientaci, podporovat rovnost příležitostí pro všechny a odstartovat rozsáhlou diskusi o výhodách rozmanitosti jak pro evropské společnosti, tak pro jednotlivce, kteří v nich žijí.

Nebudu na tomto místě hodnotit úspěšnost roku 2007, pokud jde o dosažení výše uvedených cílů,[2] nýbrž se zaměřím na úspěšnost členských států při implementaci základních směrnic upravujících problematiku rovného zacházení a zákazu diskriminace, na něž výše uvedená citace poukazuje, a to konkrétně směrnice Rady 2000/43/ES ze dne 29. června 2000, kterou se zavádí zásada rovného zacházení s osobami bez ohledu na jejich rasu nebo etnický původ,[3] a směrnice Rady 2000/78/ES ze dne 27. listopadu 2000, kterou se stanoví obecný rámec pro rovné zacházení v zaměstnání a povolání,[4] přičemž jako příklad jsem si zvolila samozřejmě Českou republiku, a pro komparaci s ní Slovensko.

Směrnice 2000/43/ES

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1 Viz Evropský rok rovných příležitostí pro všechny. Proč Evropský rok 2007? [citováno 4. dubna 2008]. Dostupný z: http://ec.europa.eu/employment_social/eyeq/index.cfm?cat_id=EY; a dále rozhodnutí Evropského parlamentu a Rady č. 771/2006/ES. Dostupné z: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:146:0001:0007:CS:PDF.

2 K antidiskriminačním aktivitám Evropské unie prováděným v roce 2007 blíže např. Equal Rights In Practice, Issue 7. Spring 2007. Dostupný z: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/news/nl7_07_en.pdf; či Equal Rights In Practice, Issue 8. Autumn 2007. Dostupný z: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/news/nl8_07_en.pdf.

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Publikovaná v Úředním věstníku Evropských společenství Official Journal of the European Communities, 19. července 2000, L180/22 – L180/26; česká verze v Úředním věstníku Evropské unie 20/sv. 1, str. 23 – 27; CELEX 32000L0043) [citováno 4. dubna 2008]. Dostupná z: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:20:01:32000L0043:CS:PDF. Dále jen směrnice 2000/43/ES.

4 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Publikovaná v Úředním věstníku Evropských společenství (Official Journal of the European Communities, 2. prosince 2000, L303/16 – L303/22; česká verze v Úředním věstníku Evropské unie 05/sv. 4, str. 79 – 85; CELEX 32000L0078) [citováno 4. dubna 2008]. Dostupná z: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:05:04:32000L0078:CS:PDF. Dále jen směrnice 2000/78/ES.

Účelem této směrnice je stanovit rámec pro boj s diskriminací na základě rasy nebo etnického původu s cílem zavést v členských státech zásadu rovného zacházení.[5] Za tímto účelem ukládá směrnice členským státům povinnost přijmout odpovídající vnitrostátní legislativu a stanoví jim k tomu minimální obsahové náležitosti, jež musí být v příslušných právních předpisech zohledněny.

Prvním z takových požadavků je odpovídající vymezení základních pojmů, jako jsou *zásada rovného zacházení, přímá a nepřímá diskriminace, obtěžování* či *navádění k diskriminaci*. Všechny tyto pojmy rovněž sama směrnice definuje (viz její čl. 2). Pokud jde o věcnou a osobní působnost směrnice, resp. na ni navazující vnitrostátní legislativy, vztahuje se tato směrnice *na všechny osoby z veřejného i soukromého sektoru včetně veřejných subjektů, pokud jde o*

a) *podmínky přístupu k zaměstnání, samostatně výdělečné činnosti nebo do pracovního poměru včetně kritérií výběru a podmínek náboru, bez ohledu na obor činnosti a na úroveň profesní hierarchie, včetně pracovního postupu;*
b) *přístup ke všem typům a úrovním odborného poradenství, odborného vzdělávání, dalšího odborného vzdělávání a rekvalifikace, včetně získávání praktických zkušeností;*
c) *podmínky zaměstnání a pracovní podmínky včetně podmínek propouštění a odměňování;*
d) *členství a účast v organizaci zaměstnanců nebo zaměstnavatelů nebo v jakékoli organizaci, jejíž členové vykonávají určité povolání, včetně výhod poskytovaných těmito organizacemi;*
e) *sociální ochranu včetně sociálního zabezpečení a zdravotní péče;*
f) *sociální výhody;*
g) *vzdělání;*
h) *přístup ke zboží a službám, které jsou k dispozici veřejnosti, včetně ubytování, a jejich dodávky.*

Netýká se však diskriminace na základě státní příslušnosti ani vstupu, pobytu či právního postavení cizích státních příslušníků třetích zemí a osob bez státní příslušnosti na území členských států.[6]

Členské státy byly (a samozřejmě i nadále jsou) konkrétně povinny zajistit do 19. července 2003 soulad svého vnitrostátního práva s touto směrnicí, přičemž nejde jen o pouhé zakotvení práva na rovné zacházení, nýbrž též o jeho efektivní realizaci. Za tímto účelem musí členské státy jednak stanovit, že diskriminace z důvodu rasy či etnického původu je zakázaná, a současně v této souvislosti vymezit i základní formy diskriminace, včetně jejich definic. Směrnice umožňuje pouze dvě výjimky s tím, že jejich využití záleží na vůli členských států. Tou první je připuštění tzv. oprávněné diskriminace na základě rasy či etnického původu, *pokud z povahy profesní činnosti nebo z podmínek jejího výkonu*

[5] Srov. čl. 1 této směrnice.
[6] Srov. čl. 3 této směrnice.

vyplývá, že tyto charakteristiky představují podstatný a určující profesní požadavek, ovšem pouze *je-li jeho cíl legitimní a požadavek přiměřený*. Druhou výjimku tvoří tzv. pozitivní opatření, jejichž účelem je poskytnutí určitých výhod osobám, které jsou na základě své rasy či etnického původu nějakým způsobem znevýhodněny či segregovány.[7]

Současně jsou členské státy povinny zajistit efektivní ochranu uplatnění takových práv, a to prostřednictvím soudních, správních, popř. jiných dohadovacích řízeních, která musí být dostupná všem bez rozdílu. Kromě toho musí členské státy zajistit, aby mohla příslušné řízení zahájit ve prospěch či na podporu oběti diskriminace, samozřejmě s jejím souhlasem, též právnická osoba, která má v souvislosti s vnitrostátními kritérii oprávněný zájem na dodržování této směrnice. Podstatným a v členských státech poměrně diskutovaným je v této souvislosti požadavek směrnice týkající se přenosu důkazního břemene, jenž spočívá v tom, že diskriminovaná osoba (žalobce) má soudu, popř. jinému orgánu, pouze *předložit skutečnosti nasvědčující tomu, že došlo k přímé nebo nepřímé diskriminaci*, přičemž *prokázat, že nedošlo k porušení zásady rovného zacházení přísluší již odpůrci*. Vybočit z tohoto požadavku mohou členské státy pouze v případě, že to bude pro žalobce výhodnější. Většina členských států však řeší opačný problém, a sice jak předejít tzv. šikanózním žalobám, které se nezakládají na skutečném diskriminačním jednání a jejichž účelem je pouze neoprávněná diskreditace žalovaného. A konečně musí členské státy v rámci efektivní právní ochrany stanovit systém účinných, přiměřených avšak odrazujících sankcí, jež mohou zahrnovat též vyplácení náhrad obětem diskriminace, za porušení vnitrostátních ustanovení provádějících tuto směrnici.[8]

Požadavky směrnice nicméně tímto nekončí, neboť v dalších ustanoveních požaduje po členských státech též zajištění ochrany před pronásledováním, tj. před nepříznivým zacházením či následky, jež jsou reakcí na uplatňování práv vyplývající z principu rovného zacházení prostřednictvím soudu či jiného orgánu. Stejně tak jsou členské státy povinny určit jeden či více subjektů zaměřujících se na podporu rovného zacházení, tedy především na prevenci diskriminace a pomoc jejím případným obětem. Takové subjekty musí být minimálně oprávněny podávat návrhy na zahájení řízení z důvodu diskriminace, zpracovávat nezávislé studie, podávat doporučení a zveřejňovat nezávislé zprávy týkající se diskriminace.[9]

Kromě toho jsou členské státy povinny zajistit šíření informací, resp. seznámení veřejnosti s předpisy přijatými k provedení této směrnice, a dále sociální dialog se sociálními partnery za účelem další

[7] Srov. k tomu čl. 4 a 5 směrnice.
[8] Srov. k tomu čl. 7, 8 a 15 směrnice.
[9] Srov. k tomu čl. 9 a 13 směrnice.

podpory rovného zacházení prostřednictvím např. kolektivních smluv či vnitropodnikových předpisů, a současně dialog s nevládními organizacemi orientujícími se na podporu rovného zacházení a boj proti diskriminaci.[10]

O veškeré své činnosti v daných oblastech pak musí členské státy poskytovat vždy v pětiletých intervalech Evropské komisi informace *nezbytné k tomu, aby Komise vypracovala zprávu pro Evropský parlament a Radu o uplatňování této směrnice*, přičemž prvním termínem pro zaslání takové zprávy byl 19. červenec 2005.

Směrnice 2000/78/ES

Účelem této směrnice je stanovit obecný rámec pro boj s diskriminací na základě náboženského vyznání či víry, zdravotního postižení, věku nebo sexuální orientace v zaměstnání a povolání, s cílem zavést v členských státech zásadu rovného zacházení.[11] Jak vyplývá ze zde uvedených diskriminačních důvodů, nenahrazuje tato směrnice všechny směrnice předchozí, neboť neupravuje zákaz diskriminace ani na základě pohlaví ani z důvody rasy či etnického původu, nýbrž je pouze doplňuje tak, aby byla zásada rovného zacházení a zákazu diskriminace v rámci Evropské unie upravena komplexně. I tato směrnice je určena členským státům, jimž stanoví rámec minimálních požadavků, které musí promítnout do svého vnitrostátního práva.

Členské státy byly (a samozřejmě i nadále jsou), podobně jako v případě předchozí směrnice, povinny zajistit do 2. prosince 2003 soulad svého vnitrostátního práva s touto směrnicí, přičemž nejde jen o pouhé zakotvení práva na rovné zacházení, nýbrž též o jeho efektivní realizaci.

Stejně jako u výše popsané směrnice 2000/43/ES, i zde musí členské státy vycházet z jasného vymezení základních pojmů, jako jsou *zásada rovného zacházení*, *přímá* a *nepřímá diskriminace*, *obtěžování* či *navádění k diskriminaci*, přičemž samotná směrnice jim k tomu poskytuje určitý návod v podobě obecných definic těchto pojmů (viz čl. 2). Oblast osobní působnosti je shodná s osobní působností předešlé směrnice, tj. *všechny osoby ve veřejném i soukromém sektoru, včetně veřejných subjektů*, věcná působnost je poněkud užší, neboť se týká pouze následujících oblastí:

[10] Viz čl. 10, 11 a 12 směrnice.
[11] Viz čl. 1 této směrnice.

a) podmínky přístupu k zaměstnání, samostatné výdělečné činnosti nebo k povolání, včetně kritérií výběru a podmínek náboru bez ohledu na obor činnosti a na všech úrovních profesní hierarchie včetně získávání praktických zkušeností;

b) přístup ke všem typům a úrovním poradenství pro volbu povolání, odborného vzdělávání, dalšího odborného vzdělávání a rekvalifikace včetně pracovní praxe;

c) podmínky zaměstnání a pracovní podmínky včetně podmínek propouštění a odměňování;

d) členství a činnost v organizaci zaměstnanců nebo zaměstnavatelů nebo v jakékoli organizaci, jejíž členové vykonávají určité povolání, včetně výhod poskytovaných těmito organizacemi.

Negativní působnost směrnice se vztahuje na diskriminaci na základě státní příslušnosti, na vstup, pobyt či právní postavení cizích státních příslušníků třetích zemí nebo osob bez státní příslušnosti na území členských států, a dále na platby jakéhokoli druhu poskytované státními systémy nebo podobnými systémy, popř. na ozbrojené síly, stanoví-li tak členské státy u diskriminace na základě zdravotního postižení nebo věku.[12]

Stejně jako v předchozí směrnici mohou členské státy stanovit výjimky ze zásady rovného zacházení jí zakotvené, a to *pokud z povahy dotyčné pracovní činnosti nebo z podmínek jejího výkonu vyplývá, že tyto vlastnosti představují podstatný a určující profesní požadavek*, ovšem pouze *je-li cíl legitimní a požadavek přiměřený*. Kromě toho lze dále v případě diskriminace na základě náboženského vyznání či víry připustit rozdílné zacházení, pokud to vyplývá jako profesní požadavek u organizace či osoby, jejíž pracovní činnost, resp. etika takové činnosti je založena na náboženském vyznání nebo víře. I zde však platí, že se musí jednat o *legitimní a odůvodněný profesní požadavek se zřetelem k etice organizace*. Členské státy mohou dále připustit diskriminaci z důvodu věku, pokud je objektivně a rozumně odůvodněna legitimními cíli, souvisejícími zejména s politikou zaměstnanosti, trhem práce a odborným vzděláváním, pakliže prostředky k dosažení uvedených cílů jsou přiměřené a nezbytné. Tyto výjimky mohou především zahrnovat rozdíly související s odborným vzděláním či praxí. Diskriminaci na základě věku je možno za určitých okolností připustit též v systémech sociálního zabezpečení, ovšem pouze nepovede-li to k diskriminaci z důvodu pohlaví. V rámci pozitivních opatření pak mohou členské státy zakotvit tzv. přiměřené uspořádání pro postižené osoby spočívající v uložení povinnosti zaměstnavateli *umožnit zdravotně postižené osobě přístup k zaměstnání, jeho výkon nebo postup v zaměstnání nebo absolvování odborného vzdělávání, pokud tato opatření pro zaměstnavatele neznamenají neúměrné břemeno*, popř. je-li toto břemeno dostatečně *vyváženo opatřeními existujícími v rámci politiky dotyčného*

[12] Srov. čl. 3 směrnice.

členského státu v oblasti zdravotního postižení. Kromě toho mohou členské státy obecně přijímat, popř. podporovat pozitivní opatření, jejichž účelem je poskytnutí určité výhody osobám, které jsou na základě některého z diskriminačních důvodů uvedených ve směrnici v nevýhodném postavení vůči ostatním, a stejně tak další opatření související s bezpečností a ochranou zdraví při práci zdravotně postižených.[13]

Pokud jde o zakotvení ochrany před diskriminací, obsahuje tato směrnice stejné požadavky jako směrnice předchozí, tj. jak dostupnost soudních, správních či jiných řízení pro všechny, možnost zahájení takového řízení ve prospěch či na podporu diskriminované osoby a s jejím souhlasem právnickou osobou působící v oblasti rovného zacházení a zákazu diskriminace, tak i přenos důkazního břemene. Členské státy jsou rovněž povinny přijmout *nezbytná opatření pro ochranu zaměstnanců před propuštěním nebo jiným nepříznivým zacházením ze strany zaměstnavatele, které je reakcí na stížnost podanou v podniku nebo na soudní řízení zaměřené na dodržování zásady rovného zacházení*. Kromě toho i zde by měly členské státy stanovit systém účinných, přiměřených avšak odrazujících sankcí a přijmout opatření k jejich efektivnímu uplatnění.[14]

Šíření informací, zajištění sociálního dialogu a dialogu s nevládními organizacemi působícími v oblasti rovného zacházení je i zde upraveno stejně jako v předešlé směrnici.[15]

O veškeré své činnosti v daných oblastech pak musí členské státy poskytovat, stejně jako u směrnice 2000/43/ES, vždy v pětiletých intervalech Evropské komisi informace *nezbytné k tomu, aby Komise vypracovala zprávu pro Evropský parlament a Radu o uplatňování této směrnice*, přičemž prvním termínem pro zaslání takové zprávy byl 2. prosinec 2005.

Implementace obou směrnic v členských státech

Ačkoli současně se vstupem v platnost nové legislativy v Lucemburku v prosinci 2006 všechny členské státy transponovaly výše uvedené směrnice do svých vnitrostátních právních řádů, a tudíž byla i ukončena řízení o porušení komunitárního práva vedená vůči Německu, Finsku, Rakousku a Lucembursku kvůli nečinnosti související s implementací předmětných směrnic, byla zahájena spousta

[13] Srov. k tomu čl. 4, 5, 6, 7 a 17 této směrnice.
[14] Viz čl. 9, 10 a 11 směrnice.
[15] Srov. čl. 12, 13 a 14 této směrnice.

nových řízení,[16] jejichž předmětem je nekonformnost vnitrostátních právních předpisů s požadavky komunitárního práva, resp. konkrétně s požadavky obou antidiskriminačních směrnic přijatých v roce 2000. V únoru 2006 byla zahájena řízení vůči Belgii, Dánsku, Řecku, Španělsku, Irsku, Itálii, Nizozemí, Portugalsku, Švédsku a Spojenému království a v červenci 2006 též vůči České republice, Estonsku, Kypru, Maďarsku, Litvě, Lotyšsku, Maltě, Polsku, Slovinsku a Slovensku, a to kvůli nesprávné implementaci směrnice 2000/43/ES. V prosinci 2006 pak následovalo zahájení dalších řízení kvůli nesprávné implementaci směrnice 2000/78/ES, a sice vůči Dánsku, Řecku, Španělsku, Irsku, Itálii, Nizozemí, Portugalsku, České republice, Estonsku, Kypru, Maďarsku, Litvě, Lotyšsku, Maltě, Polsku, Slovinsku, Slovensku a Finsku, přičemž Spojené království, Švédsko, Francie a Belgie využili možnosti prodloužení lhůty až do prosince 2006 k provedení ustanovení této směrnice týkajících se diskriminace na základě věku a zdravotního postižení, již jim poskytuje čl. 18 této směrnice.[17]

Jak vidno, v podstatě všechny členské státy mají s implementací předmětných směrnic problémy, nicméně v následujícím textu se blíže zaměřím samozřejmě na Českou republiku a pro srovnání též na Slovensko.

Antidiskriminační zákon v České republice

V poslední době je v České republice skloňovaný antidiskriminační zákon,[18] jenž se dostal do povědomí mimo jiné též díky novému kodexu pracovního práva. Původní zákoník práce[19] totiž postupně

[16] Nemám zde zatím na mysli řízení před Evropským soudním dvorem, nýbrž pouze zahájení provádění určitých opatření ze strany Evropské komise.

[17] Srov. k tomu přílohu k 24. výroční zprávě Komise o kontrole uplatňování práva společenství (2006) – Commission Staff Working Document annex to the 24th Annual Report from the Commission on Monitoring the Application of Community Law (2006) Situation in the Different Sectors. Brussels, 2007, s. 46, COM(2007) 398 final, SEC(2007) 976 [citováno 4. dubna 2008]. Dostupná z: http://ec.europa.eu/community_law/infringements/pdf/sec_2007_0975_1_en.pdf. Zpráva z roku 2007 dosud není zpracována, a proto je možné, že některé z výše uvedených států již provedly příslušné úpravy vnitrostátních právních předpisů a učinily je konformními s požadavky dotčených směrnic. Např. Slovensko přijalo rozsáhlou novelu antidiskriminačného zákona, účinnou od 1. dubna 2008, o níž bude ještě pojednáno dále.

[18] Návrh zákona o rovném zacházení a o právních prostředcích ochrany před diskriminací a o změně některých zákonů (antidiskriminační zákon).

[19] Zákon č. 65/1965 Sb, zákoník práce, ve znění pozdějších předpisů (platný a účinný až do 31. prosince 2006).

novelizován, zejména prostřednictvím tzv. první a druhé euronovely,[20] jimiž, spolu s dalšími novelami, byly současně doplněny rovněž ostatní pracovněprávní předpisy, tak, že antidiskriminační úprava v rámci pracovního práva byla co do požadavků Evropské unie relativně dostačující. To se nicméně změnilo v okamžiku nabytí účinnosti nového zákoníku práce,[21] který již ve svých ustanoveních upravujících zásadu rovného zacházení a zákazu diskriminace počítal s existencí obecného antidiskriminačního zákona.[22]

První návrh antidiskriminačního zákona spatřil světlo světa již v roce 2004, přičemž dne 21. ledna 2005 jej předložila vláda Poslanecké sněmovně, v níž byl projednáván jako sněmovní tisk č. 866 (související změnový zákon jako tisk č. 867). V senátu byl tento návrh projednáván jako senátní tisk č. 201. Senát jej však zamítl a vrátil Poslanecké sněmovně, která toto rozhodnutí nepřehlasovala, a tak osud prvního návrhu antidiskriminačního zákona byl definitivně zpečetěn dne 23. května 2006.

Vzhledem neutěšené situaci v antidiskriminační právní úpravě České republiky, jež způsobila též zahájení čtyř řízení pro porušení komunitárního práva, byl na sklonku roku 2006 zpracován druhý návrh antidiskriminačního zákona, jenž byl Poslanecké sněmovně předložen dne 12. července 2007 a byl jí projednáván jako sněmovní tisk 253. Dne 19. března 2008 schválila Poslanecká sněmovna ve třetím čtení tento již druhý návrh zákona s několika svými pozměňovacími návrhy. Dne 31. března 2008 byl návrh antidiskriminačního zákona schválený Poslaneckou sněmovnou doručen Senátu a je jím projednáván jako senátní tisk č. 225.

Z důvodu omezeného rozsahu tohoto příspěvku se nebudu detailně zabývat celým návrhem antidiskriminačního zákona, neboť je v tuto chvíli ještě otázkou, zda bude vůbec přijat a stejně tak, v jaké podobě, neboť i Senát jej může prostřednictvím svých pozměňovacích návrhů ještě upravit. Konečné posouzení obsahu z hlediska jeho souladu s komunitárním právem, bude-li antidiskriminační zákona přijat, bude nicméně především na Evropské komisi. Zmíním se tedy pouze obecně o některých skutečnostech, které mě při přečtení návrhu zaujaly.

Podíváme-li se na samotný obsah návrhu antidiskriminačního zákona, zjistíme, že dle textu důvodové zprávy je hlavním cílem tohoto návrhu jednak doplnění chybějící právní úpravy v rámci českého právního řádu tak, aby byly naplněny požadavky komunitárního práva, a dále též dosažení koherentní,

[20] První euronovela byla provedena zákonem č. 155/2000 Sb., účinným až na určité výjimky dnem 1. ledna 2001, druhá euronovela pak zákonem č. 46/2004 Sb, účinným dnem 1. března 2004.
[21] Zákon č. 262/2006 Sb., zákoník práce, ve znění pozdějších předpisů, účinný od 1. ledna 2007.
[22] Srov. § 16 nového zákoníku práce.

transparentní a srozumitelné právní úpravy českého právního řádu, která je provázána s ústavními principy.[23]

Pokud jde o soulad návrhu s požadavky směrnic 2000/43/ES a 2000/78/ES, lze konstatovat, že z hlediska rozsahu oblastí, v nichž zásadu rovného zacházení upravuje (alespoň dle svého § 1) odpovídá dikci obou směrnic. Osobní působnost zákona je vymezena tak, že *fyzická osoba má právo v právních vztazích, na které se vztahuje tento zákon, na rovné zacházení a na to, aby nebyla diskriminována*.[24] Zákon by se tedy měl vztahovat na všechny fyzické osoby, což rovněž odpovídá požadavkům komunitárního práva. Diskutabilní je nicméně vztah antidiskriminačních ustanovení vůči osobám právnickým, jež samy o sobě z povahy věci diskriminovány být nemohou, nicméně ve spojení s jejich členy, společníky, statutárními orgány apod. je i diskriminace právnických osob možná. Slovenský antidiskriminačný zákon toto např. zohledňuje, jak bude uvedeno dále, nicméně z dikce směrnic Evropské unie toto jednoznačně nevyplývá. Bude tedy záležet především na stanovisku Evropské komise, jejímž úkolem je hlídat soulad vnitrostátních právních řádů členských států s právem komunitárním. Stejně tak lze spekulovat o rozsahu povinných subjektů, neboť konkrétní povinnost dodržovat zásadu rovného zacházení je v návrhu antidiskriminačního zákona výslovně uložena pouze zaměstnavatelům.[25]

Vymezení pojmů je další problematickou oblastí, která činila např. problém slovenským zákonodárcům (viz dále). Ačkoli přístup českých zákonodárců je poměrně pečlivý, neboť značná část návrhu antidiskriminačního zákona je věnována v podstatě pouze definicím pojmů, jež jsou zpravidla převzaty z překladu obou směrnic, obecně lze této části vytknout vymezení určitých pojmů pouze pro účely antidiskriminačního zákona a jiných obecně, aniž by byl patrný určitý logický záměr.[26] Stejně tak lze vytknout z hlediska systematiky zákona uspořádání, resp. zařazení některých konkrétních ustanovení. Např. povinnost dodržovat zásadu rovného zacházení a zákaz diskriminace a tomu odpovídající právo na rovné zacházení, jež by si zřejmě zasloužily samostatný paragraf, jsou obsaženy pouze „skrytě“, a to jednak v rámci vymezení působnosti zákona v § 1 odst. 3 (právo fyzických osob na rovné zacházení), a dále ve vymezení pojmů v § 5 odst. 3 (povinnost zaměstnavatelů dodržovat zákaz diskriminace v pracovněprávních vztazích), popř. až ve speciální úpravě konkrétních oblastí (viz např. § 8). Diskutabilní zřejmě bude rovněž stanovení rozdílné věkové hranice důchodového věku pouze na

[23] Viz Důvodová zpráva k vládnímu návrhu zákona, o rovném zacházení a o právních prostředcích ochrany před diskriminací a o změně některých zákonů (antidiskriminační zákon), Obecná část, Hlavní principy navrhované právní úpravy, s. 25 [citováno 4. dubna 2008]. Dostupná z: http://www.psp.cz/sqw/text/orig2.sqw?idd=11133.

[24] Srov. § 1 odst. 3 návrhu antirdiskriminačního zákona

[25] Viz např. § 5 odst. 3 či § 8 návrhu antidiskriminačního zákona.

[26] Např. právo na rovné zacházení je v § 1 odst. 3 návrhu definováno pro účely tohoto zákona, zatímco zajišťování rovného zacházení v § 5 odst. 2 je již vymezeno obecně, apod.

základě pohlaví,[27] což dle mého názoru neodpovídá dikci čl. 6 odst. 2 směrnice 2000/78/ES, neboť v důsledku takového rozlišení jsou v podstatě muži diskriminováni z hlediska přístupu k dávkám sociálního zabezpečení v podobě starobního důchodu. Pozoruhodné je pak ustanovení § 6 odst. 6, dle něhož *diskriminací z důvodu pohlaví není rozdílné zacházení při poskytování služeb, které jsou nabízeny v oblasti soukromého a rodinného života a úkonů prováděných v této souvislosti*.

Velmi diskutovaným tématem při projednávání antidiskriminačního zákona byla, vedle dalších otázek,[28] též problematika právní úpravy přenosu důkazního břemene, dle níž by měl žalobce (diskriminovaná osoba) pouze předložit soudu skutečnosti odůvodňující podezření z diskriminace, přičemž prokázat, že k porušení zásady rovného zacházení nedošlo, je uloženo žalovanému.[29] Většina členských států, včetně České republiky i Slovenska, totiž řeší v této souvislosti otázku předcházení tzv. šikanózním žalobám. Slovensko např. toto vyřešilo stanovením požadavku, aby žalobce předložil důkazy, z nichž je možno dovodit, že byl diskriminován. Poslední novelou slovenského antidiskriminačného zákona však byl tento požadavek zmírněn na pouhé oznámení skutečností, z nichž lze důvodně usuzovat na diskriminační jednání.[30] Toto mírnější pojetí zvolila i Poslanecká sněmovna Parlamentu České republiky, a to přijetím pozměňovacího návrhu poslance Bendy ve 3. čtení (viz navrhovaná novela § 133a občanského soudního řádu[31] ve znění schváleném Poslaneckou sněmovnou).

Otázka konformity antidiskriminačního zákona s právem komunitárním bude především předmětem posuzování Evropské komise. Nicméně z pohledu postavení antidiskriminačního zákona v rámci českého vnitrostátního práva je však třeba konstatovat, že cíl směřující k *dosažení koherentní, transparentní a srozumitelné právní úpravy českého právního řádu* dle mého názoru v žádném případě naplněn není, a to především z následujících důvodů.

Především je třeba upozornit na skutečnost, že žádné z ustanovení tohoto zákona neřeší otázku jeho vztahu k ostatním právním předpisům, které buďto již nyní úpravu rovného zacházení a zákazu diskriminace obsahují, anebo předpisům, jež by takovou úpravu obsahovat měly, ale nečiní tak. V této souvislosti lze rovněž poukázat na relativně úzký a navíc taxativní výčet diskriminačních důvodů v § 2

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[27] Viz § 6 odst. 2 návrhu antidiskriminačního zákona.

[28] Jako např. povaha samotné antidiskriminační úpravy – jeden obecný zákon či novelizace řady již existujících zákonů, úprava pozitivních opatření, výběr státní instituce zaměřující se na podporu rovného zacházení a boj proti diskriminaci (vedle nevládních organizací) – zřízení instituce nové či svěření těchto kompetencí veřejnému ochránci práv, neurčitost některých pojmů apod. Blíže k tomu viz např. *Otáhalová, L., Čižinský, P.* Antidiskriminační zákon v poločase. Via Iuris – čtvrtletní příloha Právního fóra, 2006, č. IV, s. 61 – 67 [citováno 4. dubna 2008]. Dostupný z: http://www.viaiuris.cz/files/pravni_forum/VIA_IURIS_06_4.pdf.

[29] Viz čl. 10 směrnice 2000/78/ES a čl. 8 směrnice 2000/43/ES.

[30] Viz § 11 odst. 2 slovenského antidiskriminačného zákona před a po nabytí účinnosti zákona č. 85/2008 Z.z., jenž nabyl účinnosti 1. dubna 2008.

[31] Zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů.

odst. 3 návrhu antidiskriminačního zákona (o jeho zařazení k definici přímé diskriminace, namísto vymezení obecného ani nemluvě).

Dle mého názoru by měl být antidiskriminační zákon obecným zákonem (*lex generalis*) subsidiárně použitelným vůči všem zvláštním právním úpravám regulujícím oblasti, na něž se vztahuje. Tato skutečnost je sice zmíněna v důvodové zprávě,[32] nicméně v samotném návrhu zákona již nikoli. Tato neprovázanost s ostatními zákony se odráží též ve skutečnosti, že antidiskriminační zákon obsahuje novely pouze několika zákonů z oblasti pojištění a občanského soudního řádu. Potřeba novelizace dalších speciálních zákonů, včetně zákonů z oblasti pracovněprávní, je opět zmíněna pouze v důvodové zprávě (viz strana 30 – 32), samotný návrh antidiskriminačního zákona, jenž je pojat poměrně obecně, a to včetně relativně neurčitého vymezení řady pojmů či institutů, ji vůbec neřeší. Již nyní je tedy patrné, že samotné schválení antidiskriminačního zákona nebude v rámci komplexní úpravy principu rovného zacházení a zákazu diskriminace řešením konečným, nýbrž pouze prvním, a to ještě poněkud pochybným, krůčkem.

Exkurz ke slovenskému antidiskriminačnému zákonu

Vzhledem k omezenému rozsahu tohoto příspěvku se nyní již jen stručně zmíním o slovenském antidiskriminačném zákonu, a to především kvůli určitému srovnání, popř. inspiraci pro Českou republiku. Slovenský antidiskriminačný zákon se totiž, podobně jako antidiskriminační zákon český, potýkal s problémy již před jeho samotným přijetím. Dvakrát odmítl Parlament Slovenské republiky návrh tohoto zákona projednat, a tak schválený *zákon č. 365/2004 Z.z., o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)*, účinný od 1. července 2004, byl až v pořadí třetím návrhem. Avšak i navzdory takto brzkému přijetí antidiskriminačného zákona (ve srovnání s Českou republikou) se Slovenská republika potýkala s výhradami ze strany Evropské komise (a kromě toho § 8 odst. 8 antidiskriminačného zákona byl předmětem posuzování Ústavného súdu z hlediska jeho souladu s ústavním pořádkem Slovenské republiky, přičemž nálezem publikovaným pod č. 539/2005 Z.z. bylo toto ustanovení zrušeno).[33]

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[32] Viz Důvodová zpráva k návrhu antidiskriminačního zákona, Obecná část, Popis platného právního stavu, s. 21: *Antidiskriminační zákon je zákon obecný, další předpisy upravující rovné zacházení jsou k němu ve vztahu speciálním a v případě rozporu se použijí přednostně.*

[33] Blíže k tomu viz např. *Feťková, G.* Nesúlad antidiskriminačného zákona s Ústavou SR. Justičná revue, 2006, č. 1, s. 132 – 150, *Jánošíková, M.* Posudzovanie antidiskriminačnej legislatívy v konaní pred Ústavným súdom Slovenskej republiky. Jurisprudence, 2006, č. 5, s. 36 – 41, či *Lipšic, D.* K pozitívnej diskriminácii. Justičná revue, 2007, č. 5, s. 650 - 654. Blíže obecně k obsahu antidiskriminačného zákona, ve znění účinném před novelou provedenou zákonem č. 85/2008 Z.z., a jeho vztahu ke směrnicím 2000/43/ES a 2000/78/ES viz např. *Barancová, H.* Antidiskriminačný zákon a zásada

Evropská komise vytýkala Slovensku především vymezení pojmů,[34] a proto byla v letošním roce přijata rozsáhlá novela antidiskriminačného zákona, provedená zákonem č. 85/2008 Z.z., účinným od 1. dubna 2008, jejímž předmětem je především zcela nová úprava definic pojmů, a dále zakotvení výslovného zákazu diskriminace v jednotlivých blíže upravených oblastech (*v sociálnom zabezpečení, zdravotnej starostlivosti, poskytovaní tovarov a služieb a vo vzdelávaní*, a dále *v pracovnoprávnych vzťahoch a obdobných právnych vzťahoch*), ale také určité zmírnění (ve vztahu k žalobci) již výše zmíněné úpravy přenosu důkazního břemene, či nové zavedení pozitivních opatření, jež byla již určitým způsobem upravena v nálezem Ústavného súdu zrušeném § 8 odst. 8 původního znění antidiskriminačného zákona, a i nyní jsou předmětem kritiky odborné veřejnosti.[35]

Závěr

Řádná implementace směrnic Evropské unie, jak vidno, nespočívá pouze v jejich formální transpozici do vnitrostátního právního řádu, např. v podobě obecného antidiskriminačního zákona, jak bývá mnohdy zdůrazňováno v souvislosti se snahou o schválení návrhu tohoto zákona v České republice, nýbrž především v obsahové kvalitě příslušných antidiskriminačních ustanovení, ať už jsou přijata v podobě jediného zákona či formou úpravy speciálních zákonů regulujících konkrétní oblasti (i když, dle mého názoru je přijetí jednoho obecného zákona vhodnější, avšak za podmínky jeho důsledné provázanosti s předpisy zvláštními, přičemž tato komplexní úprava by měla být především kompaktní, přehledná a transparentní). Tento závěr potvrzuje též příklad slovenského antidiskriminačného zákona, který byl účinný již v roce 2004, a přesto byla Slovenská republika ve 24. výroční zprávě Evropské komise z roku 2007 (zohledňující stav v roce 2006) – viz výše – zmíněna jako jeden z členských států, vůči nimž bylo

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rovnakého zaobchádzania v pracovnoprávnych vzťahoch. Právny obzor, 2005, č. 4, s. 335 – 348, *Poláková, A.* Antidiskriminačná legislatíva v Slovenskej republike a postavenie Slovenského národného strediska pre ľudská práva. Justičná revue, 2006, č. 12, s. 1827 – 1834, *Freund, M.* Zásada rovnakého zaobchádzania v pracovnoprávnych vzťahoch. In *Barancová, H. a kol.* Pracovné právo v zjednotenej Európe. Sympózium s medzinárodnou účasťou. Trenčianske Teplice – Omšenie 8. – 10. september 2004. Žilina: Poradca podnikateľa, 2004, s. 62 – 80, *Barancová, H.* Protidiskriminačný zákon a zásada rovnakého zaobchádzania v pracovnoprávnzch vzťahoch. In *Barancová, H. a kol.* Pracovné právo v zjednotenej Európe. Sympózium s medzinárodnou účasťou. Trenčianske Teplice – Omšenie 8. – 10. september 2004. Žilina: Poradca podnikateľa, 2004, s. 81 – 98, či *Švecová, D.* K zákazu diskriminácie v pracovnoprávnych vzťahoch. In *Barancová, H. a kol.* Pracovné právo v zjednotenej Európe. Sympózium s medzinárodnou účasťou. Trenčianske Teplice – Omšenie 8. – 10. september 2004. Žilina: Poradca podnikateľa, 2004, s. 99 – 111.

[34] Viz např. Únia našla chyby v slovenskom zákone. Pravda, 13. srpna 2006 [citováno 4. dubna 2008]. Dostupné z: http://spravy.pravda.sk/unia-nasla-chyby-v-slovenskom-zakone-dsp-/sk_domace.asp?c=A060813_195016_sk_domace_p04.

[35] Srov. k tomu např. *Skobla, D.* Novela antidiskriminačného zákona – ďaľšia premárnená šanca [citováno 4. dubna 2008]. Dostupné z: http://www.changenet.sk/?section=forum&x=339973. A dále např. *Lipovská, I.* Do zákona sa dostalo sexuálne obťažovanie. Pravda, 14. února 2008 [citováno 4. dubna 2008]. Dostupné z: http://spravy.pravda.sk/do-zakona-sa-dostalo-sexualne-obtazovanie-fik-/sk_domace.asp?c=A080214_155235_sk_domace_p12; či *Lipšic, D.* K pozitívnej diskriminácii. Justičná revue, 2007, č. 5, s. 650 – 654.

zahájeno řízení pro nesoulad vnitrostátní právní úpravy s požadavky komunitárního práva, a sice konkrétně s předmětnými směrnicemi. To by mělo být současně inspirací pro Českou republiku, jejíž antidiskriminační zákon je v současné době prozatím ve fázi legislativního procesu, avšak již nyní vykazuje určité, dle mého názoru nikoli nepodstatné, nedostatky.

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[2] Equal Rights In Practice, Issue 7. Spring 2007. Dostupný z: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/news/nl7_07_en.pdf

[3] Equal Rights In Practice, Issue 8. Autumn 2007. Dostupný z: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/news/nl8_07_en.pdf

[4] Směrnice Rady 2000/43/ES ze dne 29. června 2000, kterou se zavádí zásada rovného zacházení s osobami bez ohledu na jejich rasu nebo etnický původ (Official Journal of the European Communities, 19. července 2000, L180/22 – L180/26; česká verze v Úředním věstníku Evropské unie 20/sv. 1, str. 23 – 27; CELEX 32000L0043); Dostupná z: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:20:01:32000L0043:CS:PDF

[5] Směrnice Rady 2000/78/ES ze dne 27. listopadu 2000, kterou se stanoví obecný rámec pro rovné zacházení v zaměstnání a povolání (Official Journal of the European Communities, 2. prosince 2000, L303/16 – L303/22; česká verze v Úředním věstníku Evropské unie 05/sv. 4, str. 79 – 85; CELEX 32000L0078). Dostupná z: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:05:04:32000L0078:CS:PDF

[6] Commission Staff Working Document annex to the 24th Annual Report from the Commission on Monitoring the Application of Community Law (2006) Situation in the Different Sectors. Brussels, 2007, s. 46, COM(2007) 398 final, SEC(2007) 976. Dostupné z: http://ec.europa.eu/community_law/infringements/pdf/sec_2007_0975_1_en.pdf

[7] Vládní návrh zákona o rovném zacházení a o právních prostředcích ochrany před diskriminací a o změně některých zákonů (antidiskriminační zákon), ve znění předloženém Poslanecké sněmovně, včetně důvodové zprávy. Dostupný z: http://www.psp.cz/sqw/text/orig2.sqw?idd=11133

[8] Návrh antidiskriminačního zákona ve znění schváleném Poslaneckou sněmovnou. Dostupný z: http://www.psp.cz/forms/tmp_sqw/0d1b001f.doc

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[12] *Lipšic, D.* K pozitívnej diskriminácii. Justičná revue, 2007, č. 5, s. 650 - 654

[13] *Barancová, H.* Antidiskriminačný zákon a zásada rovnakého zaobchádzania v pracovnoprávnych vzťahoch. Právny obzor, 2005, č. 4, s. 335 – 348

[14] *Poláková, A.* Antidiskriminačná legislatíva v Slovenskej republike a postavenie Slovenského národného strediska pre ľudská práva. Justičná revue, 2006, č. 12, s. 1827 – 1834

[15] *Barancová, H. a kol.* Pracovné právo v zjednotenej Európe. Sympózium s medzinárodnou účasťou. Trenčianske Teplice – Omšenie 8. – 10. september 2004. Žilina: Poradca podnikateľa, 2004

[16] Únia našla chyby v slovenskom zákone. Pravda, 13. srpna 2006. Dostupné z: http://spravy.pravda.sk/unia-nasla-chyby-v-slovenskom-zakone-dsp-/sk_domace.asp?c=A060813_195016_sk_domace_p04

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DIE AUFHEBUNG DER ARBEITSVERHÄLTNISSE IN UNGARN

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Abstract

Die ungarische Demokratie und Marktwirtschaft, dementsprechend das ungarische „marktwirtschaftliche" Arbeitsrecht ist ziemlich jung. In den ersten Jahren der 90-er Jahren hat die Regelung so viel entwickelt, wie vorher binnen 40 Jahren. Statt dem alten „Arbeiter" terminus technikus verwenden wir „Arbeitnehmer". Natürlich hat es keine Bedeutung im Recht, aber es kann symbolisieren, wie groß der Werdegang war. Die Formgebung des heutigen Atbeitsrechtssystems begann im Jahre 1988. Aus dem Jahre 1989 stammt das Gesetz über die Streik und spater das Arbeitsgesetzbuch, Das Gesetz über die Rechtsstellung der Angestellten im öffentlichen Dienst und Das Gesetz über die Rechtsstellung der Beamten im öffentlichen Dienst.

Key words

Arbeitsverhältnisse in Ungran, Das System der Auflösung des Arbeitsverhältnisses, Kündigung, ordentliche Kündigung, außerordentliche Kündigung.

I.

Heute gibt es in Ungarn drei Arbeitsgesetze. Alle drei stammen aus dem Jahre 1992.

- Das Arbeitsgesetzbuch[1] (mit den generellen und speziellen Regelungen)

Und zwei spezielle Arbeitsgesetze:

- Das Gesetz über die Rechtsstellung der Angestellten im öffentlichen Dienst[2]

- Das Gesetz über die Rechtsstellung der Beamten im öffentlichen Dienst[3]

Diese dreifachige Regelung ist begründet, weil diese drei Kreise der Arbeitnehmer ganz andere Rechtslagen haben.

[1] 1992. évi XXII. tv. (=Mt.)
[2] 1992. évi XXXIII. tv. (=Kjt.)
[3] 1992. évi XXIII. tv. (=Ktv.)

Hier möchte ich anmerken, dass die Begriffe „Angestellte und Beamte“ eine andere Bedeutung im Arbeitsrecht der verschiedenen europäischen Länder haben. Die ungarische Regelung in einigen Sätzen zusammengefasst: Öffentliche Bedienstete (*Angestellter*) arbeiten bei staatlichen Institutionen, bekommen den Lohn vom Staat oder von der örtlichen Selbstverwaltung. Sowohl die Sekretärin, als auch die Lehrerin und die Putzfrau einer Schule gehören in diesen Kreis. Beamten im öffentlichen Dienst (Staatsbeamter oder einfach *Beamter*) arbeiten in einem Ministerium, bei der Selbstverwaltung des Dorfes als Referent usw., also sie arbeiten in der Staatsverwaltung. Alle andere Arbeiter und Angestellten sind im ungarischen Arbeitsrecht als „Arbeitnehmer“ genannt.

Das System der Auflösung des Arbeitsverhältnisses und der Kündigung

Das Arbeitsverhältnis kann

- durch Erklärung (einseitig oder gegenseitig)

- unabhängig von dem Wille der Parteien, wegen äußerer Ursachen

erlöschen.[4]

Die Aufhebung des Arbeitsverhältnisses durch gegenseitiges Einverständnis:

Es ist ein optimaler Fall, wenn die Zweckbestimmung des Arbeitsverhältnisses bei den Parteien gleichzeitig aufhebt. Hier ist die Aufgabe des Arbeitsrechtes nur die Sicherung der Möglichkeit und das Ausseihen der Mißbrauch, weil es die Interesse beiden Parteien ist.

Die Aufhebung des Arbeitsverhältnisses durch einseitige Erklärung:

Wenn der Wille der beiden Parteien nicht der selbe ist, drängt sich das Recht hervor. Es wäre erwünscht solche Umstände zu schaffen, wo die Interessen der Gegenparteien, also des Arbeitgebers und des Arbeitnehmers kein unangemessener Abbruch leiden.

Das Recht muss die Möglichkeit der einseitigen Auflösung sichern! Keiner ist dazu zu verpflichten, dass er das für sich ungünstige Arbeitsverhältnis aufrechtalten soll. Den Schutz der Interesse der anderen Partei sichert ein sogenannter Zeitraum, die Kündigungszeit. Diese Weise der Aufhebung heisst **Kündigung**.

Der zweite aber nicht zweitklassige Gesichtspunkt ist der erhöhte Schutz der Interesse des Arbeitnehmers. Die Folge der ungleichen gesellschaftlichen-wirtschaftlichen Lage des Arbeitgebers

[4] Miholics, Tivadar: Munkajog. Budapest: 1987. 83. p.

und Arbeitnehmers ist, dass die Kündigung nicht in einer gleichmäßigen Maße der beiden Parteien betrifft. Auf der Seite des Arbeitnehmers kann eine Kündigung als grober, erheblicher Nachteil melden, besonders, wenn er eine spezielle Ausbildung oder schlechte Familienzustände usw. hat. Dementgegen bedeutet nicht so großen Nachteil eine Kündigung auf der anderen Seite.[5] Also die richtige rechtliche Regelung - die die Interesse der Arbeitnehmer beachtet – soll die folgenden Anforderungen gewachsen:

- Mit der Ansetzung der formalen und materiellen-inhaltlichen Bedingungen der Kündigung seitens des Arbeitgebers – so werden nur die wirklich Verwendungszweck verlorene Arbeitsverhältnisse aufgelöst

- Mit der Bildung spezieller Restriktionen – so kann das Gesetz die Kündigung verhindern bei Arbeiter, die eine erhöhte Interesse zur Bewahrung des Arbeitsplatzes haben (z.B. Schwangerschaft, etc.)

- Mit der Freizeitsicherung unter der Kündigungszeit, damit der Arbeitnehmer eine neue Stelle suchen kann

- Mit der Sicherung als eventuelle Rechtsfolge einer wiederrechtlichen Kündigung – neben materiellen Reparation – die Neuherstellung des Arbeitsverhältnisses.

Historisch gesehen sind *gebundene und ungebundene* Kündigungssysteme abzugrenzen. Diese Klassifikation der Kündigungssysteme gründet auf der Untersuchung der zur Aufhebung führenden Anlässe. Die Möglichkeit der Kündigung ist ungebunden, wenn es keine Begründungspflicht besteht[6]; und es ist gebunden, venn die Kündigung nur mit einer gerechten, entsprechenden Begründung gültig ist. In diesem zweiten System können wir auch zwei Klassen: *absolut gebundene* und *reltiv gebundene* Systeme unterscheiden. Das System ist absolut gebunden, wenn man nur in den Rechtsnorm taxativ bestimmten Fällen kündigen kann[7]. Relativ gebunden ist das System der Kündigung, venn das Arbeitsverhältnis nur im gerechtfertigten Fall zu Kündigen ist[8]. Die Anlässe gesehen beinhaltet das Gesetz keine konkrete Vorschrifte, es kann irgendwelcher Anlaß sein, was die Aufhebung der Zweckbestimmung des Arbeitsverhältnisses bewirkt[9].

[5] In vielen entwickelten Industrieländern ist die Kündigungsrecht größer und ziseliierter, als in Ungarn.
[6] Die klassische Form lebt heute noch in einigen Staaten der USA, der sog. „employement at will". Beide Parteien können ohne Begründung aufheben.
[7] So ist die Enthebung der Beamten und Angestellten im öffentlichen Dienst in Ungarn.
[8] Wie z. B.: „vernunftgemäß", „angemessen"
[9] Z. B.: ordentliche Kündigung seitens Arbeitgeber im Mt. (ung. ArbG.)

Die fristlose Kündigung ist eine exzeptionelle Möglichkeit! Während des Arbeitsverhältnisses können solche Umstände ereignen, dass die Aufrechthaltung des Arbeitsverhältnisses auch für kurze Zeit Beschwerde oder Gefahr bedeuten würde. Unter Berücksichtigung der Umstände muss die arbeitsrechliche Regelung – in einem beschränktem Kreis – auch diese Möglichkeit erlauben und erkennen.

Die Aufhebung des Arbeitsverhältnisses durch vom Willen der Parteien unabhängigen Gründe:

Diese Gründe sind im Arbeitsrecht sehr beschränkt. Aber das Arbeitsrecht muss sich mit solchen Umständen beschäftigen, in erster Linie mit dem Fall, wenn eine der Parteien stirbt oder aufgelöst wird.

Ein Spezialfall, wenn die Geschäftsfähigkeit der Person erlischt, und sie vorher als Beamte im öffentlichen Dienst arbeitete. In diesem Fall folgt die „Kündigung" kraft des Gesetzes, automatisch. Die vierte Variation in diesem Kreis sind di befristeten Arbeitsverhältnisse.[10]

Die Aufhebung des Arbeitsverhältnisses durch gegenseitiges Einveständnis

Der Arbeitgeber und der Arbeitnehmer können das Arbeitsverhältnis jederzeit durch gegenseitiges Einverständnis aufheben.[11] Das bezieht sich sowohl auf die befristete, als auch auf die unbefristete Arbeitsverhältnisse[12]. Die Aufhebung kann bald oder in einem späteren Zeitpunkt in Kraft treten.[13]

Obwohl sich das Gesetz darum ausdrücklich nicht handelt, muss die Vereinbarung als erforderliches Inhaltliches den – auf Willkür beruhenden und bestimmten - Willen der beiden Parteien enthalten. Die Vereinbarung muss eindeutig, unmissverständlich sein! Daneben kann das Abkommen auch weitere Fragen ordnen (wie z. B. Schadenersatzanspruch).

Da der Arbeitnehmer mit einer obengenannten Vereinbarung auf einen deutsamen Schutz verzichtet, muss der Gerichtshof bei einem Rechtstreit mit einer besonderen Aufmerksamkeit den auf Willkür

[10] Ausführlicher: Radnay, József: *Munkajog*. Budapest 2003. 218-220. p.
[11] Arany – Cséffán – Dabis*: A Munka Törvénykönyve és magyarázata iratmintákkal.* Szeged, 1992. 151. p.
Román, László*: Munkajog (Elméleti alapvetés)* Budapest, 1989. 315. p.
[12] Mt. 87. § (1) a., 88. § (1)
[13] Kiss, György: *Munkajog.* Budapest, 2005.

beruhenden und bestimmten Willen des Arbeitnehmers analysieren.[14] Manchmal ist es auch schwer festzustellen, ob es sich um eine Irreführung, widerrechtliche Bedrohung oder Pression handelt. Diese Sachen können auch eine ungebührliche „Vereinbarung" abzwingen. Andersseits, wenn der Arbeitnehmer seine Lage und Möglichkeiten bei den Verhandlungen schlecht abgeschätzt hat, kann eine Klage und ein eventuelles Verfahren aus seinem Aspekt nicht mehr erfolgreich sein.

Die Vereinbarung – wie alle mit dem Aufhebung des Arbeitsverhältnisses zusammenhängenden Äußrungen - muss zu Papier gebracht werden. Die Zeitpunkt der Aufhebung darf nicht fehlen, andersfalls wendet das Arbeitsgericht die Folgen der widerrechtlichen Aufhebung an.

Die Kündigung

Die positiv rechtliche Regelung der Kündigung (Enthebung/Entlastung, Entsagung/Verzicht):

In diesem Teil meiner Arbeit handle ich die „normale", mit Kündigungszeit zustande kommende einseitige Aufhebung an. Der Name dieser Aufhebungsform ist *Kündigung* oder(=) *ordentliche Kündigung*. Man muss diese Art der Aufhebung von der *außerordentliche*n *Kündigung* unterscheiden.[15] Die außerordentliche Kündigung reagiert immer auf grob vertragsbrüchige Attitüde. Die Terminologie des geltenden ungarischen Arbeitsrechtes hat bei Beamten und Angestellten im staatlichen/öffentlichen Dienst andere Kunstwörter – Enthebung und Verzicht eingeführt.

Die generelle (für beide Parteien maßgebende) Voraussetzungen der Kündigung:

Die Regeln der Kündigung dienen vorwiegend den Schutz der Interessen des Arbeitnehmers. Da es aber ein zweipoliges Verhältnis ist, gibt es auch gemeinsame, für beide Parteien maßgebende Voraussetzungen. Und zwar die der anderen Partei rechtskräftig zur Kenntnis gebrachte, schriftliche Kündigung und die Ableistung der Kündigungsfrist.[16]

Die Kündigungserklärung:

Das auf unbestimmte Zeit entstehende Arbeitsverhältnis kann von dem Arbeitnehmer und auch von dem Arbeitgeber gekündigt werden. Das wichtigste Zubehör ist eine rechtskräftige

[14] Kiss Gy. – Berke Gy. – Bankó Z.: *Bevezetés a munkajogba*, Pécs 2007. 129. p.
[15] Kündigung und ordentliche Kündigung sind also Synonime, die außerordentliche Kündigung steht immer mit dem Attribut.
[16] Ferencz, Jácint: A felmondási idő jogi természete. In.: *Munkaügyi Tanácsadó*, Budapest 2008/3. 7. p.

Kündigungsäußerung bei der Kündigung. Die Kündigungsäußerung ist rechtskräftig, wenn die schriftliche Aussage von der anderen Partei empfangt wird. Es gibt keine inhaltliche Vorausserzungen! Zur Kündigung seitens Arbeitgeber muss auch eine Begründung gehören. Die mündliche Begründung, oder wenn die Begründung nicht gleichzeitig ist (also später) machen die Kündigung ungültig.

Die Kündigungsfrist:

Die Einhaltung der Kündigungsfrist ist eine generelle, also für beide Parteien maßgebende Voraussetzung. Die Rolle dieser Regelung ist, dass sich die gegenseitige Partei auf die Aufhebung des Arbeitsverhältnisses einrichten kann: der Arbeitnehmer soll einen neuen Job suchen und der Arbeitgeber braucht neuen Arbeitskraft. Das ungarische Arbeitsgesetzbuch (Mt.) bestimmt nur einen Minimum- und einen Maximumzeitraum. Die weitere Regelung ist die Vereinbarung der Parteien oder der Kollektivvertrag.

Laut Mt. ist die Minimalfrist mindestens 30 Tage. Die minimale Kündigungsfrist ist auch von der bei dem Arbeitgeber verbrachten Zeit abhängig. Nach zwanzig Jahren ist diese Minimalfrist 90 Tage[17]. Die Parteien können auch in längerer Kündigungsfrist vereinbaren, aber es kann nicht länger als ein Jahr sein[18].

Extraregelung für Arbeitgeber:

Das Gesetz stellt neben den für beide Parteien magebenden Bedingungen weitere Voraussetzungen bei einer Kündigung seitens Arbeitgeber. Der Zweck dieser Regelung ist der Schutz des Rechtes des Arbeitnehmers zur Arbeit (und die Sicherung der Stelle), neben der Beachtung der wirtschaftlichen-geschäftlichen Interesse des Arbeitgebers. Die sich überbietenden Interessen soll das Gesetz mit den Extraregeln abgleichen – gegen die eigenmächtigen Attitüde.

Die Regeln sind folgenderweise zusammenzufassen:

- Die Kündigung seitens Arbeitgeber muss immer schriftlich begründet sein, außer Rentner[19],
- Der Kündigung seitens Arbeitgebers entgegen gelten in bestimmten Fällen Gränzen,
- Die Kündigungsfrist bei der Kündigung seitens Arbeitgeber hat eine spezielle Lage,
- Bei Kündigung seitens Arbeitgebers kommt meistens ein Entlassungsgeld zu.

[17] Bei Angestellten und Beamten im öffentlichen Dienst ist diese Regelung auch zisellierter.
[18] Mt. 92. §
[19] Mt. 89. § (2) und (6), Mt. 87/A. §

Inhaltliche Bedingungen der Begründung der Kündigung seitens Arbeitgeber[20]:

Das Mt. definiert die konkreten Anlässe der Kündigung nicht, aber die Möglichkeiten des Arbeitgebers sind stark begrenzt. Der Beweggrund der Kündigung kann nur

- mit den Fähigkeiten der Arbeitnehmer,
- mit dem Verhalt in Beziehung der Arbeit beziehungsweise
- mit der Tätigung der Arbeitgeber zusammenhängender Ursache sein.[21]

So ist es gesichert, dass der Arbeitgeber das Arbeitsverhältnis nur im Fall Kündigen kann, wenn es seine Funktion wirklich verloren hat. Die Kündigung seitens Arbeitgeber ist gestützt, wenn der Anlaß vier Voraussetzungen entspricht:

- klar,
- der Realität entspricht,
- folgerichtig,
- und im Rahmen der bestimmungsgemäßen Rechtspraxis bleibt.[22]

Die Begründung und der Anlaß ist klar, wenn davon der Arbeitnehmer die **konkret**en Gründe und Umstände erfahren kann, die die Kündigung verursacht haben.[23] Der Voraussetung der klaren Begründung entsprechen die Anlässe nicht, wenn sie gemeinplätzig sind (z. B.: „er entspricht nicht den Anforderungen“ oder „unfähig“).

Der Arbeitgeber muss beweisen, dass die Anlässe der Wahrheit entsprechen. Die Tatsachen, die die Kündigung verursacht haben, müssen in dem Zeitpunkt der Kündigung bestehen. Widerrechtlich ist also die Kündigung, wenn die Tatsachen oder Umstände konkret, klar sind, der Wahrheit entsprechen (zum B.: Umstrukturierung des Betriebes oder der Arbeitnehmer renteberechtigt wird), aber nur später, nicht in dem Zeitpunkt der Kündigung. Bei dem Beweis der Wahrheit der Ursachen sind nur die in der Kündigung aufgezählten Anlässe von Bedeutung. Bezieht sich der Arbeitgeber in der Kündigung nur auf Umstrukturierung, hat es keine Bedeutung, dass er es nicht, aber die ständige

[20] Bei allen Arbeitnehmern anzuwenden, bis auf Angestellten und Beamten im öffentlichen Dienst. Bei denen gibt es viel strengere, taxative Voraussetzungen.
[21] Pál L. – Radnay J. - Tallián B.: *Munkajogi kézikönyv*. Budapest 2007. 139. p.
[22] MK 95.
[23] (Red.) Lehoczkyné K. Cs.: A magyar munkajog I. Budapest, 2001

Alkoholisation des Angestellten auch vor dem Arbeitsgericht bestätigen kann. In diesem Fall ist die Kündigung unwirksam.

Bei einem Streitfall muss der Arbeitgeber auch die Folgerichtigkeit der Kündigung beweisen. Das bedeutet, dass die Tatsachen, die Anlässe, die in der schriftlichen Begründung stehen, sollten die Kündigung verursachen (und verursachen können)! Sie müssen also in einem ursächlichem Zusammenhang stehen.

Die Anforderung des bestimmungsgemäßen Rechtspraxis bedeutet, wenn die Kündigung nicht auf seinem Zweck angewendet ist[24] (zum Beispiel aus Rache, Moleste etc.).

Die speziellen Grenzen der Kündigungrecht seitens Arbeitgeber

Das ungarische Arbeitsgesetzbuch ergänzt in bestimmten Fällen den allgemeinen Schutz mit weiteren Garantien – mit speziellen Grenzen der Kündigung und mit Kündigungsverbot. Die Kündigungsverbote bedeuten absoluten, aber nur zeitlichen Schutz. Die Kündigungsgrenzen bedeuten aber relativen Anstand, also die Kündigung ist von etwas abhängig.

Kündigungsverbote laut des Mt.:

- Erwerbsunfähigkeit durch Krankheit
- Krankengeldberechtigten wegen der Krankheit des Kindes, bzw. diejenige, die unbezahlten Urlaub wegen Pflege einer nahen Angehörigen bekamen
- Schwangerschaft und drei Monaten nach der Entbindung
- Liniensoldaten nach dem Erhalt des Einberufungsbefehls

Das Verbot bedeutet nicht, dass die Kündigung untersagt ist, aber die Kündigungsfrist beginnt nicht, solange das Verbot dauert.

Laut des Mt. § 89 Abs. (7) kann der Arbeitgeber nur in einem ***vornehmlich begründet***en Fall in den fünf Jahren vor der renteberechtigkeit Kündigen. Die vornehmliche Begründung ist ein genereller Regel in diesem Zeitraum. Bei Angestellten und Beamten im öffentlichen Dienst gibt es auch noch weitere Kündigungsgrenzen.

[24] Petrovics, Zoltán: *Munkajog.* Budapest, 2006. 83. p.

Die ungarische Kündigungsrecht kennt auch die Institution der vom Beitrag abhängiger Kündigung. Der Zweck der Regelung ist der Schutz der Arbeitnehmer, die wegen ihrer Position oft mit den Arbeitgeber in Kollision kommen. Der Arbeitgeber braucht das vorherige Einverständnis des oberen Gewerkschaftsorgan, wenn er das Arbeitsverhältnis eines gewählten Gewerkschaftsfunktionären kündigen will. Der Schutz dauert in der Zeit, während der Arbeitnehmer die Funktion versorgt, und wenn es mindestens sechs Monaten lang dauert, dann noch ein Jahr lang nach dem Vergang.

Die Ableistung der Kündigungsfrist und das Entlassungsgeld

Die Freistellung von Arbeitspflicht:

Während der Kündigungsfrist besteht noch das Arbeitsverhältnis, und beide Parteien müssen den davon ergebenden Verpflichtungen nachkommen. Aber in dem Fall, wenn es sich um eine Kündigung seitens Arbeitgeber handelt, muss unbedingt eine Freizeit dem Arbeitnehmer gesichert werden, um neue Arbeitsstelle suchen zu können. Dieser Zeitraum beträgt die Hälfte der Kündigungsfrist und die Hälfte der Freistellung muss nach dem Wunsch des Arbeitnehmers ausgegeben werden. Die Freistellung darf natürlich auch länger dauern[25].[26] Während der Freistellung bekommt der Arbeitnehmer seinen vorherigen Durchschnittsverdienst.[27]

Entlassungsgeld im Mt.:

Das Entlassungsgeld ist eine Kompensation gegen der Nachteile der Kündigung. Es ist nich nur deswegen zu bezahlen, weil der Arbeitnehmer in eine unsichere Lage kommt, sondern auch, weil der Arbeitnehmer seine auf den bei dem Arbeitgeber verbrachten Jahren basierenden Rechte verliert. Dementsprechend ist das Entlassungsgeld eine einmalige Auszahlung, das von zwei Umständen abhängt.

- Von der Art der Aufhebung des Arbeitsverhältnisses,
- von den bei dem Arbeitgeber verbrachten Jahren.

Laut des Mt. bekommt der Arbeitnehmer ein Entlassungsgeld, wenn sein – mindestens seit drei Jahren bestehenes – Arbeitsverhältnis wegen

1) Kündigung seitens Arbeitgebers,
2) fristlosen Kündigung seitens Arbeitnehmers,

[25] Cogentia claudicans
[26] Mt. 93. §
[27] Petrovics, Zoltán: Felmondási idő – mértékek, kezdet és vég, felmentés a munkavégzés alól. In: *Humán Saldo* Budapest, 2006/6. 244. p.

3) der Auflösung ohne Rechtsnachfolger des Arbeitgebers

erlischt.

Die Höhe des Entlassungsgeldes beträgt das Durchschnittslohn von einem Monat bis sechs Monaten. Die größte Summe bekommt man mindestens nach fünfundzwanzig Jahren[28]. Laut des Mt.[29] erhöht sich das Entlassungsgeld mit drei Monaten Durschnittsverdienst, wenn die Kündigung oder die Auflösung des Arbeitgebers in den fünf Jahren vor Renteberechtigkeit des Arbeitnehmers passiert.

Die fristlose Kündigung*[30]*

Bei der fristlosen Kündigung kündigt eine der Parteien ohne Kündigungsfrist in der Zeitpunkt der Mitteilung der Kündigung. Diese Weise der Aufhebung des Arbeitsverhältnisses lehnt die Beachtung der Interessen ab, die vom Kündigungssystem in Schutz beteiligt werden. Mit der fristlosen Kündigung ist nicht nur das unbefristete, sondern auch das befristete Arbeitsverhältnis zu kündigen. Diese Möglichkeit besteht nur in ausnehmenden Fällen. Zwei Umstände können zu dieser Lösung führen:

- grob vertragsbrüchiges Verhalten, und
- wenn das Rechtsverhältnis noch nicht endgültig bzw. gültig ist[31].

Die fristlose Kündigung ist eine einseitige, schriftliche Äußerung, zur gegenseitigen Partei adressiert. Es beinhaltet den Absicht der fristlosen Kündigung und die Begründung. Wenn diese Äußerung den Rechtsnormen entspricht, tretet die Kündigung fristlos in Kraft. Es gibt zwei Tatbestände, die eine fristlose Kündigung nachziehen können:

Wenn die andere Partei

- seine von dem Arbeitsverhältnis folgende Verpflichtung durch vorsätzliches oder schwerwiegend fahrlässiges Verhalten in bedeutender Maße bricht, oder
- ansonsten solches Verhalten erzeigt, was die weitere Erhaltung des Arbeitsverhältnisses nicht ermöglicht.[32]

[28] Mt. 95. § (4)
[29] Mt. 95. § (5)
[30] Ausführlicher: Radnay, József: *A munkaviszony megszűntetésének egyes rendszerei*. In: Liber Amicorum, Studia di Stephano Kertész dedicata. Budapest, 2004. 269-282. p.
[31] z. B.: Probezeit oder ungültigkeit
[32] Mt. 96. § (1)

Wenn z. B.: der Arbeitnehmer stehlt, Alkoholisiert, verursacht große Schaden, kann der erste Fall in Kraft treten. Der zweite Satzteil bedeutet eine elastische Fallgruppe. Das zurückbezogene Verhalten kann nicht nur das Arbeitsverhalten bedeuten. Wer in einer führenden Stelle angestellt ist, muss auch im Privatleben höheren Anforderungen entsprechen.

Der Kollektivvertrag oder der Arbeitsvertrag kann weitere Verhalten bestimmen, die zu einer fristlosen Kündigung seitens Arbeitgeber führen.

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[3] Kiss, György: *Munkajog.* Budapest, 2005.

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JSOU ZAMĚSTNANCI CHRÁNĚNI PŘI SKONČENÍ PRACOVNÍHO POMĚRU DOSTATEČNĚ?

JINDŘIŠKA FIALOVÁ

VRCHNÍ SOUD V OLOMOUCI

Abstrakt

Tento příspěvek se zamýšlí nad stavem ochrany zaměstnanců při skončení pracovního poměru ve znění nového zákoníku práce. Zaměřuje se především na ochranu při rozvázání pracovního poměru dohodou a výpovědí, když tyto jsou dle názoru autora nejčastějšími způsoby zániku pracovního poměru. V části nazvané Skončení pracovního poměru výpovědí se příspěvek věnuje vybraným výpovědním důvodům a institutům výpovědní doby, zákazu výpovědi a odstupného.

Klíčová slova

Nový zákoník práce; způsoby skončení pracovního poměru; rozvázání pracovního poměru dohodou; výpověď; výpovědní doba; zákaz výpovědi; odstupné; ochrana zaměstnanců.

Abstract

This article consideres the situation of protection of employees within the termination of contract of employment according to the new Labour Code. It is mainly focused on protection during the dissolution of contract of employment by agreement and notice of termination, when these ways are according to the author, the most common ways of ending the employment. In the part called Termination of contract of employment, the article deals with the chosen reasons of termination and institutiones as termination period, prohibition of termination and redundancy payment.

Key words

Protection of employees; new Labour Code; the ways of termination; agreement; notice of termination; termination period; prohibition of termination; redundancy payment.

ÚVOD

Zákon č. 262/2006 Sb., tzv. nový zákoník práce, byl „slavný“ ještě dříve než vstoupil 1. 1. 2007 v účinnost. Pravděpodobně se od něj očekávalo více, než byl schopen nabídnout, jinak si jeho neúspěch lze jen těžko vysvětlit. Každá demokratická vláda České republiky si dala za cíl ho vytvořit, nakonec

vždy ale došlo jen k další z mnoha novel původního zákoníku, zákona č. 65/1965 Sb. Paradoxní situace nastala, když skupina poslanců a senátorů podala v prosinci 2006 k Ústavnímu soudu stížnost ohledně některých ustanovení právě přijatého zákoníku. Po roce „fungování" se zákoník dočkal významnější novelizace, tzv. technické novely (z. č. 362/2007 Sb.), která odstraňovala především technické nepřesnosti. Ovšem 14. 4. 2008 byl ve Sbírce zákonů ČR, částka 37, uveřejněn nález Ústavního soudu č. 116/2008 Sb., výsledek dříve zmiňované stížnosti. S nadsázkou (slovy JUDr. Novotného) nyní můžeme hovořit o „třetím" novém zákoníku práce. Tak dalekosáhlé následky ústavní nález má.

Nicméně, na institutu ochrany zaměstnanců při skončení pracovního poměru se s novým zákoníkem příliš nezměnilo. I tak se ale podle mého názoru jedná o téma, které v určitém okamžiku zajímá každého z nás. Zejména proto, že existují určité, často i mylné představy stran pracovního poměru o tom, jak pracovní poměr skončí a co od sebe mohou v té chvíli očekávat.

Zákoník práce v § 48 taxativně vyjmenovává všechny právní úkony a právní události, které mají za následek skončení pracovního poměru. Rozeznáváme skončení pracovního poměru dohodou, výpovědí, okamžitým zrušením, zrušením ve zkušební době, uplynutím sjednané doby, smrtí zaměstnance, smrtí zaměstnavatele fyzické osoby, který podnikal na základě jiného než živnostenského oprávnění a skončení v případě pracovního poměru cizince.

Pracovní poměr nekončí žádným, v podstatě subjektivním rozhodnutím jedné ze stran pracovního poměru a neskončí ani v okamžiku, kdy zaměstnanec dosáhne důchodového věku. Přesné vymezení metod ukončení pracovního poměru vlastně tvoří jakousi primární ochranu zaměstnance, ale i zaměstnavatele. „Právní záruka stability samozřejmě neznamená vyloučení možnosti ukončit pracovní poměr vůbec. Znamená však vyloučení ´divokých´ způsobů, které nejsou právem aprobovány, a zakotvení takových způsobů, při nichž jsou právem chráněny určité zájmy obou účastníků pracovního poměru."[1] Připočteme-li k tomu i celkovou orientaci zákoníku práce (rozuměj ochranářskou, prozaměstnaneckou), nemělo by být o zabezpečení zaměstnanců při skončení pracovního poměru pochyb. Bohužel, ne vždy je vše tak jasné a zřejmé, jak se zdá.

Ve svém příspěvku se budu věnovat míře ochrany zaměstnanců pouze u dvou ze způsobů skončení pracovního poměru, a to u dohody a výpovědi. Jedná se, podle mého názoru, o nejrozšířenější způsoby zániku pracovního poměru, zároveň jsou ale velmi odlišné. Dohoda o rozvázání pracovního poměru je, obecně řečeno, velmi jednoduchý a jen málo formalizovaný způsob, jak ukončit pracovní poměr;

[1] Galvas, M.: *Pracovní právo. 2. aktualizované a doplněné vydání*, Brno: Nakladatelství Doplněk, 2004, ISBN 80-210-3558-7, str. 289.

výpověď je především pro zaměstnavatele téměř strašákem, protože zákon pro ni stanoví přísná pravidla.

SKONČENÍ PRACOVNÍHO POMĚRU DOHODOU

Všeobecně nejméně komplikovanou variantou rozvázání pracovního poměru je dvoustranná dohoda mezi zaměstnancem a zaměstnavatelem, jak ji popisuje § 49 zákoníku práce (dále jen ZP). Dohoda musí být uzavřena písemně, jinak je neplatná. To je posun od starého zákoníku, který při nedodržení písemné formy žádnou sankci nestanovil. Požadavek písemné formy je však podle JUDr. Jakubky „v rozporu s deklarovaným požadavkem na zjednodušení zákonem stanovených formálních požadavků na pracovněprávní vztahy, protože je zřejmé, že pokud někdo uzavírá ústní dohodu, musí si být vědom toho, že v případě problémů s prokázáním jejího obsahu se může dostat do důkazní nouze. Je proto v jeho vlastním zájmu požadovat písemnou dohodu či minimálně písemné potvrzení o ústně uzavřené dohodě, aniž by problematiku zajištění důkazu musel řešit zákon, a tím vnucoval účastníkům mnohdy proti jejich vůli byrokratickou formu právního úkonu.“2

Pracovní poměr skončí dnem, na kterém se strany dohodly nebo také až nastane určitá událost, např. skončení konkrétních sezónních prací nebo návrat zaměstnankyně z mateřské dovolené. Předpokládá se, že písemnou smlouvu sepíše zaměstnavatel, který na výslovné přání zaměstnance uvede také důvody, které vedly k rozvázání pracovního poměru. Pro postavení zaměstnance má význam uvedení organizačních, popř. zdravotních důvodů jako důvodů pro skončení pracovního poměru, protože při nich vzniká zaměstnanci nárok na odstupné podle ustanovení § 67 odst. 1 ZP.

Při skončení pracovního poměru dohodou se na zaměstnance nevztahují obecná ustanovení o ochranné době nebo o zákazu výpovědi. Předpokládá se totiž, že souhlas s dohodou je dán svobodně a s úmyslem pracovní vztah ukončit, a z tohoto důvodu zřejmě nepotřebuje zaměstnanec, podle mínění zákonodárce, zvláštní ochranu. V případě, že má jedna ze stran pracovního poměru za to, že dohoda nebyla uzavřena dobrovolně, vůle uzavřít pracovní poměr tu nebyla, pak o dohodu dle ustanovení § 49 ZP v žádném případě nejde. Na tuto situaci zákoník práce pamatuje tak, že umožňuje stranám (většinou ale pravděpodobně půjde o zaměstnance) obrátit se dle § 72 zákoníku práce do dvou měsíců od uzavření takové dohody na soud s tím, že byla uzavřena v tísni. Dokáže-li zaměstnanec svá tvrzení, soud dohodu zruší.

[2] Jakubka, J.: *Zákoník práce s komentářem*, Olomouc: ANAG, 2007, ISBN 978-80-7263-370-8, str. 107.

Jakou má ale zaměstnanec šanci prokázat, že k dohodě byl donucen postupným tlakem ze strany zaměstnavatele, popřípadě, když mu byla dohoda předložena v soukromí kanceláře vedoucího? Má se zaměstnanec smířit s tím, že je zaměstnavatel „ochoten" přistoupit na dohodu, ale v žádném případě s uvedením jednoho z organizačních důvodů, aby nemusel zaměstnanci vyplácet odstupné? Důkazní břemeno leží na „slabší" straně, která v některých případech raději zvolí cestu menšího odporu, než aby se zdlouhavě domáhala svých práv.

Poměrně pravidelně se mezi laickou veřejností vyskytuje pojem „výpověď dohodou". V žádném případě se nejedná o další způsob skončení pracovního poměru, musí se ale, podle obsahu takové listiny, zjišťovat, zda-li jde o dohodu nebo výpověď.

SKONČENÍ PRACOVNÍHO POMĚRU VÝPOVĚDÍ

Naprosto odlišný případ od dohody o rozvázání pracovního poměru je výpověď dle ustanovení § 50 a násl. ZP. Jedná o jednostranný právní úkon, kterým kterýkoli ze subjektů pracovního poměru projevuje vůli pracovní poměr skončit bez ohledu na stanovisko druhého subjektu, protože samozřejmě není potřeba, aby druhá strana s výpovědí souhlasila.[3] Je zřejmé, že takový úkon znamená jistý zásah do zájmů účastníka pracovního poměru vůči kterému směřuje, a proto musí podléhat určité kontrole a také musí probíhat podle stanovených podmínek.

Jak již bylo řečeno, výpověď může dát jak zaměstnanec, tak zaměstnavatel. Ovšem, z důvodu zvýšené ochrany zaměstnance, tradice a dosud neratifikované dohody Mezinárodní organizace práce č. 158[4], je u výpovědi dávané ze strany zaměstnavatele nutné, aby tato obsahovala jeden z omezených výpovědních důvodů, které zákoník práce vyjmenovává v § 52. Důvod, který zaměstnavatel uvede jako výpovědní, nesmí být zaměnitelný s jiným a také nemůže být později změněn. Toto opatření směřuje k ochraně zaměstnanců, když vlastně nezáleží na vůli zaměstnavatele (zákonodárce chce předejít „libovůli" zaměstnavatele), zda-li dá zaměstnanci výpověď, ale naopak musí vybrat jeden z uvedených důvodů, který je navíc povinen, v případě pochybností, věrohodně prokázat, jinak soud výpověď zruší jako neplatnou. Zároveň ale platí, že kumulace více výpovědních důvodů, sama osobě nezpůsobuje neplatnost výpovědi. „Skutečnost, že zaměstnavatel ve svém jednostranném právním úkonu směřujícím k rozvázání pracovního poměru uplatnil více důvodů uvedených v ustanovení § 46 odst. 1 zák. práce (současný § 52 ZP), má za následek, že v řízení zahájeném na návrh zaměstnance podle ustanovení § 64

[3] Galvas, M.: *Pracovní poměr aneb Co by měl vědět každý zaměstnavatel i zaměstnanec*, Brno: Elita Bohemia, 1995, ISBN 80-901927-0-X.
[4] Jakubka, J.: *Zákoník práce s komentářem*, Olomouc: ANAG, 2008, ISBN 978-80-7263-432-3.

zák. práce (současný § 72 ZP) je třeba jednotlivé výpovědní důvody zkoumat každý zvlášť a samostatně je také třeba posuzovat jejich účinky na další trvání pracovního poměru; jestliže pracovní poměr skončí na základě jednoho z nich, stávají se ostatní uplatněné důvody obsolentními."[5]

Ani „třetí" nový zákoník práce nezná výpověď bez udání důvodu, popř. výpověď pro ztrátu důvěry, která se poměrně hojně vyskytuje v západních zemích. Těžko říct, zda-li byl v tomto případě zákonodárce příliš úzkoprsý nebo bojácný, nebo si jen reálně přiznal, že na takový právní institut není český pracovní trh připravený.

K některým z výpovědních důvodů

Zákoník práce relativně přesně formuluje sedm výpovědních důvodů, na které musí zaměstnavatel ve výpovědi odkázat. Obecně je rozlišujeme do tří skupin, a to organizační (§52 písm. a)-c) ZP), zdravotní (§52 písm. d)-e) ZP) a na straně zaměstnance (§52 písm. f)-g) ZP). Není na tomto místě možné se vyjádřit ke všem z těchto důvodů, ale za zmínku stojí především výpovědní důvod dle ustanovení § 52 písm. c) ZP.

Tzv. nadbytečnost zaměstnance je jeden z nejvyužívanějších výpovědních důvodů, a to zejména proto, že pod něj lze „schovat" i jiné, v zákoně neuvedené důvody. Zákoník práce říká, že pokud se stane zaměstnanec nadbytečný z důvodu změny jeho úkolů, technického vybavení, snižování stavů zaměstnanců za účelem zvyšování efektivnosti práce nebo z jiných organizačních důvodů, je zaměstnavatel oprávněn zaměstnancům pracovní poměr zrušit. Tomu však musí předcházet rozhodnutí zaměstnavatele. A právě tato podmínka je kamenem úrazu. Je nutné, aby takové rozhodnutí bylo písemné? Musí s ním být zaměstnanec seznámen? Vzhledem k tomu, že jde o čistě subjektivní rozhodnutí zaměstnavatele, není možné, aby ho v rámci soudního řízení přezkoumával soud.

Zákon také nestanoví způsob, jakým má být při nadbytečnosti vybrán ten který zaměstnanec. Nelze ale úspěšně rozvázat pracovní poměr takového zaměstnance, na jehož pracovním úseku ke snižování stavu zaměstnanců nedochází. Nejde zároveň pouze o snižování počtu zaměstnanců, záleží i na jejich praxi, kvalifikaci, vzdělání; takže je možné, že v průběhu reorganizačních změn bude zaměstnavatel zároveň i počet zaměstnanců zvyšovat.[6] Pokud ale došlo k výpovědi z důvodu nadbytečnosti určitého zaměstnance a ve lhůtě dvou měsíců od skončení jeho pracovního poměru byl na stejnou pozici (nebo jen kosmeticky upravenou) přijat nový pracovník, má ten původní možnost se dle § 72 ZP obrátit na

[5] Rozhodnutí Nejvyššího soudu ČR ze dne 8. 3. 2005, sp. zn. 21 Cdo 2098/2004.
[6] Jouza, L.: *Firmy a zaměstnanci.* Právo pro podnikání a zaměstnání č. 11/2007, Praha: LexisNexis, 2007.

soud, aby ten přezkoumal platnost takové výpovědi. Nešlo by pak totiž ze strany zaměstnavatele o účinnou reorganizaci, ale pravděpodobně jen o úmysl neoprávněně ukončit pracovní poměr.

Výpovědní doba

„Výpovědní doba je zákonným důsledkem výpovědi.“[7] Jde ve své podstatě o institut chránící zaměstnance před náhlým a „drtivým“ dopadem výpovědi, když má umožnit stranám pracovního vztahu se s novou situací vyrovnat a poskytnout dostatek času k hledání nového zaměstnání.

Pro začátek počítání výpovědní doby je důležitý okamžik doručení výpovědi. I tady je patrná větší výhoda pro zaměstnance, když zákoník stanovuje, že stačí, aby pracovník předal výpověď nejbližšímu nadřízenému, zatímco zaměstnavatel výpověď doručuje dle § 330 a násl. ZP, tedy osobně nebo prostřednictvím držitele poštovní licence bez možnosti náhradního doručení. Zasílá-li výpověď prostřednictvím poštovního doručovatele, musí být adresována do vlastních rukou a účinky doručení nastanou i tehdy, pokud zaměstnanec odmítne zásilku převzít. Jinak může zaměstnavatel doručit výpověď zaměstnanci na pracovišti nebo kdekoli, kde bude zastižen.

Výpovědní doba musí být stejná jak pro zaměstnavatele, tak i pro zaměstnance a činí minimálně dva měsíce (§ 51 odst. 1 ZP). Stanovení pouze dolní hranice této doby znamená, že je možné, aby „například zaměstnanci, kteří pracují u zaměstnavatele po delší dobu, měli možnost si sjednat výpovědní dobu delší, jak to ostatně předpokládá i Sociální charta Evropy.“8 Začíná běžet prvním dnem kalendářního měsíce, který následuje po doručení výpovědi a obvykle končí posledním dnem určeného kalendářního měsíce. Znění zákona také umožňuje, aby během výpovědní doby byl pracovní poměr ukončen okamžitě nebo dohodou.

Zákaz výpovědi

Ochranný institut zákazu výpovědi je upraven v § 53 a násl. zákoníku práce a použije se především za okolností, kdy by daná výpověď mohla způsobit určitému okruhu zaměstnanců příliš velké problémy. Zaměstnavatel tak nesmí dát výpověď pracovníkovi, na kterého se vztahuje ochranná doba, a to je dle § 53 odst. 1 zákoníku práce např. doba, během níž je zaměstnanec dočasně pracovně neschopný pro nemoc, kterou si nezpůsobil sám, při výkonu vojenského cvičení, popř. kdy je zaměstnanec plně uvolněn pro výkon veřejné funkce.

[7] S III, str. 70, Doležílek, J.: *Přehled judikatury ve věcech pracovněprávních-I. Vznik, změny a skončení pracovního poměru*, Praha: ASPI, 2005, ISBN 80-7357-048-3, str. 63.
[8] Jakubka, J.: *Zákoník práce s komentářem*, Olomouc: ANAG, 2008, ISBN 978-80-7263-432-3, str. 126.

Na tomto místě musím podotknout, že souhlasím s názorem JUDr. Jakubky, že konkrétní vymezení ´ochranných dob´ je zastaralé a nemá v dnešním „moderním a liberalizovaném“ zákoníku práce místo. Účinnější by pravděpodobně byla ochrana zaměřená na nejčastější jevy objektivní povahy, jako je samozřejmě častá nemocnost, těhotenství nebo péče o invalidního člena rodiny.[9]

V případě, že byla výpověď dána již před vznikem ochranné doby a výpovědní lhůta by tak skončila během ní, uplatní se pravidlo, že výpovědní doba se zastavuje a pokračuje až po uplynutí ochranné doby. Dále platí, že „výpověď, kterou zaměstnavatel dává bez ohledu na to, zda věděl nebo mohl vědět, že zaměstnanec je v ochranné době, je právně neúčinná. Rozhodující je objektivní skutečnost, nikoli vědomost o ní“.[10] Pro zákaz výpovědi je rozhodující stav, který tu byl v době doručení výpovědi zaměstnanci.[11] Tento rys zákazu výpovědi je příznivý především pro těhotné zaměstnankyně, vůči zaměstnavateli je ale takové ustanovení neseriózní.

Zákaz výpovědi se ovšem vztahuje pouze na zaměstnavatele, zaměstnanec může sám, bez ohledu na to, že tu je situace, která brání zaměstnavateli s ním rozvázat pracovní poměr, rozvázat pracovní poměr výpovědí podle ustanovení § 50 odst. 3 ZP. Pracovní poměr však lze uzavřít i jinými, zákonem stanovenými, důvody.[12]

Zvláštní ochrany před skončením pracovního poměru výpovědí požívají podle zvláštních právních předpisů poslanci a senátoři parlamentu ČR. Jejich pracovní poměr u původního zaměstnavatele nemůže během výkonu funkce a během následujících dvanácti měsíců po zániku mandátu skončit bez souhlasu předsedy komory Parlamentu.[13]

Odstupné

„Odstupné“, podle JUDr. Jouzy, „představuje jednorázový příspěvek uvolňovanému zaměstnanci, kterým se neřeší jeho zabezpečení v době po uvolnění, ale jde o určitou formu odškodnění za ztrátu zaměstnání bez vlastního zavinění. Není vůbec rozhodné, zda uvolňovaný zaměstnanec nastoupí po skončení pracovního poměru do nového zaměstnání k jinému zaměstnavateli, zda začne soukromě podnikat nebo

[9] Jakubka, J.: *Zákoník práce s komentářem*, Olomouc: ANAG, 2007, ISBN 978-80-7263-370-8.
[10] Jakubka, J.: *Výpověď z hlediska zaměstnance i zaměstnavatele,* Praha: Grada, 2000, ISBN 80-7169-983-7, str. 46.
[11] S III, str. 59, Doležílek, J.: *Přehled judikatury ve věcech pracovněprávních-I. Vznik, změny a skončení pracovního poměru*, Praha: ASPI, 2005, ISBN 80-7357-048-3.
[12] S III, str. 60, Doležílek, J.: *Přehled judikatury ve věcech pracovněprávních-I. Vznik, změny a skončení pracovního poměru*, Praha: ASPI, 2005, ISBN 80-7357-048-3.
[13] Bělina, M. a kol.: *Pracovní právo*, 3. dopl. a přepr. vydání, Praha: C. H. Beck, 2007, ISBN 978-80-7179-672-5.

zda odejde do starobního důchodu."[14] Na odstupné mají samozřejmě nárok všichni zaměstnanci, jejichž pracovní poměr končí z organizačních důvodů, tj. z důvodů na straně zaměstnavatele.

Pokud tedy dojde k situaci, kdy již nelze z objektivních důvodů daného zaměstnance nadále zaměstnávat, spočívá ochrana takového zaměstnance právě v tom, že mu je na základě zákona poskytnuto odstupné tak, jak jej stanovuje zákoník práce v § 67, tj. ve výši trojnásobku, popř. dvanáctinásobku průměrného výdělku. Vyplácí se většinou jednorázově, následující výplatní termín po uplynutí výpovědní doby. Technická novela upřesnila dřívější nejasnosti ohledně odstupného, které se váže k výpovědnímu důvodu dle § 52 písm. d) ZP. Pokud zaměstnavatel prokáže, že si pracovní úraz, na základě kterého již není zaměstnanec schopen nadále vykonávat sjednanou práci, přivodil sám (např. v opilosti), není povinen mu dvanáctinásobek průměrného výdělku vyplatit.

ZÁVĚR

Laickému oku se může zdát, že ochraně zaměstnance při skončení pracovního poměru zákonodárce moc péče nevěnoval, jinak by přece pracovněprávní vztahy a pracovní trh vůbec, vypadaly úplně jinak. Nevím, jestli mohu tuto situaci hodnotit, ale domnívám se, že zákoník práce „myslí" na zaměstnance poměrně hodně, možná až příliš. V konečném důsledku na to doplatí zase jenom zaměstnanci. Zákon stanoví formu, obsah, náležitosti, lhůty, doby, .. a kde je prostor pro vyjednávání stran? Ano, jak jsem zmínila již dříve, český pracovní trh není připraven na přílišnou dávku liberalizace, to prostě fungovat nemůže. Mám za to, že formalismus vede jen k obcházení zákona. Možná bude lepší uvolnit zaměstnavatelům ruce při rozvazování pracovních poměrů s tím, že zaměstnanci budou mít větší možnosti, jak se bránit, pokud bude skončení nezákonné. Především pak ale platí, že pokud se zaměstnanec nebude svých práv domáhat, nemá smysl vytvářet zákon o stovkách ustanovení.

Příspěvek neměl za cíl zhodnotit veškerou teorii i praxi v této oblasti, není to ani z kapacitních důvodů možné. Je ale jarní vlaštovkou, která naznačuje, že nad ochranou zaměstnanců při skončení pracovního poměru se nesmráká.

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VÝKON VÝDĚLEČNÉ ČINNOSTI PŘI ČERPÁNÍ DOVOLENÉ VE SPOLKOVÉ REPUBLICE NĚMECKO

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Abstrakt

Článek se zabývá institutem dovolené na zotavenou, a to především ve Spolkové republice Německo. Nejprve je nastíněn obecný význam a účel dovolené na zotavenou a poté je zdůrazněn zotavovací význam dovolené tak, jak je zamýšlen právní úpravou v Německu. Těžiště tohoto příspěvku spočívá v analýze jednoho z konkrétních ustanovení Spolkového zákona o dovolené, konkrétně § 8 daného zákona, ve kterém je uvedeno, že zaměstnanec nesmí během dovolené vykonávat žádnou výdělečnou činnost, která by odporovala účelu dovolené na zotavenou.

Klíčová slova

Dovolená na zotavenou, účel dovolené, zotavení, Spolková republika Německo, Spolkový zákon o dovolené

Abstract

This article is dealing with the institute of vacation, especially in the Federal Republic of Germany. First the general meaning and the purpose of vacation are being outlined, afterwards the recovering purpose of vacation is being accented, so as it is accented by the law in Germany. The decision point of this contribution lies in the analysis of Vacation Code of Germany, par. 8. In this paragraph it is written, that the employee must not perform any gainful activity that would resist the purpose of vacation.

Key words

Vacation, purpose of vacation, recovering, Federal Republic of Germany, Vacation Code of Germany

Dovolená na zotavenou, resp. její čerpání, je institutem bezesporu velice příjemným, který je tradičním institutem pracovního práva snad ve všech zemích Evropy. V tomto článku se budu zabývat zdravotním a předně však zotavovacím významem dovolené na zotavenou, a to především ve Spolkové republice

Německo, neboť tato země jako jedna z mála zdůrazňuje význam dovolené na zotavenou jako zdravotního volna, které slouží především k zotavení člověka a regeneraci jeho pracovních sil.

Dovolená na zotavenou v České republice a ve Spolkové republice Německo

Pojem dovolená je zákonem č. 262/2006 Sb., zákoník práce, ve znění pozdějších předpisů (dále jen „ZP“) používán na mnoha místech, avšak vždy je jím delší souvislé volno, které je delší než nepřetržitý odpočinek v týdnu a které je určené k zotavení, ke zdravotní kompenzaci nebo k jiným specifickým účelům. Hlavním účelem dovolené je poskytnutí delšího souvislého pracovního volna zaměstnancům po celoroční práci v zájmu obnovy pracovní síly, zotavení zaměstnance a zachování či upevnění zdraví zaměstnanců a kompenzace různých nepříznivých faktorů. Poskytování dovolené je samozřejmě i v zájmu zaměstnavatele, neboť jejím čerpáním dochází k zachování aktivity zaměstnanců a tím i jejich pracovních sil. Jako taková je dovolená jedním z nejvýraznějších projevů ochranné funkce pracovního práva, neboť zaměstnanci je umožněno odpočívat a regenerovat své síly bez obav o zhoršení své sociální situace, neboť mu po dobu čerpání dovolené náleží náhrada mzdy či platu ve výši průměrného výdělku a případné naturální požitky. Naopak však znamená čerpání pro zaměstnavatele výdajově velký náklad, neboť při čerpání dovolené zaměstnancem mu zaměstnavatel poskytuje jak pracovní volno, tak i náhradu mzdy.
Tradičním pojetím zdravotní dovolené byla dovolená na zotavenou. Již z názvu tohoto institutu vyplývalo, k jakému účelu primárně má toto volno sloužit. Zavedením nového zákoníku práce došlo ke změně. Od 1.1.2007 se již spojení „dovolená na zotavenou“ nepoužívá, a část devátá této normy tak nese název pouze „Dovolená“. Je otázkou, zda k tomuto vypuštění došlo úmyslně, či ne, důvodová zpráva však uvádí, že podobně jako překážky v práci na straně zaměstnance patří úprava dovolené k tradiční úpravě pracovněprávních vztahů, která musí mít nezastupitelné místo i v novém zákoníku práce. Zřejmě se tedy nejedná o náznak, že by dovolená měla být chápána jako tradiční, tedy jako dovolená na zotavenou, a i nadále by zotavení mělo být jejím hlavním záměrem.
Zatímco v České republice (dále jen „ČR“) je dovolená regulována a upravena zákoníkem práce a nutno podotknout, že tomu tak bylo i před velkou novelizací pracovního práva a vytvořením pracovněprávního kodexu, ve Spolkové republice Německo (dále jen „SRN“) se dovolené na zotavenou věnuje celý jeden zákon, tzv. „Bundesurlaubsgesetz“, tedy Spolkový zákon o dovolené (dále jen „SZoD“). Řečí čísel, v ČR je dovolená na zotavenou regulována 13ti paragrafy, v SRN je to paragrafů 16, přičemž § 14, tzv. „Berlin-Klausel“ nemá uveden žádný předmět, tedy je počet ustanovení regulujících tento institut v obou zemích přibližně shodný.

Pojem „dovolená na zotavenou“ je výslovně použit přímo v § 1 SZoD. Všude jinde je použit pouze pojem dovolená, avšak je jím míněna dovolená na zotavenou. Čerpání dovolené na zotavenou znamená absolutní osvobození zaměstnance od povinnosti konat práci dle pracovní smlouvy za současného pokračování ve vyplácení mzdy, resp. platu ze strany zaměstnavatele (pozn. autora: Kde bude v textu hovořeno o mzdě či náhradě mzdy, je třeba taktéž rozumět i plat, resp. náhradu platu). Je třeba si uvědomit, že taktéž zaměstnanec v tzv. pracovní pohotovosti i v případě, že práci skutečně nevykonává, nesplňuje podmínky pro to, aby mohl čerpat dovolenou. Volný pracovní den, tedy sobotu, je však dle německého práva také třeba započítat do dovolené.
Od pojmu dovolená na zotavenou je však třeba odlišit další formy dovolené, resp. uvolnění zaměstnance z výkonu práce z jiných důvodů. SRN se pro takovéto ostatní formy dovolené či volna používá pojem tzv. „Beurlaubung“. Pod pojem Beurlaubung lze pak zahrnout například zvláštní dovolenou, neplacené volno, volno k určitým účelům, apod. a tyto formy buď placeného či neplaceného volna jsou pak poskytovány zaměstnancům za jinými účely. Pro samotnou dovolenou na zotavenou (tzv. „Erholungsurlaub“) se pak vžil obecný pojem dovolená (tzv. „Urlaub“), trend je tedy stejný, jako v ČR a jak bude řečeno níže, hlavním účelem této dovolené je především zotavení zaměstnance.

Spolkový zákon o dovolené a jeho § 8

Dle § 8 SZoD nesmí zaměstnanec během dovolené vykonávat žádnou výdělečnou činnost, která by odporovala účelu dovolené na zotavenou. Znění tohoto ustanovení odpovídá obecným zásadám tzv. „dovolenkového“ práva (Urlaubsrecht). Z účelu poskytování dovolené na zotavenou nutně vyplývá, že by zaměstnanec neměl toto volno, které je mu poskytnuto za účelem zotavení, využít k tomu, aby si našel jinou krátkodobou práci a něco si přivydělal a zákonitě tak tento účel zmařil. Jelikož tento účel vyplývá už z § 1 SZoD, není odchýlení od ustanovení § 8 možné, a to ani v individuální pracovní, ani v kolektivní smlouvě. Z tohoto pravidla, resp. z této zásady existují samozřejmě výjimky. Tato zásada tak platí pro skutečné čerpání dovolené, neplatí v případě skončení jednoho pracovního poměru, vyplacení náhrady mzdy za nevyčerpanou dovolenou v penězích a následné navazující nastoupení do nového pracovního poměru. Platí však ale, že před uplynutím výpovědní doby, čerpá-li zaměstnanec dovolenou, nemůže během této dovolené konat práci ani pro jednoho zaměstnavatele. Tato zásada však také neplatí u zaměstnanců, kteří mají sjednány dva pracovní poměry, a to v případě, že nemohou dovolenou čerpat u obou zaměstnavatelů současně. Za určitých okolností může být taktéž nastoupeno do druhého pracovního poměru, který však ale nemůže být uzavřen pouze na dobu trvání dovolené na zotavenou u prvního zaměstnavatele.

Zakázaná výdělečná činnost během dovolené

Zakázána je tedy výdělečná činnost, která odporuje účelu dovolené na zotavenou. To znamená, že zakázáno není pouze pokračování výkonu činnosti v daném pracovním, popřípadě služebním vztahu, ale také jakákoliv další činnost, která by byla vykonávána samostatně v jiném povolání, při výkonu živnosti či při výkonu práce na základě dohod o pracích konaných mimo pracovní poměr, příčila-li by se tato účelu čerpání dovolené na zotavenou. Výdělečná činnost je pak každá taková činnost, která směřuje k dosažení výdělku či zisku, přičemž však tato odměna nemusí být pouze v penězích či v penězi ocenitelných věcech, ale může spočívat také v obdržení jakéhokoliv protiplnění. Koná-li osoba nějakou činnost z laskavosti, resp. z ochoty, tato činnost nespadá pod zákaz uvedený v § 8 SZoD, neboť zde není očekáván výdělek v žádné z jeho výše uvedených forem. Naproti tomu však činnost ve vlastní prospěch na svém vlastním domě či na své vlastní zahradě může být výdělečnou činností, neboť osoba touto činností ušetří výdělek, který by musela odevzdat jinému (např. zedníkovi, uklízečce, nebo zahradníkovi), případně tak docílí hospodářského pozitivního výsledku (např. zhodnocení nemovitosti, tedy dochází ke vzniku penězi ocenitelného výsledku), který představuje zisk. Bylo by však absurdní tyto činnosti zakazovat, tedy tyto jsou dovoleny proto, že je nelze nahlížet jako činnosti, které by představovaly činnosti odporující účelu dovolené na zotavenou. Naopak je pozitivní, pokud např. manažer či řidič tramvaje takovou fyzicky náročnější činnost vykonává, neboť touto činností, tolik rozdílnou od činnosti při výkonu své profese, regeneruje nejen své fyzické, ale i své duševní zdraví a takováto činnost tak zcela odpovídá účelu dovolené. Je třeba také podotknout, že i když činnosti povedou k tvorbě penězi ocenitelného výsledku, netřeba je vždy považovat za zakázané. Takto je třeba hodnotit například případ, kdy mladiství během své dovolené vykonávají dobrovolné práce na táboře, či si prostřednictvím např. mytí nádobí obstarají slevu z ceny tábora. Tato činnost bude dovolená především z toho důvodu, že jejím prvotním účelem není získat odměnu.

Rozlišení, zda se při konkrétní činnosti jedná o konání dovolené či zakázané je vždy třeba hodnotit dle okolností jednotlivých případů. Tak nebude například nedovoleným jednáním osoby, která pracuje především duševně, bude-li o své dovolené připravovat k publikaci svou knihu. Není nedovoleným jednáním o dovolené dokonce ani činnost, kterou zaměstnanec vykonává ve svém povolání, jako například píše-li učitel knihu o pedagogice, právník odborný článek či vysokoškolský učitel vědeckou práci.

Lze shrnout, že práce, které jedinec činí ve vlastním zájmu lze generelně nahlížet jako povolené, nejsou-li vykonávány v přehnané míře, naproti tomu však práce, které činí jedinec pro ostatní za účelem

vydělat peníze či jiný zisk, lze generelně nahlížet jako zakázané. Přesto však i takové činnosti, avšak drobného významu a příležitostné, by dokonce mohly být nahlíženy jako povolené. Je však třeba si uvědomit, že i přes určitou míru benevolence § 8 SZoD není možné výklad tohoto ustanovení nepřiměřeně rozšiřovat a povolit jakoukoliv činnost, případně zúžit výčet zakázaných prací pouze na ty, které by byly buď konány na plný úvazek, případně by byly konkurenčním jednáním.

Následky porušení zákazu výkonu nepovolených činností během dovolené

Následků porušení zákazu je několik. Jsou jimi:

a) Nicotnost smlouvy o výkonu činnosti během dovolené
b) Možnost požadovat zdržení se činnosti
c) Nárok na vrácení náhrady mzdy vyplacené v průběhu výkonu zakázané činnosti během dovolené
d) Nárok na náhradu škody
e) Spotřebování dovolené i přes výkon nepovolené činnosti

Ad a) Nicotnost smlouvy o výkonu činnosti během dovolené

Koná-li zaměstnanec činnost, která je během dovolené zakázána, porušuje touto činností zákonný zákaz ve smyslu § 134 BGB. Smlouvu uzavřenou na výkon zakázané činnosti je tedy třeba považovat za nicotnou. Pakliže zaměstnanec činnost uvedenou ve smlouvě i přes její nicotnost vykonává, vzniká mu nárok na odměnu od ve smlouvě uvedeného zaměstnavatele, stejně, jako by tomu bylo u platně uzavřené smlouvy.

Ad b) Možnost požadovat zdržení se činnosti

Zaměstnavatel má možnost požadovat po zaměstnanci, aby se takovéto nedovolené činnosti o dovolené zdržel, případně může podat žalobu na zdržení se činnosti. Vzhledem k níže uvedeným dalším možnostem zaměstnavatele a jejich využití v praxi, bude tato varianta velice častou.

Ad c) Nárok na vrácení náhrady mzdy vyplacené v průběhu výkonu zakázané činnosti během dovolené

Dle dříve rozšířeného mínění existoval nárok na vrácení náhrady mzdy vyplacené v průběhu výkonu činnosti během dovolené, přičemž daný nárok vyplýval ze zásad o bezdůvodném obohacení. Následně

byl rozšířen názor, že jestliže zaměstnanec vykonává během dovolené zakázanou činnost, nebylo dosaženo chtěného účelu dovolené a proto vzniká zaměstnanci dle § 812 odst. 1 věta druhá BGB povinnost vrátit vyplacenou mzdu. Dle § 819 odst. 1 BGB se zaměstnanec nemůže dovolávat neodejmutelnosti nároku na dovolenou (jelikož na dovolenou existuje nárok, stejně jako v českém právu), neboť je to sám zaměstnanec, který porušil účel dovolené a zmařil tak důvody pro neodejmutelnost jeho nároku na dovolenou, dokonce za danou činnost obdržel odměnu od dalšího zaměstnavatele, a proto musí sám akceptovat, že se jím zneužitá dovolená změnila v dovolenou neplacenou. Dne 25.2.1988 však učinil německý Spolkový soud pro pracovněprávní věci průlomové rozhodnutí a změnil dosavadní judikaturu v tom smyslu, že stanovil, že nejen že výkon zakázané činnosti během dovolené nemá za následek možnost odejmout za tuto činnost mzdu, která byla vyplacena od zaměstnavatele, který zaměstnanci dovolenou poskytl, ale i to, že nedochází ke spotřebování dovolené. Od předchozí judikatury bylo tímto absolutně upuštěno. Toto rozhodnutí Spolkového soudu pro pracovněprávní věci narazilo na ostrou kritiku, a není čemu se divit. Kdo zneužije dovolené pro výkon zakázané činnosti, musí také počítat s tím, že mu poskytnutý volný čas nebude dosavadním zaměstnavatelem uhrazen. Tomuto využití dovolené k dosažení dalšího výdělku mělo být skrze § 8 SZoD zamezeno. Správné by tedy, oproti danému rozhodnutí soudu, mělo být, aby zaměstnavatel mohl i nadále za porušení zákazu výkonu činnosti požadovat vrácení vyplacené náhrady mzdy. Požadovat vrácení náhrady mzdy lze však pouze za dny, resp. za hodiny, ve kterých zaměstnanec poskytoval zakázanou činnost. Za tuto dobu mu pak nenáleží náhrada mzdy a může být požadováno její vrácení, aniž by se jakkoli zohledňovalo, jakou odměnu dostal zaměstnanec za zakázanou činnost. V praxi však, i s ohledem na novou judikaturu, zaměstnavatelé daného oprávnění nevyužívají, neboť nejen že si nemohou být jisti rozhodnutím Spolkového soudu pro pracovněprávní věci, ale i proto, že spočítat konkrétní hodiny, za které by měla být náhrada mzdy vrácena, je mnohdy velice komplikované, nehledě na to, že by případně musela být poskytnuta náhradní dovolená v případě, že by nedošlo ke spotřebování. Proto je lepší ponechat jedenkrát čerpanou dovolenou a využít práva požadovat po zaměstnanci zdržení se činnosti, případně uplatnit nárok na náhradu škody (viz níže). Možné je taktéž při dalším porušení ze strany zaměstnance pohrozit mu možnou výpovědí. V kolektivních smlouvách je však možné ještě výslovně stanovit, že nárok na náhradu mzdy při čerpání dovolené nepřísluší v případě, že zaměstnanec během dovolené bude vykonávat zakázanou činnost.

Ad d) Nárok na náhradu škody

Zaměstnanec se výkonem zakázané činnosti během dovolené dopouští porušení smluvního vztahu, přičemž může zaměstnavatel po něm požadovat náhradu škody. Toto Spolkový soud pro

pracovněprávní věci reflektoval ve svém sporném rozhodnutí ze dne 25.2.1988. Je zpravidla téměř nemožné, aby byl prokázán vznik škody tím, že se zaměstnanec dostatečně nezotavil, avšak je možné sjednat si smluvní pokutu pro případ tohoto porušení. V případě, že zaměstnanec kvůli výkonu zakázané práce onemocní, či se mu přihodí nehoda, díky které nemůže po dovolené nastoupit opět do zaměstnání, může po něm zaměstnavatel požadovat náklady na výpomoc, která musela být sehnána jako náhrada za daného zaměstnance.

Ad e) Spotřebování dovolené i přes výkon nepovolené činnosti

Dle dříve rozšířeného mínění byla dovolená zaměstnancem čerpána i v případě, že po něm zaměstnavatel požadoval vrácení vyplacené náhrady mzdy kvůli výkonu zakázané činnosti. Dle nového výkladu v takovém případě zůstává nárok na dovolenou zachován. V případě, že bude zaměstnanec za porušení zákazu činnosti okamžitě propuštěn, mění se jeho nárok na čerpání dovolené na nárok na vyplacení nevyčerpané dovolené v penězích. Naopak však je-li v pracovním poměru pokračováno, nemá § 8 SZoD, který sám o sobě neobsahuje žádnou sankci za porušení v něm uvedené povinnosti, žádné tvrdší následky. Proto se ustálil názor, že buď bude zaměstnavatel požadovat vrácení vyplacené náhrady mzdy, v takovém případě však nárok na dovolenou zůstává zachován, nebo může pouze požadovat, aby se zaměstnanec takto zakázané činnosti zdržel a dovolená se tak nadále čerpá. V takovém případě nelze než doporučit nepožadovat vrácení náhrady mzdy a požadovat pouze zdržení se činnosti a uplatnit nárok na náhradu škody, případně zaměstnanci výpověď dát, či s ní pohrozit, aby byl zaměstnanec určitým způsobem napomenut.

Další povinnosti zaměstnance při čerpání dovolené

Tento oddíl nese název „povinnosti zaměstnance“, avšak hned první vymezení je negativní, tedy uvádí, co není a ani nemůže být povinností zaměstnance. Prvotně neexistuje povinnost zaměstnance se skutečně zotavit. Na jednu stranu sice existuje zákaz určitých druhů činností během čerpání dovolené na zotavenou, na druhou stranu však nemůže být po zaměstnanci obecně požadováno, aby se choval tak, aby se dostatečně zotavil. Také v případě, že se zaměstnanec během dovolené dokonce více vysílí, než zotaví a tím způsobí zmaření účelu dovolené, nevzniká mu povinnost vrátit náhradu mzdy a ani nemusí poskytovat náhradu škody. Proto také neexistuje žádný nárok na informování o obsahu či zorganizování dovolené, není-li důvod domnívat se, že dochází k porušení zákona.

V SRN však existuje povinnost zaměstnance zamezit vzniku sebepoškození svým vlastním zaviněním. Taktéž během dovolené platí pro zaměstnance obecné povinnosti, které spočívají v tom, že zaměstnanec nemůže lehkomyslně ve formě svého vlastního zavinění ohrozit své zdraví a tím způsobit, že po ukončení dovolené nebude možné, aby pokračoval ve výkonu práce. Každý zaměstnanec se tedy musí chovat tak, aby neznemožnil následný řádný výkon svého povolání. Přesto není možné zakázat zaměstnanci náročné horské či lyžařské túry, i když vedou k vyčerpání zaměstnance. Existují však činnosti, které je třeba nahlížet jako nepřípustné, jako je například cesta do Španělska v červenci i přesto, že zaměstnanec trpí nemocemi krevního oběhu, stejně tak je nepřípustná nepřerušená jízda po dobu trvání 36 hodin, aniž by zaměstnanec dělal dostačující přestávky v jízdě, přičemž následovalo u zaměstnance nervové zhroucení. Tyto následky při porušení povinností zaměstnance však nespočívají v právu týkajícím se dovolené, ale vychází z toho, že zaměstnancem samotným byla způsobena nemožnost vykonávat nadále práci a proto mu nenáleží nárok na náhradu mzdy v období následujícím po tom, co čerpal dovolenou.

Zaměstnanci může být za porušení zákazu činnosti taktéž dána výpověď, neboť se jedná o porušení obecných povinností vyplývajících z pracovněprávního vztahu. Je-li zaměstnancem vykonávána takováto činnost u konkurenčního zaměstnavatele, může s ním být dokonce i okamžitě zrušen pracovní poměr.

Co se informování zaměstnavatele o místě čerpání dovolené týká, je tuto otázku třeba zodpovědět vždy dle konkrétní situace. Zaměstnavatel má oprávněný zájem na tom, aby zaměstnance i po dobu čerpání jeho dovolené měl možnost zastihnout. Stejně tak je oprávněn zaměstnance v nutných případech z dovolené odvolat a proto by měl i z tohoto důvodu mít k dispozici informaci o místu čerpání dovolené. Udá-li zaměstnanec adresu, kde bude trávit dovolenou, musí mu být případná korespondence zasílána na tuto adresu. Bez konkrétního důvodu však zaměstnanec nemá povinnost sdělovat tuto informaci svému zaměstnavateli.

Závěr

Závěrem je možné říci, že právní úprava ČR neobsahuje úpravu povinností zaměstnance během čerpání dovolené, ač by se tato jevila jako velice vhodná. SRN celkem důsledně nastínila možné činnosti během dovolené tak, aby zaměstnanci dostatečně zregenerovali vlastní síly a nezmařili tak účel dovolené, popřípadě si sami nezpůsobili újmu, která by jim po ukončení čerpání dovolené neumožnila opětovný výkon práce. Stanovenými oprávněními zaměstnavatelů, které jsou vymezeny celkem široce, je těmto

dána možnost postihnout zaměstnance, kteří by jakýmkoli způsobem porušili čerpání dovolené za účelem zotavení. Je však dle mého názoru třeba postavit se kriticky k výše uvedenému zlomovému rozhodnutí Spolkového soudu pro pracovněprávní věci, který dal zaměstnancům porušujícím jejich povinnosti vyplývající z pracovněprávního vztahu zelenou, neboť zúžil značné negativní sankce doposud vyplývající z daných porušení. Umožňuje-li zákon osoby porušující zákonná ustanovení náležitě sankcionovat, není na místě, aby soud dané sankce zužoval. Napříště je třeba si uvědomit, že je třeba brát i nadále v potaz zájem zaměstnance na dostatečnou ochranu jeho organismu před možným škodlivým působením pracovního prostředí a jeho dostatečnou regeneraci v době čerpání dovolené tak, aby nejen že nedocházelo k poškození zdraví, ale ani k maření účelu dovolené výkonem činnosti nepovolené a ani k ohrožení činnosti zaměstnavatele po návratu zaměstnance z dovolené.

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ZKUŠEBNÍ DOBA PO NOVELE ZÁKONÍKU PRÁCE

ANDREA HRDLIČKOVÁ

PEF MZLU

Abstrakt

Článek se zabývá institutem zkušební doby , jako jedním z institutů pracovního práva, jehož účelem je, aby zaměstnavatel mohl náležitě posoudit, zda zaměstnanec splňuje všechny předpoklady pro řádný výkon práce a aby zaměstnanec mohl uvážit, zda v novém pracovním poměru setrvá nebo zda ho bezprostředně skončí, neboť neodpovídá jeho představám.

Klíčová slova

Zkušební doba, novela, zákoník práce, trvání zkušební doby,zrušení ve zkušební době

Abstrakt

The article deals with the probation institute as one of the component part of the Czech labour law. The purpose of the probation is that the employer can thoroughly explore the potential and qualification for the work of the eployee; and also it gives the employee the opportunity to reconsider whether to stay in the work or not.

Key words

The probation, amendment,labour law kodex,duration of the probation,dissolution in the probation

S institutem zkušební doby se zajisté setkal již každý z nás. Byť nepatří mezi povinné náležitosti pracovní smlouvy, je smluvními stranami při uzavírání pracovního poměru hojně užíván, neboť umožňuje oběma stranám, aby si v jejím průběhu ověřili, zda jim bude pracovní poměr vyhovovat a v opačném případě , aby jim bylo umožněno rozvázání pracovního poměru bez větších průtahů.

Institut zkušební doby byl upraven i v zákoníku práce č. 65/ 1965 Sb. Není tedy institutem novým, nicméně ohledně právní úpravy se po účinnosti zákona č. 262 / 2006 Sb. vedou spory, přestože k žádným zásadním změnám nedošlo. Obecně řečeno, zkušební doba je zákonem vymezený časová úsek

určený k tomu, aby zaměstnavatel mohl náležitě posoudit, zda zaměstnanec splňuje všechny předpoklady pro řádný výkon práce, a aby zaměstnanec mohl uvážit, zda v novém pracovním poměru setrvá nebo zda ho bezprostředně – protože neodpovídá jeho očekávání – skončí.
Zákoník práce stanoví její délku , obligatorní formu a také způsob skončení pracovního poměru v průběhu této doby.

V úvodu bych ocitovala znění ustanovení o zkušební době v zákoně č. 65 / 1965 Sb. :
Ustanovení § 31 znělo :
1/ V pracovní smlouvě může být sjednána zkušební doba, která činí, pokud nebyla dohodnuta zkušební doba kratší, tři měsíce. Sjednaná zkušební doba nemůže být dodatečně prodlužována.
2/ Doba překážek v práci, pro které zaměstnanec nemůže během zkušební doby konat práci, se započítává do zkušební doby v rozsahu nejvýše deseti pracovních dnů.
3/ Zkušební doba musí být sjednána písemně, jinak je její sjednání neplatné.

Ustanovení § 58 – Zrušení pracovního poměru ve zkušební době
1/ Ve zkušební době může jak zaměstnavatel, tak i zaměstnanec zrušit pracovní poměr písemně z jakéhokoliv důvodu nebo bez uvedení důvodu. Zaměstnavatel však nemůže ve zkušební době zrušit pracovní poměr v době prvních 14 kalendářních dnů trvání dočasné pracovní neschopnosti / karantény / zaměstnance.
2/ Písemné oznámení o zrušení pracovního poměru má být doručeno druhé straně zpravidla alespoň tři dny přede dnem, kdy má pracovní poměr skončit.

V novém zákoníku práce je zkušební doba uvedena v § 35 :
1/ Je-li před vznikem pracovního poměru sjednána zkušební doba, nesmí být delší než 3 měsíce po sobě jdoucí ode dne vzniku pracovního poměru. Zkušební doba může být sjednána před vznikem pracovního poměru rovněž v souvislosti se jmenováním na pracovní místo vedoucího zaměstnance / § 33 odst. 3 /. Sjednaná zkušební doba nemůže být dodatečně prodlužována. Zkušební dobu je možné sjednat nejpozději v den, který byl sjednán jako den nástupu do práce, popřípadě v den,který byl uveden jako den jmenování na pracovní místo vedoucího zaměstnance / § 33 odst.3/. Zkušební dobu není možno sjednat,jestliže pracovní poměr již vznikl.
2/ Doba překážek v práci, po které zaměstnanec nekoná práci v průběhu zkušební doby, se do zkušební doby nezapočítává.
3/ Zkušební doba musí být sjednána písemně, jinak je neplatná.

Ustanovení § 66 – Zrušení pracovního poměru ve zkušební době

1/ Zaměstnavatel i zaměstnanec mohou zrušit pracovní poměr ve zkušební době z jakéhokoliv důvodu nebo bez uvedení důvodu. Zaměstnavatel však nemůže ve zkušení době zrušit pracovní poměr v době prvních 14 kalendářních dnů trvání dočasné pracovní neschopnosti / karantény / zaměstnance.

2/ Písemné oznámení o zrušení pracovního poměru podle odstavce 1 má být doručeno druhému účastníku zpravidla alespoň 3 dny přede dnem, kdy má pracovní poměr skončit.

Vyjdeme-li z výše uvedeného ustanovení § 35 platného do 31.12.2007 tak platí, že zkušební dobu lze sjednat již před vznikem pracovního poměru s podmínkou, že její trvání nesmí překročit tři měsíce po dni vzniku pracovního poměru. Takto koncipovaná norma způsobovala v praxi problémy . Dle § 333 ZP se počítání času řídí § 122 občanského zákoníku v platném znění. Pak tedy platí / neboť jde o lhůtu určenou podle dnů, tak lhůta začíná běžet dnem po události, jež je rozhodující pro její začátek /, že zkušební lhůta vlastně běží až den následující po dni vznik pracovního poměru. Bude-li tento dne sobotou , nedělí či svátkem, bude posledním dnem lhůty nejblíže následující pracovní den. V tomto uvedeném případě by ale nebyla dodržena maximální délka zkušební doby.

Technická novela ZP účinná do 1.1.2008 upravila znění ZP tak , že se běh zkušební doby bude napříště počítat ode dne vzniku pracovního poměru.

Co se týká délky zkušební doby / § 35 odst.1/ věta třetí ZP / tak platí, že nesmí být dodatečně prodlužována a nesmí být delší než 3 měsíce po sobě jdoucí ode den vzniku pracovního poměru a musí být sjednána nejpozději v den nástupu do práce.

Budeme – li vycházet z výše uvedeného a současně z rozhodnutí R 6 / 1984 / byť je vydané za účinnosti dnes již neúčinného ZP č. 65 / 1965 Sb. / tak se zde jeví střet v tom, že pokud si sjednám pracovní smlouvu ústně a sepíši pracovní smlouvu písemně až v den nástupu do práce , pak ustanovení o zkušební době začíná platit až ode dne následujícího / § 333 ZP viz výše / a tedy ustanovení o zkušební lhůtě v takto uzavřené pracovní smlouvě je neplatné, neboť platí , že zkušební lhůtu není možné dohodnout se zpětnou platností ./ R 6 / 1984 / . Jestliže tedy byla pracovní smlouva vyhotovena písemně později než v den nástupu zaměstnance do práce , vznikl pracovní poměr na základě ústně sjednané pracovní smlouvy. Písemné vyhotovení má tedy ve svých důsledcích jen povahu písemného potvrzení obsahu ústně sjednané pracovní smlouvy s tím, že dle odst. 3 § 35 ZP platí, že ustanovení o zkušební době musí být písemné a zkušební doba nesmí být uzavírána pokud již pracovní poměr vznikl takže v tomto případě bude ustanovení o zkušební době neplatné.

V zákoně č. 65 / 1965 Sb. bylo stanoveno / § 31 odst. 2 /, že doba překážek v práci, pro které zaměstnanec nemůže během zkušební doby konat práci, se započítává do zkušební doby v rozsahu nejvýše 10 pracovních dnů. V zákoně č. 262 / 2006 Sb. , v § 35 odst. 2 , že o dobu překážek v práci , pro které zaměstnanec nekoná práci v průběhu zkušební doby, se do zkušební doby nezapočítává , technickou novelou bylo upřesněno, že o tu dobu, kdy trvají překážky v práci, se zkušební doba prodlužuje. Stavím se za názor, že takováto úprava vyjasnila situaci a předešla různým sporům. Vyjasnit zůstává otázka , zda-li je možné ukončit pracovní poměr zrušením ve zkušební době v případě trvání překážek v práci.Vzhledem k tomu, že zákon nezná přerušení zkušební lhůty, domnívám se, že zkušební lhůta stále běží i když trvají překážky v práci, a proto je možné učinit zrušení ve zkušební době učinit. To, že ve zkušební době lze zrušit pracovní poměr i v době překážek v práci na straně zaměstnance např. v jeho pracovní neschopnosti , vyplývá i ze soudní judikatury :

Rozsudek Nejvyššího soudu ČR z 29.1.2004 , č.j. 21 Cdo 1807 / 2003 :
V rozsudku je mimo jiné uvedeno : „ Za této situace může být pracovní poměr platně zrušen podle ustanovení § 58 odst. 1 zák.práce i v době po uplynutí původní zkušební doby, kdy trvá překážka v práci na straně zaměstnance, jestliže o ni došlo k prodloužení zkušební doby podle ustanovení § 31 odst. 2 zákoníku práce

Rozsudek Vrchního soudu ze den 28.4.1995 sp.zn. 6 Cdo 11 / 94
Právní názor se týká platnosti sjednávání zkušební doby a její délky. *Je uvedeno : „ Právní úkon směřující ke zrušení pracovního poměru ve zkušební době učiněný po uplynutí sjednané zkušební době je neplatný. Během zkušební doby nelze učinit zrušovací projev s tím, že jako den skončení pracovního poměru bude označen den následující po uplynutí zkušební doby, ani ke zrušení nemůže dojít zpětně. Určení dne následujícího po uplynutí zkušební doby anebo zpětné zrušení pracovního poměru ve zkušební době je pro rozpor s obsahem a účelem zákona neplatné / § 242 odst. 1.písm.a/ ZP /.Obsahuje-li zrušovací projev zpětné zrušení pracovního poměru, jakož i v případě , že ve zrušovacím projevu vůbec nebyl označen den skončení pracovního poměru, pracovní poměr skončí dnem doručení / oznámení / zrušení pracovního poměru druhému účastníku. Jestliže byl jako den zrušení pracovního poměru označen den následující po uplynutí zkušební doby, pak pracovní poměr končí posledním dnem zkušební doby. “*
Z výše uvedených citovaných rozsudků jasně vyplývá, že ve zkušební době lze zrušit pracovní poměr i v době překážek v práci na straně zaměstnance. Domnívám se, že by bylo možno tento problém odstranit změnou právní úpravy v § 66 zákoníku práce , kdy by bylo uvést jednoznačné vymezení o tom, že pracovní poměr lze ve zkušební době zrušit i v době překážek v práci na straně zaměstnavatele.

Jak je výše uvedeno, nový zákoník práce umožnil sjednat zkušební dobu také u pracovního poměru založeného jmenováním. Tato možnost výslovně v předchozí právní úpravě nebyla , a tak zde existovaly dva právní názory – jeden z nich se stavěl na názor, že lze platně sjednat zkušební dobu s odůvodněním na § 68 zákoníku práce, kde byl uvedeno, že pro pracovní poměry založené volbou a jmenováním platí jinak ustanovení o pracovním poměru sjednaném pracovní smlouvou. Druhý názor tvrdil, že zkušební dobu není možno sjednat, protože možnost sjednání byla dána pouze u pracovní smlouvy. Vyjasnění těchto oponentních názorů jednoznačným vymezením v textu zákona lze hodnotit pouze pozitivně.

S § 35 souvisí samozřejmě i § 66 zákoníku práce o zrušení pracovního poměru ve zkušební době. Zde platí zásada, že písemné oznámení o zrušení pracovního poměru dle § 66 odst.1 má být doručeno druhému účastníku zpravidla alespoň 3 dny přede dnem, kdy má pracovní poměr skončit. Samotné toto ustanovení o stanovení lhůty 3 dny má pouze pořádkový charakter a její nedodržení nezpůsobuje neplatnost takového právního úkonu. Je nutno mít ale na paměti , že toto by neplatilo v případě , že by přímo v pracovní smlouvě u ustanovení o zrušení pracovního poměru ve zkušební době byla dohodnuta podmínka doručení nejméně 3 dny předem. Pak by došlo ke změně ze lhůty pořádkové ve lhůtu hmotně právní jejíž nedodržení by způsobilo neplatnost právního úkonu.

Co se týká podmínky uvedení dne, kdy má pracovní poměr zrušený ve zkušební době skončit, tak platí, že nemusí být konkrétní den uveden. V takovém případě dochází ke skončení pracovního poměru dnem doručení resp. oznámení této skutečnosti druhému účastníku. V případě , že je uveden přesné datum skončení pracovního poměru, nesmí být uveden den , který již uběhl popř. nesmí být uveden den, kdy zkušební doba již netrvá. V případě označení dne následujícího po uplynutí zkušební doby, skončí pracovní poměr posledním dnem zkušební doby.

Co říci závěrem ?

Institut zkušební doby má v pracovním právu svém pozitivní opodstatněné místo. Umožňuje totiž svojí podstatou reagovat nejpružněji na potřeby pracovního trhu v České republice ze všech právních institutů, které má pracovní právo, v oblasti vzniku a skončení pracovního poměru, k dispozici . Otázkou k diskusi zůstává , jestli 3 měsíční lhůta je lhůtou dostatečně dlouhou k poznání nového prostředí pro jednu i druhou stranu a jestli určité navazování opakujících se pracovních poměrů mezi týmiž účastníky smluvního vztahu nevede k obcházení zákona a tím i k znevažování zamýšlenému účelu zkušební doby. Možná by bylo řešením, kdyby zákonodárce kromě nemožnosti dodatečného prodlužování zkušební

doby, zakázal i možnost opakovaného sjednání zkušební doby v případě navazujících pracovních poměrů.

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ZÁKONÍK PRÁCE A ŘÍZENÍ PRACOVNÍHO PROCESU

ALEŠ JANOCH

PRÁVNICKÁ FAKULTA, MASARYKOVA UNIVERZITA

Abstrakt

Možnost zaměstnavatele disponovat zaměstnancem, tzv. dispoziční pravomocí (ius disponendi) a zejména pak obsahem této dispoziční pravomoci. Vymezení nástrojů této dispoziční pravomoci a základní limity těchto nástrojů. Identifikace jednotlivých nástrojů daných přímo zákoníkem práce pro řízení pracovního procesu.Možnost řídit pracovní proces výběrem jednotlivých pracovníků, skladbou pracovního týmu a v rámci vytvořeného závazku řízením individuálními a hromadnými pokyny, krátkodobé i dlouhodobé povahy. Dopad ústavního nálezu Pl. ÚS 83/06.

Klíčová slova

Management, řízení lidských zdrojů, dispoziční pravomoc, vnitropodnikový předpis, pracovní řád.

Abstract

The contribution deals with origination of possibility of employer to dispose of an employee, i.e. disposal authority (ius disponendi) and content of this disposal authority in particular. The article defines tools of such disposal authority and fundamental limits of these tools. It identifies individual tools set directly by labour code for management of work process. The article also handles possibilities of human resource management by selection of employees, composition of work team and within the created commitment by management of individual and collective instruction, of both short and long term nature (mandatory instruction, working regulation, internal rules).

Key words

Management, human resource management, disposal authority/power, internal rules, working regulation.

Manažerská činnost pohledem pracovního práva

Pracovní právo bývá nejčastěji nazíráno pohledem zaměstnanců, jako četnější skupiny jednotlivců, která je ekonomicky závislá na zaměstnavateli a tedy bez dalšího oslabena ve faktickém výkonu svých

práv. Pracovní právo, resp. zákoník práce pak bývá nejčastěji vnímán jako regulátor této nerovnosti. Na pracovní právo však lze pohlížet i jako na soubor norem, které při svém užití (subjektivní právo) pomáhají řídit, vymezují nástroje řízení a zároveň stanoví limity řízení.

Činnost zaměstnavatele v pracovním procesu lze chápat jako proces koordinování činností skupiny pracovníků, realizovaný jednotlivcem nebo skupinou lidí za účelem dosažení určitých výsledků, které nelze dosáhnout individuální prací. Za tímto účelem zaměstnavatelé využívají různých nástrojů, jak dosáhnout stanovených cílů. Při své manažerské činnosti se pak (nejen) z pohledu pracovního práva věnují tzv. řízení lidských zdrojů, tj. dosahování podnikových cílů prostřednictvím získávání, stabilizování, propouštění, rozvoje a optimálního využívání lidských zdrojů v podniku.

Při užívání nástrojů pro řízení pracovního procesu, jsou však zaměstnavatelé vázáni limity danými zákoníkem práce. Vedení lidí v pracovněprávním vztahu tak není volné, nemůže být zcela volné, podléhající pouze představám zaměstnavatele, či vedoucích zaměstnanců o řízení. Tím se projevuje jedna z funkcí pracovního práva, funkce ochranná. Pracovní právo samo má i funkci organizační. Pracovní právo jako takové nic neorganizuje, určuje pouze práva a povinnosti a garantuje jejich realizace prostřednictvím subjektů pracovního práva.

Pracovní právo, poskytuje zaměstnavatelům určité nástroje pro řízení podniku, resp. spíše jeho jednotlivých zaměstnanců a skupin zaměstnanců. Ještě přesnějším vyjádřením skutečnosti by bylo tvrzení, že pracovní právo poskytuje zaměstnavatelům formy nástrojů pro řízení, přičemž obsah těchto forem již není tak rigidně vymezen a při dodržování určitých ustanovení pracovního práva dává zaměstnavateli či jeho vedoucím pracovníkům relativně širokou možnost zvolit styl, způsob a konkrétní podobu řízení. Lze tedy shrnout, že pracovní právo samo dává zaměstnavateli možnost organizovat práci zaměstnanců jako takovou, víceméně bez bližší konkretizace.

Dispoziční pravomoc

Každý jednotlivý zaměstnavatel si pro řízení a organizaci činnosti svého podniku a pro uspořádání vtahů se zaměstnanci volí určitý systém řízení, jehož nástrojem je určitý systém psaných či nepsaných pravidel, kterými upravuje chod a organizaci podniku. Z pohledu pracovního práva touto činností zaměstnavatel vykonává tzv. dispoziční pravomoc

Termín dispoziční pracovní pravomoc není zákoníkem práce ani jinou normou pracovního práva explicitně zmíněn. Jde o termín užívaný právní teorií a literaturou. Termín dispoziční pravomoc v pracovním právu je odvozen od obsahu základního práva soukromého, práva vlastnického. Obsahem vlastnického práva je notorická známá vlastnická triáda, tj. věc držet, užívat a věcí disponovat, podle své úvahy, ve svém zájmu, mocí, které není závislá na vůli jiného, vše v mezích právního řádu.

Zaměstnavatel zaměstnance samozřejmě nevlastní, zaměstnanec je stejně jako zaměstnavatel subjektem pracovněprávního vztahu, předmětem zde není zaměstnanec, ale práce zaměstnance, resp. jeho vůle uzavřením pracovního poměru poskytovat konkrétnímu zaměstnavateli výkon práce. Oproti tomu je zaměstnavatel nadán a povinován tímto potenciálem disponovat, je nadán dispoziční pravomocí. Zaměstnavatel, jsa nadán dispoziční pravomocí, tak může, dle svých cílů, záměrů a vůle, v mezích zákona, řídit zaměstnance a tím i chod celého podniku. Existence dispoziční pravomoci je obsahovou podmínkou pro možnost faktického řízení jak podniku, tak zejména lidských zdrojů podniku.

Dispoziční pravomoc vzniká spolu se vznikem pracovního poměru. Do okamžiku uzavření pracovní smlouvy jsou si subjekty budoucí pracovní smlouvy fakticky rovny, mohou svobodně projevit svoji vůli (autonomie vůle) ohledně toho, koho zvolí za druhý subjekt uzavření smlouvy a zda vůbec k takové volbě dojde a toho, co bude obsahem právního úkonu.

Dispoziční pravomoc zaměstnavatele je sama obsahem právního vztahu, kterým je individuální pracovněprávní vztah. Až vznikem dispoziční pravomoci je tak dána možnost zaměstnavatele řídit zaměstnance a tím i výsledky jeho práce, podílející se na celkových výsledcích podniku. Základním znakem organizace práce je podřízení se zaměstnance řídící vůli zaměstnavatele.

Nicméně již sám vznik pracovního poměru, resp. okolnosti uzavření pracovní smlouvy a obsah pracovní smlouvy, jsou základním nástrojem řízení, jakož i vymezením limitů řízení. Proces uzavírání pracovního poměru je svým způsobem základním nástrojem, kterým jsou lidské zdroje řízeny. Již při předsmluvních vztazích jsou ověřovány schopnosti potenciálního subjektu pracovního poměru na danou pozici, jsou konfrontovány s představou zaměstnavatele o kvalitách a zkušenost daného kandidáta. Výběrem vhodného uchazeče pak zaměstnavatel buduje pracovní tým, skládá personální substrát podniku, zaměstnance kteří budou podřízení vlastní dispoziční pravomoci zaměstnavatele. Realizace vzniku pracovněprávního vztahu tak dává první nástroj řízení, vlastní možnost ovlivnit personální složení zaměstnanců.

Vznikem pracovního poměru je aktivováno objektivní právo, a to samo dává rámcový obsah možnosti řízení. Zcela záměrně je uvedeno „možnost“. Vlastní obsah řízení může být velice různorodý, vycházejí ze zkušeností a kvalit manažera, ze stylů řízení, které velmi progresivně vyvíjejí, ale i z předmětu podnikatelské činnosti.

Pracovní poměr bývá nejčastěji založen pracovní smlouvou. Pracovní smlouva svým obsahem představuje druhý nástroj řízení. Z obligatorních bodů pracovní smlouvy nabude z hlediska rozsahu dispoziční pravomoci největšího významu povinnost v pracovní smlouvě sjednat druh práce, který může být sjednání poměrně úzce, stejně jako široce, totéž platí o místu výkonu práce.V pracovní smlouvě lze samozřejmě, kromě druhu práce, místa výkonu práce a dne nástupu do práce, sjednat i další podmínky na kterých mají účastníci zájem. Je však otázkou, na kolik je obsáhlá pracovní smlouva optimálním řešením. Pokud by byla pracovní smlouva příliš precizovaná, mohlo by dojít k samotnému popření možnosti řídit činnost zaměstnance dispoziční pravomocí. Vzhledem k povaze smlouvy jako takové, tedy možnosti změny obsahu jen souhlasným projevem vůle zúčastněných stran, při relativní dlouhodobosti pracovněprávního vztahu se jeví daleko praktičtější zachovat pracovní smlouvě co možná nejmenší rozsah úpravy pracovněprávního vztahu a tam, kde to zákoník práce připouští použít jinou úpravu.

Pracovní smlouva, stejně jako pracovněprávní předpisy blíže specifikují obsah (a tedy i rozsah) dispoziční pravomoci. Pracovní smlouva a pracovněprávní předpisy upravují, co do obsahu, jenom obecná práva a povinnosti vzešlé z pracovněprávního vztahu a v souvislosti s ním. Vlastní styl řízení a výkon dispoziční pravomoci je dán jen řídícímu subjektu. Pracovněprávní předpisy, pracovní smlouvy, případně kolektivní smlouvy tak stanoví zejména limity řízení.

Vzhledem k rozmanitosti předmětů činnosti zaměstnavatelů a jejich velikostí nemohou pracovněprávní normy postihnout všechny situace, které je třeba v konkrétních případech regulovat a to nezřídka i velmi pružně. Tomuto účelu nemůže sloužit ani pracovní smlouva. Nástrojem, který zákoník práce za tímto účelem zřizuje je závazný pokyn, vnitřní předpis a typ vnitřního předpisu, pracovní řád. Jedná se o další nástroje řízení, zde jíž přímo nástroje dispoziční pravomoci. Tyto nástroje ve specifických podmínkách konkrétního zaměstnavatele posilují a rozvíjejí (tedy alespoň by měly) obecné funkce, obzvláště v případě organizační funkce dávají tomuto termínu obsah ve vlastním slova smyslu. Těmito nástroji se řídící vůle zaměstnavatele transformuje do konečné konkretizace povinností zaměstnance.

Nástroje dispoziční pravomoci však nepůsobí bez dalšího pouze jednostranně v linii od zaměstnavatele k zaměstnanci. Vztah mezi zaměstnancem a zaměstnavatelem nelze totiž v jeho vertikální rovině chápat jako vztah jednostranně působící, ale jako vztah, ve kterém jsou chráněny nejen zájmy zaměstnavatele, ale i zaměstnance. Dispoziční pravomoc jednostranně působí ve směru od zaměstnavatele k zaměstnanci, její limit v zájmu ochrany zaměstnance pak dává platné právo a v jeho rámci nastavená pracovní smlouva a nástroje dispoziční pravomoci. Dohromady je tak vytvořen komplex vztahů. Jsou-li tyto vztahy průhledné a dávají-li jasně vymezená pravidla, pak přispívají k efektivnějšímu, rychlejšímu, ale i nekonfliktnímu dosažení cílů obou stran.

Z pohledu zaměstnanců je jasně konkretizován obsah dispoziční pravomoci tím, že je v podmínkách zaměstnavatele právě podle těchto specifických podmínek rozpracován obsah pracovní smlouvy a zákoníku práce, kde k tomu sám dává prostor. Naopak tím, že některá ustanovení zákoníku práce a přepisů souvisejících jsou kogentní nebo relativně kogentní povahy, je vymezen prostor, ve které zaměstnavatel může svoji pravomoc uplatňovat a tím jsou tedy dána a chráněna práva, ale i povinnosti zaměstnanců.

Jednotlivé nástroje řízení pracovního procesu

Konkrétním nástrojem řízení, který zná zákoník práce je již zmíněný závazný pokyn. Pojem závazný pokyn bývá často ztotožňován s pojmem dispoziční pravomoc zaměstnavatele. K tomu může vést skutečnost, že závazný pokyn, ve své nejširší podobě, je jediným formálním projevem dispoziční pravomoci. Autor se však domnívá, že závazný pokyn a dispoziční pravomoc nelze ztotožňovat. Dispoziční pravomoc je obsahovou součástí pracovněprávního vztahu a závazný pokyn je formálním projevem dispoziční pravomoci.

Závazný pokyn může mít různý právní charakter a různou jevovou podobu, tedy formu. Závazný pokyn může mít charakter právního úkonu nebo může jít o projev vůle, který nemá povahu právního úkonu.V tomto druhém případě lze hovořit o jiném projevu vůle nebo o organizačním opatření. Závazné pokyny mohou mít z hlediska formy podobu písemnou či ústní. V případě písemné formy, půjde typicky o vnitřní předpisy zaměstnavatele. Ústní závazný pokyn bývá nejčastěji vydáván pro jednotlivce či menší skupinu zaměstnanců a obvykle ad hoc. Písemnou formou závazného pokynu, jako jednostranného právního úkonu je vnitřní předpis. Přesnějším vyjádřením je, že takovými předpisy jsou předpisy nesoucí označení vnitropodnikové. Pod pojem vnitropodnikové předpisy lze podřadit vnitřní předpis (§

305, pracovní řád (§306), případně jiné závazné pokyny v písemné formě zákoníkem práce přímo nezmíněné.

Důležitost vnitropodnikových předpisů je dána tím, že rozvádí tam, kde je k tomu dán právní normou prostor, úpravu vztahů a podmínek na pracovišti u každého jednotlivého zaměstnavatele a to podle jeho specifických podmínek. Prostor pro výkon dispoziční pravomoci představují tím, že přestože je v podstatě bez dalších zúčastněných stran vydává sám zaměstnavatel, je tímto on sám vázán. Ze strany zaměstnavatele pak samozřejmě obvykle není problém, aby bez dalšího došlo ke změně předpisu (pokud u zaměstnavatele nepůsobí odborová organizace). Častá změna vnitropodnikových přepisů však není žádoucí, neboť by došlo k nejistotě ohledně podmínek, za kterých má být práce vykonávána, což je negativním jevem samo o sobě i s negativními dopady na pracovní výkony zaměstnanců.

Vnitropodnikovým předpisem bude nejčastěji pracovní řád (zejména vzhledem k tradici založené zákonem č. 65/1965 Sb.), který upravuje základní podmínky, pravidla a vazby na pracovišti a organizační řád, který určuje hierarchii mezi zaměstnanci, obvykle též s vymezením pravomocí na jednotlivých pozicích. Dalším vnitropodnikovým předpisem bude vnitřní předpis. V souvislosti se zmíněním vnitřního předpisu pak je třeba zmínit i kolektivní smlouvu, kterou pro svůj obsah lze svým způsobem též považovat za nástroj řízení, i když vzhledem ke kolektivnímu vyjednávání za velmi specifický. Dalšími vnitropodnikovými předpisy mohou být např. vnitřní mzdový předpis, organizační řád, normy spotřeby práce. V závislosti na předmětu činnosti zaměstnavatele s může objevit i méně obvyklý předpis, např. oděvní řád. V posledních letech se pak objevují uvnitř podniků normy kvality, nejčastěji ISO 900X. Normy kvality představují z hlediska normativnosti specifickou oblast, tyto normy upravují ne fragment činnosti, ale celou oblast od výroby, dokumentaci až po vlastní organizaci jako takovou. Normy kvality dokonce leckdy nepředstavují projev přímé vůle zaměstnavatele, přesto přímo ovlivňují činnost zaměstnanců i zaměstnavatelů. Tyto normy bývají zpravidla zaváděny na přání zákazníka, který jimi podmiňuje setrvání dalších dodávek.
Normy kvality jako takové se většinou jako přímý vnitropodnikový předpis neobjevují. Pokud je však podnik podle této normy certifikován, musí jí podřídit organizaci firmy. Nástrojem této organizace jsou vnitropodnikové předpisy. Objevují se i odkazy, např. v pracovním řádu, že zaměstnanci jsou povinni se chovat v souladu s požadavky normy kvality. Takový odkaz však bývá většinou „hluchý“ neboť normy jsou poměrně složité a pro laika těžko pochopitelné. Účelnější je tedy efektivní zapracování do konkrétních instrukcí či vnitropodnikových předpisů.

Shora uvedenými nástroji lze více či méně podrobně upravit vzájemná práva a povinnosti účastníků individuálního pracovněprávního vztahu. Kvalita této úpravy pak výrazně přispívá jak ke kvalitě cílů, kvůli jejichž dosažení strany do pracovněprávního vztahu vstoupily, tak ke kvalitě vztahu.Vnitropodnikové předpisy by měly odrážet konkrétní představu zaměstnavatele o řízení podniku. Zaměstnavatel by si měl při tvorbě vnitropodnikových předpisů uvědomit, že se jedná především o organizační předpis, který dává chodu podniku konkrétní podobu. Cílem vnitropodnikových předpisů by mělo být výraznou měrou přispění k efektivnímu systému organizace a řízení práce. Vnitropodnikový předpis by neměl slepě opisovat ustanovení pracovněprávních norem. Měl by modifikovat jejich ustanovení podle individuálních podmínek zaměstnavatele. Na druhou stranu je třeba vzít v potaz, co je účelem. Účelem systému vnitropodnikových předpisů je přispět k řízení a to řízení funkčnímu a efektivnímu. Předpokladem pro tyto vlastnosti je jednak kvalita vnitropodnikového předpise a jednak jeho znalost a zajištění jeho aktualizace. Těžko lze aplikovat na řadové zaměstnance zásadu ignoratia legis neminem excusat. Zaměstnanec bude možná znát obecně některá ustanovení zákoníku práce , těžko však lze předpokládat aktivní znalost vyhlášek a nařízení. Účelem tak je zabezpečení znalostí platné právní úpravy, která se na danou oblast vztahuje, resp. jejich úprav podle individuálních podmínek zaměstnavatele.

Shora uvedené je možné, v zásadě bez výjimky vztáhnout jak na zrušenou normu, zákon č. 65/1965 Sb., tak i na kodex nový, zákon č. 262/2006 Sb. Nová norma měla přinést zcela novou koncepci pracovního práva a ve svém důsledku měl vést k žádanému rozvolnění rigidity starého kodexu, se šířeji pojatou možností smluvní svobody a tedy možností flexibilnějšího řízení pracovní pracovního procesu. Nelze však konstatovat, že toto nový kodex přinesl. Poněkud kostrbaté a nejasné ustanovení § 2 zákoníku práce, provázené ještě více matoucím ustanovením § 4 kýžené uvolnění a flexibilitu v řízení nepřineslo. Jistý průlom do tohoto nežádoucího stavu přinesl až nález ústavního soudu ze dne 12. března 2008 s označením P.. ÚS 86/06, který právě část § 2 a § 4 zrušil snad přinese kýženou smluvní volnost. Tím se otevře i cesta k flexibilnějšímu řízení pracovního procesu. Bude to však situace zcela nová, pracovnímu právo v podstatě neznámá. Zakonzervovanost pracovněprávních vztahů bude jistě překonávána delší dobu, s četnými problémy. Lze však důvodně věřit, že pozitiva nad negativy převáží.

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JANA KOMENDOVÁ

PRÁVNICKÁ FAKULTA, MASARYKOVA UNIVERZITA V BRNĚ, KATEDRA PRACOVNÍHO PRÁVA A SOCIÁLNÍHO ZABEZPEČENÍ

Abstrakt

Zdravotní postižení bylo na rozdíl od pohlaví, rasy, barvy pleti či národnosti uznáno jako diskriminační důvod v poměrně v nedávné době. Ve srovnání s jinými diskriminačními důvody se vyznačuje určitými specifiky. Aby byla dodržena zásada rovného zacházení ve vztahu ke zdravotně postiženým, je v některých případech nutné provést přiměřené uspořádání. Základem je právo ES ukládající zaměstnavatelům povinnost přijmout vhodná opatření, která dané zdravotně postižené osobě umožní přístup k zaměstnání, jeho výkon, postup v zaměstnání nebo absolvování odborného vzdělání.

Klíčová slova

Osoby se zdravotním postižením, zákaz diskriminace na základě zdravotního postižení, zásada zákazu diskriminace, rovné zacházení, přímá diskriminace, nepřímá diskriminace, obtěžování, navádění k diskriminaci, přiměřené uspořádání, nepřiměřené břemeno.

Abstract

Contrary to sex, race, colour or nationality a disability has been recognised as a base of discrimination only for quite a short period of time. Compared to other bases of discrimination a disability is characterized with certain specific features. In order to comply with the principle of equal treatment with persons with disabilities a reasonable accommodation is sometimes required. The EC law provides for an obligation for employers to take an appropriate action, where needed in particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo a vocational training.

Key words

Persons with disabilities, prohibition of discrimination based on disability, principle of non-discrimination, equal treatment, direct discrimination, indirect discrimination, harassment, instruction to discrimination, reasonable accommodation, disproportionate burden.

Úvod

Pro osoby se zdravotním postižením je při výkonu pracovní činnosti jednou z nejdůležitějších otázek dodržování zákazu diskriminace, protože je u nich zvýšené riziko, že se stanou předmětem diskriminace z důvodu zdravotního postižení. Kromě toho mohou být vystaveny diskriminací z jiných důvodů, pokud zároveň patří k některé ohrožené skupině. V této souvislosti se často hovoří o dvojí diskriminaci, kdy např. ženy se zdravotním postižením mohou být vystaveny jak genderové diskriminaci, tak diskriminaci z důvodu zdravotního postižení. Tento příspěvek se zabývá úpravou zákazu diskriminace z důvodu zdravotního postižení v pracovněprávních vztazích podle současné právní úpravy. Vzhledem ke stávající podobě zákoníku práce odkazujícího na zákon, který byl v den zpracování konečné verze tohoto příspěvku Prezidentem republiky vetován, se příspěvek zaměřuje na nesoulad právního řádu ČR s právem Evropských společenství (dále jen ES) v oblasti zákazu diskriminace na základě zdravotního postižení. První část příspěvku vymezuje požadavky kladené na vnitrostátní právní řád ze strany ES. Ve druhé části jsou nastíněny hlavní nedostatky současné právní úpravy a navrhované právní úpravy, tak jak je hodnotí autorka příspěvku.

Požadavky vyplývající z právního řádu ES

Zákaz diskriminace na základě zdravotního postiženi byl do právního řádu ES včleněn přijetím Amsterdamské smlouvy v roce 1997.[1] Nový čl. 13 Smlouvy o založení ES tak stanoví: „*Aniž by byla dotčena ostatní ustanovení této smlouvy a v mezích pravomocí svěřených Společenství může Rada jednomyslným rozhodnutím na návrh Komise a po konzultaci s Evropským parlamentem přijmout vhodná opatření*[2] *k odstranění diskriminace na základě pohlaví, rasového nebo etnického původu, náboženství nebo víry, zdravotního postižení, věku nebo sexuální orientace.“* Výčet zde uvedených diskriminačních důvodů je taxativní.

Toto nové znění je důležité v tom smyslu, že výslovně a poprvé uděluje Společenství pravomoc jednat v oblasti zdravotního postižení a také, že uznalo problém diskriminace na základě zdravotního postižení.[3] Na rozdíl od úpravy zákazu diskriminace založené na státní příslušnosti upravené v čl. 12

[1] Celým názvem se nazývá Smlouva pozměňující smlouvu o Evropské unii, Smlouvu o založení Evropských společenství a související akty..

[2]Anglické znění čl. 13 Smlouvy ES používá pojem „appropriate action,“ který lze přeložit jako vhodná opatření, zatímco francouzské znění obsahuje výraz „messures nécessaires,“ který lze přeložit spíše jako nutná opatření.

[3]Guide sur le Traité d'Amsterdam – Partie 4, Forum européen des personnes handicapées, [citováno dne 16.11.2005]. Dostupný z: http://www.edf-feph.org/Papers/teudocs.fr.

Smlouvy ES, však čl. 13 nemá přímý účinek. Stanoví pouze možnost zahájit činnost v rámci Společenství. Druh opatření, která mohou být přijata na základě čl. 13 Smlouvy ES, není blíže specifikován. Protože výslovně nevylučuje žádná opatření, pojem musí zahrnovat nejenom všechny nástroje uvedené v čl. 249 (dříve čl. 189) Smlouvy, ale také ostatní opatření, která Společenství používá, jako jsou pokyny, akční programy a sdělení.[4] Čl. 249 umožňuje přijmout legislativní opatření ve formě směrnice nebo nařízení nebo opatření, která nejsou právně závazná, mezi něž patří doporučení a stanoviska. Čl. 13 Smlouvy ES se uplatní pouze tehdy, kdy neexistuje jiné specifické ustanovení týkající se dané oblasti, což vyplývá z úvodního znění čl. 13 odst. 1 *„Aniž by byla dotčena ostatní ustanovení této smlouvy.“* Formulace použitá v čl. 13 však může být chápána také tak, že umožňuje, aby klauzule zakazující diskriminaci byla vložena do právních nástrojů přijatých na základě jiných ustanovení Smlouvy ES.[5]

Čl. 13 představuje právní základ pro přijetí sekundární legislativy a dalších opatření v oblasti zákazu diskriminace založené na zdravotním postižení. Na jeho základě byla přijata směrnice Rady 2000/78/ES ze dne 27. listopadu 2000, kterou se stanoví obecný rámec pro rovné zacházení v zaměstnání a povolání (zkráceně nazývaná rámcová směrnice). Jejím účelem je stanovit obecný rámec pro boj s diskriminací na základě náboženského vyznání nebo víry, zdravotního postižení, věku nebo sexuální orientace v zaměstnání a povolání s cílem zavést v členských státech zásadu rovného zacházení. Tou se pro účely směrnice rozumí neexistence jakékoli přímé nebo nepřímé diskriminace na základě náboženského vyznání nebo víry, zdravotního postižení, věku nebo sexuální orientace. Ačkoli čl. 1 podává taxativní výčet diskriminačních důvodů, žádné z ustanovení směrnice 78/2000/ES tyto důvody blíže nevymezuje. Tento výsledek je zvláště neuspokojivý ve vztahu k tak mimořádně vágnímu a neurčitému pojmu, jakým je zdravotní postižení.[6]

Pro vymezení pojmu *„zdravotní postižení“* směrnice Rady 78/2000/ES ani neodkazuje na právní řády členských států. V mnohých případech nemusí být jasné, které skupiny osob směrnice chrání, neboť pojem *„zdravotní postižení“* není zcela jednoznačný. Charakteristickým znakem zdravotního postižení je zejména míra poškození zdraví, protože až při určitém stupni narušení zdravotního stavu dochází nebo může docházet ke znevýhodnění dané skupiny oproti ostatním a vyvstává potřeba ji chránit. Dalšími charakteristickými znaky zdravotního postižení jsou trvalost a stálost narušení zdraví. Je nutné odlišovat nemoc, která je brána jako krátkodobá porucha zdraví, od zdravotního postižení vyjadřujícího stálost zdravotního stavu.

[4] Flynn, L., The implications of article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others? Common Market Law Review, Vol 36 Issue 6, Kluwer Law International, Netherlands, 1999, p. 1136.
[5] Blíže viz. Flynn, L., The implications of article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others? Common Market Law Review Vol, 36 Issue 6,, Kluwer Law International, Netherlands, 1999, p.1134.
[6] Ellis, E., EU Anti-Discrimination Law, Oxford : Oxford University Press, 2005, p. 35.

Otázkou, zda směrnice Rady 2000/78/ES zakazuje také diskriminaci z důvodu nemoci, se zabýval Evropský soudní dvůr (dále jen ESD) ve věci Sonia Chacón Navas v. Eurest Colectividades SA (c – 13/05), který se týkal propuštění zaměstnankyně z důvodu nemoci. V čl. 1 uvedené směrnice si však podle názoru ESD zákonodárce úmyslně zvolil výraz, který se liší od výrazu *„nemoc".* Jednoduché postavení naroveň obou těchto pojmů je tedy vyloučeno. Vyloučení nemoci jako základu diskriminace dovodil ESD z významu opatření k přizpůsobení pracoviště zdravotnímu postižení, který jim zákonodárce Společenství přiznává bodem 16 odůvodnění směrnice. Zákonodárce Společenství měl na mysli případy, ve kterých je účast na profesním životě narušena dlouhodobě.[7] Pro úplnost je třeba zmínit názor Generálního advokáta v této věci, podle kterého může propuštění z důvodu nemoci představovat diskriminaci na základě zdravotního postižení zakázanou směrnicí 2000/78 pouze tehdy, pokud dotyčná osoba může prokázat, že skutečnou příčinou propuštění není nemoc samotná, ale dlouhodobá nebo trvalá omezení z ní vyplývající.[8]

Skutečnosti přispívající k nejasnostem ohledně možnosti ochrany před diskriminací na základě zdravotního postižení podle směrnice 78/2000/ES je, že právní řády jednotlivých členských států mohou vymezovat (a také vymezují) pojem *„zdravotní postižení"* rozdílným způsobem. Některé členské státy poskytují ochranu před diskriminací na základě zdravotního postižení i jiným skupinám osob než jsou osoby se zdravotním postižením, např. jedincům, kteří byli dříve zdravotně postiženi, nebo osobám, které pečují o zdravotně postiženého nebo s ním žijí.

Touto otázkou se bude ESD zabývat ve věci S. Coleman v. Attridge Law a Steve Law (c – 303/06). Žalobkyně v původním řízení se dovolává zákazu diskriminace z důvodu, že je matkou zdravotně postiženého syna. Podle jejího tvrzení s ní zaměstnavatel zacházel méně příznivě než se zaměstnanci, kteří jsou rodiči dětí bez zdravotního postižení. Na otázku, zda směrnice 2000/78/ES zakazuje diskriminaci i v případě, že objekt diskriminace sám není zdravotně postižen, odpověděl Generální advokát kladně. Není podle něj nutné, aby někdo, kdo je objektem diskriminace, byl podroben nepříznivému zacházení z důvodu „svého zdravotního postižení." Postačí, že byl podroben takovému zacházení z důvodu „zdravotního postižení.[9]

[7] Rozsudek ESD ze dne 11. července 2006 ve věci Sonia Chacón Navas v. Eurest Colectividades SA (c – 13/05) par.44 a 45.
[8] Srov. Stanovisko Generálního advokáta L. A. Geelhoeda přednesené dne 16. března 2006 ve věci Sonia Chacón Navas v. Eurest Colectividades SA (c – 13/05), par 81.
[9] Stanovisko Generálního advokáta M. Poiarese Madura přednesené dne 31. ledna 2008 ve věci S. Coleman v. Attridge Law a Steve Law (c – 303/06), par 22.

Právo upravující zákaz diskriminace obecně činí rozdíl mezi přímou a nepřímou diskriminací, přičemž druhý z uvedených případů je uváděn jako nestejné zacházení nebo nepříznivý důsledek.[10] Tyto pojmy definuje čl. 2 odst. 2 směrnice 200/78/ES.[11] Přímou diskriminací na základě zdravotního postižení se pro účely směrnice rozumí, pokud se s jednou osobou zachází méně příznivě, než se zachází nebo zacházelo nebo by se zacházelo s jinou osobou ve srovnatelné situaci na základě zdravotního postižení. Nepřímou diskriminací se rozumí, pokud by v důsledku zdánlivě neutrálního ustanovení, kritéria nebo zvyklosti byla osoba určitého zdravotního postižení v porovnání s jinými osobami znevýhodněna. Z tohoto vymezení jsou však stanoveny dvě výjimky. Podle první z nich se nejedná o nepřímou diskriminaci, jestliže zdánlivě neutrální ustanovení, kritérium nebo praxe jsou objektivně odůvodněny legitimním cílem a prostředky k dosažení uvedeného cíle jsou přiměřené a nezbytné. Druhá výjimka se týká pozitivní činnosti ve prospěch osob s určitým zdravotním postižením. O nepřímou diskriminaci se nejedná, pokud jsou zaměstnavatel nebo kterákoli jiná osoba či organizace povinny podle vnitrostátních právních předpisů učinit vhodná opatření v souladu se zásadami přiměřeného uspořádání pro zdravotně postižené osoby (uvedenými v čl. 5 směrnice) za účelem odstranění nevýhod vyplývajících ze zdánlivě neutrálního ustanovení, kritéria nebo praxe. Z formulace čl. 2 odst. 2 písm. b) nevyplývá, zda by se jednalo o výjimku z nepřímé diskriminace, pokud by zaměstnavatel (nebo jiná osoba či organizace) učinil opatření v případě osoby s určitým zdravotním postižením, aniž by mu tuto povinnost ukládaly vnitrostátní právní předpisy nebo by toto opatření bylo nad rámec daný vnitrostátním zákonodárstvím.

Za diskriminaci na základě zdravotního postižení se považuje i obtěžování a chování směřující k navádění k diskriminaci z důvodu zdravotního postižení. Obtěžováním se rozumí situace, kdy dojde k nežádoucímu chování souvisejícímu se zdravotním postižením, které má za účel nebo za následek narušení důstojnosti osoby a vytvoření zastrašující, nepřátelské, ponižující, pokořující nebo urážlivé atmosféry. Směrnice umožňuje, aby pojem *„obtěžování“* byl vymezen v souladu s vnitrostátními právními předpisy a zvyklostmi členských států.

Rozsah působnosti směrnice 2000/78/ES stanoví čl. 3. Do osobního rozsahu působnosti spadají všechny osoby ve veřejném i soukromém sektoru, včetně veřejných subjektů. Věcný rozsah působnosti zahrnuje:

[10] Waddington, L., Hendriks, A. The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accomodation Discrimination, The International Journal of Comparative Labour Law and Industrial Relations, Vol. 18 Issue 4, Kluwer Law International, Netherlands, p. 405.

[11] Smlouva ES, jejíž čl. 13 představuje právní základ pro přijetí opatření k odstranění diskriminace výslovně nezmiňuje nepřímou diskriminaci.

1. podmínky přístupu k zaměstnání, samostatně výdělečné činnosti nebo k povolání, včetně kritérií výběru a podmínek náboru bez ohledu na obor č innosti a na všech úrovních profesní hierarchie, včetně získávání praktických z kušeností,
2. přístup ke všem typům a úrovním odborného poradenství pro volbu povolání, o dborného vzdělávání, dalšího odborného vzdělávání a rekvalifikace, včetně pracovní praxe,
3. podmínky zaměstnání a pracovní podmínky, včetně podmínek propouštění a odměňování,
4. členství a činnost v organizacích zaměstnanců nebo zaměstnavatelů nebo v jakékoli organizaci, jejichž členové vykonávají určité povolání, včetně výhod poskytovaných těmito organizacemi.

Pro osoby se zdravotním postižením má velký význam úprava přiměřeného uspořádání (angl. reasonable accomodation fr. aménagements raisonnables) stanovená čl. 5. Přiměřené uspořádání se poskytuje za účelem zaručení dodržení zásady rovného zacházení ve vztahu ke zdravotně postiženým osobám. Zaměstnavateli je uložena povinnost přijmout vhodná opatření, která dané zdravotně postižené osobě umožní přístup k zaměstnání, jeho výkon nebo postup v zaměstnání nebo absolvování odborného vzdělání. Povinnost přijmout vhodná opatření však není stanovena absolutně. Platí pouze tehdy, pokud vhodná opatření nepředstavují pro zaměstnavatele neúměrné břemeno. Za neúměrné nelze považovat břemeno, které je dostatečně vyváženo opatřeními v rámci politiky dotyčného státu v oblasti zdravotního postižení. Odmítnutí poskytnout přiměřené uspořádání však směrnice 2000/78/ES nepovažuje za formu diskriminace. Jedná se pouze o nesplnění povinnosti ze strany zaměstnavatele uložené čl. 5 této směrnice za účelem dodržení zásady rovného zacházení.

Při pohledu na znění čl. 5 směrnice 78/2000/ES se nabízí otázka, zda by toto ustanovení mohlo být přímo použitelné v členském státě, aniž by bylo implementováno do jeho vnitrostátního právního řádu. Podle názoru autorky příspěvku má čl. 5 přímý účinek, neboť na rozdíl od ostatních ustanovení směrnice obracející se na členské státy ukládá povinnost přímo zaměstnavatelům. Subjektem, který je povinen přijmout vhodná opatření umožňující dané zdravotně postižené osobě přístup k zaměstnání, jeho výkon nebo postup v zaměstnání nebo absolvování odborného vzdělání, je přímo zaměstnavatel, nikoli členský stát. Navíc je tato povinnost formulována dostatečně konkrétně.

Zákaz diskriminace na základě zdravotního postižení patří zřejmě k nejproblematičtějším otázkám upraveným směrnicí 2000/78/ES. Samotná Komise ES uznala, že právě transpozice zákazu diskriminace na základě zdravotního postižení a věku do vnitrostátního právního řádu je nejsložitější ze

všech základů diskriminace, a to z důvodu možného dopadu na trh práce.[12] Členské státy měly povinnost převést ustanovení Směrnice Rady 2000/78/ES do vnitrostátního právního řádu do 2. prosince 2003 (15 států EU), resp. do 1. května 2004. Kromě toho jim byla dána možnost poskytnutí další doby v rozsahu 3 let pro implementaci ustanovení směrnice týkající se diskriminace na základě věku nebo zdravotního postižení. O tom musely členské státy informovat Komisi.[13]

Dne 31. ledna 2008 zaslala Komise deseti členským státům, včetně ČR, odůvodněný názor, aby plně implementovaly pravidla EU zakazující diskriminaci v zaměstnání a povolání založenou na pohlaví, rase nebo etnickém původu, náboženském vyznání nebo víře, zdravotním postižení, věku nebo sexuální orientaci. Členské státy mají 2 měsíce na odpověď. Po uplynutí této lhůty může Komise rozhodnout o zahájení řízení před Evropským soudním dvorem.

Implementace zákazu diskriminace z důvodu zdravotního postižení do právního řádu ČR

Český právní řád obsahuje rámec pro rovné zacházení v čl. 3 odst. 1 Listiny základních práv a svobod, který sice výslovně nezakazuje rozlišování z důvodu zdravotního postižení, nicméně uvedený výčet diskriminačních důvodů je pouze demonstrativní. Formulace tohoto ustanovení však nemůže být přímo použitelná pro oblast pracovněprávních vztahů. Podrobná úprava musí být provedena zákonem. Pokud jde o právní vztahy vznikající při zajišťování práva na zaměstnání, je zákaz diskriminace z důvodu zdravotního postižení obsažen v zákoně č. 435/2004 Sb., o zaměstnanosti, ve znění pozdějších předpisů, o kterém lze říci, že je v souladu se směrnicí 78/2000/ES. Pro oblast základních pracovněprávních vztahů je obsažen v zákoně č. 262/2006 Sb., zákoníku práce, ve znění pozdějších předpisů, který zahrnuje zákaz diskriminace mezi základní zásady pracovněprávních vztahů. Dále tuto problematiku rozvádí Hlava IV části první zákoníku práce. Podle ustanovení § 16 odst. 1 jsou zaměstnavatelé povinni zajišťovat rovné zacházení se všemi zaměstnanci, pokud jde o jejich pracovní podmínky, odměňování za práci a o poskytování jiných peněžitých plnění a plnění peněžité hodnoty, o odbornou přípravu a příležitost dosáhnout funkčního nebo jiného postupu v zaměstnání.

[12] Srov. Rapport de la Commission au Conseil – mise en application des dispositons relatives à la discrimination fondée sur l'âge et le handicap de la directive 2000/78/EC du 27 novembre 2000 portant création d'un cadre generál en faveur del'égalité de traitement en matiére de l'emploi et de travail, [citováno 10. února 2008]. Dostupný z: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/agehan_fr.pdf.

[13] Státy, které požádaly o prodloužení lhůty pro implementaci ustanovení zakazující diskriminaci na základě zdravotního postižení, jsou: Dánsko (požádalo o lhůtu 1 rok), Francie a Spojené království, včetně Gibraltaru, (požádali o 3 roky). Rakousko v lednu 2004 požádalo o dodatečnou lhůtu, Komise však tuto žádost nepřijala.

Zákoník práce však upravuje zákaz diskriminace v pracovněprávních vztazích neúplně, neboť počítá s existencí zvláštního zákona, konkrétně se jedná o zákon o rovném zacházení, o právních prostředcích ochrany před diskriminací a o změně některých zákonů (dále jen antidiskriminační zákon).[14] Ten by měl zapracovávat příslušné předpisy ES, navazovat na Listinu základních práv a svobod a mezinárodní smlouvy, které jsou součástí právního řádu, a vymezovat právo na rovné zacházení a zákaz diskriminace mj. ve věcech pracovních, služebních poměrů a jiné závislé činnosti, včetně odměňování, práva na zaměstnání a přístupu k zaměstnání.[15]

Jedním z hlavních nedostatků zákazu diskriminace v zákoníku práce je nevymezení diskriminačních důvodů. Z hlediska právní jistoty účastníků pracovněprávních vztahů by podle názoru autorky příspěvku měly být důvody zakazující diskriminaci vymezeny taxativně, aby nedocházelo k pochybnostem, na jakém základě je diskriminace v pracovněprávních vztazích zakázána. Diskriminační důvody vyjmenovává návrh antidiskriminačního zákona v ustanovení § 2 odst. 3, které stanoví taxativní výčet diskriminačních důvodů, mezi něž je zařazeno i zdravotní postižení.[16] Návrh antidiskriminačního zákona však jako diskriminační důvod neuvádí zdravotní stav, což znamená, že je zakázána diskriminace až tehdy, dojde-li k naplnění definice zdravotního postižení. Tento pojem je vymezen v ustanovení § 5 odst. 6. Zdravotním postižením se pro účely antidiskriminačního zákona rozumí *tělesné smyslové, mentální, duševní nebo jiné postižení, které brání nebo může bránit osobám v jejich právu na rovné zacházení v oblastech vymezených tímto zákonem; přitom musí jít o dlouhodobé zdravotní postižení, které trvá nebo má podle poznatků lékařské vědy trvat alespoň jeden rok.*

Toto vymezení zdravotního postižení má tedy platit i pro zákaz diskriminace ve věcech pracovních poměrů a jiné závislé činnosti, včetně odměňování a práva na zaměstnání a přístupu k zaměstnání, což autorka příspěvku považuje za poněkud problematické, neboť pro účely pracovněprávních předpisů vymezuje okruh osob, které jsou považovány za zdravotně postižené, ustanovení § 67 odst. 2 zákona o zaměstnanosti. V pracovněprávních předpisech se tak od okamžiku nabytí účinnosti antidiskriminačního zákona bude uplatňovat dvojí vymezení zdravotního postižení. Jedno pro účely zaměstnávání a ochrany v pracovněprávních vztazích a druhé pro účely práva na rovné zacházení a zákazu diskriminace. Druhé z uvedených vymezení je podle názoru autorky práce širší, a to ze dvou důvodů. Zaprvé nevyžaduje, aby zdravotní postižení bylo doloženo rozhodnutím orgánu státní správy, jako je tomu u uznání osoby zdravotně postižené podle ustanovení § 67 odst. 2 zákona o zaměstnanosti. Zadruhé se za zdravotní postižení považuje již situace, kdy fyzické, smyslové, mentální, duševní nebo

[14] Tento zákon schválila Poslanecká sněmovna 19. března 2008, Senát jej schválil 23. dubna, 2. května byl doručen k podpisu Prezidentu republiky, který jej 16. května vetoval.
[15] Srov. § 1 návrhu antidiskriminačního zákona.
[16] Dalšími diskriminačními důvody jsou: rasa, etnický původ, národnost, pohlaví, sexuální orientace, věk, náboženské vyznání, víra či světový názor.

jiné postižení může bránit osobám v právu na rovné zacházení v oblastech vymezených antidiskriminačním zákonem. Nemusí skutečně dojít k nastoupení negativních důsledků zdravotního postižení v oblasti pracovněprávního vztahu.

Kromě toho, že zákoník práce neobsahuje výčet diskriminačních důvodů, nevymezuje ani základní pojmy týkající se diskriminace, jakými jsou přímá a nepřímá diskriminace, obtěžování, sexuální obtěžování, pronásledování či pokyn k diskriminaci a navádění k diskriminaci. Pojmy přímá a nepřímá diskriminace vymezuje návrh antidiskriminačního zákona, a to způsobem, který se výrazně neliší od směrnice 2000/78/ES. Návrh antidiskriminačního zákona jde však nad rámec stanovený směrnicí 2000/78/ES v tom, že za nepřímou diskriminaci z důvodu zdravotního postižení považuje také odmítnutí nebo opomenutí přijmout přiměřená opatření, aby měla osoba se zdravotním postižením zajištěný přístup k určitému zaměstnání, k výkonu pracovní činnosti nebo funkčnímu nebo jinému postupu v zaměstnání, aby mohla využít pracovního poradenství, nebo se zúčastnit jiného odborného vzdělávání, nebo aby mohla využít služeb určených veřejnosti, ledaže by takovéto uspořádání představovalo nepřiměřené zatížení. Jak již bylo řečeno výše, ukládá směrnice 2000/78/ES v čl. 5 zaměstnavateli povinnost přijmout vhodná opatření, která dané zdravotně postižené osobě umožní přístup k zaměstnání, jeho výkon nebo postup v zaměstnání nebo absolvování odborného vzdělání, nicméně nepřijetí těchto opatření nepovažuje za diskriminaci. Jedná se pouze stanovení povinnosti pro zaměstnavatele. Navíc směrnice 2000/78/ES tuto povinnost nestanoví absolutně, nýbrž pouze tehdy, pokud tato opatření nepředstavují pro zaměstnavatele neúměrné břemeno. Toto břemeno není neúměrné, je-li dostatečně vyváženo opatřeními existujícími v rámci politiky dotyčného státu v oblasti zdravotního postižení.

Návrh antidiskriminačního zákona není podle názoru autorky příspěvku v souladu s čl. 5 směrnice 2000/78/ES, neboť v ustanovení § 3 odst. 3 stanoví, skutečnosti, které je třeba brát v úvahu při rozhodování o tom, zda konkrétní opatření nepředstavuje nepřiměřené zatížení. Těmito skutečnostmi jsou:

a) míra užitku, který má osoba se zdravotním postižením z realizace opatření,
b) finanční únosnost opatření pro fyzickou osobu nebo právnickou osobu, která je má realizovat,
c) dostupnost finanční a jiné pomoci k realizaci opatření a
d) způsobilost náhradních opatření uspokojit potřeby osoby se zdravotním postižením.

Za nepřiměřené zatížení se nepovažuje opatření, které je fyzická nebo právnická osoba povinna uskutečnit podle zvláštního právního předpisu. Čl. 5 směrnice 2000/78/ES však pouze stanoví, že břemeno není neúměrné, je-li dostatečně vyváženo opatřeními existujícími v rámci politiky dotyčného členského státu v oblasti zdravotního postižení. Nezmiňuje např. míru užitku, který má osoba se zdravotní postižením z realizace opatření. Nesoulad ustanovení § 3 odst. 3 návrhu antidiskriminačního zákona se směrnicí 2000/78/ES dovozuje autorka příspěvku z čl. 5 této směrnice, který neponechává vymezení neúměrného břemene na vnitrostátních právních řádech členských států.

Posledním závažným nedostatkem úpravy zákazu diskriminace podle zákoníku práce je nevymezení právních prostředků ochrany před diskriminací. Zákoník práce zde opět odkazuje na antidiskriminační zákon. Návrh antidiskriminačního zákona vymezuje právní prostředky ochrany před diskriminací v ustanovení § 10, které stanoví, že dojde-li k porušení práv a povinností vyplývajících z práva na rovné zacházení nebo k diskriminaci, má ten, kdo byl tímto jednáním dotčen právo se u soudu zejména domáhat, aby bylo upuštěno od diskriminace, aby byly odstraněny následky diskriminačního zásahu a aby mu bylo dáno přiměřené zadostiučinění. Pokud by se takovéto zjednání nápravy nejevilo jako dostačující upravuje ustanovení § 10 odst. 2 návrhu antidiskriminačního zákona právo na náhradu nemajetkové újmy v penězích.

Závěr

Podle současné právní úpravy není zákaz diskriminace na základě zdravotního postižení v pracovněprávních vztazích upraven v souladu s požadavky práva ES, což lze konstatovat i o dalších základech diskriminace upravených právní řádem ES (pohlaví, rasa, etnický původ, náboženství, víra, věk a sexuální orientace). V době vstupu ČR do EU byly příslušné směrnice ES implementovány do českého právního řádu, neboť zákon č. 65/1965 Sb., tzv. „*starý zákoník práce*“, ve znění pozdějších předpisů upravoval zákaz diskriminace v souladu s požadavky právního řádu ES. Současný neuspokojivý stav je důsledkem přijetí zákona č. 262/2006 Sb., tzv. „*nového zákoníku práce*“, který nabyl účinnosti 1. ledna 2007. Návrh tohoto zákona počítal s přijetím zvláštního právního předpisu tzv *„antdiskriminačního zákona“*, který však nebyl přijat. Nový návrh antidiskriminačního zákona schválila Poslanecká sněmovna v březnu tohoto roku, Senát jej schválil 23. dubna tohoto roku. Dne 2. května byl odeslán k podpisu Prezidentu republiky, který je však 16. května vetoval.

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AKTUÁLNY VÝVOJ PRACOVNÉHO PRÁVA EÚ :ZÁKAZ DISKRIMINÁCIE V PRACOVNOPRÁVNYCH VZŤAHOCH.

MICHAL KURIL

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Abstrakt

Príspevok autora sa zaoberá aktuálnym stavom legislatívy Európskej únie v oblasti zákazu diskriminácie v pracovnoprávnych vzťahoch. Úvodná časť článku pojednáva o všeobecných východiskách antidiskriminačnej politiky Spoločenstva v intenciách primárneho a sekundárneho práva a vymedzení pojmov priamej a nepriamej diskriminácie. Hlavná pozornosť je venovaná najvýznamnejším normotvorným aktivitám orgánov Európskej únie, predovšetkým Smernici Európskeho parlamentu a Rady č. 2006/54/ES o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania, ktorá s účinnosťou od 15. augusta 2009 nahradí viaceré smernice Spoločenstva. V záverečnej časti autor poukazuje aj na niektoré príčiny nedostatočnej vykonateľnosti antidiskriminačnej politiky Európskej únie v prostredí vnútroštátneho práva Slovenskej republiky.

Klíčová slova

Diskriminácia, zákaz diskriminácie, priama diskriminácia, nepriama diskriminácia, rovnaké zaobchádzanie, antidiskriminačné normotvorné aktivity, Smernica Európskeho parlamentu a Rady č. 2006/54/ES o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania.

Abstrakt

The author of the article draws attention to the prohibition of discrimination in employment relations according to actual development of EU labour law. He deals with most relevant directives adopted by EU institutions as well as their last amendments (especially with Directive 2006/54/EC of the European Parliament and of the Council from 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which will replace the Directives 75/117/EEC, 76/207/EEC and 97/80/EC from 15 August 2009). Author emphasises the principle of prohibition of discrimination such as essential pillar of advanced

democratic states´ legislation and in the conclusion he considers some reasons related to insufficient practicable EU´s anti-discrimination policy in the legal system of the Slovak republic.

Key words

Discrimination, prohibition of discrimination, direct discrimination, indirect discrimination, equal treatment, antidiscrimination standards, Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

I.

Zásada zákazu diskriminácie predstavuje v demokratických a vyspelých štátoch sveta, vrátane právneho priestoru členských štátov Európskej únie, jeden zo základných pilierov ich moderných právnych poriadkov. Implementácia a efektívna vykonateľnosť antidiskriminačných princípov vytvára predpoklady pre bezproblémové fungovanie právnych vzťahov, pracovnoprávnych a sociálnych nevynímajúc. V odbornej právnickej literatúre a v intenciách viacerých významných medzinárodných a vnútroštátnych dokumentov sa za diskriminačné konanie považuje predovšetkým také konanie, ktoré znevýhodňuje alebo obmedzuje jednotlivca alebo skupiny osôb na základe ich pohlavia, rasového pôvodu, etnického pôvodu, národnostného pôvodu, farby pleti, jazyka, veku, sexuálnej orientácie, viery, náboženstva, politického či iného zmýšľania, národného alebo sociálneho pôvodu, príslušnosti k národnosti alebo etnickej skupine, majetku, rodu alebo iného postavenia.[1]

Vychádzajúc z judikatúry Európskeho súdneho dvora diskriminácia znamená uplatňovanie rôznych pravidiel v porovnateľných situáciách ako aj uplatňovanie toho istého pravidla v rôznych situáciách.[2]

Rodová rovnosť je základným právom a základnou hodnotou demokratickej spoločnosti. Predstavuje jeden z dôležitých ukazovateľov stupňa rozvoja demokracie a uplatňovania demokratických princípov v danej spoločnosti. Nemenej dôležitá je však aj druhá stránka rodovej rovnosti, ktorá je spojená s novými výzvami trvalo udržateľného ekonomického rozvoja, ekonomického rastu a sociálnej kohézie. Súčasný a najmä budúci vývoj je založený predovšetkým na vytváraní nových a kvalitnejších pracovných miest. V tejto súvislosti určite nie je nezaujímavé konštatovať, že až ¾ nových pracovných miest, ktoré vznikli v Európe v rokoch 2001-2006, boli obsadené ženami.[3]

Antidiskriminačnú legislatívu na úrovni Európskej únie tvorí značné množstvo právnych aktov, či už primárnych alebo sekundárnych. Konkrétne záväzky v tejto oblasti vyplývajú pre členské štáty zo

[1] Porovnaj napr. § 5-7 zákona č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov v znení neskorších predpisov; čl. 12 ods. 2 zákona č. 460/1992 Zb. Ústava Slovenskej republiky; článok 1 a § 13 zákona č. 311/2001 Z.z. Zákonník práce v znení neskorších predpisov.

[2] Právna vec C-394/1996 Mary Brown proti Rentokil Ltd. zo dňa 30. júna 1998.

[3] Piscová, M.: Úvod. In: Slovensko na ceste k rodovej rovnosti. Accord GS: Bratislava 2006, s. 7.

smerníc Európskeho parlamentu, Rady alebo Európskej komisie. Ide o pramene sekundárneho komunitárneho práva, ktoré majú supranacionálny charakter a ktoré sú súčasťou úpravy prvého piliera Európskej únie – politiky vnútorného trhu Európskych spoločenstiev.[4]

Aplikácii zásady zákazu diskriminácie do svojich ustanovení venuje mimoriadnu pozornosť nielen sekundárne, ale aj primárne právo Európskej únie. V znení článku 13 Zmluvy o založení Európskeho spoločenstva môže Rada, na návrh Komisie a po konzultácii s Európskym parlamentom, jednomyseľne prijať opatrenia na boj proti diskriminácii založenej na pohlaví, rasovom alebo etnickom pôvode, náboženskom vyznaní alebo viere, zdravotnom postihnutí, veku alebo sexuálnej orientácii. Podľa článku 141 uvedenej Zmluvy každý členský štát je povinný zabezpečiť uplatňovanie zásady rovnakej odmeny pre mužov a ženy za rovnakú prácu alebo prácu rovnakej hodnoty. Na dosiahnutie tohto účelu znamená „odmena" obvyklú základnú alebo minimálnu mzdu alebo plat a všetky dávky, ktoré zamestnávateľ vypláca priamo alebo nepriamo, v hotovosti alebo formou naturálnej mzdy, zamestnancovi v pracovnom pomere. V bode 4 článku 141 je deklarovaný princíp pozitívnej diskriminácie zamestnancov na základe pohlavia a s cieľom zachovať alebo zaviesť opatrenia umožňujúce osobitné výhody menej zastúpenému pohlaviu pre ľahšie uplatnenie sa v odbornej pracovnej činnosti alebo ako prevenciu či kompenzáciu nevýhod v profesijnej kariére.

Odmenou za prácu sa podľa rozhodnutí Európskeho súdneho dvora považuje aj náhrada mzdy, príspevky zamestnávateľa zamestnancom z titulu súkromného (nie však štátneho) dôchodkového poistenia, odstupné pri ukončení pracovného pomeru, či právo na zľavu cestovného pre dôchodcov. V prípade Defrenne v. Sabena Súdny dvor stanovil, že článok 141 Zmluvy o založení Európskeho spoločenstva má horizontálny priamy účinok a môže sa ho preto dovolávať zamestnanec voči zamestnávateľovi. Nie je pritom dôležité, či zamestnávateľom je súkromný alebo štátny subjekt. [5]

Pri dôslednej analýze skúmaného právneho inštitútu zákazu diskriminácie v pracovnoprávnych vzťahoch regulovaných právnymi predpismi Spoločenstva dochádzame k záveru, že jeho vnútorné štrukturálne členenie je viacspektrálne, adresované rôznym spoločenským a právnym vzťahom. Ich bližšie dešifrovanie ponúka najmä prostredie sekundárneho práva, kde početné smernice Európskej únie upravujú napríklad problematiku prístupu k zamestnaniu, pracovných podmienok, skončenia zamestnania, ochrany dôstojnosti v pracovnoprávnych vzťahoch, zákazu sexuálneho obťažovania, postavenia mužov a žien v systémoch sociálneho zabezpečenia a niektoré iné.

Od rozšírenia Európskej únie v roku 2004 o viaceré krajiny strednej a východnej Európy sú podľa viacerých odborných štúdií najzraniteľnejšou skupinou v rámci Spoločenstva rómovia a občania z bývalých štátov Sovietskeho zväzu. Pravidelne sú terčom rasových útokov, xenofóbneho správania či

[4] Davala, M.: Súčasný vývoj transpozície európskej antidiskriminačnej legislatívy v slovenskom právnom poriadku. In: Dny veřejného práva. Masarykova univerzita, Právnická fakulta. Brno, 2007, s. 955.

[5] Svitanová, K.: Voľný pohyb pracovníkov v EÚ. In: Aktuálne otázky pracovnoprávnej legislatívy v EÚ a SR. Univerzita Mateja Bela v Banskej Bystrici. Právnická fakulta. Zborník príspevkov z vedeckej konferencie. Banská Bystrica 2007, s. 111.

diskriminácie v oblasti predovšetkým občianskoprávnych a pracovnoprávnych vzťahov. Na viaceré diskriminačné tendencie s dosahom aj na pracovnoprávnu a sociálnu oblasť v európskej spoločnosti poukazujú tiež výročné správy Európskeho monitorovacieho centra pre rasizmus a xenofóbiu. Z mimoriadne rozsiahlej výročnej správy za rok 2007 uvádzame aspoň jeden príklad, ktorý si podľa nás, zaslúži rozsiahlejšiu citáciu : „V roku 2006 bola v Lotyšsku nezamestnaná rómska žena odporučená miestnym úradom práce na pohovor o prijatie do zamestnania k potenciálnemu zamestnávateľovi, do predajne zmiešaného tovaru. Potom ako sa o prácu prišla uchádzať, bola okamžite odmietnutá a poslaná preč, bez akéhokoľvek dotazovania praktických pracovných skúseností, životopisu alebo iných relevantných skutočností vo vzťahu k voľnému pracovnému miestu zo strany zamestnávateľa. Žena bola presvedčená, že k tomu došlo z toho dôvodu, že patrí k rómskej komunite, obrátila sa preto na príslušný súd. V rámci následného súdneho konania sa zamestnávateľ bránil tým, že žena prišla na interview neupravená a v oblečení nezodpovedajúcom štandardom obchodu. Súd vzápätí konštatoval porušenie zákazu nepriamej diskriminácie na základe etnických dôvodov a priznal žene kompenzáciu vo výške 1,422 euro.“[6]

V roku 2006 bolo prijaté rozhodnutie Európskeho parlamentu a Rady č. 771/2006 o ustanovení Európskeho roku rovnakých príležitostí pre všetkých (2007) – na ceste k spravodlivej spoločnosti. Závery poukazovali na skutočnosť, že napriek výraznému pokroku pri presadzovaní rovnosti a boja proti diskriminácii oba fenomény v negatívnom vyjadrení pretrvávajú v spoločnosti aj naďalej v rôznych podobách. Hodnotiace uznesenie Rady z decembra 2007 konštatovalo, že pre dosiahnutie skutočného pokroku pri zabezpečovaní rovnosti v praxi je potrebné posilniť najmä všeobecné povedomie, vykonateľnosť právnych predpisov, vzájomnú spoluprácu členských štátov a rovnako zintenzívniť úsilie pre realizácii Európskeho paktu pre rodovú rovnosť (2006) a Plánu Spoločenstva pre rovnosť medzi mužmi a ženami na roky 2006-2010. Podpora rovnoprávneho postavenia mužov a žien patrí aj mimo rámca uvedených rokov dlhodobo medzi základné úlohy Spoločenstva.[7]

II.

Sekundárne právo upravujúce oblasť zákazu diskriminácie a rovnakého zaobchádzania je konkretizované v početných smerniciach Európskej únie a v právnickej literatúre sa všeobecne usudzuje, že zásada rovnakého zaobchádzania je „najobľúbenejším dieťaťom“ práva Európskej únie. [8]

Orgány Spoločenstva prijali v priebehu rokov niekoľko smerníc zaoberajúcich sa uvedenou problematikou, k najvýznamnejším patria nasledovné:

[6] European Union Agency for Fundamental Rights: Report on Racism and Xenophobia, Elanders Hungary Kft. Budapešť 2007, s. 52

[7] Pozri článok 2 a článok 3 bod 2 Zmluvy o založení Európskeho spoločenstva.

[8] Barancová, H.: Európske pracovné právo. Sprint. Bratislava 2003, s. 54.

- smernica Rady č. 75/117/EHS o aproximácii právnych predpisov členských štátov o uplatňovaní zásady rovnakého zaobchádzania pri odmeňovaní mužov a žien,
- smernica Rady č. 76/207/EHS o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami, pokiaľ ide o prístup k zamestnaniu, odbornej príprave, postup v zamestnaní a pracovné podmienky,
- smernica Rady č. 86/378/EHS o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami v zamestnaneckých systémoch sociálneho zabezpečenia,
- smernica Rady č. 97/80/ES o dôkaznom bremene v prípade diskriminácie na základe pohlavia,
- smernica Rady č. 2000/43/ES o vykonávaní zásady rovnakého zaobchádzania s osobami bez ohľadu na ich rasový alebo etnický pôvod,
- smernica Rady č. 2000/78/ES ustanovujúca všeobecný rámec pre rovnaké zaobchádzanie v zamestnaní a povolaní,
- smernica Európskeho parlamentu a Rady č. 2006/54/ES o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania.

Antidiskriminačné smernice je možné rozdeliť do viacerých skupín. Uvažujeme o tzv. antidiskriminačných smerniciach v užšom slova zmysle, ale tiež širšom slova zmysle – v druhom prípade ide o smernice, ktoré síce problematiku zákazu diskriminácie priamo neupravujú, no veľmi významne napomáhajú tomuto zákazu.[9]

Vývoj európskej antidiskriminačnej politiky je relatívne dynamický, tak pri komplexnom hodnotení, ako aj s osobitným zreteľom na oblasť pracovnoprávnych vzťahov. V posledných rokoch boli prostredníctvom viacerých smerníc posilnené právne poriadky členských štátov o viaceré progresívne právne inštitúty. Významnú zmenu v aktuálnych súvislostiach predstavuje smernica Európskeho parlamentu a Rady č. 2006/54/ES o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania. Podľa článku 34 bod 1 svojho textu s účinnosťou od 15. augusta 2009 nahrádza a zároveň ruší smernice č. 75/117/EHS, č. 76/207/EHS, č. 97/80/ES a č. 86/378/EHS. [10]

Skôr, než pristúpime k analýze smernice č. 2006/54/ES, ako aktuálne vlajkovému antidiskriminačnému pracovnoprávnemu dokumentu Spoločenstva, načrtneme v historických súvislostiach podľa nás najvýznamnejší prínos smerníc zo 70-tych až 90-tych rokov. Smernica č. 75/117/EHS o aproximácii právnych predpisov členských štátov o uplatňovaní zásady rovnakého zaobchádzania pri odmeňovaní

[9] Išlo napr. o smernicu Rady č. 86/378/EHS o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami v zamestnaneckých systémoch sociálneho zabezpečenia.

[10] Smernica č. 2006/54 predstavuje subsumovanie smerníc 75/117/EHS, 76/207/EHS a 97/80/ES do jedného právneho dokumentu mutatis mutandis, zároveň ale prináša aj niektoré nové prvky.

mužov a žien bola prijatá 10. februára 1975. V svojom článku 1 deklarovala, že zásada rovnakej odmeny pre mužov a ženy ustanovená v článku 119 Zmluvy o založení Európskeho spoločenstva znamená odstránenie akejkoľvek diskriminácie z dôvodu pohlavia v súvislosti so všetkými aspektmi a podmienkami odmeňovania za rovnakú prácu alebo za prácu, ktorej sa prisudzuje rovnaká hodnota.[11] Smernica neobsahovala rozsiahly normatívny text (spolu ju tvorilo 10 článkov), zaväzovala však členské štáty v prípade využívania systému kvalifikácie zamestnaní, aby bol založený na rovnakých kritériách pre mužov aj ženy a vylúčil akúkoľvek formu diskriminácie. Rovnako obsahovala záväzok adresovaný členským štátom, aby zaviedli do svojich vnútroštátnych právnych systémov garancie pre každého zamestnanca, ktorý sa pokladá za poškodeného v dôsledku neuplatnenia zásady rovnakej odmeny, domáhať sa svojich práv súdnou cestou.

III.

Smernica č. 76/207/EHS o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami, pokiaľ ide o prístup k zamestnaniu, odbornej príprave, postup v zamestnaní a pracovné podmienky z 9. februára 1976 prehĺbila obsahovú náplň pojmu rovnaké zaobchádzanie o to, že vylúčila akúkoľvek priamu alebo nepriamu diskrimináciu z dôvodu pohlavia, najmä s odvolaním sa na manželský alebo rodinný stav.[12] Uplatňovanie zásady rovnakého zaobchádzania znamenalo, že nesmela existovať žiadna diskriminácia z dôvodu pohlavia, pokiaľ ide o podmienky prístupu, vrátane kritérií výberu, k akýmkoľvek pracovným miestam alebo pozíciám, bez ohľadu na sektor alebo odvetvie činnosti, a k akýmkoľvek úrovniam zamestnaneckej hierarchie.

Pojem nepriamej diskriminácie bol po prvýkrát vymedzený v Smernici č. 97/80/ES z 15. decembra 1997 o dôkaznom bremene v prípade diskriminácie na základe pohlavia. V článku 2 bod 2 sa uvádzalo, že k nepriamej diskriminácii dochádza tam, kde zjavne neutrálne ustanovenie, kritérium alebo praktiky znevýhodňujú podstatne väčšiu časť osôb jedného pohlavia, pokiaľ toto ustanovenie, kritérium alebo praktiky nie sú vhodné a nevyhnutné a nemôžu byť ospravedlnené objektívnymi faktormi netýkajúcimi sa pohlavia.[13] Smernica ustanovila úzus, že v prípade, ak sa osoby, ktoré sa považujú poškodené, pretože v ich prípade nebola uplatnená zásada rovnakého zaobchádzania, uvedú pred súdom alebo iným príslušným orgánom skutočnosti, z ktorých možno odvodiť, že došlo k priamej alebo nepriamej diskriminácii, bude na odporcovi dokázať, že k porušeniu zásady rovnakého zaobchádzania nedošlo.

[11] Zásada rovnakého zaobchádzania medzi mužmi a ženami pri odmeňovaní za prácu bola pôvodne ustanovená v článku 119 Zmluvy o založení Európskeho spoločenstva, prijatím Amsterdamskej zmluvy (v r. 1996) došlo k jej k prečíslovaniu a následne bola zakotvená do článku 141.

[12] K vymedzeniu pojmu nepriama diskriminácia došlo až smernicou č. 97/80/ES o dôkaznom bremene v prípade diskriminácie na základe pohlavia.

[13] Pojmové vymedzenie priamej diskriminácie a nepriamej diskriminácie obsahujú aj smernice č. 2000/43/ES o vykonávaní zásady rovnakého zaobchádzania s osobami bez ohľadu na ich rasový alebo etnický pôvod a č. 2000/78/ES ustanovujúca všeobecný rámec pre rovnaké zaobchádzanie v zamestnaní a povolaní.

Pojmy priama a nepriama diskriminácia sú obsiahnuté aktuálne vo viacerých smerniciach Spoločenstva. V zmysle článku 2 bod 2 Smernice č. 2000/43/ES sa za priamu diskrimináciu považuje prípad, keď sa s jednou osobou z dôvodu rasy alebo etnického pôvodu zaobchádza, zaobchádzalo, alebo by sa zaobchádzalo v porovnateľnej situácii menej priaznivo ako s inou osobou a za nepriamu diskrimináciu sa považuje prípad, ak by v dôsledku navonok neutrálneho predpisu, kritéria alebo zvyklosti bola znevýhodnená osoba určitej rasy alebo etnického pôvodu v porovnaní s inými osobami.

Smernica č. 2000/78/ES vymedzuje priamu diskrimináciu ako nepriaznivejšie zaobchádzanie s jednou osobou ako sa porovnateľnej situácii zaobchádza, zaobchádzalo alebo by sa mohlo zaobchádzať s inou osobou. O nepriamu diskrimináciu ide, keď zdanlivo neutrálne ustanovenie, kritérium alebo prax by uviedla osoby určitého náboženstva alebo viery, s určitým zdravotným postihnutím, určitého veku alebo určitej sexuálnej orientácie do nevýhodného postavenia v porovnaní s inými osobami.

Z vyššie uvedeného vyplýva, že jedným z diferenciačných znakov pojmu priama diskriminácia a nepriama diskriminácia je, že stačí, ak sa menej priaznivé zaobchádzanie v porovnateľnej situácii v prípade priamej diskriminácie dotýka jednej osoby a v prípade nepriamej diskriminácie ide o osoby v množnom čísle, pričom len Smernica č. 97/80/ES v článku 2 v súvislosti s vymedzením pojmu nepriamej diskriminácie zakotvuje, že menej priaznivé zaobchádzanie podľa pohlavia sa má dotýkať podstatne väčšej časti členov jedného pohlavia.[14]

Podľa existujúcej právnej literatúry a judikatúry Európskeho súdneho dvora je pojem nepriamej diskriminácie charakteristický tým, že :

- ide o predpis, pravidlo, rozhodnutie alebo pokyn, ktoré sa vzťahujú na všetkých, resp. na určitú skupinu osôb vymedzenú všeobecnými znakmi,
- realizáciou tohto predpisu, pravidla, rozhodnutia alebo pokynu dochádza k rozdielnemu zaobchádzaniu,
- takéto rozdielne zaobchádzanie znevýhodňuje určitú diskriminačným dôvodom priamo vymedzenú skupinu osôb,
- takéto rozdielne zaobchádzanie nie je odôvodnené sledovaním oprávneného cieľa alebo nie je primerané a nevyhnutné na jeho dosiahnutie [viď napríklad Rozhodnutie Európskeho súdneho dvora v právnej veci C-79/1999 (Schnorbus)].[15]

Z rozsiahlej judikatúry Európskeho súdneho dvora k zákazu diskriminácie uvádzame aspoň niektoré vybrané rozsudky, ktoré si podľa nás zaslúžia byť citované.Občania z členských štátov Spoločenstva

[14] Barancová, H.: Európske pracovné právo. Sprint. Bratislava 2003, s. 56.
[15] Barancová, H.: Zákonník práce. Komentár. Sprint. Bratislava 2007, s. 25.

majú právo na prístup k zamestnaniu a vykonávanie pracovných činností v inom členskom štáte v rovnako rozsahu a za rovnakých podmienok ako tuzemskí zamestnanci.[16]

V prípade, ak sa žena a muž uchádzajú o to isté pracovné miesto, ktoré má vyššie pracovné zaradenie a sú rovnako kvalifikovaní, danie prednosti žene z dôvodu, že ide o pracovnú oblasť, ktorá vykazuje výrazne menšie zastúpenie žien, sa považuje za diskriminačné konanie na základe pohlavia.[17]

Veľmi častou formou nepriamej diskriminácie sú jazykové požiadavky na výkon určitého druhu práce, keďže je zrejmé, že tieto požiadavky môžu splniť lepšie najmä tuzemskí uchádzači o pracovné miesto. Nariadenie Rady č. 1612/68/EHS o slobode pohybu zamestnancov v rámci Spoločenstva však pripúšťa zavedenie kvalifikačných podmienok týkajúcich sa jazykových znalostí, len ak sú odôvodnené povahou práce, ktorá sa má vykonávať. Jazykové požiadavky nesmú slúžiť ako zámienka na vylúčenie zamestnancov pochádzajúcich z iných členských štátov.[18]

Podmienkou prijatia do zamestnania môže byť zo strany zamestnávateľa stanovenie inojazyčných kritérií pre uchádzača, ktoré musí spĺňať, nemôžu byť však posudzované výhradne len na základe určitého osobitného potvrdenia.[19]

Zásadou zákazu diskriminácie sú viazané nielen členské štáty Spoločenstva, ale aj súkromní zamestnávatelia a odborové organizácie (neštátne inštitúcie). Zavedenie takýchto obmedzení zo strany súkromných subjektov by mohlo obmedziť funkčnosť vnútorného trhu.[20]

Za porušenie zásady rovnakej odmeny pre mužov a ženy sa považuje aj poskytovanie rôznych zvýhodnení za pracovný výkon v prospech mužov a žien, pričom sa nemusí vždy jednať o prácu rovnakú, ale pre tento účel môže ísť i o prácu rovnocennú.[21]

Ako diskriminačné sa kvalifikuje aj také rozhodnutie zamestnávateľa, na základe ktorého je pri čiastočnom pracovnom úväzku odmena za prácu rovnakej alebo rovnocennej hodnoty nižšia ako pri plnom pracovnom úväzku.[22]

Za diskriminačné konanie sa nepovažuje požiadavka perfektnej znalosti štátneho jazyka členského v prípade, ak to vyplýva z povahy vykonávanej práce (napr. pedagogickí zamestnanci).[23]

IV.

Členské štáty Európskej únie sa zaviazali v zmysle článku 33 Smernice prijať do 15. augusta 2008 právne predpisy a ďalšie opatrenia na zosúladenie svojich vnútroštátnych poriadkov s obsahovou

[16] Rozsudok vo veci C-167/73 Commission of the European Communities v French Republic.
[17] Rozsudok vo veci C-450/93 Eckhard Kalanke v Freie Hansestadt Bremen.
[18] Karas, V., Králik, A.: Európske právo. Iura Edition. Bratislava, 2007, s. 303.
[19] Rozsudok vo veci C-281/98 Roman Angonese v Cassa di Risparmio di Bolzano SpA.
[20] Rozsudok vo veci C-36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo.
[21] Rozsudok vo veci 129/79 Macarthys Ltd v Wendy Smith.
[22] Rozsudok vo veci 96/80 J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.
[23] Rozsudok vo veci C 379/87Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee.

ideológiou smernice. Jej elementárnym cieľom je zabezpečiť vykonávanie zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnania a povolania. S účinnosťou od 15. augusta 2009 Smernica ruší a nahrádza smernice č. 75/117/EHS, č. 76/207/EHS, č. 86/378/EHS a č. 97/80/ES.

V článku 2 bode 1 vymedzuje Smernica niekoľko základných pojmov. *Priamou diskrimináciou* sa rozumie menej priaznivé zaobchádzanie s jednou osobou z dôvodu pohlavia, než sa zaobchádza alebo by sa zaobchádzalo s inou osobou v porovnateľnej situácii. *Nepriama diskriminácia* znamená situáciu, kedy zjavne neutrálne ustanovenie, kritérium alebo prax priviedli osoby jedného pohlavia do osobitnej nevýhody v porovnaní s osobami druhého pohlavia, pokiaľ toto ustanovenie, kritérium alebo prax nie sú objektívne odôvodnené legitímnym cieľom a prostriedky na dosiahnutie tohto cieľa sú primerané a potrebné.

Obťažovanie znamená podľa Smernice nežiaduce správanie súvisiace s pohlavím s úmyslom alebo účinkom porušenia dôstojnosti osoby a vytvorenia zastrašujúceho, nepriateľského, ponižujúceho, znecťujúceho alebo urážlivého prostredia. *Sexuálne obťažovanie* zakotvuje akúkoľvek formu nežiaduceho verbálneho, neverbálneho alebo telesného správania sexuálnej povahy s úmyslom alebo účinkom porušenia dôstojnosti osoby, najmä pri vytvorení zastrašujúceho, nepriateľského, ponižujúceho, znecťujúceho alebo urážlivého prostredia.

Z hľadiska historických súvislostí patrilo k jednému z najvýznamnejších zásahov do právneho poriadku Slovenskej republiky premietnutie smernice č. 97/80/ES, ktorá preniesla dôkazné bremeno na odporcu.[24]

Komunitárne právo upravujúce zásadu rovnakého zaobchádzania veľmi dôsledne vyžaduje, aby v prípade súdneho sporu bolo dôkazné bremeno na žalovanom.[25] Tieto požiadavky na národné právo členských štátov kladie nielen Smernica č. 97/80/ES, ale aj Smernica č. 2000/43/ES, Smernica č. 2000/78/ES a Smernica č. 2002/73/ES.[26]

Smernica 2006/54/ES rieši túto situáciu identickým spôsobom, keď ponecháva na odporcovi aby preukázal, že nedošlo k porušeniu zásady rovnakého zaobchádzania.[27]

Konštatujeme, že Smernica o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania napriek skutočnosti, že od 15. augusta 2009 dôjde k zrušeniu štyroch iných smerníc Spoločenstva v oblasti rovnakého zaobchádzania, právnu

[24] Článok 4 bod 1 cit.: „Členské štáty prijmú v súlade so svojimi vnútroštátnymi súdnymi systémami také nevyhnutné opatrenia, ktorými sa zaistí, že ak osoby, ktoré sa považujú za poškodené tým, že v ich prípade nebola uplatnená zásada rovnakého zaobchádzania, uvedú pred súdom alebo iným príslušným orgánom skutočnosti, z ktorých možno odvodiť, že došlo k priamej alebo nepriamej diskriminácii, bude na odporcovi dokázať, že nedošlo k porušeniu zásady rovnakého zaobchádzania“.

[25] Neplatí pre konania, v ktorých prislúcha zisťovanie skutkových okolností súdu alebo príslušnému orgánu (ex offo).

[26] Barancová, H.: Zákonník práce. Komentár. Sprint. Bratislava 2007, s. 215.

[27] Pozri článok 19 bod 1 Smernice.

úpravu tohto inštitútu neoslabuje, práve naopak, má výrazný podiel na jej posilnení a sprehľadnení, v ktorej sa bežný občan Európskej únie podstatne ľahšie zorientuje.

Smernica č. 2006/54/ES bude samostatne upravovať celú oblasť rodovej rovnosti v zamestnaní; Smernica č. 2004/113/ES pri prístupe k tovarom a službám; Smernice č. 79/7/EHS, č. 86/613/EHS, č. 92/85/EHS a č. 96/34/ES v znení Smernice č. 97/75/ES v oblasti sociálneho zabezpečenia a ochrany materstva a rodičovstva. Najpodstatnejšími zmenami, ktoré zavádza Smernica č. 2006/54/ES budú tieto: [28]

- definícia rovnakých podmienok odmeňovania nebude v niektorých prípadoch (v súlade s judikatúrou Európskeho súdneho dvora) obmedzovaná len na situácie, keď muž a žena pracujú pre toho istého zamestnávateľa;[29]
- zásada rovnakého zaobchádzania sa bude jednoznačnejšie vzťahovať aj na zamestnancov vykonávajúcich prácu vo verejnom záujme a na štátnych zamestnancov;
- rozšírenie princípu ochrany tehotných žien a matiek, ale aj mužov pri návrate z rodičovskej dovolenky do zamestnania (vzťahujúci sa nielen na nárok na návrat na pôvodné pracovné miesto, ale aj na uplatnenie rovnakých pracovných podmienok);
- uplatnenie definícií zavedených Smernicou č. 2002/73/ES na všetky oblasti upravené Smernicou č. 2006/54/ES;
- rozšírenie aplikácie zásady dôkazného bremena na strane odporcu aj na správne a administratívnoprávne konania (okrem situácie ak je sám kompetentný orgán povinný danú vec náležite vyšetriť a obstarať dôkazy);
- a iné.

Významnou oblasťou bezprostredne súvisiacou s problematikou antidiskriminačnej politiky Spoločenstva je uznávanie odborných kvalifikácií a vzdelania.Ich (ne)uznávanie predstavuje v praxi jednu z najvýznamnejších prekážok voľného pohybu osôb v dimenzii nielen bez obmedzení sa presúvať na územia iných členských štátov, ale skutočne tam aktívne participovať v pracovnom procese v postavení migrujúceho zamestnanca. Tento stav pramení predovšetkým z prostredia diferencovanosti multivzdelávacích európskych systémov a pomerne neprehľadnej mašinérie vydávania rôznych druhov

[28] Čambáliková, M., ml.: Prehľad legislatívy ES a SR týkajúcej sa rodovej rovnosti. In: Slovensko na ceste k rodovej rovnosti. Bratislava : Accord GS 2006, s. 187.

[29] Pozri napr. rozsudok v právnej veci 43/75 (Defrenne) alebo rozsudok v právnej veci C-320/00 (Lawrence and others). Ide o prípady, keď je zamestnávateľ, či už ako súkromná spoločnosť alebo úrad/inštitúcia verejnej správy, nejakým spôsobom súčasťou širšieho celku, napr. ovládaná a ovládajúca osoba (teda materské a dcérske spoločnosti) alebo jednotlivé úrady/inštitúcie v pôsobnosti jednej nadriadenej ustanovizne a pod., alebo môže ísť o prípady, keď diskriminácia vyplýva priamo z ustanovení kolektívnej zmluvy vyššieho stupňa a pod. Aby však išlo o porušenie princípu rovnakého odmeňovania pre mužov a ženy, musí poskytovaná odmena nejakým spôsobom vychádzať z jedného „zdroja" (a nemusí ísť pritom o jedného a toho istého zamestnávateľa). (Bližšie v rozsudku C-256/01 Debra Allonby vs. Accrington and Rossendale College and Others.)

potvrdení o dosiahnutej kvalifikácii alebo vzdelaní.[30] Permanentnosť tohto problému vyvstáva aj zo situácie, že systematika vzdelávania je ponechaná v kompetencii členských štátov a na úrovni Európskej únie nepodlieha harmonizácii.

V.

Slovenská republika je od roku 2004 členským štátom Európskej únie, ktorá už vo svojom primárnom práve explicitne deklaruje rovnaké zaobchádzanie medzi mužmi a ženami ako jednu zo základných úloh Spoločenstva. Vnútroštátna legislatíva bola v posledných rokoch obohatená prostredníctvom transpozície viacerých antidiskriminačných smerníc a rovnako prijatím antidiskriminačného zákona (v r. 2004) o viaceré právne inštitúty, čím došlo k posilneniu princípu rovnoprávnosti mužov a žien aj v prostredí pracovnoprávnych vzťahov a na trhu práce.

Vzhľadom k ambícii autora poukázať týmto príspevkom aj na praktický výskum uvedenej problematiky, dovoľujeme si uviesť na záver niekoľko skutočností publikovaných v Správe o dodržiavaní ľudských práv v Slovenskej republike za rok 2006 vydanej Slovenským národným strediskom pre ľudské práva. Vyberáme nasledovné :

- približne 10% populácie staršej ako 18. rokov nevie, čo pojem diskriminácia znamená, alebo o ňom nikdy nepočula;
- mimoriadne vysoké percento (91) sa domnieva, že problematike diskriminácie v pracovnoprávnych vzťahoch sa nevenuje dostatočná pozornosť;
- najčastejšou formou diskriminácie s ktorou sa občania vo svojom živote v zamestnaní stretli bola diskriminácia na základe veku;[31]
- najmenej skúseností bolo zaznamenaných u diskriminácie v práci založenej na vierovyznaní a sexuálnej orientácii, ktoré uviedlo 13,5 % resp. 7,4 % skúmaného súboru;
- najviac skúseností s diskriminačnými praktikami v pracovnoprávnych vzťahoch vzhľadom na vek vykázala stredná generácia (35-54 rokov).

Antidiskriminačná politika v pracovnoprávnej legislatíve je mimoriadne dôležitá, jej vykonateľnosť v praxi je ale často komplikovaná a nedostatočná. Príčinou takéhoto stavu je viacero skutočností, medzi najvýznamnejšie zaraďujeme :

[30] V roku 2005 bola prijatá smernica Európskeho parlamentu a Rady č. 2005/36/ES o uznávaní odborných kvalifikácií s ambíciou zjednodušiť a sprehľadniť systém uznávania odborných kvalifikácií a vzdelávania, ktorá s účinnosťou od 20. októbra 2007 zrušila doterajšie smernice č. 89/48/EHS o všeobecnom systéme uznávania diplomov a č. 92/51/EHS o druhom všeobecnom systéme uznávania odborného vzdelania.

[31] Až 67,7 % skúmaného súboru pozná situáciu, keď: „zamestnávateľ otvorene povedal, že uprednostní na danú profesiu mladšiu osobu“ a 66,5 % sa osobne alebo vo svojom okolí stretlo s prípadom, že: „zamestnávateľ prepustil zamestnanca kvôli vyššiemu veku“.

- nejednoznačné interpretácie niektorých základných pojmov (priama diskriminácia, nepriama diskriminácia, rovnaké zaobchádzanie, rovnaká mzda za prácu rovnakej hodnoty);
- relatívne nízku mieru pripravenosti sudcov využívať novú legislatívu v praxi;
- nedostatočná znalosť novej legislatívy medzi verejnosťou (navyše tieto situácie sa týkajú predovšetkým už zamestnaných fyzických osôb, pričom existuje aj nemalá skupina potenciálnych zamestnancov);
- a ďalšie.[32]

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ZÁVISLÁ PRÁCA – PILIER ALEBO BREMENO?

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Abstrakt

V príspevku sa autor zameriava na protikladnosť a interakcie pojmov závislosť (závislá práca) a samostatnosť/nezávislosť (samostatná práca). Okrem toho je identifikovaná právnoteoretická a legislatívna medzera medzi uvedenými pojmami. Základná otázka, ktorá je v príspevku položená a zodpovedaná, má vzťah k samotnému pojmu závislá práca vo všeobecnosti ako aj v jeho špecifickom prevedení v podobe legálnej definície pojmu závislá práca v Zákonníku práce č. 311/2001 Z.z.

Kľúčové slová

Závislá práca, ekonomicky závislý pracovník, zamestnávateľ, zamestnanec, práca, legálna definícia, samozamestnaná osoba

Abstract

In his paper, the author is dealing with the contradiction and interactions of the notion dependence (dependent work) and independence (independent work). Beside this, the legal-theoretic and legislative gap between these two notions is identified. Fundamental question asked and answered in the paper has a relation to the very notion dependent work in general as well as to the specific execution in the form of legal definition of the notion dependent work in Labor Code no. 311/2001 Coll.

Key words

Dependent work, economically dependent worker, employer, employee, work, legal definition, self-employed person

Úvod

Problematika závislej práce predstavuje kľúčovú otázku pracovného práva ako aj diskurzu teórie pracovného práva v Slovenskej republike v poslednom období. Nemožno spochybniť, že povaha právnych vzťahov výkonu práce pre iného sa mení. Právo môže, ale nemusí reagovať, zákonodarca sa môže pokúsiť aj o negáciu nových trendov a eliminovať zmeny na trhu práce vytvorené praxou. V reálnych vzťahoch praxe sa „volá" po flexibilite v spojení s istotou pre pracovníka. V oblasti legislatívnej zákonodarca zakotvuje novelou č. 348/2007 Z.z. legálnu definíciu pojmu závislá práca. Možno si položiť otázku, či pojem „závislá práca" je zvolený vhodne a či uvedená legálna definícia vystavaná na vybraných znakoch reprezentuje potreby pre pracovné právo 21. storočia alebo nie? V tomto príspevku nemám[*] ambície postihnúť celú matériu a ani duplikovať v písomnej podobe svoje názory prezentované v inom článku, a preto si dovoľujem zamerať sa na teoretické základy pojmu závislá práca a zhodnotenie požiadavky ako aj následkov, ktoré uvedený pojem mal podľa zákonodarcu mať pre prax de lege lata a aký ho môže mať pre oblasť pracovného práva de lege ferenda v kontexte otázky: Predstavuje pojem závislá práca a implikácie pojmu závislosť pilier alebo bremeno pre efektívnosť, flexibilitu a istotu pracovnoprávnych vzťahov v 21. storočí? Uvedená otázka vzhľadom na vymedzený priestor má zúžený rozsah a bude zodpovedaná v zúženom zmysle[1] postihujúcom definíciu ako celok vo vzťahu k iným definíciám a vo vzťahu k alternatívnym spôsobom riešenia otázky ochrany pracovníkov, ktorí začali kontrahovať svoju prácu na zmluvných formách mimo pracovného práva.

I. Teoretické východiská

Na samotné teoretizovanie býva často nahliadané s príslušnou skepsou, osobitne v oblasti pracovného práva. Uvedené teoretické východiská si dovoľujem pokryť vzhľadom na skutočnosť, že ide o nóvum,[2] ktoré nie je dostatočne rozvinuté v slovenskej pracovnoprávnej literatúre a je potrebné zároveň poukázať/skúmať, či zákonodarca zakotvil celé odvetvie na správnom teoretickom pilieri. Moje teoretické úvahy majú len subjektívnu povahu, preto prosím pozorného čitateľa o láskavú zhovievavosť.

Interakcie pojmov „závislý" a „závislosť" – „samostatný" a „samostatnosť" a pristúpenie pojmu práca – kritické zhodnotenie pojmu

[*] Mgr. Jozef Toman, doktorand v dennej forme doktorandského štúdia na Právnickej fakulte Trnavskej univerzity v Trnave, katedra pracovného práva a práva sociálneho zabezpečenia. Článok bol vypracovaný v rámci riešenia projektu v programe LLP 2006 vyhláseného Agentúrou na podporu výskumu a vývoja „Pracovné právo v 21. storočí: Možnosti a požiadavky - šance a riziká".

[1] Pokiaľ ide o analýzu otázky vhodnosti pojmových znakov, si dovoľujem odkázať na svoj článok, ktorý by mal vyjsť v časopise Justičné revue č. 5/2008.

[2] Jeden zo záverov pracovnoprávnej teórie znie, že je to dané tým, že *„socialistický právny a spoločenský systém si nemohol priznať, že práca vykonávaná za socializmu je závislou, nesamostatnou, námezdnou prácou vykonávanou pre iného".* Barancová, H.: K vymedzeniu pojmu pracovného pomeru. Pracovný pomer alebo obchodnoprávny vzťah. Právny obzor č. 1/2004, str.30.

Pri analýze uvedenej otázky má byť primárne skúmaný samotný zvolený pojem **závislý** (závislosť)[3] a jeho vzťah k pojmu **práca**[4] ako aj k opozitnému pojmu **nezávislý/samostatný**[5] (samostatnosť) v teoretickom ako aj aplikovanom modeli. Do protikladu sú kladené dve slová, ktoré pri vymedzovaní právnych vzťahov medzi subjektmi majú odrážať protipólové postavenie týchto právnych vzťahov na pomyselnej linke slobody rozhodovania sa v právnom vzťahu, kde dochádza k výkonu práce. Predstavujú ich slová **„samostatný"** a **„nesamostatný"/„nezávislý"** a **„závislý"**. Pri ich prenesení do legálneho jazyka práva spojením s pojmom práca **„samostatná práca"** a **„nesamostatná práca"**. Podobne môžeme postupovať aj pri pojmoch **„závislý"** a **„nezávislý"** a vytvoriť právne pojmy **„závislá práca"** a **„nezávislá práca"**. Z hľadiska právnej úpravy pôjde o **závislú práca** – legálna definícia v zmysle ust. § 1 ods. 2 ZP a samostatnú prácu – pojem definovaný v podobe pojmu podnikanie (§ 2 ods. 1 ObZ) a živnosť (§ 2 ŽZ)[6]. V pracovnoprávnej teórii je intenzívne skúmaná otázka hraníc medzi závislou a nezávislou prácou.[7] Zároveň z dôvodov zmien na trhu práce bol na prelome 20. a 21. storočia identifikovaný priestor, ktorý sa nachádza medzi uvedenými dvoma pojmami, ktorý je vypĺňaný časťou subjektov vyskytujúcich sa na trhu práce (tzv. ekonomicky závislé osoby), kde sa pojmy závislý a samostatný „zmiešavajú" v podobe ekonomickej závislosti a osobnej samostatnosti práce. V tejto súvislosti si na tomto mieste dovolím oboznámiť čitateľa s niekoľkými vlastnými pozorovania a závermi:

1. Dovoľujem si poukázať na skutočnosť, že kým legálna definícia pojmu závislá práca (§ 1 ods. 2 ZP) predstavuje zastrešujúci pojem práce vykonávanej v podriadenosti inému (s ostatnými prvkami legálnej definície), pojem samostatnosti práce nie je samostatným zastrešujúcim pojmom, ale len prvkom legálnej definície podnikania a živnosti, kde predstavuje len jeden z pojmových znakov v kumulácii s ďalšími pojmovými znakmi, čo možno považovať za istú kontradikciu: 1. so závermi pracovnoprávnej teórie, ktorá priznáva na jednej úrovni „práci" ako právne spôsobilému predmetu pracovnoprávneho

[3] Podľa Krátkeho slovníka slovenského jazyka[3] slovo **závislý** je prídavné meno, ktoré má význam *„kt. od niekoho, alebo niečoho závisí",* napr. hospodársky závislé krajiny. Slovo **„závisieť"** podľa uvedeného slovníka znamená *„byť na niekoho, na niečo odkázaný"* (napr. priemysel závislý od dodavky surovín), alebo *„byť niekým, niečím podmienený; záležať"*. Pri prenesení/pretransformovaní tohto slova do právneho jazyka, uvedený pojem má predstavovať právnu závislosť v konaní, činoch. V spojení s ekonomickým rozmerom ekonomickej závislosti vytvára množinu závislosti A od B. V jazyku pracovného práva je to závislosť zamestnanca od zamestnávateľa (a do istej miery aj závislosť zamestnávateľa od zamestnanca). Autorský kolektív Jazykovedného ústavu Ľudovíta Štúra SAV: Krátky slovník slovenského jazyka, vydavateľstvo VEDA, 1988, Bratislava.

[4] Pojem **„práca"** Krátky slovník slovenského jazyka definuje ako: 1. vynakladanie telesného alebo duševného úsilia na niečo, robota, 2. telesná alebo duševná činnosť ako spoločenský jav; takáto činnosť ako zdroj zárobku, zamestnanie, 3. telesná alebo duševná činnosť zameraná na dosiahnutie alebo vyrobenie niečoho, 4. úsilie, námaha, namáhanie, robota, 5. vec, na ktorej sa pracuje; výsledok pracovného procesu; robota, 6. činnosť, chod, fungovanie.

[5] Pojem **samostatný** podľa Krátkeho slovníka slovenského jazyka znamená „spoliehajúci sa na vlastné sily", „vykonávaný bez cudzej pomoci", "nezávislý, slobodný".

[6] Zákonník práce č. 311/2001 Z.z. (ďalej „ZP"), Obchodný zákonník č. 513/1191 Zb. (ďalej „ObZ"), Živnostenský zákon č. 455/1991 Zb. (ďalej „ŽZ").

[7] Pozri napr. Lokiec, P.: France. In: Labour Law in Motion: Diversification of the Labour Force & Terms and Conditions of Employment (Bulletin of Comparative Labour Relations), Kluwer Law International, Hague, 2005, str.10.

vzťahu „kvality“ práce – osobnej, závislej, námezdnej, nesamostatnej, odplatnej[8] a obdobne pri pojme podnikanie na rovnakú úroveň stavajú prvky samostatnosti, tj. práca samostatná, nezávislá, nenámezdná, 2. s jazykom, kde pojem závislý/samostatný je opozitom pojmu nezávislý/nesamostatný.

2. Pojem „závislá práca“ zahŕňa komplexný súbor znakov, ktoré umožňujú identifikovať závislú prácu, ktorá môže byť vykonávaná len na základe ustanovení ZP predovšetkým v pracovnom pomere. Podľa môjho názoru prvok závislosti („podmienenosti“) predstavuje len jeden zo znakov, ktorý **nie je homogénny v obsahu** (pokyny - osobná, ekonomický prvok - ekonomická), ktorý môže byť identifikovaný aj pri iných zmluvných typoch, resp. novodobých zmluvných vzťahoch v oslabenom zmysle predovšetkým vo forme koordinácie a kooperácie (napr. ekonomicky závislé osoby, ktoré sú závislé z hľadiska prvku odmeňovania, ale nie osobne a z tohto hľadiska nevykonávajú závislú prácu). K pojmu závislosť pristupujú parametre, ktoré „rozvrstvujú“ na rôzne kategórie závislosti. Pojem závislosť nie je v súčasnosti pojmom jednotným, ale skladá sa z prvkov **ekonomickej závislosti** a **osobnej závislosti**. Historicky (v období poddanstva) uvedená závislosť presahovala rámec právneho vzťahu výkonu práce a utvárala sa životná závislosť poddaného od svojho pána, tj. komplexný pomer nezahŕňajúci len pracovný vzťah, ale **životný pomer a pomer všestrannej závislosti**[9] medzi pánom a poddaným.

3. V súčasnom teoretickom diskurze možno identifikovať tri stupne „pevnosti a pružnosti“ vzájomného prepojenia/závislosti subjektov pri kontrahovaní výkonu práce, a to: 1. plne závislý klasický vzťah zamestnanec – zamestnávateľ, pokrytý v plnom rozsahu právnymi predpismi pracovného práva, 2. ekonomickú závislosť osoby A od osoby B, ktorá sa v mnohých prípadoch ocitá v šedej zóne legislatívy medzi typom 1 a 3 a po 3. vzťahy založené na relatívnej[10] nezávislosti subjektu A od subjektu B (napr. SZČO, výkon práce na základe zmluvných typov občianskeho a obchodného práva). Pracovnoprávna teória túto skutočnosť zosumarizovala do nasledujúcich záverov:[11] **zamestnancom** je osoba osobne a ekonomicky závislá na zamestnávateľovi, **kvázi-pracovníkom** (tzv. ekonomicky závislou osobou/pracovníkom) je osoba osobne nezávislá a ekonomicky závislá na druhej zmluvnej strane („klientovi“), **samozamestnanou osobou/samostatne zárobkovo činnou osobou** je osoba osobne a ekonomicky nezávislá od druhej zmluvnej strany. Okrem uvedeného možno z legálnej definície závislej práce dedukovať „obrátenú“ závislosť, a to závislosť zamestnávateľa od zamestnanca, ktorá sa vyskytuje predovšetkým vo sfére ekonomickej, resp. hospodárskej závislosti. Za závislý možno

[8] Pozri Barancová, H.: Pracovné právo. 4. vydanie, SPRINT, vydavateľská, filmová a reklamná agentúra, Bratislava, 2007, str. 34-40.

[9] Luby, Š.: Dejiny súkromného práva na Slovensku. IURA EDITION, spol. s r.o., 2.vydanie, Bratislava, 2002, str. 491.

[10] Koncepčne ide o absolútnu samostatnosť, ako to uvádza napr. ustanovenie § 2 Živnostenského zákona alebo ustanovenie § 2 ods. 1 Obchodného zákonníka. Realita praxe vytvára isté prvky závislosti u osôb spadajúcich do tretej skupiny a tým sa približujú k osobám v druhej skupine. Realita toto členenie mení zo závislého a nezávislého postavenia osôb na viac a menej závislé postavenie.

[11] Pozri napr. Wank, R.: Germany. In: Labour Law in Motion: Diversification of the Labour Force & Terms and Conditions of Employment (Bulletin of Comparative Labour Relations), Kluwer Law International, Hague, 2005, str.25.

považovať nielen výkon práce, ale závislým je aj príjem tejto práce, vzhľadom na tú skutočnosť, že osoba, ktorá je príjemcom výsledkov cudzej práce je závislá na jej výkone osobou, ktorá ju má vykonávať.

4. Pojem závislý v „nepovýšenej" podobe vyjadruje **vzťah podmienenosti** (jednostranne, resp. dvojstranne) konania („závislý od pokynov, od poskytnutia mzdy"), pričom každá podmienenosť má iné implikácie. Ekonomická podmienenosť má charakter primárne sociálny, osobná podmienenosť primárne pracovnoprávny.

5. Pojem závislosť neznamená apriori podriadenosť a legálna definícia to akceptuje *(„Za závislú prácu, **ktorá je vykonávaná** vo vzťahu nadriadenosti zamestnávateľa a podriadenosti zamestnanca **sa považuje** ..."*).[12] Z uvedenej formulácie môže byť dedukované argumentom a contrario, že môže existovať aj závislá práca, ktorá nie je vykonávaná v nadriadenosti a podriadenosti. Uvedená nadriadenosť a podriadenosť nie je prvkom charakteristík (znakom) závislej práce, ale atribútom samotnej definovanej závislej práce. V tejto súvislosti možno poukázať aj na skutočnosť, že kým v ust. § 1 ods. 2 ZP vymedzuje „závislú prácu, ktorá je vykonávaná vo vzťahu nadriadenosti zamestnávateľa a podriadenosti zamestnanca", povinnosť vykonávať závislú prácu „výlučne v pracovnom pomere, v obdobnom pracovnom vzťahu alebo výnimočne za podmienok ustanovených v tomto zákone aj v inom pracovnoprávnom vzťahu" sa v ust. § 1 ods. 3 (a ďalších ustanoveniach) viaže v užšom rozsahu len na závislú prácu, ktorá je bez vzťahu k nadriadenosti zamestnávateľa a podriadenosti zamestnanca a s takto užšie vymedzenou závislou prácou pracuje v celom texte právneho predpisu.[13]

6. Aj v iných právnych odvetviach, napr. pri regulácií mandátnej zmluvy („mandatár závislý na pokynoch mandanta je povinný uskutočňovať činnosť, na ktorú sa zaviazal podľa pokynov mandanta" § 567 ods. 2 ObZ, ktorými je s výnimkou ust. § 567 ods. 3 ObZ viazaný a nemôže sa od nich odchýliť) existuje podmienenosť konania, ktoré môže vykazovať prvky zmluvnej podriadenosti sa inému subjektu, avšak nevykazuje hierarchickú povahu.

7. V pracovnoprávnej teórii sa vyskytujú názory odmietajúce používanie pojmu „závislá práca" a namiesto tohto spojenia navrhujú používanie alternatívneho pojmu napr. **„nesamostatná práca".**[14] [15]

Na základe uvedeného možno učiniť záver viažuci sa k samotnému rýdzo teoretickému pojmu. Uvedený pojem nepredstavuje „bremeno", ale ani pilier pre pracovné právo. Vyvstáva tu predovšetkým potreba zosúladenia teoretickej opozitnosti pojmov závislosť-samostatnosť alebo ich alternácii na jednu úroveň.

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[12] Spojenie „sa považuje" sa nachádza za slovným spojením „ktorá je vykonávaná *vo vzťahu nadriadenosti zamestnávateľa a podriadenosti zamestnanca",* nie pred ním.

[13] Zákonodarca nepoužil legislatívnu skratku v ust. § 1 ods. 2 ZP v podobe spojenia ďalej „závislá práca".

[14] Napr. autori W. Zöllner a K.G. Loritz. Pozri o tom viac v článku Barancová, H.: vymedzeniu pojmu pracovného pomeru. Pracovný pomer alebo obchodnoprávny vzťah. Právny obzor č. 1/2004.

[15] Ani s uvedeným pojmom autor nesúhlasí, čo argumentačne zdôvodňuje vo vlastnej rigoróznej práci.

Teoretický model a jeho problémy v 21. storočí

Uvedená protipólovosť slov závislosť a samostatnosť môže byť predmetom analýzy v teoretickej ako aj praktickej rovine.

V teoretickom modeli (bez akcentovania reality) je závislá práca charakterizovaná atribútom takmer absolútnej nesamostatnosti do vnútra pracovnoprávneho vzťahu. Závislosť osoby zamestnanca sa viaže k osobe toho, kto prácu prideľuje a vypláca za ňu odmenu (k zamestnávateľovi). Táto osoba osobne alebo v zastúpení (§ 9 ZP) vykonáva svoje dispozičné oprávnenie na konkretizáciu zmluvou založenej povinnosti kde, kedy, čo, ako to vykonávať. V tomto ponímaní je dôraz kladený na periodicitu práce, opakovanie práce, nie na výsledok. Naopak činnosť živnostníka, tj. výkon samostatnej práce v podobe samostatnej zárobkovej činnosti a činnosť podnikateľa je charakterizovaná atribútom takmer absolútnej samostatnosti (osoba si zarába na seba vlastnou samostatnou zárobkovou činnosťou a rozhoduje sa slobodne o druhu práce, ktorý bude vykonávať, kedy ju bude vykonávať, ako ju bude vykonávať) vymedzenej výsledkom práce.

Pri prenesení teoretického modelu do praktického sveta aplikácie práva v oblasti pracovného práva 21. storočia (**model odrážajúci prax**) vyvstávajú problémy. Trendy vo vývoji organizácie práce naznačujú, že dochádza k zvyšovaniu miery samostatnosti konania u zamestnancov vykonávajúcich závislú prácu a k znižovaniu miery samostatnosti konania u pracujúcich vykonávajúcich samostatnú zárobkovú činnosť, napr. pri komparácii postavenia zamestnanca a živnostníka na trhu práce. Drobný živnostník (napr. s malým počtom odberateľov alebo jedným veľkým odberateľom) sa v mnohých prípadoch dostáva do závislosti na odberateľovi svojich služieb, práce a vo viacerých prípadoch sa de facto utvára pozícia silnejšieho a slabšieho. Tento vzťah tak nadobúda povahu obdobnú ekonomickej závislosti. Na druhej strane zamestnanec dostáva v mnohých prípadoch voľnosť „ciest“ k dosahovaniu výsledkov (tj. oslabovanie prvku „podľa pokynov“). Z tohto hľadiska teoretický pojem závislá práca nemá v mnohých prípadoch povahu opozita v pojme nezávislá práca u živnostníkov (podnikateľov) v absolútnom vyjadrení z hľadiska praxe. Platí to vice versa. Samostatne zárobkovo činná osoba vykonáva v zmysle ustanovenia § 2 ŽZ činnosť, ktorá má atribút samostatnosti, v realite trhu práce v mnohých prípadoch nejde o samostatnosť absolútnu, ale relatívnu. Dochádza k zbližovaniu kategórií, tj. k relativizácii pojmu samostatnosť v prospech pojmu závislosť a k relativizácii pojmu závislosť v prospech pojmu samostatnosť. Okrem toho sa vynoruje kategória osôb, ktorá z povahy svojej činnosti nespadá ani do jednej z kategórií vo svojej celistvosti a vykazuje prvky samostatnosti aj závislosti.

Pojem závislá práca – teoretické závery pri konfrontácii s praxou

Nové poznatky z nastavenia trhu práce v 21. storočí majú byť prenesené aj do teoretických východísk a postihnúť uvedenú relativizáciu zákonnej absolutizácie protipólových pojmov závislosť-samostatnosť. S pristúpením novej, tretej kategórie vyvstáva potreba posúdiť pružnosť a pevnosť uvedených znakov a hraníc medzi znakmi, tj. ktoré znaky bude možné použiť aj na uvedenú tretiu kategóriu osôb a ktoré nebude možné identifikovať u tejto kategórie subjektov, resp. potreba odbúravať uvedené znaky z legálneho vymedzenia uvedených kategórií a zakotviť právnu úpravu na odlišnom filozofickom základe.

Z hľadiska odrazu praxe v teórii pojem závislá práca ako kategória viažuca vybrané subjekty s istými znakmi a vylučujúce subjekty iné (na základe neexistencie znaku/ov) začína vykazovať znaky „bremena“, tj. nereflektuje už aktuálne trendy na trhu práce a ani neprispieva k riešeniu ich negatívnych sprievodných znakov.

II. Legálna definícia pojmu závislá práca a alternácie legálnej definície

Na začiatku prípravných prác bolo Ministerstvo práce, sociálnych vecí a rodiny SR postavené pred úlohou zostaviť právnu vetu zameranú na dosiahnutie vymedzeného účelu, tj. vyriešiť problém, kde v praxi došlo ku kontrahovaniu (závislej) práce v podriadenom postavení na základe zmluvných typov iného ako pracovného práva. Samotná tvorba legislatívy si vyžaduje umenie spojené s vedeckým prístupom.[16] Z tohto hľadiska pred samotnou prípravou a prijatím legálnej definície zákonodarcom mali byť položené viaceré základné otázky,[17] ako aj otázka ako a či vôbec pomenovať právny vzťah výkonu práce pre iného. Závery analýz boli zákonodarcom pretransformované do zvolenia pojmu závislá práca – ako konceptu definujúceho vzťah vznikajúci v priestore pracovného práva (v roku 2001 bez jeho definovania) a do filozofie legálnej definície závislej práce zakotvenej v ust. § 1 ods. 2 ZP, podľa ktorého *„za závislú prácu, ktorá je vykonávaná vo vzťahu nadriadenosti zamestnávateľa a podriadenosti zamestnanca, sa považuje výlučne osobný výkon práce zamestnanca pre zamestnávateľa, podľa pokynov zamestnávateľa, v jeho mene, za mzdu alebo odmenu, v pracovnom čase, na náklady zamestnávateľa, jeho*

[16] Svák, J., Kukliš, P: Teória a prax legislatívy. 1.vydanie, Poradca podnikateľa spol. s r.o., 2007, str.55.

[17] Vystala pre pracovné právo a právnu prax potreba zakotvenia definície závislej práce? Bolo vhodné upravovať túto otázke formou jej definovania v podobe legálnej definície? Nebola postačujúca súčasná právna úprava v texte Zákonníka práce? Nesťaží sa prijatím legálnej definície výkladová činnosť príslušných orgánov a súdu? Dosiahne sa zakotvením definície cieľ a zámer zákonodarcu obmedziť tzv. nútenú živnosť? Nebolo možné zamýšľané ciele dosiahnuť alternatívnymi spôsobmi? Majú mať tieto alternatívne spôsoby povahu úprav v právnej alebo ekonomickej povahy? Aké sú spoločné znaky závislej práce? Nie je stanovenie väčšieho počtu pojmových znakov zákonom v legálnej definícii na prekážku výkladovej činnosti?

výrobnými prostriedkami a na zodpovednosť zamestnávateľa a ide o výkon práce, ktorá pozostáva prevažne z opakovania určených činností." Otázky teoretických východísk a záverov sú vymedzené vyššie, v ďalšej časti sa plánujem zamerať na definíciu ako celok a alternáciu definície.

Pri tvorbe právnej normy vo všeobecnosti legislatívne pravidlá tvorby zákonov vyžadujú splnenie istých požiadaviek. Kľúčovými požiadavkami pre prípravu a tvorbu právnych predpisov a právnych noriem sú požiadavka **primeranosti a vhodnosti** právnej úpravy a požiadavka **vnútornej súladnosti** (bezrozpornosti) ako aj **medzipredpisovej súladnosti.** Osobitný význam pre analýzu vykonanú v tomto príspevku majú **otázky primeranosti**, tj. dôležitosti schopnosti navrhovateľa úpravy rozlíšiť, či má byť otázka riešená právnou úpravou alebo inými spoločenskými mechanizmami[18] a zároveň akú povahu má mať uvedená (právna) úprava. **Pracovnoprávna teória** už pred prijatím legálnej definície dotvárala obraz o tom, aké znaky vytvárajú komplexný pojem závislá práca. Samotné znaky bolo možné odvodiť z príslušných ustanovení Zákonníka práce. Z členských krajín Európskej únie je mi známe, že len Česká republika pred prijatím právnej úpravy v Slovenskej republike zakotvila v právnej úprave legálnu definíciu pojmu "závislá práca".[19] Z hľadiska možného riešenia celospoločenského problému kontrahovania závislej práce v zmluvných typoch občianskeho a obchodného práva sa na odstránenie identifikovaného problému resp. počtu osôb vykonávajúcich prácu ponúkajú riešenia v podobe **právnych nástrojov regulácie** a/alebo **ekonomických nástrojov regulácie**. Pri stanovovaní si cieľov v tejto oblasti si štát musí určiť priority, tj. či mu pri výkone závislej práce kontrahovanej v iných zmluvných typoch ako je pracovná zmluva, prekáža aspekt nedostatočnej ochrany osoby vykonávajúcej prácu alebo skutočnosť, že táto činnosť má iný, výhodnejší režim týkajúci sa daňových povinností a odvodových povinností.[20]

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[18] Svák, J., Kukliš, P: Teória a prax legislatívy. 1.vydanie, Poradca podnikateľa spol. s r.o., 2007, str. 55.

[19] V rámci členských štátov EÚ sa vyskytujú tieto prístupy: 1. právne úpravy štátov so zákonodarcom zakotvenou **legálnou definíciou** závislej práce v právnom predpise (Slovensko, Česká republika, diskusia prebieha aj v iných krajinách, 2. terminologické používanie pojmu závislá práca alebo iného porovnateľného pojmu právnymi predpismi príslušného štátu **bez jeho zakotvenia v podobe legálnej definície**. K definovaniu pojmu závislej práce dochádza nepriamo prostredníctvom iných pracovnoprávnych pojmov (zamestnanec, zamestnávateľ, pracovná zmluva, zamestnanie). Môže koexistovať viacero týchto pojmov alebo iba jeden z nich. Ďalšie pojmové znaky vzťahu závislej práce sa vyvodzujú z ostatných ustanovení príslušných pracovnoprávnych predpisov, popr. aj právnych predpisov iných právnych odvetví. V niektorých úpravách a vytvárajú hlavné definičné znaky a subdefiničné znaky, ktoré môžu byť variabilné, 3. právne úpravy, kde a) nie je zakotvená legálna definícia závislej práce alebo porovnateľného pojmu a zároveň b) obsahom právneho poriadku nie sú ani legálne definície ani iných pracovnoprávnych pojmov ako zamestnanec alebo zamestnávateľ a zároveň c) výklad pojmu závislá práca a praktické aplikovanie práva v prípadoch sporu spočíva výlučne na **výkladovej činnosti súdu**, 4. právna kvalifikácia vzťahu výkonu práce je založená **dohodou sociálnych partnerov** na základe východísk stanovených právom, spravidla rešpektovaná súdom. Viac pozri napr. Lokiec, P.:France, In: Labour Law in Motion: Diversification of the Labour Force & Terms and Conditions of Employment (Bulletin of Comparative Labour Relations), Kluwer Law International, Hague, 2005, str.12 alebo Rönnmar, M.: Sweden. In: Labour Law in Motion: Diversification of the Labour Force & Terms and Conditions of Employment (Bulletin of Comparative Labour Relations), Kluwer Law International, Hague, 2005, str.41.

[20] Napr. znížením odvodového zaťaženia osoby zamestnanca i zamestnávateľa by mohlo spôsobiť presun osôb vykonávajúcich prácu v pracovnom pomere, čím sa zvýši ich ochrana, ale zároveň by to mohlo znamenať zníženie príjmov štátu.

1. Alternatívne právne nástroje

Na tomto mieste si dovolím poukázať na alternatívne spôsoby riešenia (regulácie alebo jej absencie) uvedenej problematiky.

1. Jedným z možných riešení daného problému by mohlo byť ustanovenie zákona, ktoré by stanovovalo, že „v prípade nejasností, resp. v prípade, ak nie sú naplnené znaky na založenie právneho vzťahu subjektov podľa Obchodného zákona alebo iných právnych predpisov platí (prezumuje sa), že vzťah medzi osobou, ktorá využíva výsledky práce iného/priamo si najíma prácu iného a osobou, ktorá ju osobne vykonáva pre túto osobu je pracovnoprávnym vzťahom podľa Zákonníka práce (a z tohto hľadiska by požíval plnú ochranu podľa pracovnoprávnych predpisov), pokiaľ nie je preukázané inak."

2.Ďalším z možných riešení je presun bremena dôkaznej povinnosti z osoby formálne deklarovanej ako samostatne zárobkovo činná osoba alebo podnikateľ (zastrený zamestnanec) na zastreného zamestnávateľa. Ak sa v prípade sporu na súd obráti osoba, ktorá je v zmluve označená formálne ako osoba iná ako zamestnanec, bude sa prezumovať, že táto osoba je zamestnancom (ak bude zjavné, že vôbec o takúto osobu môže ísť), až kým zamestnávateľ nepreukáže, že táto osoba nenapĺňa znaky závislej práce, tj. kritériá vymedzené Zákonníkom práce.[21]

3. Tretiu možnosť predstavuje použitie prístupu Írska založeného na „tripartitnej" dohode alebo prístup Talianska umožňujúci predložiť právny problém kvalifikácie odborníkom.[22]

4. Štvrtou možnosťou je vytvorenie obdobného systému univerzálnych a selektívnych sociálnych práv, aký je podporovaný talianskym zákonodarcom, kde by sa vytvorili „okruhy" (kategórie), pričom prvý by sa týkal všetkých osôb vykonávajúcich prácu a stanovoval by základné práva spoločne všetkým (napr. bezpečnosť a ochranu zdravia) a zvyšné by boli selektívne (pre zamestnancov, pre samostatne zárobkovo činné osoby, resp. ekonomicky závislých pracovníkov).[23]

5. Jednou z ciest ako riešiť požiadavky praxe inak ako legislatívou, by bolo využitie internej inštrukcie/výkladu pre príslušné orgány štátnej správy, kde by sa vymedzilo, ktoré hlavné znaky si tieto

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[21] V roku 2005 vtedajšia vláda Českej republiky uznesením z 19. januára 2005 č. 94 prijala návrh na zmenu § 13 ods. 4 zákona o zamestnanosti, ktorý dopĺňal uvedený paragraf *„ak je pracovnoprávny vzťah zastrený vzťahom obchodno-právnym alebo občianskoprávnym, považuje sa za vzťah pracovnoprávny".* Po búrlivej diskusii nedošlo k novelizácii predmetného ustanovenia zákona o zamestnanosti . Myšlienky uvedeného návrhu boli premietnuté do znenia zákona č. 282/2006 Sb.

[22] Zakotvil sa proces **„certifikácie" pracovných zmlúv**, ktorý je vystavaný na princípe dobrovoľnosti a súhlase oboch zmluvných strán. Právo certifikácie priznalo vybraným orgánom majúcim dostatočnú úroveň kompetencie a autority. Viac pozri Del Cnnpe, M., Tiraboschi, M.:Italy. In: Labour Law in Motion: Diversification of the Labour Force " Terms and Conditions of Employment (Bulletin of Comparative Labnur Relations), Kluwer Law Internanional, Hague, 2005, str.30-31.

[23] Viac k tejto problematike pozri Treu, T.: Laboup Law and Social Change: Decline or Innovation. Prednáška na pôde International Institute for Labour Studies, Geneva, November 2002 alebo Perulli, A.:Economically dependent/quasi-subgrdinate (parasubordinate) employement: legal, social and economic aspects, [cit. 10.10.2007] Dostupné na internete: <http://www.unionnetwork.org/uniibidsn.nsf/ 45ad01d8ed7d732bc12571210070e077/$FILE/Perulli study en.pdf>, str. 114-115.

orgány majú identifikovať pri posudzovaní činnosti. Časť výkladovej práce sa mohla ponechať na judikatúru a schopnosť sudcov/pracovníkov príslušných orgánov "dotvárať" právo.

Ciest ako riešiť uvedený problém z hľadiska práva je niekoľko, variujú od rigidných po relatívne flexibilné. Z hľadiska voľby zákonodarcu SR sa zvolené riešenie javí ako značne rigidné.

2. Alternatívne ekonomické nástroje

Medzi ekonomické nástroje riešenia tohto okruhu problémov môžeme zaradiť stanovenie rovnakých odvodových povinností zamestnanca a zamestnávateľa (celkové odvody oboch subjektov) a samostatne zárobkovo činných osôb. Uvedené je možné vykonať troma spôsobmi:

a) znížením odvodových povinností zamestnávateľov a zamestnancov,

b) zvýšenie odvodových povinností samostatne zárobkovo činných osôb (vrátane úpravy paušálnych náhrad), [24]

c) úpravami na strane zamestnanca v podobe zavedenia možnosti uplatnenia paušálnych náhrad aj zamestnancami.[25]

Konzistencia v práve - § 1 ods. 2 Zákonníka práce a ostatné právne predpisy

Z hľadiska otázky nerozpornosti predmetom skúmania musí byť vnútropredpisová nerozpornosť ustanovení[26] a nerozpornosť medzipredpisová. Otázka prieniku pojmových znakov závislej práce a pojmových znakov definícií subjektov a činností v iných právnych predpisoch má osobitný význam hraníc závislej práce vo vzťahu k pojmu živnosť (§ 2 ŽZ) a pojmu podnikanie (§ 2 ods. 1 ObZ)[27] a vice versa, vrátane subsumpcie subjektov pod uvedené kategórie.

Z **právno-teoretického** hľadiska by mali byť uvedené pojmové znaky živnosti[28] budované na **protikladnosti** k pojmovým znakom závislej práce[29] (a vice versa), aby nedochádzalo k problémom

[24] Vzhľadom na politické dopady je táto možnosť oveľa menej priechodná v súvislosti s nárastom povinností, kým prvá možnosť predstatuje zníženie povinností.

[25] Návrh strany ČSSD v roku 2005 plánoval zaviesť paušálne náhrady aj pre zamestnancov. S kritikou strany ODS, ktorá tvrdila, že sa problém mal riešiť plošným znížením odvodov, sa vysporiadala tvrdením, že tým by sa nevyriešila nerovnosť výhod a nevýhod. Cit. DOLEŽÁLEK, V.: Proč se podnikatelé mají lépe než zaměstnanci?. 24.4.2006. [cit. 1. 2. 2008] Dostupné na internete: <http://www.finexpert.cz/default.aspx?textart=1&article =5721>.

[26] Otázka, ktorej predmet je mimo rozsah príspevku.

[27] V zmysle ustanovenia § 2 zákona č. 455/1991 Zb., tj. Živnostenského zákona je živnosťou *„sústavná činnosť prevádzkovaná samostatne, vo vlastnom mene, na vlastnú zodpovednosť, za účelom dosiahnutia zisku a za podmienok ustanovených týmto zákonom."* Obdobne v zmysle § 2 ods. 1 Obchodného zákonníka 513/1991 Zb. *„podnikaním sa rozumie sústavná činnosť vykonávaná samostatne podnikateľom vo vlastnom mene a na vlastnú zodpovednosť za účelom dosiahnutia zisku."*

[28] Pojmovými znakmi definície živnosti v zmysle ustanovenia § 2 Živnostenského zákona sú: 1. sústavnosť („sústavná činnosť"), 2. samostatnosť („činnosť prevádzkovaná samostatne"), 3. konanie vo vlastnom mene, 4. konanie na vlastnú zodpovednosť, 5. konanie za účelom dosiahnutia zisku, 6. a za podmienok ustanovených živnostenským zákonom. Aby

s kvalifikáciou činností z hľadiska jej znakov. Z uvedeného hľadiska sa možno vysloviť, že zákonodarca na teoretickej úrovni uvedenú úlohu zvládol a nedochádza k priamej kolízií medzi pojmovými znakmi ustanovenia § 2 ŽZ a § 2 ods. 1 ObZ s ustanovením § 1 ods. 2 ZP.

III. Zhodnotenie legálnej definície v jej jednotnosti

Mojím zámerom v tomto článku nebolo postihnúť jednotlivosti uvedenej legálnej definície, a preto aj závery budú postihovať predovšetkým celok. Akékoľvek definovanie právneho pojmu/inštitútu v podobe legálnej definície je spôsobilé vyvolať v danom právnom odvetví a pre daný právny inštitút kladné ako aj záporné následky. Kladný dôsledok prijatia legálnej definície môže spočívať v poskytnutí návodu pre orgány Inšpekcie práce a súdy pri kvalifikovaní činnosti, ak ide o spor, resp. nejasnosť, či má ísť o výkon práce podľa Zákonníka práce alebo podľa iných predpisov. Sprievodnými negatívnymi javmi, ktoré akékoľvek definovanie nového a relatívne neurčitého pojmu so sebou prináša je riziko rigidity vo vzťahu realite, nemožnosti postihovať nuansy jednotlivých prípadov v ich samostatnej jedinečnosti. Otázka presunu časti zamestnancov z ochrannej sféry pracovného práva nie je primárne otázkou právnou, ale ekonomickou a primárna pozornosť musí byť zacielená uvedeným smerom, tj. k iným mechanizmom mimo pracovného práva. V úvode položenú otázku, či predstavuje legálna definícia pojmu závislá práca na všeobecnej úrovni pilier alebo bremeno, možno zodpovedať nasledovne:

1. Z hľadiska teoretického zakotvenia predstavuje samotný pojem ako aj jeho legálna definícia skôr „bremeno“, pretože sa nevyriešil teoretický vzťah/hierarchia medzi vyššie uvedenými kategóriami znakov, zároveň v teoretickej rovine je už realitou negovaná protipólovosť uvedených pojmov a zároveň teoretické vymedzenie plne neakcentuje požiadavky praxe vyplývajúce z flexibilňovania práce, ktoré každá rigidná definícia môže „spomaliť“. Z tohto hľadiska je vhodné nezameriavať sa na hranice kategórií, ale na komplexnosť pokrytia subjektov vybranými druhmi práv.
2. Z hľadiska interakcií pojmu samostatnosť a závislosť na teoretickej úrovni zákonodarca na jednej strane zvládol teoretické ukotvenie pojmov zakotvených na protikladnosti pojmu závislosť-

činnosť mohla byť kvalifikovaná ako živnosť podľa ustanovenia § 2 ŽZ, musia byť naplnené všetky pojmové znaky definície **kumulatívne**. V prípade naplnenia len niektorých znakov nepôjde o vykonávanie činnosti, ktorú možno právne kvalifikovať ako živnosť a subsumovať pod ustanovenie § 2 ŽZ.

[29] Zákonodarca v legálnej definícii závislej práce za pojmové znaky závislej práce označil: 1. výlučne osobný výkon práce zamestnanca pre zamestnávateľa (osobne závislá práca, tzv. osobnoprávny záväzok výkonu práce),
2. práca vykonávaná podľa pokynov zamestnávateľa (pod)riadená závislá práva), 3. práca vykonávaná v mene zamestnávateľa, 4. práca vykonávaná za mzdu alebo odmenu (ekonomicky závislá práca), 5. práca vykonávaná v pracovnom čase (časovo závislá práca), 6. práca vykonávaná na náklady zamestnávateľa a 7. práca vykonávaná výrobnými prostriedkami zamestnávateľa (materiálne závislá práca), 8. práca vykonávaná na zodpovednosť zamestnávateľa (zodpovednostne limitovaná závislá práca), 9. výkon práce, ktorá pozostáva prevažne z opakovania určených činností (druhová závislá práca). V spojení s existenciou nadriadenosti zamestnávateľa a podriadenosti zamestnanca.

nesamostatnosť, na druhej strane však nepostihol trendy, ktoré pojmu „závislosť“ pripisujú nejednotnú povahu.

3. Z hľadiska požiadavky na elasticitu zakotvenie uvedenej definície utvára bariéru pre výkladovú činnosť súdu, ktorá musí primárne skúmať naplnenie rigídne stanovených základných znakov, pričom do úvahy môže vziať len tie z ďalších znakov, ktoré nie sú v rozpore s rigídne stanovenými základnými znakmi.

4. Pri právnom teoretickom a praktickom posúdení problému môžeme odpoveď na otázku položenú na začiatku[30] analýzy formulovať kladne. Po rozšírení predmetu tejto otázky[31] formulovaná odpoveď už nebude jednoznačná. Možno formulovať záver, ktorý znie: pre znenie Zákonníka práce nevyvstala potreba zakotvenia ucelenej definície závislej práce. Uvedená potreba prijatia legálnej definície bola odrazom potrieb praxe s dominanciou neznalosti pracovného práva alebo zámerným nezáujmom vyvodzovať z ustanovení Zákonníka práce právne závery pokiaľ ide o to, čo je závislá práca a výkon závislej práce a vyvodzovať z negatívnych znakov (resp. pozitívnych pojmových znakov živnosti ich negáciou), čo závislou prácou nie je, ale môže byť kvalifikované napr. ako živnosť v zmysle ustanovenia § 2 ŽZ. Aj v prípade, ak by sme uznali naliehavosť potreby legálnej definície vychádzajúc pritom z trhu práce v Slovenskej republike (tj., čo nie je v texte zákona, akoby ani neexistovalo), tak príslušný orgán identifikujúci potrebu zakotvenia legálnej definície závislej práce ju mal naformulovať precíznejšie.

Záver, ktorý možno vo svojej celistvosti uviesť, znie: pojem závislá práca ako označenie právnych vzťahov je vystavený zmene, a preto je sám o sebe diskutovateľný, ale nemusí byť apriori zamietnutý. Konanie zákonodarcu povyšujúceho závislú prácu na legálnu definíciu predstavuje „bremeno“ pre požiadavku flexibility práce v 21. storočí a z tohto hľadiska je potrebné skúmať alternatívne riešenia, či už v práve alebo mimo neho, zamerané na riešenie otázky ochrany osôb vykonávajúcich práce vykonávanej pre iného.

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[30] Potrebovalo pracovné právo a právna prax definíciu závislej práce?

[31] Potrebovalo pracovné právo a právna prax legálnu definíciu závislej práce?

[4] Del Conte, M., Tiraboschi, M.:Italy. In: Labour Law in Motion. Diversification of the Labour Force & Terms and Conditions of Employment (Bulletin of Comparative Labour Relations), Hague: Kluwer Law International, 2005, 220 s., ISBN 90-411-2315-6.

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KONKURENČNÍ DOLOŽKA A PENĚŽITÉ VYROVNÁNÍ

ROMAN TUREK

PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY, KATEDRA PRACOVNÍHO PRÁVA A SOCIÁLNÍHO ZABEZPEČENÍ

Abstrakt

Institut konkurenčních doložek v pracovněprávních vztazích umožňuje smluvním stranám sjednat dohodu, na základě které je zaměstnanec povinen zdržet se výkonu konkurenční činnosti vůči bývalému zaměstnavateli. Obligatorní náležitostí retenčního ujednání je závazek zaměstnavatele hradit zaměstnanci přiměřenou finanční kompenzaci. Aplikace institutu peněžitého vyrovnání způsobuje výkladové problémy, jak v oblasti pracovních vztahů, tak i s ohledem na otázky práva daňového, práva sociálního zabezpečení a výkonu rozhodnutí.

Klíčová slova

Konkurenční doložka, ochrana know – how, pracovní smlouva, peněžité vyrovnání, konkurenční jednání

Abstract

In the case of conclusion of agreement under which an employee undertakes, after the termination of his employment for a certain period but for no longer then one year, to refrain from performance of gainful activity which would be of a competitive nature to the employer´s business activity. The employer must pay to the employee a monthly compensation in money during the whole period of respecting the prohibition. We consider issue of monetary compensation within branches of Tax law, Social insurance and general health insurance law and in a branch of enforcement of a decision.

Key words

restraint of trade clause, covenant not to compete, non-competition clause, contract of employment, competitive relationship, financial compensation

Institut konkurenčních doložek v pracovněprávních vztazích umožňuje ve smyslu § 310 zákona č. 262/2006 Sb., zákoník práce, v platném znění, smluvním stranám sjednat dohodu, na základě které se zaměstnanec zavazuje, že se po určitou dobu po skončení zaměstnání, nejdéle však po dobu 1 roku, zdrží

výkonu výdělečné činnosti, která by byla shodná s předmětem činnosti zaměstnavatele nebo která by měla vůči němu soutěžní povahu. Obligatorní náležitostí retenčního ujednání je závazek zaměstnavatele hradit zaměstnanci přiměřenou finanční kompenzaci. Aplikace institutu peněžitého vyrovnání způsobuje výkladové problémy, jak v oblasti pracovních vztahů, tak i s ohledem na otázky práva daňového, práva sociálního zabezpečení a výkonu rozhodnutí.[1]

Obecná povaha

V minulosti vzbuzoval požadavek úplatnosti dohod o nekonkurenci polemiky, nepanoval jednotný názor na nutnost poskytování finančního plnění zaměstnanci.[2] Obligatorní náležitost v podobě peněžitého vyrovnání poskytovaného zaměstnanci v průběhu sjednané doby plnění dohody o nekonkurenci je projevem synallagmatické povahy doložek.

Nekoncepční činnost zákonodárce, projevující se v užívání právním řádem neznámých a nedefinovaných pojmů, způsobuje obtíže při výkladu právních norem. Potřeba konsistence a jednoznačnosti právní úpravy by se měla projevovat nejenom v rámci jednoho právního odvětví, ale napříč celým právním řádem. Problémy spojené s názvoslovím lze odstranit výkladem práva, některé ale i tak způsobují aplikační problémy právní praxi. Domníváme se, že právě i institut peněžitého vyrovnání v právní úpravě konkurenční doložky je příkladem nevhodně zvoleného způsobu právní úpravy bez provázanosti s dalšími normami.

Otázka povahy finančního plnění ze strany zaměstnavatele vzbuzuje řadu pochybností. Její vyřešení má dosah na posouzení peněžitého vyrovnání z hlediska právních vztahů mimo pracovní právo. Především se bude jednat o nazírání na peněžité plnění plynoucí z konkurenční doložky z hlediska předpisů daňových, z hlediska předpisů upravujících výkon rozhodnutí nebo z hlediska předpisů z oblasti sociálního zabezpečení a dalších. Jaký druh příjmu resp. jaký druh pohledávky peněžité vyrovnání představuje?

Jak je z textu zákonné úpravy zákoníku práce patrné, ten blíže jeho povahu nespecifikuje. Srovnáním s jinými instituty, využitím analogického výkladu, dospějeme k závěru, že i s ohledem na všechny odlišnosti bude mít peněžité plnění zaměstnavatele nejužší vztah k institutu mzdy. Nemůžeme říci, že se jedná přímo o mzdu, jelikož vyrovnání není plněním poskytovaným za vykonanou práci. Na rozdíl od

[1] Pichrt, J.: Konkurenční doložka a odchodné, PRAVNIRADCE.IHNED.CZ 27. 10. 2003 11:05
[2] Pelikánová, I.: Konkurenční doložky ve smlouvách – český způsob analýzy, Právní praxe v podnikání, 1997, č. 1; Jakubka, J.: Konkurenční doložka, Práce a mzda, 2001, č. 8, s. 5-10

mzdy může být poskytováno jenom v penězích, naturální forma plnění se s ohledem na text zákona nepřipouští. Právě naopak je plněním poskytovaným za upuštění od realizace práce. Závazek zaměstnavatele plnit vzniká skončením pracovního vztahu a trvá po dobu plnění závazku ze strany zaměstnance. Částečně by tak peněžité vyrovnání mohlo připomínat pracovněprávní institut náhrady mzdy, která je poskytovaná zaměstnanci v situaci, kdy mu za zákonem stanovených předpokladů náleží finanční plnění ze strany zaměstnavatele i v době, kdy práci pro zaměstnavatele nekoná. Evidentním zůstává bližší vztah ke mzdě nebo jejím náhradám než k jiným druhům peněžitých pohledávek vyskytujících se v pracovním právu. Společným rysem je relace k základnímu pracovnímu vztahu, k výkonu závislé práce. Plnění poskytnuté zaměstnanci plní některé z funkcí připisovaných institutu mzdy v pracovněprávních vztazích[3], dle našeho názoru především funkci alimentační, regulační i kompenzační. Blízkost vztahu dokazují i obdobná práva zaměstnance v případě neposkytování plnění ze strany zaměstnavatele vedoucí k ukončení smluvního vztahu. Činíme závěr, že peněžité vyrovnání poskytované zaměstnanci za plnění povinností plynoucích s retenčního ujednání budeme vnímat jako příjem úzce spjatý s realizací závislé práce a plnící funkci mzdy.

Výše peněžitého vyrovnání

Povinnou obsahovou součástí konkurenční doložky představuje dohoda smluvních stran o výši finančního plnění, které bude zaměstnavatel hradit zaměstnanci po dobu plnění závazku nekonkurovat. Peněžité plnění musí být dle zákoníku práce přiměřené, přičemž nejnižší přípustná míra přiměřenosti byla stanovena ve výši průměrného měsíčního výdělku. Vrchní hranici limitace zákon nestanoví. Průměrným měsíčním výdělkem rozumíme průměrný hrubý výdělek,[4] jehož způsob výpočtu stanoví zákoník práce v ustanoveních HLAVY XVIII. Vychází-li zákonodárce v pojetí peněžitého vyrovnání z koncepce hrubého výdělku, máme za to, že na rozdíl od čistého výdělku[5]jsou jeho součástí i finanční prostředky, na které se vztahuje odvodová povinnost:

a) daň z příjmu fyzických osob ze závislé činnosti
b) pojistné na všeobecné zdravotní pojištění
c) pojistné na sociální zabezpečení a příspěvku na státní politiku zaměstnanosti

[3] Galvas, M. a kol.: Pracovní právo, Masarykova univerzita, Brno, 2004, str. 370
[4] § 352 zákoníku práce: „Průměrným výdělkem zaměstnance se rozumí hrubý výdělek, nestanoví-li pracovněprávní předpisy jinak“
[5] § 356 odst. 3 zákoníku práce: „Má-li být uplatněn průměrný měsíční čistý výdělek, zjistí se tento výdělek z průměrného měsíčního hrubého výdělku odečtením pojistného na sociální zabezpečení a příspěvku na státní politiku zaměstnanosti 100), pojistného na všeobecné zdravotní pojištění 101) a zálohy na daň z příjmu fyzických osob ze závislé činnosti 102), vypočtených podle podmínek a sazeb platných pro zaměstnance v měsíci, v němž se průměrný měsíční čistý výdělek zjišťuje.“

K zákonem stanovené výši peněžitého vyrovnání se negativně vyjadřuje Tomek, když uvádí, že „výše měsíčního vyrovnání stanovená částkou, která činí minimálně výši průměrného měsíčního výdělku, je podle mého názoru ve většině případů nepřiměřeně vysoká a omezuje využití konkurenční doložky v praxi. Jeho výše by se měla odvíjet od rozsahu omezení žádaného po zaměstnanci po skončení zaměstnání, ceny konkrétních znalostí a dovedností na trhu práce, přičemž jeho minimální výše by měla být snížena.6 S uvedeným nemůžeme souhlasit, domníváme se, že zákonem vymezená hranice nejnižší úrovně kompenzace odpovídá míře zásahu do ústavních práv bývalého zaměstnance. Stanovování vyrovnání s ohledem na další řadu těžko měřitelných a subjektivných kategorií by zbytečně vnášelo právní nejistotu do smluvních vztahů, stanovení minimálního standardu je proto namístě.

Vyrovnání je splatné pozadu za měsíční období, pokud se smluvní strany nedohodli na jiné době splatnosti.

V literatuře se dále setkáváme s názorem, že povinnost hradit resp. nehradit peněžité vyrovnání by měla zohledňovat i důvody skončení pracovněprávního vztahu, po jehož skončení nastupují účinky konkurenční doložky. V případě, že původní pracovní vztah končí z důvodů porušování povinností vyplývajících z právních předpisů vztahujících se k zaměstnancem vykonávané práci, mohla by být povinnost hradit kompenzaci omezena.7 Máme za to, že není rozhodující důvod ukončení pracovního vztahu, protože ten nemá vliv na obsah závazku ujednaného v retenční doložce. Předmětem i nadále zůstává ochrana informací a pracovních postupů zaměstnavatele před využitím v konkurenčním boji. Cenou za tuto ochranu je povinnost úhrady kompenzace bývalému zaměstnanci. Zaměstnavatel se měl možnost rozhodnou, jestli si zaměstnance ponechá i nadále, tedy i v případě neřádného plnění svých povinností, nebo s ním pracovní vztah ukončí a bude muset dostát povinnostem z konkurenční doložky anebo od konkurenční doložky odstoupí, pak ale nebude mít možnost dožadovat se smluvního zákazu konkurence bývalého zaměstnance.

Povinnost hradit sjednané peněžité vyrovnání minimálně ve výši průměrné hrubé mzdy platí dle současné právní úpravy po celou dobu trvání závazku. Zákonodárce nezohledňuje skutečnost, jestli zaměstnanec v době dodržování zákazu konkurence realizuje právo na svobodu podnikání a právo na svobodnou volbu povolání jiným způsobem neporušujícím retenční ujednání a získává tak prostředky k uspokojování životních potřeb. Máme za to, že k výdělkům zaměstnance v době dodržování zákazu konkurence by mělo být přihlíženo.

[6] Tomek, M.: Konkurenční doložka, Právní rádce, 2007, č. 8, str. 29
[7] tamtéž

Tím, že zákon stanovuje minimální výši peněžitého vyrovnání na úrovni průměrného výdělku u bývalého zaměstnavatele, zohledňuje tak situaci, kdy zaměstnanec s ohledem na omezení plynoucí z konkurenční doložky, především s přihlédnutím k jeho pravděpodobné úzké specializaci, nebude schopen realizovat práci bez porušení závazku. Minimální standard jeho životní úrovně v porovnání s dobou před skončením zaměstnání ale zůstane zachován.

V případě, že by byla konkurenční doložka koncipována mírněji a zaměstnanec by byl schopen prací získávat potřeby k uspokojení životních potřeb v jiném odvětví nebo na jiné pracovní pozici, faktická míra omezení jeho ústavních práv by byla nižší. Tato skutečnost by pak mohla být zohledněna ve výši kompenzace hrazené od bývalého zaměstnavatele.

Samozřejmě si uvědomujeme i tu skutečnost, že zaměstnanec má právo nejenom udržovat si příjmem z práce životní úroveň, ale také ji nadále zvyšovat, např. sjednáním nového pracovního vztahu zaručujícího více ohodnocené realizování jeho schopností. Proto tvrzení, že příjem u nového zaměstnavatele má být plně zohledněn při výpočtu výše finanční kompenzace plynoucí z retenční doložky, se nám také nezdá spravedlivý.

Domníváme se, že nejvhodnějším způsobem úpravy zohlednění výše příjmů z realizace práce v době plnění povinnosti nekonkurovat by mohlo být moderační právo soudu, který by na návrh bývalého zaměstnavatele přiměřeně k okolnostem případu snížil jeho povinnost hradit finanční kompenzaci. Vycházejíc ze zmíněné úvahy o tom, že zaměstnanec má právo si svoji životní úroveň nejenom udržet ale i zvýšit, bychom doporučovali stanovit, že soud má možnost peněžitou kompenzaci snížit maximálně na polovinu sjednané částky.8

a) Daň z příjmu fyzických osob ze závislé činnosti

Z pohledu práva daňového představuje peněžité plnění, které chápeme jako požitek související s výkonem závislé práce, příjem ze závislé činnosti dle zákona o daních z příjmů.[9] Příjmy ze závislé činnosti se dle § 6 odst. 1 písm. d) citovaného zákona rozumí také „příjmy plynoucí v souvislosti se současným, budoucím nebo dřívějším výkonem závislé činnosti podle písmen a) až c) nebo funkce bez ohledu na to, zda plynou od plátce, u kterého poplatník vykonává závislou činnost nebo funkci, nebo od

[8] Jak uvádí Čechtická, A., Gajda, M.: Konkurenční doložky v Česku a v Německu, http://www.dtihk.cz/Plus/archiv-cz/2005/0505/plus_0505_recht_noerr_cz.htm, započítání příjmu dosahovaného výdělečnou činností v době platnosti konkurenční doložky obsahuje i německá právní úprava.

[9] Zákon č. 586/1992 Sb., o daních z příjmů, v platném znění

plátce, u kterého poplatník závislou činnost nebo funkci nevykonává“. Plnění plynoucí z konkurenční doložky naplňuje charakteristiku příjmu plynoucího v souvislosti s dřívějším výkonem závislé činnosti ve formě pracovněprávního poměru ve smyslu § 6 odst. 1 písm. a).[10] Příjem ze závislé činnosti je dle § 3 odst. 1 písm. a) předmětem daně z příjmu fyzický osob, a tedy dani podléhá i plnění plynoucí bývalému zaměstnanci z konkurenční doložky.[11] Zaměstnavatel tak i nadále vystupuje v pozici plátce daně a je povinen dostát všem povinnostem stanoveným v zákoně o dani z příjmu, především daň ve formě zálohy z příjmu bývalého zaměstnance srazit a odvést příslušnému správci daně.

V této souvislosti považujeme za vhodné upozornit na skutečnost, jestli bylo bývalým zaměstnancem podepsané prohlášení ve smyslu § 38k odst. 4 zákona o dani z příjmu.[12] V případě, že zmíněné prohlášení bylo bývalým zaměstnancem podepsáno, zaměstnavatel dle zákona vypočtenou zálohu na daň, „nejprve sníží o prokázanou částku měsíční slevy na dani podle § 35ba a následně o prokázanou částku měsíčního daňového zvýhodnění.“[13] Nebylo-li prohlášení podepsáno, žádné nezdanitelné částky nebudou při výpočtu daně zohledněny[14] a daň se vypočte dle § 38h odst. 4 zákona o daních z příjmů. Záloha na daň za kalendářní měsíc je dle § 38 odst. 2 stanovena ve výši 15% ze základu pro výpočet zálohy.

b) Pojistné na všeobecné zdravotní pojištění

Vyřešení otázky, jestli má být z peněžitého vyrovnání placeno zdravotní pojištění je docela úzce spjato s právě řešenou daňovou problematikou. Dle § 4 zákona o veřejném zdravotním pojištění[15] (dále jenom ZVZP) jsou plátci pojistného zaměstnavatelé a pojištěnci, kterými se ve smyslu § 5 písm. a) ZVZP rozumí mimo jiné také zaměstnanci. Za zaměstnance se pro účely zdravotního pojištění považuje fyzická osoba,

[10] Máme za to, že pojem pracovněprávního poměru s odkazem na definici provedenou v § 6 odst. 1 zákona o daních z příjmu „poplatník při výkonu práce pro plátce příjmu je povinen dbát příkazů plátce“ subsumuje všechny pracovněprávní vztahy, ne jenom pracovní poměr.

[11] Obdobně uvádí Brychta, I.: Konkurenční doložka, Mzdy a personalistika v praxi, 2004, č. 10, str. 12

[12] „Plátce daně srazí zálohu podle § 38h odst. 3 a přihlédne měsíční slevě na dani podle § 35ba a k měsíčnímu daňovému zvýhodnění, podepíše-li poplatník do 30 dnů po vstupu do zaměstnání a každoročně nejpozději do 15. února na příslušné zdaňovací období prohlášení o tom,
a) jaké skutečnosti jsou u něho dány pro přiznání slevy na dani podle § 35ba, popř. kdy a jak se změnily,
b) že současně za stejné zdaňovací období ani za stejný kalendářní měsíc zdaňovacího období neuplatňuje nárok na slevu na dani podle § 35ba u jiného plátce daně a že současně na stejné období kalendářního roku nepodepsal u jiného plátce prohlášení k dani,
c) jaké skutečnosti jsou u něho dány pro přiznání daňového zvýhodnění na vyživované dítě (§ 35c), popřípadě kdy a jak se změnily a jedná-li se o zletilé studující dítě, že nepobírá plný invalidní důchod,
d) že současně za stejné zdaňovací období ani za stejný kalendářní měsíc zdaňovacího období neuplatňuje daňové zvýhodnění na vyživované dítě u jiného plátce daně a že daňové zvýhodnění na to samé vyživované dítě za stejné zdaňovací období ani za stejný kalendářní měsíc zdaňovacího období neuplatňuje jiná osoba.

[13] § 38h odst. 3 zákona č. 586/1992 Sb., o dani z příjmu, v platném znění

[14] Brychta, I.: Konkurenční doložka, Mzdy a personalistika v praxi, 2004, č. 10, str. 12

[15] Zákon č. 48/1997 Sb., o veřejném zdravotním pojištění a o změně a doplnění některých souvisejících zákonů, v platném znění

které plynou nebo by měly plynout příjmy ze závislé činnosti nebo funkčních požitků podle zvláštního právního předpisu, kterým je zákon č. 586/1992 Sb., o dani z příjmu v platném znění. Jak jsme již uvedli v předcházející části, peněžité vyrovnání plynoucí z konkurenční doložky představuje příjem ze závislé činnosti, jeho příjemce bude s ohledem na uvedené považován pro problematiku zdravotního pojištění za zaměstnance, a tedy plátce pojistného.[16] Povinnost zaměstnavatele hradit pojistné zaniká dle § 8 odst. 2 ZVZP dnem skončení zaměstnání, s výjimkou uvedenou v § 6 ZVZP, který stanoví, že „Zaměstnavatel je plátcem části pojistného z příjmů ze závislé činnosti a funkčních požitků podle zvláštního právního předpisu zúčtovaných[17] bývalému zaměstnanci po skončení zaměstnání." Vyměřovacím základem zaměstnance dle § 3 odst. 1 o pojistném na všeobecné zdravotní pojištění[18](dále jen ZPVZP) je úhrn příjmů ze závislé činnosti a funkčních požitků, které jsou předmětem daně z příjmů fyzických osob podle zákona o daních z příjmů a nejsou od této daně osvobozeny, a které mu zaměstnavatel zúčtoval v souvislosti se zaměstnáním, v našem případě tedy peněžité vyrovnání plynoucí z konkurenční doložky. Dle § 9 odst. 2 ZVZP hradí pojistné za zaměstnance z jedné třetiny zaměstnanec a ze dvou třetin zaměstnavatel. Dle § 2 odst. 1 ZPVZP činí výše pojistného 13,5 % z vyměřovacího základu za rozhodné období. Zaměstnavatel odvádí část pojistného, které je povinen hradit za svého zaměstnance a současně má povinnost odvést i část pojistného, které je povinen hradit zaměstnanec, srážkou z jeho mzdy nebo platu, a to i bez souhlasu zaměstnance.[19] Pojistné se odvádí i v případech, kdy byla konkurenční doložka sjednaná podle dřívější právní úpravy dle § 29a zákona č. 65/1965 Sb., zákoník práce, platná do 31.12.2006.[20]

Musíme konstatovat, že v praxi se v této souvislosti často potkáváme s nesprávným nahlížením na objem finančních prostředků potřebných k dostání všem povinnostem plynoucím z konkurenční doložky. Existuje totižto představa, že sjednané peněžité vyrovnání pojímá i pojistné odvody ze strany zaměstnavatele. Máme za to, že takový názor je mylný a že k finančnímu vyrovnání sjednanému s bývalým zaměstnancem je nutné připočíst náklady, které vzniknou odvodem příslušného pojistného

[16] V souvislosti s uvedenou problematikou uvádí Červinka, T.: Zaměstnanecké výhody a pojistné na zdravotní pojištění, Práce a mzda, 2007, č. 7, str. 15: „Odvod pojistného z tzv. peněžitého vyrovnání je realizován i přesto, že částky jsou vypláceny bývalému zaměstnanci a ten může mít zajištěn odvod pojistného souběžně i z jiného titulu - může být dokonce považován za tzv. osobu bez zdanitelných příjmů a souběžně si odvádět pojistné jako samoplátce v minimální výši." Se samotným souběhem příjmů a zdvojením odvodové povinnost počítá ZPVZP v 13, když stanoví: „Má-li pojištěnec současně více příjmů podle § 3 nebo § 3a, odvádí pojistné ze všech těchto příjmů." Nemůžeme se ale ztotožnit se závěrem, že se bude jednat o osobu bez zdanitelných příjmů samostatně si odvádějící minimální výši pojistného, jelikož plnění z konkurenční doložky, jak jsme uvedli na jiném místě, dani z příjmu podléhá, a tedy pro účely zdravotního pojištění má účastník zdravotního pojištění povahu zaměstnance.

[17] Dle § 3 odst. 1 zákona č. 592/1992 Sb., o pojistném na všeobecné zdravotní pojištění, v platném znění se zúčtovaným příjmem rozumí „plnění, které bylo v peněžní nebo nepeněžní formě nebo formou výhody poskytnuto zaměstnavatelem zaměstnanci nebo předáno v jeho prospěch, popřípadě připsáno k jeho dobru anebo spočívá v jiné formě plnění prováděné zaměstnavatelem za zaměstnance."

[18] zákon č. 592/1992 Sb., o pojistném na všeobecné zdravotní pojištění, v platném znění

[19] § 5 odst. 1 zákona ZPVZP

[20] Červinka, T.: Zaměstnanecké výhody a pojistné na zdravotní pojištění, Práce a mzda, 2007, č. 7, str. 15

ze strany bývalého zaměstnavatele. Současný právní stav je mladého data a souvisí se změnami provedenými v oblasti pracovního práva a práva sociálního zabezpečení v souvislosti s přijetím nového zákoníku práce (zákon č. 262/2006 Sb.), kde se v oblasti zdravotního pojištění výrazně změnilo vymezení vyměřovacího základu pro pojistné na zdravotní pojištění.[21] Ohledně právní úpravy platné do 31.12.2006 nebyla v názorech odborné veřejnosti dosažena jednotnost v otázce možnosti započtu peněžitého vyrovnání plynoucího z konkurenční doložky do vyměřovacího základu.[22] V současné době je tak nákladová stránka pro bývalého zaměstnavatele méně příznivá a požadavky na finanční zdroje k uspokojení nároku z konkurenční doložky jsou vyšší.

c) Pojistné na sociální zabezpečení a příspěvek na státní politiku zaměstnanosti

Zkoumáme-li peněžité vyrovnání plynoucí z konkurenční doložky, dospějeme k jiným závěrům než v předcházejícím případě. Základní normou upravující oblast sociálního pojištění je zákon č. 589/1992 Sb., o pojistném na sociální zabezpečení a příspěvku na státní politiku zaměstnanosti, v platném znění (dále ZPSZ). Osobní rozsah účasti zaměstnanců váže ZPSP na podmínky účasti nemocenského pojištění dle zákona č. 54/1956 Sb., o nemocenském pojištění zaměstnanců, v platném znění (dále ZNP), který v § 2 provádí výčet subjektů, na které se hledí jako na zaměstnance. Vztah bývalého zaměstnance a zaměstnavatele plynoucí z konkurenční doložky nespadá ani do jedné kategorie zaměstnanců vymezených pro účely ZNP. Z uvedeného tedy plyne, že bývalý zaměstnanec se nebude ze zákona účastnit pojistného vztahu založeného ZPSZ a bývalému zaměstnavateli končí povinnost zákonných odvodů okamžikem skončení pracovního vztahu souvisejícího s konkurenční doložkou. Zaměstnanec se ale může dobrovolně účastnit alespoň důchodového pojištění ve smyslu § 6 odst. 2 zákona č. 155/1995, o důchodovém pojištění, v platném znění. Zaměstnanec by si měl být vědom, že se mu finanční plnění plynoucí z retenční doložky nebude započítávat do výpočtového základu pro určení výše důchodu a také, že se mu doba, kdy se zdržel konkurenčního jednání vůči bývalému zaměstnavateli a nevykonával jinou činnost zakládající účast na důchodovém pojištění, nebude započítávat do pojistné doby pro vznik nároku na důchod. Konkurenční doložka tedy není

[21] Zákon č. 264/2006 Sb., kterým se mění některé zákony v souvislosti s přijetím zákoníku práce

[22] Brychta, I.: Konkurenční doložka, Mzdy a personalistika v praxi, 2004, č. 10, str. 12: „Lze říci, že z hlediska sociálního a zdravotního pojištění se nejedná o příjem zaměstnance v souvislosti s výkonem zaměstnání, proto nelze příjem zahrnout do vyměřovacího základu podle odst. 1 zmíněných paragrafů. Jde pouze o příjem v souvislosti se zaměstnáním, tudíž bychom se měli řídit ustanoveními odst. 2 zmíněných paragrafů, tam však vyrovnání na základě dohody o konkurenční doložce nenalezneme. Nejedná se ani o plnění stabilizační a věrnostní povahy, nýbrž o odměnu za závazek zdržet se konkurenčního jednání. Z uvedeného plyne, že se z peněžitého vyrovnání na základě dohody o konkurenční doložce podle ustanovení § 29a zákoníku práce neodvádí ani zdravotní, ani sociální pojištění."
Červinka, T.: Změny v platbě pojistného na zdravotní pojištění – k 1.1.2007, Práce a mzda, 2007, č. 1, str. 24: „Pojistné na zdravotní pojištění se z tohoto plnění (peněžité vyrovnání – poznámka autora) odvádí (v roce 2006 i později)."

příjmem, který by podléhal odvodům na pojistné na sociální zabezpečení a odvodům na státní politiku zaměstnanosti.[23]

Peněžité vyrovnání a výkon rozhodnutí

Vyřešení otázky právního hodnocení plnění vypláceného zaměstnavatelem zaměstnanci z titulu konkurenční doložky má důležitý význam i pro oblast výkonu rozhodnutí upravenou v části VI. Zákona č. 99/1963 Sb., občanský soudní řád, v platném znění (dále jen OSŘ). Povaha finančního plnění vypláceného zaměstnanci rozhoduje o způsobu provedení exekuce. Jelikož jsme shora konstatovali, že peněžité vyrovnání není mzdou v pravém slova smyslu, nelze jej postihnout výkonem rozhodnutí formou srážek ze mzdy. Do úvahy tedy přichází dva jiné způsoby provedení exekuce a to exekuce srážkami z jiných příjmů dle § 299 a násl. OSŘ anebo exekuce přikázáním jiné peněžité pohledávky dle § 312 a násl. OSŘ. Při obecném hodnocení peněžitého vyrovnání jsme konstatovali, že mzdu zaměstnanci po skončení pracovního poměru nahrazuje, a proto ho lze považovat za zvláštní způsob náhrady mzdy, ne ale za náhradu mzdy výslovně uvedenou zákoníku práce. S ohledem na toto konstatování můžeme zkusit uplatnit ustanovení o srážkách z jiných příjmů dle § 299 OSŘ[24] na peněžité vyrovnání. Zmíněné ustanovení obsahuje taxativní výčet příjmů, které lze považovat za mzdu, resp. které plní funkci mzdy, plnění plynoucí z konkurenční doložky ale neobsahuje a nelze jej podřadit ani k pojmově nejbližším kategoriím - náhrada mzdy, odstupné, popřípadě obdobná plnění poskytována v souvislosti se skončením zaměstnání[25], peněžitá plnění věrnostní a stabilizační povahy. Výkon rozhodnutí srážkami z jiných příjmů proto nelze použít. Musíme konstatovat, že současná právní úprava je relativně nová a znění platné do 31.12.2006 obsahovalo demonstrativní výčet příjmů, na které se nahlíželo jako na

[23] Obdobně uvádí Brychta, I.: Konkurenční doložka, Mzdy a personalistika v praxi, 2004, č. 10, str. 12

[24] § 299
(1) Ustanovení o výkonu rozhodnutí srážkami ze mzdy se použijí i na výkon rozhodnutí srážkami z platu, z odměny z dohody o pracovní činnosti, z odměny za pracovní nebo služební pohotovost, z odměny členů zastupitelstva územních samosprávných celků a z dávek státní sociální podpory, které nejsou vyplaceny jednorázově. Srážky se dále provádějí z příjmů, které povinnému nahrazují odměnu za práci nebo jsou poskytovány vedle ní, jimiž jsou
a) náhrada mzdy nebo platu, b) nemocenské 80a), c) ošetřovné 80a) nebo podpora při ošetřování člena rodiny, d) vyrovnávací příspěvek v těhotenství a mateřství 80a), e) peněžitá pomoc v mateřství 80a), f) důchody, s výjimkou jejich zvýšení pro bezmocnost, g) stipendia, h) podpora v nezaměstnanosti a podpora při rekvalifikaci, i) odstupné, popřípadě obdobná plnění poskytnutá v souvislosti se skončením zaměstnání, j) peněžitá plnění věrnostní nebo stabilizační povahy poskytnutá v souvislosti se zaměstnáním, k) úrazový příplatek, úrazové vyrovnání a úrazová renta 80b).
(2) Jde-li o výkon rozhodnutí srážkami z důchodu fyzické osoby, která z tohoto důchodu platí náklady za pobyt v ústavu sociální péče, nepodléhá výkonu rozhodnutí částka potřebná na úhradu pobytu a částka rovnající se výši kapesného v takovém ústavu. Výkon rozhodnutí ohledně dávek státní sociální podpory, které nejsou vyplaceny jednorázově, nelze provést přikázáním pohledávky.

[25] Jak uvádí Jirmanová, M., Kasíková, M., Vokřinková, M.: ASPI – OSŘ s komentářem, ASPI, 2007, jedná se především o „odstupné dle § 67 a § 68 zák.práce, popřípadě obdobná plnění poskytnutá v souvislosti se skončením zaměstnání např. odchodné dle § 155, §156 zák.č. 361/2003 Sb., o služebním poměru příslušníků bezpečnostních sborů nebo odbytné nebo odchodné dle § 138 až 140 zákona č. 221/1999 Sb., o vojácích z povolání, pokud jsou tyto nároky vyplaceny za trvání pracovního poměru, jinak mohou být postiženy výkonem rozhodnutí přikázáním pohledávky podle § 312 a násl.“

mzdu[26]. Domníváme se, že s ohledem na povahu peněžitého vyrovnání z konkurenční doložky byla exekuce srážkami z jiných příjmů realizovatelná.[27] Cílem přijetí shora popsané nové právní úpravy bylo především zpřesnění regulace a zlepšení vymahatelnosti pohledávek, při zajištění sociální jistoty dlužníků.[28] Máme za to, že zákonodárce v případě postihu plnění plynoucího z konkurenční doložky způsobil negativní externalitu normotvorby, se kterou nepočítal a která mohla nepříznivě zasáhnout do práv některých bývalých zaměstnanců. Zákonodárce se mněl spíš držet obecného a bazálního požadavku na obecnost právní úpravy, která je výkladem lépe aplikovatelná, než příliš detailní právní norma vylučující flexibilní aplikaci a právní výklad.

Musíme tedy zvolit jiný způsob provedení exekuce, a to exekuci přikázáním jiné peněžité pohledávky dle § 312 na násl. OSŘ. Dle § 312 odst. 1 OSŘ: „Výkon rozhodnutí přikázáním jiné peněžité pohledávky povinného než pohledávky z účtu u peněžního ústavu nebo nároku uvedeného v § 299 lze nařídit i v případě, že pohledávka povinného se stane splatnou teprve v budoucnu, jakož i v případě, že povinnému budou dílčí pohledávky z téhož právního důvodu v budoucnu postupně vznikat.“ Je nepochybné, že peněžité vyrovnání je pohledávkou bývalého zaměstnance za bývalým zaměstnavatelem a splňuje vymezené zákonné předpoklady pro tento způsob exekuce. Nejedná se ani o pohledávku nepodléhající výkonu rozhodnutí[29], a proto považujeme tento způsob za jediný prostředek exekučního postihu finanční kompenzace plynoucí z konkurenční doložky.

[26] § 299 odst. 1 OSŘ ve znění platném do 31.12.2006
„Ustanovení o výkonu rozhodnutí srážkami ze mzdy se použijí i na výkon rozhodnutí srážkami z platu, z pracovní odměny členů družstev a z příjmů, které povinnému nahrazují odměnu za práci, zejména z důchodu, nemocenského, peněžité pomoci v mateřství, stipendia, náhrady ucházejícího výdělku, náhrady poskytované za výkon společenských funkcí a z podpory v nezaměstnanosti a podpory při rekvalifikaci.“

[27] Změna právní úpravy souvisela s přijetím nového zákoníku práce. Zákonodárce po novele upustil od demonstrativního výčtu jednotlivých druhů příjmu, nedomyslel tak důsledky projevující se v exekuci jiných druhů pohledávek. Taxativním výčtem posílil situaci příjemců vyjmenovaných příjmů, pro příjemce finanční kompenzace plynoucí z retenčního ujednání, jak vysvětlíme v základním textu, je současná právní úprava méně příznivá.

[28] Důvodová zpráva k zákonu č. 264/2006 Sb., uvádí: „Návrh aktuálněji a napříště i taxativně vymezuje okruh příjmů, s nimiž se pro účely srážek nakládá jako se mzdou. Taxativnost tohoto vymezení je nezbytná k zamezení nejasností, z jakého okruhu příjmů lze srážky provádět (jak o tom svědčí i nedávný protest ombudsmana proti provádění srážek ze státní sociální podpory). Okruh zabavitelných příjmů se však současně slaďuje s pracovněprávní úpravou, obsaženou v návrhu nového zákoníku práce, ale i částečně rozšiřuje. Toto rozšíření souvisí s liberalizací pracovněprávních vztahů, v nichž nebudou napříště již kladeny zábrany pro poskytování různých peněžitých plnění zaměstnancům. Pro ně často nebude stanoven ani jednotný název. Jako účelné se jeví rozšíření okruhu zabavitelných příjmů o odstupné a obdobná plnění, poskytovaná při skončení zaměstnání, jakož i o peněžitá plnění věrnostní nebo stabilizační povahy. Tento návrh je veden snahou posílit ochranu věřitelů a vymahatelnost pohledávek, při zajištění potřebných sociálních jistot dlužníků.“

[29] § 317 OSŘ:
(1) Výkonu rozhodnutí nepodléhají pohledávky náhrady, kterou podle pojistné smlouvy vyplácí pojišťovna, má-li být náhrady použito k novému vybudování nebo k opravě budovy.
(2) Výkonu rozhodnutí nepodléhají peněžité dávky sociální péče a dávky státní sociální podpory vyplácené podle zvláštního zákona 85) jednorázově.
(3) Výkonu rozhodnutí nepodléhají peněžité pohledávky, které jsou předmětem finančního zajištění 85a) podle zvláštního právního předpisu 85b) nebo podle zahraniční právní úpravy.

Jak již bylo uvedeno výše, změnou právní úpravy výkonu rozhodnutí srážkami z jiných příjmu, kterou již nadále na námi zkoumanou problematiku nelze uplatnit, došlo k zhoršení postavení bývalého zaměstnance v pozici dlužníka. V případě srážek prováděných z příjmů, na které se hledí jako na mzdu, zákon ukládá povinnému ponechat alespoň jejich část k uspokojení základních životních potřeb.[30] Musíme-li postihovat peněžité vyrovnání formou přikázání jiné pohledávky, nemá bývalý zaměstnanec nárok na ponechání nezabavitelné částky z tohoto příjmu a renta od bývalého zaměstnavatele bude postižena v plné výši. Domníváme se, že platná právní úprava založila nespravedlivé postavení pro okruh bývalých zaměstnanců plnících povinnost nekonkurovat plynoucí z retenčního ujednání v porovnání s jinými subjekty práva, které pobírají příjmy plnící obdobné funkce. De lege ferenda by měl být nastolen stav, kdy budou tyto subjekty zrovnoprávněny, a peněžité vyrovnání plynoucí z konkurenční doložky bude považováno za příjem, na který se z pohledu exekučního práva hledí jako na mzdu.

Literatura:

[1] Brychta, I.: *Konkurenční doložka*, Mzdy a personalistika v praxi, 2004, č. 10, str. 12

[2] Čechtická, A., Gajda, M.: *Konkurenční doložky v Česku a v Německu*, http://www.dtihk.cz/Plus/archiv-cz/2005/0505/plus_0505_recht_noerr_cz.htm

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[30] Nařízení vláda č. 595/2006 Sb., o způsobu výpočtu základní částky, která nesmí být sražena povinnému z měsíční mzdy při výkonu rozhodnutí, a o stanovení částky, nad kterou je mzda postižitelná srážkami bez omezení (nařízení o nezabavitelných částkách), v platném znění

„§ 1

(1) Základní částka, která nesmí být podle § 278 občanského soudního řádu sražena povinnému z měsíční mzdy, je rovna úhrnu dvou třetin součtu částky životního minima jednotlivce 1) a částky normativních nákladů na bydlení pro jednu osobu podle zvláštního právního předpisu (dále jen "nezabavitelná částka") na osobu povinného, a jedné čtvrtiny nezabavitelné částky na každou osobu, které je povinen poskytovat výživné. Částka normativních nákladů na bydlení pro jednu osobu se stanoví pro byt užívaný na základě nájemní smlouvy v obci od 50 000 do 99 999 obyvatel 2).

(2) Na manžela povinného se započítává jedna čtvrtina nezabavitelné částky, i když má samostatný příjem. Na dítě, jež manželé společně vyživují, se započítává jedna čtvrtina nezabavitelné částky každému manželovi zvlášť, jsou-li srážky prováděny ze mzdy obou manželů. Jedna čtvrtina nezabavitelné částky se nezapočítává na žádného z těch, v jejichž prospěch byl nařízen výkon rozhodnutí pro pohledávky výživného, jestliže výkon rozhodnutí dosud trvá.

§ 2

Částka, nad kterou se zbytek čisté mzdy vypočtené podle § 279 odst. 1 věty první občanského soudního řádu srazí bez omezení, činí součet částky životního minima jednotlivce a částky normativních nákladů na bydlení pro jednu osobu.

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BILATERÁLNÍ EKONOMICKÉ VZTAHY MEZI KAZACHSTÁNEM A ČESKOU REPUBLIKOU

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Abstrakt

Příspěvek věnován bilaterálním ekonomickým vztahům mezi Kazachstánem a Českou republikou. Tento příspěvek analyzuje ekonomickou spolupráci mezi Kazachstánem a Českou republikou a také ukazuje na nové směry spolupráce mezi dvěma státy. Hlavní nový námět příspěvku je založení kazašsko-českého obchodně-ekonomického centra v Almaty a česko-kazašského obchodně-ekonomického centra v Praze pro podporu kazašských a českých výrobků mezi oběmi zeměmi. Dalším novým námětem příspěvku je vyřešení problémů uznávání vzdělaní (nostrifikace diplomů a maturitních vysvědčení) mezi Kazachstánem a Českou republikou.

Klíčová slova

bilaterální ekonomické vztahy, spolupráce, Kazachstán, Česká republika, obchod, perspektivní směry.

Abstract

The present article is devoted to bilateral economic relations of Kazakhstan and Czech Republics. The article extensively reports on nowadays state of economic cooperation, and also suggests new trends of development of cooperation between two countries. The novelty of the article is the offer on creation of joint Kazakhstan-Czech Commerce Chamber, and solution of the issue related to recognition of diplomas and certificates in both countries.

Key words

Bilateral economic relations, co-operation, Kazakhstan, Czech Republic, perspective trends.

Zlepšení vztahů Kazachstánu s ČR záleží především na prohloubení dvoustranné spolupráce mezi těmito dvěma státy, která zaručí rovnoprávné získávání výhod a zohlední společné zájmy, čímž přispěje k vzájemně uspokojivé cestě sociálně-ekonomického, politického rozvoje obou států.

Kazachstán byl 16. 12. 1991 jednou ze svazových republik Sovětského svazu, proto pro vnější vztahy byly prioritou především zájmy Moskvy. Dnes je těžké najít materiály o přímé spolupráci Kazachstánu a Československa z dob minulého režimu. Od roku 1993 v Almaty působí Velvyslanectví České republiky. Diplomatické vztahy mezi Republikou Kazachstán i Českou republikou byly navázány 1. ledna 1993. V dubnu roku 1997 se v Praze otevřela Diplomatická mise RK, která se nařízením Prezidenta Republiky Kazachstánu č.1468 ze dne 4. listopadu 2004 povýšila na úroveň Velvyslanectví. Od dubna 2005 v Praze působí Velvyslanectví Kazachstánu [1].

Spolupráce mezi Českou republikou a Kazachstánem se rozvíjela pomalu. Hlavní odlišností v hospodářském rozvoji byl fakt, že Česká republika měla již ukončené sociálně-ekonomiko-politické reformy, když Kazašská republika začínala provádět své politiko-hospodářské reformy [1]. Samozřejmě měla Česká republika větší zkušenosti ve sféře mezinárodních vztahů; obchodních operací; v oblasti příhraniční spolupráce, a to z toho důvodu, že Česká republika nebyla satelitním státem Sovětského svazu; před druhou světovou válkou měla tato země jedno z nejrozvinutějších hospodářství v Evropě, obyvatelé měli větší zkušenosti v oblasti právně-osobních vztahů v obchodování a důležitou úlohu sehrálo také sousedství s vyspělými ekonomikami světa apod.

Celkově můžeme rozdělit rozvoj obchodně-ekonomických vztahů mezi zeměmi na 3 stadia [2]:

První etapa období je ohraničena lety 1993-1999. V této době vznikaly první obchodně-ekonomické vztahy mezi jednotlivými subjekty a uzavíraly se první dohody a smlouvy k zlepšení fungování a prohlubování spolupráce. V této době nebyla situace v kazašském hospodářství pozitivní, což ovlivňovalo všechny činnosti státu. Obchodní styky měly víceméně náhodný charakter, subjekty měly zájem o okamžité výhody. Pro české byznysmeny byly důležitější vztahy s Ruskem a obchodní operace se uskutečňovaly rovněž přes Rusko.

Druhá etapa proběhla v období 2000-2003. Změny ve struktuře spolupráce mezi státy probíhaly s ohledem na hospodářskou situaci v zemích. Od roku 2000 se zlepšuje ekonomická situace Kazachstánu (získáním statutu tržní ekonomiky, provedení hlubokých reforem), čeští obchodníci tak začaly mít větší zájem o Kazachstán. V průběhu druhé etapy se zvýrazňují pokroky ve spolupráci završené vznikem obchodně-ekonomického oddělení Velvyslanectví České republiky v Kazachstánu. Hlavním cílem tohoto

oddělení jsou: stanovení nových kontaktů, poskytování informací a podpora projektů státního významu. Vzrostla úroveň obchodních operací, česká strana například začala kupovat ropu přes operátory z třetích zemí apod.

Třetí etapa rozvoje spolupráce mezi státy se datuje od roku 2004 do současnosti. Vztahy se rozvíjejí velmi dobře, jak dokládají návštěvy oficiálních představitelů z Prahy. Dne 8. září 2007 navštívil prezident České republiky Václav Klaus Kazachstán (před tím byl Václav Klaus na území Kazachstánu na začátku roku 2004 mezi přistáním na cestě do Číny). Pro českou stranu se Kazachstán stává velmi atraktivním partnerem také ve sféře průmyslu. Z dob Sovětského svazu nejsou v kazašském hospodářství rozvinuté technologické směry rozvoje. V ropném průmyslu, zemědělství a ostatních odvětvích hospodářství v Kazachstánu roste potřeba různých technických zařízení, proto by se čeští podnikatelé a výrobníci mohli stát dodavateli zařízení. Kromě toho má české strojírenství dobrou reputaci, přičemž hraje významnou roli cena a kvalita českých podniků. V oblasti spolupráce však stále chybí přímé kontakty, například je třeba rozvíjet dvoustranné kontakty spíše než s pomocí třetí strany bez tzn. offshore firem apod. [2]. S ohledem na současnou situaci ve spolupráci mezi státy můžeme konstatovat, že se prohlubuje, ale na druhou stranu ještě existuje množství atraktivních a zajímavých oblastí pro další rozvoj a prohlubovaní spolupráce.

Velkým problémem ve spolupráci obou států jsou neshodující se statistické údaje o obratu zboží mezi státy. Tyto chybné informace byly několik let sledovány a hlavním bodem daného problému je to, že do Čech dovážejí zboží i podniky z třetích zemí, proto v statistice jak Kazachstánu, tak i Česka existují mezery [3]. Řešení daného problému záleží především na společné informovanosti statistických úřadů obou zemí. V tomto mohou spolupracovat také ekonomické úseky ambasád jednotlivých zemí.

Graf 1. Znázorňující vývoj vzájemného obchodu mezi ČR a KZ (tis. USD), (podle české statistiky)

Zdroj: www.businessinfo.cz

Za období 1993-2006 český vývoz do Kazachstánu rostl a ve srovnaní s rokem 1993 se v roce 2006 vývoz zvětšil 4násobně: v roce 1993 český vývoz činil 26,187 tis. USD a v roce 2006 dosáhl 109,699 tis.USD. Kazašský vývoz do České republiky za 13 let měnil strukturu, zaznamenal období poklesu a růstu. V roce 1993 kazašský vývoz činil 7,738 tis.USD, poté sledujeme nárůst exportu do Česka, ale v období 1998-1999 byl ve srovnání s rokem 1997 zaznamenán pokles. Taková situace, kdy byla zaznamenaná viditelná změna v obchodu nastala i v letech 2002-2003. Za poslední období celkový kazašský vývoz do České republiky roste, přičemž v roce 2006 činil 291,264 tis.USD, což ukazuje růst českého dovozu z Kazachstánu až 37násobně v srovnání s rokem 1993. Jestliže v kazašském vývozu do Čech figurují především nerostné suroviny, v českém vývozu do Kazachstánu je to konečná produkce jako stroje a zařízení, tržní výrobky tříděné dle materiálu, léky, chemikálie apod. V dovozu převládají hlavně ropné produkty, fosfor, válcované železo, barevné kovy, dále pak bavlna a kůže. Kazašská strana by mohla do České republiky dovážet koberce a produkci z čisté vlny, přírodní léčebné oleje, které se vyrábějí jen v Kazachstánu, nebo z produkce regionu Střední Asie.

Od tohoto roku belgický Fortis Bank financuje dodání technologie firmě PSP Engineering do Kazachstánu. Příjemcem vývozního úvěru v Kazachstánu je banka AO BTA, která má poskytnout leasing společnosti BI Cement na deset let. BI Cement patří k jedné z největších kazachstánských stavebních firem Bild Investments Group. Přerovská firma dodá technologie pro cementárnu v Kazachstánu, která má být dokončena do 31. března 2009. Pojistná částka tvoří kolem 2 miliard korun. Přerovský podnik dodá kazašské společnosti technologické linky pro výrobu cementu o výkonu 1600 tun slínku denně [4]. V současné době je situace, která nastala při stanovení ceny cementu velmi obtížná z toho důvodu, že cena cementu roste už několik let. Tato situace byla způsobena velkým rozvojem stavebnictví v Kazachstánu za poslední období. Dá se předpokládat, že zprovoznění cementárny, s novým technologickým vybavením, přispěje ke zlepšení situace. Kromě toho vysoké ceny cementu by se mohly snížit i přes nové dodavatele cementu na kazašský trh.

Aktuálním a novým krokem v oblasti spolupráce mezi Kazachstánem a Českou republikou jsou jednání o založení společenského poradenského centra, které by podporovalo a pomáhalo subjektům při obchodování v obou zemích, a případně by i poskytovalo poradenství pro státy regionu Střední Asie, Rusko. Dalším aspektem spolupráce by bylo zapojení do výzkumných projektů univerzit, výzkumních centrů Kazachstánu a České republiky, které by se mohly zabývat různými teoretickými i praktickými projekty.

Kromě toho mezi perspektivní je nutné řadit i dovoz obuvi, zejména společnosti Baťa, možností je rovněž založení vlastního obchodu obuvnických firem v Almaty a v Astaně. Nyní do Kazachstánu proudí obuv hlavně z Itálie, Ruska, Číny, Turecka. Obuv z Itálie patří k nejdražší produkci, ostatní jsou ve srovnání s italským zbožím nižší kvality, ale na druhou stranu levné. V případě, že český výrobce obuvi bude ve spolupráci s kazašským podnikem nebo sám vstupovat na kazašský trh, v obou případech bude mít šanci na úspěch, kazašský trh s obuví má mezery, kterou by mohli zaplnit čeští výrobci. K těm mezerám patří skutečnost, že kvalita české obuvi je vysoká, sortiment obuvi je napořád větší než u čínských nebo tureckých producentů. Českou obuv by si mohla dovolit koupit kazašská střední a nižší-střední vrstva obyvatel. Nyní obuvnický průmysl Kazachstánu skoro vůbec neexistuje, a spolupráce s českými podniky by vedla ke zlepšení situace. Více předností by měly obuvnické továrny, které se nacházejí v Jižním regionu republiky, kde by se mohl rozvíjet celý komplex činností, k němuž by patřil: **sběr přírodní kůže u chovatelů zvířat; zpracování kůže; výroba konečného produktu – obuvi**. Kazašský obuvnický průmysl patří k stagnujícím, takže zájemci by mohli získat výhody od místních regionálních úřadů, obcí, či z fondu

Strategického rozvoje „Kazyna“, Inovačního fondu apod. Podporu podnikání by mohli poskytnout i pracovníci velvyslanectví Kazachstánu a České republiky.

Implikace pro podporu českých investičních aktivit v Kazachstánu

K hlavním perspektivním a prioritním odvětvím ekonomiky Kazachstánu pro investování českých subjektů patří strojírenství, energetický sektor, zpracovatelský a lehký průmysl, zemědělství, turismus, finanční trh, ale perspektivy jsou i v zapojení a získaní tenderů na projekty, které mají státní význam, např. účast ve projektech zaměřených na řešení ekologických problémů (čistírny odpadních vod) a v technicky náročných odvětvích hospodářství Kazachstánu:

[9] strojírenství – dodávky materiálů pro potřeby strojírenství, chemického strojírenství, pro potřeby v petrochemickém průmyslu, rekonstrukce strojírenských odvětví, stroje pro zpracování kůže, založení společných podniků zaměřených na výrobu produkce pro potřeby strojírenství, dodávky technických zařízení pro důlní komplex Kazachstánu;

[10] energetický sektor – dodávky českých zařízení do ropného průmyslu, účast na zpracovávání nalezišť: ropných, kovových, uhlí apod.;

[11] zemědělství – dodávky technologických zařízení pro zemědělské produkce a potravinářský průmysl, zakládání společných konzerváren, které by zpracovávaly zeleninu a ovoce (zpracovávání meruněk, jablek, hrozen, hrozinek, vodního melounu, rajčat, okurek apod.), rovněž perspektivními by mohly být dodávky zařízení pro malé a střední podniky;

[12] lehký průmysl – dovoz textilních výrobků, rozvoj společných podniků v lehkém průmyslu; spolupráce v oblasti lehkého průmyslu: v Almaty se nachází jedna z velkých textilních továren, kde je vyráběn kvalitní textil - ACHBK Almaty. Kromě toho po republice existuje hodně textilních továren, které by ve spolupráci s českými podniky mohly uskutečnit renovace svých výrobků. Důležitá je podpora ze strany vlády a státních institucí, zejména všech fondů, založených na podporu diversifikace kazašského hospodářství;

[13] těžký průmysl – spolupráce v průmyslu barevných kovů nebo metalurgii;

[14] turistické infrastruktury – rozvoj atraktivních turistických destinací, zakládání turistických společností v Kazachstánu apod., spolupráce v oblasti turismu a také v lázeňství;

[15] finanční trh - kapitálový trh Kazachstánu je jedním z lákavých investičních příležitostí, i když kazašské finanční subjekty jsou více podporované. Odborníci z České republiky zaznamenaly perspektivu podílet se na kazašském finančním trhu. Komora pro hospodářské styky se Společenstvím nezávislých států upozorňuje na příležitost pro české ekonomické subjekty vstoupit na kazašský kapitálový trh [4]. Spolupráce v oblasti finančních produktů: vstup českých úvěrových institucí na kazašský finanční trh: v současnosti funguje v Kazachstánu česká Home Credit, která je jedním z prvních zahraničních finančních společností umožňujících získat dostupný úvěr pro obyvatele střední vrstvy a nižší střední vrstvy. Kazašský trh úvěrů není tak rozvinut jako v České republice a spolupráce v této oblasti by byla uvítána; poskytování finančních úvěrů společným podnikům; účast na burze; využití zkušeností českých finančních podniků firmami; spolupráce v oblasti pojištění;

[16] infrastruktura - účast na obnovení městské infrastruktury, výstavba a modernizace železnic, účast na projektech pro rekonstrukci dopravních systémů Kazachstánu; spolupráce mezi kazašskými podniky a českými firmami při výstavbě komplexu závodů na zpracování ropy; využití zkušeností českých firem při výstavbě mostů, silnic; spolupráce ve výstavbě bytů a jiných zařízení nejen v Almaty - Astaně , ale i v dalších městech a oblastech Kazachstánu;

[17] farmaceutický průmysl - dovoz léků a farmaceutických polotovarů, spolupráce ve vědecko-výzkumné oblasti farmacie; organizace stáží specialistů;

[18] inovace – účast ve výrobě moderních technologií; spolupráce mezi kazašskými a českými technoparky: rozvoj vysoce kvalitních technicky zaměřených podniků s ohledem na praxi stejných podniků USA, Indie; organizace stáží specialistů, výměna studentů, spolupráce vysokých škol při zpracovávání projektů;

[19] zpracovatelský – dodávky následujících českých zboží budou vítané: balící stroje na zboží jak pro lehký průmysl tak i pro potravinářství; stroje pro zpracování kůže;

[20] automobilový průmysl – doplňující částky pro auta apod., existují nové možnosti rozvoje tohoto průmyslu v Kazachstánu, dodávky dopravních prostředků pro městskou a meziměstskou dopravu – tramvaje, trolejbusy, železniční prostředky – lokomotivy, vagony apod.;

[21] ekologie - české podniky, vzdělávací centra a výzkumné instituty by se mohly podílet i na dodavkách technologií pro čištění pitné vody, odpadkové vody a odpadků včetně zpracovávání chemických odpadků, ve zpracovávání odpadků v ropném průmyslu, technologie pro čištění ovzduší, výzkumné záměry na odstranění ekologických problémů v Kazachstánu apod.;

[22] zdravotnictví - spolupráce mezi kazašskými a českými nemocnicemi: rozvoj spolupráce v oblasti transplantací; spolupráce lékařů ve složitých akutních případech apod.; organizace stáží specialistů, výměna studentů, spolupráce vysokých škol v oblasti zdravotnictví; výměna praktických zkušeností;

[23] dodávky spotřebitelských zboží: sklenářství (křišťálové zboží), módní doplňky (produkce společnosti Jablonex), domácí nádobí, šperky z českých drahých kovů a kamenů, kosmetické výrobky (Dermacol), zboží z kůže – kožená obuv (Baťa), potravinářské výrobky (minerální vody - Mattoni, Poděbradka apod.), domácí zařízení apod.

V současné době pro české aktivity existují mnohé možnosti spolupráce s Kazachstánem anebo vzájemné obchodování s touto zemí. Na specializovaných českých webových stránkách, časopisech a v novinách o příležitostech obchodování a vstupu českých podniků na zahraniční trh se uvádí základní náměty pro vybudování kazašských kontaktů. Rekomendace, které uvádějí na stránkách www.businessinfo.cz, www.czechtrade.cz, www.mzv.cz a periodické časopisy a noviny (Hospodářské noviny) pravdivě nastiňuji podnikatelskou atmosféru v zemi, ale s postupem času se budou měnit i zvyklosti obchodovaní v kazašské společnosti. Nyní si mnozí Kazaši mohou dovolit vzdělávání svých dětí v evropských zemích, které jsou budoucí generací ekonomického rozvoje, např. v České republice studuje velký počet studentů z Kazachstánu, kteří by se mohli podílet na rozvoji spolupráce mezi Kazachstánem a Českou republikou.

Jedním z perspektivních kroků ve zkvalitnění spolupráci mezi Kazachstánem a Českou republikou je založení kazašsko-českého obchodně-ekonomického centra v Almaty a česko-kazašského obchodně-ekonomického centra v Praze pro podporu kazašských a českých výrobků mezi oběmi zeměmi. Tato

obchodně-ekonomická centra by mohla pomoc zejména malým a středním podnikům, která nejsou finančně schopná investovat do propagace svých výrobků v zahraničí anebo určitě nejsou schopni financovat své pobočky v zahraničí.

Dalším mým námětem pro perspektivní spolupráci je aktivizace ekonomického úseků Velvyslanectví Kazachstánu a České republiky, které by mohlo pomoci v poskytnutí informací z oblasti obchodního klimatu obou zemích, a co je nejdůležitější provádět analýzu a sběr informací o podnicích, které by mohly dodávat své zboží do zahraničí anebo najít potenciální klientelu. Neposlední důležitá role i u představitelů Obchodní komory a Velvyslanectví obou zemí, které by mohli urychlit a zkvalitnit spolupráci mezi Kazachstánem a Českou republikou.

Zlepšení bilaterálních vztahů Kazachstánu a České republiky v oblasti ekonomiky by přispěly i nově definované mezivládní dohody v různých sférách spolupráce. Celá řada uzavřených dohod a smluv mezi oběma státy doposud nefunguje v potřebné míře. Bohužel v současné době nejsou mezi Kazachstánem a Českou republikou uzavřeny dohody ve sféře vzdělání. Zejména neexistují dohody o uznávání úrovně vzdělání mezi veřejnými vysokými školami obou států. S ohledem na to, že rok od roku se zvyšuje počet kazašských vysokoškolských studentů působících v České republice, vyřešení problémů uznávání vzdělaní (nostrifikace diplomů a maturitních vysvědčení) by ulehčilo vyřizování právních náležitosti potenciálním studentům z Kazachstánu.

Mezi Kazachstánem a Českou republikou existuje celá řada perspektivních oblasti spolupráce jen je nezbytné najít správnou cestu k jejich realizaci. V současné době k aktuálním odvětvím spolupráce patří: kooperace v oblasti turismu a také v lázeňství, ve výrobě léků kazašské farmacie s českými výrobci léků, při vytvoření společných podniků na zpracování zemědělské produkce, mezi kazašskými a českými technoparky, v oblasti finančních produktů, v oblasti lehkého průmyslu, v oblasti těžkého průmyslu.

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VÝZNAM INTEGROVANÉ EKONOMIKY VE VZDĚLÁVACÍM PROCESU

THEODOR BERAN

ČVUT V PRAZE, FAKULTA STROJNÍ, ÚSTAV ŘÍZENÍ A EKONOMIKY PODNIKU

Abstrakt

Příspěvek popisuje zejména historické aspekty vyučování účetnictví na katedře ekonomiky a řízení strojírenského podniku ČVUT. Jsou zdůrazněny významné faktory důležité pro kontinuální proces a následně interdisciplinární povaha účetnictví, jako východiska pro integrovanou ekonomiku s širším využitím na právnických směrech. Dále charakterizuje systémové pojetí managementu, charakterizuje systémy řízení, stupně řízení, celopodnikové řízení; důraz klade na vnitropodnikové řízení; procesní řízení, řízení projektové, zásady tvorby hospodářských středisek, odpovědnost, plán, rozpočet, předběžnou kalkulaci, výslednou kalkulaci, linie výkonů, linie útvarů.

Klíčová slova

Účetnictví, řízení vnitropodnikové,řízení celopodnikové, hospodářské středisko, systém managementu, kalkulace, makroekonomie, mikroekonomie.

Abstract

The article described a historic aspects teaching process of the accounting, at the Department of Enterprise Management , Faculty of Mechanic Engineering CTU Prague. Attributes of this special approach , the continual process with relation to other disciplines of the Management. Teaching probléme at the Law university and profile of graduates of CTU.This article explains system conception of management, characterizes systems of management, management levels, management of companies; internal management; procedural managemnt, rols for project management, fundamentals outcomes for establish economic profit centres, responsibility, plan, budget, preliminary calculation, resulting calculation, line achievements, line of individual unit.

Key words

Accounting, management, internal management, economic profit centres, microeconomics, macroeconomics

1ÚVOD

Ekonomie, jež je součástí vzdělání právníků i sociálních pracovníků by mělo, krom odborných znalostí, formovat vyvážený vztah mezi ekonomií – svobodou – etikou a právem.

Ekonomický řád by měl být uspořádán tak, aby vyhovoval svobodě lidské osoby. Primárním institutem není zvláštní hospodářské ústavní právo, ale obecné ústavní právo akcentující zaručení základních práv a svobod. Nutno si uvědomit, že hospodářský život je sociálním životem lidí a nemůže ho chápat bez svobody. Hospodářský řád má umožnit svobodný rozvoj osobností manuálně i duševně pracujícího. Toto není kontradiktivní k úkolu hospodářství spolupůsobit při vytváření obecného blaha, je-li toto jak svým vznikem , tak funkcí vázáno na svobodný rozvoj osobnosti. Svobodný ekonomický řád vyžaduje řád právní, který zabezpečuje svobodnou iniciativu výrobků, svobodnou volbu místa vzdělávání a pracoviště, svobodu povolání, obchodního partnerství, vlastnictví, soutěže, zakládání společenství a sdružení i vyjednávání o sazbách - ale který taktéž předpokládá nástroje k tomu, aby zabránil zneužívání svobody nebo je přinejmenším omezil. Zmínili jsme se o obecném blahu, ale nevymezily jsme jako význam; je souhrnem politických, sociálních a ekonomických podmínek umožňující osobní rozvoj člověka. Aby podnikatel (jeho image je často v podmínkách Česka ambivalentní – prospěchář, pak zase novátor, hned mafián) mohl rozvinout vlastní schopnosti, potřebuje množinu společenských, právních a politických rámcových podmínek. Prvým předpokladem je politický systém, uspořádaný dle subsidarity, odsunuje stát na druhé místo a nepožaduje, aby se občan chopil jen těch iniciativ, které mu přiznal zákonodárce. Subsidiární stát může jednotlivému občanovi, rodinám i skupinám odebrat jen ty úkoly, na které nemohou stačit. Druhým předpokladem pro rozvoj podnikatele jsou právní řád a společenský konsensus, zaručující soukromé vlastnictví a hospodářskou soutěž.

Podnikatel (eticky způsobilý) nesmí k dosažení zisku používat nekalých praktik. Zisk musí být podložen výkonem a má se ho dosahovat v konkurenčním prostředí. Právní řád musí pamatovat na sankce proti zneužití vlastnictví i soutěže. Zisky nesmí zůstat nezdaněny ani vyňaty z hospodářského koloběhu. Právní řád musí uplatňovat odpovědnost vlastní za obecné blaho a zabránit úniku kapitálu. Na okraj nesmí být vytlačeni lidé, kteří nemohou nic poskytnout. Právní řád musí pomoci systému sociálních odvodů a státního sociálního zabezpečení zajistit, aby se hospodářství neorientovalo jen na rentabilitu, ale i na sociální spravedlnost – princip výkonnosti doplněn solidaritou. Ve společnosti, která hodnotí lidi jen podle výkonu,

jsou nenarození, nemocní, staří v nebezpečí, slabí v nesnázích a všichni v obavách, vděčnost je zbytečná, slušnost, čestnost jen pro slabé osamělost samozřejmostí.

2. Konkrétní předpoklady pro integrovanou bázi manažerského účetnictví

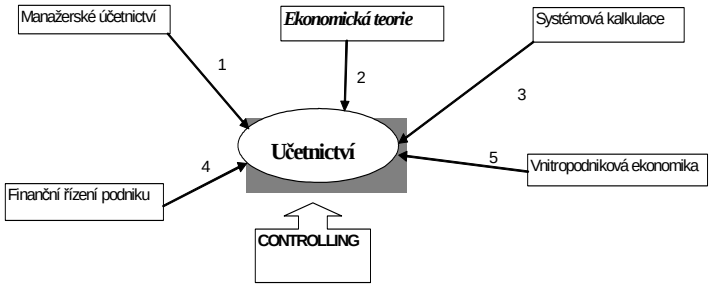
Poslání manažerského účetnictví ve všech důsledcích, si nárokuje vytvoření specifických počátečních a okrajových podmínek. Základní požadavek lze spatřovat v integrovaném pohledu a v určitém stupni dekompozice, resp. ve snaze zachycovat a porovnávat vnitřní jevy podniku za nejmenší úseky v relativně krátkých obdobích dle jednotlivých činností. Proto je zřejmý controllingový pohled na podnikové hospodářství.

Uvedeme tuto zásadu: Veškerou činnost podniku sledujeme v nejmenších organizačních jednotkách, které mají stejnorodou charakteristickou povahu. Je tedy nutné začít detailní analýzou pojmu i funkce střediska, respektive hospodářského střediska a členit organizaci dle funkcí. Záměrně jsme uvedli konkrétní zásadu, abychom odvodili důležitý aspekt, týkající se začleňování manažerského účetnictví do kurzů, studijních plánů atd. Je zřejmá souvislost se znalostmi managementu, respektive s dokonalým zvládnutím náplně managementu jako procesu. Proto pečlivý a týmový výběr vhodného studijního materiálu je neodiskutovatelný. Autor se domnívá, že musíme zvažovat rozumnou míru verbálního a kvantitativního pojetí. Verbální výklad vytváří nadstavbu, nikoliv základní instrumentárium! Manažerské účetnictví má relativně zvláštní pozici ve školách technického charakteru, ale uveďme jeden z mnoha příkladů: Jestliže vymezujeme například výrobní středisko, musíme respektovat výrobní postup a definovat produkt tak, abychom samostatně zachytili náklady připadající na výkony, jež musí být měřitelné a ocenitelné. Dle autorova názoru je pro manažerský pohled- tedy pohled v souvislostech, velmi příznivé technologické zázemí, respektive technický – technickoekonomický profil uživatele, manažera. Zatím jsme stručně uvedli aspekt organizační. Další informace pouze dokazují onen silně interdisciplinární charakter manažerského účetnitcví.

Považme, jakou roli hraje ergonomie. Tato disciplina, ač zdánlivě odtažitá, silně ovlivňuje integrovanou bázi a není zdaleka jen předmětem určeným technikům. Budeme-li uplatňovat vědecké řízení práce, jehož hlavním znakem je odpovídající příprava před zahájením libovolné činnosti. Máme-li respektovat controllingový pohled, nejde zdaleka jen o kontrolu technickou! Právě příprava práce v nejširším slova smyslu velmi silně působí ve dvou oblastech: Technická oblast- podklady, dokumentace, normy, atd. Ekonomická oblast – analýza nákladů, členění kalkulace a akcentování rozpočtů.

Má-li jasně vymezený integrovaný přístup, srozumitelně definována báze, pak musí fungovat a komunikovat tyto oblasti manažerského účetnictví: Členěné rozpočetnictví, rozpočty s jasně vymezenou datovou základnou a hierarchií, vazba na kalkulaci- ex ante pohled. Za druhé: Vhodně členěný bilanční informační systém.

Je zřejmé, že na jedné straně existuje instrumentárium metod manažerského účetnictví, na sraně druhé jeho vyváženost, pokud nám jde o poměr mezi informacemi ex ante a ex post. Dle autorova názoru je potřeba věnovat značnou pozornost správné koncepci výuky podnikového managementu v širokém kontextu ve všech druzích výuky



Obr.2.1 *Elementární vazby jako předpoklad integrace*
Obrázek naznačuje elementární vazby, jejichž naplnění je silně vázáno na specifickou náplň jednotlivých předmětů a je velmi fakultativní.

3. Specifická diferenciace rysů vnitřního řízení podniku na rozdíl od řízení podniku jako celku[1670]

Nyní je zapotřebí záměrně učinit krátký exkurz do různých úrovní řízení podniku.
Řízení podniku jakožto proces celopodnikový je zaměřeno na ekonomicky a právně vymezený subjekt-podnik, který vstupuje do hospodářského koloběhu (makrosféry) – je plátcem daní a odvodů, vstupuje do

[1670] Cf. BERAN,TH. *Oceňování výkonů ve vnitřním řízení,* (doktorská disertační práce na ČVUT v Praze, ústavu řízení a ekonomiky podniku), Praha, 2006

vztahů s dodavateli a odběrateli, tzn. více či méně podrobné vazby v makroekonomickém koloběhu.

Další úrovní řízení, je řízení vnitropodnikové (resp. Řízení vnitropodnikových útvarů.) Vnitropodnikové útvary jsou objektem řízení, jehož subjektem je vrcholové řízení podniku. Hospodářská střediska – vnitropodnikové útvary jsou vrcholovým řízením (TOP managementem) v oblasti jejich činností usměrňovány tak, aby se veškeré jejich činnosti vyvíjely v souladu s cíli podniku jako celku. Vnitropodnikové řízení tedy směřuje veškeré skupiny aktivit do nitra podniku, ostatní řízení je orientováno převážně vně a řeší vztahy s podstatným okolím podniku. Určující charakteristika vnitropodnikového řízení vychází z jeho obsahu. Vnitropodnikové řízení z hlediska jeho obsahu představuje souhrn řídících činností směřujících k vytvoření účelné dělby práce a kooperace mezi činnostmi v rámci podniku.

Řízení vnitropodnikové je specifickou formou řízení a liší se od řízení podniku jako celku těmito zvláštnostmi:

a) Vnitropodnikové řízení představuje řízení dílčích oblastí podnikového hospodaření. Důsledek této zvláštnosti se projevuje v nutnosti vytvářet subsystémy vnitropodnikového řízení.

b) Existence vnitropodnikových útvarů je základním předpokladem vnitřního řízení. Vnitropodnikové útvary nelze vytvářet libovolně. Určujícím faktorem v průběhu procesu tvorby vnitropodnikových útvarů – hospodářských středisek je kritérium odpovědnosti. Vnitropodnikové útvary musí nést odpovědnost za oblast vlastní činnosti, ovlivňovat její vývoj v rámci podniku jako celku. Činnost těchto útvarů je pak vyhodnocována. Vytvářené odpovědnostní okruhy jsou uzavřeny systémem vnitropodnikových cen.

c) Vnitropodnikové řízení je typické krátkodobým charakterem řízeného období. Charakteristickým časovým horizontem bývá měsíc a v některých případech týden, den, dokonce i směna.

d) Technické, organizační a ekonomické podmínky jednotlivých vnitropodnikových útvarů determinují potřebu diferenciace. To znamená, že čím je vnitropodnikové řízení blíže vlastnímu výrobnímu procesu, tím více respektuje jeho naturální povahu, konkrétní podmínky a předurčuje přístupy vlastního vnitřního řízení.

e) Řízení vnitropodnikové má velmi konkrétní charakter , neboť řídící aktivity jsou určitým převodem řídící činnosti na bezprostřední vykonávání prací. Tato skutečnost má zásadní dopady:

1. Vnitřní řízení musí nutně respektovat reálné technické, ekonomické i organizační možnosti vnitropodnikových útvarů – hospodářských středisek.
2. Různorodými metodami a nástroji se provádějí také inovace ad hoc, proto musí být reálné.

Z hlediska specifické charakteristiky vnitropodnikového řízení je nejdůležitější detailní analýza jeho dvou stránek – první stránka vychází z obsahu řízených procesů a druhá charakterizuje způsob prosazování úkolů a rozhodnutí všeobecně. Dvě stránky vnitropodnikového řízení předurčují používání metod a způsobů řízení.

- Naturální stránka řízení jako řízení zaměřeného na naturální vztahy, je vyvoláno tím, že vnitropodnikové řízení je velmi konkrétní, dezagregované, zaměřené na dílčí výrobní nebo řídící činnosti.
- Hodnotová stránka řízení se soustřeďuje na hodnotové vztahy, jejichž nástroji jsou tedy hodnotové kategorie, náklady,výnosy,ceny. Význam této stránky vnitřního řízení lze spatřovat ve vyšším stupni agregace, syntetizujícím vyjádření úrovně činnosti vnitropodnikových útvarů. Typickým příkladem je hospodářský výsledek vnitropodnikových útvarů. Hodnotová stránka řízení umožňuje postihnout zejména kvalitativní stránky činnosti vnitropodnikových útvarů (např. oblast řízení jakosti). Dalším pozitivem je postižení vlivu daného vnitropodnikového útvaru na reprodukční proces probíhající v podniku, zejména prostřednictvím vnitropodnikových cen a jejich struktury. Hodnotové kategorie se stávají nástrojem kontroly a rozboru hospodaření, ve smyslu adresném k jednotlivcům a skupinám tato skutečnost vytváří motivační aspekt vnitřního řízení. úkolem řízení na všech stupních podniku je především koordinace. V tomto kontextu jde o koordinaci obou výše uvedených stránek. Jde o jejich propojení.Východiskem pro integraci obou stránek vnitřního řízení jeví se kontinuální péče o normativní základnu. Technickohospodářské normy jsou integrujícím činitelem v tom smyslu, že v sobě spojují jak naturální stránku výrobního procesu, tak i stránku hodnotovou. Tato skutečnost nesmí být nikdy opomenuta! V podmínkách

praxe, kde není normativní základně věnována dostatečná pozornost, kde je vzhledem ke konkrétním podmínkám daného podniku příliš malý podíl technicky zdůvodněných norem, kde nejsou navzájem propojeny a nenavazují na sebe jednotlivé druhy kalkulací, tam bývá od sebe odtržena naturální a hodnotová stránka výrobního procesu.

4.Přesah „užitečnosti“ podniku do sféry nadpodnikové

Kvantitativní vyjádření vazeb mezi jednotlivými úrovněmi národního hospodářství vytváří agregační veličiny, které budou doplněné a korigované množinou tzv. měkkých faktorů jako základu pro definování parametrů užitečnosti daného objektu.

Má-li se kvantifikovat a hodnotit výstup strojírenského podniku a jeho hospodářský přínos, (podniková produkce) musí se vhodně ocenit tak, aby byla zajištěna agregace v příslušné úrovni (podnikové, odvětvové, mezzoekonomické, ale také místně – regionálně).

Účelem promyšlené tvorby tzv. oceňovacích bází podnikových ukazatelů produkce je:

1. očištění celkového produktu podniku od duplicit (obsažených v dodávkách),
2. propojení více hospodářských úrovní procesem agregace produkcí dílčích.

$$\text{Např.: } TP^{(L,M)} = (GP_{F_1} + GP_{F_2} + GP_{F_3} + \ldots + GP_{F_n})_{L,M} \quad (1)$$

kde $TP^{(L,M)}$ … celková produkce v dané úrovni L,M,
L,M … L = lokalita, M = vymezená hospodářská úroveň,
GP_{F_n} … hrubá produkce dílčích hospodářských jednotek (podniku).

$$GNP^{(L,M)} = (VE_{F_1} + VE_{F_2} + \ldots + VE_{F_n})_{L,M} \quad (2)$$

kde $GNP^{(L,M)}$ … hrubý národní produkt v dané úrovni L,M,
VE_{F_n} … přidaná hodnota dílčí hospodářské jednotky.

$$NY^{(L,M)} = (\mathrm{NP}_{F_1} + \mathrm{NP}_{F_2} + \ldots + \mathrm{NP}_{F_n})_{L,M} \quad (3)$$

kde $NY^{(L,M)}$ … národní důchod v dané úrovni L,M,
NP_{F_1} … čistá výroba dílčích hospodářských jednotek.

Pro účely agregace vytváříme tyto tři hodnotové báze:

$TP = [C1 + C2 + C3 + \ldots + C9]$ tzv. Devítipoložková báze hrubé produkce,
$VE = [C3 + C4 + C5 + C6 + C8 + C9]$ tzv. Báze přidané hodnoty,
$NP = [C5 + C6 + C8 + C9]$ tzv. Báze čisté výroby.

Předmětem výzkumu je definování množiny {*S*} s prvky, resp. měkkými faktory, zakomponovanými do strukturních agregačních modelů.
Dalším významným krokem je vyjádření účinku tzv. měkkých faktorů diferencovaných od měkkých faktorů výrobků běžné spotřeby a výrobků s dlouhým životním cyklem.

Pro životní cyklus výrobku,resp.dlouhodobý životní cyklus strojírenského výrobku jsou účelně definované tzv. dílčí fáze cyklu, charakteristické působením tzv. relevantních faktorů parciálních utilit.

1. dílčí fáze *TF* – fáze definování technologické úrovně v širším smyslu,
2. dílčí fáze *PF* – fáze časoprostorové specifikace,
3. dílčí fáze *DF* – fáze konfigurační.

C_I = [*TF*, *PF*, *DF*], kde *I* … je část dlouhodobého životního cyklu.

4. dílčí fáze *LOT* … vazbová fáze,
5. dílčí fáze *LUF* … uživatelsko – implementační fáze,
6. dílčí fáze *WT* ….. výběhová fáze.

C_{II} = [*LOT*, *LUF*, *WT*], kde *II* … je část dlouhodobého životního cyklu.

Předmětem výzkumu je nalezení specifických užitků, resp. množin parciálních relevantních utilit: $\{TF_U, PF_U, DF_U, LOT_U, WT_U\}$.

5.Uplatnění absolventů

Absolventi ekonomického směru strojní fakulty jsou žádáni nejen v průmyslových podnicích. Hovoří o tom zpětná vazba mezi podniky a naším ústavem. (Podobná situace je patrná na podobných oborech v Česku. Autor nesdílí názor na potřebu konkurence v tak malé zemi, ale zastává potřebu spolupráce mezi univerzitami!!!) Nezřídka absolventi budují informační systémy v podnicích jako vedoucí týmů, jsou vysoce flexibilní a ve velmi krátké době jsou schopni zcela samostatně řídit zavádění controllingové aplikace. Není zvláštností, že se každoročně přicházejí podělit se svými kolegy – mladšími studenty formou přednášek a prezentacemi plně funkčních ukázek s podporou počítačového vybavení. V ústavu ekonomiky a řízení strojírenského podniku se vyučuje praktickému předmětu, jehož vyučující se střídají a jsou to tzv. kapitáni průmyslu, tedy manažeři na vrcholných úrovních řízení průmyslových a jiných podniků.

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FAKTORY VPLÝVAJÚCE NA DOPYT PO PRAVIDELNEJ AUTOBUSOVEJ DOPRAVE

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Abstrakt

Individuálny motorizmus patrí k najväčším konkurentom pre verejnú osobnú dopravu či už autobusovú, železničnú alebo mestskú hromadnú dopravu a to nielen v podmienkach Slovenskej republiky, ale s týmto vážnym problémom sa stretávajú aj vyspelé ekonomiky Európskej únie. Článok analyzuje najhlavnejší faktor, ktorý vplýva na ponuku pravidelnej autobusovej dopravy a tým je cena za tieto služby, ktorú musí cestujúci uhradiť dopravnej spoločnosti a komparuje ju s nákladmi vynaloženými pri použití individuálneho dopravného prostriedku – automobilu v podmienkach Košického samosprávneho kraja. Príspevok je súčasťou výskumnej úlohy VEGA č.1/3795/06 „Vplyv kapitálových investícií na vyrovnávanie rozdielov ekonomickej úrovne regiónov v SR“.

Kľúčové slová

Preprava osôb; pravidelná autobusová doprava; železničná doprava, individuálny motorizmus; náklady na dopravu;

Abstract

Individual motoring belongs to the biggest competitor for the public personal transport provided by means of bus, railway or city public transport. This is the case not only in Sloval Republic conditions but also it is a serious problem of developed economies of European Union. The article is analyzing the main factor which affects the supply of regular bus transport which is the price of these services and which must be payed by travellers to a transport company and compares the price to cost of using individual means of transport – a car in the conditions of Košice self-government district. This article is the component of grant

VEGA n. 1/3795/06 "Efficiency of capital investment in addressing the differences in the level of economic development between the regions in the Slovak Republic".

Key words

Personal transport; regular bus trenasport; railway transport; individual motoring; transport costs;

Úvod

Pravidelnú verejnú prepravu osôb na území Slovenskej republiky zabezpečujú hlavne verejná autobusová doprava a železničná osobná doprava. Individuálny motorizmus však významne zasahuje do dopytu po prepravných službách nielen na Slovensku, ale tento trend je zaznamenávaný aj vo vyspelých krajinách Európskej únie. Forma prepravy, ktorú budú cestujúci voliť je determinovaná sociálnym prostredím, hospodárskou vyspelosťou krajiny, resp. územia, dopravnou infraštruktúrou a zvyklosťami obyvateľov.

Súčasný stav v osobnej doprave v SR

V tabuľke č. 1 porovnávame verejnú dopravu a individuálny motorizmus. Z pohľadu počtu prepravených osôb je vidieť, že na Slovensku má individuálny motorizmus prevahu v počte prepravených osôb nad verejnou osobnou dopravou a v rámci verejnej osobnej dopravy má dominantné postavenie pri uspokojovaní prepravných potrieb obyvateľstva autobusová doprava pred železničnou dopravou.

Rok	Železničná verejná	Cestná verejná doprava	MHD-DP	Individuálny motorizmus
1995	89 471	722 510	515 593	1 333 334
1996	76 015	698 256	543 246	1 415 621
1997	71 489	667 427	527 662	1 469 116
1998	70 008	656 230	509 862	1 491 078

1999	69 431	621 567	485 472	1 653 820
2000	66 806	604 249	404 539	1 664 342
2001	63 473	566 445	373 269	1 673 019
2002	59 430	536 613	370 018	1 735 560
2003	51 274	493 706	394 465	1 742 915
2004	50 325	461 772	383 118	1 750 171
2005	50 388	435 673	384 284	1 769 147

Zdroj: Vlastné spracovanie na základe údajov www.telecom.gov.sk

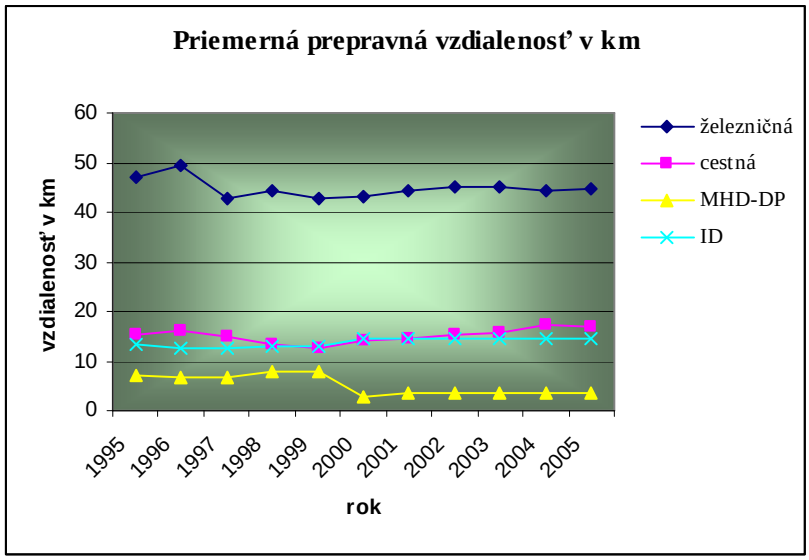
Tabuľka č. 1 Preprava osôb železničnou, verejnou cestnou dopravou a individuálnym motorizmom v tis. osôb

Najdlhšiu priemernú prepravnú vzdialenosť zabezpečuje železničná doprava (pozri tab. č. 2, graf. č. 1). Cestná verejná doprava a individuálny motorizmus prepravujú približne na rovnakú priemernú prepravnú vzdialenosť. Najkratšiu priemernú prepravnú vzdialenosť vykazuje pochopiteľne MHD.

Rok	železničná	cestná	MHD-DP	ID
1995	46,96	15,49	7,15	13,48
1996	49,58	15,89	6,77	12,71
1997	42,76	14,94	6,68	12,64
1998	44,17	13,47	7,85	12,94
1999	42,75	12,6	7,97	13,02

2000	42,96	13,96	2,9	14,38
2001	44,19	14,57	3,62	14,38
2002	45,13	15,35	3,71	14,39
2003	45,16	15,71	3,51	14,47
2004	44,28	17,07	3,47	14,47
2005	44,87	17,01	3,4	14,6

Zdroj: vlastné spracovanie na základe údajov z www.telecom.gov.
Tabuľka č. 2 Priemerná prepravná vzdialenosť osobnej dopravy v km



Zdroj: vlastné spracovanie

Graf č.1 Priemerná prepravná vzdialenosť osobnej dopravy v km v SR

Faktory, ktoré ovplyvňujú dopyt po pravidelnej autobusovej doprave

Cestujúci pri výbere z najviac frekventovaných druhov preprav v SR zvažuje niekoľko faktorov, ktoré ovplyvňujú jeho výber. Správanie sa cestujúcej verejnosti, ako sme už v úvode uviedli je výrazne determinované sociálnym prostredím, hospodárskou vyspelosťou krajiny, resp. územia, dopravnou infraštruktúrou a zvyklosťami obyvateľov.

Cestujúci vystupuje v podstate ako spotrebiteľ. Podľa Ivanovej „Na racionálne rozhodovanie o svojej spotrebnej stratégii potrebuje spotrebiteľ informácie, ktoré opisujú jeho individuálnu situáciu a situáciu na trhu, informácie o faktoroch, ktoré vplývajú na jeho rozhodovanie...“[1671]

[1671] IVANOVÁ, E.: Mikroekonómia. (2. prepracované vydanie), Trnava Artea № 1, Trnava 2005, ISBN: 80 – 8075 – 055 – 6 str. 67

Na základe týchto javov sa obyvateľ (spotrebiteľ) rozhoduje medzi individuálnou automobilovou dopravou a hromadnou osobnou dopravou. Tabuľka č. 3 poukazuje na najvýznamnejšie faktory v objeme prepráv hromadnou osobnou dopravou.

Faktor	Uplatnenie faktora pre zvýšenie počtu cestujúcich
Cena	Primerané cestovné a cielené zľavy
Rýchlosť	Poskytovanie služieb s vysokou rýchlosťou premiestnenia, opatrenia pre preferenciu vozidiel hromadnej osobnej dopravy
Informácie	Poskytovanie informácií o tom kde, kedy a ako využiť služby hromadnej osobnej dopravy
Bezpečnosť	Zaistiť, aby dopravné prostriedky, zariadenia (napr. autobusové stanice) a s dopravou súvisiace oblasti boli bezpečné
Komfort	Poskytovanie primerane kvalitných služieb s obmedzením preplňovania vozidiel
Integrácia	Tvorba integrovaných dopravných systémov
Dostupnosť	Rozvoj systémov s väčšou dostupnosťou územia, rôznorodosť dopravných systémov
Prestíž	Vhodné a ústretové správanie k cestujúcim a prezentácia hromadnej osobnej dopravy ako vhodného spôsobu prepravy

Zdroj: Victoria Transport Policy Institute: Transit Evaluation – Determining the Value of Public Transit Service, 2005

Tab. 3 Najvýznamnejšie faktory vplývajúce na dopyt po hromadnej osobnej doprave

Z uvedených faktorov je cena najdôležitejším faktorom ovplyvňujúcim dopyt po verejnej osobnej doprave. V dokumente „Vypracovanie a poskytnutie plánu dopravnej obslužnosti – pilotná štúdia, etapa 3“, ktorý vypracovalo združenie Prodos a výskumný ústav dopravy, a.s. v Žiline, v tejto súvislosti uvádzajú, že ***„V súvislosti s najvýznamnejším faktorom determinujúcim dopyt – cenou za prepravu – je potrebné uvažovať s rizikom presunu cestujúcich z hromadnej osobnej dopravy na používanie osobných automobilov.***“[1672]

Komparácia nákladov na pravidelnú autobusovú dopravu a individuálnu automobilovú dopravu

[1672] Združenie Prodos, VÚD, a.s. v Žiline : Vypracovanie a poskytnutie plánu dopravnej obslužnosti – pilotná štúdia, etapa 3, Návrh dopravnej obslužnosti Košického samosprávneho kraja, júl 2007

V uvedenom pláne dopravnej obslužnosti Košického samosprávneho kraja porovnávajú cenu (Sk/os) v súvislosti s prepravou osôb prímestskou autobusovou dopravou a nákladmi na pohonné hmoty pri použití osobného automobilu (Sk/os) pri jeho rôznej obsaditeľnosti. Porovnanie je zjednodušené, uvažuje len s nákladmi na PHM u OA, ktoré sú najväčšou variabilnou nákladovou položkou motoristu.
Pri osobnom automobile brali do úvahy priemernú spotrebu 7 litrov/100 km, vzhľadom na štruktúru osobných automobilov registrovaných v SR (v KSK) podľa druhu paliva uvažovali s benzínovými OA, a s cenou 1 litra benzínu 38,60 (9. 7. 2007, www.natankuj.sk),

Náklady na PHM pri použití osobného automobilu sú 2,70 Sk/km, ktoré stanovili podľa vzťahu:

$$\text{náklady na PHM} = \frac{\text{spotreba PHM (litre/100 km)}}{100} \cdot \text{cena PHM (Sk/l)}$$

Na základe uvedenej spotreby PHM a pri obsadení OA jedným až piatimi cestujúcimi stanovili náklady na PHM u OA (Sk/os) na základe súčinu priemernej tarifnej vzdialenosti PAD v km a nákladov na PHM v Sk/oskm pri konkrétnej obsaditeľnosti OA.

Náklady na PHM prepočítané na oskm pri rôznej obsaditeľnosti osobného automobilu:

- 1 osoba: $\frac{2{,}70\,\text{Sk/km}}{1\,\text{osoba}} = 2{,}70\,\text{Sk/oskm}$
- 2 osoby: $\frac{2{,}70\,\text{Sk/km}}{2\,\text{osoby}} = 1{,}35\,\text{Sk/oskm}$
- 3 osoby: $\frac{2{,}70\,\text{Sk/km}}{3\,\text{osoby}} = 0{,}90\,\text{Sk/oskm}$
- 4 osoby: $\frac{2{,}70\,\text{Sk/km}}{4\,\text{osoby}} = 0{,}68\,\text{Sk/oskm}$
- 5 osôb: $\frac{2{,}70\,\text{Sk/km}}{5\,\text{osôb}} = 0{,}54\,\text{Sk/oskm}$

PAD			OA				
Tarifná vzdialenosť (km)	**Priem. tarif. vzdialenosť (km)**	**Cestovné (Sk/os)**	**OA, 1 osoba (Sk/os)**	**OA, 2 osoby (Sk/os)**	**OA, 3 osoby (Sk/os)**	**OA, 4 osoby (Sk/os)**	**OA, 5 osôb (Sk/os)**
do 4	**2,5**	**9,0**	6,75	3,375	2,25	1,7	1,35
5 - 7	**6**	**10,0**	16,2	8,1	5,4	4,08	3,24
8 - 10	**9**	**14,0**	24,3	12,15	8,1	6,12	4,86
11 - 13	**12**	**18,0**	32,4	16,2	10,8	8,16	6,48
14 - 17	**15,5**	**22,0**	41,85	20,93	13,95	10,54	8,37
18 - 20	**19**	**25,0**	51,3	25,65	17,1	12,92	10,26
21 - 25	**23**	**31,0**	62,1	31,05	20,7	15,64	12,42
26 - 30	**28**	**40,0**	75,6	37,8	25,2	19,04	15,12
31 - 35	**33**	**47,0**	89,1	44,55	29,7	22,44	17,82
36 - 40	**38**	**53,0**	102,6	51,3	34,2	25,84	20,52
41 - 45	**43**	**58,0**	116,1	58,05	38,7	29,24	23,22
46 - 50	**48**	**66,0**	129,6	64,8	43,2	32,64	25,92
51 - 55	**53**	**74,0**	143,1	71,55	47,7	36,04	28,62
56 - 60	**58**	**78,0**	156,6	78,3	52,2	39,44	31,32
61 - 70	**65,5**	**89,0**	176,85	88,43	58,95	44,54	35,37
71 - 80	**75,5**	**100,0**	203,85	101,93	67,95	51,34	40,77
81 - 90	**85,5**	**117,0**	230,85	115,43	76,95	58,14	46,17
91 - 100	**95,5**	**128,0**	257,85	128,93	85,95	64,94	51,57

Zdroj: Združenie Prodos, VÚD, a.s. v Žiline : Vypracovanie a poskytnutie plánu dopravnej obslužnosti – pilotná štúdia, etapa 3, Návrh dopravnej obslužnosti Košického samosprávneho kraja, júl 2007

Tab.4 Porovnanie cestovného v PAD a osobného automobilu v Sk/os podľa priemernej tarifnej vzdialenosti PAD (SAD KDS)

Legenda:

- **PAD je ekonomicky výhodnejšia ako OA**
- **OA je ekonomicky výhodnejší ako PAD**
- **PAD je rovnako ekonomicky výhodná ako OA**

Z takéhoto zjednodušeného pohľadu vychádza preprava osôb osobným automobilom ako ekonomicky výhodnejšia už pri preprave dvoch osôb pri určitých prepravných vzdialenostiach a pri troch a až piatich prepravovaných osobách je ekonomickejší už iba individuálny motorizmus. Práve tento spôsob prepočtu nákladov na dopravu je vžitý medzi verejnosťou. Neuvažuje sa s nákladmi na údržbu a opravy, náklady na odpisy, povinné zmluvné poistenie, prípadne havarijné poistenie vozidla a s poplatkami za parkovanie.

Na základe uvedených skutočností bolo zrealizované porovnanie PAD a OA nielen použitím základnej náhrady pri uvažovaní nákladov na pohonné látky, ale aj ostatných nákladov OA použitím základnej náhrady 6,20 Sk/km podľa Zákona NR SR č.283/2002 Z. z. o cestovných náhradách v znení neskorších predpisov.

Náklady na PHM + základná náhrada = 2,70 Sk/km + 6,20 Sk/km = 8,90 Sk/km

A ďalej :

(Náklady na PHM + základná náhrada)/ počet prepravených osôb = náklady na PHM a základnú náhradu v Sk/oskm

V tabuľke 5 je uvedené porovnanie cestovného PAD a použitie osobného automobilu pri jeho rôznej obsaditeľnosti, ak uvažujeme s nákladmi na PHM a ostatnými nákladmi vyjadrenými základnou náhradou (6,20 Sk/km). Pri takomto porovnaní vychádza ako efektívnejší druh dopravy PAD.

PAD			OA				
Tarifná vzdialenosť (km)	Priem. tarif. vzdialenosť (km)	Cestovné (Sk/os)	OA, 1 osoba (Sk/os)	OA, 2 osoby (Sk/os)	OA, 3 osoby (Sk/os)	OA, 4 osoby (Sk/os)	OA, 5 osôb (Sk/os)
Do 4	**2,5**	**9,0**	22,25	11,13	7,425	5,56	4,45
5 - 7	**6**	**10,0**	53,4	26,7	17,85	13,35	10,68
8 - 10	**9**	**14,0**	80,1	40,05	26,73	20,03	16,02
11 - 13	**12**	**18,0**	106,8	53,4	35,64	26,7	21,36
14 - 17	**15,5**	**22,0**	137,95	68,98	46,04	34,49	27,59
18 - 20	**19**	**25,0**	169,1	84,55	56,43	42,28	33,82
21 - 25	**23**	**31,0**	204,7	102,35	68,31	51,18	40,94

26 - 30	**28**	**40,0**	249,2	124,6	83,16	62,3	49,84
31 - 35	**33**	**47,0**	293,7	146,85	98,01	73,43	58,74
36 - 40	**38**	**53,0**	338,2	169,1	112,86	84,55	67,64
41 - 45	**43**	**58,0**	382,7	191,35	127,71	95,68	76,54
46 - 50	**48**	**66,0**	427,2	213,6	142,56	106,8	85,44
51 - 55	**53**	**74,0**	471,7	235,85	157,41	117,93	94,34
56 - 60	**58**	**78,0**	516,2	258,1	172,26	129,05	103,24
61 - 70	**65,5**	**89,0**	582,95	291,48	194,54	145,74	116,59
71 - 80	**75,5**	**100,0**	671,95	335,98	224,24	167,99	134,39
81 - 90	**85,5**	**117,0**	760,95	380,48	253,94	190,24	152,19
91 - 100	**95,5**	**128,0**	849,95	424,98	283,64	212,49	169,99

Zdroj: Združenie Prodos, VÚD, a.s. v Žiline : Vypracovanie a poskytnutie plánu dopravnej obslužnosti – pilotná štúdia, etapa 3, Návrh dopravnej obslužnosti Košického samosprávneho kraja, júl 2007

Tab. 5 Porovnanie cestovného v PAD a osobného automobilu (Sk/os) pri uvažovaní nákladov na PHM aj cestovných náhrad podľa priemernej tarifnej vzdialenosti PAD (SAD KDS)

Záver

PAD a IM prepravujú na približne rovnakú priemernú vzdialenosť (graf č.1). Cestujúca verejnosť pri rozhodovaní, ktorý druh dopravy zvolí vychádza z jednoduchého porovnávania nákladov na spotrebu PHM a počtu prepravovaných osôb. Vzniká tu mylná predstava, že používanie osobného automobilu je efektívnejšie. Pri stanovení celkových nákladov, ktoré zohľadňujú aj náklady na PHM a cestovné náhrady je efektívnejšia PAD. Cena cestovného lístka je však iba jeden aj keď dôležitý faktor, ktorý ovplyvňuje dopyt po preprave prostredníctvom PAD. Cestujúci pri svojom rozhodovaní však berie do úvahy aj iné faktory, ako je dostupnosť, časová náročnosť, pohodlie, kultúra cestovania a pod. Preto je potrebné nezabúdať a nepodceňovať aj na ostatné faktory, ktoré môžu zvýšiť dopyt po službách PAD.

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MANAŽMENT INOVÁCII

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Abstrakt

Manažment inovácii je ucelený manažérsky nástroj pre efektívne riadenie procesov inovácii v podnikateľskej jednotke. Hlavným úkolom a cieľom manažmentu inovácii je racionálne a efektívne riadiť inovácie, ktoré rýchle pružne reflektujú potreby zákazníkov v harmonickom súlade s potrebami výrobcov. Výsledkom komplexných inovačných akcií sú výrobky a služby s maximálnou hodnotou pre zákazníka. Veľkú úlohu tu zohráva tímová práca, tvorivý duch a vitalita.

Kľúčové slová

konkurencia, inovácie, podnik, zákazník, manažment, trhové prostredie, segmentácia, manažérske inovácie, produktové inovácie, cieľavedomá ľudská aktivita

Abstract

Management of innovation is integrated control instrument that is used for an effective operation of innovation processes in entrepreneurial unit. The main aim and target of management of innovation is a rational and an effective innovation control that dynamically reflects requirements of customers that are in harmonic accord with requirements of producers. Result of complex innovation actions are products and services with maximum customer value. Team work, creative mind and vitality play an important role.

Key words

competition, innovation, company, account, management, market environment, segmentation, manager innovations, product innovations, purposeful human activity

Inovačný manažment, manažment inovácií alebo riadenie inovácií? Majú tieto slovné spojenia rovnaký obsah? A je ich obsah jednoznačne určený? Odpovede na túto tému budú závisieť od diskutujúcich, od ich vedomostí, skúseností a odbornosti, ako aj ich spôsobu myslenia.

V literatúre možno nájsť rozsiahle množstvo definícií pojmu inovácia. Svedčí to o potrebe ľudí pomenovať jav (vytvárania nového), ktorý podmieňuje rozvoj ľudstva. Existujúce definície pojmu inovácia sú vždy poznačené subjektívnym pohľadom autorov na problematiku vytvárania niečoho nového.

Súčasné chápanie pojmu inovácia zvýrazňuje jej:

- spätosť so spôsobom života organizácie, s myslením a správaním ľudí,
- vplyv na všetky zložky reprodukčného procesu,
- vplyv a zároveň závislosť od významných prvkov systémového okolia organizácie, ktorá inováciu vytvára a ponúka na trh.

Pri výbere definície tohto kľúčového pojmu pre manažéra – podnikateľa treba dať dôraz na jeho globálne poňatie. Túto požiadavku spĺňa nasledovná definícia tohto pojmu:

„Inovácia je praktické prenesenie ideí do nových produktov (výrobkov a služieb), procesov, systémov a spoločenských vzťahov“.[1673]

Z vecného hľadiska sú inovácie najčastejšie rozdeľované na výrobkové, procesné (technologické), prípadne ich kombinácie.

Výrobkové inovácie sú zamerané:

- na zdokonaľovanie parametrov a vlastností už vyrábaných výrobkov,
- na vytvorenie celkom nových výrobkov, založených na nových konštrukčných koncepciách a princípoch uspokojujúcich nové potreby zákazníkov.

[1673] TUREKOVÁ H., MIČIETA B.: Inovačný manažment – východiská, overené postupy, odporúčania

Cieľom výrobkových inovácií býva najčastejšie snaha podnikateľov o zachovanie trhového podielu, zvýšenie ziskovosti a konkurencieschopnosti organizácie a zabezpečenie nových trhov.

Procesné inovácie (t. j. technologické, v riadení a správe) sú najčastejšie zamerané:

- na zníženie materiálovej spotreby, mzdových nákladov, energetickej spotreby, nepodarkovosti, zlepšenie pracovných podmienok a podobne.

Zvlášť pri výrobkoch založených na nových technologických koncepciách a princípoch môže pokles výrobných nákladov nadobúdať značné rozmery. To umožňuje voliť nové varianty marketingovej stratégie.

Pri uvedenom členení sa dostávajú do úzadia služby. Členenie inovácií na výrobkové a procesné je odrazom potrieb zmien minulého storočia. Dnes sú rovnako dôležité služby ako aj výrobky slúžiace na uspokojovanie potrieb. Preto je užitočné také členenie inovácií, ktoré bude zahŕňať a zvýrazňovať rovnako výrobky i služby – produkty. Produkt možno charakterizovať ako výsledok cieľavedomej ľudskej činnosti a je odpoveďou na otázku *Čo* poskytnúť zákazníkom. Manažéri organizácii však rozhodujú nielen o tom, čo poskytnúť zákazníkovi, ale aj *AKO* požadované výstupy dosiahnuť. Preto i spôsoby dosahovania výsledkov musia byť predmetom inovačného procesu. Pri takomto chápaní možno členiť inovácie na produktové a manažérske, pričom výraznou odlišnosťou uvedených skupín je ich rozdielne zameranie:

Produktové inovácie

Sú zamerané na zvýšenie záujmu zákazníkov o produkt (výrobok alebo službu). Inovácia je zameraná na splnenie existujúcich, alebo predvídaných potrieb zákazníka.

Manažérske inovácie

Sú zamerané na zvýšenie efektívnosti všetkých činností manažéra. Inovácia je zameraná do vnútra organizácie na procesy prebiehajúce v produkčnom systéme.

V predmetnej definícii sú zdôraznené tiež *inovácie systémov a spoločenských vzťahov.* Tu už nie je materializácia novej idey taká zjavná ako pri výrobku či technológii. Zmeny sa týkajú najčastejšie organizácie práce, zmeny správania sa ľudí a zmeny správania sa organizácie v trhovom prostredí. Schopnosť nachádzať nové poznatky, vidieť možnosti užitočných zmien sa označuje ako invencia. Nie všetky nové poznatky prerastú do fázy realizácie, nie všetky sa stanú inováciami. Zvládnutie premeny invencie v inováciu vyžaduje rad činností, ktoré môžu v podstatnej miere ovplyvniť rýchlosť a efektívnosť tohto procesu. Na proces inovácie sa možno pozerať z rôznych hľadísk. Vhodne sa to dá ilustrovať na rôznorodosti vnímania procesu inovácie z hľadiska:

1. marketingu
2. kvality
3. prognózovania

Z marketingového hľadiska, vývoju nového produktu predchádza segmentácia trhu, výber zákazníckych skupín a stanovenie požadovaného umiestnenia na trhu.
Marketingová koncepcia riadenia predpokladá, že logickým východiskom pre vyhľadávanie nápadov na nové výrobky sú potreby a priania zákazníkov. Nové výrobky sú tvorené nie pre dnešné, ale pre zajtrajšie trhy.

Rovnako dôležitá je i *kvalitatívna stránka inovačného procesu*. Z tohto hľadiska sa možno na výrobok pozerať ako na komplex hmotných a nehmotných znakov, ktorý je schopný uspokojovať určité potreby. Medzi najdôležitejšie znaky výrobku možno zahrnúť: funkčnosť, trvanlivosť, ovládateľnosť, hygienickosť, bezpečnosť použitia, estetickú pôsobnosť a ekologickú neškodnosť.

Proces inovácie je úzko zviazaný s *prognózovaním v inovačnom procese*. Objektom prognózovania v inovačnom procese sú najčastejšie odhady zmien trhov, potreby zákazníkov, vývoj kapacity trhov, vývoj u konkurentov a podobne.

Poznatky z firmy KPK spol. s r. o., Martin

Začiatkom transformácie v 90–tých rokoch sa vytvorili podmienky pre vznik spoločností, ktoré promptne reagujú na požiadavky zákazníka. Systém tzv. „typových výrobkov“, čo platilo aj u žeriavov už nespĺňal

individuálne požiadavky odberateľov. Spoločnosť KPK spol. s r. o., Martin vznikla v roku 1993 ako reakcia na požiadavky trhu. Najskôr ako konštrukčno-projekčná kancelária v roku 1991 a v roku 1993 ako spoločnosť s ručením obmedzeným reagujúca na požiadavky trhu. V tom čase začínala s troma pracovníkmi, z čoho dvaja boli konatelia spoločnosti s dlhoročnou praxou v oblasti projektovania a konštrukcie a tretí s dlhodobou praxou v oblasti projektovania strojárskych výrobných systémov. V počiatočných rokoch sa KPK s. r. o., Martin zaoberala len projektovaním vyhradených technických zariadení a to hlavne žeriavov, zdvíhadiel a manipulačnej techniky. Po veľmi krátkej dobe sa ukázalo, že zvolený systém nespĺňa požiadavky zákazníkov na pružnosť, kvalitu a bolo potrebné ďalšie rozhodujúce činnosti okrem konštrukcie a projekcie - výrobu oceľových konštrukcií, elektrických zariadení vrátane montáže a servisu zefektívniť, zvýšiť akosť, čo si vyžiadalo investície do vlastných výrobných priestorov, technologických zariadení a následného získania potrebných oprávnení a certifikátov.

Rok 1995 znamenal pre spoločnosť KPK s. r. o., Martin významný krok vpred. Počet pracovníkov stúpol na 15, vrátane výrobných pracovníkov. Prenajala si výrobné priestory, v ktorých už s vlastnými pracovníkmi začala s výrobou naprojektovaných zariadení. Podobne montáž, finalizácia a skúšky zariadení u zákazníkov zabezpečovali kmeňoví pracovníci spoločnosti. V roku 1997 výrobnú halu odkúpila a došlo k výraznému nárastu počtu pracovníkov najmä vo výrobe a v roku 2000 k nej pribudla nová administratívna budova, kde sa v súčasnosti nachádza sídlo spoločnosti. Oba objekty tvoria ucelený komplex. V roku 2003 spoločnosť kúpila ďalšiu nehnuteľnosť, kde plánovala rozšíriť výrobu v oblasti mechanického opracovania a premiestniť elektroinštalačnú dielňu. V roku 2005 pribudla k majetku spoločnosti ďalšia nehnuteľnosť – výrobná hala, vďaka ktorej spoločnosť rozšírila výrobu o montáž a finalizáciu výrobkov. Koncom tohto roku došlo k rozšíreniu spoločnosti vstúpením do spoločnosti MONT IRP spol. s r. o., Žilina.

V súčasnosti má spoločnosť cca 75 vlastných zamestnancov v KPK spol. s r. o., Martin a 120 v MONT IRP spol. s r. o. Žilina, ktorí zabezpečujú všetky činnosti od projekcie cez výrobu a montáž. Sedem spolupracujúcich firiem pracuje na zákazkách KPK spol. s r. o. ako subdodávatelia pri výrobe, montáži a servise nielen na Slovensku ale aj v zahraničí. Samozrejmosťou je vybudovaná servisná sieť, sklad náhradných dielov čím spoločnosť KPK spol. s .r. o. garantuje nástup na servisný úkon do 12 hodín na území Slovenska.
V dnešnej dobe spoločnosť KPK s. r. o., Martin stavia na pružnosti, vysokej kvalite, kvalitnom servise a taktiež na progresívnych technických riešeniach a plnení požiadaviek užívateľov, čím si zabezpečuje

dominantné postavenie nielen na Slovenskom trhu, ale aj v zahraničí ako seriózny a spoľahlivý obchodný partner.

Aby firma mohla zabezpečiť a udržať svoju prosperitu a úspešnosť na trhu čo najdlhšie, uvedomuje si, že musí rozširovať svoje silné a odstraňovať svoje slabé stránky, neustále odhaľovať a využívať svoje špecifické prednosti. Preto využíva tiež inovácie, dopĺňanie a rozširovanie podľa zvolenej stratégie. Medzi ich priority patrí nie len udržanie si existujúcu klientelu, ale aj oslovenie a získanie si nových partnerov.

Za inováciu budúceho štýlu manažmentu ako oblasť podnikového riadenia KPK spol. s r. o. považuje manažérsku etiku. Tým, že firma nahliada na manažérsku etiku ako na inováciu, manažment ju chápe ako: vývojovú zmenu metód a nástrojov manažmentu v súlade s rozvojom techniky a novými potrebami ekonomického rozvoja, stimul pre hľadanie nových metód a nástrojov vnútorného riadenia v konkrétnych podmienkach, motiváciu pre formovanie vlastnej osobnosti a východisko k uplatňovaniu systémového prístupu v rozhodovaní, ktoré tvorí základnú činnosť manažmentu a tiež požiadavku na rýchle prispôsobenie sa meniacich podmienok. Dynamický vývoj techniky vyžaduje rýchle uplatňovanie zmien v správaní riadených objektov, aby sa predchádzalo stratám. Keďže firma pokladá uplatňovanie zmeny za inováciu, vychádza z metodických požiadaviek inovačnej teórie, pričom stále zdôrazňuje význam podmienky: komplexnosť, sústavnosť, dôslednosť a včasnosť. Tiež si uvedomuje, že nedodržiavanie základných podmienok ovplyvňuje kvalitu a efektívnosť uplatnených zmien.

Na druhej strane si firma uvedomuje, že vedecko-technický rozvoj sa obvykle nerealizuje ako komplex zmien, ale skôr ako výstrel vo vnútri jednej oblasti. Každý posun vedecko-technického rozvoja v oblasti strojárenstva považuje za podnetnú inováciu, ktorá vyvoláva potrebu uplatnenia ďalších zmien (vyvolávajúcich inováciu) v konkrétnej sústave faktorov, ktoré reprezentujú a zobrazujú oblasť a úroveň. Hľadá cesty k tomu, aby zabezpečila jej komplexné pôsobenie a tým zvyšovala jej efektívnosť.

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FINANCOVANIE CESTNEJ INFRAŠTRUKTÚRY V SLOVENSKEJ REPUBLIKE

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FAKULTA SOCIÁLNO-EKONOMICKÝCH VZŤAHOV, TRENČIANSKA UNIVERZITA A. DUBČEKA V TRENČÍNĚ

Abstrakt

Významným faktorom, ktorý ovplyvňuje ekonomickú úroveň krajiny a regiónu, je cestná infraštruktúra. Stav cestnej infraštruktúry v Slovenskej republike zaostáva za potrebami. Zlepšovanie stavu cestnej siete výstavbou, rekonštrukciami a opravami ciest a objektov je financované najmä zo štátneho rozpočtu, zo spoplatnenia cestnej siete, z úverov a z prostriedkov európskych fondov. Pripravuje sa spoplatňovanie diaľnic a rýchlostných ciest elektronickým výberom mýta a využívanie projektov verejno-privátneho partnerstva. Nevyhnutné je hľadanie nových zdrojov financovania a ich efektívne využívanie.

Príspevok je súčasťou výskumnej úlohy VEGA č. 1/3795/06 "Vplyv kapitálových investícií na vyrovnávanie rozdielov ekonomickej úrovne regiónov SR".

Kľúčové slová

Cestná infraštruktúra, finančné zdroje, fondy EÚ, verejno-privátne partnerstvá.

Abstract

Significant factor, which affects the economic level of country and region, is the road infrastructure. The road infrastructure level in Slovak Republic tails away the needs. Improvement of the condition of the road network by construction, reconstructions and repairs of roads and facilities is financing especially from the state budget, charges of using road network, loans, and from EU funds resources. The toll payment and the public-private partnership makes ready. Looking for new resources and their effective exploitation are necessary. This article is the component of grant VEGA n. 1/3795/06 "Efficiency of capital investment in addressing the differences in the level of economic development between the regions in the Slovak Republic".

Key words

Road infrastructure, financial resources, EU funds, Public-Private Partnership.

Úvod

Rozvinutá dopravná infraštuktúra je základným predpokladom fungovania ekonomiky každého štátu. Prudký rozvoj cestnej dopravy a najmä nárast individuálnej dopravy, ktorý súvisí s rastom životnej úrovne, spôsobuje čoraz väčšie využívanie cestnej infraštruktúry na úkor infraštruktúry železničnej dopravy. To vyvoláva nevyhnutnosť modernizácie a rozširovania kapacity cestnej siete.

1. Charakteristika cestnej infraštruktúry

Cestná infraštruktúra je jedným z kľúčových faktorov, ktoré ovplyvňujú tak ekonomický rozvoj, ako aj priestorové usporiadanie štátu, ale je tiež limitujúcim faktorom rozvoja územia. Cestnú sieť predstavujú diaľnice, rýchlostné cesty, cesty I., II. a III. triedy, miestne komunikácie a účelové komunikácie. Ich súčasťou sú všetky zariadenia, stavby, objekty a diela, ktoré sú potrebné pre ich úplnosť, zabezpečenie a ochranu, a tiež na zaistenie bezpečnej, rýchlej, plynulej a hospodárnej premávky na nich. Cestné komunikácie sú určené na vzájomné dopravné spojenie medzi sídelnými útvarmi alebo ich záujmovým územím, medzi krajmi a okresmi.

Významnú úlohu pri hodnotení cestnej infraštruktúry zohrávajú najmä hustota cestnej siete, dopravná kapacita, kvalita vozoviek, údržba, ale aj poskytované služby a ich kvalita. Pre krajinu a jednotlivé regióny majú nezastupiteľný význam všetky kategórie cestných komunikácií.

2. Stav cestnej infraštruktúry v SR

Cestná infraštruktúra patrí v Slovenskej republike z hľadiska jej využívania, ako aj pôsobenia jej účinkov a vplyvov na život občanov a životné prostredie medzi jednu z najdôležitejších oblastí podmieňujúcich fungovanie spoločnosti. Má pre ekonomiku nielen národohospodársky, ale aj štátnopolitický, administratívny a kultúrno-spoločenský význam.

Najstaršie cesty na území dnešnej SR boli budované ešte za čias Keltov. Postupne boli rozširované a modernizované v závislosti od ekonomického a politického stavu krajiny. V najlepšom stave boli hlavné obchodné a banské cesty, celkovo však bola cestná sieť ešte aj po prvej svetovej vojne veľmi nekvalitná, komunikácie boli prevažne úzke a nespevnené. Až po druhej svetovej vojne bola vytvorená jednotná cestná

sieť a od roku 1961 sa komunikácie delili na diaľnice, cesty, miestne a účelové komunikácie. Počas Československej republiky však bola cestná sieť na Slovensku menej vybudovaná a menej kvalitná ako v Čechách. Problémy s financovaním nastali aj pri vzniku samostatnej Slovenskej republiky v roku 1993 v súvislosti s prechodom financovania z federálnych na republikové zdroje. Ako tvrdí E. Ivanová, „dopravná infraštruktúra je výrazne lepšia v Českej republike ako na Slovensku, ak budeme vychádzať z hustoty infraštruktúry na 100 km². Hustota diaľnic je v oboch krajinách porovnateľná, ale hustota ciest a železničných tratí je v ČR niekoľko krát vyššia. Dopravná sieť ČR je najlepšia v strednej a východnej Európe“(1,s.28).

V posledných rokoch nastal rozmach výstavby diaľnic aj rýchlostných ciest, a tiež sa uskutočňujú nevyhnutné opravy a rekonštrukcie ostatných kategórií ciest.

Vývoj jednotlivých kategórií cestných komunikácií v SR v rokoch 1999 – 2006 je znázornený v tabuľke 1.

Rok	Cesty a diaľnice						Cestné komunikácie spolu	Miestne komunikácie	Cestné a miestne komunikácie spolu
	diaľnice a diaľničné privádzače	z toho diaľnice	rýchlostné cesty	cesty I. triedy	cesty II. triedy	cesty III. triedy			
	[km]								
1999	295,0	295,0	*	3 220,1	3 826,2	10 392,6	17 733,9	24 978,7	**42 712,6**
2000	295,7	295,7	*	3 221,7	3 826,3	10 393,7	17 737,4	25 219,9	**42 957,3**
2001	298,7	296,4	*	3 220,4	3 827,9	10 391,4	17 738,4	25 219,9	**42 958,3**
2002	306,5	301,6	*	3 224,3	3 828,7	10 395,5	17 754,9	25 219,9	**42 974,8**
2003	318,2	312,8	*	3 334,7	3 728,7	10 396,0	17 777,6	25 219,9	**42 997,5**
2004	322,4	316,2	78,0	3 263,3	3 729,0	10 393,9	17 786,5	25 219,9	**43 006,4**
2005	333,7	327,5	79,7	3 341,1	3 733,5	10 400,6	17 809,0	25 219,9	**43 028,9**
2006	333,7	327,5	104,7	3 359,0	3 742,1	10 398,8	17 833,6	25 942,0	**43 775,6**

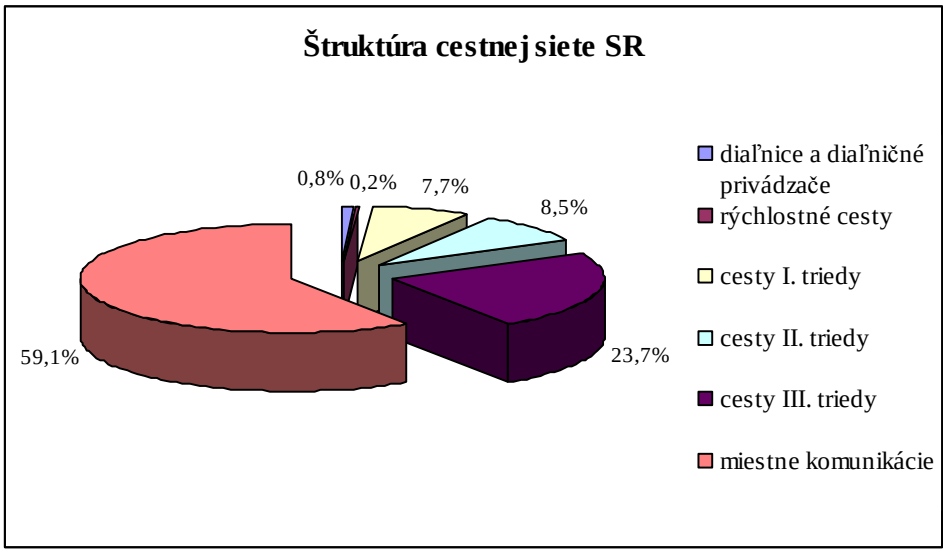
Tabuľka 1: Vývoj siete cestných komunikácií v SR v rokoch 1999-2006

*zahrnuté v cestách I.-III. triedy

Zdroj: vlastné spracovanie podľa údajov Cestnej databanky Slovenskej správy ciest

Ako z údajov v predchádzajúcej tabuľke vyplýva, dĺžka ciest a miestnych komunikácií sa mení iba veľmi mierne. V roku 2006 sa výraznejšie zvýšila iba dĺžka rýchlostných ciest – o 25 km, mierne tiež dĺžka ciest I. a II. triedy. Dĺžka miestnych komunikácií sa v rokoch 2000-2005 nemenila, ale v roku 2006 sa zvýšila o 722,1 km. Toto výrazné zvýšenie je spôsobené tým, že štatistické zisťovanie o dĺžke miestnych komunikácií a ich objektoch sa uskutočňuje raz za päť rokov.

Štruktúra cestnej siete SR v roku 2006 je názorne zobrazená v grafe 1.



Graf 1: Štruktúra cestnej siete Slovenskej republiky k 31. 12. 2006 (%)

Zdroj: vlastné spracovanie

Z grafu 1 vyplýva, že miestne komunikácie predstavujú takmer 3/5 celkovej dĺžky pozemných komunikácií SR. Takmer ¼ cestnej siete tvoria cesty III. triedy. Cesty I., resp. II. triedy predstavujú 7,7 %, resp 8,5 % z celkovej cestnej siete. Diaľnice a rýchlostné komunikácie spolu tvoria iba 1 % z celkovej dĺžky pozemných komunikácií.

Čo sa týka rozloženia cestnej siete v jednotlivých regiónoch (krajoch), možno konštatovať, že na dĺžku cestnej siete a jej hustotu vplýva viacero faktorov ako sú napr. poloha regiónu, členitosť územia, rozloha, počet obyvateľov a iné. Tabuľka 2 charakterizuje vybavenosť krajov SR cestnou infraštruktúrou.

Kraj	Diaľnice a diaľničné privádzače	Cesty I. triedy	Cesty II. triedy	Cesty III. triedy	Spolu	Rozloha	Počet obyvateľov	Hustota cestnej siete	
	km	km	km	km	km	km^2	počet	km/km^2	km/1000 obyv.

BA	107,214	130,309	210,427	353,079	800,844	2053	601.132	0,390	1,332
TT	67,242	291,014	535,873	1056,859	1950,988	4148	553.198	0,470	3,527
TN	77,090	307,559	349,376	1139,334	1873,359	4502	601.392	0,416	3,115
NR	-	517,749	500,223	1541,200	2559,172	6344	709.350	0,403	3,608
ZA	46,534	506,177	318,057	1120,276	1991,044	6788	694.129	0,293	2,868
BB	-	612,910	718,371	1851,087	3182,368	9455	658.368	0,337	4,834
PO	30,492	626,650	523,608	1916,163	3096,913	8993	796.745	0,344	3,887
KE	5,325	366,651	586,198	1420,771	2378,945	6751	770.508	0,352	3,088
Spolu	333,712	3359,019	3742,133	10398,769	17833,633	49033	5.384.822	0,364	3,312

Tabuľka 2: Základné údaje o sieti cestných komunikácií v krajoch SR (stav k 1. 1. 2007)

Zdroj: vlastné spracovanie podľa www.ssc.sk

Najväčšia dĺžka diaľnic je v Bratislavskom kraji, až 1/3 z celkovej dĺžky diaľnic v SR. Nasleduje Trenčiansky, Trnavský, Žilinský a Prešovský kraj. V Košickom kraji je iba 5,325 km diaľnice, a v Banskobystrickom a Nitrianskom kraji sa nenachádza žiadna diaľnica. Celkovo najväčšia vybavenosť cestami je v Banskobystrickom a Prešovskom kraji, čo súvisí s ich rozlohou. Najväčšia hustota cestnej siete v km/km2 je v Trnavskom, Trenčianskom a Nitrianskom kraji, naopak najmenšia hustota ciest je v Žilinskom kraji. Čo sa týka dĺžky cestnej siete pripadajúcej na 1000 obyvateľov, najlepším v tomto ukazovateli je Banskobystrický kraj, najhorším je Bratislavský kraj.

Celková dĺžka ciest a diaľnic v SR k 1. 1. 2007 je 17833,6 km, čo predstavuje hustotu 0,364 km/km^2, a 3,312 km/1000 obyv. Dĺžka miestnych komunikácií je 25942 km, t. j. hustota v km/km^2 je 0,529, a 4,8 km/tis. obyvateľov. Dĺžka cestných a miestnych komunikácií spolu je 43775 km, čo predstavuje hustotu 892,8 km/tis. km^2 a 8,1 km/tis. obyvateľov.

Na základe uvedených analýz možno konštatovať, že súčasný stav cestnej infraštruktúry je charakterizovaný relatívne hustou sieťou ciest, avšak s relatívne nízkym podielom ciest vyšších tried (diaľnice a rýchlostné cesty) pričom najmä na hlavných medzinárodných cestných spojeniach dochádza k prekročeniu existujúcej kapacity ciest. Sieť ciest II. a III. triedy a miestnych komunikácií je hustá a pre

dostupnosť územia postačujúca, avšak technický stav týchto ciest i ciest I. triedy a im prislúchajúcich cestných stavieb je nevyhovujúci.

3. Financovanie cestnej infraštruktúry

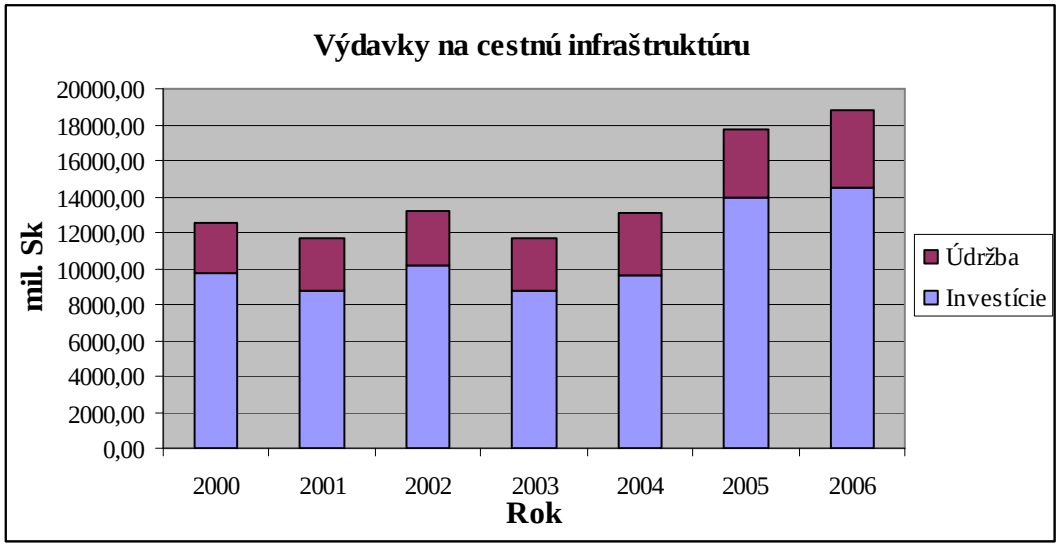
Hoci sa na financovanie cestnej infraštruktúry každoročne vynakladajú nemalé prostriedky, predsa ich množstvo stále ďaleko zaostáva za potrebami. Objem výdavkov do cestnej infraštruktúry podľa zisťovania Ministerstva dopravy, pôšt a telekomunikácií SR v období rokov 1999-2005 uvádza tabuľka 3.

Rok	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Investície	9 680,0	8 718,3	10 209,7	8 723,9	9 610,6	13 894,8	14 439,0
Údržba	2 838,0	2 938,0	2 943,3	2 987,3	3 447,0	3 869,0	4 352,6
Spolu	**12 518,0**	**11 656,3**	**13 153,0**	**11 711,2**	**12 194,1**	**17 763,8**	**18 791,6**

Tabuľka 3: Celkové výdavky do cestnej infraštruktúry v SR, bežné ceny (v mil. Sk)

Zdroj: Štátne štatistické zisťovanie MDPT SR

Objem prostriedkov vynaložených na cestnú infraštruktúru v sledovanom období kolísal, s rastovou tendenciou v posledných troch rokoch. V roku 2006 narástol objem prostriedkov do cestnej infraštruktúry v porovnaní s rokom 2000 o viac ako 50 %, pričom najvyšší rast bol zaznamenaný v roku 2005 (zvýšenie o 45,7 % oproti roku 2004). Podiel investičných výdavkov na celkových výdavkoch tvorí zhruba ¾, najviac v roku 2004, a to 78,81 %, najmenej v roku 2003, čo činí 74,49 %. Uvedený vývoj názorne zachytáva graf 2.



Graf 2: Výdavky na cestnú infraštruktúru v SR v mil. Sk, bežné ceny

Zdroj: vlastné spracovanie

I keď sa v posledných rokoch objem prostriedkov určených na výstavbu a rekonštrukciu cestnej siete zvyšuje, stále je nedostatočný.

Na financovanie cestnej infraštruktúry sa v Slovenskej republike využívajú najmä zdroje zo štátneho rozpočtu, príjmy zo spoplatnenia cestnej siete, prostriedky z fondov Európskej únie a úverové zdroje. Ďalšími zdrojmi sa majú stať príjmy z elektronického výberu mýta od užívateľov ciest. Pripravuje sa výstavba ciest v spolupráci so súkromným sektorom (projekty verejno-privátnych partnerstiev).

Keďže správa jednotlivých zložiek (úrovní) cestnej infraštruktúry je v SR decentralizovaná, je nevyhnutné skúmať možnosti financovania cestnej infraštruktúry osobitne na každej úrovni. Vlastníci a správcovia pozemných komunikácií sú povinní ich udržiavať v stave zodpovedajúcom účelu, na ktorý sú určené.

3.1 Financovanie výstavby diaľnic a rýchlostných ciest

Vznikom Národnej diaľničnej spoločnosti a. s. (NDS) dňom 1. 2. 2005 prešli diaľnice, rýchlostné cesty a časť ciest I. triedy do jej vlastníctva a správy. K 1. 1. 2007 spravuje NDS spolu 571,606 km ciest, z toho diaľnic 325,375 km, diaľničných privádzačov 6,207 km, ciest I. triedy 233,812 km, ciest II. triedy (úseky v zložitých križovatkách) 2,690 km a ciest III. triedy 3,522 km (taktiež úseky v zložitých križovatkách).

Národná diaľničná spoločnosť je financovaná viacpilierovým systémom. Okrem prostriedkov zo štátneho rozpočtu využíva zdroje z Európskych fondov, úverov a predaja diaľničných nálepiek. Ďalším zdrojom budúcich príjmov spoločnosti má byť zavedenie mýtneho systému. Okrem toho sa plánuje výstavba diaľnic v spolupráci so súkromným sektorom (verejno-privátne partnerstvá).

Prostriedky štátneho rozpočtu sú najstaršou formou financovania cestnej infraštruktúry. Po schválení štátneho rozpočtu a následnom oznámení o pridelení finančných prostriedkov pre potreby NDS sa uzatvára medzi Národnou diaľničnou spoločnosťou a Ministerstvom dopravy, pôšt a telekomunikácií SR Dohoda o účelovosti použitia finančných prostriedkov zo štátneho rozpočtu. Jej predmetom je vymedzenie použitia

prostriedkov štátneho rozpočtu resp. dotácií pre financovanie výstavby diaľnic a rýchlostných ciest, ako i financovanie ich údržby, prevádzky a opráv.
Z fondov Európskej únie možno na financovanie cestnej infraštruktúry využiť prostriedky Európskeho fondu regionálneho rozvoja (ERDF) a Kohézneho fondu. V novom programovacom období 2007 - 2013 je v rámci Operačného programu Doprava určená z Kohézneho fondu Prioritná os 2 "Modernizácia a rozvoj cestnej infraštruktúry" na výstavbu diaľnic. Z ERDF možno prostredníctvom Prioritnej osi 5 "Modernizácia a rozvoj cestnej infraštruktúry" financovať výstavbu rýchlostných ciest a modernizáciu a výstavbu ciest I. triedy.

Národná diaľničná spoločnosť výstavbu diaľnic a rýchlostných ciest financuje aj prostredníctvom úverov, a to z Európskej investičnej banky, alebo od komerčných bánk. V septembri 2005 poskytlo Národnej diaľničnej spoločnosti úver vo výške 10 mld. Sk s dobou splatnosti do 15 rokov konzorcium bánk, pričom lídrom bola HVB Bank Slovakia. V októbri 2006 poskytla HVB Bank Slovakia nový úver vo výške 1,8 mld. Sk so splatnosťou do 15 rokov na financovanie výstavby diaľnic a rýchlostných ciest a na financovanie technológie a vozového parku.

Ďalším zdrojom financovania diaľnic a rýchlostných ciest je spoplatnenie cestnej siete – t.j. poplatok za používanie diaľnic - diaľničná nálepka. Príjem z výnosu diaľničných nálepiek je v zmysle zákona o NDS príjmom Národnej diaľničnej spoločnosti. Distribúciu a predaj diaľničných nálepiek zabezpečuje NDS prostredníctvom mandátnych spoločností na základe uzatvorených zmlúv. Cenník diaľničných nálepiek je regulovaný štátom a stanovuje ho každoročne svojim nariadením Vláda SR. V súčasnosti sa tiež pripravuje spoplatnenie používania ciest formou elektronického výberu mýta. Už od januára 2009 by sa malo elektronické mýto vyberať aj v SR, pričom zatiaľ by ho mali platiť iba vozidlá nad 3,5 t.

V zahraničí sa na financovanie výstavby diaľnic a rýchlostných ciest využíva spolupráca so súkromným sektorom - tzv. verejno-privátne partnerstvo (public-private partnership - PPP). Ide o previazanie verejného a súkromného sektora pri rozvoji infraštruktúry a verejných služieb na zmluvnom základe, pričom miera rizika sa rozloží medzi zmluvných partnerov. Súkromný partner zabezpečuje celý projekt, jeho realizáciu, implementáciu, údržbu a financovanie, pričom partner zo sektora verejnej správy zabezpečuje definovanie cieľov a kritérií projektu z hľadiska verejného záujmu, konkrétne definuje požadovanú kvalitu služieb, cenovú politiku a kontrolu stanovených cieľov a kritérií projektu z hľadiska verejného záujmu. Výhodou PPP je kvalitnejšie a efektívnejšie zabezpečenie výstavby a prevádzkovania

dopravnej infraštruktúry súkromným partnerom, lebo súkromná firma spravidla dokáže zabezpečiť úspornejší projekt, dodržať termín výstavby a neprekročiť náklady. S využívaním projektov PPP sa uvažuje aj v SR. V novembri 2007 bol zverejnený prvý tender na výstavbu vybraných úsekov diaľnice D1 prostredníctvom projektov PPP. Tento tender sa týka vypracovania projektovej dokumentácie, výstavby, financovania, prevádzky a údržby diaľnice D1 na piatich úsekoch v celkovej dĺžke 74,84 km. Koncesná lehota bude trvať najviac 30 rokov.

3.2 Výstavba a rekonštrukcia ciest I. triedy

Popri diaľniciach a rýchlostných cestách sú nosnou zložkou, ktorá zabezpečuje bez prerušenia vzájomné prepojenie sídiel, najmä cesty I. triedy. Okrem miestneho a regionálneho významu majú cesty I. triedy význam aj pre celoštátnu a medzinárodnú dopravu.

Cesty I. triedy sú až na výnimky (na území Bratislavy sú vo vlastníctve a správe mesta - spolu 50,928 km, časť ciest I. triedy v dĺžke 233,812 km spravuje NDS) vo vlastníctve a správe štátu, pričom výkon správy zabezpečuje Slovenská správa ciest - celkom 3071,233 km. Okrem toho je správcom časti ciest I. triedy v dĺžke 3,046 km Colný úrad.

Slovenská správa ciest (SSC) je samostatná rozpočtová organizácia zriadená dňa 1. 1. 1996 Ministerstvom dopravy, pôšt a telekomunikácií SR, ktorá vykonáva pre diaľnice, rýchlostné cesty, cesty I., II. a III. triedy dopravné plánovanie, ústrednú technickú evidenciu, centrálnu databanku, technický rozvoj, vrátane súvisiacej koncepčnej, koordinačnej a metodickej činnosti, vykonáva správu ciest I. triedy a pozemkov vo vlastníctve SR vrátane investorskej činnosti pre cesty I. triedy.

Koncom roka býva na základe Uznesenia vlády SR uzatvorený Kontrakt medzi Ministerstvom dopravy, pôšt a telekomunikácií SR a Slovenskou správou ciest na nasledujúci rozpočtový rok, ktorý o. i. obsahuje aj podrobný rozpis rozpočtu na uvedený rok v členení na bežné a kapitálové výdavky. Tieto prostriedky sú členené aj podľa jednotlivých zdrojov:

- vlastné príjmy SSC (z prenájmu, z poplatkov)
- bežné výdavky na opravy a údržbu ciest I. triedy
- kapitálové výdavky - prostriedky z Európskeho fondu regionálneho rozvoja v rámci Prioritnej osi 5 "Modernizácia a rozvoj cestnej infraštruktúry" - pre projekty ciest I. triedy, a prostriedky na spolufinancovanie týchto projektov zo štátneho rozpočtu.

Výstavbu ciest I. triedy je tiež možné financovať z úverov a zo súkromných zdrojov, v súčasnosti však SSC tieto alternatívy nevyužíva.

3.3 Výstavba a rekonštrukcia ciest II. a III. triedy

Cesty II. a III. triedy sú vo vlastníctve a správe samosprávnych krajov (vyšších územných celkov - VÚC), na území Bratislavy sú vo vlastníctve a správe mesta, na území mesta Košice sú cesty II. a III. triedy vo vlastníctve a správe mesta Košice.
Sieť ciest II. a III. triedy zabezpečuje dopravnú obslužnosť územia a dostupnosť obyvateľov do sídiel, v ktorých je najvyššia občianska vybavenosť. Ako sme už vyššie uviedli, jej hustota je dostatočná, avšak viac ako ¼ ich dĺžky je charakterizovaná nevyhovujúcim dopravno-technickým stavom. Základným predpokladom pre zabezpečenie prevádzkovej spôsobilosti cestnej siete je vykonávanie pravidelnej údržby a opráv ciest. Oneskorená cyklická obnova vozoviek súvisí s nedostatočným financovaním opráv ciest v minulom období, pričom ani v súčasnosti nie je úroveň financovania opráv ciest dostatočná.

Keďže vyššie územné celky spravidla nemajú dostatok finančných prostriedkov, výstavba nových ciest sa uskutočňuje len výnimočne, poväčšine zabezpečujú iba nevyhnutné opravy a rekonštrukcie existujúcich ciest. Zdrojmi financovania ciest II. a III. triedy zo strany samosprávnych krajov sú najmä prostriedky rozpočtu VÚC (bežný i kapitálový ropočet), príjmy z dane z motorových vozidiel, úvery (EIB a komerčné banky), verejno-privátne partnerstvá a fondy EÚ.
Samosprávne kraje vyrubujú daň z motorových vozidiel a stanovujú jej sadzbu, a príjem z tejto dane je príjmom rozpočtu VÚC. Cieľom jej zavedenia je zdanenie využívania komunikácií tuzemskými a zahraničnými dopravcami v súlade so zásadou EÚ o prenesení úhrady nákladov na údržbu, opravy a výstavbu pozemných komunikácií na užívateľov. Predmetom dane sú cestné motorové vozidlá a prípojné vozidlá, ktoré sú používané na podnikanie alebo v súvislosti s podnikaním.
Čo sa týka využívania fondov EÚ na financovanie regionálnych ciest, prostredníctvom Regionálneho operačného programu bude možné v novom programovacom období 2007 – 2013 realizovať aktivity zamerané na rekonštrukciu, obnovu a modernizáciu ciest II. a III. triedy, najmä na tie úseky, ktoré spájajú obce, ktoré nie sú pólmi rastu s obcami identifikovanými ako kohézne póly rastu. V rámci Priority 5 Regionálneho operačného programu sa plánuje do roku 2015 zrekonštruovať 600 km ciest II. a III. triedy, čo predstavuje 4,5 % z celkovej dĺžky siete ciest II. a III. triedy, pričom je na to predbežne vyčlenených 152 mil. EUR.

3.4 Výstavba a rekonštrukcia miestnych komunikácií

Sieť miestnych komunikácií tvoria všeobecne prístupné a používané pozemné komunikácie nezaradené do cestnej siete, ktoré slúžia miestnej doprave v zastavanom alebo k zastavaniu určenom území. Ich súčasťou sú objekty, ktoré sa na nich nachádzajú, napr. mosty, lávky, chodníky, parkoviská, detské dopravné ihriská atď. Správu a financovanie miestnych komunikácií zabezpečujú jednotlivé mestá a obce. Nedostatok kapitálových zdrojov na rozsiahlejšie investičné aktivity miest a obcí spôsobuje, že miestne komunikácie nedosahujú požadované funkčné vlastnosti. Nové miestne komunikácie sa spravidla stavajú v prípade rozširovania intravilánu, výstavby nového stavebného obvodu, výstavby nových nájomných bytov a pod. Inak sa vynakladajú iba nevyhnutné prostriedky na opravy a údržby miestnych komunikácií, aj to iba v minimálnom rozsahu.

Obce a mestá využívajú na financovanie výstavby a opráv miestnych komunikácií prostriedky zo svojho rozpočtu na základe schválených príjmov a výdavkov. Ďalšími možnými zdrojmi sú dotácie z Ministerstva výstavby a regionálneho rozvoja SR určené na výstavbu infraštruktúry. Okrem toho môžu obce na výstavbu a rekonštrukciu miestnych komunikácií využívať bankové úvery. Ďalšou možnosťou je využitie prostriedkov z fondov Európskej únie.

Štrukturálne fondy sú mnohými samosprávami často vnímané ako jediná alternatíva na realizáciu ich investičných zámerov v oblasti miestnych komunikácií. V skrátenom programovacom období 2004 – 2006 bolo možné čerpať prostriedky z Európskych fondov na rozvoj cestnej infraštruktúry v rámci Operačného programu Základná infraštruktúra prostredníctvom Priority 3 – Lokálna infraštruktúra. V novom programovacom období 2007 – 2013 na to nadväzuje Regionálny operačný program, a v rámci neho Prioritná os 4 – Regenerácia sídiel, ktorá bude podporovať aktivity zamerané o.i. aj na rekonštrukciu miestnych komunikácií a ich objektov (mostov, lávok, cyklistických trás a iných), avšak iba v obciach a mestách, ktoré sú identifikované ako kohézne a inovačné póly rastu, a tiež v obciach so separovanými a agregovanými rómskymi osídleniami. Oprávneným územím pre Regionálny operačný program, ktorý je financovaný z fondu ERDF je územie západného, stredného a východného Slovenska (t. j. územie SR okrem Bratislavského kraja). Na základe predbežne schválenej alokácie finančných prostriedkov na jednotlivé priority Regionálneho operačného programu má byť na rekonštrukciu miestnych komunikácií určených 100 mil. EUR (v bežných cenách).

Záver

„Slovenská ekonomika prešla za posledných pätnásť rokov významnými ekonomickými a spoločenskými zmenami. Najzásadnejšie boli: transformácia ekonomiky na trhovú ekonomiku, výrazné štrukturálne reformy a vstup Slovenska do Európskej únie. Slovenská ekonomika nastúpila cestu spoločnej stratégie s krajinami EÚ.“ (2, s.79). Ako konštatuje E. Ivanová vo svojom článku, SR sa stane integrálnou súčasťou EÚ nielen z hľadiska ekonomického, ale aj územného, budovanie dopravnej infraštruktúry tomuto procesu napomáha.

Slovensko má centrálnu pozíciu v rámci Európy a z tejto polohy môže ťažiť hlavne tým, že je tranzitnou krajinou, ktorá spája sever s juhom i západ s východom. Budovaním a rozširovaním svojej dopravnej siete sa Slovensko napojilo na významné európske dopravné trasy, vďaka ktorým má spojenie s dôležitými mestami i regiónmi Európy. Okrem toho má kvalitná cestná sieť význam aj pre atraktivitu územia pre investorov a pre mobilitu obyvateľov za prácou. Tiež nemožno opomenúť, že dopravná obslužnosť regiónov je základným faktorom ovplyvňujúcim dostupnosť občianskej vybavenosti. Kvalitná a rozvetvená cestná infraštruktúra sa považuje za jeden z nosných pilierov pre dosahovanie ekonomického rastu, zvyšovanie konkurencieschopnosti a prosperity spoločnosti a regiónov. Napomáha zlepšovaniu sociálneho postavenia obyvateľstva, zvyšovaniu zamestnanosti a odstraňovaniu disparít menej rozvinutých regiónov.

Za hlavný problém v tejto oblasti okrem chýbajúcich diaľnic a rýchlostných ciest v niektorých regiónoch SR sa považuje najmä dlhodobý a nevyhovujúci technický a kvalitatívny stav ciest I. triedy, regionálnych a miestnych komunikácií. Tento stav je spôsobený oneskorovaním cyklickej obnovy vozoviek, čo vyplýva z nedostatočného financovania opráv ciest.

Modernizácia a rozvoj cestnej infraštruktúry je rozsiahla, finančne i technicky veľmi náročná. Z dôvodu jej vysokej finančnej náročnosti je potrebné zabezpečiť optimálne vytváranie zdrojov a ich efektívne využívanie. V súčasnosti sa výstavbu, rekonštrukciu a údržbu ciest a miestnych komunikácií využívajú najmä prostriedky zo štátneho rozpočtu, rozpočtu VÚC a rozpočtov miest a obcí, zo spoplatnenia cestnej siete, úverové prostriedky a zdroje z fondov Európskej únie. Pripravujú sa ďalšie formy – mýto a projekty verejno-privátneho partnerstva. Je nevyhnutné hľadať aj ďalšie zdroje a tiež určiť efektívny model využívania dostupných zdrojov. Stabilné a dostatočné financovanie je totiž hlavným predpokladom ďalšieho efektívneho rozvoja cestnej siete.

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EFFECTIVE AND EFFICIENT UNBUNDLING OF TRANSMISSION SYSTEM OPERATORS (TSO)

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Abstract

Depending on the outcome of the EU Council and EU Parliament deliberations, the new proposed legislative package presented by the European Commission on 19/09/2007 might have far reaching consequences on both the internal and the external dimensions of the energy and natural gas markets. Is necessary to give supports the Commission's aim to achieve a fully functioning internal market. This requires a lot of questions just like, effective application of the current legislation (particularly I am concerned with the topic of unbundling in v EU), non discriminatory access and system operation, stable regulatory framework conducive to support investment needs for Europe's supplies etc. I like to show shortly, where we are now in EU?

Klíčová slova

V závislosti na výsledcích jednání Rady EU a Evropského parlamentu by nově navrhovaný legislativní balíček, který Evropská komise předložila dne 19. září 2007, mohl mít dalekosáhlé důsledky jak pro vnitřní, tak i vnější dimenzi trhů s energiemi a zemním plynem. Je zapotřebí podporovat cíl sledovaný Komisí, zaměřený na dosažení plně funkčního vnitřního trhu. To vyžaduje účinné uplatňování stávající legislativy (konkrétně se věnuji otázce unbundlingu), nediskriminační přístup a provoz soustav, stabilní regulační rámec vedoucí k podpoře investičních požadavků v souvislosti se zásobováním Evropy,atd. Chtěl bych krátce ukázat, kde jsme v EU nyní.

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Proposal for a Directive of the Council emending Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [1)].

The European Commission has 19.9.2007 published a third liberalization package of energy regulations. It represents a proposal for an amendment of the Regulation on common rules for the:

- Internal market in electricity,
- Directive on conditions for access to the network for cross-border electricity trade,
- and proposal of a new Directive on constitution of a European Agency for Cooperation of Energy Regulatory Offices.

I supports adoption of the package and hopes that it will be primarily the endeavour to improve the interconnection among member states that will contribute to the completion of a single European energy market without any pointless barriers.

The proposal of the third liberalization package of the EU contains mainly a proposal of a Directive which will amend Directive 2003/54/ES on common rules for the internal market in electricity [2-3)].

The proposal imposes an obligation on member states to:

- ensure implementation of ownership unbundling at the level of transmission system operators,
- or establishment of an independent system operator within one year following the transposition of the Directive into their national law.

So, the proposal of the Directive contains two alternative solutions and can be considered as a concession to member states, which expressed their disapproval to ownership unbundling.

An ownership separation of the transmission system in the Czech Republic took place already 4 or more years ago, and the operator and owner of the transmission system, CEPS, is 100% owned by the state just like in Slovenia where ELES, is owned by the state. It only confirms the fact that the Czech Republic and Slovenia is one of the leaders of the process of electricity market liberalization in the EU.

I supports the part of the liberalization package establishing an agency for cooperation of energy regulatory offices as a new communitory organ with legal identity.

The Agency should publish opinions for:

- transmission system operators,
- regulatory offices,
- European Commission and make individual decisions towards energy companies.

I see the coordination of the activities of national regulatory offices as the best means to integrate their decision-making practices. However, it believes that powers of the new organ need to be exactly and exhaustively determined in the final version of the new Regulation. The third amended regulation is the Resolution No 1228/2003 on Conditions for Access to the Network for Cross-border Electricity Trade. The proposal of the Regulation states that transmission system operators should cooperate within Europe through the European Transmission System Operator as an organ accountable to the European Commission.

Within the European network, a ten-year investment plan for the whole EU will be adopted and, along with that, an obligation to cooperate at regional level will be imposed on transmission system operators. HSE - Holding slovenske elektrarne considers the regional cooperation of transmission system operators essential for the improvement of interconnection capacities, which the company finds crucial for the creation of a single European energy market.

At the same time, HSE regards increasing cross-border capacities as one of the measures needed to cover the growing demand for electricity in Europe. That must, however, be accompanied by construction of new resources.

The pack of proposals will contain the draft directive amending Directive 2003/541EC on Joint Rules of the internal Electricity Market, draft regulation on the establishment of the Agency for Cooperation of Energy Regulators and the draft regulation amending Regulation No. 1228/2003 on the conditions of access to the network for cross-border trading in electricity. The submitted proposals will also relate to the following circles of issues:

- effective cooperation between operators of transmission systems, while the enhancement of this cooperation is essential for the integration of the European electricity and gas market, and the result should be a cooperation mechanism directed at solving problems,

- the enhancement of the authority and independence of national regulators,

- the creation of an independent mechanism of the support of cooperation between national regulators, allowing the adoption of necessary decision through the establishment of the Agency for Cooperation of Energy Regulators, while the legislative proposal will bring a list of main tasks for this new community agency. The European Commission will also propose a way to manage and operate this new agency,

- the effective separation of production and electricity and gas supplies from the operation of transport networks, while this more effective "unbundling" will, of course, apply only to the operators of transmission systems, and

- improving the function of the electricity and gas market, specifying the system of exemptions, transparency and determining the framework for the gradual creation of the European retail market, as well as a framework for agreements over solidarity events to enhance the security of energy supplies in the EU.

A pragmatic approach is expected by the European Commission concerning the most discussed issues of the degree of ownership separation of production/supplies from transmission activities, which will enable the member countries to choose between full ownership separation, already existing in a number of member countries today, and a new option based on the function of an independent system operation (ISO), which will, of course, be more demanding from the regulatory point of view and will include in the national and community level a further regulatory link permitted to ensure competitive pricing and equal access to energy networks.

Depending on the outcome of the EU Council and EU Parliament deliberations, the new proposed legislative package presented by the European Commission on 19/09/2007 might have far reaching consequences on

both the internal and the external dimensions of the energy and natural gas markets [4-5]. Is necessary to give supports the Commission's aim to achieve a fully functioning internal market. This requires [6-8] :

- effective application of the current legislation,
- non discriminatory access and system operation,
- stable regulatory framework conducive to support investment needs for Europe's supplies,
- improved regulatory process,
- improved TSO co-operation,
- the need for investments to secure supplies in Europe,
- The lack of legal unbundling and insufficient managerial separation of transmission and distribution system operators to ensure their independence,
- Insufficient legal unbundling of TSO/DSO to guaranty independence,

<u>On the question on unbundling is necessary stressed the following</u>:

- any solution must be implemented coherently and must be proportioned,
- ISO is a possible alternative to be studied,
- other feasible solutions may exist,
- better, well targeted regulation should be sought.

Any future legislation should aim at a well functioning internal market and at preserving the ability of energy companies to become globally competitive, to invest and to determine their portfolios and their long term strategies. In this respect, I see it is necessary the need for EU external policy to support dialogue and partnership under a general umbrella of reciprocity with producing countries as a way to strengthen European security of supply.

EFFECTIVE AND EFFICIENT UNBUNDLING OF TRANSMISSION SYSTEMS OPERATORS (TSO)

First case:

Assets, equipment, staff and identity [9]

2. TSOs shall be equipped with all human, physicaf and financial resources of the, vertically integrated undertaking necessary for the regular business of electricity transmission; in particular;

2.1. Assets that ace necessary for the regular business of electricity transmission shall be owned by the TSO.

2.2. Personnel necessary for the regular business of electricity transmission shall be employed by the TSO.

2.3. Leasing of personnel and rendering of services from to any branch of the vertically integrated undertaking performing functions of generation or supply. shall be limited to cases with no discriminatory potential and be subject to approval by national regulatory authorities in order to exclude competition concerns and conflicts of interest

2.4. Appropriate financial resources for future investment projects shall be kept available in due time.

The activities deemed necessary for the regular business of electricity transmission mentioned in paragraph 2 shall at least include:

a) representation of the TSO and contacts to third parties and the regulatory authorities ,
b) grating and managing third party access,
c) Collection of the access charges, congestion rents and payments under the inter transmission system operator compensation mechanism in compliance with Article 3of Regulation (EC) No. 1228/2003,
d) Operation, maintenance and development of the transmission system,
e) Investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply,

3. TSOs shall be organized in the legal form of a joint – stock company,

4. The TSOs shall have its own corporate identity, significantly different from the vertically integrated undertaking with separate branding, communication and premises,

5. TSOs account shall be audited by another auditor than the one auditing the vertically integrated undertaking and all its affiliated companies.

Independence of the TSO management, chief executive officier / executive board

6. Decisions on the appointment and on any premature termination of the employment of the chief executive officer/members of the executive board of the TSO and the respective contractual agreements of the employment and its termination shall be notified to the regulatory authority or any other competent national public authority. These decisions and agreements may became binding only if, within a period of 3 weeks time after notification, to the regulatory authority or any other competent national public authority has not used it's right of veto. A veto may be issued in cases of appointment and respective contractual agreements if serious doubts arise as to the professional independence of the nominated chief executive officer/member of the executive board, or in the case of premature terminations of employment and respective contractual agreements, if serious doubts, exist regarding the reasoning for this measure.

7. Effective rights of appeal to the regulatory authority or another competent national public authority or to a court shall be guaranteed far any complaints by the management of the TSO against premature terminations of their employment

8. After termination of employment in the TSO, chief executive officers/members of the executive board shall not participate in any branch of the vertically integrated undertaking performing functions of generation or supply for a period of not less than 3 years.

9. The chief executive officer/members of the executive board shall not hold any interest in or receive any compensation from any undertaking of the vertically integrated company other than the TSO. His/their remuneration shall in no part depend on activities of the vertically integrated undertaking other than those of the TSO.

10. The chief executive officer or the members of the executive board of the TSO may not bear responsibility, directly or indirectly, in the day-to-day operation of any other branch of the vertically integrated undertaking.

11. Without prejudice td the provisions above, the TSO shall have effective decision making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 22 c, in a subsidiary are protected in particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the transmission system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of transmission lines, that do exceed the terms of the approved financial plan, or any equivalent instrument.

Grid development and powers to make investment decisions

TSOs shall elaborate a 10-year network development plan at least every two years. They shall provide efficient measures in order to guarantee system adequacy and security of supply.

12. The 10-year network development plan shall particular

a. indicate to market participants the main transmission infrastructures that ought to be built over the next ten years.

b. contain a11 the investments already decided and identity new investments for which an implementation decision has to be taken in the next three years.

13. In order o elaborate this 10-years network development plan, each TSO makes reasonable hypothesis about the evolution of generation, consumption and exchanges with other countries, and takes into account regional and European-wide existing network investment plans. TSO shall submit in due time the draft to the competent national body.

14. The Competent national body shall consult all relevant network users art the basis of a draft for the 10 year network development plan in an open and transparent manner and may publish the result of the consultation process in particular possible needs for investments.

15. The competent national body shall examine whether the 10- year network development plan covers all investment needs identified in the consultation. This authority may oblige the TSO to amend his plan.

16. Competent national body in the sense of paragraphs 24, 25 and 26, may be the national regulatory authority, any other competent national public authority or a network development trustee constituted by TSO's. In the latter case, TSQs shall submit the drafts of the statutes, of the list of members and at the rules of procedure to the approval of the competent national public authority.

17. If the TSO rejects to implement a specific investment listed in the 10-year network development plan to be executed in the next three years. Members States shall ensure that the regulatory authority or any other competent national public authority have the competence for one of the following measures, either:

1/ request by all legal means the TSO to execute his investment obligations using his financial capacities, or,

2/ invite independent investors to tender for a necessary investment in a transmission system and may oblige the TSO:

- to agree to financing by any third party,
- to agree to building by any third party or to built the respective new assets and
- to operate the respective new asset.

The relevant financial arrangements shall be subject to the approval of the regulatory authority or any other competent national authority.

In both cases, tariff regulation shall allow for revenues that cover the costs of such investments.

18. Competent national public authority shall monitor and evaluate the implementation of the investment plan.

Decision making powers regarding the connection of new power plants to the transmission grid

19. TSOs shall be obliged to establish and publish transparent and efficient procedures for non-discriminatory connection of new power plants to the grid. Those procedures shall be subject to the approval of national regulatory authorities or any other competent national public authority.

20. TSOs shall not be entitled to refuse the connection of a new power plant on the grounds of possible future limitations to available network capacities, e.g. congestion in distant parts of the transmission grid. The TSO shall be obliged to supply necessary information.

21. TSOs shall not be entitled to refuse a new connection point, on the sole ground that it will lead to additional costs linked with necessary capacity increase of grid elements in the close-up range to the connection point.

Regional cooperation

22. When the cooperation between several countries at a regional level encounters significant difficulties, following the joint request of these countries the Commission may designate, in agreement with all Member states concerned, a regional coordinator.

23. The regional coordinator shall promote at a regional level the cooperation of regulatory authorities and any other competent public authorities, network operators, power exchanges, grid users and market parties. In particular, he shall:

a) promote new efficient investments in interconnections. To this end, he shall assist TSOs while elaborating their regional interconnection plan and contribute to the coordination of their investments decisions and where appropriate, of their open season procedure.
b) promote the efficient and safe use of the networks. To this end, he shall contribute to the coordination between TSDs national regulatory authorities and other competent national public authorities with the elaboration of common allocation and common safeguard mechanisms.
c) submit a report to the Commission and Member states concerned every year on the progress achieved in the region and on any difficulty or obstacle that may hinder progress.

Proposal for a directive of the European Parliament and of the council amending Directive 2003/54/ec concerning common rules for the internal market in electricity - how to resolve the dispute between member states in order the package is adopted in 2008

For example:

1) Justification

Some of Member states EU give support the efforts of the European Commission regarding the creation of a functioning single market with electricity. It simultaneously considers as a fundamental prerequisite for the functioning of the market, besides the sufficient production capacities, also the sufficient and accessible pan-European transmission capacities. Therefore, these states promote harmonisation of the regulation procedures and regional coordination of the transmission systems. With regard to these aims, some of Member states EU support the objectives and intentions of the European Commission in the area of cross border trade with electricity with a view to create a single market at least at regional level. The cooperation at regional level is fundamental [10)].

Nevertheless, some of Member states EU are not sure whether the appropriate instruments were chosen to achieve this goal. It considers that some of the proposed solutions do not take into account the differences in functioning of the national markets with electricity, previous experiences during the integration of national markets, as well as the different approaches of the Member States, as regards the investments into the transmission networks. Too much emphasis is given to the ownership of the assets and not to the operation and functioning of the grids. At the present time, the assets become less important than the system services, cross border issues and cooperation amongst TSOs.

The current approaches regarding the transmission or distribution, their tasks and the role in the electricity market were formed at the time when, in Europe, there were many individual electricity „markets“ (or in other words, the markets did not exist) within individual Member States and the international cooperation of transmission system and their interconnection did not, in fact, exist. Currently, we are in a situation where the EU has fixed as one of the fundamental objectives of the energy policy the security of supply, sustainability, environmental protection and the creation of a single functioning electricity market at the European level.

According to some of Member states EU it is necessary to reconsider the definition and designation of roles and tasks notably of transmission system. In a view to ensure sufficient and accessible transmission capacities for international trade with electricity, this redefinition should enable that the role and the tasks of the transmission system (necessary for functioning of a single electricity market at the European level) regarding the international interconnection and cooperation of transmission systems are set apart from the roles and tasks that are being ensured by the transmission systems only at the level of a Member State. Subsequently, it will be easier to ensure necessary degree of cooperation of the transmission system at the European level (firstly, at regional level at least) and de facto the transfer of liability, management and control over the relevant roles of transmission system from national to the European level.

Therefore, some of Member states EU consider as important to modify the proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54 in a way that in every Member State, it will be possible to build such a model of the market with electricity and such a structure of the market participants enabling the cooperation of the transmission system operators at the European level throughout the creation of the European Network for Transmission System Operators for Electricity, but also throughout the creation of a pan-European transmission system operator responsible for cross border transmissions and connected activities.

The gist of the amendments consists in the fact that the both options of ownership unbundling and the ISO should be brought on the same footing. The Member States should have the right to choose – at the moment of entry of the Directive into force – between these options irrespective of the structure of the market within their territory at the given time. This option will better enable the creation of the regional, and subsequently, pan-European system operator responsible for cross border issues.

The amendments stated below reflect the afore mention opinion and simultaneously result in a simpler and shorter formulation of the wording of the directive.

For an example:

b) Amendment 2.
Article 8 (1) a):

To be deleted

(a) each undertaking which owns a transmission system acts as a transmission system operator,

Justification:

The deletion of this letter in Article 8 implies that the transmission system operator could be not only the owner of the transmission assets as a whole, but also could have no assets at all or could be the owner of part of transmission assets. Nevertheless, and in any case, the same requirements would apply.

f) Amendment 6.
Article 10 (1) c):

Where the transmission system belongs to a vertically integrated undertaking ***on entry into force of this Directive or where a Member state considers as appropriate in a view to ensure the conditions for effective functioning of the European Network for Transmission System Operators (TSO) for Electricity or the creation of a supra-national transmission system operator.*** *Member States may grant derogations from Article 8(1), provided that an independent system operator is designated by the Member State upon a proposal from the transmission system owner and subject to approval of such designation by the Commission. Vertically integrated undertakings which own a transmission system may not in any event be prevented from taking steps to comply with Article 8(1).*

Justification:

The objective of this amendment is to bring the TSO and ISO models on the same footing as a way to provide a coherent model for system operation throughout Europe and to facilitate the establishment to region or pan – European system operators. The Member States should have the possibility to choose between two equal options (ownership unbundling and creation of the independent system operator - ISO).

CONCLUSION:

The agreement regarding unbundling on the territory of EU will be not easy and the discussion will last for just a longer time. I have shortly focused on two different points of view about solving this problem of

unbundling, namely by a group of EU states which doesn't directly support separating from vertical corporations and another group of EU states in the second part of this essay which support separating. In my opinion it is necessary to reconsider the definition and designation of roles and tasks notably of transmission system (TSO).

Vertically integrated dominant energy companies are designated as the major disrupters of the market environment impeding market access to competitors. Therefore proposals for either forced separation or so called independent system operator (ISO) have been raised. Alternative Proposal of 8 EU countries for ownership unbundling and independent ISO operator – so called Effective and Efficient Unbundling [11)] – (EEU). In principle, the EEU defines making the current system more rigorous by introducing duty to elaborate so called compliance program for each TSO (a kind of TSO functioning Codex) and regulators´ supervision over its performance. Though the Commission formally welcomed this proposal and promised discussion over it, its current position towards this proposal is negative.

Probably ISO regarding gas unbundling is not a real alternative from reason:

- has never been implemented in gas industry,
- leads to a loss of all competencies (for example technical,…
- creates problems of reparation of responsibilities, industrial and financial risks.

As says Anders Pleydrup about unbundling [12)]:

The spot exchanges must unbundled, when implicit auction becomes the day-ahead congestion management system:

- As they get a monopoly: only the spot exchanges can carry out day-ahead cross border power trading. Naturally, you may install a system grating the players the opportunity to complete with the spot exchanges for day-ahead cross-border capacity.

  - However, even with such a system in place, the spot exchanges are granted a special status.

- Hence, they become regulated entities like the TSOs!

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INTEGRATION OF FINANCIAL MARKETS

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Abstrakt

Tento článek se zabývá integrací finančních trhů. Spolupráce institucí EU při vytváření jednotných legislativních pravidel vytváří legislativní základ integrace finančních trhů. V rámci sekundárního prává má zde nezastupitelné místo směrnice jejímž cílem je aproximace jednotlivých právních systémů. Přičemž jednotlivé instituce mají své specifické pravomoci. Nezaměnitelnou roli při integraci finančních trhů zaujímá Evropská komise. Mezi první kroky k vytvoření jednotného finančního trhu EU patří Akční plán finančních služeb, který zveřejnila Evropská komise a který byl Evropskou radou schválen v roce 2000.

Klíčová slova

Evropská komise, finanční trhy, Akční plán finančních služeb, Zelená kniha, Bílá kniha

Abstract

This paper deals with the integration of financial markets. The EU institutions cooperation at generating of single legislative rules generates the legislative base of financial markets integration. In terms of secondary legislation have here irreplaceable place directive whit the main purpose is to align national legislation. Whereas individual institutions have his specifically powers. In the integration of financial market have incommutable role European Commission. To the first steps to achievement of simple financial market of European Union belongs Financial Sector Assessment Program that was published of European Commission and was approved in 2000 by European Council.

Key words

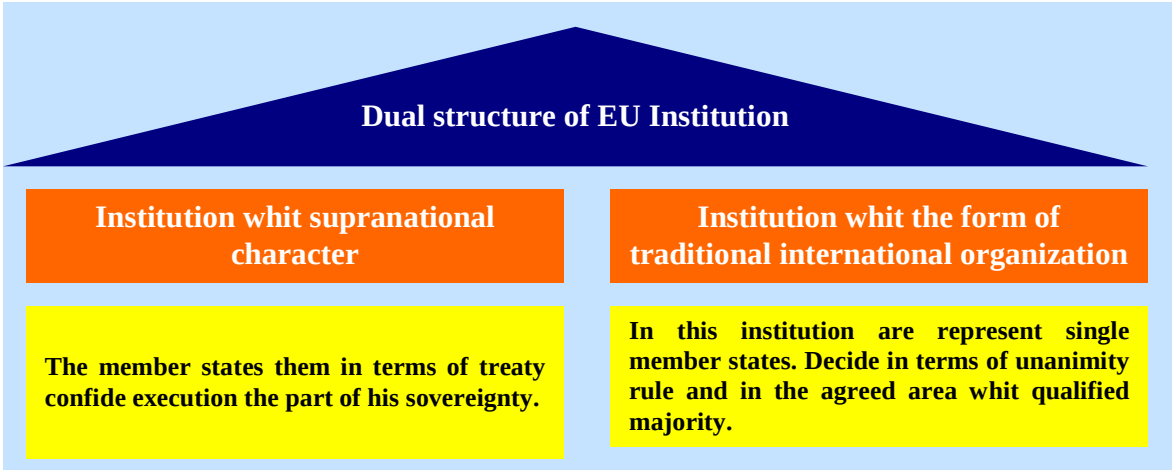
European Commission, financial markets, Financial Sector Assessment Program, Green paper, White paper

Introduction

Financial markets are crucial to the functioning of modern economies. The EU institutions cooperation at generating of single legislative rules generates the legislative base of integration of financial markets. The more integrated they are, the more efficient the allocation of capital and log-run economic performance will be. Completing the single market in financial services is thus a crucial part of the European Commission's. The financial markets can be divided into different subtypes (e. g. capital markets, commodity markets, money markets, derivatives markets, insurance markets …), but this paper describes the European Union approach to the integration of financial markets as a whole.

1 Institution of European Union

Institutions of European Union have dual structure that forms the institution whit supranational character and the institution what have form of traditional international organization (see figure 1). [1]



Source: self-elaboration

Figure 1 **Dual structure**

In compliance with the Treaty of Maastricht (Treaty on European Union), which came into force in 1993 exist these main institutions of European Union, namely: European Council, European Parliament, Council of the European Union, European Commission, Court of Justice and Court of Auditors. This individual institutions have his specifically powers. [1]

In the integration of financial market have incommutable role European Commission, here is short characteristic of her four main roles.

The European Commission has four main roles:

- it has a near-monopoly in initiating legislation: the Commission is responsible for drawing up proposals for new legislative instruments which it forwards to the Parliament and the Council. It also plays an active part in the successive stages of the legislative procedures;
- it puts policies into effect and implements the budget of the European Union: the Commission is responsible for managing and carrying out the budget and puts into effect the policies and programmers' adopted by Parliament and the Council;
- it is the guardian of the treaties: the Commission ensures that the legal provisions adopted by the Community institutions are applied by individuals, by the Member States and by the other institutions. In exercising its powers, the Commission can in particular impose sanctions on individuals and companies for infringements of Community law. It can institute infringement proceedings against Member States, as part of which it invites Member States to rectify the situation within a specified period. Lastly, the Commission can bring actions before the Court of Justice on the grounds of infringements of Community law by the Member States or by other institutions;
- it represents the Community: on behalf of the Community the Commission conducts negotiations with a view to concluding international agreements with non-member countries or international organizations', in conjunction with special committees appointed by the Council and within the framework of negotiating directives established by the Council. [2]

This Treaty pursues two main objectives: the creation of a monetary union by laying down the principles and arrangements for the introduction of the Euro and the creation of an economic and political union. This is the treaty that originated the concept of a tree-pillar structure. The first pillar consisting of the European Community and the other two of the common foreign and security policy and police and judicial cooperation in criminal matters.

There is, however, a big difference between the first pillar and the other two, which have not given rise to any transfers of sovereignty to the common institutions as was the case with the Treaty establishing the European Community. In these fields the Member States wished to preserve their independent decision-making powers and restrict themselves to an intergovernmental form of cooperation. The most important legal instruments in these fields are the joint action, the common position, and the framework decision, which are almost always adopted unanimously and are binding only to a limited extend. [3]

2 Legislative procedures

In contrast to the national systems, in which the will of the nation is expressed in Parliament, the European Union accords a major legislative role to the representatives of the Member States meeting in the Council. As the institutions have developed, the European Parliament has seen its powers increase: the Council now shares its legislative powers with Parliament for the adoption of general legal instruments of a binding nature (regulations and directives). The decision-making procedures comprise the consultation procedure, the cooperation procedure, the co-decision procedure and the assent procedure.

The legislative procedures include 4 procedures. Namely:

- **Assent procedure** (see figure 2) – this procedure, which was introduced by the Single European Act, gives Parliament the possibility of expressing its approval or disapproval of certain Council instruments. There are certain matters on which the Council cannot legislate unless Parliament gives its consent by an absolute majority of its members. The assent procedure, which represents as it were a right of veto for Parliament, was originally intended to apply only to the conclusion of association agreements and the examination of applications to join the European Community.
- **Co-decision procedure** - which was introduced by the Treaty on European Union, was conceived as an extension of the cooperation procedure. However, while in the latter the Council can, acting unanimously, disregard the opinion of Parliament, in the co-decision procedure there is no such possibility: in the event of disagreement, a conciliation committee made up of representatives of the Council and of Parliament has to arrive at a text that is acceptable to the two institutions. The co-decision procedure now puts these two institutions on an equal footing in the legislative roles. Under this procedure, the Council cannot adopt a common position if the process of conciliation with Parliament fails. If no agreement is reached, the legislative process is liable to be broken off.

- **Cooperation procedure** - was introduced by the Single European Act to step up the role of the European Parliament compared with the consultation procedure. Parliament can make amendments to a Council common position but, unlike the co-decision procedure, the final decision lies with the Council alone.

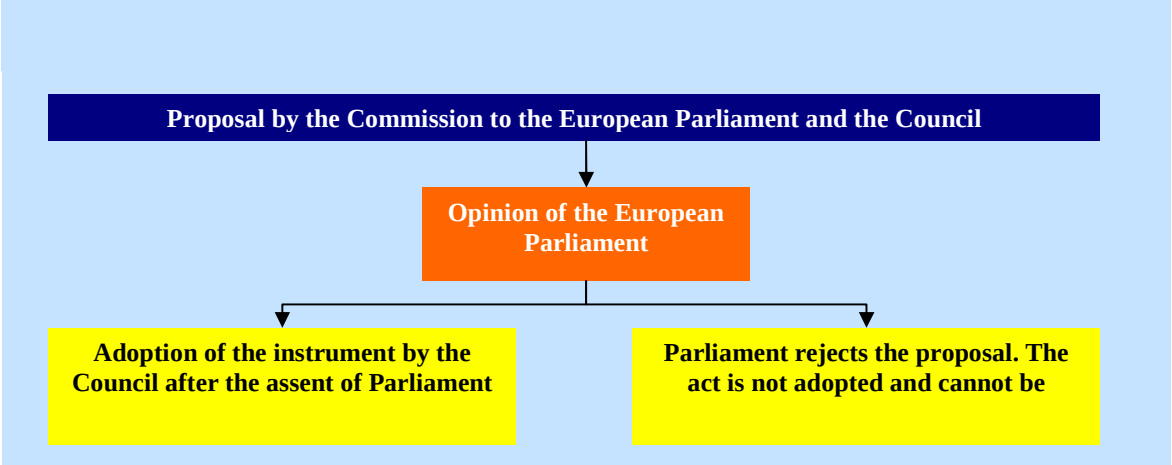


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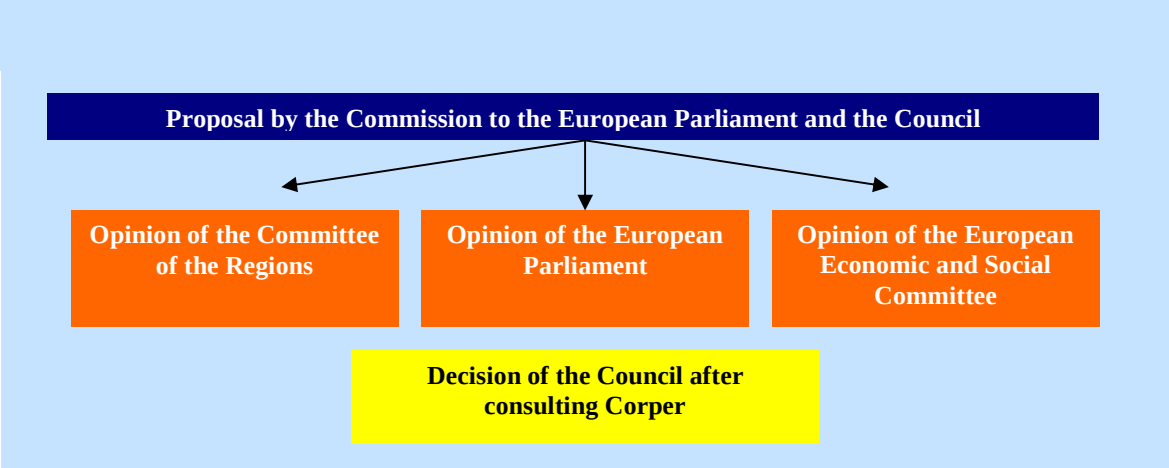
Figure 2 **Assent procedure**

- **Consultation procedure** (see figure 3) - the characteristic feature is a division of tasks between the Commission and the Council that can be summed up in the phrase 'the Commission proposes, the Council disposes'. However, before the Council can take a decision, certain stages have to be completed, in the course of which, besides the Commission and the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions may also have their say, depending on the subject of the regulations in question. [3]



Source: self-elaboration

Figure 3 **Consultation procedure**

3 First steps to achievement of simple financial market of European Union

To the first steps to achievement of simple financial market of European Union belong Financial Sector Assessment Program (FSAP) that program was prepared by the Staff of the International Monetary Fund and the World Bank. The FSAP, launched in 1999, was largely completed by its 2004 deadline, with 39 of he 42 measures adopted. This program was published of European Commission and was approved in Lisbon

in 2000 by European Council. The Lisbon objective of becoming "the world's most dynamic knowledge-based economy by 2010" was one that the world's press, public leaders and private individuals all came to know, and as the FSAP was named as a major contributing factor to achieving the Lisbon goals, this additional glare of public attention helped. [4]

The object of these measures was elimination of remaining barriers to legal and regulatory framework, which enable the financial markets integration in the all-European dimension.

The central philosophy of FSAP:

- Financial industry's performance has improved;
- Higher liquidity;
- Increased competition;
- Sound profitability;
- Stronger financial stability.

3.1 Green paper of European Commission on Financial Services Policy (2005 – 2010)

This paper presents the preliminary views of the Commission for its financial services policy priorities for the next five years. It takes into account many convergent opinions expressed in the 2-year consultation process that started with the work of tour expert groups, followed by wide public consultation. Other parallel Services Committee and the Draft Report by the Economic and Monetary Affairs Committee of the European Parliament on the current state of integration of EU financial markets.

In the last six years there has been major progress towards an integrated European capital and financial services market. Most of the necessary rules outlined in the Financial Services Action Plan (FSAP) have been agreed on time and are now being put in place. European decision making and regulatory structures have become more rational and efficient as a result of the "Lamfalussy process". Continued systematic cooperation has developed between the European institutions and market participants. And, in the wake of the euro in some member countries, political confidence in the integration process has increased.

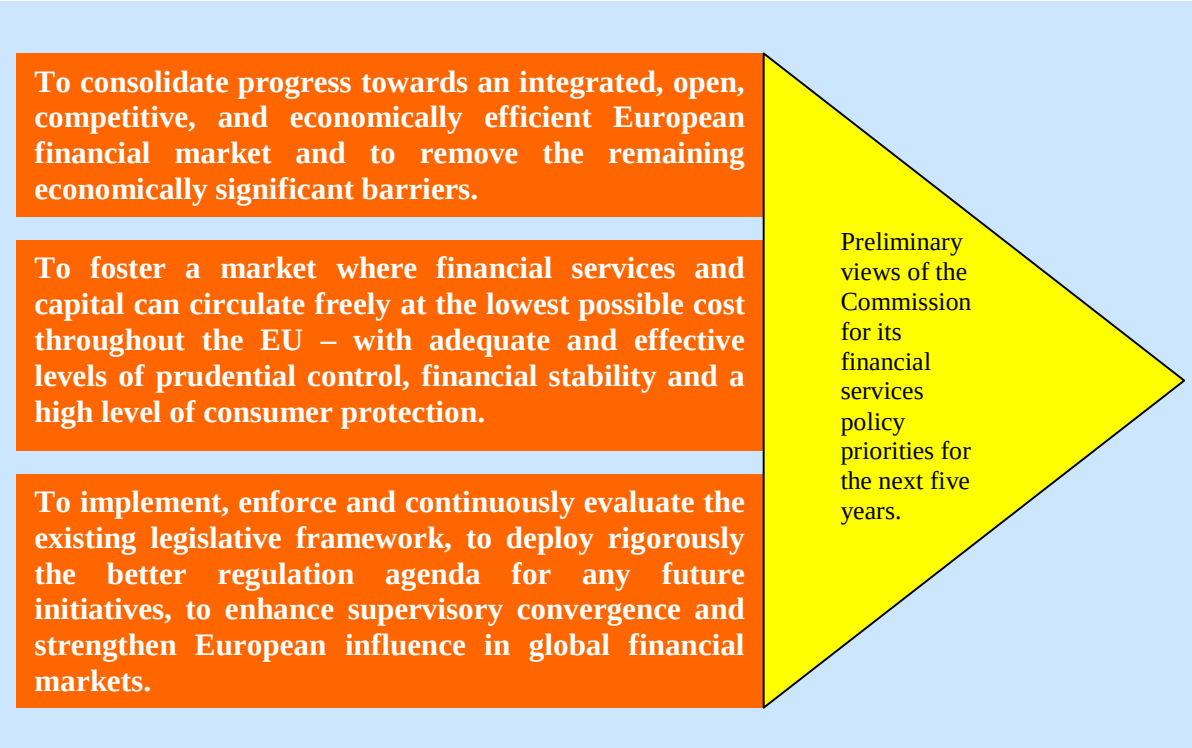


Figure 4 **The overall objective over the next 5 years**

A very different focus new phase for the period 2005 – 2010 includes Consolidation of existing legislation, with few new initiatives; ensuring the effective transposition of European rules into national regulation and more rigorous enforcement by supervisory authorities; continuous ex-post evaluation whereby the Commission will monitor carefully the application of these rules in practice – and their impact on the European financial sector. The overall objectives of Green paper see in figure 4.

In this period be very important, that Member States, regulators and market participants must play their role. If needed, the Commission will not hesitate to propose to modify or even repeal measures that are not delivering the intended benefits. This approach is essential to ensure that the hard-won European regulatory framework will function optimally – for the benefit of market participants, more than 20 million European businesses and 450 million citizens, and thus for the European economy as a whole.

A rigorous "better regulation" approach will be applied throughout. Thereby so think – from policy conception, to open and transparent consultation at all levels, to establishing thorough and convincing economic impact assessments before launching a new proposal and to ex-post evaluation. This is very important to reduce administrative costs for financial institutions and issuers and to raise the competitiveness of the European financial industry. [5]

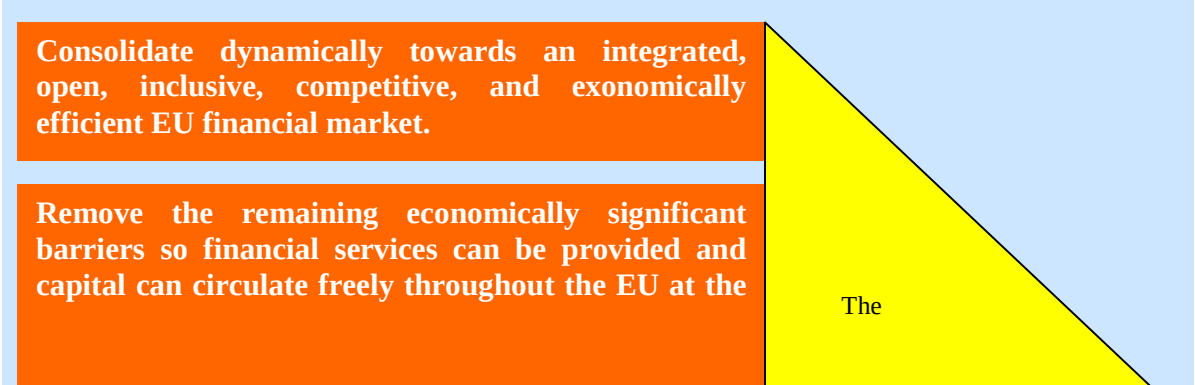
3.2 White paper of European Commission on Financial Services Policy (2005 – 2010)

This paper presents the European Commission financial services policy priorities up to 2010. The consultation on the Green Paper has shown broad support for these political priorities. This Paper also takes into account the results of the "Exchange of Views" of 18 July 2005 and parallel initiatives such as the Report on financial integration by the Financial Services Committee, the ECOFIN Council Conclusions of the European Parliament on the current state of integration of EU financial markets. What belong to the overall objective of the Commission's financial services policy over next 5 years see in figure 5.

Financial markets are pivotal for the functioning of modern economies. The more they are integrated, the more efficient the allocation of economic resources and long run economic performance will be. Completing the single market in financial services is thus a crucial part of the Lisbon economic reform process; and essential for the EU's global competitiveness.

But efforts have to continue. The EU financial services industry has strong untapped economic and employment growth potential. A further boost in the efficiency of pan- European markets for long-term savings products is needed urgently. The EU's major structural economic challenge – its huge pension's deficit – needs to be financed. The retail internal market is a long way from completion. A better functioning risk capital market is needed to promote new and innovative firms and to raise economic growth.

So, consolidating progress; completing unfinished business; enhancing supervisory cooperation and convergence; and removing the remaining economically significant barriers are the key axes of Commission policy for the next 5 years. [6]



Source: self-elaboration

Figure 5 **The overall objective over the next 5 years**

Conclusion

The legislative processes in the EU have their standing rule. In the third part of this paper are these four very important procedures specify. These four procedures are very important to the legislative procedures in terms of European Union, while given single rules for legislative creation and herewith happen not to the overlap of powers.

As European financial integration progresses, new challenges for supervisors are emerging.

Monitoring cross-border risk is becoming more critical and although integration will strengthen overall stability, the potential for 'spill-over effects' such as a system failure affecting several financial markets and/or groups that operate on an EU-wide basis will increase.

The Commission will monitor carefully that candidate countries fulfill their responsibilities in the financial services area. Furthermore, enhancing European influence on the global stage and ensuring the global competitiveness of the European financial sector should remain a priority. Financial services are a global business - developments in one jurisdiction have an impact on others.

The integration of financial markets has very positive impacts', with this process should be connect with the elimination of a number of directives. This process begins in 90. years and continue to the 21st century to the successful end. In this legislative process have European Commission lead role.

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VYPLÁCENÍ NÁHRAD NÁKLADŮ CHOVATELŮM PŘI VÝSKYTU BOVINNÍ SPONGIFORMNÍ ENCEFALOPATIE V ČESKÉ REPUBLICE A JEJICH PRAKTICKÁ REALIZACE V LETECH 2001 AŽ 2007

RICHARD POSPÍŠIL

PRÁVNICKÁ FAKULTA, KATEDRA FINANČNÍHO PRÁVA, NÁRODNÍHO HOSPODÁŘSTVÍ A EKONOMIE, UNIVERZITA PALACKÉHO

Abstrakt

Na základě právní úpravy jsou v České republice chovatelům při výskytu BSE poskytovány náhrady za náklady spojené s výskytem tohoto onemocnění. Za dobu výskytu nemoci od roku 2001 bylo v České republice vyšetřeno 1.194.743 krav a do konce roku 2007 bylo prokázáno 27 případů BSE a v souvislosti s nimi utraceno a neškodně odstraněno 3.997 krav. Náklady na vyšetření na BSE, utracení a asanaci dosáhly 18,9 mil. Kč, za utracená zvířata činila výše vyplacených náhrad téměř 164,0 mil. Kč a náhrady za nerealizovanou produkci dosáhly téměř 13,6 mil. Kč. Spolu s dalšími dodatečnými náklady činila celková výše vyplacených náhrad za celé období výskytu nemoci v ČR přes 197 mil. Kč.

Klíčová slova

Bovinní spongiformní encefalopatie, infekční nemoci, skot, náhrady nákladů, finanční právo

Abstract

Based on Czech legislature, the farmers whose herds were affected by bovine spongiform encephalopathy (BSE) are reimbursed for the costs associated with this disease. Between 2001 and 2007, a total of 1 194,743 were examined for BSE, 27 BSE-positive cases were detected and, consequently, 3,997 animals were killed and destroyed. The costs of examination for BSE, killing animals and destroying their carcasses, and decontamination of farms were CZK 18.9 million, compensations for the value of the animals killed amounted to almost CZK 164.0 million and compensations for non-materialised production reached almost CZK 13.6 million. Together with some additional costs, the total of reimbursements during the 2001-2007 period in the Czech Republic were more than CZK 197 million.

Key words

Financial compensation, bovine spongiform encephalopathy, cattle, infectious diseases, costs, financial law

Bovinní spongiformní encefalopatie (BSE) se dostala do popředí zájmu široké veřejnosti na konci 80. let, tedy několik let poté, kdy byly v jihovýchodní Anglii v roce 1985 poprvé zaznamenány první a ojedinělé případy výskytu krav s tehdy neznámým onemocněním [1]. To se projevovalo změnou chování a poruchou koordinace pohybu a během několika měsíců končilo vždy úhynem. Společným nálezem všech vyšetření uhynulých kusů skotu byla degenerace neuronů mozku a prodloužené míchy, která dávala mozkové tkáni pod mikroskopem houbovitý (spongiformní) vzhled [2].

Onemocnění podobného charakteru se však vyskytují i u člověka. Mimo dříve se vyskytující kuru, která postihovala kmeny praktikující rituální kanibalismus na Papua – Nové Guinei, jde především o Creutzfeldt – Jakobovu chorobu, způsobující předčasnou demenci u lidí od 55 do 70 let a nejnověji i její novou variantu, která postihuje i lidi daleko mladší (od 19 do 39 let). I spongiformní encefalopatie u lidí se vyznačují poruchami chování, koordinace pohybu, mají velmi dlouhou inkubační dobu a končí vždy smrtí [3].

Pravidelné vyšetřování zvířat – tzv. aktivní monitoring – byl u nás zahájen 1. února 2001 a do 30.11. 2007 bylo vyšetřeno celkem 1.194.743 kusů skotu, přičemž pozitivních bylo celkem 27 zvířat [4]. Jediný případ výskytu bovinní spongiformní encefalopatie (BSE) v roce 2007 potvrdil sestupný trend výskytu tohoto onemocnění v České republice, což odpovídá i situaci v ostatních členských zemích Evropské unie.

Průměrný počet případů BSE v uplynulých šesti letech byl 3,86 kusů za rok a průměrný věk pozitivního kusu krávy činil 68 měsíců. Nejčetnější výskyt BSE v uplynulých šesti letech byl ve Středočeském a Pardubickém kraji (5 kusů), dále v kraji Vysočina, Jihočeském a Libereckém kraji (shodně 4 kusy), v Jihomoravském kraji 2 kusy a v Královehradeckém, Zlínském a Moravskoslezském kraji (shodně 1 kus). Ostatní kraje (Olomoucký, Karlovarský, Plzeňský, Ústecký a Hlavní město Praha) jsou dosud bez pozitivního nálezu BSE [5].

V rámci Společné zemědělské politiky Evropské unie i ochrany venkova poskytuje Unie chovatelům skotu s výskytem BSE finanční náhrady, které jsou v České republice upraveny zákonem č. 166/1999 Sb., o veterinární péči (dále jen veterinární zákon), který v Hlavě IX „Náhrada nákladů, ztrát vzniklých v souvislosti s nebezpečnými nákazami“ upravuje výplatu náhrad chovatelům, v jejichž chovech se vyskytují některá infekční onemocnění, specifikovaná v přílohách č. 3 a 4 tohoto zákona. Jde celkem o 62 druhů vyjmenovaných nebezpečných nákaz a o obecné pojetí a obecnou strukturu těchto náhrad (Anonym

1999). Česká právní úprava tak plně odpovídá Nařízení Evropského parlamentu a Rady (ES) č. 999/2001 ze dne 22.května 2001 o stanovení pravidel pro prevenci, tlumení a predikaci některých přenosných spongiformních encefalopatií, v platném znění.

Protože je BSE jednou z nákaz, na něž se vztahuje výše zmíněná právní úprava, stanovil jsem si za cíl v první části práce shrnout a okomentovat obecná ustanovení veterinárního zákona a aplikovat je na výskyt BSE v České republice. Ve druhé části práce jsem se zaměřil na analýzu a sumarizaci náhrad nákladů vyplácených chovatelům. Studie, které by u nás vyhodnocovaly ekonomické ztráty způsobené BSE prozatím chybí a data dostupná ve světové literatuře hovoří především o celkových nákladech za určité období bez bližší analýzy a rozčlenění nákladů. Proto jsme si stanovil za cíl strukturovat výše uvedené celkové náklady, vyplácené podle veterinárního zákona v letech 2001 až 2007 a rozčlenit je podle jednotlivých druhů nákladů, kterými jsou chovatelé při výskytu nemoci zatíženi a následně odškodněni.

Materiál a metody

Převažující metodou první části práce je zhodnocení obecně závazných právních předpisů, tj. zákonů, vyhlášek a prováděcích předpisů a jejich aplikace na výskyt nemoci BSE v chovech v České republice. Zároveň je analyzována právní úprava této problematiky v zemích EU a její komparace s pozitivní právní úpravou v ČR.

V ekonomické části práce je hlavní metodou práce analýza statistických dat získaných v souvislosti s náklady spojenými s likvidací nemoci BSE v České republice, které jsme obdrželi z Ministerstva zemědělství ČR [6]. Tato data byla následně aplikována na jednotlivé druhy náhrad, které stanovuje veterinární zákon.

Do kategorie asanace je mimo vlastního neškodného odstranění kadáverů zahrnuta i jejich doprava do asanačního podniku, nebo živého zvířete z kohorty do asanačního podniku.

Do kategorie nákladů souvisejících se zajištěním utracení a asanace jsou zahrnuty mzdové náklady, znalecký posudek, doprava pracovníků, případně náklady na veterinární služby, vnitropodniková doprava a desinfekce v případě porážky ve stáji i očista celého hospodářství a jeho vybavení.

Do kategorie náhrada za nerealizovanou produkci jsou zahrnuty ztráty v produkci mléka, masa, statkových hnojiv a náhrada za konfiskované kusy na jatkách. U dojnic je náhrada poskytována za nejvyšší užitkovost dle „Kontroly užitkovosti“. U každého kusu dojnice se zvlášť počítají zbývající dny laktace (standardní laktace 305 dní), průměrná denní užitkovost dojnice a jejich součinem nerealizovaná produkce mléka.

Do kategorie náhrada nákladů na dodržování opatření jsou zahrnuty náklady na utrácení a asanaci zvířat, která nebyla součástí kohorty, ale náklady vznikly v době platnosti Mimořádných veterinárních opatření, resp. zákazu přesunu zvířat z hospodářství.

Podle těchto kategorií byly jednotlivé druhy nákladů strukturovány a následně sumarizovány za všechny druhy vyplácených náhrad, a to u všech pozitivních případů v letech 2001 až 2007 v ČR.

Výsledky

Obecnou strukturu náhrad a hlavní zásady vyplácení těchto náhrad upravuje po právní stránce Hlava IX, § 67 až 70 veterinárního zákona č. 166/1999 Sb.

V § 67 odst.1 je uvedeno, že chovateli se poskytne náhrada nákladů a ztrát, které vznikly v důsledku provádění mimořádných veterinárních opatření nařízených ke zdolávání a ochraně před šířením některé z nebezpečných nákaz uvedených v příloze č. 3 k tomuto zákonu a v příloze č. 4 k tomuto zákonu, a to za podmínky, že tato neprodleně uplatňovaná opatření zahrnují nejméně izolaci zvířat v hospodářství a zákaz jejich přemisťování od doby vzniku podezření z výskytu nákazy a po potvrzení jejího výskytu.

Obecné zásady poskytování náhrad, uvedené v odstavci 1, jsou specifikovány v odstavci 2. Náhrady se poskytují za:

- podle písm. a) náklady na utracení nebo nutnou porážku nemocných a podezřelých zvířat vnímavých druhů a za neškodné odstranění jejich kadaverů. Podle potřeby se poskytuje i náhrada za neškodné odstranění jejich produktů (například u influenzy ptáků jejich vajec). Předmětem náhrady podle písm. a) jsou tedy náklady na vlastní utracení pozitivně testovaného zvířete a celé kohorty v asanačním

podniku a s tím spojené všechny náklady režijní, tedy mimo vlastní asanaci například i náklady na vyšetření zvířat, na jejich dopravu do asanačního ústavu, nikoliv tedy náklady za vlastní utracená zvířata.

- podle písm. b) utracené nebo nutně poražené zvíře. Jsou hrazeny náhrady za náklady za všechna zvířata utracené kohorty dle znaleckého posudku. Podle § 68 odst.2 se náklady hradí ve výši obvyklé ceny zdravého zvířete téhož druhu a kategorie v místě a době vzniku škody.

- podle písm. d) očistu, dezinfekci, dezinsekci a deratizaci hospodářství a jeho zařízení a vybavení.

- podle písm. e) prokázané ztráty způsobené výpadkem produkce hospodářského zvířete v době provádění mimořádných veterinárních opatření. U dojnic je náhrada poskytována za největší užitkovost dle „Kontroly užitkovosti". U každého kusu dojnice se zvlášť počítají zbývající dny laktace (standardní laktace 305 dní), průměrná denní užitkovost dojnice a jejich součinem nerealizovaná produkce mléka.
Podle § 70 se náhrada poskytuje z prostředků státního rozpočtu (kapitola Všeobecná pokladní správa), nestanoví-li předpisy ES jinak. Žádost o poskytnutí náhrad může být podána nejdříve první den následující po dni utrácení nebo poražení zvířat a nejpozději do 6 týdnů ode dne utracení nebo poražení. K posouzení, zda jsou splněny podmínky pro poskytnutí náhrady a v jaké výši, si vyžádá ministerstvo stanovisko krajské veterinární správy. Není-li žádost podána v uvedené lhůtě, nárok na náhradu zaniká. Trvají-li ochranná a zdolávací opatření dlouhou dobu, může být chovateli na náhradu pole § 67 odst.2 poskytnuta přiměřená záloha.

V ekonomické části práce jsou výsledky práce prezentovány, analyzovány a souhrnně sumarizovány za léta výskytu nemoci u nás, tj. za období let 2001 až 2007. Celkově bylo v tomto období prokázáno 27 případů BSE, utraceno bylo 3,997 zvířat, která vzhledem k vytváření kohort pocházela ze 138 chovů. Celkové náklady na vyplácení náhrad za celou dobu výskytu nemoci dosáhly 197,057 tis. Kč. Průměrná četnost výskytu BSE u nás činila 3,86 případů za rok a průměrná nákladovost jednoho případu 7,3 mil. Kč.

Rok výskytu	Počet chovů dle počtu zvířat v kohortě v kusech A. do 10 B.11-100 C.nad 100	Počet utrac. zvířat	Náhrada za utracená zvířata	Náhrada nákladů za				Náhrada za nerealiz. produk.	Náhr. nákl. na dodrž. Mim. vet. opatř.	Celkem
				Utracení	asanace	vyšetření BSE	Náklady souvis. se zajištěním utracení a asanace			
2001 až 2007	A. 109	219	10350,8	232,9	1076,5	161,3	103,3	133,8	0,7	12059,1
	B. 14	608	21118,4	314,9	1806,1	672,5	308,6	899,1	109,0	25738,9
	C. 15	3170	132572,5	1297,8	8671,7	3531,6	729,5	11681,0	413,6	159259,1
Celkem	138	3997	164041,7	1845,6	11554,3	4365,4	1141,4	12713,9	523,3	197057,1

Tabulka: Náklady na 1. až 27. případ BSE v tis. Kč – souhrn za léta 2001 až 2007

Diskuse

Navzdory řadě přísných a včasně přijatých veterinárních opatření, především zákazu zkrmování masokostních mouček (od roku 1991), byla v roce 2001 BSE prokázána i v České republice. Výskyt BSE v naší republice zřejmě způsobila nepřímá kontaminace krmiva dovozovými masokostními moučkami, případně krmnými směsmi pro skot, a to moučkami, které do roku 2003 bylo možno používat například pro krmení prasat či drůbeže [7]. Při aktivním monitoringu na BSE bylo od 1.února 2001 do 30.11. 2007 vyšetřeno celkem 1.194.743 krav a zjištěno celkem 27 pozitivních případů. Tento záchyt se zdařil díky cílené a koordinované laboratorní diagnostice ve Státních veterinárních ústavech v Praze, Jihlavě a Olomouci.

V případě výskytu pozitivního kusu na BSE je sestavena kohorta zvířat určených k utracení a neškodnému odstranění. Sestavení kohorty organizují odborníci příslušné Krajské veterinární správy (KVS), kteří spolu s chovatelem vycházejí z ústřední evidence hospodářských zvířat a kteří dohledávají zvířata, která byla prodána jinému majiteli apod. Převoz zvířat z kohorty do vyčleněného asanačního podniku zajišťuje chovatel, utrácení zvířat organizují a řídí pracovníci Státní veterinární správy. Vlastní utrácení zvířat pak

provádějí pracovníci pohotovostních středisek pro likvidaci nákaz, která jsou při KVS v Brně a v Hradci Králové.

Díky včasně přijaté a kvalitní legislativě bylo už v prvním roce výskytu (1. a 2. případ) přistoupeno k výplatě náhrad všem chovatelům s výskytem této nemoci a do května 2007 byly vyplaceny i náhrady za poslední tři případy výskytu BSE v roce 2006 (24. až 26. případ). V prosinci 2007 pak byly vyplaceny i náhrady za poslední případ výskytu BSE z 11. září 2007. V roce 2001 činila celková výše vyplacených náhrad 5,5 mil. Kč, v roce 2002 1,6 mil. Kč, v roce 2003 47,0 mil. Kč, v roce 2004 39,8 mil. Kč, v roce 2005 91,9 mil. Kč a v roce 2006 11,1 mil. Kč. V roce 2007 dosáhla výše vyplacených náhrad pouze 169,5 tis. Kč. Důvodem této skutečnosti je, že 27. případ byl diagnostikován u více než jedenáctileté krávy, takže kohorta s ohledem na dřívější postupné porážení ostatních krav čítala pouze tři kusy. To mimo jiné poukazuje na skutečnost, že všechny ostatní krávy, které byly odchovávány nebo krmeny s touto pozitivní krávou byly po poražení při vyšetření na BSE negativní.

Souhrnné náklady za celé období výskytu BSE v České republice tak dosáhly 197,1 mil. Kč. Průměrná četnost výskytu BSE u nás činila 3,86 případů za rok a průměrná nákladovost jednoho případu 7,3 mil. Kč.

Z výše uvedených nákladů připadá plných 83,3% (164,0 mil. Kč) na náhrady nákladů za utracená zvířata, 9,7% (18,9 mil. Kč) na náhradu nákladů na utracení, asanaci a vyšetření BSE a 6,9% (13,6 mil. Kč) na náhradu nákladů za nerealizovanou produkci.

Ke snížení negativních ekonomických dopadů poskytuje Evropská unie všem členským státům finanční prostředky. Například pro rok 2005 poskytla Unie České republice na monitoring 1,640 tis. euro a na eradikaci 2,500 tis. euro [8].

Je zajímavé, že v odborné zahraniční literatuře jsou náklady náhrad uváděny většinou pouze souhrnně a i informace z Velké Británie, která byla BSE nejvíce postižena, udávají jen celkové položky ztrát za určité období. Při výpočtu výplat náhrad vycházejí z předem stanovených tabulek, ve kterých jsou pro věkově vymezené kategorie skotu předem stanoveny výše náhrad, bez přihlédnutí k jejich aktuální užitkovosti [9]. Podle studie britské vlády dosáhly celkové náklady vyvolané nemocí BSE do konce finančního roku 2001/2002 částky 4,2 miliardy liber, přičemž Evropská unie přispěla částkou 487 mil. liber, což činilo 11,6% z celkových nákladů [10]. Je však třeba vzít v úvahu, že tato vysoká částka odpovídá mimořádnému

počtu pozitivních krav, který do té doby ve Velké Británii přesáhl 187 tisíc kusů. V této částce je zahrnut i výpadek exportu hovězího masa do zemí EU ve výši 720 mil. liber, který byl Evropskou komisí zakázán už v březnu 1996 (USA zakázaly dovoz britského hovězího už na konci 80.let). Produkce hovězího masa představuje přibližně 0,5% objemu britského HDP a celé odvětví produkce hovězího masa zaměstnává přes 130 tisíc pracovníků.

S poklesem cen hovězího masa došlo ve Velké Británii k růstu cen substitutů, tj. masa ostatních druhů zvířat. Byl zaznamenán růst cen drůbeže a jehněčího masa přibližně o 5%, cena vepřového masa se výrazněji nezměnila [11].

V Severním Irsku pracuje v sektoru produkce hovězího masa přes 5 tisíc zaměstnanců a dalších 600 zaměstnanců v navazujících odvětvích [12]. Zaměstnanost v sektoru produkce hovězího masa má tak i dalekosáhlé důsledky sociální. Náklady na rekvalifikaci zaměstnanců, kteří přišli o práci v důsledku útlumu produkce masa, jsou odhadovány na 7,9% z celkových nákladů vyvolaných nemocí BSE.

V roce 2003 byla BSE zaznamenána i v Severní Americe – konkrétně 20. května v provincii Alberta v Kanadě a následně 23. prosince ve státě Washington ve Spojených státech. Americké a kanadské ekonomické studie ukazují čtyři hlavní vlivy nemoci BSE na národní ekonomiku – vliv na odvětví, vliv na firmu, vliv na trh a souhrnné sociální vlivy na společnost [13].

Před zaznamenáním prvního případu BSE v USA exportovaly Spojené státy hovězí maso do 53 zemí, nejvíce do Japonska, Mexika, Jižní Koreje a Kanady. Tyto čtyři země se podílejí na americkém exportu z 91%. Hodnota exportu dosáhla v roce 2003 3,95 miliard USD a po zákazu dovozu masa těmito zeměmi meziročně poklesla o 82%. Během prvního týdne po oznámení výskytu BSE klesla cena hovězího masa v USA o 16% [14]. Poptávka po hovězím mase se v následujícím roce snížila přibližně o 15% a celé odvětví produkce hovězího masa utrpělo ztrátu přes 2 miliardy USD [15].

Co se týče exportu hovězího masa, je podobně otevřená i ekonomika kanadská. Kanada exportuje více než 50% produkce hovězího masa a více než 40% tohoto objemu je vyváženo do USA. Po oznámení výskytu BSE byl pokles ceny masa v Kanadě ještě dramatičtější než v USA. Během osmi týdnů klesla cena masa ze 107 CND za 100 liber masa (přibližně 45 kg) na 30 CND, tj. došlo k poklesu o téměř 72%. V roce 2004 se pak cena stabilizovala mezi 75 až 83 CND [16]. Ve Spojených státech například činí pokles ceny 100 liber

masa o každých 10 USD snížení příjmů v odvětví o téměř 3,5 miliardy USD. Jediná práce vyčísluje i hodnotu specifikovaného rizikového materiálu (SRM), který je na jatkách ze zákona součástí odpadu a který nemůže být součástí tržní produkce, a to na 7 USD u jednoho kusu krávy. Testování zvířat na jatkách zatížilo americkou ekonomiku jen v roce 2004 dalšími 221 mil. USD, tedy přibližně 12 až 15 USD za kus [17].

Výskyt nemoci BSE je však spojen nejen s poklesem ceny hovězího masa a s poklesem spotřeby, ale je rovněž provázen růstem celé řady nákladů. Podle americké Food Safety Inspection Service (FSIS) se jen jednorázové náklady na školení zaměstnanců chovatelských firem pohybovaly v závislosti na velikosti firem od 14 tis. USD do 100 tis. USD. Splnění bezpečnostních a zdravotních nařízení FSIS stálo americkou ekonomiku v roce 2004 téměř 65 mil. USD a celkové firemní náklady spojené s výskytem nemoci přesáhly 200 mil. USD. Vlivem zvýšených nákladů došlo ke snížení firemních investic v průměru o 700 tis. USD.

V souvislosti s nemocí BSE přijala kanadská vláda tzv. Ozdravný ekonomický program, který v roce 2005 dosáhl celkového objemu přes 1 miliardu USD [18]. Tento program se skládá z řady dílčích podpůrných programů, především z Národního ozdravného programu pro chovatele skotu ve výši 460 mil. USD, Programu pro chovatele skotu v provinci Alberta ve výši 65 mil. USD, Programu pro zpracovatele masa ve výši 67 mil USD, Zvláštního programu pro chovatele býků a jalovic ve výši 100 mil. USD, Programu pro zpracování odpadu v provincii Alberta ve výši 125 mil. USD a z Federálního programu pro zpracování odpadu z býků a krav ve výši 200 mil. USD.

I když vzhledem k rozdílným cenovým relacím ve výše uvedených zemích nelze náklady spojené s výskytem BSE plně srovnávat, lze z porovnání údajů přesto vyvodit, že náklady na poskytování náhrad našim chovatelům jsou úměrné nákladům v zahraničí.

Potěšující však je, že na základě včasně přijatých a dlouhodobě uplatňovaných veterinárních opatření dochází u nás v posledních dvou letech k očekávanému poklesu výskytu BSE, na což reaguje spotřebitelská veřejnost zvýšenou spotřebou hovězího masa.

Poznámka: Krátce po odevzdání rukopisu do redakce se v České republice vyskytl 28. případ BSE u téměř desetileté krávy. Kohorta činila 25 kusů zvířat.

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EXPLOITATION OF IP VALUE GROWTH POTENTIAL IN TERMS OF SME'S INTERNAL ENVIRONMENT

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Abstract

This paper deals with broad field of knowledge management from valuation theory and practice point of view. The aim of this article is to provide deeper understandings of intellectual property value creation. On the basis of fundamental scientific methods the extensive literature searching, analysis of assumption and deduction of consequential results are carried out. In fine, method for future empirical research aimed on intellectual property value creation is derided.

Key words

SME'S, Tacit Knowledge, Economic Niveau, Net Income Capitalization, Internal Environment

Introduction

An effective management of knowledge is necessary for the right investment decisions at the age of knowledge economy nowadays. A considerable distinction of shares of objectified intellectual property in a property portfolio of enterprises has happened during the last few decades**.** Primarily, the aim of this paper is to analyze knowledge management within an internal environment of small and medium sized enterprise. Further we consider assumption suitable for qualifying and quantifying value of intellectual property which is capable for yield potential capitalization. Intellectual property is distinctive mover of competitive advantage on the present. This stage is suitable for analysis of historical and present data. Accordingly it can be applied for predict future time period and this coefficient is feasible for volatility analysis of intellectual property value changes. Finally, we derived brand new author's method suitable for intellectual property value expression in terms of market value of a small and medium sized enterprise.

Methodology

Firstly we carried out an extensive literature searching focused on subject of knowledge management definition. Above all, analysis and comparison scientific methods were applied in this stage. Secondly we prepared schemes described intellectual property in tangible evidence. Mainly the description method was applied in this stage. The last part is devoted to methodological question of economics and management theory and practice in order to draw the intellectual property value equation. Consequently, further applied methods were deduction and induction.

Knowledge Management Niveaues

There are exists many ways for recognition and in other words materialising knowledge. Knowledge should be apprehended as a part of transformation knowledge chain from general data to knowledge (see f.i. Truneček, Vágner). Knowledge management is dynamic modern branch of management with several discrepancies in technology and heterogeneous conception. Fundamental dichotomy is based on divergent interpretation of knowledge concept. Results of our observations are progress concept grounded on rudimental application approaches. These approaches are differentiated above all particular methods and according to the detailed event and also techniques.

We extract author's concept of knowledge management in accordance with particular niveau. The top niveau called philosophic niveau shows us the first purpose, intention. This is the ideological cornerstone of knowledge management. On account of the first mover there is pushed the choice of rudimental possible approaches toward application procedure determining. This is the part of theories and gnoseological thoughts. The second niveau, methodical or systematic niveau, already we are able to select sortable methodical device. Hereinafter all along we finished this part of progress we are able to approach into the last part, technique niveau. In this level, partial techniques, computations and management activities are applied on the specific entities and subjects of management.

IP Recognition in the SME's Internal Environment

Knowledge according to a part of general management are changed rapidly recently. The changes and the shift of conception are evident in particular move from management of humans being to a management of

theirs knowledge as a fundamental subject of knowledge management. The management targeting is yield potential exploitation covered in knowledge. Knowledge are especially explicit which are expressed a sort of tangibles. The next classification is implicit knowledge expressed indirectly. Namely it can be subject logic, process sequence, technology or answer. The tacit knowledge is the source data for the competitive advantage of SME's. Tacit knowledge we apprehend as an incommunicable, secret fact in issue.

Broad Conception of IP

Knowledge management is known on several names. Some author called it "conceptual Babylon". According to particular paradigm of various schools of economics and management are used unstructured titles for this subject. We can meet with subject of knowledge management named in accordance with accounting regulations and guidelines, tax laws, industrial property laws and valuation rules and guidelines. Other view providing economics and valuation theory. The broad concept of intellectual property is accepted ourselves. Indications are not semantic equal, but are based on exploitation and expression of some sort of knowledge. Kisslingerova, Novy (2005) pointed out commonly used terms for intellectual property such as for instance intangible assets, intangibles, intellectual property, intellectual capital, intellectual ownership, and industrial property, copyright et sequentia.
Objective elaborated scheme come out from economics analysis of the Czech laws and industrial property practice. Fundamental terms are circumscribed quite broadly and vague herein. Particular species are incorporated in several laws and legal enactments. Applied diction of these resources conforms to instead license agreement negotiation than corporate finance occasions. According to the Commercial code entered separate terms company name called firm and enterprise. Company name is used for business operations. Internal and external stakeholders get into business relations exactly under the company name.

An extensive literature searching of intellectual property namely according to the Czech law and accounting system (see Figure 1) shows dichotomy of economics and especially law conceptions. Internal environment of enterprise is figured out central circle. While external environment of law and economics system was not object of out observation.

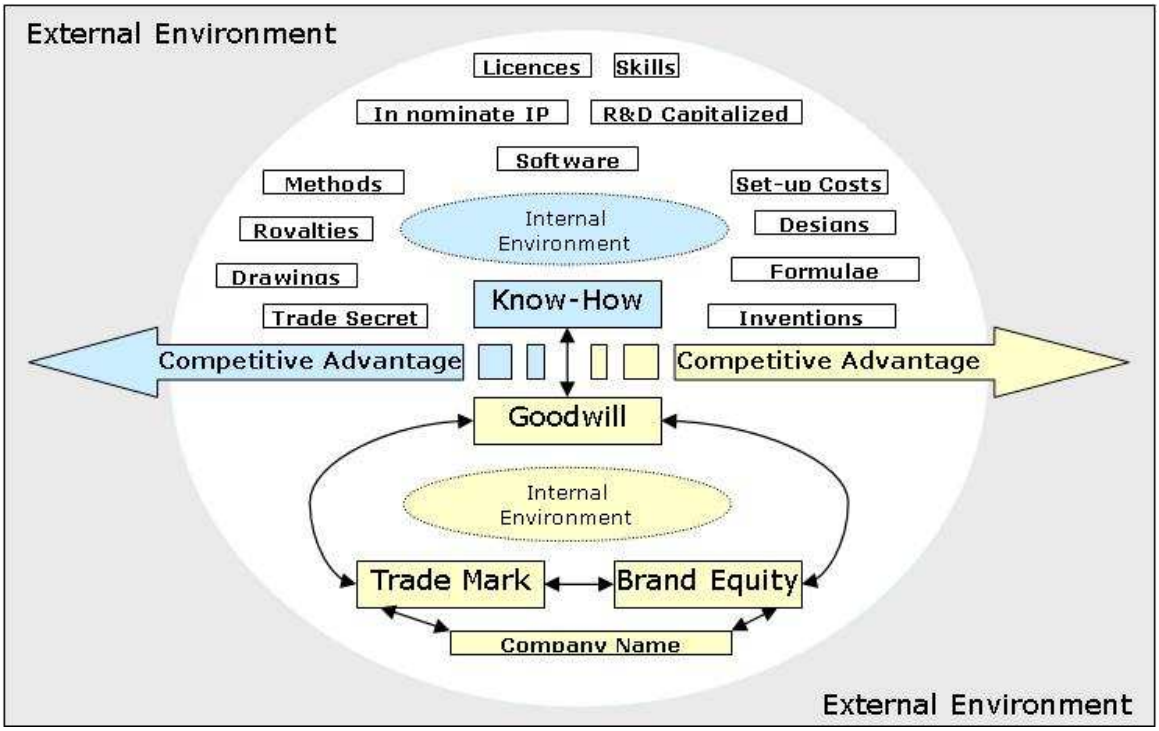

Figure 1: Economics Consequence of the Industrial Property

Intellectual property according to the Czech Accounting Standards balance sheet recorded industrial property called Intangible Fixed Assets. Inter these are filed following items: set-up costs, research and development capitalized, software, royalties, goodwill and other intangible fixed assets. Hereinafter contains for our purposes insignificant heads: intangible assets in the course of construction and advance paid for intangible assets.

In the terms of the intangibles exploitation phenomena does not unmistakable nexus between brand equity (financial expression of brand), trade mark and goodwill. Indeed there we can recognize several others, but very similar terms such as trade name, trade brand and brand name. According to Czech commercial code any one particularity can be traced up. According to commercial code entrepreneurs or businessmen make entrepreneurial activity under the company name (also called business, association or organization). Every enterprise must "have" only one company name, but it is on its own about ownerships of the brand. Goodwill is especially accounting term which is able to reflect difference becomes from accounting and market value of the firms in acquisitions processes. According to Czech accounting standards goodwill has been recorded as accounting entry only since 2003. Until that time the value of goodwill had been addressed as impairment of acquired fixed assets. Jurecka (2005) pointed out that the intangibles value is estimation of trademark value and group of incidental brand names, trade brand and goodwill. Particular parts overlap together each other. It is too complicate task to separate yields per parts. That is economics

point of view. Different point of view brings accounting and other rule of law. Jurecka (2005) further pointed out in several mutually interconnected studies the important role of intangibles in balance sheets as failure of the Czech economics.

Measure of IP Value

The information about value of enterprises is necessary for the right investment decision nowadays. The deficiencies of previous years do not bring favourable tools for its measuring and managing. In the Czech Republic we can recognize three periods' necessity attainments of value of companies. The first wave of the intellectual property valuation was connected with the privatization in the beginning of 90th in the Czech Republic. Already at the time the several cases were inefficiently appraised and huge spectrum of intangibles were nonrefundable lost. The second wave was connected with the economics crisis in the second half of 90th. The HDP decreased and whole economy came into crisis. In this time, abroad economics subject have made mergers and acquisitions with underestimated enterprises in the Czech Republic. The third wave started round about 2004 and still continuous. Multinational corporations make mergers and acquisitions with the moneymaking, successful, profitable enterprises. Huge challenge remains underestimated value of enterprises. Management does not achieved enough information about the value of intangibles and a lot of pieces of intellectual property had been purposely acquired by abroad companies and after that stopped derived benefit from theirs. By all means, the value of intellectual property is basically derived from realized cash flows, accordingly the previous affirmation means liquidation of exploitation potential of subject intellectual property.

On a basis of empirical survey in the western countries and USA the ratio of intellectual property in the value portfolio of enterprises still rapidly growth. If management want to responsibly managing the chain of enterprise value creation is necessary to measure, quantify and qualify the value within responsible appraisal of intellectual property.

General IP Valuation Framework

Basic valuation concepts can be deal out in to branches. The first is qualitative approach and second is quantitative approach. Qualitative approach is based on subjective ranking of appraiser. This approach is usually employed within the frame of marketing assessment. For instance we can mention dotted estimation according to Balance Scorecard, Rules of Thumb, Information method based on the crucial

deficiency is the result of this method etc. Marketing experts are usually satisfied with a soft evaluative verdict without resulting amount associated with the concrete intellectual property and/or assets. For value creation management of IP is hence for this reason ineligible.

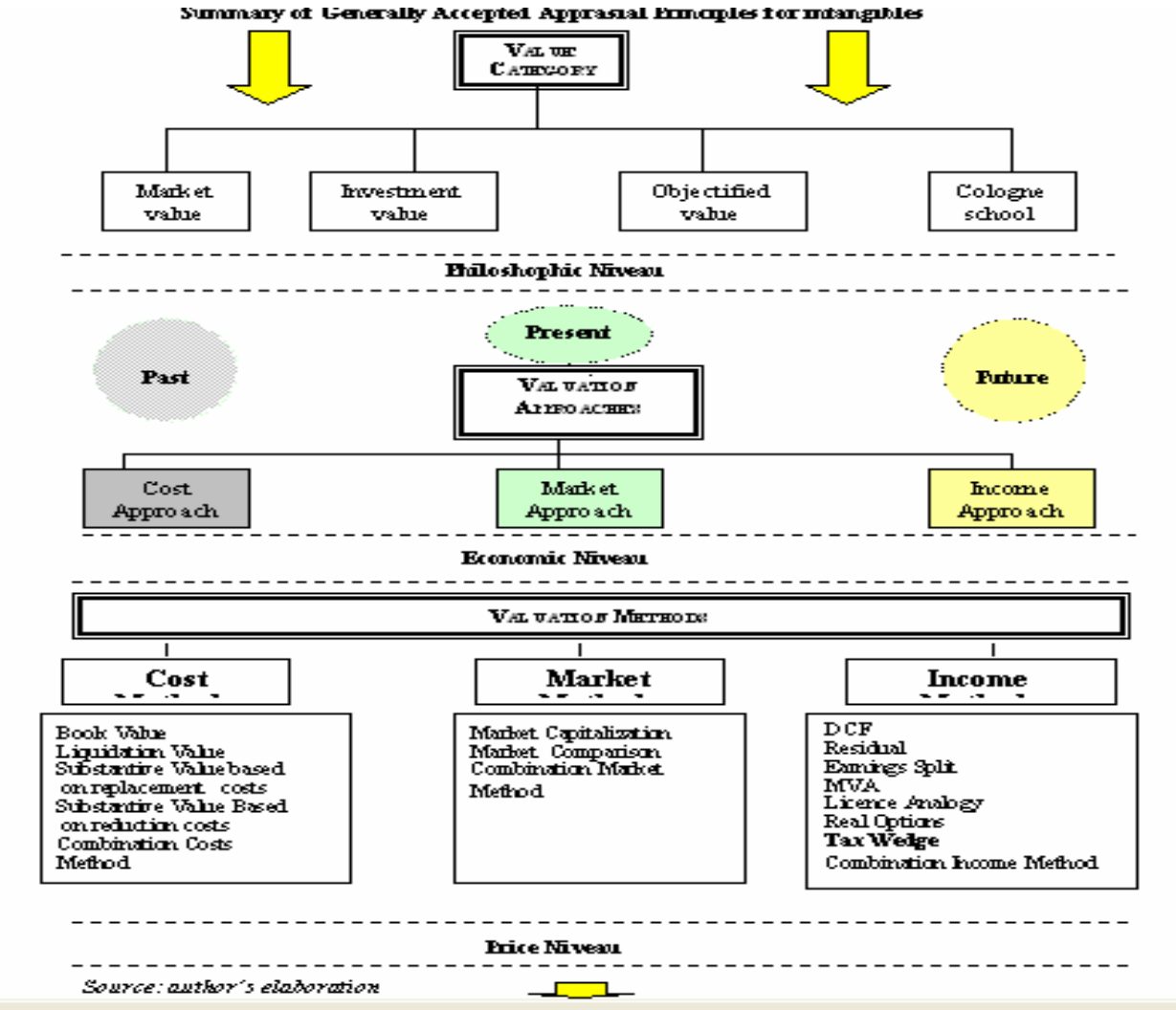

Figure 2: Economics Consequence of the Industrial Property

The figure 2 vide supra shows a general appraisal principle. The scheme describes basic steps in appraisement and IP price negotiation in three rudimental niveaues. In the case of this paper we describe theoretical solution of fundamental approaches for valuation method. If presented appraisal model is used incorrectly without basic knowledge, the method does not help has therefore been underrated by the public. Using three niveaues model valuation is being applied more effectively, but opportunity still remains[1].

Intellectual property valuation method for long run tome series

A basic appraisal concept for wide field defined intangibles comes out from companies operation called mergers and acquisition. Transfer of a business share/company stock is able to bear appealing gains for new-one business holder/stock holder. There are not exists any available database of these operations in market or other type of company values in the Czech Republic.

Traditional concept for explication of the three-digit group of intangibles (vide supra Figure 1) can be articulated following equation:

$$V_i = V_m - V_b \qquad (1)$$

V_i.....Intellectual property company's value
V_m..... Company's market value
V_b..... Company's substantive (book) value

By this simple equation we can obtain total value of intellectual property with naked variance market and book values. This ratio is applicable to transition countries quite tough. Valid assumption comes up from expectation of developed functional market with enterprises and effective stock market. Mentioned assumption can not be applied in the Czech Republic.
Our topical concept for long run horizontal and vertical technical analysis is in preference determined for effective management of underlying properties. Our draft appears from German point of views on particular matters. On the contrary of the approach reoffered above all specialists from US and western countries (vide e.g. Damodaran, A. 2006, Smith, G., Parr, R. 2000) the German approach, methods and

[1] Compare Figure 2. with knowledge management niveaues

techniques are based on earnings. In detail, these methods are based on Net Income Capitalization rather than Discounted Cash Flow[2] methods and techniques. A DCF method, dividend discount methods and market (also called relative) valuation methods needs data from effective market. On the contrary, initial presumption for Net Income Capitalization outgoing from accountancy. Deficiencies of accounting regulations are sufficiently known in general. As well effort of the board of the International Accounting Standards Committee which issues International Financial Reporting Standards (IFRS) to cleanup expression of accounting entries value.

In the concrete, our equation comes up form Version II, how the methods named Marik (2007). This case is further called variance of practitioners. The methods origins are worked out by the Institut der Wirtschaftsprufer, Germany. Net income is derivates particularly from adjusted operating earnings on the accounting background.

$$V_{NI} = \frac{\sum_{t=1}^{K} q \cdot NI}{\sum_{t=1}^{K} q} - IAV \qquad (2)$$

V_{NI}..... Value of a wide define intellectual property (goodwill=trademark=brand)

NI..... Adjusted Net Income

q..... Weights determines interest of net Income behalf specific last year for prediction future adjusted net income

K..... The number of past years included to the computation

IAV..... Substantive value based on book value

The most influential variable in this equation are the weights. They are estimated by statistical methods for each particular enterprise on the basis of last time series. Data are smoothed suited mathematic function. Variance and uncertainty are compensated certainty equivalent of Adjusted Net Income. Possibilities of improvement are in research on systematic samples of enterprises in particular fields. Furthermore, the aim of further research is analysis of time series industrial property changes in portfolio of enterprises.

[2] Bellow DCF

Conclusion

Incomes derived from exploitation of intellectual property poses the highest potential of earnings from types of assets in portfolio of enterprises. Managing and measurement of intellectual property value is unconditional for the right investment decision in the age of knowledge economy nowadays. Intellectual property can be expressed by legal rights and/or implicit by relative prevention according to trade code. These examples mean only a few types of intellectual property in tangible expression.

We selected the Net Income Capitalization method with the frame of income approach and the substantive value methods in the frame of cost approach for creation of author's economic model. In fine we conclude by the draft of an additional research on the basis of present results. On the basis of the model we going to observe time series and changes in intellectual property value during the transition period because this is requirement of future business success.

In fine, knowledge management represents one of the latest branches of paradigm shit of economics thoughts. Intellectual property on the basis of our observe concentrate knowledge as a type of intangible assets by means of material record in accounting system of enterprise. The companies in the Czech Republic still does not cultivate this part of property portfolio and does not exist explicit methodology for the intangible property analysis in the long run time period. One of the fundamental premises of management is – to manage only what you are able to qualify. This is the crucial task for the Czech companies, if they want to exploit, to manage and make use of value creation potential concealed in the intellectual property.

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ČESKÉ ZEMĚDĚLSTVÍ V RÁMCI EVROPSKÉ INTEGRACE

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Abstrakt

Příspěvek se zabývá problematikou českého zemědělství v rámci evropské integrace. Cílem příspěvku je zjistit situaci v českém zemědělství před a po připojení k EU. Dílčím cílem je taktéž naznačení příležitostí českého zemědělství. V příspěvku je pojednáno o subjektech podnikajících v zemědělství v ČR, zemědělské produkci v ČR a EU, produktivitě tohoto sektoru, soběstačnosti EU u vybraných zemědělských produktů a podíl prostředků rozpočtu EU vydávaných na jednotnou zemědělskou politiku.

Klíčová slova

české zemědělství, EU, jednotná zemědělská politika, rozpočet EU

Abstract

This article deals with the Czech agriculture from the view EU integration. The aim of this article is to know the situation in the Czech agriculture before joining Czech Republic to the EU and current situation. The article should show the future of Czech agriculture in EU and the opportunity to better offer of Czech agricultural products. There is written a word or two about specific of Czech agricultural subjects, agricultural production in the Czech Republic and in the other member or EU, productivity of this sector, self-supporting the EU of selected agricultural products, the EU budget and the rate of this budget related to agricultural politics.

Key words

Czech agriculture, EU, agricultural politics, EU budget

Úvod

Perspektivy českého zemědělství jsou oblastí zájmu, k níž se vyjadřují nejen odborníci, politici, ale taktéž laici. Ačkoliv tento ekonomický sektor přispívá na tvorbu celkového HDP nejnižší měrou, přesto je součástí tradiční ekonomiky a takto je k němu i přistupováno. Pěstování plodin a chování hospodářských zvířat se v některých

kruzích dědí z generace na generaci, proto jakýkoliv zásah mající za následek regulaci zemědělské výroby vyvolá toliko negativních postojů z řad široké veřejnosti.

Diskuze na toto téma se před vstupem ČR do EU ještě zintenzívnily, neboť bylo zřejmé, že tato oblast bude muset být regulována jednotně, dle zájmů všech členů EU a že české zemědělství bude v tomto směru značně eliminováno. A to i přesto, že EU každoročně vydává značné finanční prostředky ze svého rozpočtu na podporu zemědělských subjektů.

Tento příspěvek se zabývá českým zemědělstvím v rámci evropské integrace. Cílem tohoto příspěvku je přiblížit základní situaci panující v českém zemědělství před a po vstupu do EU, naznačit další vývoj a příležitosti rozvoje českého zemědělství. Metodami použitými pro zpracování tohoto příspěvku byly analýza a komparace.

Zemědělství v ČR

Abychom mohli posoudit situaci v českém zemědělství, je nutné analyzovat několik ukazatelů. Prvním z nich je vývoj počtu subjektů v zemědělství, dále pak vývoj zemědělské produkce a produktivitu v oblasti zemědělství.

Zemědělské subjekty v ČR

Zemědělské subjekty se na rozdíl od ostatních subjektů ekonomiky vyznačují určitými specifiky. Mezi tato specifika můžeme zařadit:

- produkce je dodávána předem sjednanému jednomu či několika málo odběratelům
- s odběrateli jsou uzavřeny dlouhodobé smlouvy
- nejdůležitější faktory pro volbu dodavatele nezaujímá jen samotná kvalita produkce, ale také dodržení množství produkce a dodržení dohodnutého termínu

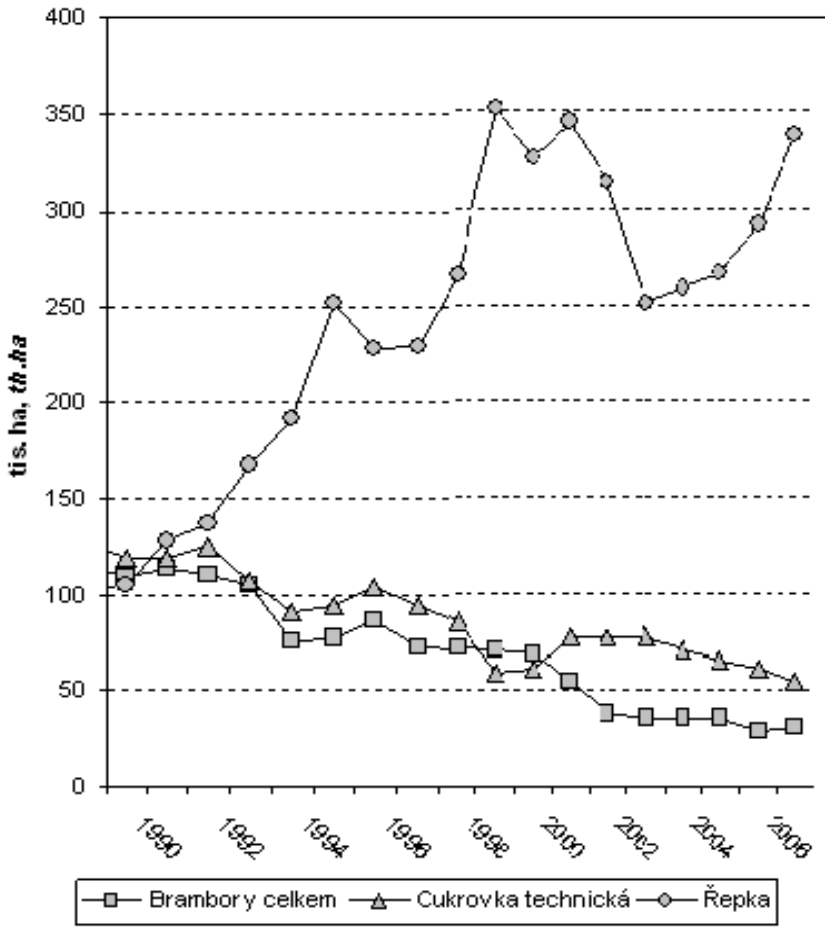
Podíl zemědělských subjektů na celkovém počtu podnikatelských subjektů v České republice se podle Českého statistického úřadu pohybuje přes 5 %. Podle Českého statistického úřadu je tedy v oblasti zemědělství a lesnictví evidováno cca 133 800 podnikatelských subjektů. Do roku 2003 docházelo k postupnému nárůstu těchto subjektů. Poměr mezi nově vzniklými a zaniklými byl cca 1,2 : 1. Tento poměr se však po roce 2004 změnil v neprospěch nově vzniklých zemědělských podniků, a to poměrem 1 : 1,3.

Pokud bychom se zaměřili na insolvenci zemědělských subjektů, pak po vstupu ČR do EU nedošlo k jejich výraznějšímu nárůstu. V zemědělství je počet insolventních subjektů 0,14 %, tj. stejný poměr jako průměr celé ekonomiky.

Z hlediska právní formy zaujímají nejčetnější podíl 90 % fyzické osoby (cca 121 000 subjektů). Družstva se pak na celkovém počtu podnikajících subjektů podílí pouze malým zlomkem. Podle Českého statistického úřadu je v této oblasti činných cca 1600 družstev.

Zemědělská produkce v ČR

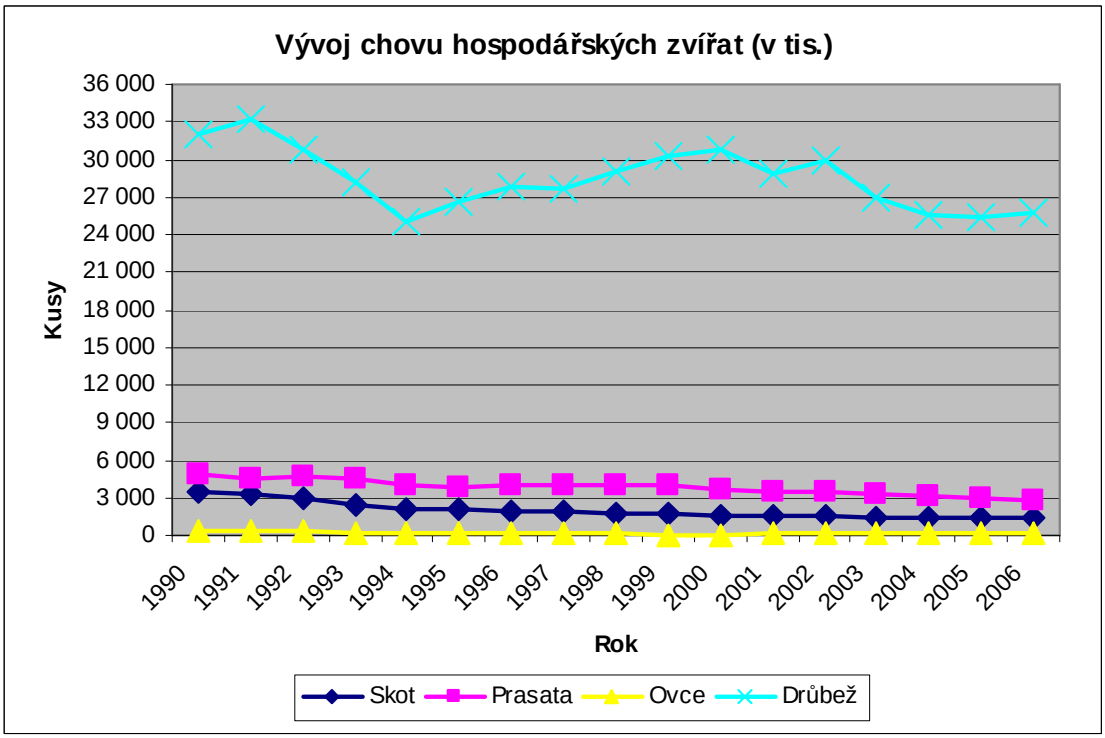
Zemědělskou produkci v ČR můžeme opět hodnotit dle několika kritérií. Prvním z nich může být velikost plochy oseté zemědělskými plodinami. V Grafu 1 je uveden vývoj plochy osevů půdy v letech 1990 až 2008. Ve sledovaném období došlo k výraznému poklesu osevu brambory a cukrovkou. Výrazný nárůst vykázala jen řepka.



Graf 1: Plochy osevů zemědělských plodin (Zdroj: ČSÚ)

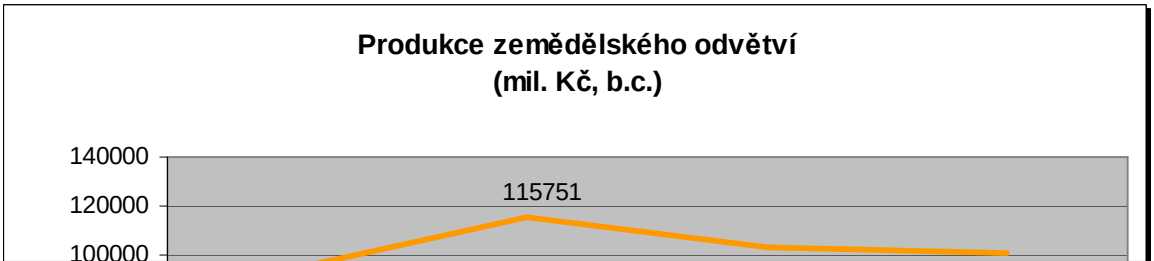
Oproti roku 2003 došlo v roce 2004 k výraznému nárůstu obilovin. Od roku 2004 však opět dochází k mírnému poklesu. Po roce 2003 Vzhledem k současné zemědělské politice EU se u pěstovaných plodin nepředpokládá žádný výrazný nárůst.

Druhým kritériem může být počet kusů chovaných hospodářských zvířat. V Grafu 2 je zachycen jejich vývoj od roku 1990 po rok 2006. V daném období je patrný pokles všech druhů hospodářských zvířat, nejvýraznější rozptyl je u chovu drůbeže. Výkyvy mohou být mimo jiné způsobeny i z důvodu nemocnosti a rozšíření epidemií, např. ptačí chřipky. Ačkoliv to z grafu není patrné jediný mírný nárůst po vstupu ČR do EU byl zaznamenán u chovu ovcí. V roce 2006 taktéž došlo k mírnému zvýšení počtu drůbeže. Z výše uvedených informací je však znatelný útlum chovu hospodářských zvířat po vstupu do EU, ačkoliv tento není jedinou příčinou snížení počtu chovů.



Graf 2: Vývoj chovu hospodářských zvířat v tis. kusech (Zdroj : ČSÚ)

V Grafu 3 je uvedena produkce zemědělského odvětví v České republice. Z dat uvedených v tomto grafu je patrné, že zemědělská produkce kulminovala v roce 2004, dále pak dochází k postupnému poklesu. Výkyvy v rámci rostlinné výroby jsou daleko výraznější na rozdíl od živočišné výroby, která ve sledovaných letech byla spíše rovnoměrná či mírně se snižující.



Graf 3: Produkce zemědělského odvětví (Zdroj: ČSÚ)

Nutné je také podotknout tu skutečnost, že uvedený graf obsahuje produkci v rámci běžných cen. Abychom mohli danou situaci řádně zhodnotit, je nutné zohlednit i vývoj cen zemědělských výrobců. V roce 2003 došlo podle Českého statistického úřadu k poklesu cen zemědělských produktů o 2, 9 %, v roce 2004 pak došlo k výraznému vzrůstu cenové hladiny, a to až o 8, 1 %. V roce 2005 vykázala cenová hladina u zemědělských produktů pokles o 9,4 %, následující rok pak nárůst o 1,1 %. Na základě těchto informací je patrné, že nárůst v roce 2004 byl způsoben vzrůstem cenové hladiny a taktéž na poklesu produkce se v následujících letech výrazně podílela i změna cenové hladiny. Množství produkce je díky těmto skutečnostem v uvedeném období spíše vyvážené.

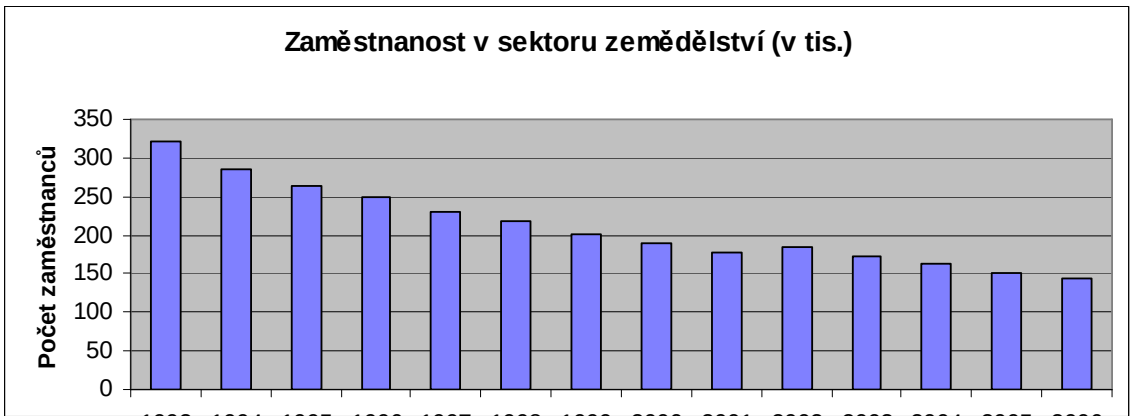
Produktivita v českém zemědělství

Produktivitu v oblasti zemědělství znázorňuje Graf 4. Produktivita se ve sledovaných letech zvyšovala, její výrazný nárůst však můžeme spatřit v roce 2004. Do tohoto data převažovala živočišná produkce nad rostlinou produkcí v poměru cca 1,3 : 1. Od roku 2004 však dochází k přibližnému vyrovnání obou těchto oblastí, nadále však v mírně převyšuje živočišná výroba, a to poměrem cca 1,1 : 1. Vzrůst produktivity je po celé sledované období zejména dán vzrůstem produktivity rostlinné výroby. Od roku 2004 dochází k mírnému poklesu produktivity.

Graf 4: Hrubá zemědělská produkce na pracovníka (Zdroj: ČSÚ)

Opětovně má na produktivitu českého zemědělství vliv řada faktorů. Jedním z nejvýraznějších faktorů je nepochybně vývoj počasí a výskyt nemocí. Lze předpokládat, že vstup ČR do EU mohl mít taktéž pozitivní vliv na zvýšení produktivity daného odvětví, nicméně, abychom mohli tuto domněnku potvrdit, bylo by nutné nejprve provést detailní analýzu, ta ovšem není předmětem této práce.

Zvyšování produktivity zemědělství verifikuje i srovnání celkové produkce a zaměstnanosti v sektoru zemědělství.Vývoj zaměstnanosti v sektoru zemědělství je patrný z Grafu 5. Od vzniku ČR dochází ke snižování počtu zaměstnanců. Jedinou diferenciaci vykázal rok 2002, kdy byl počet zaměstnanců v zemědělství krátkodobě zvýšen. Následující rok však vývoj sleduje předchozí trend. Tento výkyv v roce 2002 mohl být zapříčiněn povodněmi v ČR, kde na základě spekulativní domněnky, mohl být zaměstnán vyšší počet pracovníků, kteří pomáhali s likvidací následků škod po povodních. V zemědělství nyní pracuje méně než polovina počtu pracovníků evidovaných v roce 1993.



Graf 5: Vývoj zaměstnanosti v sektoru zemědělství (Zdroj: ČSÚ)

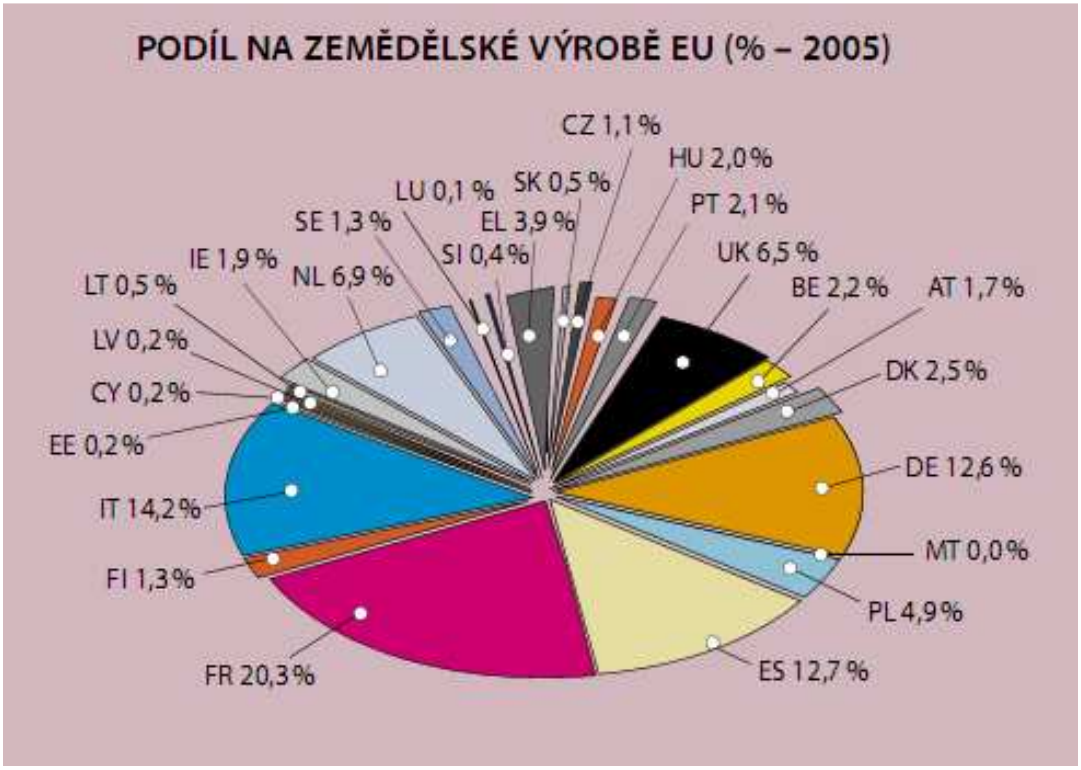
Na závěr této podkapitoly je nutné podotknout, že práce v zemědělství příliš zájemců o práci neláká. Nezaměstnaní si raději vybírají jiné druhy činnosti, případně dále vystupují v pozici nezaměstnaných než aby pracovali v tomto sektoru. Důvodem tohoto stavu je ta skutečnost, že mzdy v zemědělství patří k nejnižším v zemi. Dle Českého statistického úřadu se průměrné mzdy zaměstnanců v zemědělství v roce 2005 pohybovaly ve mzdové kategorii 10 000 – 12 000 Kč, přičemž vyjma zdravotnictví a ostatních veřejných služeb vykázala v tomto roce všechna ostatní odvětví průměrnou mzdu vyšší než 20 000 Kč.

Zemědělství EU

Taktéž k pochopení současné zemědělské politiky EU vyžaduje alespoň zevrubnou analýzu několika důležitých faktorů. Nejprve se podíváme na podíl jednotlivých členských států EU na zemědělské výrobě, dále je vhodné v tomto směru zhodnotit soběstačnost EU alespoň u vybraných zemědělských produktů a následně se zaměříme na výdaje rozpočtu EU do této oblasti.

Podíl států EU na zemědělské výrobě

K pochopení postavení našeho státu při dojednávání limitů množství produkce v jednotlivých oblastech zemědělství je nutné vnímat je v kontextu podílu naší produkce na celkové produkci EU. V Grafu 6 je znázorněn podíl členských států na zemědělské výrobě EU.

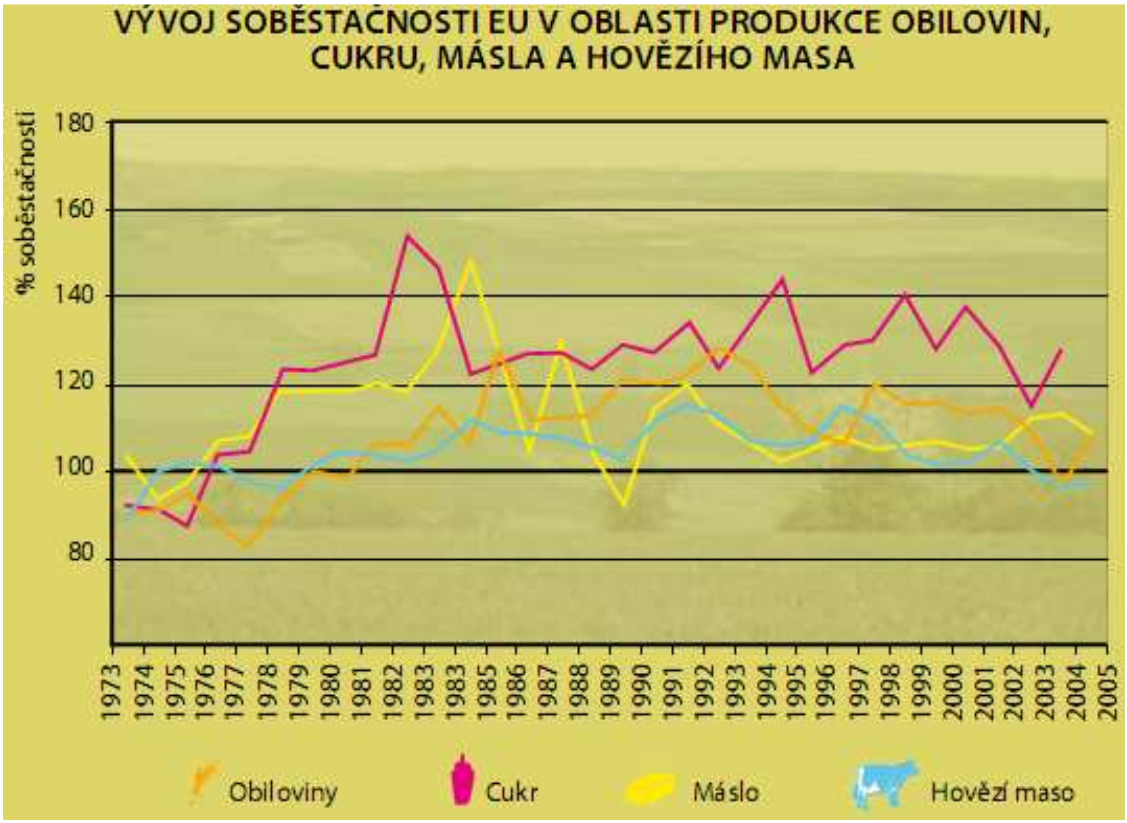


Graf 6: Podíl států EU na zemědělské výrobě (Zdroj: Společná zemědělská politika)

Skutečnosti uvedené v tomto grafu nejsou pro nás a pro naše zemědělce příliš povzbudivé. Česká republika se podílí na celkové produkci EU pouze cca 1 % (v roce 2005 to bylo 1,1 %). V tomto ohledu by se dalo říci, že se víceméně jedná o zanedbatelné procento. Vůdci v oblasti zemědělství jsou Francie (20,3 % podílu produkce v roce 2005), Itálie (14,2 % podílu produkce v roce 2005), Španělsko (12,7 % podílu produkce v roce 2005) a Německo (12,6 % podílu produkce v roce 2005). Tyto čtyři státy zaujímají cca 60 % produkce celé EU. Je tedy zřejmé, že mají taktéž na vývoj jednotné zemědělské politiky největší vliv. Česká republika v tomto směru nemůže těmto zemím konkurovat.

Soběstačnost EU ve vybraných zemědělských produktech

Druhým faktorem, prostřednictvím nějž budeme moci lépe predikovat vývoj českého zemědělství je soběstačnost zemědělské produkce v EU. Graf 7 zobrazuje vývoj soběstačnosti EU u vybraných zemědělských surovin. Jedná se o komplexní vývoj třicetileté situace na trhu EU, počínaje rokem 1973 a konče rokem 2005.

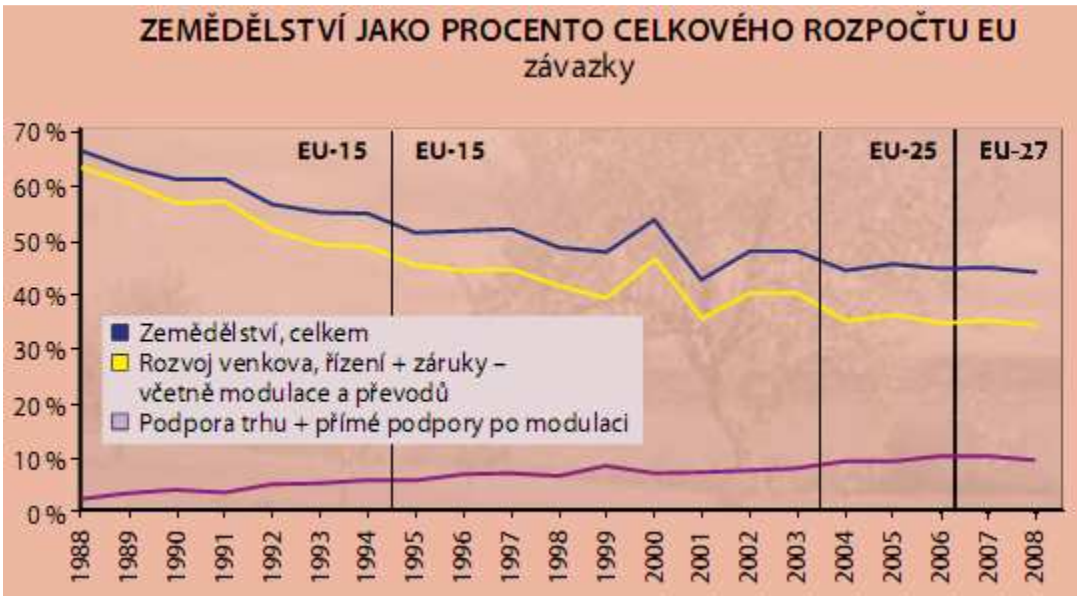


Graf 7: Soběstačnost EU v produkci vybraných zemědělských výrobků (Zdroj: Společná zemědělská politika)

Zevrubnou analýzou tohoto grafu získáváme pro české zemědělství ne příliš potěšující výsledek. EU byla v celé své historii v produkci zemědělských výrobků spíše soběstačná a vytvářela často i výraznou nadprodukci. Soběstačnou začala být u všech čtyřech sledovaných produktů od roku 1980. Od tohoto data se z produkce 100 % a vyšší vychýlila pouze v roce 1989 – 1990 nižší produkcí másla a v roce 2003 poklesem produkce obilovin a hovězího masa, jehož mírná nesoběstačnost je patrná i v následujících letech. Naopak pro české zemědělství po dlouhá desetiletí kruciální plodina, kterou představovala řepa cukrovka, je v EU dlouhodobě ve výrazné nadprodukci. Z tohoto vývoje je patrné, proč EU po ČR vyžadovala tak razantní útlum výroby cukru. Taktéž produkce obilovin a másla se nachází nad hranicí, kterou je EU schopna zkonzumovat. Jedinou oblastí, kde by bylo možné uspět, je produkce hovězího masa. O tuto oblast samozřejmě budou mít zájem i ostatní členské země EU, tudíž prosazení je sice teoreticky možné, otázkou zůstává, nakolik však reálné. Budeme-li danou situaci simplifikovat, můžeme dojít k závěru, že EU naši zemědělskou produkci nepotřebuje, spíše naopak – potřebuje nalézt odbytiště svých zemědělských přebytků.

Výdaje rozpočtu EU na společnou zemědělskou politiku

Výdaje rozpočtu EU na společnou zemědělskou politiku jsou třetím důležitým faktorem, který celkovou zemědělskou politiku a postavení ČR v rámci EU, ovlivňuje. Graf 8 ilustruje vývoj společné zemědělské politiky EU po dvacetileté období, tj. od roku 1988 do roku 2008.



Graf 8: Výdaje rozpočtu EU do zemědělství (Zdroj: Společná zemědělská politika)

Z výše uvedeného grafu můžeme vysledovat, že podíl výdajů na společnou zemědělskou politiku se postupně snižuje, z cca 68 % na současných cca 50 %. Podle Společné zemědělské politiky však se tento podíl snižuje rychleji než veřejné výdaje. Z Grafu č. 8 můžeme také vysledovat tu skutečnost, že výdaje na zemědělství celkem jsou z největší části tvořeny výdaji na rozvoj venkova a křivka výdajů na zemědělství celkem kopíruje křivku výdajů na rozvoj venkova. Tento podíl na celkových výdajích se však postupně snižuje. Naopak v průběhu let dochází ke zvyšování výdajů na podporu trhu, tyto se však pohybují ve výši cca 10 % celkových výdajů EU.

Dle dokumentu Společná zemědělská politika, vydává EU ročně cca 55 mld. EUR právě do oblastí dotací určených pro zemědělce. Celkově tato částka není v rámci EU nikterak alarmující, jedná se o cca 0,5 % HDP EU.

Diskuze

Česká republika podle Ministerstva zemědělství dostává z EU každoročně vyšší podíl dotací. V roce 2006 to bylo 33 mld. Kč, v roce 2007 36 mld. Kč a v roce 2008 40 mld. Kč. Ačkoliv tato situace může být pozitivně vnímána, je nutné však upozornit na skutečnost, že čeští zemědělci mají nárok na 50 % výše dotací, které získávají původní země EU. Sice dalších 30 % může českým zemědělcům přispět státní rozpočet ČR, ten však v roce 2008 počítá

s dorovnáním ve výši 27 %. Celková suma toho, co mohou čeští zemědělci získat bude tedy výrazně nižší, než příspěvky jejich protějšků z původních členských států EU. Přesto však Ministerstvo zemědělství deklaruje, že účetnictví českých zemědělců od vstupu ČR do EU je každoročně v černých číslech. Dle současného ministra zemědělství, Petra Gandaloviče, by zemědělci měli každý rok vydělat 6 - 9 mld. Kč. Otázkou však zůstává, jak dokáží být čeští zemědělci s nižšími dotacemi dostatečně konkurenceschopní vůči zemědělcům rekrutujícím se z původních členských zemí EU.

Důležité je však upozornit, že prostředky z EU jsou zemědělcům vypláceny dle výměru obhospodařovaných pozemků, tj. znevýhodněni jsou chovatelé hospodářských zvířat. Mariann Fischerová-Boelová, evropská komisařka pro oblast zemědělství, naznačila, že by mělo v nejbližší době dojít ke změně přidělování dotací ve prospěch menších farem. Podle Ministerstva zemědělství tak ČR může přijít až o 40 % přímých plateb.

Přesto může být EU pro řadu českých zemědělských podniků vhodným zdrojem pro získání dotací. Mnohé jiné podniky jsou však právě díky směrnicím EU ve své činnosti příliš svazovány a regulace ze strany EU vnímají velmi negativně.

Vyjednávací pozice ČR je po analýze výše uvedených faktorů ve srovnání s řadou jiných zemí EU druhořadá. České zemědělství zaujímá velmi nízký podíl na zemědělské výrobě, nelze tudíž očekávat výrazné ústupky českým zemědělcům z EU, bude stále více sílit tlak Francie, Itálie, Španělska a Německa. Otázkou v EU spíše zůstává, „kam se zemědělskými přebytky“.

Čeští zemědělci v takové situaci mají jen několik málo možností, jak stávající stav zlepšit. Jednou nich je zvolit strategii diferenciace. Vzhledem k tomu, že není možné plošně snížit náklady produkce, je nutné se specializovat na realizaci takových produktů, které nejsou v EU běžně nabízeny, a kde je konkurence nižší. Další možností je obohatit nabídku na trhu o některou ze složek marketingu. Jednou z možných příležitostí je např. rozšířit současnou nabídku doprovodných služeb. Ta je v českém zemědělství zatím nabízena jen v omezené míře.

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ÚČETNÍ STANDARDY V SOUVISLOSTECH

IVANA VALOVÁ

MASARYKOVA UNIVERZITA, EKONOMICKO-SPRÁVNÍ FAKULTA

Abstrakt

Regulace a harmonizace jsou v současné době často užívanými pojmy. Je možné nalézt celou řadu definicí a souvislostí těchto výrazů. Příspěvek se zabývá problematikou harmonizace regulace účetnictví. Konkrétně pak zmiňuje a analyzuje možné cesty regulace účetnictví ve světě, uvádí důvody harmonizace regulace, zabývá se a rozebírá situaci v České republice a upozorňuje na úskalí implementace společných pravidel vykazování.

Klíčová slova

Americké standardy (US GAAP), harmonizace regulace účetnictví, Mezinárodní účetní standardy (IFRS), výkaznictví.

Abstract

Regulation and harmonization are very often discussed. We can find number of definitions and contexts of the terms. The article is engaged in problems of accounting regulation harmonization. Namely, the paper mentions and analyzes possible way of accounting regulation in the world, gives reasons of regulation harmonization, engages in situation in the Czech Republic and attentions to difficulties of accounting and reporting rules implementation.

Key words

Generally Accepted Accounting Principles (US GAAP), Accounting regulation harmonization, International Financial Reporting Standards (IFRS), Reporting.

Úvod

Každý investor využívá ke svému rozhodnutí informace, které z velké části získává z účetnictví. Odlišné vykazování v různých zemích proces rozhodování znesnadňuje. Rozhodnutí učiněné na základě chybného

pochopení informací z účetnictví může vést ke ztrátě a odrazuje investory od vstupu na zahraniční trhy. Tato situace nutí země spolupracovat na mezinárodní a dnes už na celosvětové úrovni v oblasti **harmonizace** regulace účetnictví.

Možné cesty regulace

Hlavním důvodem harmonizace je zabezpečení srovnatelnosti vykazovaných informací pro potřeby investorů a dalších uživatelů, protože účetní výkazy jsou jejich hlavním a mnohdy jediným zdrojem informací o podniku. Harmonizace (tj. odstraňování rozdílů mezi jednotlivými způsoby regulace) má různý územní rozsah, odstraňuje bariéry pohybu kapitálu a vede ke globalizaci.

Harmonizace regulace účetnictví lze dosáhnout třemi způsoby:

1. právním předpisem,
2. standardem,
3. kombinací dvou předchozích způsobů.

Právní předpisy

Právní předpisy jsou založeny na římském právu. Mají podobu právních norem, které jsou vymahatelné, a mají sankční ustanovení. Jsou schvalovány zákonodárnými orgány, jejich předkladatelem je zpravidla exekutiva. Obsah norem bývá ovlivněn zpravidla jinými než profesními zájmy. Platnost právních předpisů je vázána na územně-správní celky a jejich případná aktualizace je časově náročná. Předmětem regulace účetnictví bývá nejen běžné účetnictví, ale také závěrka. Za nejsilnější podobu regulace je možné považovat regulaci, která vede k unifikaci (např. stanovení účtové osnovy, přesné postupy účtování apod.).

V mnoha případech jsou právní předpisy vytvářeny malou skupinou lidí, kteří nemají bližší zkušenosti s oborem či prostředím, jehož činnost je předpisem upravována. Navíc tyto osoby nebudou dodržování daných předpisů kontrolovat ani vymáhat. Z tohoto důvodu je řada nových právních předpisů neefektivní, neodpovídá reálné situaci nebo se dokonce míjí účinkem, a musí být proto v zápětí novelizována.

Standardy

Standardy (nebo taky usance) jsou založeny na zvykovém právu a vychází ze zkušeností poskytovatelů a uživatelů informací. Proces tvorby, obsah a aktualizace standardů je řízena a prováděna zástupci profesních skupin. Standardy jsou dobrovolně dodržovaným doporučením, ve srovnání s právními předpisy nemají sankční ustanovení a nejsou právně vymahatelné. Jednoznačnou výhodou standardů je, že pružněji reagují na změny v požadavcích a na strukturu a obsah informací poskytovaných účetnictvím. Jejich platnost není omezena na územně-správní celky. Standardy zaměřují svoji pozornost především na závěrku.

Nespornou výhodou standardů ve srovnání s právními předpisy je, že nejsou sestavovány „státem", ale vytváří je profesní a zájmové skupiny, složené z profesionálů a odborníků z praxe. Ti si velmi dobře uvědomují, že vykázaná účetní data jsou hlavním zdrojem informací pro investory, a snaží se naplnit hlavní cíle standardů.

Na první pohled by se mohlo zdát, že absence sankčních ustanovení u standardů snižuje účinnost těchto standardů a znemožňuje jejich vymahatelnost. Opak je ale pravdou.

- Zájem finančního úřadu se orientuje především na výběr daní, a to ve správné výši, ze zákonem stanoveného daňového základu. „Stát" zajímá výše výnosů a nákladů, tedy hospodářský výsledek zjištěný při dodržení právních předpisů. V případě porušení příslušného zákona hrozí podnikateli stíhání. Vedení sporu ve věci daňového úniku je nákladné, zdlouhavé a výsledek sporu je pro finanční úřad v řadě případů nejistý.
- Hlavním cílem standardů je podávat co nejpravdivější a nejpřesnější informace o situaci v podniku. Osoba, která je díky chybnému vykázání jiného podnikatele poškozena (např. v podobě ztráty či ušlého zisku), může podat trestní oznámení. V tomto případě je v zájmu všech stan, dojít ke konečnému rozhodnutí sporu co možná nejrychleji.

<u>Kombinace právního předpisu a standardu</u>

Poslední způsob regulace, který je kombinací právního předpisu a standardu, spojuje výhody obou zmíněných přístupů.

Právní předpisy	**Standardy**
Právní předpisy jsou zaměřeny na vymezení základních povinností účetní jednotky.	Národní nebo nadnárodní standardy upravují konkrétní postupy běžného účetnictví a výkaznictví.
Právní předpisy vytváří formální legislativní rámec na národní úrovni.	Standardy zabezpečují obsahovou harmonizaci na nadnárodní úrovni.
Právní předpisy jsou dlouhodobé povahy.	Standardy jsou průběžně aktualizovány.

Předmětem zájmu je jak běžné účetnictví, tak i závěrka.	Úprava je zaměřena na závěrku, usměrňování běžného účetnictví je ve větší míře ponecháno na samoregulaci.

Tabulka 1: Právní předpisy versus standardy

Regulace účetnictví ve světě

Ve světě existuje více účetních systémů. Pojďme se nyní zabývat konkrétními případy regulace účetnictví, konkrétně americkými US GAAP, evropskými IFRS a také českými účetními standardy (dále jen ČÚS).

Spojené státy americké

Spojené státy americké se dnes řídí nejucelenějším a nejpropracovanějším souborem požadavků na obsah, formu a zveřejnění účetních výkazů. První pověření pro tvorbu takových zásad obdržela Americká komise pro cenné papíry (tzv. SEC – Securities and Exchange Commission) v roce 1934. Konkrétním zpracováním uvedeného souboru pravidel byla pověřena soukromá profesní organizace FASB (Financial Accounting Standards Board), složená ze zástupců auditorů, bank, investorů apod., kteří o přijímaných pravidlech hlasují. Aby bylo zamezeno možnému střetu zájmů, byla tato organizace pověřena americkou Komisí pro cenné papíry a burzu také kontrolou.

Výsledkem práce profesní organizace FASB jsou americké standardy, tzv. US GAAP (Generally Accepted Accounting Principles), které podrobně upravují jednotlivé dílčí oblasti. Dnes US GAAP obsahují více než 145 standardů a jsou všeobecně akceptovanými standardy.

Evropská unie

Situace členských zemí Evropské unie je odlišná. Evropa, zejména její kontinentální část, má jiné historické zkušenosti a zvyklosti. Právní systém zemí je založen na zákonných předpisech, finanční prostředky nejsou v takové míře získávány na kapitálovém trhu.

Úkolem Evropské unie je postupné vytváření předpokladů pro spojení evropských zemí za účelem hospodářského a sociální pokroku. Základem právního systému a harmonizace jsou direktivy Evropské unie, které jsou zabudovány do národních úprav členských zemí. Přestože by měly národní právní systémy respektovat direktivy, zůstávají národní účetní systémy značně odlišné.

Základními směrnicemi pro oblast účetnictví jsou:

- 4. direktiva (1978)

  Zabezpečuje srovnatelnost účetních výkazů závěrek co do formy, obsahu (tj. oceňování) a způsobu zveřejňování.

- 7. direktiva (1983)

  Stanovuje pravidla pro sestavení a zveřejnění konsolidované účetní závěrky. Je přesnější a ponechává menší prostor pro alternativní postupy.

- 8. direktiva (1984)

  Stanovuje pravidla pro získání kvalifikace auditora (přístup do profese) a pro možnost výkonu profese ve všech členských státech EU.

Mezinárodní účetní standardy

Mezinárodní účetní standardy, známé pod zkratkou IFRS (International Financial Reporting Standards, dříve IAS, International Accounting Standards), jsou souborem mezinárodních směrnic pro vedení účetnictví a sestavování účetních závěrek. Jak již bylo řečeno, tyto standardy sestavuje Rada pro mezinárodní účetní standardy (IASB, International Accounting Standards Board, dříve IASC, International Accounting Standards Committee).

Na rozdíl od tradičního zaměření kontinentálních evropských účetních standardů kladou IAS důraz na zjištění tzv. „fair value“ (reálné hodnoty podniku), tedy na informace důležité na jedné straně pro akcionáře a na straně druhé pro věřitele. Účetnictví tedy musí poskytovat **ekonomické informace** (nikoli informace sociální, ekologické či daňové), které budou sloužit externím uživatelům ke správnému rozhodování.

Společnosti, které jsou veřejně obchodované na burzách Evropské unie, jsou od 1. 1. 2005 povinny vykazovat své konsolidované finanční výkazy v souladu s IFRS. V praxi jde tedy o účetní závěrky všech těchto společností za rok 2005.

Implementace Mezinárodních účetních standardů

Důvody Mezinárodních účetních standardů v Evropské unii

Čtvrtá směrnice Evropské unie, zabezpečující srovnatelnost účetních výkazů, byla podepsána v roce 1978:

- Ukládala členským státům uvést ve stanovené lhůtě národní úpravu do souladu s direktivou. Členské státy Evropské unie musely 4. směrnici zavést do své legislativy do 20let, tj. do roku 1998.
- Prostřednictvím práva volby členského státu, odvozeného práva volby a přímého práva volby účetní jednotkou nabízela směrnice celkem 40 různých alternativ.

Výše uvedené skutečnosti naznačují, že touto směrnicí nemohlo být dosaženo harmonizace účetních výkazů. Také proto se některé země (např. Itálie, Řecko) implementací směrnice nezabývaly.

Směrnice Evropské unie byly již mnohokrát novelizovány, upravovány a doplňovány. Nejsou rozpracovány do úrovně konkrétních postupů a nejsou všeobecně uznávány na světových burzách. Dávají značná práva volby a jsou mnohdy zastaralé a nepružné.

Evropská unie nebyla schopna prostřednictvím direktiv profesionálně a pružně zabezpečit harmonizaci účetních systémů členských zemí, proto se rozhodla přijmout a implementovat Mezinárodní účetní standardy.[1] Novela 4. směrnice:

- umožňuje užití nejen historické ceny, ale také reálné hodnoty,
- ukládá povinnost vést účetnictví (ovšem to, jakým způsobem má účetní jednotka účetnictví vést, udává IFRS),
- v této podobě se 4. směrnice „zakonzervovala".

Začlenění Mezinárodních účetních standardů do legislativy ČR

Se vstupem České republiky do Evropské unie jsou Mezinárodní účetní standardy platné pro všechny účetní jednotky, které jsou emitentem cenných papírů registrovaných na regulovaném trhu cenných papírů.

Ačkoliv se Česká republika stala členem Evropské unie teprve k 1. 5. 2004, již v roce 2000 bylo Ministerstvem financí České republiky schváleno pět hlavních bodů harmonogramu rozvoje účetnictví v České republice. Ty mimo jiné již počítaly s částečným uplatněním mezinárodních účetních standardů.

[1] Hlavní rozhodnutí Evropského parlamentu a Rady Evropské unie o uplatňování IAS v Evropské unii je zakotveno v rozhodnutí EC 1606/2002 zveřejněno v standardu L243 ze dne 11. 9. 2002.

S výjimkou pátého bodu, kterým byla nezávislost účetnictví a daní (tedy oddělení daní od účetnictví), Česká republika stanovené předsevzetí v oblasti rozvoje účetnictví splnila.

Podle současné legislativy tedy účetní jednotky, které implementovaly Mezinárodní účetní standardy, nemohou vycházet při výpočtu daňového základu z účetního hospodářského výsledku podle Mezinárodních účetních standardů. Výchozím bodem pro zdanění těchto společností je nadále výsledek hospodaření podle české účetní legislativy. V praxi to znamená, že účetní výsledek hospodaření je nutné upravit o efekty vyplývající z rozdílů mezi Mezinárodními účetními standardy a českou účetní legislativou.

Harmonizace IFRS a US GAAP

V současné době dochází, zejména ze strany Spojených států amerických, k velmi silným tlakům na konvergenci US GAAP a IFRS. Přestože by mělo jít o vzájemnou konvergenci, je již dnes zcela jasné, že dochází zejména o přiblížení IFRS k US GAAP (tzn. na straně IFRS bude provedeno daleko více úprav a změn než na straně US GAAP). Důvodem této situace je mj. skutečnost, že americké standardy US GAAP jsou daleko kompletnější. Obsahují více než 145 standardů, mají přibližně 50 000 stran (jsou tedy víc jak 15x rozsáhlejší než standardy IFRS).

Pojďme se nyní zamyslet, co nad důvody harmonizačních snah:

- V současné době americká Komise pro cenné papíry a burzu (SEC, Securities Exchange Commission) registruje akcie přibližně 13 000 společností. Z tohoto počtu jde přibližně ve 1 200 případech o zahraniční společnosti, tj. společností ze zemí mimo Spojené státy americké (USA). V případě, že uvedené zahraniční společnosti sestavují účetní závěrky podle Mezinárodních účetních standardů, příp. místních účetních pravidel a postupů, musí být jejich výnosy a čistá aktiva převedena na hodnoty podle účetních postupů US GAAP. Tyto hodnoty musí být poté odsouhlaseny americkou Komisí pro cenné papíry a burzu. Uvedený postup je značně zdlouhavý, nákladný a připravuje americký trh o řadu investorů.
- Do roku 2005 bylo u americké Komise pro cenné papíry a burzu evidováno pouze asi 50 registrovaných subjektů. V roce 2005 přešlo ve svých registracích na Mezinárodní účetní standardy dalších 350 evropských společností kótovaných v USA. Proto v roce 2005 americká Komise pro cenné papíry a burzu vytvořila podrobný časový plán na zrušení výše uvedeného požadavku odsouhlasení údajů na postupy US GAAP vztahující se na zahraniční registrované subjekty, které sestavují své účetní závěrky dle standardů IFRS, a to do roku 2009.

Vzhledem k tomu, že samotný přenos standardů do jiného právního systému je velmi náročný, bylo nutné nalézt neutrální cestu, která přiblížení standardů umožní. V současné době končí první ze dvou etap harmonizace. Změny provedené v průběhu těchto dvou etap povedou ke značnému sblížení amerických a evropských standardů. Už dnes je ale jasné, že do budoucna nedojde k úplnému nahrazení IFRS americkými US GAAP.

Závěr

Harmonizace regulace účetnictví je možné dosáhnout právním předpisem, standardem nebo kombinací dvou předchozích způsobů. Přičemž praxe ukazuje, že vymahatelnost standardů je daleko vyšší a efektivnější než v případě právních předpisů.

V našem prostředí známe několik účetních systémů: americké US GAAP, evropské IFRS a české účetní standardy. V posledních letech dochází, zejména ze strany Spojených států amerických, k velmi silným tlakům na konvergenci US GAAP a IFRS. Důvodem jsou snahy o zjednodušení vstupu zahraničních investorů na americký finanční trh.

Legislativa České republiky, kterou se řídí finanční výkaznictví a audit, se mění tak, aby odpovídala nejen národním standardům, ale také Mezinárodním účetním standardům (IAS), Mezinárodním auditorským standardům (ISA) a dále se snaží o maximální soulad se 4., 7. a 8. směrnicí EU. Nadále ovšem neřeší zásadní problémové oblasti, kterými jsou z hlediska Mezinárodních účetních standardů např. leasing, oceňování apod. Také důvodem této harmonizace účetnictví je dosažení co možná nejvyšší míry srovnatelnosti a transparentnosti účetních závěrek v celosvětovém rozsahu.

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[4] Směrnice Rady ze dne 25. července 1978, založená na čl. 54 odst. 3 písm. g) Smlouvy, o ročních účetních závěrkách určitých forem společností (78/660/EHS), ve znění směrnic Rady 83/349/EHS, 84/569/EHS, 89/666/EHS, 90/604/EHS, 90/605/EHS, 94/8/ES, 1999/60/ES a směrnice Evropského parlamentu a Rady 2001/65/ES.
[5] Směrnice Rady ze dne 13. června 1983, založená na čl. 54 odst. 3 písm. g) Smlouvy o konsolidovaných účetních závěrkách (83/349/EHS), ve znění směrnic Rady 89/666/EHS, 90/604/EHS, 90/605/EHS a směrnice Evropského parlamentu a Rady 2001/65/ES.
[6] Vyhláška č. 500/2002 Sb., kterou se provádějí některá ustanovení zákona č. 563/1991 Sb., o účetnictví, ve znění pozdějších předpisů, pro účetní jednotky, které jsou podnikateli účtujícími v soustavě podvojného účetnictví.
[7] Vyhláška č. 501/2002 Sb., kterou se provádějí některá ustanovení zákona č. 563/1991 Sb., o účetnictví, ve znění pozdějších předpisů, pro účetní jednotky, které jsou bankami a jinými finančními institucemi.
[8] Vyhláška č. 502/2002 Sb., kterou se provádějí některá ustanovení zákona č. 563/1991 Sb., o účetnictví, ve znění pozdějších předpisů, pro účetní jednotky, které jsou pojišťovnami.
[9] Zákon č. 563/1991 Sb., o účetnictví, ve znění pozdějších předpisů.
[10] Zákon č. 586/1992 Sb., o daních z příjmů.
[11] Zákon č. 591/1992 Sb., o cenných papírech, ve znění pozdějších předpisů.

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NOVÉ SMĚRY SPOLEČNÉ ZEMĚDĚLSKÉ POLITIKY EVROPSKÉ UNIE

BOHUMILA ŽIŽKOVÁ

FAKULTA MANAGEMENTU A EKONOMIKY, UNIVERZITA TOMÁŠE BATI VE ZLÍNĚ

Abstrakt

Tento článek je zaměřen na objasnění základních principů a tezí společné zemědělské politiky Evropské Unie a zvláště na její zacílení pro další období. Text je časově i věcně chronologicky seřazen od vymezení a vzniku Společné zemědělské politiky, přes její nejdůležitější reformy, až k nejnovějším principům vyplývající ze sdělení komise o zjednodušení a zlepšení právní úpravy společné zemědělské politiky (KOM(2005) 509) a z tzv. „kontroly stavu" plánu Evropské komise pro zefektivnění a další modernizaci společné zemědělské politiky Evropské unie ze dne 20. listopadu 2007. Součástí článku je i zhodnocení dopadu a míry ovlivnění českých zemědělců Společnou zemědělskou politikou EU.

Klíčová slova

Společná zemědělská politika (SZP), dotace do zemědělství, přímé podpory, reformy SZP, decoupling, gross – compliance „křížová shoda"

Abstract

The article deals with the explanation of basic principles and theses on the Common Agricultural Policy (CAP) of the European Union and especially its future aims for the next period. The text is ordered systematically and in chronological sequence from the first definition and the origin of the CAP through its most important reforms until the newest principles resulting from the statement by the Commission on Simplification and Better Regulation for the Common Agricultural Policy COM(2005) 509 and from the so-called 'Health Check' of the CAP plan by the European Commission for streamlining and further modernising the European Union's Common Agricultural Policy from the 20th November 2007. The part of the article also deals with the evaluation of impact and measure of affection on Czech farmers by the CAP.

Key words

The Common Agricultural Policy (CAP), agricultural subsidies, direct payments, reforms of CAP,

decoupling, cross-compliance

Vznik a historie Společné zemědělské politiky

K nalezení prvotních kořenů Společné zemědělské politiky EU se musíme vrátit do poválečné Evropy, ve které nedostatek potravin a zavedení přídělových systémů na potraviny vedl k vytváření agrárních politik s cílem zajištění soběstačnosti ve výrobě zemědělských výrobků a potravin a zlepšení nízké úrovně příjmů zemědělců. Již do vzniku Evropského hospodářského společenství (EHS) měla být společná zemědělská politika základním pilířem evropské integrace. V roce 1957 byla podepsána Římská smlouva o založení EHS (platnost smlouvy od 1.1.1958). Již v ní jsou obsaženy obecné cíle společné zemědělské politiky a také nastíněny nástroje, pomocí kterých má být daných cílů dosaženo.

„Článek 39

Cílem společné zemědělské politiky je:

a) *zvýšit produktivitu zemědělství podporou technického pokroku a zajišťováním racionálního rozvoje zemědělské výroby a optimálního využití výrobních činitelů, zejména pracovní síly;*
b) *zajistit tak odpovídající životní úroveň zemědělského obyvatelstva, a to zejména zvýšením individuálních příjmů osob zaměstnaných v zemědělství;*
c) *stabilizovat trhy;*
d) *zajistit plynulé zásobování;*
e) *zajistit spotřebitelům dodávky za rozumné ceny….*

Článek 40

….K dosažení cílů vymezených v článku 39 bude zřízena společná organizace zemědělských trhů ...

… Aby společná organizace trhů podle odstavce 2 mohla dosáhnout svých cílů, může být vytvořen jeden nebo více zemědělských orientačních a záručních fondů. …“ [5]

V červenci 1958 na konferenci v italském městě Strese byly formulovány základní úkoly SZP, které by vedly k dosažení výše uvedených cílů, a to:

- udržovat ceny nad úrovní světových cen,
- ustanovit společný cenový systém tak, aby zemědělci ve všech členských zemích teoreticky získávali stejný výtěžek za svou zemědělskou produkci,

- přetvořit strukturu zemědělství tak, aby vzrostla její konkurenceschopnost při zachování tradičního modelu s rodinnými zemědělskými podniky,
- vytvořit společný finanční režim pro SZP. [1]

Z cílů společné zemědělské politiky uvedených v Římských smlouvách byly odvozeny i její tři základní principy:

- Princip jednotného trhu – představuje volný pohyb zemědělských produktů mez jednotlivými členskými státy.
- Princip preference společenství – přednost odbytu produktů vyrobených v členských zemích.
- Princip finanční solidarity – náklady na fungování SZP musí být hrazeny společně. Zároveň byl vytvořen Evropský zemědělský orientační a záruční fond, který je součástí rozpočtu Společenství.

V roce 1960 předložila Evropská komise připravený návrh na vytvoření SZP, která se začala uskutečňovat od roku 1962 s cílem zvýšit produktivitu zemědělství, zajistit soběstačnost a udržet cenovou stabilitu zemědělských výrobků. Zároveň měla tato politika zabránit odlivu obyvatel z venkovských oblastí do měst. V tomto období byla SZP postavena na nástrojích podpory tržních cen a fungovala prostřednictvím cenových systémů, které zabezpečovaly jednotnou cenovou hladinu komodit jak na vnitřním trhu EU, tak vůči světovému trhu tzv. společné organizace trhu.

Společná zemědělská politika byla v této době řízena čtyřmi institucemi:

- Radou ministrů zemědělství;
- Generálním ředitelstvím Evropské komise pro zemědělství;
- Společnými tržními organizacemi;
- Evropským orientačním a záručním zemědělským fondem.

Rozhodující reformy SZP

Snahy o zlepšení společné zemědělské politiky a zkvalitnění jejích cílů probíhaly již od samého začátku. První pokus o reformu je z konce šedesátých let dvacátého století. Jednalo se o tzv. Mansholtův plán. Cílem plánu bylo snížit množství používané zemědělské plochy a finanční podporou přimět starší zemědělce odejít do důchodu. Tím by se zemědělství modernizovalo a došlo by k snížení intervenčních a indikativních cen. Tento plán neuspěl.

Koncem 70 let se začaly projevovat problémy s nadvýrobou a nedostatkem odbytu zemědělské produkce. Tato situace vyvrcholila v roce 1991, kdy nadvýroba obilí byla vyšší než 15 milionů tun a zároveň výdaje na podporu farmářů přesahovaly stanovený plán. Další významnou událostí bylo jednání GATT tzv. Uruguayské kolo, ve kterém byla vytýčena za hlavní cíl liberizace zemědělství. Tato situace vyústila v reformu z roku 1992 s názvem Mac Sharryho reforma (dle tehdejšího komisaře pro zemědělství). Tato reforma se zaměřila na snížení intervenčních cen u obilovin, hovězího masa a mléka, podporu předčasného odchodu do důchodu, podporu alternativních příjmů na venkově, atd. Do určité míry přetvořila původní záměr podpory zemědělské výroby jako základního příjmu obyvatel na venkově a již zde nalezneme snahy o podporu životního prostředí a diverzifikace činností na venkově.

Další reforma byla součástí Agendy 2000. Navržení spadalo do roku 1997 ale definitivní schválení proběhlo až na berlínském summitu Evropské rady v březnu roku 1999, proto je často označována jako „Berlínská dohoda". Tato reforma navazovala na reformu z roku 1992 a jejím cílem bylo především připravit SZP na rozšíření EU o nové členy, pokračovat ve snižování intervenčních cen (u obilí, mléka a hovězího masa), podpořit venkovský rozvoj a ochranu životního prostředí a vytvořit podmínky pro splnění požadavků blížícího se kola rozhovorů WTO. V Agendě 2000 bylo dohodnuto, že dojde v roce 2003 ke zhodnocení reformy SZP a na základě toho budou následovat další kroky.

V červenci 2002 předložila Komise Evropské radě zprávu nazývanou Mid-Term Review, ve kterém se nacházelo zhodnocení a návrhy dalšího postupu. Na základě této zprávy byla navržena tehdejším komisařem pro zemědělství, Franzem Fischlerem, další reforma SZP (Reforma z roku 2003). Reforma byla přijata na summitu EU 26. června 2003. Její zásady vstoupily v platnost v roce 2005 (členské země mohly tento termín posunout až do roku 2007). Reforma se obecně zaměřovala zvláště na podporu kvality oproti dosavadní kvantitě a to zejména v oblasti životního prostředí, zdraví spotřebitelů a životních podmínek zvířat. Přijaté změny představovaly největší proměnu Společné zemědělské politiky od reforem v roce 1992. Tato reforma zahrnovala dvě základní opatření: horizontální oblast a oblast tržních opatření.

Tržní opatření se vztahovala na tzv. společné organizace trhu (SOT). SOT se dá zjednodušeně popsat jako soubor administrativních cen a podpor vytvořených tak, aby zemědělci mohli počítat s tím, že pokud se jim nepodaří prodat produkci na běžném trhu, bude vykoupena za intervenční cenu stanovenou u

jednotlivých komodit, která je ale nižší než cena na trhu. Na každou komoditu byla vytvořena zvlášť legislativní norma.

Mezi hlavní cíle *horizontální oblasti* patřilo:

- zvýšení konkurenceschopnosti zemědělství;
- decoupling tzn. zvýšení míry oddělení přímých podpor od produkce např. zavedení jednotné platby na farmu SPS či jednotné platby na plochu SAPS místo podpory produkce jednotlivých komodit
- cross – compliance („křížové shody“) existence vazby mezi přijatou podporou v rámci SZP a dodržováním určitých standardů na farmě týkajících se životního prostředí, bezpečnosti potravin, welfare zvířat, atd. V praxi to bude znamenat, že v případě kontroly např. z životního prostředí a nalezení pochybení, bude toto pochybení nahlášeno i platební agentuře zprostředkující dotace a kromě sankce udělené životním prostředím bude také krácena dotace.
- posílení rozvoje venkova převedením prostředků z pilíře I SZP (z podpory cen a příjmů) do strukturálních podpor (do pilíře II SZP). Konkrétně se jednalo o zrušení orientační sekce Evropského zemědělského orientačního a záručního fondu a vznik Evropského zemědělského garančního fondu a Evropského zemědělského fondu pro rozvoj venkova (EAFRD). Oba tyto fondy spadají pod Společnou zemědělskou politiku Evropské Unie. Tímto krokem došlo k vyčlenění problematiky rozvoje venkova ze strukturálních fondů a její implementace do SZP EU.
- zřízení sítě kontrolorů pro plnění nových pravidel;
- zlepšení bezpečnosti a kvality potravin, pohody zvířat a vztahu zemědělství k životnímu prostředí.

Současné směry Společné zemědělské politiky

Pro analýzu novodobých směrů SZP vycházím ze sdělení Komise o zjednodušení a zlepšení právní úpravy spoledně zemědělské politiky vydané v Bruselu 19.10.2005 (KOM(2005) 509 v konečném znění), z nařízení Rady (ES) č. 1234/2007 ze dne 22. října 2007 , kterým se stanoví společná organizace zemědělských trhů a zvláštní ustanovení pro některé zemědělské produkty a tzv. „kontroly stavu“ nejaktuálnějšího plánu Evropské komise pro zefektivnění a další modernizaci společné zemědělské politiky Evropské unie.

1) Zjednodušení a zlepšení právní úpravy SZP

Již od roku 1995 pracuje komise na zjednodušení SZP. Principy tohoto zjednodušení vychází z reforem z roku 2003 a z „Aktualizace a zjednodušení acquis communautaire“ (KOM(2003) 71). Tento dvouletý program byl vyvrcholením činností komise, která po řadu letu sledovala *aquis*, aby určila nadbytečné právní předpisy v odvětví zemědělství. V letech 2003 a 2004 bylo v rámci probíhajících zjednodušujících činností odstraněno ze seznamu platných právních předpisů přibližně 520 právních předpisů, a to formálním zrušením či uznáním za nadbytečné. Díky konsolidaci a kodifikaci právních textů pak tvořilo *aquis* přístupnějším veřejnosti a zlepšovalo právní jistotu.

Toto zjednodušení probíhalo dvěma způsoby:

- technické zjednodušení - přezkoumání právního rámce, správních postupů a mechanismů řízení
- „zjednodušením politiky“ - zlepšení nástrojů na podporu zemědělství a rozvoje venkova

Technické zjednodušení

Technické zjednodušení se skládá z 5 hlavních oblastí. Jednou z nejdůležitějších je *pročištění zemědělských pravidel* tzn. pokračování v identifikaci a odstraňování nadbytečných právních předpisů Rady a Komise. Komise prozkoumává nové způsoby, jak zlepšit strukturu a prezentaci zemědělských právních předpisů a uvažuje o zavedení „právního auditu“, aby se odstranila zbytečná ustanovení. Tím by vznikly nové možnosti pro zjednodušení mechanismů řízení, týkajících se některých specifických dovozních a vývozních postupů, soukromého skladování, veřejného skladování, nabídkových řízení, finančních nástrojů a postupů, povinností podávat zprávy atd.

Další významnou oblastí jsou nařízení o *jednotné společné organizaci trhu*. Doposud byla každá oblast společných organizací trhu řízena samostatným základním nařízení Rady, jež bylo často doplněno souběžným souborem dalších právních předpisů Rady. Reforma z roku 2003 již zjednodušila právní prostředí SZP tím, že zřídila horizontální právní rámec pro všechny přímé platby a sjednotila řadu režimů podpory do režimu jednotné platby. Zjednodušení SZP pak usiluje o rozšíření horizontálního přístupu na 21 společných organizací trhu a vytvoření jednotného souboru harmonizovaných pravidel pro všechny společné organizace trhu. Tohoto bylo dosaženo nařízením Rady (ES) č. 1234/2007 ze dne 22. října 2007 , kterým se stanovila společná organizace zemědělských trhů a zvláštní ustanovení pro některé zemědělské produkty tzv. jednotné nařízení o společné organizaci trhů.

Mezi další oblasti patří *kvantifikace a snižování správních nákladů*, *rozšíření nařízení o výjimce (ES) č. 1/2004* a to snížením počtu stále platných textů ze sedmi na tři: nařízení o výjimce, jediný soubor pokynů a nařízení o podpoře de minimis a *sdílení osvědčených postupů*, kde bude přezkoumána možnost zřízení sítě zemědělských odborníků EU na sdílení osvědčených postupů při provádění právních předpisů v oblasti SZP .

Zjednodušení politiky

Do zjednodušení politiky lze zařadit *přezkoumání jednotné platby*, které bylo zavedeno reformou v roce 2003, dle doložky pro přezkum uvedené v nařízení Rady (ES) č. 1782/2003. Dále *reformu společné organizace trhu s cukrem* zahrnující např. zavedení systému jediné kvóty, zahrnutí přímé podpory příjmů v odvětví cukru do režimu jednotné platby, intervenci nahrazenou soukromým skladováním, atd., *posouzení dopadu a vyhodnocování*, kde je kladen největší důraz na zásadu „úměrné analýzy" a která bude integrována zejména do hodnocení ex ante (předem) a zjednodušení dalších odvětví např. společné organizace trhu s vínem a oblast ekologického zemědělství a politiky jakosti, které budou v rámci zjednodušování SZP taktéž přezkoumány k nalezení možných zlepšení.

Cílem zjednodušení je zvýšení transparentnosti a srozumitelnosti nařízení, zmírnění jejich náročnosti a snížení nákladů pro podniky. Základní vizí celého sdělení je pak efektivnější využívání zemědělských dotací. Těchto cílu chce EU dosáhnout pomocí konzultací zúčastněných subjektů, prověřováním, akčními plány, konferencemi a školeními a v neposlední řadě lepším využíváním nástrojů informačních technologií. [6]

2) *Jednotné nařízení o společné organizaci trhů*

Toto nařízení a jeho základní pravidla jsou zmíněna v rámci části technické zjednodušení pod bodem Zjednodušení a zlepšení právní úpravy SZP.

3) Kontrola stavu

Stejně jako zjednodušení a zlepšení úpravy SZP, také „kontrola stavu" SZP je založena na přístupu, který byl zahájen reformami v roce 2003. Jejím hlavním úkolem je ještě důkladnější přezkum nařízení a podpor v rámci SZP a přizpůsobení ji novým úkolům a příležitostem v EU sestávající se již z 27

členských států. Jedná se o šestiměsíční konzultace, které probíhají od listopadu 2007 do dnešních dnů a zaměřují se na tři hlavní otázky:

1. jak zefektivnit a zjednodušit režim přímých podpor;
2. jak dosáhnout toho, aby nástroje tržní podpory, které byly původně vypracovány pro Společenství šesti států, odpovídaly nynější realitě;
3. jak se vypořádat s novými úkoly od změny klimatu, přes biopaliva, vodní hospodářství až po ochranu biologické rozmanitosti.

Add 1. Přímé podpory

Přímé podpory úzce souvisí s již zmiňovaným pojmem „decoupling“ a „režim jednotné platby“. Stále zde nalezneme snahu o co nejpaušálnější platby a jejich oddělení od produkce, ale nyní je dále snaha o zvýšení sazby oddělení plateb v těch zemích, které se v různých oblastech zemědělství rozhodly zachovat vazbu mezi dotacemi a produkcí např. díky hospodářským či environmentálním omezením. Další změnou je krácení výše podpor velkých zemědělským subjektům např. od obratu 100000 EUR ročně, přičemž by výše podpor „malých“ zemědělských subjektů zůstala na stejné hladině jako doposud. Při zavedení tohoto „solidárního“ systému vyplácení podpor by se dále muselo rozlišovat mezi podniky, které mají více vlastníků a vysoký počet zaměstnanců, a podniky, které jsou vlastněny pouze jedním majitelem a zaměstnávají jen málo zaměstnanců atd. Aby však nebyli malí farmáři zvýhodněni nadměrně, mělo by se zvýšit požadované množství půdní plochy, kterou musí zemědělec vlastnit, aby splňoval podmínky pro podporu EU.

Add. 2. Přizpůsobení nástrojů tržní podpory tak, aby odpovídaly realitě Evropské unie 27 členských států v roce 2007

Výchozím bodem této oblasti je vytvoření takového systému podpor, který by byl pro všechny státy finančně únosný a zároveň by zajistil zemědělství jeho soběstačnost. Proto by výše podpor měla být nastavena takovým způsobem, aby fungovala jako záchranná síť a ne jako hlavní zdroj příjmů u méně rozvinutých států. Také otázka životního prostředí je značně palčivá, jelikož maximální podpora extenzivního zemědělství není ideální řešení ochrany životního prostředí.

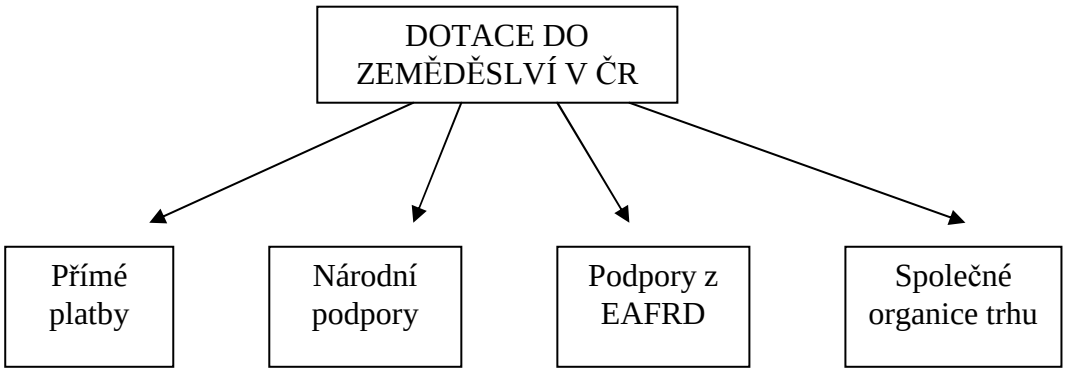
Add 3. Nové úkoly

Kromě řešení stávajících problémů, z nichž některé přetrvávají od dob založení SZP, musí novodobá SZP reagovat i na nově přicházejí problémy jako jsou řízení rizik, boj proti změně klimatu, účinnější vodní

hospodářství, co nejlepší využívání příležitostí, které nabízí bioenergie, a zachování biologické rozmanitosti. Cíle boje proti změně klimatu a cíle vodního hospodářství by mohly být splněny prostřednictvím podmíněnosti neboli Cross – comliance, které bylo zmíněno v rámci horizontálních opatření reformy z roku 2003. Opět je zde znatelná snaha o snižování podpor zvláště velkým farmářům a převedení těchto zdrojů do rozpočtu rozvoje venkova a do nových stimulací zemědělců k dodržování ochrany životního prostředí, welfare zvířat či produkci biopaliv. [7]

Společná zemědělská politika EU a její vztah k ČR

Dotace do zemědělství v EU jsou odvozeny od cílů Společné zemědělské politiky a proto je i pro systém dotací v ČR po jejím začlenění do EU v roce 2004 tato politika stěžejní. Abychom pochopili její vliv, tak pro názornost uvádím strukturu dotací do zemědělství v ČR, které zobrazuje následující schéma.



Obr. 1 Schéma dotací do zemědělství v ČR

Zdroj: vlastní zpracování

Přímé platby patří mezi základní typ dotací. Česká republika využívá pro čerpání finančních prostředků z Evropské unie zjednodušený systém přímých plateb nazývaný „režim jednotné platby na plochu“ (single area payment scheme – SAPS). Jednotná platba na plochu znamená, že zemědělec dostává jednu platbu místo plateb několika (např. na trvalé travní porosty, vinice, sady, atd.) jak již bylo mnohokrát uvedeno. Dále mezi přímé platby patří tzv. Top-up neboli doplňkové přímé platby. Mezi národní podpory

patří podpůrné programy ministerstva zemědělství a podpory z Podpůrného a garančního rolnického a lesnického fondu (PGRLF). Hlavní činností fondu PGRLF je poskytování podpor ve formě dotací a částí úroků z úvěrů a garancí části jistiny úvěru na ekonomicky návratné podnikatelské záměry subjektů z resortu zemědělství. Podpory z Evropského zemědělského fondu pro rozvoj venkova (EAFRD) jsou rozděleny do 4 základních os. První osa je zaměřena na zlepšení konkurenceschopnosti zemědělství a lesnictví, osa 2 na zlepšování životního prostředí a krajiny, osa 3 na podporu kvality života ve venkovských oblastech a diverzifikaci hospodářství venkova a čtvrtá osa na program Leader. Poslední část, technická pomoc, slouží k zajištění financování koordinace všech předchozích částí, monitoringu, kontroly a ostatních organizačních činností. Poslední pilíř na kterém dotace do zemědělství v České republice stojí jsou Společné organizace trhu (SOT).

Jak vyplývá z předešlého textu, závěry reformy z roku 2003 jsou již z velké míry implementovány do struktury dotační politiky do zemědělství v České republice. Již od roku 2004 byla zavedena jednotná platba na plochu SAPS a od nového programovacího období 2007-2013 také posílena úloha rozvoje venkova skrze Program rozvoje venkova. Cross- compliance „křížové shody" budou vymahatelné až do roku 2009. Během posledních měsíců lze zaznamenat též vliv nejnovějších směrů SZP a to zjednodušení skrze zavedení jednotné žádosti o platbu na přímé platby konkrétně SAPS, Top-Up, dále LFA (less favoured areas – méně příznivé oblasti), Natura 2000, Agroenvirnonmentální opatření (AEO) z druhé osy Programu rozvoje venkova, podporu pěstování energetických plodin, oddělenou platbu na cukr a oddělenou platbu na rajčata.

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DOKAZOVÁNÍ V ŘÍZENÍ PŘED HORNÍM SOUDEM PODLE IUS REGALE MONTANORUM

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Abstrakt

Článek se zabývá dokazováním před horním soudem podle Horního zákoníku krále Václava II. Zaměřuje se zejména na jednotlivé okruhy důkazů, které horní zákoník připouští. Většina prostoru je stejně jako v Horním zákoníku věnována svědecké výpovědi a její nepřípustnosti z úst některých okruhů osob. Dále poukazuje na římskoprávní původ některých ustanovení horního zákoníku.

Klíčová slova

Ius Regale Montanorum – Gozzio z Orvieta – horní právo – středověké právo – procesní právo – Kutná Hora – horní soud – dokazování – 14. století – Václav II. – těžba – důkazy

Abstract

The article deals with the probation in the mining court according to the Mining act of king Václav II. It is mainly focusing on particular groups of proofs permitted by the Mining act. Most of the article treats the same way as the Mining act of the witness testimony and inadmissibility of testimony given by some groups of persons. Finally the article adverts to the Roman-law origin of some Mining act's institutions.

Key words

Ius Regale Montanorum – Gozzio of Orvieto – mining law – medieval law – process law – Kutná Hora – mining court – probation – 14. century – Václav II. – mining - proofs

Základem, na němž stojí každé soudní jednání, přelíčení, je dokazování tvrzených skutečností. Rozsah a povaha prováděných a připouštěných důkazů se v průběhu času měnil, pokusím se ve stručnosti shrnout, jakým způsobem probíhalo dokazování v řízení před horním soudem podle Horního zákoníku krále Václava II. – Ius Regale Montanorum (IRM).

V průběhu 13. století dochází k nálezům stříbra nejprve na Jihlavsku, později i na Kutnohorsku. Prudký rozvoj těžby a specifické podmínky tohoto odvětví vyžadují zvláštní právní úpravu. První právní normy týkající se těžby stříbra se objevují v listině, kterou král Přemysl Otakar II. potvrzuje privilegia města

Jihlavy. Toto, tzv. Jihlavské právo, je zcela poplatné době svého vzniku a zprvu se jím řídí i těžba v Kutné Hoře.

Jihlavské právo však zdaleka nepostačuje potřebám každodenního života horních měst a těžby. Někdy v letech 1300-1305 tedy z popudu krále Václava II. vzniká Horní zákoník. Latinsky psaný Horní zákoník je dílem italského profesora obojího práva Gozzia z Orvietta. Po vzoru Justiniánských Institucí je rozdělen na čtyři knihy, z nichž první tři upravují právo hmotné a čtvrtá kniha pojednává o řízení před horním soudem.

Na tvorbě zákoníku se údajně podílel i sám panovník, každopádně na prvních třech knihách s autorem spolupracovala komise odborníků – horníků. Čtvrtá kniha, jíž se budeme nadále věnovat, pak velkou měrou odráží Gozziovu znalost římského práva.

Horní zákoník se stává první souhrnnou kodifikací horního práva a brzy se dočká překladů do němčiny i do češtiny. V rámci habsburského soustátí se postupem času dostává do Španělska a jeho zámořských kolonií, kde se stane základem pro vytvoření jihoamerických horních zákoníků. V našich zemích platí, byť s úpravami až do vydání rakouského Obecného horního zákona v r. 1854. Nicméně jeho význam v našich zemích od 16. stol. klesá – již Mikuláš Dačický z Heslova píše ve svých Pamětech na počátku 17. stol.: *„Za tohoto krále Václava Hora Kutna veliké bohatství a užitky stříbrného kovu vynášely, a práva horní jsou od téhož krále nařízena a vydána, kteráž po letech v nic přišla a nic neváží“*[1].

Při psaní tohoto příspěvku jsem vycházel z překladu Petra Přespole z r. 1460, vydaném r. 2000 v reedici s komentářem Jaroslava Bílka[2] a z díla právních historiků G. Ch. Pfeifera[3] a J. Markova[4]. Krom toho jsem pro srovnání sáhl po právu Jihlavském[5], Brněnské právní knize[6], Rožmberské právní knize[7], Justiniánských Institucích v překladu prof. Petra Blaha[8] a Digestech[9].

Řízení před horním soudem tvoří obsah čtvrté knihy Horního zákoníku, složení soudu a postavení osob vykonávajících jurisdikci na Horách je obsahem knihy první, která pojednává o osobách. Soud se skládá ze soudce a horních přísežných – jakési obdoby městských přísežných pro správu horních záležitostí. Krom řádného řízení, které je vázáno pevnými pravidly, může též ve věcech, jež nesnesou odkladu rozhodovat sám soudce v mimořádném řízení[10].

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[1] Dačický z Heslova, M.: Prostopravda, Paměti, Praha, Státní nakladatelství krásné literatury 1955, str. 107

[2] Bílek, J., Přespole, P.: Ius Regale Montanorum aneb Právo královské horníkuov, Kutná Hora, Vydavatelství a nakladatelství Martin Baroš – Kuttna 2000

[3] Pfeifer, G. Ch.: Ius Regale Montanorum, ein Beitrag zur spätmittelalterlichen Rezeptionsgeschichte des römischen Rechts in Mitteleuropa, Ebelsbach am Main, Aktiv druck & Verlag GmbH 2000

[4] Markov, J.: Kapitoly z dějin zemského soudního řízení XII.-XVII., Praha, Academia 1967

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[6] Flodr, M.: Právní kniha města Brna z poloviny 14. století, Brno, nakladatelství Blok 1990

[7] Brandl, V.: Kniha Rožmberská, Praha, tiskem dra. Edv. Grégra 1872

[8] Justiniánské Inštitúcie, preložil Blaho, P., Bratislava, IURA EDITION 2000

[9] http://www.thelatinlibrary.com/justinian.html

[10] IRM IV 5

Dokazování je podrobně upraveno ve čtvrté knize IRM v kapitolách XI.-XVII. Systémově je tak dokazování zařazeno mezi kapitoly VIII. a IX., pojednávající o zahájení přelíčení a kapitolu XVIII. o ortelu. Je tedy, narozdíl od pozdějšího řízení před zemským soudem, pevnou součástí přelíčení a důkazy se provádí pouze v jeho průběhu a zásadně za přítomnosti obou stran[11]. Výjimku z tohoto pravidla lze hledat snad pouze u svědečných listů a utajeného svědectví.

Důkazní břemeno klade horní zákoník zcela na bedra žalobce, což odůvodňuje poučkou, že nelze dokazovat, že se něco nestalo, ale pouze to, co se skutečně událo, slovy samotného horního zákoníku: *„...tomuť nastává duovod, ktož praví, ne tomu, ktož zapierá.*"[12] Připouští však, aby odpůrce vyvrátil žalobcovo tvrzení prokázáním okolností, které ho vylučující – pro názornost uvádí horní zákoník následující příklad: Když by žádal Martin od Petra vrácení deseti liber grošů, které mu měl půjčit v Praze na svatého Václava a Petr by, bráně se takové žalobě, prokázal, že na svatého Václava byl v Brně, nemůže Martin se svou žalobou uspět[13].

Jako důkazy připouští IRM jmenovitě svědky, listiny a přísahu, zvláštní postavení pak v dokazování náleží právním domněnkám. Podmínky pro provádění důkazů jsou podrobněji rozvedeny v kapitolách XII. – XVII., věnovaným jednotlivým důkazům.

V obecné rovině klade Horní zákoník zejména požadavek na to, aby provádění důkazů byly přítomny obě strany[14]. Z tohoto pravidla připouští pouze dvě výjimky. Jednak možnost důkazu svědečným listem, kdy si strana obstará za účasti dvou přísežných svědectví předem a při přelíčení je předkládá soudu pouze v listinné podobě. Druhou výjimkou je pak utajené svědectví, které z opatrnosti ukládá horní zákoník soudu ve „*větších věcech*"[15]. V takovém případě vypovídá svědek pouze za přítomnosti soudce, písaře a jednoho přísežného, kterého si strany zvolí. Neshodnou-li se strany na jednom přísežném, zvolí si každá strana jednoho.

Dále nedovoluje horní zákoník dokazovat věci, které se pří nesouvisejí a celé řízení pouze prodlužují[16] a důraz je kladen na přímé důkazy, neboť se pozná „*viece pravda očitú vierú, nežli skrze uši*"[17].

Za nejobvyklejší důkaz lze bezesporu považovat svědeckou výpověď. Proto je svědecké výpovědi v horním zákoníku věnován ze všech důkazů největší prostor (druhá polovina XI. kapitoly a celé kapitoly XII. a XII). XI. kapitola je věnována vedle obecné úpravy provádění důkazů svědecké přísaze, utajenému svědectví, apod. XII. kapitola vymezuje okruh osob, které nemohou být připuštěny jako

[11] IRM IV 11 §1
[12] IRM IV 11 §2
[13] IRM IV 11 §2
[14] IRM IV 11 §1
[15] IRM IV 11 §16
[16] IRM IV 11 §4
[17] IRM IV 11 §3

svědci před horním soudem. Obsah kapitoly XIII. dostatečně prozrazuje již její podtitul – *„o svědkuov přinucování k svědecství“*[18].

Na úpravě svědectví lze pak asi nejlépe demonstrovat, že IRM pokrokově opouští zastaralé domácí právní normy a přímo recipuje sice mnohem starší, ale ve své podstatě modernější normy římského práva. Svědci před horním soudem tak mají být tázáni *„mezi jinými věcmi, zdali viděli by nebo slyšali by, skrze která slova smlúvali sú se svářící“*[19], tedy vypovídat o skutečnostech, které svědek sám viděl, nebo slyšel. Zde je jasně patrný rozdíl oproti jiným právním pramenům té doby – kupříkladu právo jihlavské, jen o nemnoho let starší, zná stále ještě pouze ordálovou svědeckou přísahu[20], jíž určitý, pevně stanovený, počet svědků přísahou stvrzuje své přesvědčení o pravdivosti verze jedné ze stran. A v zemském právu se důkaz přísahou svědků-přísežníků udržel mnohem déle. Podobnou úpravu jako v IRM na našem území v téže době nalézáme snad jen v Brněnské právní knize[21], která sama vychází značnou měrou z římského práva.

XII. kapitola čtvrté knihy horního zákoníku vylučuje svědectví některých osob, a to jednak absolutně, jednak relativně. Absolutně jsou vyloučeni služebníci, ženy, nedospělí, blázni, osoby se špatnou pověstí, chudí, podezřelí a jinověrci, relativně pak osoby mající nějaký vztah k věci (zákaz svědčení ve vlastní při[22]) nebo k některé ze stran, zejména pak příbuzní (zákaz svědectví pokrevně příbuzného až do pátého stupně, osoby domácí[23]).

Původ tohoto ustanovení lze nalézt v Justiniánské kodifikaci, která v ustanovení o přípustnosti testamentárních svědků nedovoluje, aby svědčili (citováno z překladu prof. Blaha) *„ženy, nedospelí, otroci, nemí, hluchí, duševne chorí, márnotratníci pozbavení svojprávnosti, napokon tí, ktorí sú zákonom vyhlásení za nečestných alebo nezpôsobilých svedčiť“*[24].

Části textu XII. kapitoly jsou pak z Justiniánských Institucí přímo přejaty. To se nejvýrazněji projevuje v §§1-5, pojednávajících o vyloučení služebníků, které Horní zákoník rozlišuje na služebníky vlastní a služebníky cizí. Služebníky cizími míní lidi ve službě u některé ze stran, služebníkem vlastním (*otchovaněc*) otroka. Institut otroctví[25] pak Horní zákoník objasňuje s tím, že *„služba jestiť ustanovenie práva pohanského“*[26], místo aby text týkající se otroků, pochopitelný v římsko právní úpravě, ale středověku již cizí, jednoduše vypustil.

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[18] IRM IV 13 titul
[19] IRM IV 11 §5
[20] Jihlavské horní právo, kapitola XXXVIII. O očištění skrze přísahu od prostých žalob a o obyčeji přísahánie, čl. 68; Jihlavské horní právo, kapitola XLIII. O úrazu utětie nebo uřezánie, čl. 74 a 75
[21] *„...ceci, ubi testandum est de visis; et surdi, ubi testandum est de auditis; et muti, ubi testimonium iuramento vocali est firmandum...“* Právní kniha města Brna, De testibus, čl. 650 c
[22] IRM IV 12 §14; IRM IV 10 §2 Vylíčení věci stranou nelze považovat za svědectví.
[23] IRM IV 12 §16 a § 17
[24] INST. 2,10,6
[25] IRM IV 12 §§3-4
[26] IRM IV 12 §3

Jako zajímavost lze uvést, že ke služebníkům vlastním, tj. otrokům, řadí IRM po vzoru Justiniánských institucí ještě jeden způsob služby/otroctví, a to *„když člověk mlažší dvadcieti let ke mzdy účastnosti se prodati strpěl jest"*[27], jinými slovy, když člověk mladší dvaceti let prodá sám sebe za určitou částku do otroctví. Kromě zřejmé anachroničnosti takového ustanovení na počátku 14. stol. můžeme při důkladnějším rozboru zjistit, že se autor IRM, cituje Justiniánské instituce, dopustil chyby. Požadavek na věk do dvaceti let z Přespolova překladu sice odpovídá latinskému originálu IRM citovanému Pfeiferem – *„scilicet cum homo minor (sic) viginti annis ad precium participandum se venumdari pasus"*[28], nicméně Corpus iuris civilis, který byl bezpochyby inspirací tohoto ustanovení hovoří naopak o osobě, která již dvacátý rok dovršila[29].

Druhou skupinou osob, jejichž svědectví je absolutně vyloučeno, jsou ženy (neboť žena *„lechkého jest úmysla a neustavičná"*[30]). Zde Bílek poukazuje na jistý rozpor mezi nepřípustností svědectví podaného ženou a možností, aby žena představitele báňské správy přijala v jeho nepřítomnosti (a snad i dosvědčila u soudu) oznámení o nálezu rudní žíly. Toto právo přiznává IRM ženě v §5 I. kapitoly druhé knihy. Bílek to odůvodňuje ekonomickým zájmem na těžbě, který v tomto případě má přednost před obecným zákazem svědčit.

Dále pak nemohou svědčit nedorostlí, tj. děti, přičemž horní zákoník, stejně jako Justiniánské Instituce, stanovuje obecně hranici dospělosti na čtrnáct let u chlapců a dvanáct let u dívek a navíc ještě odkazuje na pohlavní vyzrálost jedince. Zcela stranou zůstává fakt, že věk dorostlosti či nedorostlosti dívky nemá z pohledu svědecké způsobilosti pro IRM žádnou relevanci, neboť dorostlá dívka beztak jako žena svědčit nemůže. Pro nedorostlé potomky představitele báňské správy platí totéž, co pro manželku, tj. právo přijmout oznámení nalezené žíly namísto nepřítomného otce.

Od podávání svědectví jsou dále vyloučeni:

<u>blázen</u>, tedy jedinec stižený duševní chorobou;

<u>člověk se špatnou pověstí</u>, tedy zejména jedinci vykonávající nějaké povolání, které má za následek ztrátu cti nebo jedinci, kteří čest ztratili;

<u>podezřelý</u>, zejména pak podezřelý chudý, neboť se nechá snadno koupit k falešnému svědectví[31]. Postavení chudého je plné paradoxů, neboť dle preambule XII. kapitoly je chudý ze svědectví vyloučen zcela, podle §10 je vyloučen pouze podezřelý chudý, přičemž míra podezřelosti zůstává patrně na úvaze soudu. Zároveň má být k chudému, který se pro svou bídu nemůže k podání svědectví dostavit k soudu, poslána důvěryhodná osoba, aby jej vyslechla[32]. Taktéž aktivní i pasivní procesní způsobilost chudých

[27] IRM IV 12 §4
[28] Pfeifer, G. Ch.: Ius Regale Montanorum, ein Beitrag zur spätmittelalterlichen Rezeptionsgeschichte des römischen Rechts in Mitteleuropa, Ebelsbach am Main, Aktiv druck & Verlag GmbH 2000, str. 158
[29] INST. 1,3,4
[30] IRM IV 12 §6
[31] IRM IV 12 §10
[32] IRM IV 12 §18

zůstávají nedotčeny a kromě práva na ustanovení řečníka soudem[33], svědčí chudému ve sporu s bohatým dokonce domněnka spravedlivě vedené pře[34];

posledním vyloučeným je jinověrec s prostým odkazem, že „*cesty pravdy nevie*“[35], jmenovitě IRM zmiňuje židy, saracény a kacíře.

Narozdíl třeba od brněnské právní knihy, jejíž úprava svědectví se díky stejným římskoprávním vzorům hornímu zákoníku blíží, nejsou ze svědčení vyloučeni tělesně postižení, tedy zejména slepí a hluší.

Soud v první řadě zkoumá, není-li u svědka dána některá z objektivních překážek, pro níž by jeho svědectví bylo nepřípustné. Krom toho se má soud zabývat charakterovými vlastnostmi svědka, jeho vážností, bezúhonností[36] a dokonce i majetkovými poměry[37]. Teprve ve světle zjištěných faktů zvažuje soud váhu svědectví ve vztahu k ostatním výpovědím a důkazům. IRM výslovně odkazuje na zkušenost a zralou úvahu soudce a přísežných.

Obecně pak dává Horní zákoník přednost kvalitě před kvantitou – výpovědi jednoho mravného a váženého svědka je třeba přikládat větší váhu než několika výpovědím osob sprostých[38]. K množství svědků je nutno podotknout, že zatímco dvanáctá kapitola nepřipouští pro při více než dva svědky[39], kapitola jedenáctá požaduje s odkazem na Bibli[40] alespoň dva svědky[41].

Svědectví se podává buď ústně před soudem nebo „*listem svědečným*“[42], přičemž k výslechu a zhotovení svědečného listu požaduje IRM přítomnost alespoň dvou přísežných. Výjimku z povinnosti dostavit se k výpovědi před soud představují osoby staré, sešlé, nemohoucí a „*chudobú utištění*“[43], k nimž mají být za účelem výslechu vyslány spolehlivé osoby.

Jednotliví svědci vypovídali navzájem odděleně[44], aby se zamezilo nežádoucímu vzájemnému ovlivňování. Při řízení o větších věcech doporučuje IRM zachovávat vyšší opatrnost a vyslýchat svědky tajně před soudcem, jedním přísežným a písařem a obsah výpovědi držet v tajnosti[45]. Přísežného si mají

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[33] IRM IV 4 §8
[34] IRM IV 16 §3
[35] IRM IV 12 §11
[36] *„… zdali poctivého a neuviněného života, nebo čili psanec kto a tresktánie hodný,…“* IRM IV 12 §12
[37] *„…zdali bohatý čili nuzný byl by, aby zisku příčinú snadně čeho dopustil,…“* IRM IV 12 §12
[38] IRM IV 12 §12
[39] *„V kterézkoliv při počet svědkuov nepřidává se, dva svědky s statčita, nebo množné mluvenie dvěho počtem dostatečné jest.“* IRM IV 12 §21
[40] *„Nedá-li si říci, přiber k sobě ještě jednoho nebo dva, aby ‚ústy dvou nebo tří svědků byla potvrzena každá výpověď`.“* Mat. Ev. 18, 16, dle Pfeifer, G. Ch., citované dílo, str.154
[41] *„… jednoho svědka svědecstvie nenieť dostatečné, také ač saudcovým přestkvěl by se duostojenstvím.“* IRM IV 11 §9
[42] IRM IV 11 §9
[43] IRM IV 12 §18; lat. *„paupertate depressi“* Pfeifer, G. Ch., str. 161
[44] *„Ale onen obyčej v pravení svědecstvie ovšem zamietáme, točišto když první svědek pověděl bieše své svědecstvie jiných svědkuov v přítomnosti a rozumějících všemu, kteřížto tehdy pravili sú pravenie prvnieho svědka, jich také slovo býti nižádného jiného svědecstvie nevynášejíce na nemalé bezprávie pravdě, nebo jeden každý svědek skrze se sám dlužen jest, příseha, pověděti o té při, v niežto svědkem provodí se, za obě straně plnú a výpravnú, kterúžto znal by, pravdu, vydada dokonale rozum svého pravenie;“* IRM IV 12 §19
[45] IRM IV 11 §16

zvolit strany. Nedohodnou-li se, lze vyslýchat za účasti dvou přísežných, kdy každého vybere jedna strana[46].

Před samotnou výpovědí musel svědek přísahat, že budou vypovídat pravdivě[47]. Této přísahy však mohl být stranou, proti níž svědčil zproštěn[48]. Případy falešného svědectví, ať už koupeného nebo uprošeného, přikazuje IRM trestat, neboť křivě vypovídající svědek se proviňuje proti Bohu, proti soudci i proti nevinnému, na němž se vlastně dopouští bezpráví. Horní zákoník nerozlišuje mezi tím, kdo pravdu zatajuje a tím, kdo lživě vypovídá, neboť jsou oba vinni když jeden nechce prospět a druhý chce uškodit[49]. Trest za falešné svědectví IRM blíže nespecifikuje, pouze požaduje, aby byl stejný uložen také tomu, kdo takového svědka vědomě k soudu předvede[50]. Zároveň by měl od křivých výpovědí odstrašit ostatní.

Ačkoliv nikde není stanovena obecně povinnost svědčit, umožňuje XIII. kapitola soudci, aby svědkům, kteří by se z nějakého důvodu zdráhali vypovídat, jako donucovací prostředek uložil pokutu. Výše a nejspíše i druh této pokuty závisela na *„stavu i statku svědkuov"*[51], současně měla být prostředkem k zastrašení ostatních, aby se nevyhýbali svědectví[52]. V případě osob cizího práva ukládá tuto pokutu komoří[53]. Vzhledem k tomu, že středověké právo užívá termínu „pokuta" pro jakýkoliv trest, není zde možné automaticky předpokládat trest finanční. Pokud ovšem Horní zákoník odvozuje pokutu od stavu a statku, lze se předpokládat, že se bude jednat zejména o tresty finanční.

Druhou skupinou důkazů jsou listiny. Horní zákoník rozlišuje listiny dvojího druhu – obecní zápisy (instrumenty) a privilegia.[54].

Obecní zápisy neboli instrumenty jsou zápisy pořízené k dokázání nějaké skutečnosti, opatřené pečetí a podepsány alespoň dvěma svědky[55]. Vznik obecních zápisů IRM ještě jednou odůvodňuje potřebou snazšího dokázání věcí událých[56]. Podaří-li se skutečnost prokázat, aniž by o ní byl sepsán zápis, nemá se k ní proto méně přihlížet, neboť „*viecеť muože pravda nežli písmo*"[57].

Za obecní zápisy se považují i svědečné listy, tedy záznam svědecké výpovědi pořízené za účasti dvou svědků opatřený pečetí. IRM tyto náležitosti dále konkretizuje. Za způsobilé pečetě se považují zřetelně

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[46] *„*(výslech je prováděn) *...přísežným skrze strany obecně k tomu vyvoleným, ale ač o jednoho svoliti se nemohli by, tehdy každá strana jednoho vyvol"* IRM IV 11 §16

[47] *„... nebo přísahati dlužni sú svědkové za každú stranu, kterúžto vědie pravdu, jakž najlépe mohli by pamatovati."* IRM IV 11 §10

[48] *„strana pak, proti niežto provozují se svědkové, ač chtěla by, moci bude jim otpustiti přísahu."* IRM IV 12 §20

[49] IRM IV 11 §5

[50] IRM IV 11 §§6 a 7

[51] IRM IV 13 §1

[52] *„...aby pokuta jednoho strach byla mnohých"* IRM IV 13 §1

[53] IRM IV 13 §2

[54] Pfeifer, G. Ch., citované dílo, str. 163

[55] IRM IV 14 §1

[56] *„A věděno býti má, že proto bývají zápisové obecní, aby ty věci, kteréžto mezi lidmi dějí se , snadněji dovodili se."* IRM IV 14 §4

[57] IRM IV 14 §5

otištěné[58] pečetě komořího, urburéře, měst, horních přísežných, soudce a perkmistrů[59]. V zájmu věrohodnosti listiny požaduje zákoník, aby listy nebyly sepisovány na podezřelých místech, nebyly znečištěné apod.[60]

Jediné procesní pravidlo týkající se předkládání listin spočívá v nepřípustnosti důkazu dvěma navzájem si odporujícími listinami[61].

Rozdíl mezi privilegii (*listy zvláštnieho práva*) a obecními zápisy shledává IRM právě v míře obecnosti. Zatímco privilegium *„drží právo zvlášnie,... obecní zápis drží právo obecnie"*[62]. Bílek zdůrazňuje, že IRM považuje privilegium za listinu, řekněme soukromoprávního charakteru, právě na rozdíl od zápisů obecních[63]. Privilegium uděluje zpravidla panovník *„pro věrné služby poddaných"*[64] a uděluje nebo potvrzuje (popř. dává i potvrzuje zároveň)[65] jím nějakou výsadu. IRM obsahuje vzorovou formu pro zápis zvláštního práva: *„Takovému věrnému našemu za vděčné služby nám skrze něho učiněné věrně i naložené takovú věc dali sme neboli takového předánie pojčujem listem přítomným a aby nemohlo na potom naše dánie neboli pójčenie ot někoho porušeno býti, je jemu týmž listem našich pečetí ohrazením potvrzeným se vším právem pevně potvrzujeme."*[66]

Privilegium se uděluje buď místu nebo osobě[67], stejně tak se rozlišuje mezi privilegiem věčným a dočasným[68]. Osobní privilegium je dočasné a nepřesahuje život privilegované osoby, je nepřenosné.

Skutečnost, zda je privilegium místní či osobní, jeho věčnost či dočasnost, odkaz privilegia na privilegium starší a jeho případná přednost, existence výjimky z privilegia a zánik privilegia uplynutím času nebo neřádným užíváním jsou v rámci řízení předmětem šetření[69].

V zájmu urychlení řízení a nenarušení plynulosti těžby přiznává IRM v mimořádném řízení důkazní sílu i dvěma právním domněnkám (*smělosti nasilné*). Přes svou obecnost jsou obě vyloženy na báňských vztazích[70]. Domněnka je zde koncipována jako situace nastávající po prokázání určitých předpokladů. Vzhledem k tomu, že v mimořádném řízení může rozhodovat samostatně soudce, umožňuje mu IRM

[58] *„...aby na pečetech pravé okázalo se rytie..."* IRM IV 14 §2
[59] IRM IV 14 §2
[60] *„aniž také buďte přemřížovaný, ani v některé své stránce poškvrnění a aby na pečetech pravé okázalo se rytie a aby stezka byla doplněna;"* IRM IV 14 §2
[61] *„Ač kto pak neopatrný rozličné zápisy sobě vespolek otporné v saudu vynesl by, nicť nedovodí,..."* IRM IV 14 §6
[62] IRM IV 15
[63] Bílek, J., citované dílo, str. 77, pozn. č. 292
[64] IRM IV 15 §1
[65] *„...jiný jest dávavý, jiný potvrdivý; muožeť také obojí tak dávavý jakožto potvrdivý na jednom spolu zvláštnieho práva zápisu státi..."* IRM IV 15 §3
[66] IRM IV 15 §3
[67] IRM IV 15 §4
[68] IRM IV 15 §5
[69] IRM IV 15 §§4-8
[70] Bílek, J., citované dílo, str. 77, pozn. 292

přijmout od stran přísahu a na základě domněnky rozhodnout[71]. Ve skutečnosti soudce nerozhoduje, ale pouze vynese při naplnění podmínek domněnky předepsaný nález.

První z domněnek svědčí dělníkovi, který po určitý čas pracoval s vědomím *„pána diela"* (některého z horních podnikatelů) na jeho dole, a kterému by tento podnikatel odmítl vyplatit dlužnou mzdu. Na základě této domněnky bude dlužník v mimořádném řízení přinucen mzdu vyplatit[72]. IRM tak chrání sociálně nejslabší vrstvy osob podílejících se na těžbě, existenčně závislých na mzdě, před dlouhým dokazováním a řízením.

Druhá domněnka svědčí chudému, který vede při proti mocným. Domněnka stojí na předpokladu, že není pravděpodobné, aby se chudí soudili s bohatými a mocnými aniž by k tomu byli donuceni okolnostmi[73]. Zde je třeba připomenout zřejmý rozpor v právech chudého – mezi zákazem vystupovat v řízení v postavení svědka a možností vystupovat jako žalobce.

Obě domněnky mohou být podkladem rozhodnutí jak v řízení řádném, tak mimořádném, jsou-li naplněny jejich podmínky. Kapitola končí apelem na soudce a přísežné, aby každou věc důkladně vyšetřili než vynesou rozhodnutí[74].

Posledním důkazem, který IRM připouští je přísaha, tedy přísaha ordálového typu a je třeba jí odlišit od přísahy, kterou skládají svědci nebo od přísahy křivého útisku. Ordálová přísaha zaujímá ve středověkém soudním řízení specifické postavení. Markov jí označuje za jeden z nejdůležitějších a nejrozšířenějších důkazních prostředků středověkého řízení[75]. Přísaha stran potvrzující jejich tvrzení představovala původně jediný důkaz.

IRM umožňuje ukončit spor ze smlouvy[76] v řádném řízení[77] přísahou v případech, kdy se nedostává jiných důkazů. Přísaha tak nastupuje jako důkaz v situacích, kdy nelze skutečný stav věcí zjistit jiným způsobem. Nařizuje jí některé straně soudce nebo se soudcovým přivolením protistrana.

Strana vyzvaná k přísaze má právo volby mezi složením přísahy a plněním ze smlouvy[78]. Rozhodne-li se žalovaný splnit žalobcův nárok, má ho soudce osvobodit i kdyby odmítl složit přísahu[79]. Zároveň může složení přísahy odepřít, v takovém případě ovšem ztrácí při.

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[71] IRM IV 16 §2

[72] *„...z toho samé smělosti pán dielatému zaplatiti mzdu dlužnú přinucen bude;"* IRM IV 16 §1

[73] *„...nenieť pravděpodobné chudé svár proti svým vyšším ustanovovati, leč musením připuzenibyli by..."* IRM IV 16 §3

[74] IRM IV 16 §4

[75] Markov, J., citované dílo, str. 119

[76] *„ve všech zajisté smlúváních..."* IRM IV 17 §1; k tomu též *„...wird die Entscheidung von Streitigkeiten aus Vertrag durch den Eid für den Fallvorgesehen, daß die Beweismittel nicht ausreichen..."* Pfeifer, G. CH., citované dílo, str. 167

[77] *„saud zahájený, k němužto řečené přidrží se právo přísežné"* IRM IV 17 §9

[78] *„Věděno má býti zajisté, ot kohož přísežné právo žádá se, skrze saudci má připuzen býti nebo zaplatiti nebo přísahati; některé zajisté vyvolnebo zaplať nebo přisiehni."* IRM IV 17 §4

[79] *„viněného, ač zaplatil jest, zprosť, nezaplacujícieho potup."* IRM IV §7

V souladu se soudobým nazíráním na význam přísahy přiznává IRM jí nejvyšší a konečnou důkazní sílu[80]. Proti nálezu vynesenému na základě přísahy nepřipouští IRM odvolání ani v případě podezření z křivopřísežnictví, neboť *„práva přísežného náboženstvie přestúpenie dostiť Boha jmá mstitele"*[81].
IRM doporučuje v zájmu zrychlení a zkrácení řízení a usnadnění rozhodování žádat o přísahu jako důkaz *„v každý čas saudný"*[82] a přikazuje nedodržovat všechny obyčeje, jimiž by byla možnost přísahat omezena. Těžko říci, považuje-li IRM za omezení přísahy i formální náležitosti[83], které např. u svědecké přísahy ruší. Jediná omezení stanovuje samo a to v čase církevních svátků[84], kdy nemá zasedat soud při řádném řízení.
IRM nestanovuje trest za křivou přísahu, neboť přísaha představuje akt natolik posvátný, že trestat jej přísluší pouze Bohu[85].
Po skončení dokazování vynese soud ortel.

Celý Horní zákoník zůstává svou komplexností významným milníkem v dějinách nejen horního práva, ale práva vůbec. Svou uceleností a rozsahem jednoznačně předběhl dobu svého vzniku. O tom svědčí jak fakt, že k jeho prvním podstatnějším změnám došlo až v průběhu 16. stol., tak jeho vliv na další kodifikace.
Procesní část zákoníku zůstává skvělým příkladem pronikání římského práva do právního života středověkých Čech. Ačkoliv vzniká přibližně ve stejné době jako Rožmberská právní kniha coby pramen práva zemského, narozdíl od ní značnou měrou opouští formalismus tradičního středověkého procesu. Opouští iracionální důkazní prostředky a dokazování prováděné před horním soudem se již počíná blížit modernímu chápání důkazu. Zejména tím, že svědek již přísahá, že bude vypovídat pravdu o tom, co viděl či slyšel a nikoliv o svém přesvědčení o oprávněnosti či neoprávněnosti nároku. Ruší i povinnost svědků či účastníků stát po celou dobu výpovědi bez hnutí na jednom místě.
Za pokrokový právní předpis je třeba horní zákoník považovat i přesto, že stále ze svědectví vylučuje poplatně době celé skupiny osob a ponechává možnost rozhodnout spor na základě přísahy (de facto ordálové) v případě, že se nedostává jiných důkazů.

Narozdíl od jiných soudobých pramenů práva upravuje Horní zákoník postup soudu velmi podrobně, ukládá mu, kterým skutečnostem má věnovat přednostně pozornost, k čemu má přihlížet, apod. Přesto jej rozhodně nelze považovat za formalistický.

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[80] *„...a větší moc má, nežli věc měla by sauzená,"* IRM IV 17 §1
[81] IRM IV 17 §2
[82] IRM IV 17 §8
[83] Povinnost nehnout se během skládání přísahy z místa, nepochybit v textu přísahy, atd.
[84] *„...točišto osm dní před narozením Pána našeho Ježíše Krista až do ochtábu Božieho křtěnie; opět ot neděle Květné neboli palm až do ochtábu velikonocí, i všecky dni nedělnie a svátečnie, kteřížto přikazují se skrze poctivé kněžstvo v kostele slavně světiti a tito časové potom na všech horách za jisté svátky jmieni buďte, ale všecky jiné časy slušné buď saud zahájený se všemi jeho stranami činiti"* IRM IV 17 §9
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PŘÍPRAVA VOLEB DO ÚSTAVODÁRNÉHO NÁRODNÍHO SHROMÁŽDĚNÍ V KONTEXTU VZTAHŮ ČECHŮ A SLOVÁKŮ

PETR BERÁNEK

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Abstrakt

Autor se v příspěvku zabývá problematikou přípravy voleb do československého Ústavodárného Národního shromáždění v roce 1946. Nabízí kritický pohled na nedokonalost souvisejících právních norem, které do jisté míry komplikovaly výkon volebního práva osobám slovenské národnosti dlouhodobě se zdržujícím v českých zemích a analogicky osobám české národnosti zdržujícím se dlouhodobě na Slovensku.

Klíčová slova

1946, 28/1946 Sb., 65/1946 Sb., 67/1946 Sb., ústavní zákon o Ústavodárném Národním shromáždění, Ústavodárné Národní shromáždění, volby, zákon o úpravě stálých seznamů voličských, zákon o volbě Ústavodárného Národního shromáždění

Abstract

The author of this article poses the problems about the preparation of the election the Czechoslovak Constitutional National Assembly in 1946. The article offers views on the bills deficiencies that have complicated the realisation of voting law for the Slovak people living in the Czech lands for a long time and analogously the czech people living in Slovakia for longertime period.

Key words

1946, Act of the election the Constitutional National Assembly, Act of the modification permanent electoral indexes, Act No. 28/1946 Collection of Law, Act No. 67/1946 Collection of Law, Constitutional Act No. 65/1946 Collection of Law, Constitutional Act of the Constitutional National Assembly, Constitutional National Assembly, Election

V dubnu 1946 začaly být aktuální záležitostí blížící se volby do Ústavodárného Národního shromáždění (dále ÚNS). Ostatně, základní úkol Prozatímního Národního shromáždění (dále PNS) spočíval právě

v uspořádání voleb do ÚNS na základě všeobecného, rovného, přímého a tajného hlasovacího práva. Dne 10. dubna 1946 byly PNS předloženy zprávy ústavně právního výboru o dvou velmi důležitých vládních návrzích – ústavního zákona o ÚNS a zákona o volbě ÚNS. Nutným předpokladem k realizaci voleb do ÚNS bylo rovněž přijetí zákona č. 28/1946 Sb., o úpravě stálých seznamů voličských, který byl však přijat již 21. února 1946.[1]

Osnova ústavního zákona o ÚNS počítala s dvouletým funkčním obdobím ÚNS, během něhož mělo dojít k přijetí nové československé ústavy a veškerých potřebných prováděcích norem. Předkládaný text osnovy zákona s navrženými změnami ústavně právního výboru se v zásadě nikterak výrazně neodlišoval od původního vládního návrhu, ale některé úpravy byly přece jen patrny. Tou nejmarkantnější byla úprava původního Čl. 9 vládního návrhu tak, aby zcela zřetelně převzal smysl ustanovení Čl. 2 ústavního dekretu prezidenta republiky č. 47/1945 Sb., o PNS zapovídajícího majorizaci Slováků v případě rozhodování o ústavním zákoně dotýkajícím se postavení Slovenska.[2]

Rozdělení mandátů krajům v jednotlivých zemích se mělo dít na základě celkového počtu odevzdaných platných hlasů v dané zemi.[3] Člen ústavně právního výboru John prohlásil, že by bylo správné, *„kdyby volební číslo bylo pro celý stát stejné a kdyby i pro jeho zjištění byl rozhodným počet platných hlasů, odevzdaných v celém státě."*[4] Ovšem z hlediska specifičnosti situace na Slovensku (špatné komunikační možnosti, válkou poškozená infrastruktura, vnitřní politická situace) byl na Slovensku předpoklad vyšší neúčasti na volbách než v českých zemích, čímž by Slovensko utrpělo. Protože hlavní úkol budoucího ÚNS spočíval v přijetí nové ústavy a v jejím rámci i definitivního řešení česko-slovenského státního poměru, byla v návrhu zákona ponechána zásada, že mandáty budou na jednotlivé země rozděleny podle počtu voličů zapsaných ve voličských seznamech ještě před samotným zahájením volby.[5] Slováci

[1] Zákon 28/1946 Sb., o úpravě stálých seznamů voličských upravoval proces přípravy pro výkon volebního práva – zejména zápisy do stálých voličských seznamů, vyloučení ze zápisu, sestavování a vyložení voličských seznamů, námitkové a odvolací řízení, doplňování a opravy stálých voličských seznamů, voličské průkazy, aj. Poměrně zajímavé je ustanovení § 7 odst. 3, kde se místní národní výbor zmocňuje nařídit osobám starším osmnácti let, aby se samy nebo svými zástupci podílely na sestavování voličských seznamů. Porušení takového nařízení pak mohlo být podle § 19 odst. 1 trestáno pokutou až 10.000 Kčs, případně měsíčním vězením.

[2] Předmětná část ustanovení čl. 2 ústavního dekretu prezidenta republiky č. 47/1945 Sb., o PNS zněla: *„Ve věcech týkajících se ústavně-právního postavení Slovenska, je třeba také souhlasu většiny přítomných členů Prozatímního Národního shromáždění ze Slovenska."* Formulace užitá v Čl. 9 ústavního zákona č. 65/1946 Sb., o ÚNS přijatého 11. dubna 1946 byla následující: *„Pro usnesení ústavního zákona, týkajícího se ústavně-právního postavení Slovenska, je třeba také souhlasu většiny přítomných členů ústavodárného Národního shromáždění, zvolených na Slovensku."*

[3] Viz konečná úprava v § 34 odst. 2 až 4 zákona č. 67/1946 Sb., o volbě ÚNS – *„(2) Úhrnný počet platných hlasů, odevzdaných pro strany kandidující v té které zemi, dělí počtem mandátů na tuto kterou zemi podle § 2 připadajícím. Celé číslo takto vypočtené jest zemským mandátovým číslem. (3) Zemským mandátovým číslem dělí pak úhrnný počet platných hlasů odevzdaný v každém z volebních krajů. Celé číslo takto vypočtené jest počtem mandátů, připadajících tomu kterému z volebních krajů. (4) Nebyly-li takto obsazeny všechny mandáty, na tu kterou zemi připadající, přikáže ústřední volební výbor tyto mandáty postupně v téže zemi volebním krajům, vykazujícím největší zbytek. Při rovnosti zbytků rozhodne los."*

[4] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046002.htm>.

[5] Viz konečná úprava v § 3 odst. 3 a 4 zákona č. 67/1946 Sb., o volbě ÚNS – *„(3) …Ústřední volební výbor zjistí po přezkoumání přehledů a zpráv uvedených v odstavci 2 celkový počet osob zapsaných ve voličských seznamech ke dni 7. května 1946 na území celého státu a zvláště v zemi České, Moravskoslezské a na Slovensku. Nato rozdělí tento celkový počet osob zapsaných ve*

tak získali v ÚNS zastoupení, které korespondovalo s počtem jejich obyvatelstva.[6] Jen dodávám, že ve volbách roku 1946 získala země Česká 150 mandátů, země Moravskoslezská 81 mandátů a Slovensko 69 mandátů.[7]

Další úprava osnovy vládního návrhu zákona o volbě ÚNS se týkala omezení rozsahu nevolitelnosti. Původní vládní návrh totiž odnímal pasivní volební právo i osobám, proti nimž bylo vysloveno pouhé podezření z trestného činu spáchaného proti lidu nebo státu.[8] Ústavně právní výbor však navrhl zmírnit tento přístup a pozměnil vládní návrh tak, že pasivní volební právo bylo odňato jen těm osobám, proti nimž již bylo zahájeno přípravné soudní vyšetřování pro trestný čin podle dekretu prezidenta republiky č. 16/1945 Sb., o potrestání nacistických zločinců, zrádců a jejich pomahačů a o mimořádných lidových soudech ve znění zákona č. 22/1946 Sb., jímž se schvalují, mění a doplňují předpisy o potrestání nacistických zločinců, zrádců a jejich pomahačů a o mimořádných lidových soudech, podle dekretu prezidenta republiky č. 17/1945., o Národním soudu, eventuelně podle nařízení SNR č. 33/1945 Sb. n. SNR o potrestání fašistických zločinců, okupantů, zrádců a kolaborantů a zřízení lidového soudnictví, *„byla-li ve všech těchto případech na ně pro takový trestný čin uvalena řádná soudní vazba (na Slovensku podle § 10 odst. 3 nařízení č. 33/1945 Sb. n. SNR ve znění nařízení č. 83/1945 Sb. n. SNR), pokud tato trvá.“*[9] I tak lze říci, že presumpce neviny šetřena nebyla, ovšem v kontextu doby se nejednalo o nic výjimečného.

Za KSS se k osnovám předkládaných návrhů vyjádřil poslanec G. Husák. Navrhl změnu Čl. 1 odst. 2 osnovy ústavního zákona o ÚNS tak, aby bylo jasně patrno, že zákonodárná moc SNR zůstává zachována v rozsahu pražské dohody z 2. června 1945. Ve svém proslovu mimo jiné ostře napadl demokratickou stranu, která se spojila s reprezentanty katolické církve. Husák namítal, že žádné církvi již nesmí být na Slovensku umožněno ovlivňovat politické dění.[10]

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voličských seznamech na území celého státu počtem poslanců, které je zvoliti (300). Celé číslo dělením vyšlé beze zlomku jest státním mandátovým číslem. (4) V každé zemi se zvolí tolik poslanců, kolikrát jest státní mandátové číslo obsaženo v součtu všech osobo zapsaných ve voličských seznamech v dotčené zemi. Nebyly-li takto rozvrženy všechny mandáty, přikáže ústřední volební výbor zbývající mandát podle většího zbytku dělení. Jsou-li zbytky dělení sobě rovny, rozhodne los.“

[6] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046002.htm>.

[7] KREJČÍ, O.: Kniha o volbách. Praha: Victoria Publishing, 1994, s. 159

[8] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046002.htm>.

[9] Viz § 22 odst. 1 zákona č. 28/1946 Sb., o úpravě stálých seznamů voličských; Blíže srovnej § 7 odst. 2 a § 10 ústavního zákona č. 67/1946 Sb., o volbě ÚNS a §§ 3, 22 a 25 zákona č. 28/1946 Sb., o úpravě stálých seznamů voličských.

[10] *„V dohode z vianoc 1943, ktorú sme podpísali spolu s tými demokratickými činiteľmi, ktorí najskôr založili demokratickú stranu, bolo výslovne povedané, že pri všetkej lojálnosti k náboženstvu a cirkvám, pri všetkej náboženskej slobode, ktorú chceme zachovať a rešpektovať, nedovolíme, aby cirkvi na Slovensku ovlivňovaly politický život, lebo sa to za minulých 25 rokov na Slovensku ukázalo osudným. Dnes jedna strana uteká od tohoto svojho záväzku, jedna strana, špekulujúc na volebné úspechy, dáva v šanc demokratické vymoženosti u nás. Keď sa na Slovensku už príliš veľa hovorí o odkaze slovenského národného povstania, nech je jasné, že odkaz slovenského národného povstania nebudú reprezentovať a zastupovať ľudia, ktorí sedeli a slúžili Hitlerovi a Tisovi, ktorí vtedy, keď slovenský človek, a to väčšinou katolícky človek, bol v horách v odboji alebo v koncentrákoch, sedeli v teplých miestach a prisluhovali režimu a Nemcom. Takí ľudia dnes nebudú na Slovensku hovoriť*

Po Husákovi řečnil sociálně demokratický poslanec K. Hlaváček. Čl. 1 návrhu ústavního zákona o ÚNS podle Hlaváčka neposkytoval rovnocenné postavení českým zemím a Slovensku, protože Slovensko zde bylo v konečném důsledku zvýhodňováno.[11] Věnoval se rovněž nové ústavě a zakotvení česko-slovenského poměru. Varoval před vznikáním „politických a právních přehrad", které vytváří slovenští politici v rámci prosazování svébytnosti slovenského národa. Jako zbraň proti Slovákům užil argumentace, že *„…my, Moravané a Slezané, mohli bychom si rovněž reklamovati do značné míry obdobná práva, neboť i na tomto území máme své dějiny, svou svébytnost a odlišnost."*[12] V této souvislosti stojí za zmínku reakce poslance za KSČ J. Kazimoura, který se naopak Slováků zastal a prohlásil, že každý Čech musí konečně vzít na vědomí existenci SNR a smířit se s ní.[13] Takové prohlášení českého komunistického poslance je pouhý den před přijetím tzv. druhé pražské dohody, která svou podstatou útočila právě na autoritu SNR, téměř úsměvné. V žádném případě si však nedovolím tvrdit, že poslanec Kazimour nemyslel svá slova o SNR upřímně.

Kriticky se k návrhu zákona o volbě ÚNS postavila demokratická strana prostřednictvím svého poslance P. Vibocha. Ten vládní předloze vyčetl, že nestanovuje přesný počet mandátů ÚNS pro Slovensko přímo.[14] Další nedostatek osnovy spatřoval v opomenutí mnoha slovenských dělníků a úředníků, kteří vykonávají svou profesi v českých zemích.[15] Tato námitka se zdá být oprávněná, analogický problém se ovšem týkal i Čechů zdržujících se z profesních či jiných důvodů na Slovenku. Z ustanovení zákona č.

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menom povstania a menom demokracie a republiky." – Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046006.htm>.

[11] *„Předložená osnova ústavního zákona o ústavodárném Národním shromáždění, jak prošla ústavně-právním výborem, nedává politicky a právně rovnocenné postavení českým zemím jak vůči zákonodárné moci Slovenské národní rady (čl. I), tak pro hlasování o zákonech týkajících se ústavněprávního postavení Slovenska, kde je zapotřebí i souhlasu nadpoloviční většiny přítomných poslanců ze Slovenska, kdežto na druhé straně je zcela dobře možná konstelace, že ústavně-právní předpis, který bude míti platnost jen v zemích českých, může býti rozhodnut právě hlasy slovenskými."* - Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046006.htm>.

[12] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046006.htm>.

[13] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046009.htm>.

[14] Počet mandátů pro jednotlivé země byl určen až na základě § 3 odst. 3 až 5 ústavního zákona č. 67/1946 Sb., o volbě ÚNS a byl odvozen od počtu osob zapsaných ke dni 7. května 1946 ve voličských seznamech dané země – *„(3) … Ústřední volební výbor zjistí po přezkoumání přehledů a zpráv uvedených v odstavci 2 celkový počet osob zapsaných ve voličských seznamech ke dni 7. května 1946 na území celého státu a zvláště v zemi České, Moravskoslezské a na Slovensku. Nato rozdělí tento celkový počet osob zapsaných ve voličských seznamech na území celého státu počtem poslanců, které je zvoliti (300). Celé číslo dělením vyšlé beze zlomku jest státním mandátovým číslem. (4) V každé zemi se zvolí tolik poslanců, kolikrát jest státní mandátové číslo obsaženo v součtu všech osob zapsaných ve voličských seznamech v dotčené zemi…"*

[15] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (46. schůze, 10. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/046schuz/s046011.htm>.

28/1946 Sb., o úpravě stálých voličských seznamů a zákona č. 67/1946 Sb., o volbě ÚNS vyplývalo následující:

a) Pokud chtěl občan slovenské národnosti zdržující se přechodně v českých zemích volit některou ze slovenských politických stran, musel buďto v den voleb podniknout dlouhou cestu do slovenské obce, kde byl na základě § 2 zákona 28/1946 Sb., o úpravě stálých seznamů voličských zapsán do voličského seznamu, nebo si mohl alternativně nechat vystavit podle § 15 odst. 1, bodu 4 voličský průkaz a volbu provést v jakékoliv jiné slovenské obci. Usuzuji, že zpravidla v nejbližší obci za vnitřní hranicí mezi oběma částmi republiky.[16]

b) Jestliže takový občan nezamýšlel, nebo nemohl vážit cestu na Slovensko, a voleb se přesto chtěl zúčastnit, zbývala již jen jediná možnost - nechat si vystavit voličských průkaz a hlasovat v některé z obcí země České, či Moravskoslezské.[17] Znamenalo to ale hlasovat pro některou ze čtyř českých politických stran kandidujících v českých zemích, které díky tehdy uplatňovanému politickému modelu nevyvíjely svou činnost na Slovensku. Občan slovenské národnosti byl tedy v takovém případě nucen volit politickou stranu nekorespondující s jeho národností, případně vhodit do volební urny prázdný hlasovací lístek.[18]

c) Občan mohl zvolit strategii neúčasti na volbách, ovšem z důvodů volební povinnosti zakotvené v § 11 zákona č. 67/1946 Sb., o volbě ÚNS tak mohl učinit jen ve velmi omezeném okruhu případů.[19]

Z výše uvedeného je patrno, že zákon č. 28/1946 Sb., o úpravě stálých seznamů voličských a osnova zákona o volbě ÚNS (a to ani ve schválené podobě zákona č. 67/1946 Sb.) dostatečně nezohledňovaly zmíněný problém Slováků pobývajících v českých zemích a Čechů na Slovensku. Vinu však nelze svalovat jen na nedostatečnou legislativní úpravu – ta sama o sobě by byla vyhovující, kdyby ovšem v Československu roku 1946 fungoval politický systém založený na celostátním působení politických stran. Nestandardní a podle mého názoru zhoubný „regionální" model způsoboval mnohé problémy a ve své podstatě znevažoval a znatelně narušoval notoricky proklamovanou tezi jednoty Československa. Za

[16] Volební místo si mohl občan svobodně zvolit na základě § 15 odst. 2 zákona č. 28/1946 Sb., o úpravě stálých seznamů voličských. Volební místo bylo vyznačeno na voličském průkaze a dotyčný poté mohl na základě §§ 9 a 25 odst. 1 zákona č. 67/1946 Sb., o volbě ÚNS volit pouze zde.

[17] Pokud pobýval občan slovenské národnosti v českých zemích trvale a byl již zapsán v příslušném voličském seznamu, voličský průkaz samozřejmě nebyl pro volbu v příslušné domovské obci nutný.

[18] Institut prázdných volebních lístků byl upraven v § 19 odst. 5 a § 24 odst. 3 zákona č. 67/1946 Sb., o volbě ÚNS.

[19] § 11 zákona č. 67/1946 Sb., o volbě ÚNS zněl: *„(1) Každý volič je povinen volby se zúčastniti. (2) Od této povinnosti jsou osvobození ti, kdož a) jsou starší 70 let nebo b) pro nemoc nebo vadu tělesnou se nemohou dostaviti do volební místnosti nebo c) pro neodkladné povinnosti svého úřadu nebo povolání nemohou včas přijíti k volbě nebo d) jsou v den volby od místa volby nejméně 100 km nebo e) jsou zdrženi přerušením dopravy nebo jinými nepřekonatelnými překážkami."*

touto česko-slovenskou politickou segregací však jednoznačně spatřuji zákulisní taktiku českých a slovenských komunistů, kteří měli v této době jako jediní privilegium působit v obou částech republiky. Jistě, formálně jako dva samostatné politické subjekty KSČ a KSS, ve skutečnosti však byly obě strany velmi silně ideologicky propojeny.[20] Z takového uspořádání a rozložení politických sil ve státě komunisté jednoznačně těžili. S rozbitím onoho regionálního modelu tedy jistě nebylo z komunistického pohledu kam spěchat.

Ústavní zákon č. 65/1946 Sb., o ÚNS a zákon č. 67/1946 Sb., o volbě ÚNS byly přijaty 11. dubna 1946. Naplnil se tak účel existence PNS, které tímto završilo své nejdůležitější poslání. Osnova ústavního zákona o ÚNS byla na návrh skupiny poslanců přijata s pozměňovacím návrhem, který doplnil do Čl. 1 třetí a čtvrtý odstavec. Třetí odstavec fakticky stavěl SNR do role podřízenosti ÚNS.[21] Čtvrtý odstavec pak vykládal rozsah působnosti SNR, pro níž měla být směrodatnou první pražská dohoda z 2. června 1945 mezi vládou a SNR.[22] Poslanec Řehulka zdůraznil, že *„navrhovanou změnou je plně vyhověno přání zástupců Slovenska a jest i dokumentována trvalá bratrská shoda Čechů i Slováků pro další společnou budovatelskou a tvůrčí práci, pro blaho a lepší příští lidově demokratické Československé republiky."*[23] Pokus poslanců Buriana, Kočvary a Řehulky prosadit pozměňovací návrh, aby byl z osnovy zákona vypuštěn sporný institut „prázdných lístků" nebyl úspěšný.[24] O to, zda umožnit vhazovat do volebních uren prázdné (někdy nazývané též bílé) hlasovací lístky se na půdě PNS velmi živě a dlouze diskutovalo již na předchozích schůzích, nakonec však převládl názor, že občan by měl mít právo vyjádřit nesouhlas se všemi politickými stranami formou vhození prázdného hlasovacího lístku.[25]

Paradoxně, téhož dne byla přijata druhá pražská dohoda, v jejímž důsledku došlo částečně k oslabení pozice slovenských národních orgánů. Ustanovení Čl. 1 odst. 3 a 4 ústavního zákona č. 65/1946 Sb., o ÚNS touto změnou díky své pružnosti nijak dotčena nebyla. Text ustanovení hovořil o „dosavadní dohodě" vlády a SNR. A priori tedy měl zákonodárce na mysli první pražskou dohodu z 2. června 1945. Nicméně po přijetí druhé pražské dohody 11. dubna 1946 se rázem dohodou mezi vládou a SNR stala právě tato druhá dohoda.

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[20] Oskar Krejčí k tomuto uvádí, že *„…tyto dvě strany působily do značné míry jako strana jedna, což znamenalo, že komunisté jako jediná strana působili po celém území státu."* - KREJČÍ, O.: Kniha o volbách. Praha: Victoria Publishing, 1994, s. 163

[21] *„Slovenské národní radě přísluší na Slovensku vydávati nařízení Slovenské národní rady v dosavadním rozsahu, pokud ústavodárné Národní shromáždění tuto otázku jinak neupraví."* - § 1 odst. 3 ústavního zákona č. 65/1946 Sb., o ÚNS.

[22] *„Pro výklad rozsahu působnosti ve smyslu ustanovení odstavce 3 jest směrodatná dosavadní dohoda vlády a Slovenské národní rady, jejíž znění v tomto směru bude publikováno ministrem vnitra ve Sbírce zákonů a nařízení."* – Čl. 1 odst. 4 ústavního zákona č. 65/1946 Sb., o ÚNS.

[23] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (47. schůze, 11. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/047schuz/s047001.htm>.; Tuto změnu podpořilo všech 92 přítomných poslanců PNS ze Slovenska, tudíž slova poslance Řehulky zdá se nebyla nijak přehnaná.

[24] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly (47. schůze, 11. duben 1946)* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/stenprot/047schuz/s047003.htm>.

[25] Možnost užití prázdného hlasovacího lístku při volbách do ÚNS byla zachycena v § 27 odst. 2 zákona č. 67/1946 Sb., o volbě ÚNS – *„Volič může odevzdati prázdný lístek (§ 19 odst. 3)."*

Příprava voleb do ÚNS nebyla z hlediska legislativního zpracování jednoduchým úkolem. Ačkoliv se jej PNS zhostilo poměrně zodpovědně, v důsledku časové tísně, politické situace, a také podcenění některých aspektů poválečného období nebyl konečný výsledek legislativního úsilí PNS zcela optimální. Na základě zákona č. 67/1946 Sb., o volbě ÚNS však 26. května 1946 v Československu proběhly na dlouhou dobu poslední relativně svobodné volby. Roky 1948 – 1989 ukázaly, že vývoj se může ubírat i smutnějšími cestami než jsou malá, byť nepříjemná a často zbytečná legislativní opomenutí. Z tohoto důvodu nahlížím na normy související s přípravou voleb do ÚNS v roce 1946 s respektem, který si podle mého názoru jistě zaslouží.

Literatura a prameny:

[1] KREJČÍ, O.: Kniha o volbách. Praha: Victoria Publishing, 1994

[2] Ministerstvo vnitra. *Sbírka zákonů a mezinárodních smluv* [online]. Poslední revize 8. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.mvcr.cz/sbirka>.

[3] Parlament České republiky, Poslanecká sněmovna. Digitální repozitář. *Prozatímní Národní shromáždění republiky Československé 1945 – 1946. Stenoprotokoly* [online]. Poslední revize 1. 4. 2008 (cit. 8. 4. 2008). Dostupné z <http://www.psp.cz/eknih/1945pns/index.htm>.

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PRAMENY ISLÁMSKÉHO PRÁVA

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Abstrakt

Článek pojednává o pramenech islámského práva a to jak o jeho primárních, tak i sekundárních pramenech. V rámci primárních pramenů se zabývá jak Koránem a *sunnou*, tak i *qijásem* a *ᶜidžmá*. Ze sekundárních pramenů je věnována pozornost jen *al-istihsánu, al-istisláhu, maslaha* a *al - ᶜurfu.* Předmětem zkoumání je jejich pojetí, závaznost a podmínky aplikace. Zároveň je poukázáno na často odlišné názory představitelů právních škol na tyto prameny práva a podmínky jejich aplikace.

Klíčová slova

Pramen, právo, islám, šaríᶜa, Korán, sunna, qijás, ᶜidžmá, al-istihsán, al-istisláh, maslaha, al - ᶜurf

Abstract

The study deals with the sources of the Islamic law. The primary sources of the law are the Qur´án, the *Sunna*, *Qijás* and *ᶜijmá* and secondary sources of the law are *istihsán, istisláh – maslaha* and *ᶜurf.* The above sources of islamic law are not unproblematic. There are a polemics over the common validity some of them and over the conditions of valid which must be fulfiled. The paper deals also with these polemics and show the gaps of scholars and four sunna schools of law.

Key words

Source, law, Islam, Shariᶜa, Qur´án, Sunna, Qijás, ᶜijmá, istihsán, istisláh, maslaha, ᶜurf

1. Islámské právo a právní školy

Islámské právo – šarí^{c}a (doslova cesta k prameni vody, či ke studni), představuje dle doktríny „souhrn božského řádu přikázaného lidstvu, neměnný morální Zákon“[1] považovaný za jádro islámu.[2] V přeneseném, náboženském smyslu „implikuje bezpečnou cestu k jinému a život zajišťujícímu cíli.“[3] Kráčení po přímé cestě, stezce (dodržování pravidel islámu) zaručuje muslimovi spasení. Později se pojem šarí^{c}a stává označením pro soubor právních norem. Šarí^{c}a je právem, které upravuje oblasti života muslima opravdu velmi podrobně, ať už se jedná o jeho náboženské povinnosti nebo každodenní počínání.

Islámské právo není právem jednotným, v důsledku rozdělení muslimské náboženské obce na dva hlavní proudy – sunnity a ší^{c}ity, dochází i k odlišnostem v právu. V 7. - 11. století n.l. vznikla řada právních škol (madáhib), z nichž se zachovala jen část. V případě sunnitů se jedná o hanafitský, málikovský, šáfiovský a hanbalovský madhab, u ší^{c}itů je možné zmínit školu džafarskou, ibadidskou, imamitů, ismailitů a kejsanidů.[4] Jednotlivé školy se sice v základních přístupech neliší, přesto je možné najít mezi nimi řadu rozdílů. Ty se týkají např. toho, co se uznává za pramen práva, či jak je pramen práva vůbec pojímán; rozdíly nalézáme i v „hmotném“ právu, a to hlavně v oblasti práva rodinného a dědického. Je zřejmé, že neexistuje jen jedno celistvé islámské právo.

2. Prameny islámského práva

Následující členění pramenů islámského práva by mohlo vyvolat mylnou představu, že existuje jejich numerus clausus. To však není pravda. Islámské právo nemá taxativní výčet svých pramenů.[5] U některých učenců je možné zaznamenat přes 40 různých pramenů práva, jiní jich udávají jen 15. Shoda většiny učenců panuje v existenci 4 pramenů práva.[6] Zpravidla se uvádí následující rozdělení pramenů práva, které však není všeobecně platné nebo závazné:

Hlavní (primární) prameny:

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[1] Kouřilová, I., Mendel, M. Cesta k prameni. Fatwy islámských učenců k otázkám všedního dne, Praha: Orientální ústav Akademie věd České republiky, 2003, str. 21
[2] Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 25
[3] Kouřilová, I., Mendel, M. Cesta k prameni. Fatwy islámských učenců k otázkám všedního dne, Praha: Orientální ústav Akademie věd České republiky, 2003, str. 11
[4] Hruškovič, I. Islámský právny systém a proces jeho formovania, Bratislava:Vydavatelské oddelenie právnickej fakulty UK, 1997, str. 30-31
[5] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 2
[6] tamtéž, str. 3

1. Korán,
2. Sunna (výroky a zvyklosti, které Muhammad řekl, vytvořil či potvrdil),
3. ᶜidžmá (souhlasný názor autorit),
4. qijás (zpravidla chápáno jako rozhodnutí na základě analogie).

Doplňující (sekundární) prameny:

1. al – istihsán (odchýlení se od jednoho pravidla ve prospěch jiného pravidla, přičemž odchýlení se jeví nezbytným),
2. al –istisláh (rozhodnutí na základě veřejného zájmu),
3. al - ᶜurf – (zvyk a obyčej).[7]

3. Primární prameny

3.1. Korán

Korán (qurᶜán) je posvátná kniha muslimů a těší se náležité úctě. Dle dogmatiky byl Korán seslán Muhammadovi v průběhu 23 let v nespočetně zjeveních. Sepsán byl však teprve 20 let po jeho smrti. Dnes je závazná tzv. ᶜuthmánská redakce nazvaná dle 3. chalífy, který Korán nechal sepsat[8] (některými orientalisty je nazývána Vulgátou). Jedná se o text ve formě básně plné vzletných slov, který je členěn do nestejně dlouhých 114 kapitol zvaných súra (pl. suwar).

Korán není pro muslima v prvé řadě kodifikací práva, ale slovem Božím, jež ukazuje muslimovi správnou cestu životem. Korán nelze vnímat jako text čistě právní povahy. Obsahuje verše mající politickou, sociální, morální a náboženskou povahu a pak řadu veršů právní povahy (fiqh al-qur´án).[9] Veršů právní povahy je zhruba 80, někteří autoři jich uvádějí jen 60,[10] jiní naopak mnohem víc.[11] Týkají se především práva personálního statusu – al ahwal aš-šachsíja (rodinné, dědické právo a „obecná část" občanského práva). Dále je možné nalézt verše týkající se práva trestního, obchodního či mezinárodního

[7] Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 33

[8] tamtéž, str. 21

[9] lze se setkat i s členěním koránských veršů na tři „typy ustanovení"(anwáᶜ al-ahkám): První jsou dogmatického charakteru (iᶜtiqádiyya), druhé etické povahy (ahláqiyya) a třetí jsou právní povahy (ahkám ᶜamaliyya), jež se vztahují jak na vztahy mezi lidmi navzájem (muᶜ ámalát), tak i k Bohu (ᶜibádát).

[10] Kouřilová, I., Mendel, M. Cesta k prameni. Fatwy islámských učenců k otázkám všedního dne, Praha: Orientální ústav Akademie věd České republiky, 2003, str. 15

[11] srovnej viz Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 44
pro úplný přehled kolik veršů je přiřazováno k jakému právnímu odvětví srovnej viz: Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 113 - 114

(25 veršů), skromnější jsou případy veršů týkajících se práva správního, ústavního (10 veršů) či finančního (11 veršů). Jednotlivé verše nejsou seřazeny systematicky, ale nahodile dle toho, jak vyvstala konkrétní potřeba řešit určitý sporný případ. Je zřejmé, že ne vše je v Koránu upraveno, a proto je to upravováno až dnes různou formou. Ale to již není islámské právo, ale jde právo dané islámské země. Korán neobsahuje v řadě případů konkrétní řešení právního problému, ale jen vodítka. Nalezneme v něm obecné principy, na jejichž základě (a rovněž za pomoci obecných zásad obsažených v sunně) je možné problémy řešit.[12] Korán sám říká: „A nezanedbali jsme v Písmu ničeho." (6:38).

Pro neznalého čtenáře skýtá Korán řadu úskalí. Je to text (cca 500 stran), který je pro laika bez jakéhokoliv výkladu nesrozumitelný. Proto i český překlad opatřil I. Hrbek komentářem, který odpovídá zhruba 1/3 rozsahu samotného Koránu. Přitom jde o výklad velmi stručný! Nejedná se o komentář v našem slova smyslu, ale spíše o osvětlení překladu některých slov, která jsou často mnohoznačná. Důležité přitom je, že text je závazný v arabském jazyce; překladem ztrácí Korán status svaté knihy, stává se z něj interpretace, která představuje pouze jednu z mnoha možných významových variant. Příležitostně se lze setkat s názorem, že i překlad Koránu je Koránem s odvoláním na praxi Abú Hanífy, jehož recitace Koránu v perštině během modlitby byla uznána.[13]

Úskalím Koránu je nejen jeho překlad, ale i sám jazyk, ve kterém je napsán. V době života Muhammada se v Arábii hovořilo mnoha dialekty, jež se od sebe lišily především ve výslovnosti. S největší pravděpodobností je Korán psán básnickou arabštinou, přizpůsobenou dialektu obyvatel Mekky.[14] Většina slov Koránu je arabského původu, ale nalezneme tam i výpůjčky z jiných jazyků, zejména ze semitských, ale i z perštiny, řečtiny a jiných.[15] Pro vyjádření nových myšlenek, pro která nenalezl Muhammad v arabštině slova, měnil či modifikoval[16] význam běžných arabských slov nebo odvozenin.[17] Korán podle posledních vědeckých studií obsahuje na 270 slov, která je možné považovat za výpůjčky, avšak jen o sedmdesáti lze říci, že je zavedl sám Prorok. Muhammad nezůstal jen u výpůjček a sám tvořil

[12] tamtéž, str. 33 - 34
[13] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 93 - 94
[14] Korán. Odeon, vydání celkem 6., v tomto překladu a v Odeonu 2. Vydání. Praha: 1991, str. 52 – 53; Der Koran. Uebersetzt und kommentiert von Abdel Theodor Khoury, str. 52
[15] většina muslimských právních expertů však toto odmítá a tvrdí, že v Koránu nejsou žádné výrazy nearabského původu a pro podporu svého názoru uvádí sůry 26:195, 41:3, 41:44, 43:3 a další, jež Korán označují za arabsky psanou knihu , arabský Korán, jež je srozumitelný co do své řeči.
[16] ímán zamenající v Koránu vždy „víru" je odvozeno od slovesa, které znamená „být, cítit se bezpečným, jistým před nebečím. Núr, které znamená světlo nabývá významu „náboženství". Sloveso zaká znamená růsti, vzkvétati, dobře se dařit, v Koránu se však význam zakká posouvá významově na „očišťovat se pomocí almužny, být čestný a spravedlivý" atd.
[17] Korán. Odeon, vydání celkem 6., v tomto překladu a v Odeonu 2. Vydání. Praha: 1991, str. 54

nová slova pro zvýšení účinku verše na posluchače, „čímž způsobil pozdějším komentátorům mnohé bolení hlavy při pokusech racionálně je vysvětlit.“[18]

3.2. Sunna

Sunna má především výkladovou funkci a v tomto smyslu je dělena na sunnu potvrzující (sunna taqrírija), sunnu vysvětlující (sunna tafsírija) a sunnu doplňující (sunna takmílija) – v těchto případech se však nejedná o samostatný pramen práva. Sunna je pramenem práva toliko v případě, kdy se z ní odvozuje v Koránu nestanovená povinnost.[19] Sunna v překladu znamená tradici, zvyklost. Představuje obvyklý způsob jednání v době Prorokově a v době jeho následovníků – čtyř pravověrných chalífů. Pojem „sunna“ byl Prorokem používán jako termín pro vše, co používal, řekl, udělal či schválil.[20] Sunna představuje spolu s Koránem „věčný pramen a pevnou osu zákonodárného myšlení v islámu“;[21] tyto dva prameny tvoří usúl al-usúl, tzv. „kořeny kořenů“. Korán a sunnu nelze směšovat. V případě právního problému se jeho řešení hledá v prvé řadě v Koránu a teprve pak v sunně. Ustanovení Koránu, jež jsou v rozporu se sunnou mají přednost.[22]

Lze se setkat i s dělením na sunnu právní a neprávní. Neprávní sunna obsahuje zprávy týkající se Muhammadova každodenního života (např. že jedl pravou rukou apod.). Tato sunna není pramenem šarí^{c}i.[23] Právní sunna představuje hodnověrné zprávy o chování či slovech Muhammada, jež je hodné následování.

Autorita sunny je odvozována z Koránu, jehož verše označují Muhammadovo chování za hodné následování – např.: „A věru máte nyní v Poslu Božím příklad překrásný pro každého, kdo doufá v Boha a v den poslední a kdo Boha hojně vzpomíná.“ (33:21). Jiný verš dává Prorokovi oprávnění zakazovat nějakou činnost: „To, co vám dá Posel, to si vezměte! Ale toho, co vám odepřel, toho se zdržujte!“ (59:7).

Stejně jako Korán ani sunna nebyla sepsána za života Muhammada, ale až mnoho let po jeho smrti. Sám Prorok totiž zakázal jakékoliv zaznamenávání zvyklostí či výroků, aby se vyhnul možné záměně s textem Koránu. Chtěl dodržet důsledné oddělení Koránu, jako slova Božího, a sunny, lidského

[18] tamtéž, str. 55
[19] Pelikán, P. Sunna. Pramen islámského práva. Praha: PF UK a Nakladatelství Vodnář, 1997, str. 86 - 87
[20] Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 45
[21] Al-Nabhán, M. F. Madhal lil-tašrí^{c} al-islámí. Kuwait: Wakálat al-Matbú ^{c}at, 1997, str. 74 citováno dle: Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 19
[22] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 59
[23] tamtéž, str. 51

vysvětlení Koránu Muhammadem.[24] Zatímco jednotný text Koránu existuje, u sunny tomu tak není. Vzhledem k panující obavě se záměnou s Koránem a „přílišnému upínání se“ k sunně na úkor Koránu nebyla zprvu ani po smrti Muhammada sepsána do jediné sbírky. První chalífa Abú Bakr stanovil „pravidla pro šíření tradic, která měla zamezit šíření nepravých hadíthů a zastrašit ty, jež často předávali hadíthy.“[25] Těchto pravidel se drželi i další chalífové. První století hidžry uplynulo aniž by muslimové sestavili sbírku hadíthů, o níž by se mohli později opřít. Důsledkem bránění snah šířit či dokonce sepsat sunnu je nejen neexistence universální sbírky zvyklostí, ale i vznik vědy o hadíthech (ᶜilm al-hadíth).

Bližší osvětlení si zaslouží výše zmíněný pojem hadíth. Jedná se o nositele sunny.[26] Sunna představuje právo, které je z hadíthů odvozeno. Hadíthem rozumíme zachycení hovorů, zpráv o činech či výrocích Proroka, nebo o jednáních, která Prorok následně mlčky schválil.[27] Hadíthy jsou shromažďovány ve sbírkách. Za nejznámější a nejspolehlivější jsou považovány Buchárího a Muslimova sbírka. Tyto velmi obsáhlé sbírky (2600 – 3000 hadíthů) obsahují soubor údajně správných a pravdivých hadíthů a jsou označovány za hodnověrné. Šíᶜa ani jednu z těchto sbírek neuznává; uznávají jen ta podání, jež se opírají o autoritu ᶜAlího či jeho potomků a stoupenců. Velkou váhu má sbírka údajných výroků ᶜAlího a jejich vlastní čtyři soubory tradic.[28]

Hadíthy, které jsou vlastně popisem určitého závazného chování, byly podrobeny zkoumání právníků. Zjišťovalo se, zda jsou autentické. Teprve poté byly hadíthy zařazeny do sbírek. Aby byl hadíth uznán za pravdivý a platný, musel splňovat určité náležitosti: spolehlivě doložitelný řetěz tradentů (osob, jež si zprávu předaly) a potvrzení znění hadíthu od posledního bezúhonného tradenta; toto tvoří první část hadíthu. Druhou částí je sám výrok nebo čin Proroka.[29]

3.3. Idžmáᶜ

Výraz idžmáᶜ je odvozen od slovesa adžmaᶜa (rozhodnout, shodnout se na něčem).[30] Idžmáᶜ je jedním z druhů idžtihádu, neboť ten je buď individuální (to je qijás), nebo kolektivní, a pak se jedná o idžmáᶜ.[31]

[24] Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 45
[25] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 37
[26] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 47
[27] Kropáček, L. Duchovní cesty islámu. 2. Vydání. Praha:Vyšehrad, 1998, str.47 - 48
[28] Pelikán, P. Sunna. Pramen islámského práva. Praha: PF UK a Nakladatelství Vodnář, 1997, str. 85
[29] Hruškovič, I. Islámský právny systém a proces jeho formovania, Bratislava:Vydavatelské oddelenie právnickej fakulty UK, 1997, str. 28
[30] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 169

Jedná se o jednomyslnou, nikoli pouze většinovou shodu (konsensus) učenců společnosti (ummy).[32] I když se často mluví o konsensu ummy, nejsou tím myšleni samozřejmě děti, choromyslní a laici, učenci bez kompetence k idžtihádu (tzn. vědci neprávníci), nemuslimové a heretici.[33] Výše zmíněná shoda se týká případů, které nebyly řešeny ani Koránem, ani sunnou a k jejichž konsensu došlo po smrti Proroka Muhammada.[34]

Proces vzniku konsenzu začíná individuálním idžtihádem kvalifikovaného učence (právníka), jehož výsledek je postupně přijímán za správný, až se postupně stává všeobecně akceptovatelným pro celou generaci učenců. Shoda s výsledkem idžtihádu musí být vyjádřena konkludentně, nikoliv mlčky.[35] Převažující názor nepřipouští platnost idžmáᶜ vzniklého mlčky (výjimka: hanafitský a hanbalovský madhab) a považuje výsledek za garantovanou pravděpodobnost, kterou je možné ještě změnit.[36] Během vytváření konsensu probíhá diskuse a do doby, než dojde ke všeobecné akceptaci, je tolerován odlišný názor. Později se stává pravidlo vzniklé na základě konsensu pramenem práva a odkazuje se přímo na něj.[37] Při vzniku konsensu se na začátku stojící presumpce mění v definitivní řešení či názor a stává se právně závazným.[38] Existuje-li tedy definitivní (jasný) text, není idžtihád možný.

Mezi učenci nepanuje jednota v tom, mezi kým by jednomyslnost měla být. Šíᶜité zcela odmítají idžmáᶜ pro současníky a dovolují ho jen členům Prorokovy rodiny a platnost idžmáᶜ vážou na souhlasný názor imáma (míněn je vůdce šíᶜy z Prorokovy rodiny a jejich potomků).[39] Málik je pro jednomyslnost mezi obyvateli Mediny, jelikož právě oni byli svědky činů Muhammada. Šáfiᶜí oponuje ve svém díle Al-Risalah tomu, že by kdy jiný konsensus existoval než ten, který souvisí se základy náboženství, jež jsou předávány z generace na generaci a jejichž platnost se zakládá na autentických textech. Ibn Hanbal je toho názoru, že „se nejedná o nic jiného než o lež, když se domníváme, že bylo dosaženo jednomyslnosti. V nejlepším případě je možno tvrdit, že nám není o nejednotnosti nic známo“[40] a připouští konsensus jen mezi druhy Prorokovy.[41] Proč je tedy konsensus brán jako pramen práva, když se učenci neshodnou ani na jeho existenci? Proč je později rozvíjena celá koncepce idžmáᶜ? Idžmáᶜ slouží „jen a pouze k zachování národní jednotnosti a jako ochrana proti odchýlení se jednotlivce; v tomto případě měl

[31] Badrán, A.B. Usúl al-fiqh. Alexandria: Dár al-Ma ᶜarif, 1965, str. 200 citováno dle: Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 183
[32] Goldzieher, I. An Introduction to Islamic Theology and Law. Princeton: Princeton University Press, 1981, str. 50
[33] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 198
[34] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 169
[35] tamtéž, str. 172
[36] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 200
[37] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 171-172
[38] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 183
[39] tamtéž, str.186
[40] Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 102
[41] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 183

idžmáᶜ podle svatých textů[42] právní závaznost.“[43] Z některých veršů Koránu lze dovodit oprávněnost k používání idžmáᶜ; např. verš 4:95 přikazuje poslouchat posla a autoritu. Podpůrnou roli zde má verš, jež ummě dává pravomoc přikazovat vhodné a zakazovat zavrženíhodné (3:110). Za základ idžmáᶜ jsou považovány též dva výroky Proroka a to: “Umma se nikdy neshodne na omylu” a “to, co považují muslimové za spravedlivé, je i v očích Alláha spravedlivé.”[44]

V současné době se diskutuje, zda by, vzhledem k moderní technice dovolující kontakt učenců a vzhledem k častým disputacím na kongresech, nebylo možné, tento tak pro ummu typický pramen práva „oživit“ a řešit jím nově vyvstalé problémy moderní doby. Je možné se setkat i s návrhy, aby si každý islámský stát sám v rámci vnitrostátních norem práva upravil podmínky pro konsensus.[45]

3.4. Qijás

Pojem qijás je možné přeložit jako „měřítko, měření, ověřování, vzor“; zpravidla bývá nepřesně překládán jako analogie či závěr učiněný na základě analogie. V obecném slova smyslu je tím míněno srovnávání dvou věcí co do podobnosti a rovnosti, kdy jedna představuje kritérium pro tu druhou.[46] Definice qijásu jsou různorodé, ale přesto obsahují stejné jádro – přenesení a navázání svatého textu, nebo skrze idžmáᶜ přijatého rozhodnutí na neřešený případ, který vykazuje odlišnosti, ale je zároveň podobný tomu původnímu.[47] Qijásem je možné překonat mezery v právní úpravě, není-li řešení obsaženo v Koránu, sunně, ani idžmáᶜ. Je otázkou, zda-li je možné qijásem překlenout nedostatek právní úpravy a vyřešit právní problém na poli práva náboženských povinností a trestního práva. Obecně vzato qijás je dovolen v případě použití dílčích ustanovení a ne na základy islámského práva.[48]

Opodstatnění použití qijásu je zdůvodňováno veršem Koránu 3:190: „Věru v nebes a země a v střídání nocí a dne je znamení pro lidi rozumem nadaných…“ a hadíthem, jež dával odpověď na otázku Muᶜádovu bin Džabal, podle čeho má v Jemenu jako soudce soudit. Prorok stanovil, že se má nejprve obrátit na Korán, pak sunnu a když nenajde odpověď tam, má si utvořit vlastní názor. Tím bylo i používání qijásu implicitně schváleno.

[42] oním textem je myšlen Korán, konkrétně verš 4:115: “A kdo odpadne od posla poté, co mu bylo jasně ukázáno správné vedení, a sleduje pak cestu jinou než věřící, k tomu se obrátíme zády, tak jako on se obrátil, a necháme jej hořet v pekle – a jak husný je to cíl konečný!”
[43] Abu Zarah. Abu Hanifa (v arabštině), str. 323 citováno dle: Ramadan, S. Das islamische Recht. Theorie und Praxis. 2. vydání. Marburg: Muslim Studenten Vereinigung in Deutschland e.V., 1996, str. 103
[44] Hruškovič, I. Islámský právny systém a proces jeho formovania, Bratislava:Vydavatelské oddelenie právnickej fakulty UK, 1997, str. 29
[45] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 192
[46] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 197
[47] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 204
[48] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 215

Výsledkem qijásu není nové právo, stávající právní normy se „jen“ rozvíjejí a „objevují“. Qijás je aplikací pravidla (hukm),[49] jež se vztahuje k původnímu případu (asl[50] – pravidlo obsažené v Koránu, sunně nebo idžmáᶜ) na případ nový (farᶜ, popř. maqís), o němž jiné prameny práva mlčí. Nutná je existence posouzení, hodnocení výchozího pravidla (hukm al-asl), kdy např. důvod zákazu pití alkoholu musí být jasný a racionálně pochopitelný. Nesmí se jednat o ustanovení speciální povahy, kdy adresátem normy by byla jen určitá osoba (např. Muhammad a povolení oženit se s 9 ženami, aniž by zaplatil věno). Toto pravidlo není možné použít jako asl.[51] Požadavkem pro použití qijásu je, aby ratio legis (ᶜilla) bylo společné jak původnímu, tak novému příkladu. ᶜIlla by měla být evidentní, zjevná, ověřitelná a nesmí jít proti obsahu normy, na níž se váže.[52] Je zde však i požadavek přiměřenosti a její „přenositelnost“ na další případy.

Za pilíře qijásu je možné označit: původní případ (asl), posouzení výchozího pravidla (hukm al-asl), právní důvod (ᶜilla) a nový, cílový případ (farᶜ , popř. maqís).[53] K zákazu požívání drog lze dojít na základě výše uvedeného následující dedukcí: v Koránu je zakázáno pít alkohol (šurb al-chamr), toto pravidlo představuje asl (zákaz pití vína) -> farᶜ (užívání drog) -> ᶜilla (intoxikace) -> hukm (zákaz).[54]

4. Sekundární prameny práva

4.1. Al – Istihsán

Al – istihsán představuje odchýlení se od pravidla ve prospěch jiného pravidla, které se za určitých podmínek ukazuje za nezbytné a lépe vyhovující ideálu spravedlnosti a přiměřenosti. Slovo al – istihsán má tyto doslovné významy: schválit, považovat něco za vhodnější[55] či vhodné, zdání se dobrého.[56] Někdy je tento pojem zaměňován se svobodným názorem či idžtihádem.[57] Mezi právníky nepanuje shoda ani na definici ani na tom, zda je istihsán pramenem práva.

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[49] tímto termínem rozumíme pravidlo (příkaz či zákaz) daný Koránem, sunnou či idžmáᶜ. Pravidlo musí být konkrétní povahy (ne obecná zásada), nezrušené, racionální a jasné (nevedou se spory o platnosti či obsahu normy)

[50] asl je pojem, jímž se rozumí pramen pravidla, či případ řešený tou normou, ale i samotný obsah pravidla, resp. podstata případu.

[51] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 219

[52] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 213

[53] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 214 - 223

[54] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 200

[55] tamtéž, str. 246

[56] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 313

[57] Schacht, J. Introduction to Islamic Law. Oxford: Clarendon Press, 1964, str. 37

Hanafitská právní škola ho vnímá jako odvolávání se na skrytou analogii představující zároveň protiváhu a doplněk ke qijásu.[58] Tato škola je známá pro časté používání istihsánu jako právního argumentu a ve svých právních kompendiích se jím, stejně jako qijásem zabývá. Abú Hanífa bývá označován dokonce za zakladatele doktríny istihsánu. Hanafité se odvolávají na verš 39:18 označující ty, kteří následují to nejlepší, nejkrásnější, za muslimy jdoucí po správné cestě, a dále se opírají o verš 39:55 nabádající k následování toho nejlepšího, co bylo sesláno dříve, než je stihne trest znenadání. I Hanbalovci jsou pro používání tohoto pramene práva, i když jej spíše řadí pod qijás, maslaha mursala či istihsáb. Málik sám jej vnímá jako upřednostnění rozhodnutí podle dílčích, detailních zájmů před rozhodnutím podle qijásu.

I když není možné najít jednu společnou definici istihsánu, jádrem definic zůstává chápání istihsánu jako upřednostnění výjimky či ustanovení vztahujícího se na dílčí otázku před obecnou normou, které se ale zároveň musí odvolávat na nějaký odkaz z šarícᶜi. Podle jiných definic se však jedná o upřednostnění jedné, „silnější analogie co do váhy" před jinou.[59]

Istihsán bývá odmítán pro odklon od pramenů práva šarícᶜy. Někteří namítají zbytečnost definovat jej jako samostatný pramen pro jeho velkou podobnost s qijásem a chápou ho jako jeho druh. Odpůrci istihsánu jsou Šáfiovci, Zahirité, Mucᶜtazillité a šícᶜité. Nejsilněji proti používání tohoto pramene vystupuje al - Šáfícᶜi a srovnává požívání istihsánu se zaváděním zákonů. Al - Šáficᶜi uvádí několik důvodů pro odmítnutí jeho používání: mnoho veršů Koránu nabádá k poslušnosti před Bohem, istihsán by mohl vést k závěru, že šarícᶜa nezná řešení pro každý případ, istihsán je nekontrolovatelný a mohl by vézt k rozšíření rozepří, dále neobsahuje kontrolní mechanismy k oddělení správného od nicotného a představuje tak potencionální cestu k chaosu atd.[60] Otázkou je, do jaké míry se na této právní rozepři mezi Šáfiovci a Hanbalovci podepsala rivalita a příslušnost k právní škole. Spor, který se zdá být zásadním, je však do jisté míry formálním a sporem spíše terminologickým než sporem nad skutečnou aplikací istihsánu. Odmítá-li al - Šáficᶜi istihsán, odmítá svévolné, libovolné vybrání „vhodnějšího", ale proti samotnému istihsánu v zásadě nic nemá a sám jej používá.[61]

4.2. Al – Istisláh (Maslaha)

[58] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 314, 320
[59] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 315
[60] tamtéž, str. 319
[61] tamtéž, str. 323 - 324

Maslaha (pl. masálih) bývá překládána jako veřejný zájem či veřejné blaho. Často jsou tím míněny hodnoty, jež jsou ummě vlastní a hodné ochrany. Mezi znalci práva je všeobecně uznávaným názorem, že šarícˇa je založena na zájmech společenství a slouží k realizaci dobrého žití muslimům. Maslahu šarícˇa přesně nedefinuje a je tak otevřen prostor pro podřazování různých zájmů pod tento pojem. Zpravidla se za tyto hodnoty považuje především náboženství, život, rozum, rodina – chápaná v širším měřítku jako rod a majetek.[62] Existuje několik druhů maslahy rozdělených podle stupně veřejného zájmu či podkladu v pramenu práva. Základní maslahou v rámci dělení dle stupně veřejného zájmu je zájem nutný, kam jsou řazeny hodnoty, na nichž závisí lidský život, a bez nichž by umma propadla chaosu – sem patří již zmíněné náboženství, život, rozum, rodina (rod) a majetek představující tzv. pět základních hodnot islámu. Za potřebnou, popř. doplňkovou maslahu (hádžíját), je považována ta hodnota, jejíž nedodržování by vedlo k přílišně tvrdým a těžkým podmínkám života. Poslední skupina masálih se nazývá tahsíníját (příkrasy) a představuje zájmy společnosti na dosahování a zlepšování žádoucího způsobu života.[63]

Lze se setkat i s jiným dělením maslahy podle uznání zájmů samotnou šarícˇou. Rozlišují se tři druhy užitku: ty, které sám zákonodárce uznal, ty, které označil za neplatné, a uvážení vycházející z nutnosti, k nimž mlčel.[64] Masálih výslovně zmíněné v Koránu jsou ty, jimiž lze argumentovat; tyto je možné použít jako podklad pro qijás.

Používání maslahy není možné bez splnění několika podmínek. Pozitiva maslahy musí převažovat nad jejími negativy, musí být tzv. „ryzí“ a „opravdová“, nebýt v rozporu s ochranou pěti základních hodnot islámu, ani s principem a hodnotami danými a definovanými Koránem, sunnou a cˇidžmá. Díky masálih je možné pružně reagovat na nové situace a řešit je v souladu s právem a jeho cílem. Dalo by se říci, že vzdáleně plní funkci našich obecných principů.

4.3. Al – cˇurf

Al - cˇurf je překládán jako zvykové právo, zvyk, obyčej a pochází od slova cˇarafa (znát). V Koránu se vyskytuje ještě více než pojem cˇurf jeho odvozenina marcˇúf jako opak k věcem cizím či špatným. V právním slova smyslu je cˇurf to, na co se lidé mohou spolehnout, tj. co znají a čím se řídí.[65] Jedná se o chování lidí a jednání, na než si lidé zvykli a stalo se akceptovatelným. Nemusí se nutně jednat o zvyklost z doby předislámské, ale i z doby pozdější. Mezi právníky nepanuje shoda, zda je možné chápat

[62] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 267
[63] tamtéž, str. 271 - 273
[64] Krawietz, B. Hierarchie der Rechtsquellen im tradierten sunnitischen Islam.Berlin: Duncker und Humblot, 2002, str. 227
[65] tamtéž, str. 292

ᶜurf i ve smyslu zvyku, obyčeje (áda). Přestože se běžně používají jako synonyma, je mezi nimi častěji spatřován rozdíl. Právníci pojmu ᶜurf užívají pouze v případě hodně rozšířené zvyklosti.

ᶜUrf by měl mít několik atributů – být rozumný, přijatelný, racionální a být v souladu s šaríᶜou. Zvyklost, jež není v souladu s právem, není ᶜurfem, ale škodlivým, špatným zvykem. Pro platnost ᶜurfu se vyžaduje, aby se jednalo o praxi obecně rozšířenou, neomezenou na malý okruh lidí. Z časového hlediska se musí jednat o zvyk trvající a nepřerušený jinou praxí. Třetí podmínkou pro platnost je neexistence shody na opačném zvyku. Zvyk vztahující se k právnímu úkonu musí existovat již v době činění právního úkonu, pak se právní úkon vykládá v souladu s tímto zvykem.[66] Přednost před zvykem má dohoda, ujednání stran a zvyk se použije pouze podpůrně. ᶜUrf musí být, stejně jako je tomu u jiných sekundárních pramenů, v souladu s těmi primárními. V případě že není, nemá právní váhu. Pokud je jen jeho část v rozporu s primárními prameny, pak ta část je neplatná a zbytek je ponechán v platnosti.[67]

Zpravidla je ᶜurf rozdělen do tří skupin dle možného kritéria rozlišení a to na zvyklosti jazykové a v jednání, do druhé skupiny je řazen ᶜurf co do rozsahu obecný a omezený a ve třetí je rozlišen správný a špatný zvyk (právně irelevantní).

Ne každý zvyk je ᶜurfem. Požadavek souladnosti se šaríᶜou je nezpochybnitelný a představuje třetí možné kritérium pro dělení zvyklostí. Zvyklost špatná, opovrhující hodnotami společnosti (ᶜurf fásid), nesouladná s právem, není pramenem práva a právník se na ní nemůže odvolávat. Takovou zvyklostí je pití vína, loterie atd. Ani praxe uzavírání smluv s úroky a lichvou nemají vliv na uznání těchto smluv jako dovoleného typu smlouvy.

Opakem ᶜurf fásid je ᶜurf sahíh, zvyk korektní, správný, s právem v souladu, a tudíž právně relevantní. Jedná se o takový zvyk, který nejen právnímu ustanovení šaríᶜi neodporuje, ani dovolené nezakazuje a nedovolené nepovoluje.[68] Zároveň nesmí kolidovat s uznanými nábožensko-právními zájmy a se základními principy islámského práva. Korektní zvyky mohou v současné době pomoci překlenout některé problémy s adaptací na moderní dobu, stejně jako maslaha. Podmínky pro platnost a závaznost ᶜurfu nedovolí jít proti základům a principům islámského práva. Posuny tak mohou být jen v rámci dovoleného prostoru. Trefně vyjádřeno: „Mění se jen větve, ne kořeny.“[69]

[66] tamtéž, str. 302
[67] Kamali, M. H. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, 1991, str. 286 - 288
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[69] tamtéž, str. 313

5. Závěr

Tento článek si kladl za cíl seznámit čtenáře s prameny islámského práva a osvětlit jim tuto problematiku. Vzhledem k rozsahu článku není možné obšírně pojednat o všem, co se tohoto tématu týká. Omezila jsem se jen na to, co je podstatné. Ve zbytku mohu odkázat na příslušnou zahraniční literaturu. Zároveň jsem se pokusila vyvrátit některé zažité představy o islámském právu a ukázat, že vše není tak jednoduché, jak by se kontinentálnímu právníkovi mohlo na první pohled zdát.

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FORMÁLNÍ KONTINUTITA AMERICKÉHO (KOLONIÁLNÍHO) A ANGLICKÉHO PRÁVA

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Abstrakt

Příspěvek se zabývá problematikou formální kontinutity amerického (koloniálního) práva a práva anglického. V jednotlivých částech jsou rozebírány materiální podmínky pro přenos anglického Comon law do prostředí vznikajících kolonií, formální vymezení vztahu amerického a anglického práva a vliv anglického práva na autonomní koloniální legislativu. Příspěvek se dále zabývá problematikou částečně diskontinutity vývoje a problémy spojenými s nedůsledným vyemezením vztahu anglického a amerického práva.

Klíčová slova

Formální kontinuita, kolonie, právo, charty, parlament, koloniální shromáždění, nepsaná ústava, Comon law, statutory law.

Abstract

The entry deals with problems of formal continuity of American (colonial) law and English law. In particular parts are analysed the mere material conditions for transmission of English Comon law to the specific enviroment developing in the early stages of colonial history, basic formal scope of continuity of colonial and English law and influence of English law over autonomous colonial legislation. The entry deals also with problems of partial discontinuity of development of the colonial law and with problems connected with only ambiguous delimitation of mutual relationship between American and English law.

Key words

Comon law, statutory law, formal continuity, colonies, law, charts, parliament, colonial assemblys, constitution.

Pokud hovoříme o kontinuitě amerického a anglického práva je třeba vždy mít na zřeteli, že koloniální společnost ve svých ranných fázích nebyla sto fakticky replikovat anglické právo v plně autentické podobě. Anglické Comon law bylo právem vytvářeným právně vzdělanými a zkušenými soudci. Je třeba vzít v potaz i skutečnost, že až do 17. století si v Anglii významnou roli podrželi i místní soudy, rozhodující z velké části podle lokálních obyčejů, které pak logicky spoluutvářely i právní vědomí

„prostých“ obyvatel, často ve větší míře než sofistikovaná judikatura královských soudů. Pojem anglické právo tak nebylo možno ztotožňovat s Comon law, postupně doplňovaným rostoucí masou Statutory law.

V prvních fázích života kolonií lze konstatovat absenci skupin obyvatel fakticky schopných přenosu anglického práva do kolonií. Je třeba si uvědomit sociální složení a původu ranné koloniální společnosti a jejích předáků, jejichž motivem k opuštění Anglie byly často politické či náboženské názory příčící se oficiálním anglickým myšlenkovým proudům. Tito lidé si po většinou nebyli a snad ani nemohli být vědomi aktuálního obsahu Comon law, stejně jako moderních názorových proudů. Nemohlo tudíž dojít ani k odpovídajícímu přenosu anglického práva do nových podmínek, které, nutno podotknout, nekorespondovaly s podmínkami z nichž Comon law vzešlo a které předpokládalo. Zkoumání formální kontinuity práva v tomto období tak nemá valný praktický význam.

V ranném koloniálním právu lze za dominantní pramen práva označit především starozákonní ustanovení Leviticus, Deuteronomium a další „normativní“ části Starého zákona[1].

Přenos práva do kolonií nelze zejména v prvních fázích vývoje označit za věrné kopírování anglického modelu, jako spíše za hrubou a nekomplexní imitaci řady nepřesně zapamatovaných věcí[2].

Pozornost kolonistů se ke Comon law začala obracet až s určitým časovým odstupem s tím jak se vyvíjely sociální a ekonomické vztahy v koloniích a zejména i kulturní a ekonomická úroveň těchto společenství a kdy ustanovení Comon law začala představovat součást požadavků kolonistů ve vztahu k místní i anglické, případně proprietorské moci. Tento proces znovuuvědomování a ztotožnění se s odkazy anglické právní tradice započal již v polovině 17. století, v plném rozsahu se pak projevil na přelomu století. Zcela specifického rozměru potom nabyl v době americké revoluce. Je příznačné, že k přenosu anglického práva do amerických podmínek docházelo v prvé řadě z iniciativy samotných kolonistů, kteří jednotlivé normy Comon law využívali jak jako oporu svých zájmů ve střetu s imperiální mocí, tak jako určité hotové nástroje regulace společenských vztahů[3].

[1] Významným rysem raného koloniálního práva byla silná náboženská orientace zejména tzv. puritánských kolonií. Společenský i právní řád v těchto koloniích byl ve vztahu k anglické státoprávní tradici zcela prvoplánově diskontinuitní. V rétorice dnešní doby by bylo možno použít i termín alternativní. Základem tohoto společenského řádu byla především křesťanská víra, jejíž přísné dodržování bylo vnímáno jako cesta k lepšímu uspořádání mezilidských vztahů.

[2] Friedman, Lawrence M. et Schreiber, Harry N., American law and the constitutional order : historical perspectives, Cambridge, Mass. : Harvard University Press, 1988, 581 s., ISBN 0-674-02527-X str. 33

[3] Comon law představovalo pro kolonie zdroj normativní inspirace a opory pro jejich nároky vždy především v oblasti, která se týkala zajištění určitých procesních

Comon law představovalo pro kolonie zdroj normativní inspirace a opory pro jejich nároky vždy především v oblasti, která se týkala zajištění určitých procesních záruk pro uplatňování práva a obecně práv jedince, případně i kolonie jako celku, ve vztahu ke státní moci, druhotně pak i ve vztazích relativně horizontální úrovně.

Formálním vyjádřením vztahu anglického a koloniálního práva bylo na jedné straně obecné ustanovení chart vymezujících základní meze koloniální legislativy, na druhé pak jednotlivé recepční akty kolonií (mnohdy vetované imperiální administrativou), kterými byly adoptovány jednotlivé části anglického práva, či anglické právo jako celek (s určitými výjimkami).

Jedním ze základních, formálně zachycených, pravidel vzájemného vztahu anglické a koloniální legislativy bylo pravidlo obsažené v jednotlivých chartách, které omezovalo právo koloniálních shromáždění k přijímání zákonů pokud tyto zákony nebyly v souladu se zákony Anglie.

Toto pravidlo od samého počátku svěřilo koloniím širokou legislativní autonomii a stalo se východiskem pro rozvoj originální koloniální statutorní normotvorby. Toto pravidlo, pokud mu lze přisuzovat takto dalekosáhlé vidění, zároveň představovalo určité rozšíření principu materiální kontinuity amerického a anglického práva a zajištění i budoucího vzájemně konformního právního vývoje.

Nutno podotknout, že toto pravidlo, ostatně jak je to pro formulaci chart často typické, přes svou obsahovou jednoznačnost, představovalo z dobového hlediska poněkud obtížně uchopitelnou normativní materii.

Normotvorba kolonií směřovala několika různými směry. V prvé řadě šlo o jakési znovuzachycování anglického comon law a staturory law, a tím i jeho výslovné přenášení do nových podmínek. Anglické právo se tímto způsobem stalo zcela hmatatelným východiskem koloniálního právního vývoje a rozvoje koloniálního statutory law přizpůsobovaného místním podmínkám a potřebám. V tomto rozsahu se také koloniální právo logicky nedostávalo do střetu s právem mateřské země.

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záruk pro uplatňování práva a obecně práv jedince, případně i kolonie jako celku, ve vztahu ke státní moci, druhotně pak i ve vztazích relativně horizontální úrovně.

Specifické podmínky panující v amerických koloniích však vedly i k formování institutů a sociálních řešení v Anglii neznámých, či revitalizaci těch, které byly již dávno považovány za překonané, případně dokonce za nepřijatelné.

V tomto ohledu je na počátku existence severoamerických kolonií dokonce možno sledovat určité prvky retrográdního vývoje, ve vztahu k obecně chápaným a předpokládaným zákonitostem lineárního vývoje institutů a norem sociální koexistence[4].

Hlavním nástrojem anglické kontroly nad koloniální legislativou byl povinný souhlas Koruny s akty koloniální legislativy v kombinaci s královským vetem. Souhlas byl vyjadřován prostřednictvím místních guvernérů či anglických exekutivních orgánů. Nutno podotknout, že tento nástroj nebyl zdaleka používán pouze za účelem uvedení koloniálního práva na cestu konformity s anglickými normativními vzory (jak byl představován v soudobé teorii). Hlavním cílem těchto opatření bylo v prvé řadě zajištění účinné imperiální kontroly nad koloniemi.

Právo králova veta vůči aktům koloniální legislativy svou životností daleko překonalo obdobné královo oprávnění ve vztahu k aktům parlamentu. Již tato skutečnost, představující jakousi ústavní asymetrii, zpochybňuje význam tohoto institutu ve výše naznačeném směru.

Královo veto bylo v prvé řadě používáno za účelem ochrany zájmů královských prerogativ, posléze k ochraně formálního zajištění nadřazeného postavení parlamentu. V historii je pak využívání tohoto institutu spojeno spíše s akty imperiální moci, kterými byla narušována transpozice některých základních anglických quaziústavních dokumentů, garantujících práva a svobody subjektů, do koloniálních podmínek.

Ve všech výše zmíněných případech lze vysledovat určitý pokus o nastolení ústavní dvojkolejnosti vývoje v Anglii a jejích koloniích. Výslovné rozšíření obdobných politických a právních principů i na území kolonií se jevilo jako potenciální riziko pro uchování imperiální nadvlády nad koloniemi. Příznačně pro svou dobu však anglická administrativa a legislativa nedokázaly přikročit

[4] Jako příklad lze uvést fakt, že zatímco již v roce 1290 byla v Anglii statutem Quia Emptores vymícena subinfeudace a feudální vztahy se nadále rozvíjely na principu přímé podřízenosti králi, charty Marylandu, Maine, Karolíny a Pensylvánie přiznávaly proprietorům právo subinfeudace a pět anglických kolonií tak znovu fakticky přijalo principy feudálního práva opuštěné v Anglii již v roce 1290.
Nejtypičtějším příkladem tohoto jevu je však bezpochyby postupný rozvoj institutu otroctví které bylo v Anglii 17. století dávno překonaným jevem.
V obou výše zmíněných případech šlo o zřetelně archaické či diskontinuitní instituty, minimálně v druhém případě zřetelně v rozporu s právem mateřské země. Ani v jednom z těchto případů však nedošlo k zásahu anglických imperiálních orgánů, které fakticky rezignovaly na praktické uplatňování v chartách zahrnutého principu.

k jasnému definování vztahu impéria a kolonií. Postup Anglie v této otázce představoval pouze jakousi nekoncepční, ad hoc realizaci politiky zadržování, spojenou s evidentní obavou kolonistům výslovně odepřít práva Angličanů[5].

Zejména Magna Charta, jako vyjádření základních principů anglického práva nicméně vždy představovala významné kritérium pro posuzování koloniální legislativy.

Základním rámcem právního života kolonií byly psané královské charty, které určitým, byť velmi vágním, způsobem vymezovaly hranice, jež se zavazovala královské moc respektovat. Charty zároveň stanovily základní organizační rámec života kolonií, stejně jako vágní definici vztahu a mezí koloniálního práva vůči právu anglickému.

Charty si v žádném případě nelze představovat jako ucelené zpracování ústavní materie. Svým charakterem představovaly do značné míry pouze kusou úpravu základních otázek, s celou řadou vágních ustanovení a odkazů[6].

Přes svůj charakter de facto vnějšně ex autoritas nadiktovaného právního nástroje byly charty kolonisty považovány za základ jejich právní identity a základní dokumentární záruku jejich nároků jako Angličanů.

Prostřednictvím královských chart byla formálně deklarována suverenita anglického krále nad územím kolonií, stanovena základní organizační struktura vlády a svobodným obyvatelům kolonií formálně garantovány svobody příslušející anglickým „občanům“ (tedy v dobovém pojetí práva náležející vlastníkům půdy).

[5] Samotná praxe královského veta byla vždy ve vztahu ke koloniální legislativě poměrně neúčinná. Vetované akty koloniální legislativy se často do právního řádu kolonií vkrádaly jakoby zadními dveřmi prostřednictvím celé řady dílčích zákonů, či jednoduše opakovaným přijímáním totožných zákonů. Ve vnímání kolonistů vždy zůstaly základní anglické ústavní principy, ať již vyjádřené v Magna Chartě, či jiných pramenech Comon law součástí jejich právoplatných nároků jako Angličanů a součástí jejich kulturního a právního dědictví. Aktivní uvědomování si těchto práv rezonovalo v koloniálním právním vývoji i v ústavních aktech mladého amerického státu.

[6] Z hlediska úpravy otázek ústavního charakteru lze charty zároveň označit za prameny nevýhradní. Vedle nich stále existovala především nepsaná anglická ústava, která organicky dotvářela ústavní rámec právní existence kolonií, byť nutno podotknout, že míra její přímé použitelnosti i rozsah jejích pravidel použitelných přímo na území kolonií, měla pouze nejasné obrysy. Nutno podotknout, že kolonie stále tvořily součást britského impéria. Do vnitřních procesů nastavených chartami zasahovala exekutivní moc a následně i parlament.

Poněkud odlišná situace platila v případě proprietorských kolonií, kde proprietor zpravidla disponoval pravomocemi absolutistického vládce a na mateřské zemi byl takřka nezávislý. Charta tak v tomto případě představovala prakticky jediné formální pojítko s mateřskou zemí a zároveň určitou formální limitaci mezí vývoje koloniálního práva.

Nutno podotknout, že posledně jmenovaná klauzule zůstávala v chartách bez další specifikace svého vágně formulovaného obsahu. Toto zdánlivě jednoznačné ustanovení objevující se opakovaně v jednotlivých chartách nevyhnutelně směřovalo k budoucím sporům o výklad tohoto pojmu, respektive obecně o šíři práv a povinností obyvatel severoamerických kolonií, jak ve vztahu ke královské moci, tak posléze k anglickému parlamentu, tak nakonec obecně i na horizontální úrovni v rámci běžných mezilidských vztahů vyplývajících z přirozeně se vyvíjející ekonomické a sociální aktivity (ve druhém případě šlo zejména o otázku závaznosti určitých pravidel, míry jejich všeobecnosti a obecně jejich vynutitelnosti, či přímé dovolatelnosti v koloniích).

V době vzniku jednotlivých chart nebyl žádný z výše naznačených problémů ani zdaleka aktuální. Charty vznikaly převážně v době, kdy byl ekonomický a mocenský potenciál severoamerických kolonií dobře skryt. Charty představovaly pouze velmi obecné vymezení základních organizačních otázek politického a sociálního života v koloniích. Na podrobnější řešení dosud zdánlivě nepodstatných právních otázek bylo rezignováno.

Je třeba dodat i to, že v průběhu 17.století, kdy jednotlivé charty vznikaly bylo takřka nemožné postihnout dostatečně obecně a zároveň do budoucna i dostatečně konkrétně všechna specifika podmínek v severoamerických kolonií[7]. Tuto skutečnost poměrně realisticky vystihovala i další zásada obsažená v chartách a sice zásada podle níž mělo být v nových podmínkách anglické právo použito do té míry, do které to bude možné.

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Při zkoumání dynamického vztahu anglického a koloniálního práva je třeba definovat institucionální vztah parlamentu a koloniálních shromáždění.

Po roce 1700 došlo, v souvislosti s posílením pozice parlamentu, k zásadnímu omezení královské moci nad koloniemi. Za této situace bylo jen otázkou času, kdy parlament převezme ve vztahu ke koloniím dominantní roli, kterou již plně požíval ve vztahu k vnitřním otázkám.

[7] Nebylo možno předvídat ani velikost kolonií, ani budoucí podmínky jejich rozvoje. Vágní odkaz na použití anglického práva tak byl dostatečně širokým rámcem pro budoucí rozvoj koloniálního práva.

Středem zájmu parlamentu se v tomto období stala především potřeba ochrany investic anglických obchodníků na území kolonií a potřeba ochrany, regulace a podpory koloniálního obchodu, stranou zájmu naopak zůstávaly otázky vnitřního života kolonií, což pouze podtrhávalo víceméně indiferentní vztah Anglie k otázkám koloniálního života, které neměly bezprostřední donos a odraz v Anglii samé.

Za situace, kdy byla zákonodárná moc v rukou parlamentu i zákonodárných shromáždění jednotlivých kolonií zůstávala nevyřešenou otázkou jednoznačná úprava jejich vzájemného vztahu, který zůstával víceméně nedefinován. Parlament si obecně osoboval právo regulace vnějších otázek kolonií, zatímco koloniálním shromážděním byly fakticky ponechány záležitosti vnitřního života kolonií, který byl ostatně pro anglické poslance více méně cizím tématem. Parlament nicméně v obecné rovině nikdy neopustil představu podle níž, je to on, kdo je nadán plnou autoritou nad vnitřními i vnějšími záležitostmi kolonií[8].

Pokud hovoříme o kontinuitě, či lépe řečeno o dynamickém vztahu, amerického a anglického práva, je třeba do značné míry rozlišovat postavení Comon law a Statutory law.

Jak vyplývá z výše uvedeného obecného vymezení vztahu anglického parlamentu ke koloniím, byla legislativní činnost parlamentu realizována ve dvou rovinách a legislativní akty parlamentu upravovaly vztahy v koloniích prakticky výhradně pouze v případech, kdy samotný „zákon“ obsahoval přímý odkaz na svou účinnost vůči koloniím. Druhým, z hlediska zkoumání kontinuity právního vývoje, neméně významným pramenem prosazování anglických legislativních vzorů do koloniálního zákonodárství, pak bylo přímé přebírání jednotlivých normativních celků legislativní činností koloniálních shromáždění (zde však tato činnost často narážela na odpor samotných anglických orgánů), případně přímo neformálně soudní a obecně aplikační praxí. Opomenout v této souvislosti nepochybně nelze ani význam pokračujících kulturních styků a s nimi i šíření moderních právních myšlenek v severoamerickém prostředí, které se přirozeně odrážely i v judikatuře koloniálních soudů.

Teoretické vymezení vztahu právního řádu kolonií a právního řádu mateřské země je třeba rozdělit do dvou vzájemně oddělených etap. Součástí právního řádu kolonií se na základě obecně

[8] Činnost anglického parlamentu vůči koloniím spočívala především ve stanovení obecných principů, které byly v koloniích uváděny v život orgány britské koloniální správy, tedy orgány výkonnými (tímto způsobem se zároveň realizovala výkonná stránka moci parlamentu).

respektované zásady, podle níž s sebou Angličan nese tolik práva, kolik je možné, stávalo právo, které bylo anglickým právem v době založení kolonie. Zákony následně přijaté anglickým parlamentem, případně právní normy vznikavší jako výsledek rozhodovací činnosti soudů, se nestávaly součástí právního řádu kolonií, pokud, v případě zákonů neobsahovaly přímou zmínku o své aplikovatelnosti v koloniích, obecně pak, pokud nedošlo k jejich schválení koloniálními shromážděními, případně pokud se nestaly součástí koloniálních právních řádů na základě praxe, či cestou legislativní či judikatorní inspirace[9].

Z hlediska formální garance, zajišťující kolonistům ústavní práva náležející Angličanům, je třeba zmínit vydání charty Virginie Jakubem I. v roce 1606, která se stala určitým vzorem i pro základní dokumenty budoucích kolonií.

V rámci definování formálního vztahu kolonistů k mateřské zemi představoval tento dokument zásadní přelom. Do této byli kolonisté zásadně nazíráni jako osoby mimo právní řád své domovské země.

Je přitom zcela příznačné, že jednotlivé formulace byly zásadně chápány jako dynamické vymezení vztahu obou právních řádů a kolonie tak „ze své“ považovaly i aktuální výsledky politických bojů 17. Století (Kolonisté se tak dovolávali i formulací obsažených v Petition of Right, Habeas Corpus Act a dalších statutorních deklaracích, jako pramene svých občanských práv a politických privilegií).

Výše naznačená vymezení vzájemného vztahu amerického a anglického práva je však třeba vnímat spíše jako obecný princip než, z hlediska jeho formálního zachycení, životaschopné a přímo aplikovatelné právní ustanovení.

Otázka praktického významu této formální deklarace zůstává otevřena. Na jedné straně lze konstatovat zejména omezený praktický význam tohoto ustanovení. Zejména ve vztahu k orgánům mateřské země otázka rozsahu práv kolonistů takřka po celé 17. Století nevyvolávala zásadnější diskuze.

[9] Výsledkem této skutečnosti byl fakt, že anglické comon law se do značné míry překrývalo s comon law americkým. V praxi tento vztah fungoval do té míry, do jaké byly z jedné strany kolonisté anglické comon law ochotni a schopni realizovat, z druhé strany pak v rozsahu v jakém anglické orgány byly ochotny respektovat aplikaci určitých norem comon law v koloniích a koloniemi vůči své mateřské zemi.

Lze rovněž vznést otázku nutnosti výslovného zachycení tohoto ustanovení v chartách. Nabízí se zejména otázka, zda toto ustanovení mělo deklaratorní či konstitutivní charakter[10]. Na celý problém lze nepochybně pohlížet z výše naznačeného formálního hlediska, spojeného s otázkami o ústavní a právní jednotnosti formujícího se britského impéria (která byla nepochybně zpochybňováno praxí anglických koloniálních orgánu i rozšířeným ekonomickým a politickým a tím i právním vnímáním kolonií), stejně tak však lze tuto otázku zasadit do kontextu vnímání samotných kolonistů[11].

Rozdílná míra ochrany majetku, svobody a života jedince, vztahující se na anglické subjekty a kolonisty byla vždy vnímána jako projev útlaku zasahujícího do vrozených práv kolonistů, neodůvodněná diskriminace a projev imperiálního útlaku. Intenzita odporu proti takovým mocenským opatřením rostla úměrně tomu, jak aktivně anglická vláda potlačovala přirozené tendence směřující k adopci a realizaci obdobných „ústavních" principů v koloniálním právu, respektive ve vztahu k anglické vládě.

Již ze samé podstaty kolonizačního procesu a jeho vnějších podmínek vyplývalo, že při přenosu comon law do nového prostředí byl přirozeně kladen větší důraz na jeho veřejnoprávní část. Tato skutečnost byla odůvodněna zejména zásadně odlišnými sociálními a ekonomickými podmínkami v koloniích, které s sebou přinášely i podstatně odlišný charakter a úroveň právních vztahů z těchto podmínek přirozeně vyplývajících. Nové podmínky, stejně jako nové kulturní a ekonomické vlivy tak vytvářely tlak na formy organizace ekonomických vztahů a určitou diskontinuitu či spíše jednoduše odlišnost ve vývoji jednotlivých institutů ve srovnání s mateřskou zemí.

Naproti tomu přenesení základních principů uspořádání společnosti a garancí postavení jedince ve vztahu ke státní moci se prakticky již od počátku (odhlédneme-li od ranných organizačních forem kolonizace) jevilo jako proveditelný a přirozený požadavek kolonistů (viz. určité drhy absolutismu v koloniích).

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[10] Odkázat lze v této souvislosti zejména na významný judikát v tzv. Calvinově případu, kdy soud Kings Bench rozhodl o právu Skotů na nákup pozemků na území Anglie (v širším výkladu na práva Angličanů) s odkazem na to, že občané Skotska jsou podřízeni stejnému králi, jako občané Anglie. Obdobný, ne-li ještě užší vztah nepochybně existoval i ve vztahu kolonistů ke své mateřské zemi a králi.

[11] Zde je třeba zmínit zejména přetrvávající a dlouho velmi pevné kulturní vztahy kolonií a mateřské země. Kolonisty rovněž spojovala s Angličany staletí společné historie, včetně historie právní. Kolonisté přirozeně vnímali historický „boj o právo" za svůj vlastní. Výsledky tohoto boje byly součástí jejich kulturního dědictví i jejich normativních očekávání. Skutečnost, že by měly být s opuštěním Anglie zbaveni ochrany „vymožeností" anglického práva se v tomto kontextu nejevila logická ani odůvodněná. Ustanovení chart podle něhož kolonistům náležela práva Angličanů, tak bylo kolonisty vnímáno jako deklarace zřejmého faktu.

Z faktu, že kolonistům charty zpravidla výslovně přiznávaly podřízenost (a ochranu) stejnému souboru pravidel, kterému podléhaly Angličané v mateřské zemi (ač bylo toto ustanovení z praktických hledisek obtížně realizovatelné a často přímo v chartách omezené odkazem na míru praktické realizovatelnosti tohoto požadavku), stejně jako z faktu, že kolonisté nepochybně byly nadále subjekty podřízenými anglickému králi zdánlivě vyplývala i přímá uplatnitelnost základních prvků comon law na území kolonií.

Tyto prvky byly již od ranných fází koloniálního vývoje inkorporovány přímo do koloniální legislativy. Do koloniálního práva bylo prostřednictvím legislativy koloniálních shromáždění převzato mnoho pravidel anglického comon law a statutory law, byť často široce přizpůsobených novým podmínkám a zájmům. Zároveň je však třeba konstatovat, že přejímání anglického práva, respektive akceptace všech ústavních principů, ať již implicitně obsažených v nepsané anglické ústavě, vyjádřených v common law, či jednotlivých quaziústavních dokumentech (Magna charta) nebylo nikdy automatické či mechanické.

Problémem vztahu anglické ústavy vůči koloniím se však, kromě diametrálně odlišných materiálních podmínek, začala ukazovat i sama skutečnost, že se vnímání anglické ústavy (zejména v Anglii samé) nedokázalo odpovídajícím způsobem vypořádat s existencí kolonií, jako plnoprávných subjektů v rámci organizování anglického impéria. Jakýsi modus vivendi, který se organicky vytvářel zejména od počátku 18. století byl negován snahou parlamentu o zajištění kontroly nad koloniemi, které, jak se zdálo, postupně unikaly ze sféry jeho vlivu. Kroky parlamentu vůči koloniím nedokázaly být vyváženy odpovídající organizační úpravou vzájemného vztahu. Nikdy nedošlo k rozšíření institucionálních principů o něž se opírala funkčnost anglické ústavy i na území kolonií. Parlament jako jediná záruka před zneužitím moci se tak ve vztahu ke koloniím dostával do formálně nijak nevyvažovaného postavení neomezeného „tyrana“. Pozice parlamentu vůči koloniím překročila předpokládaná schémata vztahů, která stála při definování jeho obecné ústavní pozice. Parlament vůči koloniím vystupoval jako vnější autorita prosazující v prvé řadě imperiální zájmy Británie, nikoliv jako zástupce všech subjektů podléhajících moci anglického krále.

Dlouhá desetiletí jen neochotně řešený problém právního vztahu kolonií k mateřské zemi, stejně jako neschopnost a neochota přizpůsobit ústavní rámec britského impéria novým podmínkám panujícím v koloniích (a z nich vyplývajícím zájmům a potřebám kolonií), postavily obě strany sporu na počátku 60.let 18.století tváří v tvář střetu, který zdánlivě nenabízel žádné oboustranně přijatelné

východisko. Nyní vydaný „Deklaratorní zákon," upravující vzájemný vztah plně ve prospěch parlamentu přišel příliš pozdě a svým obsahem nepředstavoval řešení, které by byli kolonisté ochotni považovat za zákon vydaný v souladu s principy anglické ústavy, tím méně pak jeho ustanovení respektovat.

Závěr

Vzájemný vztah anglického a koloniálního práva nelze shrnout jednouchým vymezením míry formální kontinuity. Tento vztah je třeba vnímat v jeho dynamice a proměnlivosti. Anglické právo představovalo jedno z východisek vývoje koloniálního práva, zároveň však jeho vývoj dále provázelo, doplňovalo a zasahovalo do něj takřka po celá dvě staletí.

Žádný z pokusů o formální vymezení vztahu anglického a amerického práva nepřinesl řešení, které by přinášelo jednoznačnou odpověď na přirozeně vznikající otázky. Stejně tak objektivní odpověď na otázku rozsahu práv kterými kolonisté, z hlediska neanglické ústavy disponovali, je prakticky nemožná. Tento vztah nebyl nikdy formálně vyřešen, jednotlivé závěry učiněné na jedné či druhé straně Atlantiku byly vždy podmíněny vlivem aktuální doktríny, či jednoduše sledovanými zájmy.Tyto problémy nakonec byly jednou z příčin krize, která vedla k osamostatnění se severoamerických kolonií na mateřské zemi.

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INŠTITÚT VYDRŽANIA V RÍMSKOM PRÁVE A V OBČIANSKOM ZÁKONNÍKU ČSR Z ROKU 1950

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PRÁVNICKÁ FAKULTA, UNIVERZITA KOMENSKÉHO V BRATISLAVE

Abstrakt

Autorka sa vo svojom príspevku venuje otázke vývoja inštitútu vydržania v rímskom práve od jeho najstarších a najjednoduchších foriem až do podoby, v ktorej tento inštitút poznáme z Justiniánskych inštitúcií. Tento vývoj naznačuje vyspelosť rímskej právnej kultúry a potvrdzuje oprávnenosť štúdia rímskeho práva aj v súčasnosti, čo autorka dokumentuje aj na právnej úprave inštitútu vydržania v československom povojnovom práve, ktorá aj napriek odlišnej spoločensko-ideologickej situácii v podstate kopíruje rímsko-právnu úpravu. A tak aj napriek značnej abstraktnosti modernej úpravy, na rozdiel od kauzálneho prístupu rímskych právnikov, môžeme pozorovať zachovanie základných princípov, ako sa vyvinuli v rímskom práve.

Kľúčové slová

vydržanie, rímske právo, občiansky zákonník, Zákon XII. tabúľ, klasická rímska jurisprudencia, usucapio, Inštitúcie

Abstract

The author is tracking development of the institute of usucaption in the Roman private law from its oldest and most primitive forms up to the form we know from the Justinian's Institutions. This development implies advance of Roman legal skill and affirms the justifiability of study of Roman law nowadays, which is documented by legal regulation of the institute of usucaption in the Czechoslovak post-war law, which despite the different socio-ideological situation imitates the Roman regulation. And so despite the considerable abstraction of the modern regulations, which is so different form the causal approach of Roman lawyers, we can observe abidance of basic principles as they have developed in Roman law.

Key words

Usucaption, Roman law, Civil Code, XII Tables, classical Roman jurisprudence, usucapio, Institutions

Vydržanie, lat. ***usucapio***, ako jeden zo spôsobov nadobúdania civilného vlastníckeho práva má svoje korene už v Zákone XII. tabúľ[1] a napriek odlišnej spoločenskej a ideologickej situácii v polovici 20.stor. v ČSR je zahrnutý aj do unifikovaného občianskeho zákonníka, ktorý bol prijatý Národným zhromaždením Československej republiky dňa 25. októbra 1950. Na druhej strane je však jasné, že počas tohto dlhého obdobia prešiel inštitút vydržania mnohými zmenami a vývojom.

ZÁKON XII. TABÚĽ

Podľa G. Diósdiho „naše zdroje viackrát spomínajú ustanovenia zákona XX. tabúľ o nadobúdaní vlastníctva dlhou držbou (napr. Cicero: *De Off.* 1, 12; *Top.* 4, 23; *De leg.* 1, 21, 55; 2, 24, 61; Gaius: 2, 42[2]; 2, 45; 2, 47; 2, 49; 2, 54; 1, 111) – pričom v pôvodnom znení zákona XII. tabúľ bol zrejme použitý termín ***usus auctoritas***[3], ktorý naznačuje, že išlo o skoršiu formu vydržania, ktorá nie je identická s neskorším inštitútom ***usucapio***."[4] Napriek tomu, že doteraz nebolo podané vyčerpávajúce vysvetlenie rozdielu medzi ***usus auctoritas*** a ***usucapio***, ktoré by bolo všeobecne akceptované uznávanými romanistami, domnievam sa, že názor Kleina a Kasera ako ho prezentoval G. Diósdi je vcelku správny. Ten uvádza, že „***usus auctoritas*** bolo pôvodne ustanovenie **dôkazového** práva – skutočné a pokračujúce užívanie veci zbavovalo držiteľa povinnosti preukazovať titul nadobudnutia veci. Týmto spôsobom ***usus auctoritas*** vykonávala **funkciu** neskoršieho ***usucapio***. Pôvodne však nebol dôraz kladený na získanie vlastníctva, ale na zbavenie povinnosti predložiť dôkaz. Túto myšlienku možno nájsť aj u Cicera (*Pro Caec.* 26, 74: *... at usucapio fundi, hoc est finis sollicitudinis ac periculi litium...*)."[5]

Zákon XII. tabúľ neobsahoval žiadne podrobné ustanovenia a v podstate išlo o prevod *de facto* držby, bez ohľadu na spôsob nadobudnutia – pokiaľ len nešlo o krádež, na zákonné vlastníctvo za predpokladu uplynutia zákonom stanovenej lehoty.[6] Je teda veľmi pravdepodobné, že ustanovenia tohto starovekého zákona nevyžadovali ani *bona fides* ani *iustus titulus* ako tomu bolo v neskoršom období a to aj z toho dôvodu, že právo v tomto období malo sklon zameriavať sa na vonkajšie a ľahko dokázateľné fakty, nie na stav mysle či pohnútku. Aj preto väčšina romanistov nemá problém s prijatím Gaiovho tvrdenia, že „ukradnutú vec zakazuje vydržať už Zákon XII. tabúľ"[7]. Spoločný účinok zákazu vydržania ukradnutej

[1] Jolowitz, H.F.: *Historical Introduction to the Study of Roman Law*. Cambridge: University Press, 1939. s. 152.
[2] Gaius 2, 42: *„Usucapio autem mobilium quidem rerum anno completur, fundi vero et aedium biennio; et ita lege XII tabularum cautum est."* - „Vydržení se pak u věcí movitých dovrší jedním rokem, naproti tomu u pozemků a budov dvěma léty. Tak bylo také ustanoveno zákonem 12 desek." (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)
[3] Napr. Cicero: *Top.* 4, 23 (Tab. VI. 3): *„Usus auctoritas fundi biennium est ... ceterarum rerum omnium annuus est usus.*" alebo Cicero: *Pro Caec.* 19, 54: *„...lex usum et auctoritatem fundi iubet esse biennium.*"
[4] Diósdi G.: *Ownership in Ancient and Preclassical Roman Law*. Budapešť: Akadémia Kiadó, 1970. s. 85.
[5] Diósdi G.: *Ownership in Ancient and Preclassical Roman Law*. Budapešť: Akadémia Kiadó, 1970. s. 90.
[6] Muirhead, James: *Historical Introduction to the Private Law of Rome*. London: A.&C. Black, 1916. s. 133.
[7] Gaius 2, 45: *„...nam furtivam lex XII tabularum usucapi prohibet...*"

veci a širokej definície krádeže v Ríme spôsobili, že vydržanie hnuteľných vecí bolo v Ríme pomerne zriedkavé, zatiaľ čo pri nehnuteľnostiach prevládal názor, že pôda nemôže byť ukradnutá.[8]

PREDKLASICKÉ RÍMSKE PRÁVO

Rímske ***usucapio*****,** hlavne v predklasickom a klasickom práve, má celkom úzke spojenie s prevodom vlastníctva. Musíme pamätať na to, že dôležitou funkciou vydržania bola konsolidácia neformálneho nadobúdania, t.j. prevod *res mancipi* tradíciou.[9]

Usus auctoritas prešlo ďalekosiahlou premenou v predklasickom rímskom práve, pričom ***Lex Atinia*** (koniec 3.stor.) používajúca ***usus auctoritas*** je považovaná za tzv. *terminus post quem*. Najjasnejšie je to vidieť na zmene názvu inštitútu na ***usucapio***. Nová terminológia bola zrejme dôsledkom zmeny funkcie tohto inštitútu a svedčí, že starodávne ***usus auctoritas*** sa transformovalo na skutočné nadobúdacie ***usucapio*** predklasického a klasického rímskeho práva, čo je zjavné aj zo samotného slova *usu capere* (nadobudnúť užívaním). K tomuto posunu vo funkcii mohlo dôjsť na základe viacerých zmien v rímskej spoločnosti ako aj v práve, napr. v rámci jurisprudencie došlo k vymedzeniu vlastníctva ako absolútneho právneho panstva nad vecou a držby ako faktickej moci nad vecou.[10]

Na druhej strane v predklasickom období došlo pri nadobúdaní dlhou držbou k zavedeniu viacerých obmedzujúcich podmienok, hlavne ***iusta causa*** a ***bona fides***, aj keď k podrobnejšiemu rozpracovaniu a spresneniu týchto podmienok došlo až v období klasickej jurisprudencie. Navyše nie je pochýb o tom, že *Lex Atinia* zaviedla zákaz vydržania aj pre tých, ktorí ukradnutú vec nadobudli v dobrej viere, t.j. sami boli dobromyseľní, čo ešte výraznejšie obmedzilo možnosti vydržania bez spolupráce civilného vlastníka.[11]

KLASICKÁ RÍMSKA JURISPRUDENCIA

V období klasickej rímskej jurisprudencie došlo k definovaniu inštitútu vydržania (lat. ***usucapio***) ako nadobúdania vlastníctva veci patriacej niekomu inému jej neprerušenou držbou (lat. *possessio*) zákonom určenú dobu, pričom ďalšími podmienkami vydržania podľa *ius civile* boli:[12]

[8] Jolowitz, H.F.: *Historical Introduction to the Study of Roman Law*. Cambridge: 1939. s. 152 – 156.
[9] Schulz, Fritz: *Principles of Roman Law.* Oxford: Claredon Press, 1936. s. 35 – 36.
[10] Diósdi G.: *Ownership in Ancient and Preclassical Roman Law*. Budapešť: Akadémia Kiadó, 1970. s. 90.
[11] Muirhead, James: *Historical Introduction to the Private Law of Rome*. London: A.&C. Black, 1916. s. 120 – 136.
[12] Berger, Adolf: *Encyclopedic Dictionary of Roman Law.* Philadelphia: American Philosophical Society, 1991. s. 752.

- ***possessio*** (držba) – platila zásada *sine possessione usucapio procedere non potest* (bez držby niet vydržania)

- ***tempus*** (vydržacia doba) – od čias Zákona XII. tabúľ bola vydržacia doba pre nehnuteľnosti 2 roky a pre hnuteľné veci 1 rok[13]. Držba musela počas vydržacej lehoty trvať nepretržite (*continuatio possessionis*), takže jej strata (bez ohľadu na dôvod) vždy znamenala koniec vydržania, okrem prípadu smrti sa pripúšťalo započítanie držby poručiteľa

- ***bona fides*** (dobrá viera), t.j. úprimná viera držiteľa, že nadobudol vec od vlastníka (aj keď v skutočnosti nadobudol od nevlastníka, *non domino*) a transakciou, ktorá právne bola vhodná na prevod vlastníctva (aj keď v skutočnosti nebola, napr. ak bola vec *mancipačná* prevedená *tradíciou*). Dobrá viera sa na strane držiaceho vyžadovala len na začiatku držby. Ak neskôr zistil pravý stav veci a tým stratil dobrú vieru, nebránilo to vydržaniu

- ***iusta causa/ iustus titulus*** (spravodlivý dôvod/ titul) – takýmto spravodlivým dôvodom mohol byť „skutok štedrosti", t.j. dar (*donatio*) vlastníka alebo dohoda s ním (kúpa), ktorá by odôvodňovala nadobudnutie vlastníctva, keby neexistovala vada v samotnej transakcii (napr. *traditio* namiesto *mancipatio* pri *res mancipi*) alebo v osobe prevodcu (nevlastník). Ani mylná viera držiteľa, že existovala ***iusta causa***, nestačila ako dôvod vydržania

- ***res habilis*** (spôsobilá vec) – nesmelo ísť o vec, ktorá nemôže byť predmetom súkromného vlastníctva, tzv. *res extra commercium*[14] a takisto boli z vydržania vylúčené veci ukradnuté (*res furtivae*)[15] a ulúpené (*res vi possessae*) a provinčné pozemky[16]

Rímska klasická právna veda teda vydržanie definovala takto: „Vydržanie je pripojenie vlastníctva v dôsledku nepretržitej držby po dobu určenú zákonom" (*Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti* – Mod. D. 41, 3, 3).[17]

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[13] Gai. 2, 42 „Vydržení se pak u věcí movitých dovrší jedním rokem, naproti tomu u pozemků a budov dvěma léty. Tak bylo také ustanoveno zákonem 12 desek." Gai 2, 49 (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)

[14] Medzi veci vylúčené zo súkromného vlastníctva patrili: veci božského práva (veci sväté, náboženské, posvätné); veci patriace všetkým; veci verejné.

[15] Gai. 2, 45 „Někdy však, byť i někdo drží cizí věc v sebelepší dobré víře, mu vydržení neprospívá, například tomu, kdo drží věc ukradenou anebo násilne do držby vzatou. Věc ukradenou zakazuje totiž vydržet zákon 12 desek, věc násilně do držby vzatou zákon Iulia a Plautia." Gai 2, 49 (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)

[16] Gai. 2, 46 „Rovněž provinční pozemky nejsou k vydržení způsobilé." Gai 2, 49 (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)

[17] Rebro, Karol – Blaho, Peter: *Rímske právo.* Bratislava: Iura edition, 2003. s. 270.

Gaius sa rozsiahle zaoberá vydržaním v druhej knihe svojej Učebnice[18] a tým nám približuje právnu úpravu inštitútu vydržania ku koncu klasického obdobia, ale nám aj poskytuje vzácny zdroj informácií o úprave podľa Zákona XII. tabúľ. Nachádzame u neho napríklad rozsiahle pojednanie o nemožnosti vydržania pri kradnutých veciach: „Řekne-li se ovšem obecně, že vydržení věcí kradených a násilím držených zakázal zákon 12 desek, nevztahuje se to na to, že nemůže vydržet sám zloděj či ten, kdo drží násilně (neboť tomu nepřísluší vydržení z důvodu jiného, a to proto, že drží ve zlé vůli): ale že právo na vydržení nemá ani žádný jiný (držitel), a to i kdyby od toho (zloděje či násilného držitele) koupil (věc) v dobré víře."[19] Z toho ďalej vyvodzuje následky nasledovne: „Proto při movitých věcech přísluší držiteli v dobré víře vydržení jen zřídkakdy: protože ten, kdo prodal a předal cizí věc, dopouští se krádeže. A stejně je tomu (i tehdy), když se (věc) předává z důvodu jiného. Ale někdy to přece jen bývá jinak: neboť nedopouští se krádeže dědic, ktorý by prodal či daroval nějakou věc, kterou pokládá za součást pozůstalosti, ač byla zemřelému jen půjčena, pronajata nebo dána do úschovy. Krádeže se nedopouští také ten, komu přísluší právo požívací k otrokyni a kdo v přesvědčení, že mu připadají i narozené děti, by je prodal či daroval. Neboť bez úmyslu ukrást, nelze krádež spáchat. Také jinými způsoby se může stát, že někdo na někoho převede cizí věc s tím účinkem, že nejde-li o věc kradenou, držitel ji vydrží."[20] Po tom, ako vymenoval možnosti vydržania pri hnuteľných veciach, obracia Gaius pozornosť na nehnuteľnosti: „Také je možné, že někdo bez použití násilí nabude držbu cizího pozemku: buď že je uvolněna nedbalostí vlastníka, anebo proto, že vlastník by zemřel bez dědice či že by byl po dlouhý čas nepřítomen. Převede-li (nabyvatel) tuto (držbu) na jiného, a ten ji v dobré víře přijme, může (nový) držitel (pozemek) vydržet. A ačkoli tedy ten, kdo uvolněnou držbu nabyl, ví, že pozemek je cizí, neškodí to přece nijak při vydržení držiteli v dobré víře, protože nebyl uznán názor těch (právníků), kteří soudili, že pozemek se může stát předmětem krádeže."[21]

Vzhľadom na to, že rímska právna veda bola prevažne postavená na kazuistickom prístupe, došlo v priebehu storočí k vyprofilovaniu viacerých „poddruhov" ***usucapia***, ktoré A. Berger klasifikuje nasledovne[22]:

- ***usucapio ex Rutiliana constitutione*** – ak muž kúpil *res mancipi* od ženy, ktorá konala bez *auctoritas* svojho opatrovníka (*tutora*), nezískal vlastníctvo, ale mohol vec vydržať. Žena však mohla *usucapio* prerušiť ak spätne zaplatila kupcovi celú cenu.

[18] Gai. 2, 41 – 59
[19] Gai 2, 49 (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)
[20] Gai 2, 50 (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)
[21] Gai 2, 51 (In: Gaius – *Učebnice práva ve čtyřech knihách*, preložil Jaromír Kincl)
[22] Berger, Adolf: *Encyclopedic Dictionary of Roman Law.* Philadelphia: American Philosophical Society, 1991. s. 752 – 753.

- ***Usucapio libertatis*** – sa vzťahuje na vlastníctvo nehnuteľnosti, ktorá je zaťažená pozemkovou služobnosťou. Vlastník pozemku, ku ktorému má niekto druhý zriadenú služobnosť, mohol „oslobodiť" svoj pozemok, ak konštrukciou alebo konkrétnym a jednoznačným skutkom zabránil oprávnenej osobe vykonávať svoje právo a táto osoba to určitý čas tolerovala (2 roky v klasickom práve).

- ***Usucapio pro derelicto*** – ide o vydržanie veci opustenej ne-vlastníkom a držanej vydržateľom *pro derelicto*, t.j. ako keby bola opustená vlastníkom.

- ***Usucapio pro donato*** – ide o vydržanie veci získanej ako dar od osoby, ktorá nebola vlastníkom a držanej vydržateľom *pro donato*, t.j. ako keby bola darovaná vlastníkom.

- ***Usucapio pro dote*** – ide o vydržanie veci, ktorú manžel získal medzi vecami tvoriacimi veno a ktorá nebola vo vlastníctve osoby, ktorá veno vytvorila. Toto vydržanie začína plynúť od času, keď došlo k uzavretiu manželstva.

- ***Usucapio pro emptore*** – ide o vydržanie veci kupujúcim, ktorému bola vec predaná a doručená, ktorý však nezískal vlastníctvo tejto veci pre právnu vadu pri prevode alebo preto, že predávajúci nebol vlastníkom. Držba veci kupujúcim je *pro emptore*, t.j. ako keby bola kúpa platná.

- ***Usucapio pro herede*** – ak osoba držala vec, ktorá bola časťou dedičstva a ktorej dedič ešte nezískal držbu, získala táto osoba vlastníctvo vydržaním nazývaným *pro herede*, t.j. ako keby bol dedič. Pri tomto druhu vydržania postačovala jednoročná vydržacia lehota aj pri nehnuteľnostiach. Keďže sa nevyžadovala ani *iusta causa* ani *bona fides*, nebolo na prekážku ani vedomie vydržateľa o tom, že vec patrí dedičovi. Dôvodom tejto nespravodlivej formy nadobúdania vlastníckeho práva k cudzej veci – rímski právnici ju považovali za *lucrativa*, t.j. výhodnú, neopodstatnenú – bolo, podľa Gaia[23] to, že starovekí Rimania chceli, aby bolo dedičstvo prijaté dedičom čo najskôr – aby mohli rodinné náboženské obrady pokračovať čoskoro po smrti hlavy rodiny a aby veritelia boli uspokojení bez odkladu.

- ***Usucapio pro legato*** – ide o vydržanie založené na držbe veci, odkázanej v platnom závete vo forme *legatum per vindicationem*, ku ktorej však odkazovník nemôže nadobudnúť vlastnícke

[23] Gaius 2, 55

právo, pretože závetca sám nebol vlastníkom. Vydržateľova držba je *pro legato*, t.j. ako keby bol odkaz platný.

- ***Usucapio pro soluto*** – ide o vydržanie veci, ktorú osoba dostala od svojho dlžníka ako splatenie dlhu a ku ktorej dlžník nenadobudol vlastníctvo pre právnu vadu pri prevode veci na neho.

- ***Usucapio pro suo*** – ide o vydržanie veci, ktorú osoba drží „ako svoju vlastnú" na základe akejkoľvek *iusta causa*. Výraz *pro suo* je všeobecný a aplikoval sa kedykoľvek neexistoval špecifický titul indikovaný vhodným výrazom (viď predchádzajúce prípady).

- ***Usucapio servitutis*** – nadobudnutie služobnosti uplatňovaním (*usus*) práv spojených so služobnosťou počas určitého časového obdobia. *Usucapio servitutis* sa v ranom práve povoľovalo hlavne v súvislosti s poľnými služobnosťami, konkrétne *iter, actus, via* a *aquaductus*; neskôr bolo zakázané zákonom *Lex Scribonia.*

JUSTINIÁNSKA KODIFIKÁCIA

Inštitúcie sú predovšetkým učebnicou pre právnikov a prameňom rímskeho práva v jeho poslednom stupni vývoja. Zároveň predstavujú dokument svojej doby, a preto odzrkadľujú tzv. reálie života stredomorského priestoru na sklonku staroveku. V Inštitúciách nájdeme zmienku o rímskych cisároch a právnikoch, o zákonoch a uzneseniach senátu, o gréckych vplyvoch na právnické myslenie, o Justiniánovom úsilí o spravodlivé a humánne právo a pod. Justiniánska komisia čerpala z Gaiovho systému z obsahového aj z formálneho hľadiska. Obsah Inštitúcií rozdelila na tri základné časti – osoby (*personae*), vec (*res*) a žaloby (*actiones*). Tomuto deleniu predchádza úvod (právo, spravodlivosť, pramene práva) a kniha sa končí stručným výkladom o trestnom práve hmotnom a procesnom (*publica iudicia*).[24]

Prehľadné podanie úpravy inštitútu vydržania v období dominátu poskytujú Justiniánske Inštitúcie (*Institutionem*); a to konkrétne v druhej knihe, šiestom titule. Aj tu sa potvrdzuje pravidlo, že cisár Justinián, resp. kompilátori pracujúci na základe jeho inštrukcií, sa snažili o čo najvernejšie zachytenie rímskeho práva klasického obdobia, pričom ho však v nevyhnutnej miere prispôsobovali novým spoločensko-politickým pomerom.

[24] Corpus Iuris Civilis – Justiniánske Inštitúcie, preklad: P. Blaho. Bratislava: Iura Edition, 2000. s. 17 – 18.

Aj preto sa tu nachádza takmer totožná úprava inštitútu vydržania ako ju poznáme z Gaiovej učebnice – v zásade potvrdzuje definíciu klasického obdobia, že „kto dobromyseľne od niekoho, kto nebol vlastníkom, koho ale za vlastníka pokladal, kúpil nejakú vec alebo na základe darovania alebo na základe iného právneho dôvodu dostal vec, túto vec vydržal.“[25] Avšak pri určovaní vydržacej lehoty nastáva odklon od klasických právnikov, ktorí v súlade so Zákonom XII. tabúľ určili vydržacie lehoty na jeden rok pri hnuteľných veciach a dva roky pri nehnuteľných, a ustanovuje toto: „...starí právnici verili, že vlastníkovi stačia uvedené lehoty na hľadanie svojich vecí, a preto sme naklonení nájsť lepšie riešenie, aby vlastníci neboli rýchlo ukrátení o svoje veci a aby výhody vydržania neboli obmedzené na určité územia (len italské pozemky). Preto sme o tom vyhlásili konštitúciu, v ktorej je nariadené, že hnuteľné veci možno vydržať v trojročnej lehote, nehnuteľné veci v dôsledku dlhotrvajúcej držby (*per longi temporis possessionem*), t.j. že ich možno vydržať medzi prítomnými po desiatich rokoch, medzi neprítomnými po dvadsiatich rokoch. A podľa týchto pravidiel sa má nadobúdať vlastnícke právo nielen v Itálii, ale v každej krajine, ktorá podlieha našej moci, pokiaľ existuje právny dôvod nadobudnutia držby.“[26]

Ďalej uvádzané podmienky a jednotlivé prípady možnosti či nemožnosti vydržania sú prakticky totožné s klasickým obdobím (viď citácie z Gaia hore) okrem bodu 9., ktorý vyníma z možnosti vydržania veci cisárskej pokladnice[27] a bodu 13, ktorý stanovuje možnosť započítania držby predchodcu pri kúpo-predaji[28].

OBČIANSKY ZÁKONNÍK ČSR Z ROKU 1950

V rámci tzv. právnickej dvojročnice vyhlásenej vládou ČSR (1948 – 1950) bola uložená úloha kodifikovať v rozhodujúcich oblastiach spoločenských vzťahov nové právo (so zapracovaním výdobytkov robotníckej triedy z februára 1948), vrátane prípravy a prijatia nového Občianskeho zákonníka, ktorý mal upraviť nové majetkové a iné s nimi súvisiace vzťahy. Prijatím nového Občianskeho zákonníka č. 141/1950 Zb., ktorý nadobudol účinnosť 1. januára 1951, sa skončila historická etapa dualizmu rakúskeho občianskeho práva v Čechách a uhorského obyčajového práva na Slovensku.[29]

[25] Inst. 2, 6 (In: Corpus Iuris Civilis – Justiniánske Inštitúcie, preklad: P. Blaho. Bratislava: Iura Edition, 2000.)
[26] Inst. 2, 6 (In: Corpus Iuris Civilis – Justiniánske Inštitúcie, preklad: P. Blaho. Bratislava: Iura Edition, 2000.)
[27] Inst. 2, 6 – bod 9: „Vec našej pokladnice (*fiskus*) sa nemôže vydržať...“ (In: Corpus Iuris Civilis – Justiniánske Inštitúcie, preklad: P. Blaho. Bratislava: Iura Edition, 2000.)
[28] Inst. 2, 6 – bod 13: „Aj držba predávajúceho a kupujúceho sa podľa jedného rozhodnutia božského cisára Septimia Severa a Antonina Caracallu započítava.“ (In: Corpus Iuris Civilis – Justiniánske Inštitúcie, preklad: P. Blaho. Bratislava: Iura Edition, 2000.)
[29] Lazar, Ján et. al.: Občianske právo hmotné, 1.časť. Bratislava: Iura Edition, 2006. s. 50 – 51.

Na Slovensku od najstarších čias až do roku 1950 bolo obyčajové právo hlavným prameňom súkromného práva. Najväčší vplyv na uhorské obyčajové právo malo v období 12. až 16. storočia rímske právo súkromné a potom bol silný vplyv rakúskeho práva, ktoré však bolo tiež značne ovplyvnené rímskym právom súkromným.[30] V Českých zemiach platil až do roku 1950 rímskym právom súkromným ovplyvnený ABGB. Preto je namieste predpoklad, že aj napriek zmenenej spoločensko-politickej situácii po „víťaznom februári" 1948 bolo do československého občianskeho práva inkorporovaných mnoho inštitútov minimálne inšpirovaných rímskym právom. Inštitút vydržania je jedným z takýchto prípadov, čo jasne dosvedčuje aj fakt, že do Občianskeho zákonníka z roku 1964, ktorý bol už výrazom postupujúcej socializácie spoločnosti, sa tento inštitút z doktrinálnych a politických dôvodov nedostal.

Keďže z hľadiska metodologického prístupu sa Občiansky zákonník z roku 1950 (ďalej len OZ) vyznačoval pomerne značným stupňom abstraktnosti právnej úpravy[31], ktorému sa rímski právnici do značnej miery bránili a využívali skôr kazuistiku, nemôžeme hovoriť o recepcii rímskeho práva či jeho jednotlivých inštitútov. Avšak vzhľadom na vysokú úroveň úpravy inštitútov rímskeho práva, praktickú využiteľnosť ich poznatkov a ich zakomponovanosť do predchádzajúcej právnej úpravy, sa tvorcovia nového OZ od definície vydržania v rímskom práve, hlavne po justiniánskej kodifikácii, veľmi neodklonili.

Vydržanie v OZ je jedným zo spôsobov nadobúdania vlastníckeho práva[32], resp. iných vecných práv[33] v súvislosti s právne kvalifikovaným uplynutím času[34]. Právna úprava vydržania podľa §§ 115 – 118 nadväzuje na právnu úpravu držby podľa §§ 143 – 149. Prostredníctvom vydržania sa poskytuje držiteľovi zákonná možnosť transformácie dlhotrvajúcich vzťahov „oprávnenej držby"[35] na vlastnícke právo. Keďže subjekty vydržania OZ špecificky neupravuje, platí všeobecná právna úprava, t.j. že subjektom vydržania môže byť fyzická aj právnická osoba. Na nadobudnutie vlastníckeho práva vydržaním musia existovať určité predpoklady ustanovené zákonom, a to:

[30] Lazar, Ján et. al.: Občianske právo hmotné, 1.časť. Bratislava: Iura Edition, 2006. s. 43 – 46.
[31] Lazar, Ján et. al.: Občianske právo hmotné, 1.časť. Bratislava: Iura Edition, 2006. s. 51.
[32] OZ § 115: „Vydržaním možno nadobudnúť vlastnícke právo..."
[33] OZ § 118: „Ustanovenia o vydržaní vlastníckeho práva platia obdobne o vydržaní iných vecných práv."
[34] OZ § 116 ods. 1: „Vlastnícke právo k hnuteľnej veci nadobudne, kto ju drží oprávnene a nepretržite tri roky; ak ide o nehnuteľnú vec, je potrebná vydržacia doba desaťročná."
[35] OZ § 145 ods. 1: „Ak je držiteľ so zreteľom na všetky okolnosti dobromyseľný v tom, že mu vec alebo právo patrí, je držiteľom oprávneným."

- ***spôsobilý predmet vydržania*** – môže ním byť akákoľvek vec, ktorá môže byť predmetom vlastníctva, okrem vecí, ktoré môžu byť len vo vlastníctve štátu alebo socialistických právnických osôb[36]. Nijaké iné obmedzenia vo vzťahu k predmetu vydržania nie sú.

- ***oprávnená držba nadobúdateľa*** – podľa § 145 OZ[37], pričom rozlišujúcim kritériom medzi držbou oprávnenou a neoprávnenou je dobromyseľnosť držiteľa, pričom otázka dobromyseľnosti sa má podľa § 145 ods. 1 posudzovať „so zreteľom na všetky okolnosti"; tzn. že oprávneným držiteľom je každý, kto s vecou nakladá ako so svojou alebo kto vykonáva právo pre seba a vzhľadom na všetky okolnosti je dobromyseľný v tom, že mu vec alebo právo patrí.
  Z vymedzenia pojmu oprávnená držba vyplýva, že dobromyseľnosť ako subjektívny prvok, ako psychická vnútorná kategória, sa má objektivizovať s prihliadnutím na okolnosti, za ktorých došlo k faktickému nakladaniu s vecou ako vlastnou, či k vykonávaniu práva pre seba. Z týchto okolností spravidla vyplynie, či držiteľ mohol, alebo nemohol rozpoznať, že mu vec alebo právo naozaj patrí.

- ***nepretržité trvanie oprávnenej držby*** – po zákonom stanovenú dobu, a to pri hnuteľných veciach tri roky a pri nehnuteľných veciach desať rokov[38]. Do tejto doby sa započítava aj doba, po ktorú mal vec v oprávnenej držbe právny predchodca.[39]

Právnym následkom splnenia všetkých zákonom predpísaných predpokladov vydržania je nadobudnutie vlastníckeho práva k veci alebo k inému vecnému právu. To znamená, že vlastnícke právo sa nadobúda *ipso facto* tým, že držiteľ má nepretržite v oprávnenej držbe predmet spôsobilý na vydržanie po zákonom ustanovenú dobu. Za okamih nadobudnutia vlastníckeho práva treba považovať uplynutie vydržacej doby.

ZÁVER

Inštitút vydržania prešiel v rámci vývoja rímskeho práva dlhým vývojom, pričom však najdôležitejšie zmeny nastali už v predklasickom období a neskoršie generácie rímskych právnikov už len

[36] OZ § 115: „Vydržaním možno nadobudnúť vlastnícke právo, ak nejde o nescudziteľné veci, ktoré sú v socialistickom vlastníctve."
[37] OZ § 145 ods. 1: „Ak je držiteľ so zreteľom na všetky okolnosti dobromyseľný v tom, že mu vec alebo právo patrí, je držiteľom oprávneným."
[38] OZ § 116 ods. 1: „Vlastnícke právo k hnuteľnej veci nadobudne, kto ju drží oprávnene a nepretržite tri roky; ak ide o nehnuteľnú vec, je potrebná vydržacia doba desaťročná."
[39] OZ § 116 ods. 2: „Kto nadobudne oprávnenú držbu od oprávneného držiteľa, môže si započítať vydržaciu dobu predchodcu."

uplatňovaním predtým zakotvených zásad a právnej logiky rozvíjali kazuistiku spojenú s týmto inštitútom. K ďalšiemu významnému prispôsobeniu inštitútu vydržania došlo za zmenenej spoločensko-politickej situácie počas dominátu a odrazilo sa to v právnej úprave justiniánskej kodifikácie.

Vzhľadom na nespochybniteľný vplyv rímskeho práva súkromného na stredoveké právo, inštitút vydržania v 20. storočí nesie mnohé znaky a potvrdzuje tento vplyv rímskeho práva. Nie je tomu inak ani v právnej úprave československého občianskeho práva hmotného v Občianskom zákonníku z roku 1950, v ktorom je úprava inštitútu vydržania, napriek väčšej abstraktnosti, podobná úprave rímsko-právnej.

Literatúra:

[1] Jolowitz, H.F.: *Historical Introduction to the Study of Roman Law*, Cambridge: University Press, 1939, 548.

[2] Gaius: *Učebnice práva ve čtyřech knihách*, Brno: Masarykova univerzita, 1981, 276, ISBN 80-210-0766-4.

[3] Diósdi, G.: *Ownership in Ancient and Preclassical Roman Law*, Budapešť: Akadémia Kiadó, 1970, 193.

[4] Muirhead, J.: *Historical Introduction to the Private Law of Rome*, London: A.&C. Black, 1916, 443.

[5] Schulz, F.: *Principles of Roman Law*, Oxford: Claredon Press, 1936, 268.

[6] Berger, A.: *Encyclopedic Dictionary of Roman Law*, Philadelphia: American Philosophical Society, 1991, 808, ISBN 0-87169-435-2.

[7] Rebro, K., Blaho, P.: *Rímske právo*, Bratislava: Iura edition, 2003, 497, ISBN 80-89047-53-X.

[8] Corpus Iuris Civilis – Justiniánske Inštitúcie, preklad: P. Blaho. Bratislava: Iura Edition, 2000, 439, ISBN 80-88715-80-6.

[9] Lazar, J. et al.: *Občianske právo hmotné, 1. časť*, Bratislava: Iura edition, 2006, 635, ISBN 80-8078-084-6.

[10] Zákon č. 141/1950 Zb. občiansky zákonník.

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CONTINUITY AND DISCONTINUITY IN CONCEPT OF LEGAL RESPONSIBILITY

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Abstract

The relatively new and ambiguous concept of legal responsibility in the private law is in a deep crisis. According to the vast majority of legal scientists, the concept is outdated and must be replaced by a new paradigm. The question is: what should this new paradigm look like? This essay tries to come up with a possible answer through analysing the similarities between the modern legal concept of responsibility and the antique censorial moral correction mechanisms. It concludes by stating that the different (i.e. moral and legal) tools regulating social behaviour could not be handled as separately as it is done nowadays.

Key words

Legal liability, responsibility, *censor*, morality, *regimen morum*, philosophy of science

I. Continuity and discontinuity

One might come to a rather interesting conclusion when taking a look at the current scholar literature on the concept of responsibility and apply the most modern scientific theories.[1] These theories were formed to describe how a scientific research should be effectively conducted. The surprise is that since the end of the 18th century (when the modern concept of legal responsibility had emerged at all) the paradigmatic changes of the dominant theories about legal responsibility have been followed the schemata of a scientific research. It was naturally an unconscious process. However, it is surely worth to make it conscious now, when the vast majority of legal scholars are looking for a new model of legal responsibility. This thought of similarity is not to be simply depreciated for being absurd or unscientifically. According to Imre Lakatos, the well-know Hungarian philosopher, even the whole territory of science as such could be described as a huge research program.[2] By comparing the scientific

[1] On these theories see Imre Lakatos, *A kritika és a tudományos kutatási programok metodológiája* [The methodology of the critique and the scientific programmes]. In Tamás Miklós (ed.), *Lakatos Imre tudományfilozófiai írásai* [Imre Lakatos' writings in philosophy of science], Budapest: Atlantisz, 1997, pp. 19 sqq.

[2] Lakatos, *A kritika*, p. 43.

method with the development of legal responsibility we can conduct a 'hard core', negative heuristic research programme on the protection of subjective liability. The legal literature was initially characterised by trying to incorporate a 'hidden culpa' into cases of responsibility that could not be explained on grounds of actual blame. By realising this effort, it wished to constitute subjective fault as the sole cause of responsibility. Throughout the nineteenth century, the relevancy of subjective liability was about to be preserved through the introduction of objectivised liability as a concept. This effort could not represent a progressive theoretical shift, mainly due to the ever growing technical challenges (for example railways, hazardous activities). Therefore the systemically external empirical context broke out of the frames of the initial model of culpability. That is why, according to the rationality of scientific methodology,[3] the positive heuristic approach was of help, especially in incorporating characteristics that could originally not be justified based on the former model, such as objective or strict liability. Recent confusion is mostly caused by the immense anomaly of the term 'liability', namely the subsuming of phenomena that differ from the initial culpability model under the concept of responsibility. The positive heuristics of the programme – the borderless extension of the concept of responsibility – does not result in a progressive shift of problems nowadays, thus it does not make sense to preserve it as a sole 'hard core' of research on responsibility.[4] Bearing the methodological consequentiality in mind, it would be rational to introduce a new starting paradigm. The exchange of the responsibility concept with another, more adequate concept that was already suggested by Eörsi[5] and Földi[6] would mean a breakthrough from the unproductive theoretical crisis, provided the new concept is not mere verbalism.[7]

II. The similarity of the concepts

The various elements of liability was characterised by Géza Marton, one of the most acknowledged Hungarian experts of responsibility in civil law.[8] Although the single elements alone do not really suggest much about the liability, they, as a whole, unmistakable define the term. The observations of Marton that are based on firm theoretical considerations are useful, with minor alterations, in drawing

[3] Lakatos, *A kritika*, p. 47.
[4] Lakatos, *A kritika*, p. 57.
[5] Gyula Eörsi, *A jogi felelősség alapproblémái. A polgári jogi felelősség* [The Fundamental Problems of Legal Responsibility. The Responsibility in Private Law], Budapest: Akadémiai Kiadó, 1961, 50. p.
[6] András Földi, *A másért való felelősség a római jogban, jogelméleti és összehasonlító polgári jogi kitekintéssel* [The responsibility for Others in the Roman Law with an Theoretical and Comparative Outlook], Budapest: Rejtjel Kiadó, 2004, 90. p.
[7] There is no significant difference between the prefixes 'sub' and 'ob' in the terms subjective and objective. Cf. Gyula Eörsi, *Elmélkedések és álmélkodások a Jogtudományi Közlöny tulajdonjogi és felelősségi jogi száma kapcsán* [Reflections on the Property Law and Responsibility Articles of the Jogtufományi Közlöny], JK 37/11 (1982), p. 839.
[8] Géza Marton, *A polgári jogi felelősség* [The Responsibility in Private Law], Budapest: Triorg, 1992, 14. p.

up the 'phantom image' of the responsibility concept to which the characteristics of *regimen morum* can be compared to.

1. The previous obligation

The most important precondition for the liability is the previous obligation. It is debateable whether this obligation has to be external to the individual as suggested by Marton as well.[9] One part of legal experts evaluates responsibility as a social phenomenon and leaves the inner struggle of the individual evoked by bad conscience for psychology, ethic, theology and other similar sciences to tackle. The objective rules of law or morality can be controlled by the 'inner forum of conscience'"[10], but it is almost impossible to be done so the opposite way, due to difficulties of proof. In the course of censorial moral judgement, numerous behaviours, which are nowadays classified as parts of the moral sphere, were taken into consideration, only considering the occurrence (not necessarily the result) of the act and without regard to its internal or external motivation.[11]

The prevailing obligation as crucial component also prevailed in the course of *regimen morum*. The sources many times referred to the norms of *mores maiorum* as the base of impeachment.[12] These norms were objective, can be regarded as external and were probably not constituted by censorial activities.[13] Their social acknowledgement must have been rather wide, and they provided exact guidance even without codification.[14]

2. The breach of the previous obligation

The blaming is mostly possible in case of the occurrence of an event that might harm the previous obligation.

However, it is not excluded that by sanctioning a minor offence, the authorities try to avoid the offence of a more meaningful value that is worth protecting. From a higher political aspect, even a potential offence of a value might serve as a responsibility-grounding circumstance.

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[9] Marton, *A polgári jogi felelősség*, p. 15.
[10] Marton, *A polgári jogi felelősség*, p. 17.
[11] Valerius Maximus, *Factorum et dictorum memorabilium*, 2, 9, 1; Plutarchos, *Cato maior* 17; Cicero, *De re publica* 4, 6.
[12] Cicero, *De legibus* 3,3; Livius, *Ab urbe condita* 4,8; id. 24, 18; id. 40, 46; id. 41, 27; 42, 3; Suetonius, *Augustus* 27.
[13] Nadja El Beheiri, *A római censorok szerepe a res publica államrendszerének kiépítésében* [The Role of the Censors in the Development of the Res Publica], Jogtörténeti Szemle 1/ 2005, p. 5.
[14] Reinhard Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford: Oxford University Press, 1996[3], p. 711, note 244.

An interesting aspect of the censor's activity is that questioning, the first act in holding liable was present in almost all cases. This occurred during the so-called *lustrum* that usually took place every five years and could not be avoided by any Roman citizen. The fact that it was obligatory could suggest a considerable degree of deterrence and it raises the attention to its most remarkable effect, namely its preventive nature that was formerly ignored in the literature on the censorial *regimen morum*.[15]

Moreover, censors considered the potential offence of the previous obligations sufficient for holding liable and its actual violation was not even needed. The sources of such thought can be discovered by looking at sanctions imposed at celibacy[16] or military horses incapable of battle.[17] In this case, the higher, hidden value was the health of the nation and its survival. The potential damages were here primarily the lack of the reproduction of Roman citizenry and the loss of battles due to underequipped military forces. It is clearly visible that the censor also took into consideration such causes that were not directly linked to the result.

3. Imputability

By imputability we mean the objective concept formulated by Eörsi. In the course of censorial activity the presence of imputability played an important role. This is confirmed by the source on the dismissal of the wife.[18] According to *communis opinion doctorum*, the sanction was imposed on the husband due to the chasing away of the wife without any specific reason. The act itself that provoked the result was insufficient; it had to be imputable as well.

It must be mentioned in connection with imputable acts that constructions of responsibility that were marked subjective and objective cannot be distinguished so clearly and the Schylock dilemma of responsibility seems to be unsolvable as well in this aspect.[19] The difference in appellation ('sub' and 'ob') is in most cases not more than a terminological difference.[20]

4. The schemata of every obligation: question-answer

[15] Elemér Pólay, *A censori regimen morum és az ún. házi bíráskodás* [The Censorial Regimen Morum and the Domestic Jurisdiction], Szeged: Acta Jur. Et. Pol. 1956, p. 31, acknowledged the preventive function of the censorial *nota*. According to WEBER the public shame was an effective deterrent tool. Cf. WEBER: . *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, Tübingen: Mohr Siebeck, 1976[5], 6.§.
[16] Valerius Maximus, *Factorum et dictorum memorabilium* 2, 9, 1.
[17] Livius, *Ab urbe condita* 24, 18 and 43; id. 27, 11; id. 29, 37; id. 43, 16.
[18] Valerius Maximus, *Factorum et dictorum memorabilium* 2, 9, 2.
[19] Eörsi, *Elmélkedések és álmélkodások*, p. 839.
[20] Eörsi, op. cit. p. 839.

Marton defines every scheme of obligation as a question-answer.[21] Both elements of the dialogue are obviously not expressed in each case. The image used by the Hungarian Romanist suggests that authority reflects on the breach of the norm by mostly but not necessarily by questioning it. This was clearly demonstrated by the dialogue that was conducted between the censor and the citizen that appeared: *„uxorem habes? – habeo".*[22] The censorial holding liable was conducted as a dialogue with contradictory characteristics.[23]

5. Different obligations emerging from one fact

The process on the breach of the previous obligation can usually be initiated in front of various forums that can lead to different outcomes. Censorial moral judgement in this aspect is extremely interesting as legal, moral and religious aspects were all included in it and were not strictly distinguished as nowadays. This homogenous forum might have been more effective considering the complex network of individual and public interests. Moral rules are namely not only inner phenomena but are often manifested as objective social institutions and law can thus shape the moral conviction of a wide range of individuals.

Besides the internal dual characteristics of moral judgement an external formal duality is also a relevant feature of the demonstrated time period. *Iudicium* was namely possible based on the state of affairs that provoked censorial sanctions. *Regimen morum* and praetorial *iurisdictio* were in a permissive and alternative relationship with each other.[24]

6. The affect of the responsibility is the sanction

The censor was given a free hand in imposing different sanctions such as levying taxes[25] or confiscating military horses.[26] The magistrate, besides repression, applied various sanctions in the first place in order to confirm the respect of the prevailing norm so that its future breach could be most effectively prevented. This fact is underpinned in many respects by the sources as well. If the censor decided to disregard the holding liable, he was entitled to do so. Moreover, the censorial *regimen morum* was not

[21] Marton, *A polgári jogi felelősség*, p. 16.
[22] Gellius, *Noctes Atticae* 4, 20, 2.
[23] Pólay, *A censori regimen morum,* p. 26..
[24] Pólay, op. cit. p. 37.
[25] Livius, *Ab urbe condita* 4, 24
[26] Livius, *Ab urbe condita* 24, 18 and 43; id. 27, 11; id. 29, 37; 43, 16.

only used to condemn the wrongdoer but also to stress the example-setting nature of remarkable citizens.[27] This effort furthermore strengthened the preventive aspects of the censorial activity.

Amongst the modern researchers of legal responsibility it is Fauconnet that acknowledges the relevance of remunerating responsibility as well, Vigh on the other hand, relating to other authors makes a clear distinction between positive (norm-adaptive) and negative (norm-breaking) responsibility.[28] The antique prefiguration of norm-adaptive responsibility can also be found in the positive value statements related to *regimen morum*.[29]

III. The unified system of liability in private law

The functional operation of the unified system of private legal responsibility can be drawn up as follows. These explications are based on Marton's theory[30] on modern responsibility on one hand and Sólyom's essay[31] on the historical evolution of responsibility theories on the other.

The leading principle of private legal responsibility is prevention.[32] The main essence of the system of tort liability is based on the effort that the repetition of harmful events is to be curbed. This basic idea is expressed in all elements and phases of the private responsibility system, ranging from the qualification of the facts of the case through the imposition of the sanction to the reimbursement of damages.

The Ariadne string of prevention pursuit can only give us a mere guideline. Responsibility in the end will be determined by two distinctive aspects that might reaffirm or weaken each other, namely individual and public interest consideration. In fact, it is just the prevention and the individual interest deliberation that *stricto sensu* belongs to the concept of responsibility. However, it is crucial for the stability of the social system that the judges build in certain correction mechanisms that consider the circumstances of the case and the wrongdoing persons as well. By doing this, they actually strengthen social justice and the legitimacy of the prevailing order.[33] The judges can punish the stronger

[27] Nadja El Beheiri, A censor tevékenységének büntetőjogi jellege [The Penal Character of the Censorial Activity], in: *Tanulmányok dr. Molnár Imre egyetemi tanár 70. születésnapjára* [Festschrift Molnár], Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Karának tud. biz., 2004, p. 54.
[28] József Vigh, *Felelősség és társadalom* [Responsibility and Society], in: Vigh József—Polt Péter (ed.): *Felelősség és társadalom* [Responsibility and Society], Budapest: s. l., 1989, p. 29.
[29] Livius, *Ab urbe condita* 7, 1, 10; Cicero, *De re publica*, 1, 1. Cf. El Beheiri, *A római censorok szerepe* p. 3.
[30] Marton, *A polgári jogi felelősség*, pp. 100 sqq.
[31] László Sólyom, *A polgári jogi felelősség hanyatlása* [The Decline of the Responsibility in Private Law], Budapest: Akadémiai Kiadó, 1977, pp. 11 sqq.
Marton, *A polgári jogi felelősség*, p. 102; Gyula Eörsi, *Tézisek a polgári jogi felelősségről* [Theses on Legal Responsibility], ÁJ, 1976/2, point 9.
[33] Marton, *A polgári jogi felelősség,* p. 104.

wrongdoer with graver sanctions, and with minor ones the socially weaker, depending on whether it is the individual or the public argument that seems more considerable in that specific case.

The system of responsibility would remain one-dimensional and distorted if it would ignore other crucial circumstances that are dependent on legislative choices and which actually define the real character of liability. It does matter indeed on which base we judge the harmful act. The main bases, as subjective fault, unconscious negligence, strict liability or the damage-distributing insurance system would each lead to different conclusions. Eörsi demonstrated this really well as bases of responsibility constitute the junctions of a continuous scale.[34] They do not exclude each other, on the contrary, they contribute to the more effective manifestation of economic-based distribution of damages in civil law.

At this point of historical development, the lawmakers' choice between these grades is usually based on task division and the different models emerge in a parallel mode.[35] In the course of history, however, there have been examples of hegemony of the above models in the application of law, especially the one of subjective liability.[36] Theoretically, the sole or the parallel manifestation of any of these bases could be possible.[37]

IV. The *regimen morum* placed into the system of responsibility

In the sources concerning the censorial activity we can find all the above mentioned elements of the modern concept of liability. This material handed down to us is not sufficient for measuring how aware were the magistrates themselves of these aspects. The existence of a very sophisticated and complex concept is improbable. On the other hand, the objective social necessities (like the stability of the given social order, the self-preservation of the nation) dictated similar solutions in the past as today.
In the following, we will discuss separately all the above defined elements of legal responsibility in the ancient sources on the *regimen morum*. These elements are again: the preventive function, the degree of imputability, the social stability (i. e. balance between individual and public interest), and the base of liability (ranging from the imputability system to the distribution of damages in the insurance policies).

[34] Eörsi, *Elmélkedések és álmélkodások,* p. 840.
[35] Sólyom, *A polgári jogi felelősség hanyatlása* , p. 17.
[36] According to Peschka the objective responsibility does not belong to the terrain of private law. Cf. Vilmos Peschka, *A polgári jogi felelősség határai* [The Limits of Responsibility in Private Law], JK 37/6 (1982), p. 432. On the contrary, Eörsi did not claim *'recipe ferrum'* for the objective responsibility. Cf. Eörsi, *Elmélkedések és álmélkodások,* p. 838.
[37] This theory was already present at the beginning of the 20th century. See Marton, *A polgári jogi felelősség,* p. 376 n. 257.

The key role of prevention can be seen from the temporality and removability of the censorial sanctions (for example in the case of *infamia* or *ignominia*), and from the publicity[38] of the censorial mark *(nota censoria)*. Among the punishments inflicted by the censors we do not find the death sentence or the deportation.[39] Thus, the primary aim of the sanctions was not the elimination rather the general and specific prevention within the affected society. Cato, for example, usually enriched his censorial decisions with moral comments:[40]

"Alius est, Philippe, amor, longe aliud est cupido, accessit ilico alter, ubi altere recessit; alter bonus, alter malus."[41]

The degree of imputability that is the mental attitude of the wrongdoer played an important role in the infliction of the sanctions. We can read it from the case of the joking equestrian:

"[…] uti mos erat, censor dixisset »ut tu ex animi tui sententia uxorem habes?«, »habeo equidem» inquit »uxorem, sed non hercle ex animi mei sententia.«"[42]

The equestrian permuted the censor's question, answering that he had not married on his own.

In another case, an equestrian was reprimanded because of the inattention to his duties concerning his publicly-funded horse. He answered, that he take care of himself, the horse, however, was kept by his slave, Stichus.[43] The harshness of the sanction, the *ademptio equi* (the taking away of the horse) was the direct consequence both of his carelessness and his light-minded behaviour in the front of the magistrate.

We may think today, that the rent of a luxurious flat does not harm anybody. It does, however, if we take into account the effect of such a luxurious act on the sensitivity of the whole society. The Roman censor realised this danger, and punished the citizen, who had rented a flat for six thousands sesterces:

"Prosequamur nota severitatem censorum Cassii Longini Caepionisque, qui abhinc annos centum quinquaginta tris Lepidum Aemilium augurem, quod sex milibus HS. aedes conduxisset, adesse iusserunt."[44]

This augur might have harmed the public moral with his extravagant expenditure of money, and must have been punished for the sake of social stability and justice.

[38] On the publicity see Livius 39, 42; Cicero, *Pro Cluentio Oratio* 42-48; Gellius 4, 20.
[39] Pólay, *A censori regimen morum,* p. 34.
[40] Livius, *Ab urbe condita* 39, 42-44; Plutarchos, *Cato maior* 17-19; Cf. Alan Astin: *Cato the censor*, Oxford: OUP, 1978, p. 78.
[41] Cf. Henrica Malcovati, *Oratorum Romanorum Fragmenta Liberae Rei Publicae*, Torino: Paravia 1976[4], p. 175.
[42] Gellius, *Noctes Atticae* 4, 20, 4-5.
[43] Gellius, *Noctes Atticae* 4, 20, 11.
[44] Velleius, *Historiae Romanae* 2, 10, 1.

The imputability was also regarded in many cases. The words of the censor's question reminded the citizen of his free will *(„ex animi tui sententia").*[45] The obligatory personal appearance affirms the probability of the acknowledgment of the subjective responsibility. It was confirmed by Cato that the taking away of the horse from the obese equestrian was accompanied by *ignominia*, the sanction was accordingly based on *culpa*:
"id profecto existimandum est, non omnino inculpatum neque indesidem visum esse cuius corpus in tam inmodicum modum luxuriasset exuberassetque."[46]

However, as the preceding passages of this fragment show, the question was heavily debated. It might also be referred from our sources that in some cases the censor's castigation took place when the higher public interest (for example the military efficiency) had been objectively weakened without fault.[47] The blameworthy act may lie very far from the caused damage in the chain of causation.

As already mentioned, we can find the distribution of damages, as a kind of collective responsibility on the other end of the scale. Once, the censor degraded the whole Roman nation except of one tribe to the lowest class with a higher rate of taxation:
„praeter Maeciam tribum, quae se neque condemnasset neque condemnatum aut consulem aut censorem fecisset, populum Romanum omnem, quattuor et triginta tribus, aerarios reliquit."[48]

V. Summary

The following conclusions can be drawn from our explications.
First, it became clear, that the censorial *regimen morum* make up an integrant part of the liability system in the republican period of Rome. Therefore, all attempts, trying to understand the social reality exclusively on the ground of legal institutions, such the Twelve Tables and the Lex Aquilia, are one-sided. The praetorian legal judicature and the censorial moral supervision shared the tasks of the regulation of the citizens' private life. Following the idea of Zweigert and Kötz on relativities *(zeitbezogene und materiebezogene Relativität)*[49] we might call this interdepency of the different norms 'system relativity'.

[45] Gellius, *Noctes Atticae* 4, 20, 2 sqq; Cicero, *De oratore* 2, 260.
[46] Gellius, *Noctes Atticae* 6, 22, 4.
[47] Valerius Maximus, *Factorum et dictorum memorabilium* 2, 7, 6.
[48] Livius, *Ab urbe condita* 29, 37, 1; Valerius Maximus, *Factorum et dictorum memorabilium* 2, 9, 6. According to Siber this text is not authentic. See Heinrich Sier, *Zur Kollegialität der römischen Zensoren*, in *Festschrift Fritz Schulz,* Weimar: Böhlau, 1951, pp. 473 sqq.
[49] Konrad Zweigert—Hein Kötz, *Einführung in die Rechtsvergleichung*, Tübingen: Mohr Siebeck, 1996[3], pp. 62 sqq.

Second, legal theories of responsibility are shifting from a subjective (culpability) towards an objective approach (insurance policies, transferring risks and spreading the liability among the members of an affected group). The most important aim of this kind of regulations is the prompt financial recuperation of the injured or otherwise materially affected person(s). However, as we may see from our historical experience the role of moral reasoning and that of personal shame should not be underestimated. The effective regulation of a society is always a fragile interaction of different order of norms. Nowadays we can experience a vacuum in the place of the disappearing religious and moral norms. These powerful public norms once balanced the individualistic character of the private law. For the sake of future generations, we should not be afraid of posing limits on our egoist attitude.

Third, we should reconsider the limits of public control on individual behaviour. Each of us all-day experience, how harmful can be private negligence to public good. Exceptionally, even the potential damage or indirect, remote causes should be enough for being held liable. Substantially, it occurs today, when the insured people pay in advance for the recuperation of the only potentially but statistically surely emerging damages.

Last but not least, we should not forget the lesson given to us by the new achievements of philosophy of science. If we know the mechanism of scientific research with all its possible byways and impasses we can neutralize or at least minimize the effects of our false presumptions and expectations.

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RELATIONSHIP OF EUROPEAN IUS COMMUNE AND NATIONAL LEGAL SYSTEMS IN FORESEEABLE FUTURE

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Abstrakt

Príspevok sa venuje popisu a definícií termínu ius comune ako ho poznáme v histórii a v súčasnosti. Popisuje v akom rozsahu môžeme v súčasnosti hovoriť o jednotnom právnom systéme, a ktorá časť práva sa mu najviac približuje. Vzhľadom existujúci trend je v závere vyjadrený predpoklad, že teraz sa vývoj nezastaví, ale sa bude ďalej rozvíjať.

Kľúčové slová

ius comune, rímske právo, kánonické právo, miestne zvyky, medzinárodné právo, Európsky právny systém, jednotný právny systém, pluralizmus, nárdný, nadnárodná úroveň

Abstract

Contribution deals with describtion and defines the term „ius comune“ how we know it in history and nowadays. In the contribution the idea is developed to which extent we can speak about unified legal system, and which part of law is closst to this describtion. Considering the trend in conclusion the assumption is drawn that the evelopemnt will not stop and how it will continue

Key words

ius comune, roman law, canon law, local customs, international law, European legal system, unified legal system, pluralism, national, supranational level

1. Introduction

Before discussing this topic, I would like to set up a kind of framework. To understand the future man need first to know the past. So it is here. Before telling how I expect the future development of, I would like to tell you in a shortcut about the sources of my understanding on the *ius commune.*

Firstly we have to go back to the history, to see what *ius commune* is and how did it develop through the past until these days.

In the second part I would like to show you on the example of my country the recent situation and relationship between the legal system of Slovak Republic and the ius commune as we know it today.

And finally on ground stones I am going to think about the possible and at the same time inevitable development of this relationship in the foreseeable future.

2. *„Ius commune"* in History

May be when talking about Ius Commune we can start with the Ancient Roman Empire. Which actually developed a large „common"culture, religion and also „The legal system of centuries". (in fact there is not very much left from the original Roman law) In regards to the process of establishing a common culture and legal system in the Roman Empire we can speak about combining the cultural aspects of all nations and peoples of the Roman Empire conquered by the Roman legies. This point of view might help us in discussing the future of *ius commune*.

It is true that within the roman legal system itself we can differentiate between *ius civile* which was applied to the citizens of the city Rome, so to speak to the elite of the Roman Empire, and then it was the *ius gentium,* which dealt with causes of the non Roman nations which is now described as international law.

This was the part of Roman law which influenced the most of the population of the Roman Empire and may be it is the part which really could be defined as *ius commune* at those times. But in the theory of law ius commune is now often understood as the communitarian law of European Union.

So than might the question arise if the international law can be also described as *ius commune* or is it the European law which is the closest „successor"of ius commune. But for the purpose of European legal

history and for the purpose of this paper let us just presume that the ius commune we are talking about is or are the legal systems of Europe and common legal principles.

After the collapse of The Roman Empire, the development of legal culture goes further on. In different parts of Europe different process due to many circumstances went on. Those circumstances and historical background can play also an important role for the possible development of *ius commune* in foreseeable future.

As we know not the easiest but the best supposition for one consistent legal system was established in England. Because of the Norman invasion in England there has been set up only one legal system for the whole country. Of course that at the end of eleventh century there were still lots of local customs and customary law, but those disappeared and in the sixteenth century we can already talk about the *ius commune* or Common law which was the kings' law all over England. This was caused by establishing Kings Courts which started to make the law in stead using ancient habits. So by knowing this we can expect the influence of common law to the future *ius commune.*

A different situation has been in France. The King of France was one of the princes to whom the Title „King of France"was given. But the King was able to make rules only for his own territory for long time. Only in the sixteenth century the unity of power was achieved by the King for the whole territory of France. At that time the King ordered to put the oral local customs in writing and starting to compare it. In comparing local customs they were trying to find common principles. We can assume that may be this was the beginning of the comparative law, which is and will also in the future be a very part of *ius commune.* But as we already know from the history that not the French kings will succeed in unifying law. France had to wait for the great little general who gave her in 1804 The Code Civil.

Even more difficult it was the situation of *ius commune* in Germany. The empire was split in more than three hundred sovereign states. And Each state had own customs and also own legal system. Until nineteenth century the empire was not united. The emperor, who was one of princes' electors, had no real power, except his own territory.

Not only in Germany, but mostly there, were local customs surrounded by Roman law. In matters concerning contemporary life Universities were asked to give legal opinions. Those were based on Roman law. In this way the Roman law came to be used in action and it became the *gemeines Recht - common law.*

The Roman law at that time was very much influenced by Canon law. Usually the Canon law and Roman law were thought at universities. And because of the power of the Roman Catholic Church in some way we could say that church was developing both legal systems. Or at least influencing Roman law in a very strong sense. The Canon law for its own use and the Roman law for the use of non ecclesiastical matters.

From these different angels of view we may summarize that *ius commune* is the law which is the unified or commonly used law in one country, mostly formed and thought at universities, the written law. On the other hand in every place there has been f course also the particular law, customs or statutes, so called the *ius proprio - customary law.*

All over the history in every country there have been in some extend two systems of law. Many times there have been numerous conflicts between those two systems. And at each time there has been an ambition to solve these conflicts by using power, divers rules or agreements.

3. *„Ius commune"* in Presence

As long as Romano-canonical law was applied within the ecclesiastic environment there was a certain degree of uniformity at a European level, albeit with some local variation.1 In this context, Romano-canonical law was a genuine *Ius Commune* in the sense that it constituted a relatively uniform system of rules for all of western world.

Nowadays this role of ius commune is overtaken by International law and on the European scale by the European-communitarian law. Within the context of the European Union in the area of substantive law, where it may very well occur that foreign law would be applied to a given legal relationship.

Here is the global definition of "community law:" For those who don't take the link, Community acquis is: The Community acquis or Community patrimony is the body of common rights and obligations which

1 As quoted in: C.H. van Rhee, 'Civil Procedure: A European Ius Commune?', *European Review of Private Law*, 2000, p. 589-611.

bind all the Member States together within the European Union. It is constantly evolving and comprises not only principles and political objectives of the treaties; it is also Community legislation and the case law of the Court of Justice.
By the time a greater role are playing the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy, measures relating to justice and home affairs. This definition includes international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's activities. When further countries join the European Union, full compliance with the Community acquis is one of the requisites for accession.2

3.1. Constitution of Slovak Republic on international law

Each state has made different changes in his own legal system in order to keep it closer to the European *ius commune.* The real situation differs from state to state. In present conditions of international law it is up to each sovereign state to decide on the relationship between the international law and the national one. Thus recently states are attached more to the monist theory. I would like to develop this idea on the example of relationship between the legal system of my country and European norms.

After separation of former Czechoslovakia on 1.1. 1993,when Slovak Republic became an autonomous subject of international law, it became also the successor of bilateral and multilateral treaties and through this step Slovak Republic took over her responsibility in international commitments.3 At the time before Slovak republic was a member of European Union the communitarian was regarded as part of international law.

Let us have a look on the Article 1 (2) of the Slovak Constitution:
"Slovak republic accepts and respects general rules of international law, international treaties by which is it is bound, and its other international commitments."

The Article 1(2) is very important, because it is expressing the opinion that a legal state is respecting its commitments which are result of international agreements. This article is saying that Slovak republic is accepting and respecting international commitments regardless of their character or creation using norms or decisions of international organizations.

2 Communitarian Law, by Niki Raapana, updated 12/10/04, http://nord.twu.net/acl/commlaw.html

3 Jan Klućka,Miesto a postavenie medzinárodných zmlúv v právnom poriadku Slovenskej republiky.

In spite of these remarks the constitution is not solving the position of international norms in the way of defining them as a part of the national legal system. In this point it is different to other constitution of some countries of central and eastern Europe4. Through the recent amendment of Slovak Constitution by the constitutional law 90/2001 Z.z. Slovak Republic on the highest legal level manifested its approach to international law and inclined to the monist theory of the relationship between the national and international law. This is clearly shown in the article 7 (5):

"International treaties on human rights basic freedoms, internationals treaties that need not to be executed by law, and international treaties directly establishing rights and duties of citizens or legal entities, which have been declared in a form foreseen by law, have priority over national laws."

This disposition enables directly exercise contractual commitments of Slovak Republic in its national legal system by using norms of international law.

The relationship to European law after entering European union changed seriously. According to the part of the Article 7 the item (2)

"Slovak Republic on the base of legitimate treaty accepted by the National parliament can transmit its rights to European Union. Also legal acts of European Union have precedence over national acts of Slovak republic."

Priority application can although not be seen as autonomous decision based on the national legal system. It is actually respecting the European legal system or as we can also say European *ius commune.* This is also one way of pulling the national legal system into European law.5

After looking at the constitution of Slovak Republic we can close up with some remarks. The constitution recognizes the international treaties as the main source of the international law and assures their direct application. With the article 7(2) the main premise is set in integrating the European law into the legal system of Slovak Republic. The constitution inclines to the monist theory but does not declare this principle in the text itself.

European norms in the legal system of Slovak Republic

Securing international commitments in the legal system is also a step closer to a common law. Especially whet talking about European treaties and legislation.

4 IbId.

5 Jiri Malenovsky, Mezinárodní právo věřejné, Praha,1999

Considering that the Constitution of Slovak Republic does not have “expresis verbis” specified that international treaties are part of the national law their position is clearly stated in the act “1/1993 Z.z. about the Collection of laws of Slovak Republic”. This statute is a complex rule about acclaiming laws. International treaties stated in the article 7(5) are holding the position under the constitution but above all other legal acts and they are printed in full text version also in the “Collection of laws”. This act is providing the form and process of executing the treaties.

As we have stated that all act of European Union and its institutions have a prevailing position over the national norms, we cannot forget the most important fact that the statute 1/1993 Z.z. is also assuring the execution of them.

Approximation is resulting from the European association treaty. European law left the manner of accepting European act on the countries self. Duty of the entering countries is to accept all arrangements of general and special character to fulfill commitments of the accession treaty.

Before the amendment 90/2001 Z.z. of Constitution was passed and effective most of the required documents were accepted by lower legislative acts. May be it seemed to be more effective but it could be doubted if the way of acceptance was appropriate enough in dealing with act of international importance. But after the change of constitution in is impossible for national central institutions to implement acts of European Union “*ex industria privata”*. Acknowledging the importance to the acts of European Union in the Constitution by giving them priority before national legal norms is a clear step towards creating common European *Ius commune.*

4. Foreseeable future of the Ius commune

On my opinion national law is coming closer to Ius commune by integrating international and European rules into national legal systems. Those are the rules which can be described as the rules of Ius commune, because nowadays they are creating a common legal system.

As Kelsen is saying the state is the model for the future development of the international legal order. That does not necessarily entail, as is usually understood and as some of Kelsen's writings may have

given to believe,6 that we are moving towards the constitution of a *`world state'*. It means only that the international legal order tends to become centralized. It is not inevitable, however, that it should become centralized to the same extent as the nation-states.

Throughout the past we have seen how law in different times and places has been united and infied. At the beginning regional customs came into the law of the whole country. It happened as they have been used and brought to real life by courts also in different regions of that country. And later on became integrated to the national legal system.
Nowadays we can see the integration of international treaties and European laws, or directives into different national systems. Especially this can be seen on the Law of European Union. The process is already so far, that there are already numerous European or international organizations with own decision-making institutions. The member states not only acknowledge these decisions, but are bound by them.

But still according to some authors say that there cannot be an European ius commune because there are no legal means of supervision of Communitarian legal acts by European Union and the the application rests in the hand of the member states, there is until now no separate system of courts in the member states. The only court is the Court of Justice in Luxembourg.7 According to the Lisbon treaty on the other hand the competence of the Court will considerably increase.

On my opinion the Development of an European system of law – an European *Ius commune* cannot be stopped any more. Regarding this obvious signals of the past and present development we can say that there is not only a strong tradition of one unified legal system. Now the international treaties, acts of European Union are integrated into national legal systems. But it is may be predictable at this time that the process will not stop at this point but will be developed further. The possible development can turn into other direction, and it might become the opposite already in the foreseeable future. It means that national systems themselves can become a part or branches of a common law.
If you take a closer look at specially the directives of European Union8, you will see that this process already started. Anywhere you can see the harmonization. And not only directives are harmonizing the law of European Union. Whether there occurs a conflict there is also the European Court of Justice that

6 Kelsen, *General Theory, supra* note 22, at 308. This whole question of centralization and decentralization of orders is covered at 303-327.
7 As quoted in Tokar Adrian, Something Happened. Sovereignity and European Integration. In Extraordinary times, IWM Junior Visiting Fellows Conferences, Vol.11:Vienna 2001
8 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) *Official Journal L 294 , 10/11/2001 P. 0001 - 0021*

decides how this or that concrete case has to be solved. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. 9

In few year using all the legal and political means more and more , step by step national legal systems will become closer and closer to each other and to European law itself.

In my conclusion I will use and support the idea of Peter Fitzpatrick in New Europe and Old Stories. Where he wrote: Mythology and Legality in the European Union explores the question of how the myth of European identity sustains the EU as an exemplary community and nationalism as the pivotal point of the European legal order. The configuration of the law, the myth and nation serves to construct Europe and its laws. Europe "joins" the nation-state to avoid particularization (particularistic interests) and to become a model of universalism. In this project, its (Europe's) identity is formed as the negative formation – against excluded other states. This exclusion is shown in the establishment of the EU's external borders and in the introducing of European citizenship for nationals of member-states only.

The rights of EU nationals create a distinct and privileged identity over and against non-nationals. But the similarities between the EU and the nation create a tension, since both occupy the same domain, whether in legal terms or in terms of the identification and loyalties of their citizens. Against the general belief, Fitzpatrick concludes that the tensions are more between competing nationalisms than between national and supranational levels. And here the law comes into play.

The Europeanness of the law subsisting at the EU and national levels, provides a singular place and universal orientation which can accommodate the duplicity and plural location of nationalism in the EU. Fitzpatrick sees all of this as a modernist project. He accepts the idea that legal pluralism infuses the EU legal order, and that it (legal pluralism) cannot alter the modernist orientation of EU law within which pluralism is a way leading to unification[10] hence to the only one legal system, the European Ius commune.

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9 The Treaty Establishing a Constitution for Europe (CIG 87/2/04)

10 Peter Fizpatrick and James Henry Bergeron Aldershot, Brookfield USA, Singapore, Sydney: Ashgate Dartmouth, 1999

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[4] Jiri Malenovsky, Mezinárodní právo věřejné, Praha,1999
[5] Kelsen, General Theory, supra note 22, at 308. This whole question of centralization and decentralization of orders is covered at 303-327.
[6] Tokar Adrian, Something Happened. Sovereignity and European Integration. In Extraordinary times, IWM Junior Visiting Fellows Conferences, Vol.11:Vienna 2001
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DEFINOVÁNÍ OPAKEM V ŘÍMSKÉM PRÁVU –CAPITIS DEMINUTIO ET STATUS LIBERTATIS, CIVITATIS ET FAMILIAE

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Abstrakt

Předmětem této studie jsou římskoprávní instituty capitis deminutio a souhrn tří statusů: status libertatis, civitatis et familiae. Tyto statusy jsou základní tříprvková složka svobodného římského občana. V rámci capitis deminutio se soustředím mimo jiné na změnu postavení římského občana v návaznosti na naplnění skutkových podstat jednotlivých capitis deminutio. Jednotlivé složky osobnosti – caput, jsou v této práci vysvětleny s pomocí pramenů a jejich komparace. Studie se zabývá definováním jednotlivých složek svobodné osoby na základě definování opaku, tak jak jsou vysvětleny v Gaiově Učebnici práva ve čtyřech knihách, Justiniánských Institucích a Digestech, kdy jsou jednotlivé instituty definovány v protikladu k jinému institutu, tak je např. definován stav svobody ke stavu otrockému a stav osoby sui iuris je definován institutem osoby alieni iuris.

Klíčová slova

status libertatis, civitatis et familiae (stav svobody, příslušnosti k obci a rodiny), capitis deminutio maxima, media et minima, caput (právní postavení), ingenui (svobodný člověk), persona sui iuris (osoba svého práva), persona alieni iuris (osoba spadající pod pravomoc jiného), servitutes (otroctví), libertatis (svoboda)

Abstract

The aim of this study is to describe the Roman juridical institutes: capitis deminutio and a summary of three statutes: status libertatis, civitatis et familiae. These statutes are a three-element basis of a free Roman citizen. Within the scope of capitis deminutio, I focus among other things on a change of the status of Roman citizen in relation to the fulfillment of substances of particular capitis deminutio. Individual elements of the personality – caput are explained with respect to sources of law and their comparison. This study is dealing with definition of individual elements of a free person based on the definition of the opposite as it is explained in Gaius´ Institutes, Institutes of Justinian and Digests. Above mentioned Roman juridical institutes are defined in contradiction to other institutes, for example the

status of freedom as opposite to the slave status and the status of sui iuris as opposite to the status alieni iuris.

Key words

status libertatis, civitatis et familiae (stav svobody, příslušnosti k obci a rodiny), capitis deminutio maxima, media et minima, caput (právní postavení), ingenui (svobodný člověk), persona sui iuris (osoba svého práva), persona alieni iuris (osoba spadající pod pravomoc jiného), servitutes (otroctví), libertatis (svoboda)

Úvod

Tento příspěvek pojednává o římskoprávních institutech: o capitis deminutio, o souhrnu tří statusů: status libertatis, civitatis et familiae a o definování opakem v římském právu. Tyto statusy jsou základní tříprvková složka svobodného římského občana. V rámci capitis deminutio se soustředím mimo jiné na změnu postavení římského občana v návaznosti na naplnění skutkových podstat jednotlivých capitis deminutio. Jednotlivé složky osobnosti – caput, jsou v této práci vysvětleny s pomocí pramenů a jejich komparace.

Studie se zabývá definováním jednotlivých složek svobodné osoby na základě definování opaku, tak jak jsou vysvětleny v Gaiově Učebnici práva ve čtyřech knihách, Justiniánských Institucích a Digestech, kdy jsou jednotlivé instituty definovány v protikladu k jinému institutu, tak je např. definován stav svobody ke stavu otrockému a stav osoby sui iuris je definován institutem osoby alieni iuris.

Caput

Co vlastně znamenají latinské právní termíny caput a status? **Caput, -itis, n** → občanství, občanská existence, souhrn práv týkajících se osobní svobody, práv občanských i rodinných; odtud capitis deminutio umenšení nebo ztráta práv občanských ; capitis minor (capite deminutus jako zajatec) zbavený práv občanských a tím i rodinných1 v souvislosti s caput je důležitý i institut capitis deminutio, kdy deminutio znamená → **deminutio, - onis, f** → zmenšení, umenšení, úbytek, újma, ztráta2. Capitis deminutio znamená buďto zmenšení nebo úplnou ztrátu práv občanských a rodinných nebo ztrátu svobody. Capitis deminutio je tedy velice zvláštní instituce v římském právu a v současných právních řádech nenalezneme jeho ekvivalent a i tento termín se nepřekládá. Jde o zvláštní změnu v obsahu právní subjektivity římského občana.

1 Pražák, J., Novotný,F., Sedláček,J.: *Latinsko – český slovník*, Praha 1933, heslo caput
2 Tamtéž, heslo deminutio

Caput neboli právní osobnost římského občana, bývá zničena, nejen když občan pozbude svobody nebo občanství, nýbrž i kdykoli on se odloučí pouze od své agnátské familie, zůstávaje občanem římským. Zrušení právní osobnosti římského občana, které nastalo následkem toho, že jeho osobní postavení právní se změnilo po té neb po druhé stránce, zove se capitis deminutio. Jako pak troje podmiňuje caput občana: **libertas, civitas a familia,** rozeznávají se též tři druhy kapitisdeminuce: **capitis deminutio maxima, media** (neboli **minor) a minima** podle toho, zdali pozbyl svobody nebo pouze občanství nebo pouze familie3.

Tedy caput neboli to co dělá římského občana římským občanem je jeho trojí postavení. Toto postavení z něj dělá plnoprávného občana římského a tvoří to jeho právní osobnost caput civis Romani. Jde o tři statuty:

- **status libertatis** → je stav svobody, tedy stav, který můžeme podle starověkého nazírání na osoby nazvat stavem, kdy je osoba subjektem práv a ne objektem práv,
- **status civitatis** → je to stav příslušnost k římské obci, je to určité dnes bychom mohli říci „státní občanství", - vyčlenění se oproti „Neřímanům" – cizincům,
- **status familiae** → je stav sounáležitosti k určité familii – tedy rodině. Je to příslušnost k určité římské rodině a to buď pokrevní nebo právní příslušnost;

Tato jednotlivá postavení - statusy nám definuje v návaznosti na institut capitis deminutio Paulus: Dig. 4.5.11 Paulus 2 ad sab. *…tria sunt quae habemus, libertatem civitatem familiam4 → máme tři druhy (právní subjektivity) svobody, občanství, rodiny.*

Jak je uvedeno výše, tak tento status je přiznám právem (právním řádem) a tak musíme hledat z čeho vychází. Z čeho plyne toto trojí postavení (status) svobodného člověka, který je plnoprávným římským občanem? To, kdo je svobodný nám říká Gaius ve své Učebnici: Gaius I: De condicione hominum*. 9. Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi5 → Gaius I.9: O právním postavení lidí: A základní rozdělení práva osob je tedy takové, že všichni lidé jsou buď svobodní anebo otroci6.* Gaius I 10 *Rursus liberorum hominum alii ingenui sunt, alii libertini*7. → Gaius I.10 *Ze svobodných lidí jsou potom jedni ingenuové, druzí propuštěnci8*. Gaius I 11*. lngenui sunt, qui liberi*

3 Heyrovský,L.: *Dějiny a systém římského soukromého práva,* Praha 1910 str. 158 – 159.
4 Dig. 4.5.11 Paulus - latinský text převzat z www.thelatinlibrary.com
5 Gaius I.9 -latinský text převzat z www.thelatinlibrary.com
6 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 32 - 33
7 Gaius I.10- latinský text převzat z www.thelatinlibrary.com
8 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 32 - 33

*nati sunt; libertini, qui ex iusta servitute manumissi sunt*9. → *Gaius I.11. Ingenuové jsou ti, kdo se narodili jako svobodní, propuštěnci ti, kdo byli propuštěni z právoplatného otroctví.*10

Stejnou dikci o ingenuích obsahuje i Justiniánovy Instituce: Lib. I., tit. IV De Ingenuis: Ingenuus is est qui statim ut natus est liber est11; *tedy svobodný je, kdo se narodí ve svobodném postavení (jako svobodný)*. Taktéž je v Institucích shodná dikce i u propuštěnců: Lib. I., tit. V: *De Libertinis: Libertini sunt qui ex iusta servitute manumissi sunt. manumissio autem est datio libertatis*12 → *Propuštěnci (libertini) jsou ti, kdo jsou propuštěni z řádného otroctví. Propuštění na svobodu - manumisse je však udělením svobody.*

Tedy římské právo rozeznávalo dva typy svobodných a to ingenui – tedy osoby, které se již svobodné narodily a propuštěnce – osoby, které byli v právoplatném otroctví a byli propuštěni na svobodu

Tyto fragmenty nám sice říkají, kdo jsou právem uznáni za svobodné, narozením či propuštěním na svobodu - manumissí, ale pořád nám neříkají, co ta svoboda zahrnuje, to se dovídáme z Digest: *Dig. 1.5.4pr. Florus 9 inst. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur*13 → *Svoboda je přirozená možnost, činit každému co je libo, pouze v tom případě, že moc nebo právo tomu nebrání.* V tomto fragmentu se již dovídáme co to svoboda je. Je to tedy svoboda činit, nečinit, konat, nekonat – jak je uvedeno výše → „činit každému co je libo“. Status je tedy v nauce římského práva právní subjektivita subjektu práv. Je to právním řádem určitým jednotlivcům přiznaná možnost jednat a uskutečňovat vlastním chováním a jednáním právní úkony. Tímto subjektem je člověk - svobodný člověk (fyzická osoba), který je subjektem práv a povinností. Tento status (caput), jak bylo vyloženo výše, je tedy souhrn práv, které se týkají osobní svobody, občanských práv a práv rodinných. Římské právo tuto subjektivitu a tento soubor práv nepřiznává všem, ale jen těm, kteří mají určité postavení – status.

Status libertatis

Status libertatis je nejzákladnější složkou osobnosti. Svoboda (libertas) jest jako iure civili tak i iure

9 Gaius I.11 - latinský text převzat z www.thelatinlibrary.com
10 Kincl, J., *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 32 - 33
11 Lib. I., tit. IV De Ingenuis - latinský text převzat z www.thelatinlibrary.com
12 Lib. I., tit. V: De Libertinis - latinský text převzat z www.thelatinlibrary.com
13 Dig. 1.5.4pr. Florus - latinský text převzat z www.thelatinlibrary.com

gentium základní podmínkou osobnosti v právním smyslu. Pouze liberi jsou osobami na poli právním14. Způsobilý k právům je jenom svobodný člověk - liber. Svobodní jsou členové římské rodiny. Otrok - servus, je nezpůsobilý k právům, právo jej považuje za předmět práva a nikoli za subjekt. Samotné otroctví má své právní zakotvení v ius gentium Gaius I. 52 a také Justiniánovy Instituce Lib. I. tit. VIII → Gaius I. 52 *In potestate itaque sunt servi dominorum. Quae quidem potestas iuris gentium est: Nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse, et quodcumque per servum adquiritur, id domino adquiritur* 15 Gaius I. 52 *Pravomoci pánů jsou tedy podřízeni otroci. Tato pravomoc má původ v „právu národů": u všech národů bez rozdílu můžeme totiž pozorovat, že pánům přísluší nad otroky právo života a smrti; a cokoli se nabývá skrze otroka, to se nabývá pro pána* 16 →. Stejný text je i v Justiniánových Institucích: Lib. I. tit. VIII: *De his dui sui vel alieni iuris sunt* (O těch, kteří jsou svého nebo cizího práva): *In potestate itaque dominorum sunt servi. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus, dominis in servos vitae necisque potestatem esse, et quodcumque per servum adquiritur id domino adquiritur*17 → . Stejně tak dále v Justiniánových Institucích Lib. I tit. VIII: *In potestate itaque dominorum sunt servi. quae quidem potestas iuris gentium es*18*.*

Ve velké většině literatury se v kapitolách nazvaných „Status libertatis" hovoří především o otrocích a tím se a contrario vysvětluje postavení svobodného. Základ je v tom, že svobodný činí co mu je libo, tak jak bylo vyloženo výše, kdežto otrok plní to, co je jeho pánovi libo. Status libertatis – stav svobody lépe pochopíme při výkladu capitis deminuce maxima, ale ve zkratce můžeme říci, že subjekt práv, který je svobodný přestane mít svoji svobodou vůli, Gaius v souvislosti se zánikem společnosti píše, že: Gaius III. 153: *Dicitur etiam kapitis deminutione solui societatem, quia ciuili ratione kapitis deminutio morti coaequatur*19*; → Říká se také, že společnost zaniká kapitisdeminucí, protože kapitisdemunice se podle civilního práva staví naroveň smrti*20. Takže musí jít o skutečnost, která je natolik závažná, že svobodný člověk ztratí svou svobodnou vůli a tento jeho stav je de iure považován za smrt, např. válečné zajetí.

Status civitatis

Status civitatis neboli postavení římského občana. Státní občanství římské (civitas) předpokládá

14 Heyrovský,L.: *Dějiny a systém římského soukromého práva,* Praha 1910 str. 122
15 Gaius I. 52 - latinský text převzat z www.thelatinlibrary.com
16 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 41
17 Lib. I tit. VIII - latinský text převzat z www.thelatinlibrary.com
18 Lib. I. tit. VIII - latinský text převzat z www.thelatinlibrary.com
19 Gaius III. 153- latinský text převzat z www.thelatinlibrary.com
20 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 41

svobodu člověka. Otrok nemohl být státním občanem (civis Romanus)21. Římské státní občanství a tedy postavení římského občana se obecně nabývá/vzniká:

1) **Narozením** → např. v Instituce: Lib. I., tit. IV De Ingenuis: *Ingenuus is est qui statim ut natus est liber est*22; → S*vobodný je, kdo se narodí ve svobodném postavení (jako svobodný)*. Bez pochybností bylo narození dítěte v řádném manželství matrimonium iustum, které bylo uzavřeno mezi osobami, které měly ius conubii. Rozhodný stav otce dítěte v době jeho početí (pokud bylo narozeno v řádném manželství). V ostatních případech rozhodoval osobní stav matky v době porodu.

2) **Propuštěním na svobodu** → Gaius I 17: *Nam in cuius persona tria haec concurrunt, ut maior sit annorum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione liberetur, id est vindicta aut censu aut testamento, is civis Romanus fit; sin vero aliquid eorum deerit, Latinus eri*t23. → *Občanem římský se totiž stane ten, v jehož osobě se setkají tyto tři (náležitosti): že je starší třiceti let a že je v kviritském vlastnictví pána a že dostává svobodu řádnou a zákonnou formou propuštění, to je buď hůlkou, nebo při censu, nebo testamentem. Bude-li však některá z těchto (náležitost) chybět, bude Latinen*24. Jsou zde tedy dány zákonné podmínky a to:
    - minimální věk třicet let
    - otrok musel být v kviritském vlastnictví
    - propuštění jen zákonnou formou a to:
        - hůlkou
        - při censu zápisem do seznamu občanů
        - propuštění na základě testamentu

3) **Udělením** → toto udělení bylo právním aktem na kterém se usnášeli Quiritové – na komitiích, dále magistrátem a v době císařské císařem. Toto udělení bylo možné buď pro jednotlivého člověka nebo také pro celé obce či provincie. Poslední velké udělení římského občanství bylo uděleno konstitucí císaře Karakally z roky 212 n.l. – známé jako constitutio Antoniniana → Edikt Karakallův z roku 212 o poskytnutí práv římského občanství obyvatelům všech římských provincií. „Uděluji všem

21 Tureček, J., a kol.: *Světové dějiny státu a práva ve starověku,* Praha Orbis 1963, str. 266
22 Lib. I., tit. IV De Ingenuis - latinský text převzat z www.thelatinlibrary.com
23 Gaius I 17 - latinský text převzat z www.thelatinlibrary.com
24 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 34

peregrínům oikúmeny (tj. Neřímanům žijícím na území impéria), s výjimkou dediticiů (usídlených barbarů), práva římského občanství“25.

Takovýto svobodný člověk byl občan římský - civis Romanus a má římské občanství – civitas Romana. Jediný plnoprávný byl otec rodiny - paterfamilias, ten byl sui iuris a ostatní příslušníci rodiny byly pod pravomocí – potestas a jsou to osoby alieni iuris (především šlo o manželku v přísném manželství – cum manu a děti). Římské občanství bylo souhrnem politických práv, jejich výčet nám možná z dnešního pohledu bude připadat jako povinnosti, ale musíme si uvědomit, že jde o starověká práva, tedy je to možnost jak se účastnit a politickém dění v obci – civitas. Jednalo se o tato základní práva:

A) Veřejnoprávní:

- **ius militiae** → právo sloužit ve vojsku, je to právo, podílet se na obraně své obce a tím i chránit své zájmy,
- **ius sufragii** – je aktivní volební právo, tedy právo hlasovat na shromážděních,
- **ius honorum** → je pasivní volební právo, je to právo kandidovat a být zvolen a tedy zastávat funkci magistráta národa římského. Toto právo bylo upraveno např. zákonem lex Villa annalis26 z roku 180 př.n.l., který stanovoval nejnižší přípustný věk pro zastávání jednotlivých úřadů a to takto, tento zákon z roku 180 př. Kr. stanovil nejnižší přípustný věk pro jednotlivé úřady a to následovně:
    - **Questura** – od 28 let po desetileté službě e vojsku
    - **Aedilita** – od 37 let
    - **Tribunát lidu** – od 37 let
    - **Praetura** – od 40 let
    - **Konsulát** – od 43 let, ale až 3 roky po praetuře; opětovné nabytí konsulátu bylo možné nejdříve po 10 letech;

– **Soukromoprávní :**

- **ius conubii** → právo uzavřít řádné římské manželství,
- **ius commercii** → právo volně obchodovat,

25 Red. Ďjakov, V.,N. a Kovaljov, S.,I. a kol.: *Dějiny starověku* Praha 1963, str. 668

26 Viz. Livius: *Dějiny VI*, přeložil Pavel Kucharský, Svoboda 1976, kniha XL 44 str. 535 a minimální věková hranice pro zastávání jednotlivých úřadů podle lex Villia annalis převzata z Skřejpek, M.: *Římské právo v datech*. Skripta. 1. vydání. Praha, C.H.Beck 1997, str. 17 a 18.

- **ius testamenti** → právo sepsat závěť a tato závěť bude respektována, první ustanovení jsou již v Lex doudecim tabularum: Deska V.3: *Jak kdo ustanovil o svém majetku nebo o poručenstvím nad svým hospodářstvím. Tak budiž po právu27*

Status familiae

Starověká rodina byla volební, politická, hospodářská, náboženská a do jisté míry samosprávná jednotka. Rodina - familia, ae – mj. rodina, příbuzenstvo, rod celek náboženský, politický a hospodářský; v nejširším smyslu, všechny osoby a věci náležející pod právní moc jednoho občana → pater familias28). Původní římská rodina byla určitá zemědělská usedlost, na pozemcích pracovali všichni členové rodiny a tato usedlost byla do jisté míry autarkní. To co rodinu spojovalo byla, dnes již pro nás asi nepochopitelná absolutní moc otce rodiny – (paterfamilias) - absolutní patriarchální moc, to můžeme vyčíst z Gaia, Gaius I. 55 *Item in potestate nostra sunt liberi nostri, quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est (fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus)*29 → Gaius I. 55. *V naší pravomoci jsou dále naše děti, které jsme zplodili v řádném manželství. Je to právo, vlastní občanům římským; neboť sotva se najdou lidé, kteří by nad svými dětmi měli takovou pravomoc, jakou máme my* 30.

Stejná dikce o patriarchální moci otce rodiny je i v Justiniánových Institucích: Lib. I. tit. IX De patria potestate*: In potestate nostra sunt liberi nostri, quos ex iustis nuptiis procreaverimus. Ius autem potestatis quod in liberos habemus proprium est civium Romanorum: nulli enim alii sunt homines qui talem in liberos habeant potestatem qualem nos habemus*31.

Již podruhé narážíme na to, že je určitý institut vytyčen pomocí jiného institutu. Poprvé to bylo u stavu libertatis, kde je tento stav jak v Gaiovy, tak i v Institucích, a odtud je i přejat do právně-romanistických učebnic a prací, vytyčen proti stavu otroka, tedy stavu nesvobody - stavu opačného, kdy svobodný je vše ostatní, co nenaplňuje zákonnou dikci o otrocích. Stejné je to i nyní u osob sui iuris – tedy u osoby otce rodiny, který jako jediný má plnou subjektivitu a je to osoba - svého práva – a je o osobách sui iuris pojednáno v opaku k osobám alieni iuris → Gaius I. 50 *Videamus nunc de iis, quae alieno iuri subiectae sint: Nam si cognoverimus, quae istae personae sint, simul intellegemus, quae sui iuris sint*32 → Gaius I.

27 Skřejpek,M.: *Texty ke studiu římského práva,* ORAC 2001, str. 35

28 Heslo familia v Pražák,J.,Novotný,F.,Sedláček,J.: *Latinsko – český slovník*, Praha, 6 opravené a doplněné vydání, 1933
29 Gaius I. 55 - latinský text převzat z www.thelatinlibrary.com
30 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 42
31 Lib. I. tit. IX De patria potestate - latinský text převzat z www.thelatinlibrary.com
32 Gaius I. 50 - latinský text převzat z www.thelatinlibrary.com

50: *Podívejme se nyní na ty, které jsou podřízeny právu cizímu. Neboť poznáme-li, kteréže osoby to jsou, pochopíme současně, kteréže (osoby) jsou svéprávné* 33.

Gaius I. 48 *Sequitur de iure personarum alia divisio. Nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae34* Gaius I. 48 *Nyní je na řadě jiné rozdělení osobního práva (právního postavení osob). Některé osoby jsou totiž svéprávné (personae sui iuris), některé jsou podřízeny právu cizímu (personae alieno iuri subiectae)35.*

Justiniánových Institucích Lib. I. tit. VIII. *De his dui sui vel alieni iuris sunt: Sequitur de iure personarum alia divisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt36.*

Gaius I. 49: *Sed rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt*37→ Gaius I. 49 *Z těch osob zase, které jsou podřízeny právu cizímu, jsou jedny v pravomoci, jiné v moci manželské, jiné v mancipiu38.*

Z těchto fragmentů můžeme tedy a contrario vyvodit, že osoba sui iuris je ten, kdo:

- kdo není v mancipiu – **in mancipio** – kdo není otrokem,
- kdo není v pravomoci – **in potestate** jako dítě – liberi nostri (Gaius I.55: Item in potestate nostra sunt liberi nostri39)
- kdo není v moci manželské – **in manu**, tedy, kdo není žena; (pozn. výjimkou zde samozřejmě jsou Vestálky a Flaminové → Gaius I.130 *Praeterea exeunt liberi virilis sexus de parentis potestate, si flamines Diales inaugurentur, et feminini sexus, si virgines Vestales capiantur40*) Gaius I. 130 *Kromě toho se děti mužského pohlaví osvobozují od pravomoci předka tím, že byli vysvěceni jako Flamines Diales, (děti(ženského pohlaví přijetím mezi panny Vestálky41*;

↓

Kdo není v žádném z těchto postavení vůči někomu jinému je osobou sui iuris.

Capitis deminutio

33 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 41
34 Gaius I. 48 - latinský text převzat z www.thelatinlibrary.com
35 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 41
36 Lib. I. tit. VIII - latinský text převzat z www.thelatinlibrary.com
37 Gaius I. 49 - latinský text převzat z www.thelatinlibrary.com
38 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 41
39 Gaius I. 55 - latinský text převzat z www.thelatinlibrary.com
40 Gaius I. 130 - latinský text převzat z www.thelatinlibrary.com
41 Kincl, J., *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 59

Římskoprávní institut capitis deminutio nám definuje: Gaius I. 159 *Est autem capitis deminutio prioris status* ***permutatio***42 → Gaius I. 159 *Kapitisdeminuce je pak proměna dřívějšího právního stavu* 43. Justiniánovy Instituce nám definují capitis deminutio následovně: Lib. I., tit. XVI De capitis minutione: *Est autem capitis deminutio prioris status* ***commutatio***44. A Digesta citují Gaia: Dig. 4.5.1 Gaius 4 ad ed. provinc. *Capitis minutio est status permutatio45*. Rozdíl je zde ve slovesech, které použil Gaius a přepisovatelé právních textů do Justiniánových Institucí. Gaius používá sloveso **permutatio** a v Justiniánovy se používá sloveso **commutatio**. Nejde o nějaké významové posunutí, permutatio, -onis, f. – proměnění, proměna, změna46 a commutatio, -onis, f. – změna, proměna, obrat47, ale musíme si uvědomit, že mezi jednotlivými texty jsou čtyři století a Gaiův text nebyl do Justiniánské učebnice převzat beze změn a občas se „přepisovatelé" snažili o pestrost výraziva než o zachování jednotné právní terminologie, jak je tomu u tohoto fragmentu.

Jak již bylo řečeno výše, tak capitis deminutio je postavena naroveň smrti a tento institut je tedy smrtí v právním smyslu; Gaius III. 153 → *Dicitur etiam capitis deminutione solui societatem, quia ciuili ratione kapitis deminutio morti coaequatur* 48 → Gaius III. 153 *Říká se také, že společnost zaniká kapitisdeminucí, protože kapitisdeminuce se podle civilního práva staví naroveň smrti*49;

Druhy capitis deminutio

Jsou tři druhy capitis deminutio: Gaius 159. E*st autem kapitis diminutio prioris status permutatio: Eaque tribus modis accidit: Nam aut maxima est kapitis diminutio aut minor, quam quidam mediam vocant, aut minima*50→ Gaius I. 159: *Kapitisdeminuce je pak proměna dřívějšího právního stavu. A ta nastává třemi způsoby: je totiž buď kapitisdeminuce velká, anebo menší – které někteří říkají střední – anebo malá*51. Dále Dig. 4.5.11 Paulus 2 ad sab. *Capitis deminutionis tria genera sunt, maxima media minima*52 → Dig. 4.5.11 Paulus 2 ad sab. Máme tři druhy kapitisdeminucí, velká, střední, malá.

Jednotlivé capitis deminutio:

42 Gaius I. 159 - latinský text převzat z www.thelatinlibrary.com
43 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 67
44 Lib. I., tit. XVI De capitis minutione - latinský text převzat z www.thelatinlibrary.com
45 Dig. 4.5.1 Gaius 4 ad ed. provinc. - latinský text převzat z www.thelatinlibrary.com
46 Pražák, J., Novotný,F., Sedláček,J.: *Latinsko – český slovník*, Praha 1933, heslo permutatio
47 Pražák, J., Novotný,F., Sedláček,J.: *Latinsko – český slovník*, Praha 1933, heslo commutatio
48 Gaius III. 153 - latinský text převzat z www.thelatinlibrary.com
49 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 179
50 Gaius I. 159 - latinský text převzat z www.thelatinlibrary.com
51 Kincl, J., *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 67
52 Dig. 4.5.11 Paulus ad sab. - latinský text převzat z www.thelatinlibrary.com

1. **capitis deminutio maxima –** kapitisdeminuce velká
2. **capitis deminutio media - –** kapitisdeminuce střední
3. **capitis deminutio minima –** kapitisdeminuce malá

Capitis deminutio maxima

Capitis deminutio maxima je definována v: Gaius I.160 *Maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit; quae accidit incensis, qui ex forma censuali venire iubentur: Quod ius *, qui contra eam legem in urbe Roma domicilium habuerint; item feminae, quae ex senatus consulto Claudiano ancillae fiunt eorum dominorum, quibus invitis et denuntiantibus cum servis eorum coierint*[53]→ Gaius I. 160 *Velká kapitisdeminuce je ta, když někdo současně ztrácí i občanství i svobodu; což se stává těm, kdo se nedostaví k censu a na příkaz (úředníka) jsou podle řádu o konání censu prodáni (do otroctví). Tohoto práva se dnes vlastně (již) neužívá. Z trestu ztrácejí však dnes podle zákona Aelia a Sentia svobodu ti, kdo patří mezi „vzdané" a měli by proti zákazu tohoto zákona bydliště ve městě Římě. (Svobodu ztrácejí) také ženy, které se podle klaudijánského usnesení senátu stávají otrokyněmi těch pánů, s jejichž otroky by se proti vůli pánů a přes jejich zákaz (nadále) pohlavně stýkaly*[54].

Dig. 4.5.11 Paulus 2 ad sab. *Capitis deminutionis tria genera sunt, maxima media minima: tria enim sunt quae habemus, libertatem civitatem familiam. igitur cum omnia haec amittimus, hoc est libertatem et civitatem et familiam, maximam esse capitis deminutionem: cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem: cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat* 55 → Dig. 4.5.11 Paulus 2 ad sab. *Jsou tři druhy capitis deminutio, velká, střední, malá: tři, neboť jednak máme svobodu, občanství a rodinu. Velká capitis deminutio je pak ztráta občanství, svobodu zachovává. Střední capitis deminutio: je zachování svobody a občanství, toliko postavení mění postavení v rodině. Malá capitis deminutio je újma v postavení.*

Velká capitis deminutio je ztráta svobody a občanství, jedná se o kumulativní podmínku k tomu, aby nastala velká capitis deminutio. Jde o situaci, kdy je osobnost podle ‚práva úplně zaniká, ač si zachovává život. Tímto druhem capitis deminutio je zničeno postavení svobodného římského občana – přišel tedy o svoji caput – postavení. Jak jsem uvedl v předchozím výkladu - *svoboda je přirozená možnost, činit každému co je libo, pouze v tom případě, že moc nebo právo tomu nebrání*[56] a zde je mu tedy bráněno, aby mohl vykonávat svá občanská práva a vůbec, aby se mohl chovat jako svobodný občan. Quirit postižený velkou capitis deminutio pak ztrácí všechna svá práva a to jak veřejná, tak i soukromá →

53 Gaius I. 160 - latinský text převzat z www.thelatinlibrary.com
54 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 67
55 Dig. 4.5.11 Paulus ad sab. - latinský text převzat z www.thelatinlibrary.com
56 Pozn. Dig. 1.5.4 pr. Florus 9 inst

Gaius III. 83 …. *quae per capitis deminutionem pereunt, quales sunt ususfructus, operarum obligatio libertorum, quae per iusiurandum contracta est, et lites contestatae legitimo iudicio*[57]→ Gaius III 83 ... *kapitisdeminucí berou za své (práva) jako ususfrukt,, přísahou založený pracovní závazek propuštěnců a nároky, o nichž byla v legitimním řízení uzavřena litiskontestace*[58]*.* Tímto tedy zanikají práva obligační. Stejně jako obligační práva jsou capitis deminutio dotčena a zrušena práva rodinná. Rodinná práva mocenská zrušují se naprosto, nechať capitis deminutio stihla majitele moci nebo poddaného. Dále končí se nejen agnatio, nýbrž i práva z kognace toho, kdo byl postižen capitis deminutione magna[59]. K této situaci, kdy svobodný ztratí svobodu i občanství je např. zotročení (Gaius I.160 – *pro ty, kteří se nedostaví k cenzu a pro ženy, které se pohlavně stýkají s otroky bez souhlasu jejich pána*). Jednou z nejčastějších možností, jak ztratit najednou jak svobodu tak i občanství, je stát se válečným zajatcem, neboť není větší hanby než upadnout do rukou nepřítele a nebojovat do posledních sil a do ztráty života v bitvě např. zajetí Aula Regula, nebo z Liviových Dějinách se dočteme o tom, že bylo v punských válkách ženám zakázáno skládat výkupné za své muže, syny, bratry – Livius XXXIV 1 až 8 – slavná Catonova řeč proti rozmařilosti římských dam.

Capitis deminutio minor

Gaius I.161 *Minor sive media est capitis deminutio, cum civitas amittitur, libertas retinetur; quod accidit ei, cui aqua et igni interdictum fuerit60*→ Gaius I. 161 *Menší neboli střední kapitisdeminuce je ta, když se ztrácí občanství, svoboda je (však) zachována; což se stává tomu, nad kým byl vysloven zákaz vody a ohně61 .* →. Stejně tak i v Lib. I., tit. XVI De capitis minutione *Minor sive media est capitis deminutio, cum civitas quidem amittitur, libertas vero retinetur. quod accidit ei cui aqua et igni interdictum fuerit, vel ei qui in insulam deportatus est*62 a dodává se: ... kdo byl odvezen/vyhnán na ostrov.

Capitis deminutio minima

Gaius I.162 *Minima est capitis diminutio, cum et civitas et libertas retinetur, sed status hominis conmutatur; quod accidit in his, qui adoptantur, item in his, quae coemptionem faciunt, et in his, qui mancipio dantur quique ex mancipatione manumittuntur; adeo quidem, ut quotiens quisque mancipetur aut manumittatur, totiens capite diminuatur* 63→ Gaius I. 162 *Malá kapitisdeminuce je ta, když se zachovává i občanství i svoboda, ale právní postavení člověka se mění; což nastává u (osob) adoptovaných, dále u žen, které podstupují koempci, jakož i o těch, kdož jsou mancipováni a kdo jsou po*

57 Gaius III. 83 - latinský text převzat z www.thelatinlibrary.com
58 Gaius III. 83 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 160 – 161.
59 Heyrovský, L. *Dějiny a systém soukromého práva římského*, Praha 1914, str. 159
60 Gaius I. 161 - latinský text převzat z www.thelatinlibrary.com
61 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 67 a 68
62 Lib. I., tit. XVI De capitis minutione - latinský text převzat z www.thelatinlibrary.com
63 Gaius I. 162 - latinský text převzat z www.thelatinlibrary.com

mancipaci propuštěni: a to tak, že kapitisdeminuce nastane tolikrát, kolikrát je kdo mancipován nebo propuštěn64. → Stejně tak i v Justiniánských Institucích: Lib. I., tit. XVI De capitis minutione *Minima capitis deminutio est, cum et civitas et libertas retinetur, sed status hominis commutatur*65.

Závěr

Definování nebo argumentování opakem - a contrario - je běžnou metodou výkladu právních textů. Jde vlastně o proces negování, kdy se např. jedna skupina definuje tím, že nemá znaky skupiny druhé, jde vlastně o obrácené podmínky nebo znaky. I v současném právu je tato metoda výkladu, či argumentace velice často využívána, např. je to vše vyjma… apod. Stejně tak i tuto metodu využívali starověcí římští právoznalci. Ti velice často definovali jen určité právní instituty a to především ty, která byly sporné. Tak nám vysvětluje Ulpianus ius naturale: *„Ius naturele je to, co příroda vnukla všem tvorům. Toto právo není vyhrazeno člověku, nýbrž týká se všech živočichů … Ius gentium je právo, jehož používají národy".* Ius civile naproti tomu Ulpianus nepovažoval za potřebné vysvětlovat, neboť bylo pro něj zjevnou samozřejmostí[66]. Z této citace z Hatenauera můžeme vyvodit, že starověcí právoznalci definovali především sporná a nejasná ustanovení která bylo potřeba vysvětlit, kdežto ta nejfrekventovanější byla většinou přecházena bez poznámek či vysvětlení, jelikož oni sami nepovažovali za nutné tyto, dnes bychom řekli notoriety, instituty vysvětlovat a hlouběji je zkoumat.

Tak se nám zachovaly nádherné pasáže, ze kterých se dovídáme vše o postavení otroků a o postavení osob alieni iuris a jsme přímo římskými právníky odkazováni na to, že pochopíme postavení osob sui iuris a svobodných tím, když si vysvětlíme, kdo jsou otroci a osoby alieni iuris.

Capitis deminutio je tedy stav právní, je to stav do kterého se může dostat každý římský občan v návaznosti na určité buďto faktické nebo právní skutečnosti, např. faktická skutečnost je válečné zajetí a právní je např. adopce, koempce což je zánik příslušnosti k jedné rodině a přináležitost k rodině nové. Na tento druh „změny" se váže např. na vykonávání rodinných sacer, kdy žena, která vstupuje manželstvím do nové rodiny (čímž vystupuje ze své dosavadní rodiny) přijímá i náboženské obřady nové rodiny – tzv. sacra privata/familia (kupř. uctívání rodinných Larů a Penátů).

Capitis diminuce jakéhokoli stupně je velice praktické právní ustanovení, kdy se mění právní postavení člověka v návaznosti na skutkovou změnu. Musíme si uvědomit, že to, co dělalo starověkého člověka člověkem je souhrn jeho politických práv a ty mohl naplňovat a vykonávat jen ve společnosti, která se

64 Kincl, J.: *Gaius, Učebnice práva ve čtyřech knihách*, Brno Doplněk 1981, str. 68
65 Lib. I., tit. XVI De capitis minutione - latinský text převzat z www.thelatinlibrary.com
66 Hattenhauer,H., E*vropské dějiny práva, Praha C.H. Beck 1998, str. 81*

nazývala město Řím. Politická práva byla odstupňována podle příslušnosti k určité třídě, ale toto postavení jednotlivce nebylo absolutní a definitivní (toto postavení se mohlo změnit i např. při censu změnou majetkových poměrů). Toto postavení se tedy mohlo kdykoliv během života změnit a stejně tak se mohl zase do svého původního postavení (ve smyslu caput) navrátit – ius postlimini, neboť Římané věděli, že Fortuna je nestálá.

Samotné postavení svobodných římských občanů – status civitatis, libertatis a familiae jsou definovány opakem. Je jasné, že pro římské občany a právníky bylo jasné, kdo to jsou svobodní a plnoprávní občané – tedy Římané a také proto systematika římského práva definovala nejjednodušším způsobem jejich postavení a to tak, že podrobně vysvětlila, kdo nejsou Římané – tedy, kdo nejsou svobodní a na základě toho si můžeme říci, že ten kdo nenaplňuje příslušná ustanovení o otrocích nebo o osobách alieni iuris jsou svobodný a je osobou sui iuris.

Podle mého je jedna z nejúžasnějších římskoprávních definic, která je v Digestech obsažena tato *Dig. 1.5.4 pr. Florus 9 inst. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur*67 → *Svoboda je přirozená možnost, činit každému co je libo, pouze v tom případě, že moc nebo právo tomu nebrání*. Nejde jen o to, že nám definuje co je to svoboda, ale také nám a contrario říká, že „nesvoboda" je tedy to, když někdo nečiní co je libo mu, ale co je libo jinému. V tomto spatřuji jasný rozdíl mezi tím, kdo je svobodný a kdo svobodným není a má jiné právní postavení (otrok, propuštěnec, ale také osoba alieni iuris). Toto je velice patrné i v tom, že, ten kdo je podřízen moci někoho jiného vše co nabude, nabude pro svého „pána" pro vlastníka pravomoci nad ním (samozřejmě vyjma peculia), ale stejně tak tento stav svobody a vykonáváním pravomoci je obtížen i nepříjemnostmi a to, že ručí za jednání osob, které spadají do jeho moci – potestas.

Prameny

Gaius Institutionum commentari quattuor:

Gaius I 9
Gaius I 10
Gaius I 11
Gaius I 17
Gaius I 48
Gaius I 49
Gaius I 50
Gaius I 52

67 Dig. 1.5.4pr. Florus - latinský text převzat z www.thelatinlibrary.com

Gaius I 55
Gaius I 130
Gaius I 159
Gaius I 161
Gaius I 162
Gaius III 83
Gaius III 153

Corpus iuris civilis

Institutiones:

Lib. I tit. IV
Lib. I tit. VIII
Lib. I tit. IX
Lib. I tit. XVI

Digesta:

Dig. 4.5.1 Gaius 4 ad ed. provinc.
Dig. 4.5.11 Paulus
Dig. 1.5.4pr. Florus 9 inst.

Titus Livius: Ab Urbe condita

XXXIV 1 - 8
XL 44

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HISTORICKÝ VÝKLAD V PRAXI EURÓPSKEHO SÚDNEHO DVORA

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Abstrakt

Historický výklad je jedným z druhov výkladu, ktoré sa využívajú v záujme správnej realizácie a aplikácie práva. Tento príspevok nadväzuje na podobný výskum vykonaný na vzorke (česko-)slovenskej judikatúry z 20. storočia, v ktorom sa autor pokúsil o kategorizáciu spôsobov využívania historickej a právnohistorickej argumentácie v procese súdnej aplikácie práva. Na tomto mieste ide o výskum miery a spôsobu využívania historickej argumentácie na pôde Európskeho súdneho dvora, ako aj o prezentáciu judikatúry tohto súdu, obmedzujúcej predmetný druh výkladu.

Kľúčové slová

Historický výklad, interpretácia práva, Európsky súdny dvor, právne dejiny, história

Abstract

Historical interpretation is one of the kinds of interpretation used in order to perform and apply law correctly. This short article builds upon previous similar research on historical and legal-historical argumentation used by (Czecho-)Slovak courts in the 20th century. Here, a scale and way of using historical argumentation by the European Court of Justice is being researched, as well as the decisions placing limits upon using the historical interpretation.

Key words

Historical interpretation, interpretation of law, European Court of Justice, legal history, history

1 Historický výklad a historická argumentácia v československej súdnej praxi

Ako bolo konštatované v jednom z autorových predchádzajúcich príspevkov,[1] historický výklad je v teórii práva považovaný za zameriavajúci sa na analýzu dokumentov, ktoré doprevádzali vznik relevantného právneho textu.[2] Toto príliš úzke chápanie je inokedy dopĺňané názorom, že historický výklad sa zakladá na objasňovaní zmyslu právnej normy v súvislosti s cieľom, ktorý bol sledovaný jej vydaním a v spojitosti so spoločenskými podmienkami, za ktorých normatívny akt nadobudol platnosť.[3] Toto chápanie teda kombinuje teleologický a historický výklad. Najlepšie ho vysvetľuje názor, podľa ktorého *„právny predpis vzniká v určitej historicky danej spoločenskej situácii, ktorá podmieňuje jeho vznik a určuje jeho obsah... V rámci historického výkladu má význam aj metóda porovnávania neskoršej právnej normy (lex posterior) so skoršou (lex prior)*."[4] Podľa P. Maršálka historický výklad je „*nadstandardní metoda interpretace práva, která se pokouší z okolností provázejících vznik právního předpisu dovodit tzv. ratio legis.*"[5] V právnej praxi sa však nestretávame iba s historickou interpretáciou práva, ale tiež s rôznymi inými formami historickej argumentácie.

Podľa výsledkov výskumu národnej judikatúry možno dospieť k záveru, že historická argumentácia sa v súdnych rozhodnutiach vyskytuje ako:

- negatívna historická skúsenosť slúžiaca ako argument podčiarkujúci význam dnešnej právnej úpravy,
- objasnenie pôvodu právneho inštitútu v kontexte svetových právnych dejín,
- historický kontext slovenskej právnej úpravy a zaradenie právnej normy do súvislostí jej kreácie,
- popretie, resp. spochybnenie historického právneho inštitútu, resp. právneho výkladu v nových podmienkach,
- použitie historického práva v súčasnej právnej praxi,
- jednoduché konštatovanie historického vývoja a formálne deklarovanie využitia historického výkladu bez ďalšieho hodnotiaceho významu.[6]

Pritom ako historický výklad v najširšom zmysle možno chápať všetky uvedené spôsoby využitia dejín s výnimkou aplikácie minulého práva a triviálnej konštatácie minulého (historického) práva.

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2 Historická argumentácia v praxi Európskeho súdneho dvora

Metódou vyhľadávania v judikatúre Európskeho súdneho dvora[7] pomocou kľúčového slova „historical", resp. jeho koreňa „histor" možno identifikovať množstvo judikátov, resp. podaní, ktoré využívajú historickú argumentáciu.[8] Po podrobnejšom preskúmaní najnovších materiálov ich možno zatriediť do nasledujúcich kategórií:

2.1 Historický kontext právnej úpravy a zaradenie právnej normy do súvislostí jej kreácie

Rozsudok Veľkej komory Súdu z 23. októbra 2007 v prípade C-112/05, kde navrhovateľom bola Komisia a odporcom Spolková republika Nemecko, podáva výklad histórie tzv. zákona o Volkswagene.[9]

Názor generálneho advokáta Mazáka zo 16. januára 2008 v prípade C-448/06 cp-Pharma Handels GmbH v. Bundesrepublik Deutschland podáva výklad postupu prijímania nariadenia č. 1873/2003.[10]

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[7] Dostupné na internete: curia.europa.eu (navštívené 20.04.2008).

[8] Samozrejme si treba uvedomiť, že historická argumentácia môže byť prítomná aj v dokumentoch,v ktorých sa pojem „historický" vôbec nevyskytuje. Na účely mikrosondy o akú sa tu pokúšam, sa však domnievam, že aj takáto obmedzená vzorka postačuje. V poznámkach pod čiarou citujem prípady v anglickom jazyku z dôvodu medzinárodnej povahy tejto konferencie a adresátov jej výstupu - zborníka.

[9] The Federal Republic of Germany observes that the VW Law is based on an agreement which was entered into in 1959 between individuals and groups which, during the 1950s, had claimed rights in respect of the limited company Volkswagenwerk. At that time, the trade unions and the workers, on the one hand, and the Federal State and the Land of Lower Saxony, on the other, claimed rights in respect of that company. Under that agreement, the workers and the trade unions, in return for relinquishing their claim to a right of ownership over the company, secured the assurance of protection against any large shareholder which might gain control of the company… The Commission takes the view that those historical considerations are irrelevant. Its criticism of the Federal Republic of Germany does not concern the reasons behind that Member State's legislative activity in 1960, but rather its current failure to legislate, inasmuch as the VW Law has for a long time fallen foul of the requirements of the free movement of capital.

[10] In 1993 an application for the establishment of an MRL for progesterone in cattle and horses was submitted to the Commission. In October 1996, the Committee recommended that progesterone be included in Annex II to Regulation No 2377/90. In April 1997, the Commission sent new scientific information to the Agency and requested a re-assessment of the risks relating, inter alia, to progesterone. In April 1998, the Commission requested the Agency that the Committee should have the possibility to take account of scientific information which was to become available in the course of 1998 from a number of sources and the results of a number of specific studies commissioned by the Commission. In April 1999, the Commission asked the Agency to update the evaluation the former had requested in 1997 of progesterone. On 30 April 1999, the Scientific Committee on Veterinary Measures Relating to Public Health ('the SCVPH') issued a report which concluded, inter alia, that no acceptable daily intake could be established for the hormone progesterone. In December 1999, the Committee confirmed its earlier opinion recommending that progesterone be included in Annex II to Regulation No 2377/90. On 3 May 2000, the SCVPH adopted a re-evaluation of its opinion of April 1999. In its re-evaluation the SCVPH concluded that recent scientific information did not provide convincing data or arguments making a revision of its previous conclusions necessary. On 25 July 2001, the Commission adopted a proposal for a Council Regulation amending Annex I to Regulation No 2377/90 classifying progesterone in that annex. That proposal was rejected by the Standing Committee which assists the Commission in accordance with Article 8 of Regulation No 2377/90. The Commission, pursuant to Article 8 of Regulation No 2377/90 submitted the proposal to the Council which was rejected in January 2002. In December 2002, the Commission submitted to the Standing Committee a second proposal classifying progesterone in Annex III to Regulation No 2377/90. That proposal did not obtain the favourable opinion of the Standing Committee. On 24 October 2003, the Commission adopted Regulation No 1873/2003 which lists progesterone in Annex II to Regulation No 2377/90, subject however to certain limitations. According to the 11th recital in the preamble to Regulation No 1873/2003, the measures provided for in that regulation are in accordance with the opinion of the Standing Committee.

Podobne je tomu v prípade názoru vyššie menovaného generálneho advokáta z 13. decembra 2007 vo veci C-439/06 citiworks AG v. Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde, kde sa spomína snaha Komisie o novelizáciu smernice o elektrine 96/92/EC a následne prebratie úpravy do novej smernice 2003/54.[11]

Ďalším príkladom môže byť názor generálneho advokáta Sharpstona zo 6. marca 2008 vo veci C-173/07 Emirates Airlines Direktion für Deutschland v. Diether Schenkel, kde sa konštatuje, že montrealská zmluva a nariadenie č. 261/2004 majú svoju „legislatívnu históriu", ktorá sa v stanovisku bližšie skúma.[12]

V stanovisku generálneho advokáta Poiares Maduro-a z 29. novembra 2007 v spojených prípadoch C-39/05 P a C-52/05 P Švédske kráľovstvo a Maurizio Turco v. Rada Európskej únie a iní sa tiež venuje pozornosť dejinám prijatia obsahu právneho predpisu – konkrétne nariadenia č. 1049/2001.[13]

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[11] Directive 2003/54 marks the second phase of the liberalisation of the market in electricity within the European Community. Its objective is to complete the internal market in electricity launched by Directive 96/92/EC (the 'first electricity directive')… The importance of the principle of third party access is also apparent from the legislative history of the directive. The provision requiring Member States to ensure third party access was an essential element of the Commission's proposal to amend the first electricity directive and was adopted, essentially unchanged, in Article 20 of the Directive.

[12] The travaux *préparatoires* show that the proper scope of the proposed new regulation in relation to flights from third country airports to the Community was the subject of specific consideration. Under Article 3(1) of the Commission's original Proposal, passengers departing from a third country to a Member State were to be covered if they had a contract with a Community carrier or with a tour operator for a package offered for sale in the territory of the Community. A subsequent Council document issued following discussions both in COREPER and by the relevant Council Working Party, presenting the revised draft of the regulation, indicates that one of the two 'major outstanding issues' concerned, precisely, the scope of the regulation in relation to flights from third countries, as now defined by Article 3(1)(b). A lengthy footnote to the text of that subparagraph (by then identical to the text finally adopted) shows that certain Member States favoured extending further the protection offered to passengers boarding a flight to a destination within the Community at an airport in a third country, whilst others opposed it; and that possible problems of extra-territoriality, unenforceability and discrimination between passengers were (variously) canvassed. The following week, the Presidency presented an unchanged text for, inter alia, Article 3(1)(b). However, it asked delegations to reflect on the possibility of entering into the Council minutes a statement by Member States related to what was at that stage Article 19 (entitled 'Report'), inviting the Commission, when drafting the report envisaged in that article, to focus in particular on the possibility of enlarging the scope of the regulation in respect of flights from third country airports to the Community. In December 2002 the Council reached political agreement on its common position on the draft regulation; and the suggestion for an entry in the Council minutes was elevated into a drafting amendment to the text of Article 19. The regulation as promulgated duly requires the Commission to report 'in particular regarding … the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour" … and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community … carriers'. Against that background, I find it impossible to accept that Article 3(1) should be read as covering a passenger on a return flight operated by a non-Community carrier from a third country to a Member State.

[13] Mr Turco however submits that the insertion of 'legal advice' in Regulation No 1049/2001 is designed solely to clarify the scope of the exception relating to the protection of court proceedings as interpreted in *Interporc* v *Commission*. However, if that were the case, another formulation of the kind already mentioned above would undoubtedly have been used by the drafters of that regulation, such as 'court proceedings and in particular legal advice'. Furthermore, the applicant's assertion is disproved by the drafting history of Regulation No 1049/2001. That history clearly indicates that there was no intention at all to establish a link between 'court proceedings' and 'legal advice', but that the purpose of inserting 'legal advice' was to enshrine in legislation the judicial approach which, in order to protect the confidentiality of the opinions of the legal services of the institutions relating to draft legislation, had added to the categories of public interest expressly referred to by the legislative instruments then in force governing the right of access to documents those of 'the stability of the Community legal

Generálny advokát Kokott v stanovisku z 20. septembra 2007 v prípade C-435/06 „C“ pomocou historického výkladu skúma význam pojmu civilné záležitosti,[14] generálny advokát Ruiz-Jarabo Colomer v názore zo 6. septembra 2007 vo veci C-337/06 Bayerischer Rundfunk v. GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH zasa skúmal vzájomný vzťah úprav smernice 92/50 a 2004/18.[15] Podobný bol postup aj v mnohých iných prípadoch.

2.2 Vedomé opustenie predchádzajúcej právnej úpravy

Príkladom môže byť rozsudok Tretej komory zo 14.júna 2007 v prípade C-127/05 Komisia v. Spojené kráľovstvo, kde sa argumentuje úmyselným opustením dovtedajšej právnej úpravy.[16]

Evolučné prekonanie dobového výkladu obsahuje názor generálneho advokáta Kokotta zo 7. septembra 2006 v prípade C-284/04 T-Mobile Austria GmbH a iní v. Rakúska republika, kde T-Mobile Austria

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order' and the 'proper functioning of the institutions'. As the Council has pointed out, the initial Commission proposal for a regulation provided for two separate exceptions, relating to the stability of the Community's legal order and 'court proceedings'. The first exception was subsequently reworded to include 'the ability of the institutions to seek the advice of their legal services' and, following legislative discussion, the wording was finally abridged and clarified to become that in Regulation No 1049/2001.

[14] That cannot be accepted. In its judgments on the Brussels Convention, the Court has always emphasised that the autonomous interpretation of the term 'civil and commercial matters' takes into account the objectives and scheme of *the Brussels Convention* and the general principles which stem from the corpus of the national legal systems. However, its objectives and scheme and – I would add – its history are not necessarily the same as the objectives, scheme and history of Regulation No 2201/2003. In the sphere of parental responsibility it is also possible that different general principles exist from those applicable in the national legal systems in relation to disputes within the scope of application of the Brussels Convention. Instead, the term 'civil matters' in Regulation No 2201/2003 must be interpreted independently within the legislative context of this Regulation… Consideration of the legislative history confirms this interpretation of the term 'civil matters'. Regulation No 1347/2000, the predecessor to Regulation No 2201/2003, concerned only civil proceedings relating to parental responsibility for the children of both spouses on the occasion of matrimonial proceedings (Article 1(1)(b) of Regulation No 1347/2000). The connection this required between the decision concerning parental responsibility and matrimonial proceedings meant that protective measures taken by the State were not within the scope of application of Regulation No 1347/2000… A further aspect of the regulation's legislative history is the close substantive connection between Regulation No 2201/2003 and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ('Child Protection Convention').

[15] That conclusion appears to be supported by the history of the Community legislation, as emerges from comparison of the respective recitals of the grounds of Directives 92/50 and 2004/18. Thus, the 25th recital in the preamble to Directive 2004/18 has added detail to the succinct 11th recital in the preamble to Directive 92/50, including 'other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme'. On the other hand, it does not extend to 'supply of technical equipment necessary' to the production of those programmes.

[16] The Commission maintains that an interpretation of Article 5 to that effect is confirmed by the legislative history of Directive 89/391 and by the fact that, while certain early directives on the safety and health of workers, which preceded the insertion into the EC Treaty of Article 118a, now Article 138 EC (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), did incorporate a 'reasonably practicable' qualification in defining the obligations imposed on the employer, subsequent directives, including Directive 89/391, adopted on the basis of Article 118a, have permanently abandoned it.

navrhoval evolutívny výklad, podľa ktorého sa má prihliadať na to, ako by asi dobový zákonodarca reagoval na zmenené pomery, vládnuce v súčasnosti.[17]

2.3 Jednoduché konštatovanie historického vývoja a formálne deklarovanie využitia historického výkladu bez ďalšieho hodnotiaceho významu

Príkladom je Rozsudok Tretej komory z 11. októbra 2007 vo veci C-460/06 Nadine Paquay v. **SOCIÉTÉ D'ARCHITECTES HOET + MINNE SPRL**, kde sa spomína, že miestny národný súd použil pri výklade domáceho právneho predpisu aj historický výklad, ale tento sa na európskej úrovni bližšie neskúma.[18] Podobne názor generálneho advokáta Sharpstona nezachytáva historický výklad jednotlivých strán v prípade C-5/06 Zuckerfabrik Jülich AG v Hauptzollamt Aachen, kde sa len konštatuje, že strany podporovali svoje tvrdenia aj historickou argumentáciou.[19]

2.4 Konštatovanie chýbajúcich historických argumentov

V názore generálneho advokáta Sharpstona z 8. marca 2007 v prípade C-434/05 Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v. Staatssecretaris van Financiën sa vyskytuje ojedinelý doklad o snahe využiť historický výklad, ale kvôli nedostatku akýchkoľvek sprievodných materiálov a dôvodovej správy k príslušnému ustanoveniu uvedená snaha zlyhala.[20]

2.5 Historický pôvod právneho inštitútu

[17] Taking a historical approach, it could conceivably be argued that the award of mobile communications frequencies to private undertakings could not be covered by the term 'telecommunications' because on the date that the Directive was adopted in 1977 the State administrative postal authorities were providing all telecommunications services under their own direct management. The Community legislature probably did not therefore originally intend to adopt legislation in relation to the allocation of radio frequencies to private suppliers.

[18] The referring court also held that Article 40 of the law of 16 March 1971, interpreted in light of its legislative history, does not prohibit the decision to dismiss being taken during the protection period, as long as the notification to the worker comes more than one month after the end of the maternity leave.

[19] The applicants and the French, Greek and Italian Governments submit, in essence, that in accordance with Article 15 of the basic regulation account should be taken, when determining the exportable surplus, only of those exports of sugar in respect of which export refunds have actually been paid. Those parties variously invoke in support of their view, first, the wording, scheme, history, objective, and interpretation by the Court of the basic regulation and, second, the principle of proportionality.

[20] There was in the original proposal no precursor to the present subparagraph (j). The latter was inserted into the Directive at a relatively late stage, without any (registered) previous commentaries, and is thus 'not burdened by a demonstrable legislative history'.

Pôvod legislatívy upravujúcej problematiku pasov a cestovných dokumentov vo svojom názore z 10. júla 2007 vyslovil vo veci C-137/05 Spojené kráľovstvo v. Rada Európskej únie generálny advokát Trstenjak.[21]

Vývoj právnej úpravy insolvencie a konkurzu zasa obsahuje názor generálneho advokáta Ruiz-Jarabo Colomer-a vo veci C-1/04 Susanne Staubitz-Schreiber.[22]

3 Postoj Európskeho súdneho dvora k historickému výkladu

Podľa judikatúry ESD majú okolnosti prijatia právnej úpravy len malý význam pre účely interpretácie normy. Vyslovil sa tak generálny advokát Kokott v názore z 13. júla 2006 v prípade C-278/05 Carol Marilyn Robins, John Burnett a iní v. štátny tajomník pre prácu a penzie.[23] Odvoláva sa pritom na prípad C-310/90 Egle [1992] ECR I-177, odsek 12, v ktorom sa právne dejiny, resp. historický výklad používajú iba na potvrdenie výkladu dosiahnutého inými prostriedkami.[24]

[21] Article 1(3) of Regulation No 2252/2004 provides that '[t]his Regulation applies to passports and travel documents issued by Member States'. Historically, the legislation concerning passports and travel documents began with the primary purpose of checking a state's own nationals when they went abroad. Secondly, even today it represents a means of checking the entry of foreigners into the state. Passports are internationally recognised legal instruments essential, according to legal writing, in order to allow freedom of movement for persons between States. Because of the particular rules of the Schengen *acquis* which abolished checks on persons at internal borders, the international movement of persons in respect of whom passport checks are required takes place at the external borders of the Schengen States.

[22] The development of the rules of insolvency proceedings in community law has Kafkaesque overtones, due not to the length of time it has taken but rather to the fact that the proposed convention underwent a mutation, similar to the transformation of Gregor Samsa, which had a significant impact on the development of those provisions. The idea of regulating insolvency proceedings within the Community has its origins in Article 220 of the EC Treaty (now Article 293 EC), which calls upon the Member States, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals, *inter alia*, the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. That provision gave rise, first of all, to the well-known 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('the Brussels Convention')... The Istanbul Convention left its mark on the subsequent process of drafting the Regulation, because, with a view to avoiding the complexities of the 1985 draft convention, an ad hoc group of national experts finalised the text of the Convention on Insolvency Proceedings, done at Brussels on 23 November 1995, which has a less rigid approach and simpler solutions… Since not all 15 Member States acceded to it, the 1995 convention collapsed irrevocably. However, as a result, the convention underwent a transformation, rather like a chrysalis: its content was unaltered but its legal status changed so that it ceased to be an international treaty and became a regulation pursuant to the second paragraph of Article 249 EC.

[23] In any event, elements from the legislative history of measures are of lower-ranking importance for purposes of interpretation. According to the Court's case-law, even formal declarations concerning the adoption of the legal measure in question cannot be used for the purpose of interpreting a provision of secondary legislation where no reference is made to the content of the declaration in the wording of the provision in question. The true meaning of a provision of Community law can be derived only from that provision itself, having regard to its context. This finding of the Court must apply *a fortiori* in regard to statements which a Commission representative makes before a Council working party. In view of the fact that, as indicated above, there is nothing in the wording of Article 8 to suggest that separation of funds is adequate for the purpose of its implementation, factors relating to the legislative history of the Directive also cannot lead to any different interpretation.

[24] That interpretation is confirmed by a joint declaration of the Commission and the Council, contained in the minutes of the session at which the directive was adopted, which states "periods of practical training incorporated into the course culminating in an examination do not affect the full-time nature of such training".

Podobný postoj súd zaujal v prípade C-292/89 Antonissen [1991] ECR I-745, ods. 18, podľa ktorého sa nemožno odvolávať na vyjadrenia, ktoré odzneli počas rokovania Rady, ak sa nijak na ne dotknuté ustanovenie neodvoláva.[25] Potvrdzuje to aj prípad C-402/03 Skov a iní [2006] ECR I-0000, ods. 42,[26] ktorý odkazuje na ďalší podobný prípad - C-375/98 Epson Europe [2000] ECR I-4243, ods. 26,[27] odkazujúci zasa na iný veľmi podobný prípad – konkrétne dva spojené prípady C-197/94 a C-252/94 Bautiaa a Société Française Maritime [1996] ECR I-505, odsek 51.[28] V prípade 429/85 Komisia v. Taliansko [1988] ECR 843, ods. 9 súd vyhlásil, že výklad vychádzajúci z deklarácie Rady nemôže dospieť k inému výsledku ako výklad opierajúci sa o doslovné znenie dotknutej smernice.[29] Napokon aj v prípade 237/84 Komisia v. Belgicko [1986] ECR 1247, ods. 17 súd konštatoval, že skutočný zmysel právnych noriem spoločenstva sa dá vyvodiť iba z ich znenia.[30]

Podobne sa v rozsudku súdu prvej inštancie (piatej komory) z 29. novembra 2006 vo veci T 33/02 Britannia Alloys & Chemicals Ltd. v. Komisia konštatuje prednosť doslovného gramatického výkladu.[31] Potvrdzujú to aj rozhodnutia ako C-245/97 Nemecko v. Komisia [2000] ECR I-11261, odsek 72[32]

[25] However, such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance.

[26] On this point, first, it must be recalled that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision (see, in particular, Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18, and Case C-375/98 Epson Europe [2000] ECR I-4243, paragraph 26).

[27] As regards the Portuguese Government's argument that it is clear from various documents and, in particular, from a declaration of the Council that ISD was excluded from the scope of Article 5(1) of the Directive, there is no basis for that contention in the wording of the Directive. Moreover, according to settled case-law, declarations recorded in Council minutes in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance (see Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18, and Joined Cases C-197/94 and C-252/94 Bautiaa and Société Française Maritime [1996] ECR I-505, paragraph 51).

[28] It should be noted in that regard, first, that the French Government was unable to provide any information on the question whether the declaration relied on by it was ever recorded in the minutes of the Council meeting. Moreover, it is settled case-law that declarations recorded in Council minutes in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance (see the judgment in Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18).

[29] It must be observed in this regard that an interpretation based on a declaration by the Council cannot give rise to an interpretation different from that resulting from the actual wording of the fourth indent of article 8 (1) of the Directive.

[30] That argument is irrelevant. The Court has consistently held that the true meaning of rules of community law can be derived only from those rules themselves, having regard to their context. That meaning cannot therefore be affected by such a statement.

[31] It is settled case-law that the literal interpretation method should be used where the text of a provision is clear and unambiguous and clearly covers the situation in question (Case C-245/97 *Germany* v *Commission* [2000] ECR I-11261, paragraph 72, Case C-133/00 *Bowden and Others* [2001] ECR I-7031, paragraphs 38 to 44; Opinion of Advocate General Mayras in Case 67/79 *Fellinger* [1980] ECR 535, at 547).

[32] Nevertheless, it is important to bear in mind that the need to ensure legal certainty means that rules must enable those concerned to know precisely the extent of the obligations which they impose on them. The Commission thus cannot choose, at the time of the clearance of EAGGF accounts, an interpretation which departs from and consequently is not dictated by the normal meaning of the words used (see, to that effect, Case C-233/96 Denmark v Commission [1988] ECR I-5759, paragraph 38).

(odkazuje na C-233/96 Dánsko v. Komisia [1988] ECR I-5759, ods. 38),[33] či C-133/00 Bowden a ostatní [2001] ECR I-7031, odseky 38-44.[34]

Zhrnutie

Z viacerých spôsobov využívania historickej argumentácie v praxi slovenských súdov v prípade preskúmania judikatúry Európskeho súdneho dvora nachádzame iba obmedzený počet možností využívania právnej histórie.

Zo spôsobov využívaných v československých podmienkach nachádzame v praxi ESD iba

- objasnenie pôvodu právneho inštitútu v kontexte svetových právnych dejín
- historický kontext právnej úpravy a zaradenie právnej normy do súvislostí jej kreácie
- popretie, resp. spochybnenie historického právneho inštitútu, resp. právneho výkladu v nových podmienkach a
- jednoduché konštatovanie historického vývoja a formálne deklarovanie využitia historického výkladu bez ďalšieho hodnotiaceho významu.

Historické právo sa tu nevyužíva, rovnako ako ani negatívna historická skúsenosť podčiarkujúca význam dotknutého právneho inštitútu. Reštitučné spory a náprava minulých krívd sú skôr doménou Európskeho súdu pre ľudské práva, ktorému sa v tomto príspevku kvôli obmedzenému rozsahu nevenuje pozornosť. Spôsob argumentácie negatívnou historickou skúsenosťou je zrejme príznačnejší

[33] he first point to be borne in mind here is the need to ensure legal certainty, which means that rules must enable those concerned to know precisely the extent of the obligations which they impose on them (see, to that effect, Case 348/85 Denmark v Commission [1987] ECR 5225, paragraph 19). The Commission thus cannot choose, at the time of the clearance of EAGGF accounts, an interpretation which departs from and is not dictated by the normal meaning of the words used (see, to that effect, Case 349/85 Denmark v Commission [1988] ECR 169, paragraphs 15 and 16).

[34] Pursuant to Article 1(3), the Directive shall apply to all sectors of activity ... with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training. It is clear that, by referring to air, rail, road, sea, inland waterway and lake transport, the Community legislature indicated that it was taking account of those sectors of activity as a whole, whereas in the case of other work at sea and the activities of doctors in training it chose to refer precisely to those specific activities as such. Thus, the exclusion of the road transport sector in particular extends to all workers in that sector. Contrary to the appellants' contention, there is nothing in Article 17(2.1)(c)(ii) of the Directive to detract from that interpretation. As the Advocate General observes in point 38 of his Opinion, that provision, whose purpose is not to widen the scope of the Directive as defined by Article 1(3), is specifically concerned with workers who, although employed in ports or airports, do not fall within the sea or air transport sectors in the strict sense, such as catering workers, shop assistants, porters or dockers. Furthermore, the Community legislature was aware of the limits of the protection provided for in 1993, since it considered it appropriate to make clear, in the 16th recital in the preamble to the Directive, that given the specific nature of the work concerned, it may be necessary to adopt separate measures with regard to the organisation of working time in certain sectors or activities which are excluded from the scope of this Directive. The travaux préparatoires for the Directive, to which reference is made in paragraph 35 of this judgment, confirm that, in departing from the Commission's alternative proposals, the Council chose intentionally to exclude from the scope of the Directive all workers in the sectors concerned. Consequently, as indeed is clear from the third recital in the preamble to Directive 2000/34, the amendments made by it to the Directive, in particular as to the scope of the Directive, are not, contrary to the appellants' contention, purely declaratory. It follows that the answer to the questions submitted must be that, on a proper construction of Article 1(3) of the Directive, all workers employed in the road transport sector, including office staff, are excluded from the scope of the Directive.

pre špecifické národné skúsenosti štátov strednej a východnej Európy. Zato však v praxi ESD nachádzame navyše ešte inú formu historickej argumentácie, konkrétne vo forme konštatovania nedostatočných informácií k procesu tvorby právnej normy. V zmienenom prípade ide o špecifikum tvorby európskeho práva ako kombinácie národných prvkov a nových úprav.

Vo všeobecnosti sa však judikatúra Európskeho súdneho dvora stavia k historickému výkladu (ale nie k historickej argumentácii) odmietavo, uprednostňujúc doslovný gramatický výklad. Skúmanie okolností prijatia právnej úpravy povoľuje len v prípade, že text právnej normy výslovne odkazuje na niektoré okolnosti alebo materiály z procesu prípravy. Je to v súlade s prevládajúcim názorom, považujúcim historický výklad za nadštandardnú metódu výkladu, ktorá by sa mala používať len keď iné metódy nevedú k žiadnemu jednoznačnému riešeniu, pričom však závery, ku ktorým sa za použitia predmetnej metódy dospeje, by nemali odporovať výsledkom použitia štandardných výkladových metód.[35]

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TEORETICKO PRÁVNE REFLEXIE O VZNIKU HOSPODÁRSKEHO PRÁVA

DUŠAN HOLUB

KATEDRA OBCHODNÉHO PRÁVA OBCHODNEJ FAKULTY EKONOMICKEJ UNIVERZITY V BRATISLAVE

Abstrakt

Hospodárske právo bolo vytvorené ako nové, samostatné právne odvetvie, ktoré upravuje vzťahy v socialistickej ekonomike. Oblasť výroby upravená hospodárskym zákonníkom sa právne oddelila od oblasti spotrebiteľskej, ktorá bola upravená občianskym zákonníkom. Hranica medzi legislatívnou úpravou občianskeho práva a hospodárskeho práva bola veľmi ostrá a zásadne neprekročiteľná. Jednalo sa o právnu úpravu konštruovanú na odlišný hospodársky systém, ako je súčasný. Pre ekonomiku založenú na súkromnom vlastníctve a trhových vzťahoch je socialistické hospodárske právo nepoužiteľné.

Kľúčové slová

Hospodárske právo, hospodárskoprávne vzťahy, socialistické organizácie, akty hospodárskeho riadenia, socialistická ekonomika, hospodársky zákonník, hospodársky systém.

Abstract

Economic law was created like new, independent law subdivision, which arranges relations in socialist economy. The bounds between legislative modification of civil and economic law was very sharp and radically uncrossable. The area of production alternated by Economic Code has legally separated from the consumer's one, which was alternated by Civil Code. It dealt about legal alternation constructed for a different economic system, like the present one. For the economy based on private ownership and market relations is socialist economic law unusable.

Key words

Economic law, economy-law relations, socialist organizations, acts of econimic control, socialist economy, Economic Code, economic system.

Od roku 1950 sa v oblasti právnej úpravy ekonomických vzťahov uberal vývoj tým smerom, že stále väčšie komplexy hospodárskoprávnych otázok boli upravované špeciálnymi predpismi. „ Veľký počet právnych predpisov nižšej právnej sily a ich časté zmeny, ktoré upravovali zmluvný systém viedol k neprehľadnosti. Začala sa prejavovať roztrieštenosť a neprehľadnosť právnych úprav.“ [1]

Rozsiahle splnomocnenia na vydanie vykonávacích predpisov viedli k rozvoju neprehľadného systému zákonodarstva a neskôr do myšlienky a doktríny hospodárskeho práva. Doktrína hospodárskeho práva nadväzovala na niektoré prúdy, ktoré sa objavili v sovietskej právnej teórii [2], kde sa však nerozvinuli alebo aspoň nevyústili do významného legislatívneho a kodifikačného diela. Podstatou doktríny hospodárskeho práva bola téza, že v socialistickej ekonomike vznikajú kvalitatívne nové vzťahy, s natoľko špecifickými rysmi, že ich vyčleňujú do zvláštnej kategórie. „Označení hospodářsko právní vztahy není samoúčelné. Zákon jím chce naznačit, že právní vztahy, které budou podle něho vznikat, budou tvořit určitý vzájemně souvisící celek, odlišný od právních vztahu upravovaných tradičními právními odvětvími, zejména právem občanským a právem správním“. [3]

Sovietsky zväz si uchoval základy občianskeho zákonodarstva ako aj občianske zákonníky pre jednotlivé republiky Sovietskeho zväzu a nikdy neschválil hospodársky zákonník. Na hospodárskoprávne vzťahy boli v Sovietskom zväze vždy subsidiárne aplikovateľné civilné kódexy. Na druhej strane stále prebiehali doktrinálne spory o systém práva a postavenie právnych odvetví.

V teoretických diskusiách o hospodárskom práve sa riešila otázka či je hospodárske právo zvláštne, samostatné právne odvetvie, alebo či je samostatnou časťou občianskeho práva, alebo či hospodárske právo vôbec existuje a právna úprava hospodárskych vzťahov tvorí integrálnu súčasť občianskeho práva. Jeden z názorov bol, že právna úprava hospodárskoprávnych vzťahov má byť koncipovaná ako nové, samostatné právne odvetvie, nezávislé na občianskom práve, ktoré upravuje zásadne odlišné vzťahy.

Názor, že hospodárske právo je samostatným právnym odvetvím získal mnohých priaznivcov, nebol však jednoliaty.

Dôvodom, ktorý nedovoľoval podriadenie hospodárskoprávnych vzťahov občianskemu alebo správnemu právu malo byť to, že tieto vzťahy sú upravené dvojitou metódou právnej úpravy, obsahujú dvojité rozdielne a navzájom neoddeliteľné prvky. Tieto dve metódy a dva prvky boli vzťahy vertikálne

[1] Suchoža,J.*:* Hospodárske zmluvy, In: Právny obzor, Bratislava 1985, s. 33.
[2] bližšie pozri Pelikánová, I. : K diskusi o hospodářském právu v sovětské právnické literatuře, In AUC Iuridica, 1979, 1-2, s. 95 - 133
[3] Čapek, K. – Kvasnička,V.: O československý hospodářský zákoník. In: Právník 1963, s. 568.

a horizontálne. Konkrétne išlo o to, že horizontálne vzťahy medzi navzájom rovnocennými organizáciami vznikali síce na základe zmlúv ako bežné záväzkové vzťahy, ale ich vznik, zmena, zánik a tiež ich obsah boli ovplyvňované vertikálne zásahmi riadiacich orgánov, tzv. aktov hospodárskeho riadenia. „ ...vzťahy, do ktorých socialistické organizácie pri uskutočňovaní svojej hospodárskej činnosti vstupujú, sú jednak vzťahy po ose vertikálnej, teda vytvárané zo strany hospodárskych orgánov pri riadení národného hospodárstva a jednak vzťahy osi horizontálnej, do ktorých vstupujú hospodárske organizácie v rámci kooperácie s inými hospodárskymi organizáciami pri realizácii svojej plánovanej hospodárskej činnosti. Určujúcim znakom týchto vzťahov je ich plánovitý charakter.“ [4]

Aktami hospodárskeho riadenia bolo možné založiť, zmeniť a zrušiť záväzkové vzťahy, určoval sa nimi obsah a predmet týchto vzťahov. Akty hospodárskeho riadenia totiž určovali povinnosť uzavrieť zmluvu a tiež predmet, lehoty, rozsah a cenu dodávok atď. Vertikálne prvky tak prenikali do všetkých prvkov horizontálnych záväzkových vzťahov. Reálne prítomným súkromnoprávnym rysom týchto vzťahov bola len určitá obmedzená vôľa účastníka zmluvy, ktorý uzavieraním zmluvy plnil vlastne skôr príkaz, ako prejavoval svoju vlastnú vôľu. Vlastné záujmy boli týmto subjektom pojmovo odoprené. Opakovane sa deklarovalo, že vlastná vôľa účastníka zmluvy je v službách jeho funkcie ako výkonného článku socialistickej ekonomiky. Napriek tomu však samozrejme vlastné záujmy zmluvných strán existovali a narušovali systém. Záväzkové právo sa tak stalo nástrojom, ktorý mal vytvárať právne vzťahy, ktoré sa od skutočných záväzkov veľmi vzdialili. V hospodárskom práve mali byť spoločne upravené vzťahy medzi rovnoprávnymi subjektami – socialistickými organizáciami a vzťahy nadriadenosti a podriadenosti, resp. vzťahy nadradenosti, nerovnosti. Majetkové vzťahy medzi socialistickými organizáciami sa považovali za odlišné od obdobných vzťahov, ktorých subjektami sú občania, pretože sa uskutočňujú na základe štátneho plánu a na jeho realizáciu a teda sú tesne a nerozlučne spojené so vzťahmi v oblasti riadenia národného hospodárstva. Preto potom podľa tohto názoru aj vzťahy socialistických organizácií nadobúdajú kvalitatívne odlišný charakter ako vzťahy, ktorých subjektami sú občania a preto nemôžu byť predmetom občianskeho práva, ale sú predmetom samostatného hospodárskeho práva.

Hospodárskoprávna legislatíva sa usilovala koncipovať komplexný právny predpis, ktorý by zahŕňal nielen zmluvnú sústavu, ale aj sústavu riadiacich a plánovacích vzťahov. Začal sa spor o existenciu hospodárskeho práva, ako samostatného právneho odvetvia, ku ktorému dal podnet článok S. Stunu : „K otázce kodifikace majetkových práv občanu a hospodářských práv a povinností socialistických organizací „ uverejnený v Socialistickej zákonnosti. S. Stuna v tomto článku vysvetlil dôvody, prečo treba pristúpiť k rekodifikáciám a zároveň sa postavil proti tomu, aby bola zachovaná doterajšia

[4] Šimovič, M.: K novému hospodárskemu zákonníku,In: Právny obzor 162, s. 205

jednotná úprava majetkových vzťahov v občianskom zákonníku. Vyslovil sa pre vydanie dvoch kódexov : občianskeho a hospodárskeho zákonníka. Svoje stanovisko odôvodnil rozporom, ktorý panuje medzi osobnou a hospodárskou sférou. V diskusii ku kodifikačným prácam na stránkach Právníka vystúpilo niekoľko ďalších autorov, ktorí buď podporovali Stunovo stanovisko alebo dochádzali k záveru o nutnosti oddelenej legislatívnej úpravy.

Myšlienky o samostatnom kódexe hospodárskeho práva a jeho uznaní za zvláštne právne odvetvie sa ujali niektorí právnici z oblasti teória a praxe. Z. Kratochvíl napísal, že tradičné občianske právo vo svojom univerzalistickom vyjadrení stále viac zastaráva a že od vydania zákona č. 69/1958 Zb., o hospodárskych vzťahoch socialistických organizácií, občiansky zákonník už pre hospodársku sféru aj tak takmer neplatí.

Podľa I. Tomsovej mal byť hospodársky zákonník základom vzniku nového právneho odvetvia, hospodárskeho práva, nemal však byť rozhodujúcim pre určenie jeho rozsahu a obsahu. „ Pracovníci praxe, zejména pacovníci hospodářských organizací na poradách a konferencích se vyslovili pro řešení zásadních problémů v jednom kodexu, což je jistě z hlediska praxe vhodné a účelné. Nutno si však položit otázku, zda vznikem kodexu vzniká odvětví práva a zda rozsahem kodexu je dán i rozsah a obsah odvetví práva“. Právne odvetvie vzniká vždy pri vytvorení nových vzťahov a pokiaľ je na tom spoločenský záujem. „ Vznikem souhrnné právní úpravy určitých problému ve formě jednoho právního předpisu – kodexu – právní odvětví nevzniká. Komplexní právní úpravy nemusí vůbec vést ke vzniku nového odvětví práva.-“ [5]

Vydanie samostatného hospodárskeho zákonníka podporili tiež J. Kobr, J.Štěpina a M. Šimovič.

S určitými výhradami podporila vydanie Hospodárskeho zákonníka M. Knappová.

Pre hospodársky zákonník a pre rozbitie jednoty občianskeho práva boli tiež J. Eliáš a J. Glos, ktorí tvrdili, že je to väčšinové stanovisko českej právnickej obce. Napriek sile tejto skupiny a skutočnosti že jej názory zodpovedali plánom vedenia KSČ na prijatie troch samostatných kódexov – občianskeho zákonníka, hospodárskeho zákonníka a zákonníka medzinárodného obchodu namiesto doterajšieho jednotného občianskeho zákonníka sa našli aj takí, ktorí sa postavili pri týmto názorom. Medzi tých, ktorí vystupovali zásadne proti, patrili najmä civilisti V. Knapp**,** ďalej A. Kanda, a tiež J. Boguszak . Z dalších, ktorí nesúhlasili so zamýšľanou dezintegráciou občianskeho práva môžeme uviesť J. Fialu M. Knappovú a J.Švestku.,– „Leges imperfectae sa vyskytujú aj v práve občianskom, najmä v onej jeho časti, ktorú niektorí nazývajú právom hospodárskym.“ ***[6]***

[5] Tomsová, I.: Poznámky k problému hospodářského práva. In: Právník 1963, s. 578 a nasl.

[6] M. Knappová: Povinnost a odpovědnost v občanském právu. Praha 1968, s.27

Celú diskusiu nakoniec predčasne uzavrel administratívny zásah ÚV KSČ, ktorý znemožnil uverejniť stanoviska A. Kandu, ktorý nesúhlasil s oficiálnou líniou strany. „Autor (A.Kanda) byl od počátku odpůrcem této koncepce a své stanovisko vyjádřil již na počátku legislativních prací v lednu 1961. Stať, v níž bylo toto stanovisko podrobně zdůvodněno, nebyla tehdy v Právníku uveřejněna. Domnívám se, že v diskusi o nové koncepci našich kodexů nebylo náležitě teoreticky zdůvodneno, proč se naše legislativní praxe dala touto ojedinělou cestou, která se odlišuje od legislativní úpravy obdobných společenských vztahů v ostatních socialistických zemích. „ [7]

Uznesenie ÚV KSČ stanovilo, že úpravu občianskeho zákonníka treba zamerať na každodenné vzťahy, do ktorých vstupujú občania pri uspokojovaní svojich osobných hmotných a kultúrnych potrieb. Ďalej bolo rozhodnuté, že do občianskeho zákonníka nepatrí úprava vzťahov medzi socialistickými organizáciami.

Okrem toho boli samostatne upravené vzťahy v oblasti zahraničného obchodu. Uznesenie ÚV KSČ ukazovalo tiež na snahu rozhodnúť základné vedecké otázky politicky, bez náležitého zváženia argumentov. „ ...publikovaných prací teoreticky jej (hospodářský zákoník) zdůvodňujících je však v československé literatuře pomerně málo“ [8] Administratívne presadzovanie určitých názorov neviedlo k dobrým výsledkom. Pri práci na príprave nových kódexov sa neskúmalo, či a hlavne v čom tie staré nevyhovujú. „ Zpráva velmi přesně rozlišuje dva základní důvody změn právního řádu. Jednak důvod objektivní, tzn. změna společenských vztahů, která nezbytně vyžaduje změnit práva, a jednak důvody subjektivní; na subjektivních důvodech není nic špatného, ale jde o subjektivistické, totiž takové změny právního řádu, které nejsou nutné a které jsou prováděny proto, že se místo operativní činnosti, místo ekonomické činnosti sahá po právním předpisu. l v současném stavu jsme velmi daleko od toho, aby byla zabezpečena plná objektivnost příčin změn právního řádu, a zejména v podzákonné normotvorbě jsou ještě případy - abych tak řekl - hypertrofie právního řádu a zbytečnosti některých právních předpisů..“[9] Rudolf Bystrický k tomu uvádza :“ Nelze považovat za uspokojující jev, že stejné společenské vztahy jsou nově upravovány v jednotlivých socialistických zemích způsobem často odlišným co do systematiky, obsahu i formy, že tyto odlišnosti nejsou odůvodněny objektivními příčinami “[10] A. Kanda požadoval dokázať správnosť našej koncepcie. „ Aby tedy správnost našich připravovaných kodexů byla spolehlivě dokázána, bylo by třeba buď vědecky vyvrátit správnost koncepce sovětské, maďarské atd., nebo dokázat, že v ekonomice naší země jsou takové odlišnosti od ekonomiky sovětské a ostatních socialistických zemí, které odůvodňují odlišnou koncepci právní úpravy

[7] Kanda, A.: Některé obecné otázky návrhu občanského zákoníku. In:Právník 9/1963, s.700.

[8] Knapp,V., Plank ,K.: Učebnice československého občanského práva, Orbis, Praha 1965, s.19, poznámka pod čiarou.

[9] Stenoprotokol z vystúpenia V. Knappa na 11. schôdzi Národného zhromaždenia ČSSR 30.6.1966. www/psp.cz/eknih/1964pns/stenoprot/011schuz.

[10] Bystrický, R.: Za marxistickou srovnávací pravovědu, In: Právník č.8/1962, s.710.

majetkových vztahů a odlišný systém práva v ČSSR. Takovéto argumenty však podávány nebyly a podlé mého názoru ani nejsou. Jestliže u nás byla zvolena koncepce, která se od koncepce ostatních socialistických zemí velmi odlišuje, bylo by tím více třeba tuto odlišnost přesvědčivě zdůvodnit.“ [11]

Potom, čo bolo takto politicky rozhodnuté o základnej koncepcii prác na kodifikácii občianskoprávnych vzťahov a prakticky umlčaná akákoľvek ďalšia diskusia, boli zahájené prípravné práce na občianskom zákonníku (Ministerstvo spravodlivosti), hospodárskom zákonníku (Štátna arbitráž ČSSR) a zákonníku medzinárodného obchodu (Ministerstvo zahraničného obchodu).

Zloženie komisií ktoré mali pripravovať uvedené zákonníky bolo obmedzené na stúpencov prijatej koncepcie, komisie boli vytvorené len z tých, ktorí predtým nemali žiadne námietky. Práce prebiehali s vylúčením akejkoľvek možnosti oponentúry a výsledok práce tomu potom plne zodpovedal. Výsledok týchto prác, ktoré prebehli v dvojročnicovom tempe, na rozdiel od rokov 1948-1950 však bez využitia skúseností a tradícií je známy v podobe troch kódexov a to: Občianskeho zákonníka - zákon.č.40/1964 Zb. prijatý 28.2.1964, účinnosť nadobudol 1.4.1964, Hospodárskeho zákonníka - zákon č.109/1964 Zb. prijatý 17.6.1964, účinnosť nadobudol 1.7.1964 a Zákonníka medzinárodného obchodu - zákon č. 101/1963 Zb. prijatý 4.12.1963, účinnosť nadobudol 1.4.1964.

Všetky tri kódexy upravovali súkromnoprávne vzťahy, pričom ani jeden z nich nebol chápaný ako všeobecný. Ich samostatnosť vo vzájomnej relácii bola tak výrazná, že mnohé ustanovenia sa v každom z nich prekrývali resp. opakovali. Teoreticky sa potom z existencie samostatných kódexov odvodzovala dokonca samostatnosť troch právnych odvetví, práva občianskeho, hospodárskeho a zahraničného obchodu. Tieto kodifikácie vychádzali z ucelenej teórie, ktorá reagovala na novú politickú a ideologickú objednávku. „Kodifikácie z týchto rokov boli radikálnym rozchodom s právnou tradíciou predvojnového obdobia. Ideologizácia práva tu dosiahla svoj vrchol, ako aj jeho kvalitatívna a kvantitatívna redukcia. Bol prijatý systém oddelených zákonníkov, ktorý narušil jednotu právneho poriadku a ktorý viedol k novodobému právnemu partikularizmu. „ [12]

Občiansky zákonník síce ostal hlavnou normou pre úpravu občianskoprávnych vzťahov, ale jeho význam vzhľadom na vymedzenie predmetu upadol. Predmet úpravy občianskeho zákonníka bol obmedzený len na majetkové a osobné vzťahy, ktoré vznikali v oblasti uspokojovania osobných potrieb, ktorých subjektami boli len vtedajšie socialistické organizácie a občania, ako aj tie spoločenské vzťahy, v ktorých

[11] Kanda, A.: Některé obecné otázky návrhu občanského zákoníku, In:Právník 9/1963, s. 700.

[12] Pelikánová I. a kol. : Obchodní právo I.díl, Codex Bohemia, Praha 1998, s. 37.

vystupovali občania medzi sebou navzájom. Občianskoprávna úprava vlastníctva sa sústredila len na právnu úpravu osobného vlastníctva, ktorého predmetom boli spotrebné predmety získané predovšetkým prácou. Každý z týchto kódexov sa aplikoval na stanovený okruh vzťahov samostatne. Medzi zákonníkmi nebol pomer subsidiarity.

Dôsledkom toho bolo, že vzťahy s cudzím prvkom, ktoré podliehali československému právu, boli podriadené len zákonníku medzinárodného obchodu, ale nie občianskemu, hospodárskemu atď. zákonníku. Režim týchto vzťahov bol oddelený od režimu tuzemských vzťahov.

Ďalším dôsledkom bolo, že vzťahy medzi socialistickými organizáciami boli upravené len hospodárskym zákonníkom. Občiansky zákonník upravoval len vzťahy medzi občanmi navzájom alebo medzi občanmi na jednej strane a socialistickými organizáciami na druhej strane. Hospodársky zákonník iba v dvoch prípadoch pripúšťal použitie ustanovení Občianskeho zákonníka. Hranica medzi legislatívnou úpravou občianskeho práva a hospodárskeho práva bola veľmi ostrá a zásadne neprekročiteľná. Oblasť výroby upravená hospodárskym zákonníkom sa právne oddelila od oblasti „spotrebiteľskej“, ktorá bola upravená občianskym zákonníkom.

Hospodárske právo bolo disciplínou úplne odlišnou od obchodného práva. Rozdiel medzi obchodným a hospodárskym právom nespočíva len v autonómii hospodárskeho práva, jeho oddelení a relatívne samostatnom vývoji. Rozdiel je najmä v podstate. Hospodárske právo bolo predovšetkým právom verejným, obchodné právo bolo predovšetkým právom súkromným, aj keď bolo poznamenané početnými prvkami verejného práva. Vertikálne vzťahy boli vzťahy mocenské, vzťahy riadiace, horizontálne vzťahy boli vzťahy koordinačné, nie konkurenčné. Nestála proti sebe rôzna vôľa, ale len nositelia rôznych funkcií v rámci tej istej jedinej a zvrchovanej plánovacej vôle. Hospodárske právo bolo vytvorené ako nové, samostatné právne odvetvie, ktoré upravuje vzťahy v socialistickej ekonomike. Jednalo sa o právnu úpravu konštruovanú na odlišný hospodársky systém, ako je súčasný. Pre ekonomiku založenú na súkromnom vlastníctve a trhových vzťahoch je socialistické hospodárske právo nepoužiteľné.

Kodifikácie z rokov 1963-65 mali prispieť hlavne k zjednodušeniu právneho poriadku čo sa podarilo, ale len čo sa týka počtu právnych predpisov. Sám hospodársky zákonník zrušil 101 zákonov, vládnych nariadení, vyhlášok a základných podmienok dodávky. V určitých smeroch ale skomplikovali právny poriadok tým spôsobom, že niektoré právne inštitúty, ktoré boli predtým upravené v jednom právnom predpise, boli teraz upravené vo viacerých právnych predpisoch. Rozdrobenosť právnej úpravy sa prejavila v právnej úprave jednotlivých právnych inštitútov, ktoré boli bez zvláštnych dôvodov

rozdielne upravené v jednotlivých kódexoch. Napr. právna úprava zodpovednosti za škodu bola samostatne a rozdielne upravená v občianskom zákonníku, hospodárskom zákonníku, v zákonníku práce ako aj v zákonníku medzinárodného obchodu, alebo právne postavenie socialistických organizácií, ktoré bolo upravené v štyroch právnych predpisoch. Nejednotná úprava bola ťažko zrozumiteľná nielen pre právnikov. Napriek služobnosti koncepcie hospodárskeho práva voči panujúcemu politickému režimu obsahovala hospodárskoprávna úprava niektoré racionálne prvky, napr. veľa výhod mala úprava neverejného a rýchleho arbitrážneho konania.

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ACTIO EXERCITORIA ET INSTITORIA ANEB PŘÍMÉ ZASTOUPENÍ V ŘÍMSKÉM OBCHODNÍM PRÁVU

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Abstrakt

Actio exercitoria et institoria patří do skupiny tzv. adjektických žalob (*actiones adiecticiae qualitatis*), které byly do římského právního řádu implementovány ediktální činností prétora ca. ve 2 stol. před Kristem. Tato intervence prétora právně reglementovala obchodní závazkové vztahy, které z pověření (*praepositio*) nositele moci (*dominus, paterfamilias*) uzavíraly jeho jménem a na jeho účet osoby *alieno iuri subiectae*. *Dominus* pak za takovéto závazky odpovídal *in solidum*.

Klíčová slova

Actio exercitoria, actio institoria, adjektické žaloby, praepositio, přímé zastoupení, odpovědnost in solidum

Abstract

Actio exercitoria et institoria belongs to the group of so called adjective actions (*actiones adiecticiae qualitatis*), which were implemented in the Roman legal order by edictal activity of a praetor during the 2nd century B.C. Such a praetor´s intervention reglemented commercial contractual relationships, which were concluded by persons *alieno iuri subiectae* on the authority of (*praepositio*) a potentate (*dominus, paterfamilias*) in his name and on his account. Consequently, *dominus* was liable for such obligations *in solidum.*

Key words

actio exercitoria, actio institoria, adjective actions, praepositio, direct representation, liability in solidum

I. Adjektické žaloby

Actio exercitoria a actio institoria patří do skupiny tzv. adjektických žalob (actiones adiecticiae qualitatis), které byly do římského „právního řádu“ zavedeny zhruba ve 2. století před Kristem a to

ediktální činností prétora. Dříve než se zaměříme na výše zmíněné žaloby, řekněme si několik slov k adjektickým žalobám jako takovým.

Adjektické žaloby jsou pozoruhodné hned z několika pohledů, přestože jsou jim v učebnicích a manuálech římského práva obvykle věnovány maximálně dvě stránky. Jsou zajímavé nejen dogmaticky, protože představují výjimku z pravidla, že obligatio est vinculum iuris, tedy že obligace je ryze osobní vztah a nemůže v zásadě účinkovat vůči třetím osobám, které nejsou na obligačním vztahu zúčastněné. Dále se zavedením adjektický žalob prétorem narušil teoreticko-právně politický postulát, že otrok je jen res a nikoliv osoba, schopna na základě své vlastní vůle jednat a uzavírat obchody a konečně za třetí, nám existence adjektických žalob zcela názorně demonstruje, že sociálně - ekonomický vývoj, kterým antický Řím, založený výlučně na otrokářské společnosti, procházel, se odrážel i ve společenské diferenciaci osob nesvobodných, tedy alieno iuri subiectae. Neboť z filius familias a otroků se postupně stávají podnikatelé a manažeři[1], kteří zastupují domina nebo pater familias což nám dokládají rozsáhlé pasáže z Digest, kde totiž hlavními protagonisty XIV. a XV. knihy jsou pouze a jenom otroci!

Označení adjektických žalob není původním římským názvem, ale termín adjektické žaloby získaly středověkou doktrínou a to sice spojením pasáže textu z Digest, kde Paulus použil tohoto výrazu pro zvláštní stav, kdy nositel moci (dominus) odpovídá nikoliv za vlastní jednání, ale za jednání druhého, tedy akcesoricky, jako další, někdy však i jako jediný dlužník (cfr. Item si servus meus navem exercebit et cum magistro eius contraxero, nihil obstabit, quo minus adversus magistrum experiar actione, quae mihi vel iure civili vel honorario competit: nam et cuivis alii non obstat hoc edictum, quo minus cum magistro agere possit: hoc enim edicto non transfertur actio, sed adicitur.)[2]

V pasáži týkající se adjektických žalob, o kterých Gaius pojednává ve čtvrtém komentáři (cfr. Gai. Inst. 4, 69 – 4, 74a) nenacházíme ani jedinou zmínku o jejich formulové podobě a struktuře těchto formulí. Svoji pozornost věnuje pouze předpokladům užití těchto žalob a různým způsobům odpovědnostních vztahů, tedy ručení in solidum či omezenému ručení do hodnoty pekulia a zmiňuje, že byly připuštěny pro vykonávání obchodní činnosti jak na souši tak na moři prostřednictvím osob svobodných či alieno iuri subiectae (Gai. Inst. 4, 71), či k vykonávání obchodní činnosti na základě iussum (Gai. Inst. 4, 70) nebo do výše pekulia (Gai. Inst. 4, 72 – 4, 73). Co je však udivující, je to, že pouze o několik odstavců dále se Gaius věnuje formulím týkajících se tzv. procesního zastoupení (Gai. Inst. 4, 86), které se vyznačují záměnou subjektů, aniž by učinil jakýkoli odkaz na adjektické žaloby, kterým se věnoval o několik řádků

[1] Cfr. Di Porto, A. Impresa colletiva e schiavo manager in Roma antica. Milano: Giuffré, 1984 nebo Serrao, F. Impresa e responsabilità a Roma nell' età commerciale. Pisa: Pacini, 1989; Bonfante, G. – Cottino, G. L imprenditore. Torino: Casa editrice dott. Milani, 2001; Cerami, P. – Di Porto, A. – Petrucci, A. Diritto commerciale romano. 2. edizione. Torino: Giappichelli, 2004

[2] D. 14, 1, 5, 1

výše. Je opravdu velmi pozoruhodné, proč na tomto místě Gaius mlčí. Proč právě o struktuře adjektických žalob není žádná zmínka a žaloby z procesního zastoupení velmi obšírně popisuje do nejmenšího detailu? Mimo to, pokud by adjektické žaloby měly stejnou strukturu, proč by se nezmínil o nějakém odkazu, jak u něho bývá zvykem?

Vyvstává tedy otázka, zda-li v intenci adjektických žalob má být uvedena obligatio vztahující se přímo k osobě otroka nebo k osobě filius familias. Nicméně analýzou nám dostupných pramenů dopějeme jednoznačně k závěru, že obligatio v intenci označuje odpovědnost domina, tedy nositele moci. Nacházíme alespoň deset příkladů respons, kde je expressis verbis vyjádřeno, že závazek se vztahuje přímo k osobě domina či pater familias, tedy subjektu, do jehož právní sféry dopadají účinky vykonaného jednání. Vzhledem k tomu, že se budeme dále zabývat pouze exercitorní a institorní žalobou, uvádíme pouze ty pasáže z Digest, které se týkají těchto žalob (ostatní žaloby cfr. Ulp. D. 14, 3, 5, 11; Ulp. D. 14, 4, 1, 2; Ulp. D. 15, 1, 3, 3; Ulp. D. 15, 1, 3, 5; Ulp. D. 15, 1, 3, 6; Ulp. D. 15, 1, 3, 9; Ulp. D. 15, 1, 5, 1; Ulp. D. 15, 3, 3, 5):

Magistri autem imponuntur locandis navibus vel ad merces vel vectoribus conducendis armamentisve emendis: sed etiamsi mercibus emendis vel vendendis fuerit praepositus, etiam hoc nomine obligat exercitorem.[3]

Cuius autem condicionis sit magister iste, nihil interest, utrum liber an servus, et utrum exercitoris an alienus: sed nec cuius aetatis sit, intererit, sibi imputaturo qui praeposuit.[4]

Aequum praetori visum est, sicut commoda sentimus ex actu institorum, ita etiam obligari nos ex contractibus ipsorum et conveniri.[5]

Je třeba poznamenat, že veškeré zmíněné pasáže z Digest jsou z doby klasické, tedy velmi vzdálené původnímu režimu adjektických žalob, ty vznikly již v 2. století před Kristem. Ve skutečnosti, analyzujeme-li jednotlivé actiones adiecticiae qualitatis, velmi lehce si povšimneme, že sankcionovatelná odpovědnost se vztahuje pouze a výhradně k osobě nositele moci. Tedy kromě výše uvedených i jiné pasáže jasně poukazují na to, že jakákoliv činnost vykonaná institorem, magistrem navis nebo otrokem vybaveným pekuliem dává zrod obligačnímu poutu, které spočívá přímo v osobě pater familias či dominus.

[3] Ulp. D. 14, 1, 1, 3
[4] Ulp. D. 14, 1, 1, 4
[5] Ulp. D. 14, 3, 1

II. Actio exercitoria et institoria aneb obchodní zastoupení v antickém Římě

Obě žaloby byly připuštěny v důsledku rozvoje obchodních vztahů a obchodu vůbec. První z nich má svoji podstatu v okolnosti, kdy majitel rejdařské společnosti (exercitor) pověřuje velením na lodi svého zmocněnce (magister navis), ať už se jedná o osobu svobodnou, filius familias či otroka (cfr. infra). Obdobně je tomu i u actio institoria, kdy majitel obchodního nebo řemeslnického podniku pověří vedením tohoto podniku osobu alieno iuris, tedy tzv. institora.

Při čtení pramenů, které se týkají actiones exercitoria et institoria, je velmi snadné si povšimnout, že odpovědnost se vztahuje převážně, ne-li výlučně na majitele moci. Pouze v několika málo případech (cfr. infra) se odpovědnost vztahuje k osobě pověřené, navíc pokud se tak stává, pouze v nepřímé souvislosti s nařízeními obsaženými v ediktech týkajících se actiones exercitioria et institoria. V žádném z pramenů však nenacházíme konfiguraci, kdy by se obligatio nebo odpovědnost pověřené osoby svobodné či otroka dala jakýmkoli způsobem předvídat v ediktech. Titul Digest vztahující se přímo k actio exercitoria začíná následovně:

Utilitatem huius edicti patere nemo est qui ignoret. nam cum interdum ignari, cuius sint condicionis vel quales, cum magistris propter navigandi necessitatem contrahamus, aequum fuit eum, qui magistrum navi imposuit, teneri, ut tenetur, qui institorem tabernae vel negotio praeposuit, cum sit maior necessitas contrahendi cum magistro quam institore.[6]

Tento zásah prétora a tudíž připuštění žaloby proti nositeli moci zdůvodňuje podle Ulpiána to, že pro třetí osoby je velmi těžké se identifikovat s právně-ekonomickými podmínkami samotného magistra navis, s nímž mají vést danou obchodní činnost, což platí jak pro actio exercitoria tak i pro actio institoria (cfr. „sit maior necessitas contrahendi cum magistro quam institore“). V minulosti se však pochybovalo o autentičnosti této pasáže[7], Pugliese například tuto laudatio edicti považoval za podvrh a viděl daleko pádnější důvody vzniku těchto dvou adjektických žalob v argumentaci Gaia ve svých Institucích (cfr. „….quia aui ita negotium gerit magis patris dominive quam filii servive fidem sequitur“[8]), který hovoří o tom, že kdo vede daná jednání, spoléhá více na fides pána, nežli na fides otroka či syna. Samozřejmě, že Gaiovo svědectví je výraznější a pronikavější ve vztahu k adjektickým žalobám, nicméně oba zmiňované texty se nerozcházejí, jenom představují různé pohledy na stejnou

[6] Ulp. D. 14, 1, 1 pr.
[7] Např. Solazzi, Longo In Miceli, M. Sulla struttura formulare delle actiones adiecticiae qualitatis. Torino: Giappichelli, 2001, s. 191
[8] Gai. Inst. 4, 70 in fine

potřebu právní reglementace. Odlišná je však formulace, kterou Ulpianus uvádí část věnovanou actio institoria:

Aequum praetori visum est, sicut commoda sentimus ex actu institorum, ita etiam obligari nos ex contractibus ipsorum et conveniri. sed non idem facit circa eum qui institorem praeposuit, ut experiri possit: sed si quidem servum proprium institorem habuit, potest esse securus adquisitis sibi actionibus: si autem vel alienum servum vel etiam hominem liberum, actione deficietur: ipsum tamen institorem vel dominum eius convenire poterit vel mandati vel negotiorum gestorum. Marcellus autem ait debere dari actionem ei qui institorem praeposuit in eos, qui cum eo contraxerint.[9]

Podle Ulpiána je tedy v rámci ekvity, když nositel moci, který profituje z činnosti svých institorů, je taktéž „obligatus" za dluhy vznikající z obchodů, které institoři uzavřeli a může být tedy žalován za jejich plnění (cfr. „ita etiam obligari nos a contractibus ipsorum et conveniri"). Není tedy pochyb o tom, že právníci pohlíželi na actiones exercitoria et institora nejen z úhlu odpovědnosti, ale dbali též ochrany víry třetích osob a ekvity v oblasti obchodních vztahů. Vazby na utilitas, fides a aequitas jsou natolik explicitní a determinující v ohledu na zavedení adjektických žalob, že vlastně určují i jejich struktura a právní režim.

Nelze vyvrátit, že takovéto druhy obchodních činností, především ty, které s odvíjely daleko od institucionálního sídla podniku, vyžadují zvláštní ochranu pro třetí osoby.[10] Je zcela odpovídající v prostředí právním a ekonomickém, že při uzavírání smluv sledují třetí osoby fides, důvěryhodnost nositele moci, který je jediným dominem negotii, a důvěřují tak pouze jeho „obchodnímu portfoliu", jeho zámožnosti a solventnosti (cfr. Gai. 4, 70 – 4, 71). Třetí osoby tedy pozorně sledují právně-ekonomickou sféru subjektu, který je nositelem titulu pro obchodní činnost a nikoliv jednotlivé pověřené osoby, které tuto činnost vykonávají v zastoupení. Jsou to tedy právě třetí osoby, které se dožadují ekvity a vyžadují její konkrétní podobu. A proto prétor vytváří actiones adiecticiae qualitatis aby dal na vědomost, že ten, kdo těží z výnosů obchodní činnosti - ať už sám nebo prostřednictvím svých podřízených- je taktéž povolán čelit takto vzniklým závazkům (cfr. supra D. 14, 3, 1).

III. Praepostio jako základ odpovědnosti nositele moci

[9] Ulp. D. 14, 3, 1 pr.
[10] Miceli, M. Sulla struttura formulare delle actiones adiecticiae qualitatis. Torino: Giappichelli, 2001, s. 193

Prameny, kterými disponujeme, ukazují zcela přesně, že praepositio tvoří fundament odpovědnosti nositele moci a zároveň stanovuje její hranice. Exercitor je tedy povoláván k odpovědnosti za jednání učiněná pouze v rámci pověření tzv. praepositio:

Eadem ratione comparavit duas alias actiones, exercitoriam et institoriam. Tunc autem exercitoria locum habet, cum pater dominusve filium servumve magistrum navi praeposuerit et quid cum eo eius rei gratia, cui praepositus fuerit, [negotium] gestum erit.[11]
Non autem ex omni causa praetor dat in exercitorem actionem, sed eius rei nomine, cuius ibi praepositus fuerit, id est si in eam rem praepositus sit, ut puta si ad onus vehendum locatum sit aut aliquas res emerit utiles naviganti vel si quid reficiendae navis causa contractum vel impensum est vel si quid nautae operarum nomine petent.[12]

Non tamen omne, quod cum institore geritur, obligat eum qui praeposuit, sed ita, si eius rei gratia, cui praepositus fuerit, contractum est, id est dumtaxat ad id quod eum praeposuit.[13]

Nicméně existují v kasuistice římských právníků případy, kdy se odpovědnost domina negotii rozšiřuje i o skutkové stavy, které nespadají úzce pod praepositio, a díky tomu se lze odvrátit od názoru, že praepositio vytváří jediný pramen a míru veškeré odpovědnosti majitele moci – tak jak se o tom vyjadřuje tradiční doktrína.[14] Za zmínku stojí především pasáž, která dokládá, že římská jurisprudence přiznávala odpovědnost majitele moci i za jednání pověřeného, která nebyla specifikovaně předvídaná v praepositio, ale vyvstala z potřeb prováděné obchodní činnosti:

Quid si mutuam pecuniam sumpserit, an eius rei nomine videatur gestum? Et Pegasus existimat, si ad usum eius rei, in quam praepositus est, fuerit mutuatus, dandam actionem, quam sententiam puto veram: quid enim si ad armandam instruendamve navem vel nautas exhibendos mutuatus est?[15]

V citovaného textu jest kladena otázka, zda může přijaté mutuum od magistra navis být zahrnuto pod praepositio nebo ne? Odpověď je zcela jednoznačná, neboť exercitor odpovídá i za takto vzniklý dluh, protože peníze byly vzaty a půjčeny za účelem, který spadá do pověření (praepositio). Obdobná analýza rozsahu praepositio je v D. 14. 1. 1. 9.:

Unde quaerit ofilius, si ad reficiendam navem mutuatus nummos in suos usus converterit, an in exercitorem detur actio. et ait, si hac lege accepit quasi in navem impensurus, mox mutavit voluntatem, teneri exercitorem imputaturum sibi, cur talem praeposuerit: quod si ab initio consilium cepit

[11] Gai. 4, 71
[12] Ulp. D. 14, 1, 1, 7
[13] Ulp. D. 14, 3, 5, 11
[14] Miceli, M. Sulla struttura formulare delle actiones adiecticiae qualitatis. Torino: Giappichelli, 2001, s. 196
[15] Ulp. D. 14, 1, 1, 8

fraudandi creditoris et hoc specialiter non expresserit, quod ad navis causam accipit, contra esse: quam distinctionem pedius probat.

Obě pasáže nám ukazují, že celkový rozsah a obsah praepositio není stanoven a priori a není tedy závislý výlučně na vůli nositele moci, ale v průběhu daného jednání se může dotvářet, převážně však v rovině objektivního plánu.[16] Zdá se tedy, že středem právního zájmu nebylo pouze pověření, ale i ochrana třetích osob. Neboť právě zmiňované ujištění, že daná zápůjčka spadá do praepositio je pro třetího tou největší zárukou při výkonu obchodních aktivit. Je tedy zřejmé, že odpovědnost majitele moci může být širší než je původní praepositio, že rozsáhlost pravomocí osoby podřízené může být větší a nemusí tedy být ovlivněna faktorem pověření, ale i sociálně-ekonomickými faktory, zejména pak tehdy, vykonává–li osoba podřízená kontinuální a organizovanou obchodní činnost.

Praepositio tedy obecně identifikuje a individualizuje druh vykonávané aktivity osoby podřízené, ale konkretizuje se a specifikuje se až v samotném průběhu výkonu pověření na základě konkrétních a často nepředvídatelných požadavků souvisejících se samotnou obchodní činností. Nestačí však samotná praepositio určující konfiguraci, že se jedná o obchodní činnost, ale je třeba brát v úvahu i druh vyvíjené činnosti a způsoby, jakými je vykonávána.[17]

Tak to činí i Gaius při definování exercitora (cfr. Gai. Inst. 4, 71), kde explicitně poukazuje na to, že se jedná o „ cottidianus quaestus“, a jasně dává najevo, že vykonávaná činnost musí nést prvky nepřetržitosti, kontinuity. Pokud se týká institora, pak se tato podmínka ozřejmuje v podobě taberna instructa[18], tedy v předmětu činnosti osoby pověřené. Co se týče způsobů výkonu obchodních činností v rámci živnosti v době římské, kterou tedy pokrývala actio institoria, je možné individualizovat hned několik druhů. Di Porto uvádí různé druhy obchodních činností, které souvisejí s emptio-venditio a obecně tedy s oběhem zboží, hmotných statků a finančních prostředků, a které jsou vykonávány organizovaně a kontinuálně ve formě taberna instructa. Jedná se zejména o provozování živnosti (cfr. D. 14, 3, 5, 12 – 15), činnosti zaměřené na zprostředkování a oběh peněz, kde se v pramenech setkáváme s označením praepositio ad mensam nebo apud mensam pecuniis accipiendis či pecunis faenerandis, okruh činností, který by v dnešní terminologii spadal do kategorie poskytování služeb: tedy negotiationes cauponiae, provozování stabula a činnosti muliones, fullones et sarcinatores (cfr. D. 14, 3, 5, 6, D. 14, 3, 5, 8, D. 4, 9, 1, 5, D. 33, 7, 13 pr., D. 33, 7, 12, 2)[19]

[16] Miceli, M. Sulla struttura formulare delle actiones adiecticiae qualitatis. Torino: Giappichelli, 2001, s. 197
[17] Ibidem, s. 207
[18] Ulp. D. 50, 16, 185 „Instructam autem tabernam sic accipiemus, quae et rebus et hominibus ad negotiationem paratis constat.“
[19] Di Porto, A. In Miceli, M. Sulla struttura formulare delle actiones adiecticiae qualitatis. Torino: Giappichelli, 2001, s. 208

Je tedy zcela evidentní, že na výše uvedené činnosti se kompletně aplikují actio exercitoria et institoria. Třetí osoby, která uzavíraly smlouvy s magistrem navis nebo institorem, měli sice na paměti subjektivní okolnosti vycházející z praepositio, ale zároveň i objektivní okolnosti vztahující se k charakteru a způsobu výkonu dané obchodní činnosti.

IV. Praepositio exercitoria/institoria v porovnání s mandátním pověřením

Na tomto místě je vhodné se zmínit o koexistenci institutu praepositio a mandátem, který se v porovnání s pověřením při obstarávání některé z činností, zvláště obchodní, jeví jako málo flexibilní. Je zcela jasné, že v době klasické, jak uvádí prameny, nebylo možné, aby mandatář překročil limity dané příkazem (cfr. „diligenter igitur fines mandati custodiendi sunt“[20]). Jak vyplývá z exegeze textů týkajících se mandátu, nemohl mandatář vybočit z příkazu, a to ani tehdy, pokud by pro mandanta obstaral věc výhodněji, levněji, apod. (cfr. D. 17, 1, 5, 3 a D. 17, 1, 5, 2) - vždy by se v takovém případě jednalo o nesplnění příkazu. Při porovnání obou forem jednání osob pověřených, ať již mandatáře či institora (eventuálně magistra navis) je zcela markantní, že v případě mandátu, je rozhodující vůle mandanta vymezující obsah pověření. To musí být natolik detailní, neboť představuje pro mandatáře skutečnou hranici jeho pravomocí a jednání, a zároveň pro mandanta znamená základní míru a limitaci jeho odpovědnosti vůči třetím osobám.

V případě praepositio institoria nebo exercitoria, je naopak vůle nositele moci pouze počátečním aktem pověření a pouze jedním z limitů při výkonu obchodní činnosti, kdy se tato vůle determinuje převážně ve vztahu ke konkrétním požadavkům vznikajícím při jednání osoby pověřené. Lze tedy konstatovat, že amplituda pověření v případě praepositio exercitoria nebo institoria je větší než u příkazní smlouvy (mandatum). Institor mohl tedy učinit veškerá jednání, která souvisela s vykonáváním dané činnosti, samozřejmě mimo ta, která byla explicitně zakázána:

Sed si pecuniam quis crediderit institori ad emendas merces praeposito, locus est institoriae, idemque et si ad pensionem pro taberna exsolvendam: quod ita verum puto, nisi prohibitus fuit mutuari.[21]

Item si institor, cum oleum vendidisset, anulum arrae nomine acceperit neque eum reddat, dominum institoria teneri: nam eius rei, in quam praepositus est, contractum est: nisi forte mandatum ei fuit praesenti pecunia vendere. quare si forte pignus institor ob pretium acceperit, institoriae locus erit.[22]

[20] D. 17, 1, 5 pr.
[21] D. 14, 3, 5, 13

Jak tedy vyplývá z výše uvedených poznatků, pak se jednoznačně ukazuje, že praepositio institoria/exercitoria představovala flexibilnější instrument pro pověření osob alieno iuri subiectae, nicméně představovala i rozsáhlejší základ odpovědnostního vztahu domina vůči třetím osobám, což posiluje jejich ochranu.

V. Odpovědnost a žalovatelnost nositele moci

Jak již bylo uvedeno výše, všechny prameny vztahující se k actio exercitoria či institoria označují za výlučně odpovědnou osobu domina. Odpovědnost magistra navis či institora není nikdy zmiňována jako předpoklad pro ručení a odpovědnost domina, pokud se však v některých pramenech objeví, pak se jedná o případy, kdy magister či institor byly osoby svobodné. Tím nastávala situace, kdy osoby třetí mohly žalovat jak exercitora, tak samotného magistra, což by pak vedlo úvaze, že právě tento skutkový stav by výrazně svědčil ve prospěch onoho označení adjektické tedy přídavné, dodatečné žaloby:

Est autem nobis electio, utrum exercitorem an magistrum convenire velimus.[23]

Item si servus meus navem exercebit et cum magistro eius contraxero, nihil obstabit, quo minus adversus magistrum experiar actione, quae mihi vel iure civili vel honorario competit: nam et cuivis alii non obstat hoc edictum, quo minus cum magistro agere possit: hoc enim edicto non transfertur actio, sed adicitur.[24]

Haec actio ex persona magistri in exercitorem dabitur, et ideo, si cum utro eorum actum est, cum altero agi non potest. sed si quid sit solutum, si quidem a magistro, ipso iure minuitur obligatio: sed et si ab exercitore, sive suo nomine, id est propter honorariam obligationem, sive magistri nomine solverit, minuetur obligatio, quoniam et alius pro me solvendo me liberat.[25]

Nicméně uvedené fragmenty se vztahují pouze k actio exercitoria, navíc vycházejí z řešení velmi partikulárních situací. Je tedy pravděpodobné, že Ulpianis považoval za irelevantní právní status osoby pověřené, když připouští, že dokonce otrok mohl být exercitorem (cfr. „Parvi autem refert, qui exercet masculus sit an mulier, pater familias an filius familias vel servus“)[26]. Expressis verbis je tedy vyjádřená hypotéza exercitora alieno iuris brána v potaz, přičemž se dále uvádí, že žaloba pak nesměřovala proti exercitorovi samotnému, ale proti jeho majiteli moci, tedy pater či dominus:

[22] D. 14, 3, 5, 15
[23] D. 14, 1, 1, 17
[24] D. 14, 1, 5, 1
[25] D. 14, 1, 1, 24
[26] D. 14, 1, 1, 16

Si is, qui navem exercuerit, in aliena potestate erit eiusque voluntate navem exercuerit, quod cum magistro eius gestum erit, in eum, in cuius potestate is erit qui navem exercuerit, iudicium datur.[27]

Mimo to existuje možnost jednat proti magistrovi navis, pokud jde o osobu svobodnou zároveň tak existuje možnost výběru mezi osobou magistra či exercitora jako osob žalovatelných[28]. Každopádně se však počítá s odpovědností in solidum nositele moci, jak je tomu obecně, ať už se jedná o exercitora jako osobu sui iuris nebo alieno iuris:

Quamquam autem, si cum magistro eius gestum sit, dumtaxat polliceatur praetor actionem, tamen, ut iulianus quoque scripsit, etiamsi cum ipso exercitore sit contractum, pater dominusve in solidum tenebitur.[29]

Obě žaloby přecházejí na dědice majitel moci (cfr. „novissime sciendum est has actiones perpetuo dari et in heredem et heredibus.“)[30], neboť se jedná o jeho vlastní osobní odpovědnost, která vychází ze samotné skutečnosti, že on sám je majitelem titulu k výkonu obchodní činnosti, jejíž výkon pouze svěřil zcela nebo částečně svému synovi, otroku či osobě svobodné.

Závěrem lze konstatovat, že v rámci prétorských ediktů, týkajících se actiones exercitoria et institoria, není tak důležitý právní status magistra či institora, solventního či nikoliv, způsobilého k právním úkonům či nikoliv, ale to, co je objektivně podstatné, je fakt, že byl pověřen plněním určité obchodní činnosti. V tom momentě se stává subjektem, který není nadán vlastní autonomií, ale jediným destinatářem právních účinků a tedy jediným žalovatelným z pohledu ius honorarium se stává nositel moci. I po jeho smrti se jeho odpovědnost z actiones exercitoria et institoria přenáší na dědice tak, jak je tomu i u ostatních obligací, ze kterých byl dotyčný osobně zavázán.

Literatura:

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[3] Talamanca, M: *Istituzioni di diritto romano*. Milano: Dott. A. Giuffré Editore, 1990, s. 829, ISBN 88-14-02222-4

[27] D. 14, 1, 1, 19
[28] Cfr. supra D. 14, 1, 1, 17
[29] D. 14, 1, 1, 23
[30] D. 14, 3, 15

[4] Talamanca, M: *Elementi di diritto privato romano*. Milano: Giuffré Editore, 2001, s. 394, ISBN 88-14-09347-4

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TRESTNÉ SÚDNICTVO V ČSSR V 60. ROKOCH 20.STOROČIA

VERONIKA KUBRIKOVÁ

PRÁVNICKÁ FAKULTA UNIVERZITY KOMENSKÉHO V BRATISLAVE

Abstrakt

Účelom odborného článku je poskytnutie prehľadu právnej úpravy v oblasti trestného súdnictva v období prijatia zákona č. 140/1961 Zb. Trestný zákon. V úvode článku sa snažím načrtnúť formálne a materiálne pramene trestného práva na začiatku 60. rokov 20. storočia. Súčasne predkladám rozdelenie pôsobnosti medzi súdmi a inými orgánmi štátnej správy pri rozhodovaní o trestných činoch a činoch, ktorých stupeň nebezpečnosti pre spoločnosť bol nepatrný, a to s dôrazom na miestne ľudové súdy. Predstavujem ich miesto v kontexte prijatých zákonov v oblasti trestného súdnictva a ich základnú charakteristiku s ohľadom na prijaté tézy o zľudovení súdnictva. Rovnako vymenúvam základné problémy súvisiace s činnosťou miestnych ľudových súdov. V závere práce naznačujem komparáciu základných zásad a organizácie súdnictva z obdobia začiatku 60. rokoch 20. storočia so zásadami nezávislého súdnictva.

Kľúčové slová

Trestné súdnictvo – miestne ľudové súdy - prečiny

Abstract

The purpose of this article is to provide the review of the legal regulation concerning the criminal justice system during the time of adoption of the act NO. 140/1961 – The Criminal Code. Firstly, I would like to outline formal and material sources of the criminal law in the beginning of the 1960´of the 20th century. I would like to introduce the differences between the courts and other administrative authorities in the process of deciding the criminal acts and the acts which dangerous degree for the society was less serious, pointing out the local people´s courts. I also introduce the position of these courts in connection with acts adoption in the sphere of criminal justice system. I am presenting the basic characteristics of these courts, viewing the adopted propositions, reffering to the local people´s courts. I mention the crucial issue concerning the action of the local people´s courts. Finaly, I draw coparison of the relevant principles and organisation of the justice from the beginning of the 1960´of the 20th century with the principles of the independent judiciary.

Key words:
Criminal justice system – local people´s courts- torts

Text príspevku

In initialibus si dovolím predložiť charakteristiku súdnictva v súčasnosti ako „rozhodovanie sporov, potrestanie za spáchaný trestný čin a uskutočňovanie práva osobitnými, na tento účel ustanovenými orgánmi. V ústavách demokratických štátov je súdnictvo zárukou právneho štátu a je späté s rozvojom štátov založených na deľbe moci, pričom jeho pôsobením sa zaručuje panstvo práva (rule of law).“[1] Nezávislé súdnictvo musí rešpektovať tieto základné zásady:

neutralitu sudcov (ktorá zaručuje nadstraníckosť a objektívnosť prejednávania vecí pred súdmi),

zabezpečenie práv a slobôd jednotlivca (ktorej základom je deľba moci a ochrana súdnictva pred politickou mocou zákonodarstva a mocou výkonnou).

Aká však bola situácia v spoločnosti a v súdnictve v 60.- rokoch minulého storočia?

Základný charakter spoločenskej situácie na začiatku 60. rokov 20. storočia vyplýva aj zo straníckych dokumentov, prejavov a publikovaných odborných článkoch, z ktorých prevažne vyplýva konštatovanie, že došlo ku kvalitatívnym zmenám v spoločnosti (zmeny v ekonomike, štruktúre obyvateľstva, [2]nové chápanie jednotlivca ako súčasti spoločnosti, ktorý je nositeľom pozitívnych vlastností a uvedomuje si svoje povinnosti voči spoločnosti) vedenou komunistickou stranou. Tieto „významné zmeny“ sa odzrkadlili aj v novoprijatej socialistickej ústave, ktorá predpokladala širšie zapojenie „pracujúcich“ do činnosti súdov, t.j. zľudovenie súdnictva. Zapojenie väčšieho počtu obyvateľov do účasti na rozhodovaní súdov, ako prvoradú úlohu stanovil Ústredný výbor KSČ v decembri 1960 [3]. V oblasti socialistickej zákonnosti prijal Ústredný výbor KSČ zásadu rozvoja a posilňovania socialistickej štátnosti a jej následné prerastanie do komunistickej samosprávy, prehlbovanie charakteru socialistického štátu ako organizácie pracujúceho ľudu.

[1] Posluch, M., Cibulka Ľ.: Štátne právo Slovenskej republiky, VO PF UK Bratislava 2000.

[2] Z prejavu poslanca Jägermana v rozprave k vládnemu návrhu zákona o miestnych ľudových súdoch prejednávaného na 7. schôdzi Národného zhromaždenia dňa 18.4.1961: „... Změnila se kultura a celý život našeho lidu za moudrého a zásadového vedení KSČ a nastaly hluboké společenské změny i v našich myslích... změnily se lidé a zůstaly jenom zbytky starého myšlení v hlavách lidí a velmi nepatrné zbytky činů protispolečenských a výslovně nepřátelských parazitních živlů a recidivistů. Morální síla socialistické společnosti dnes za vysokého stupně vývoje naší Československé socialistické republiky daleko silněji a účinněji působí proti pozůstatkům starého myšlení.“

[3] Soukup, L.: Místní lidové soudy v Československu. In: Příspěvky k vývoji právního řádu v Československu 1945-1990. Univerzita Karlova v Prahe 2002, s. 296.

V nadväznosti na nižšie uvedené závery uznesenia Ústredného výboru KSČ z decembra 1960 bol vypracovaný aj nový návrh Trestného zákona a a súčasne s ním aj návrh zákona o trestnom konaní súdnom. Nové trestné kódexy vychádzali zo základnej tézy o „hlbokých triednych zmenách v našej spoločnosti, odstránení vykorisťovania človeka človekom“ zodpovedali novej socialistickej ústave, ktorá [4]potvrdila víťazstvo socializmu v krajine a prípravu na prechod ku komunizmu (názov štátu sa rovnako zmenil na Československá socialistická republika). Nový trestný zákon mal prispieť k zdokonaleniu socialistického právneho poriadku a zodpovedal zásadám vývoja spoločnosti, ktorá mala spieť ku komunizmu.[5] Podľa proklamovanej ideológie dochádzalo k prehlbovaniu socialistickej demokracie na taký stupeň rozvoja, že sa zásady komunizmu presadia do života, štát sa postupne stane všeľudovou organizáciou, ktorá ako nástroj komunistickej výstavby bude pretvárať nového človeka. Významnú úlohu pri tomto prerode malo mať aj socialistické trestné právo. Základným smerom, ktorým malo dôjsť k zapojeniu verejnosti do boja proti porušovaniu socialistickej zákonnosti bol presun vecí, ktoré patrili do kompetencie štátnych orgánov na spoločenské organizácie a miestne ľudové súdy a prehĺbenie výchovného účinku ukladaných trestov. Takto možno stručne charakterizovať occasio legis celého komplexu zákonov v oblasti trestného práva a súdnictva.

Základný rámec súdnictva bol v ČSSR bol na začiatku šesťdesiatych rokoch 20. st. upravený v [6]ôsmej hlave zákona č. 100/1960 Sb. Ústava Československej socialistickej republiky (ďalej len „socialistická ústava“ alebo „Ústava“). Podľa čl. 98 ods. 2 Ústavy „Súdy sú: Najvyšší sud, krajské a okresné súdy, vojenské súdy, ako aj miestne ľudové súdy“. Komplexnú úpravu postavenia súdov a sudcov realizoval zákon č. 62/1961 Sb. o organizácii súdov a zákon č. 38/1961 Sb. o miestnych ľudových súdoch (ďalej len „zákon o MĽS“). Právna úprava súdnictva bola ďalej doplnená zákonom č. 142/1961 Sb. o kárnej zodpovednosti sudcov z povolania a vládnym nariadením č. 63/1961 Sb., ktorým bol vydaný volebný poriadok pre voľby sudcov okresných súdov.

Trestný zákon v období svojho prijatia, t.j. v roku 1961 poznal len kategóriu trestných činov. Trestný čin bol definovaný v § 3 Trestného zákona ako čin, ktorý je pre spoločnosť nebezpečný, a ktorého znaky sú vymedzené v Trestnom zákone. Zákon k pojmu trestného činu pripojil podľa sovietskeho vzoru

[4] Škvarna, D., Bartl, J., Čičaj, V., Kohútová, M., Letz, R., Segeš, V.: Lexikón slovenských dejín, SPN, Bratislava 1997, s. 158

[5] Z prejavu poslanca Jägermana v rozprave k vládnemu návrhu zákona o trestnom konaní súdnom prejednávaného na 10. schôdzi Národného zhromaždenia dňa 29.11.1961

[6] Jánošíková, P.- Knoll, V.- Rundová, A.: Mezníky českých právních dějin, Plzeň 2005: „Na ústavní zákonodárství z roku 1952 navazovala úprava postavení soudů a prokuratury, které měly na prvním místě chránit socialistický stát a jeho společenské zřízení a až na druhém místě práva a oprávněné zájmy občanů a organizací pracujícího lidu.“

ustanovenie, podľa ktorého čin, ktorého stupeň nebezpečnosti pre spoločnosť je nepatrný, nie je trestným činom.[7] Toto ustanovenie vyčleňuje z pojmu trestný čin menej závažné spôsoby porušenia alebo ohrozenia záujmov chránených trestných zákonom. Podľa komentára k Trestnému zákonu z roku 1964 pre rozhodnutie, čin určitý čin je trestným činom alebo nie, nestačí hodnotiť ho iba z hľadiska zákonnej normy, ale treba ho hodnotiť aj vo všetkých jeho súvislostiach s materiálnymi a politickými podmienkami spoločnosti v danej etape spoločenského vývoja.[8]

Nebezpečnosť ktorých činov však bola v tomto období pre spoločnosť len nepatrná?

Činy, ktorých stupeň nebezpečnosti pre spoločnosť bol len nepatrný, boli v období prijatia trestného zákona:

previnenia (podľa zákona č. 38/1961 Sb. o miestnych ľudových súdoch a podľa zákona č. 60/1961 Sb. o úlohách národných výborov pri zabezpečovaní socialistického poriadku),

- **priestupky** (podľa zákona č. 60/1961 Sb. o úlohách národných výborov pri zabezpečovaní socialistického poriadku),
- **kárne previnenia** (podľa zákona č. 142/1961 Sb.),
- **disciplinárne priestupky vojakov** (podľa zákona č. 76/1959 Sb.),
- **iné poklesky.**

Napriek tomu, že nešlo o trestné činy a zákony, ktoré ich upravovali, neboli normami trestného práva v pravom zmysle slova, myslím si, že je potrebné poznamenať, že mali značný vplyv na trestné právo v tom zmysle, že nepriamo obmedzovali rozsah trestných činov v nadväznosti na prijatú tézu depenalizácie. To ostatne súviselo aj s politickou a spoločenskou situáciou v krajine. Prejavy predstaviteľov politickej moci zdôrazňovali morálnu a politickú vyspelosť pracujúcich a konštatovali, že dodržiavanie socialistických noriem spoločenského spolunažívania a socialistických zákonov je dnes pre občanov už samozrejmosťou.

Socialistická ústava sa stala základom a východiskom pre nový inštitút miestnych ľudových súdov. Postavenie miestnych ľudových súdov ako najnižšieho článku československého súdnictva je vymedzené

[7] Schubert, L.: Úvaha k zákonu o miestnych ľudových súdoch. In: Právny obzor, časopis právneho kabinetu SAV, 1961, roč. XLIV, č. 7, s. 385.
[8] Breier, Š. et al.: Trestný zákon. Komentár, Osveta – Bratislava, 1964.

v [9]čl. 101 ods. 1, 2 a 3 Ústavy. Miestne ľudové súdy mali byť zriadené za účelom ďalšieho [10]prehĺbenia účasti pracujúcich na výkone súdnictva a zároveň mali prispievať k upevňovaniu socialistickej zákonnosti, k zabezpečovaniu spoločenského poriadku a pravidiel socialistického spolužitia. Zdôvodnenie zriadenia miestnych ľudových súdov v odbornej literatúre z obdobia ich zavedenia bolo o.i. nasledovné: „...tieto orgány predstavujú novú formu účasti pracujúcich na riešení konfliktných konaní, podstatne odlišnú od doteraz používaných ... ide teda o spojenie štátneho orgánu so širokým demokratizačným princípom, teda v podstate o nový, azda priekopnícky spôsob riešenia konfliktných činov, nachádzajúci svoje uplatnenie až na prechode od socializmu ku komunizmu a zároveň o vyjadrenie perspektívy pre komunistickú samosprávu.“[11]

Rozsah a právomoci miestnych ľudových súdov, spôsob, akým sa zriaďujú, ich volebné obdobie a zásady ich organizácie a konania ustanovil zákon č. 62/1961 Sb. o organizácii súdov a hlavne zákon č. 38/1961 Sb. o MĽS.

Akú trestnú činnosť mohli miestne ľudové súdy prejednávať?

Miestne ľudové súdy obligatórne prejednávali podľa § 11 ods. 1 zákona o MĽS previnenia a jednoduché majetkové spory. Fakultatívne boli príslušné na prejednanie a rozhodnutie menej závažných trestných činov, len ak im boli postúpené prokurátorom alebo súdom. Prokurátor alebo súd mohli postúpiť vec miestnemu ľudovému súdu buď na jeho žiadosť alebo z vlastného podnetu, len v tom prípade, ak po zvážení spoločenskej nebezpečnosti činu a osoby páchateľa došli k záveru, že [12]na jeho nápravu postačí výchovná sila kolektívu na pracovisku alebo v obci a [13]opatrenie ktoré môže uložiť miestny ľudový súd.

[9] Čl. 101 ods. 1 a 2 Ústavy „Na ďalšie prehlbovanie účasti pracujúcich na výkone súdnictva volia sa v miestach a na pracoviskách mieste ľudové súdy. Mieste ľudové súdy prispievajú k upevňovaniu socialistickej zákonnosti, k zabezpečovaniu socialistického poriadku a pravidiel socialistického spolužitia.“

[10] Schubert, L.: Úvaha k zákonu o miestnych ľudových súdoch. In: Právny obzor, časopis právneho kabinetu SAV, 1961, roč. XLIV, č. 7, s. 396, „miestne ľudové súdy ako priame orgány pracujúcich v závodoch a v mestách budú prerokúvať a rozhodovať niektoré previnenia občanov a riešiť niektoré občianskoprávne spory“.

[11] Schubert, L.: Úvaha k zákonu o miestnych ľudových súdoch. In: Právny obzor, časopis právneho kabinetu SAV, 1961, roč. XLIV, č. 7, s. 398.

[12] Ustanovenie § 13 ods. 2 zákona č. 38/1961 Sb. o miestnych ľudových súdoch.

[13] Podľa § 31 ods. 1 zákona č. 38/1961 Sb. o miestnych ľudových súdoch, ak dôjde miestny ľudový súd po prejednaní previnenia alebo trestného činu k záveru, že sa občan previnenia alebo trestného činu dopustil, že však samo prejednanie veci splnilo svoj výchovný účel, neuloží žiadne opatrenie. Môže to urobiť najmä vtedy, ak previnilý občan prejaví úprimnú ľútosť, ospravedlní sa poškodenému alebo kolektívu a zaviaže sa urobiť nápravu a nahradiť spôsobenú škodu. Inak uloží niektoré z týchto opatrení:
a) napomenutie,
b) verejné pokarhanie,
c) pokutu do 500,- Kčs,

Miestne ľudové súdy tak trestný čin [14]kvalifikovali a posudzovali podľa ustanovení Trestného zákona, avšak trest ukladali podľa zákona o MĽS, t.j. páchateľovi bolo uložené niektoré z opatrení podľa § 31 zákona o MĽS, príp. za podmienok stanovených v zákone neuloží žiadne opatrenie. Zároveň bolo v § 23 zákona o MĽS negatívne vymedzenie, podľa ktorého miestne ľudové súdy nie sú príslušné na prejednanie pracovných sporov a sporov z rodinného práva.

Napriek oficiálnej téze o novom človeku – socialistickom vlastencovi, o nových socialistických vzťahoch, vysokej morálnej uvedomelosti pracujúcich, ktorí s nadšením a veľkým porozumením prijali účasť na zľudovení súdnictva sa v praxi pri činnosti MĽS od začiatku ich činnosti objavovali nedostatky. Ako vyplýva z článkov viacerých autorov uverejnených v odborných časopisoch sa miestne ľudové súdy nestali „najvyšším článkom ľudovej aktivity", čo súviselo so skutočnou (nie oficiálne deklarovanou) situáciu v spoločnosti. Miestnym ľudovým súdom bol vyčítaní nízky počet zriadených súdov (nedostatočná sieť súdov spôsobuje, že majú na starosti veľký počet osôb a preto nemôžu dostatočne posúdiť závažnosť činu, uplatniť výchovné možnosti, pretože jednajú o ľuďoch, ktorých nepoznajú, miestne ľudové súdy nie sú zriadené tam, kde by boli potrebné...), nedostatočnú účinnosť uložených opatrení, [15]ich izolovanosť od občanov, pracujúcich, vedení závodov a spoločenských organizácii, najmä ROH, [16]zapríčinenej nedocenením ich významu, [17]nedostatočnú iniciatívu súdov (prejednávanie vecí z vlastného podnetu), [18]prejednávanie vecí bez účasti verejnosti, nezáujem pracujúcich o prípady prejednávané pred týmito súdmi a v neposlednom rade aj nedostatočné personálne vybavenie. Počas trvania súdov sa neustále objavovali otázky vyplývajúce z nedostatočnej zákonnej úpravy (ktorá nemala byť zbytočne zaťažená podrobnou úpravou procesnej časti) a nedostatkom usmerňovania činnosti miestnych ľudových súdov okresnými súdmi. V neposlednom rade nemožno podceňovať ani nedostatok tradície týchto súdov (bez ohľadu na obmedzené pôsobenie súdružských súdov).

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d) nápravné opatrenie zrážkou z platu až do 15 % na čas najviac troch mesiacov,

e) nariadi na čas najviac 6 mesiacov, aby previnilý občan bol preložený na nižšiu funkciu alebo na iný pracovný úsek; toto opatrenie môže uložiť len miestny ľudový súd na pracovisku.

Miestny ľudový súd môže po splnení zákonom stanovených podmienok vysloviť aj prepadnutie veci a povinnosť náhrady škody.

[14] Zároveň si na tomto mieste dovoľujem podotknúť, že právnické nebolo jednou z podmienok výkonu funkcie sudcu miestneho ľudového súdu. S ohľadom na nedostatok právnického vzdelania sudcov miestnych ľudových súdov bola zdôrazňovaná povinnosť okresných súdov usmerňovať ich súdnu prax a vykonávať nad ňou dozor. Z v tej dobe uverejňovaných článkov v odbornej literatúre sa dozvedáme aj to, že z hľadiska požiadavky riadiť sa právnym poriadkom tiež netreba mať obavy, lebo rozsah samotnej činnosti vyjadrený príslušnou právnou normou pracujúci bezpečne zvládnu.

[15] Osmančík, O.: K problematice místních lidových soudů. In: Socialistická zákonnosť, 1966, roč. XI, č. 4, s. 202.

[16] Kuzmík, O.: K činnosti miestnych ľudových súdov v Západoslovenskom kraji za rok 1963. In Socialistické súdnictvo, 1964, roč. XVI, č. 5, s. 149.

[17] Pavlišák, J.: Miestne ľudové súdy a vlastná iniciatíva. In: In Socialistické súdnictvo, 1964, roč. XVI, č. 7, s. 220-222.

[18] Tamtiež, s. 150

Podľa hodnotenia výsledkov činnosti miestnych ľudových súdov za rok 1963 v Západoslovenskom kraji vyplýva, že v tu pôsobilo 85 miestnych ľudových súdov, z čoho 49 bolo zriadených pri národných výboroch a 36 pri závodoch, čo predstavovalo vzrast v porovnaní s rokom 1962 o 9 súdov. Miestne ľudové súdy pri ročnom nápade 2789 prípadov rozhodli v 1881 veciach, z čoho len v 3,7 % išlo o drobné trestné činy. Z väčšej časti však prejednávali previnenia proti socialistickému spolužitiu, socialistickému majetku a majetku v osobnom vlastníctve, ako aj proti záujmom socialistického hospodárstva.[19] Rovnaká situácia vyplýva aj z hodnotenia činnosti MĽS v okrese Bratislava - Mesto za uplynulé roky 1963 –1964, podľa ktorej tieto súdy prejednali previnenia 2323 osôb, 39 drobných majetkovoprávnych sporov a len 55 menej závažných trestných činov, ktoré im boli postúpené súdom alebo prokuratúrou. Najčastejšie MĽS prejednávajú previnenia proti socialistickému spolužitiu. Ide vo väčšine prípadov o urážlivé výroky, vyhrážky, ohovárania, drobné ruvačky a výtržnosti, ktoré sú najčastejšie páchané v mieste bydliska a pod vplyvom alkoholu. Na druhom mieste sú previnenia proti majetku v socialistickom vlastníctve a na treťom previnenia proti majetku v osobnom vlastníctve.[20]

S ohľadom na vyššie spomenuté problémy miestnych ľudových súdov, nedostatočnosť uložených opatrení (ktoré mali výchovný charakter) a čiastočnú zmenu oficiálnej charakteristiky o vyspelosti socialistickej spoločnosti, tieto súdy postupne zanikali, hoci formálne existovali až do roku 1969. Ako vyplýva zo [21]správy o prerokovaní vládneho návrhu zákona o prečinoch prednesenej Snemovni národov: miestne ľudové súdy vykonali veľký kus práce, často však napriek obetavosti dobrovoľných pracovníkov neboli dosiahnuté žiadúce výsledky.

Miestne ľudové súdy boli zrušené ústavným zákonom č. 155/1969 Sb., ktorým sa mení a dopĺňa ôsma hlava Ústavy s účinnosťou od 1.januára 1970. Zákonom č. 150/1969 Sb. o prečinoch, ktorým bolo možné postihnúť aj páchateľov menej závažných činov prísnejšie, ako to dovoľoval zákon o MĽS, bol zrušený aj zákon č. 38/1961 Sb. o miestnych ľudových súdoch. Súčasne so stíhaním súdnych prečinov a tým zvýšením agendy na súdoch bol opatrením predsedníctva Federálneho zhromaždenia č. 99/1969 zavedený inštitút samosudcu.

Na začiatku 60. rokov bol prijatý aj zákon č. 60/1961 Zb. o úlohách národných výborov pri

[19] Kuzmík, O.: K činnosti miestnych ľudových súdov v Západoslovenskom kraji za rok 1963. In Socialistické súdnictvo, 1964, roč. XVI, č. 5, s. 148

[20] Matečný, J.: Z činnosti miestnych ľudových súdov v Bratislave. In: Socialistické súdnictvo, 1965, roč. XVII, č. 6, s. 184

[21] Z prejavu poslanca Dr. Srba zo správy o prerokovaní vládneho návrhu zákona o prečinoch prejednávaného na VI. schôdzi Snemovne národov dňa 18.12.1969.

zabezpečovaní socialistického poriadku, ktorý vymedzoval ďalšie činy, ktorých stupeň nebezpečnosti pre spoločnosť bol len nepatrný, ktorými boli priestupky.

Základný rozdiel medzi trestným činom, previnením a priestupkom spočíval v stupni spoločenskej nebezpečnosti a v ich povahe. Počas existencie zákona o MĽS sa objavovali problémy pri rozlišovaní priestupkov a previnení.

V prípade, ak konanie páchateľa nemožno zaradiť ani do jednej z predchádzajúcich kategórii, zákon o MĽS zaviedol pojem poklesok. Podľa dôvodovej správy k § 15 zákona o MĽS ako poklesky možno označovať iné spôsoby porušenia štátnej a pracovnej disciplíny, ako aj iné málo závažné porušovanie socialistickej zákonnosti a pravidiel občianskeho spolunažívania, ak nedosiahne konkrétny čin uvedený stupeň nebezpečnosti pre spoločnosť nie je ani previnením, ale pokleskom, ktorým sa bude zaoberať spoločenská organizácia, orgán závodu a pod.

Záverom tejto práce by som chcela podotknúť aj to, že zákon č. 62/1961 Sb. upravoval v jednotlivých hlavách nielen sústavu súdov, ale aj hlavné zásady ich organizácie a činnosti, voľby a postavenie sudcov a výkon štátnej správnej súdov. V zákone a v [22]Ústave bola formálne deklarovaná [23]nezávislosť sudcov a bola stanovená povinnosť vykladať zákony v súlade so socialistickým právnym vedomím. Zároveň medzi základné demokratické zásady súdnictva upravené v Ústave patrili aj [24]spôsob ustanovovania sudcov, spolupôsobenie občanov pri výkone súdnictva, [25]ústnosť a verejnosť pojednávania a napokon [26]právo na obhajobu. Do akej miery však zodpovedali znaky súdnictva na začiatku 60. rokov 20. st. znakom nezávislého súdnictva tak ako sú vymedzené v úvode mojej práce (neutralita sudcov, ochrana súdnictva pred politickou a výkonnou mocou)? Možno sudcov miestnych ľudových súdov, sudcov z ľudu alebo volených sudcov označiť za nezávislých, odtrhnutých od politickej moci? Prax ukázala, že títo sudcovia skôr vytvárali záruku, že aj tieto prijaté zákony v oblasti trestného súdnictva budú vykladané „správne“

[22] Čl. 98 ods. 1 Ústavy „Súdnictvo v Československej socialistickej republike vykonávajú volené a nezávislé ľudové súdy“. Čl. 102 ods. 1 Ústavy „Sudcovia sú pri výkone svojej funkcie nezávislí a sú viazaní iba právnym poriadkom socialistického štátu. Sú povinní spravovať sa zákonmi a inými právnymi predpismi a vykladať ich v súlade so socialistickým právnym vedomím“.

[23] Podľa § 7 zákona č. 62/1961 Sb. „Sudcovia sú pri výkone svojej funkcie nezávislí a sú viazaní iba právnym poriadkom československej socialistickej republiky. Sú povinní spravovať sa zákonmi a inými právnymi predpismi a vykladať ich v súlade so socialistickým právnym vedomím“.

[24] Čl. 99 ods. 3 Ústavy „Sudcovia okresných súdov sú volený občanmi podľa všeobecného, priameho a rovného volebného práva s tajným hlasovaním“.

[25] Čl. 103 ods. 2, 4 Ústavy „Pojednávanie pred všetkými súdmi je zásadne ústne a verejné; verejnosť môže byť vylúčená len v prípadoch ustanovených zákonom. Rozsudky sa vyhlasujú v mene republiky a vždy verejne“.

[26] Čl. 103 ods. 3 Ústavy „Obvinenému sa zabezpečuje právo obhajoby“.

a budú slúžiť potrebám politickej moci.

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VÝVOJ A VÝZNAM INSTITUTU DĚTSKÉHO OMBUDSMANA

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Abstrakt

Předkládaný příspěvek čtenářům přiblíží vznik a vývoj institutu dětského ombudsmana, podmínky, za kterých byl poprvé představen v Norsku i jak jej později přejímaly právní řády jiných zemí. V souladu s aktuálním děním v České republice a záměrem Výboru pro práva dítěte, resp. jejich myšlenkou na vytvoření podobného orgánu i u nás, pak bude poukázáno na jednotlivé argumenty, které tuto ideu podporují nebo se naopak stavějí proti ní.

Klíčová slova

Dětský ombudsman, ombudsman, práva dětí, ochrana práv

Abstract

The main aim of this article is to show how an institute of ombudsman for children came into existence, what were the conditions under which it was presented in Norway for the first time, how it developed and was transferred into legal order of other countries. With a short look at the situation in Czech Republic and possibilities of implementation of this type of institution here it tries to cover the main arguments that can be found to support or to reject this idea.

Key words

Ombudsman for children, ombudsman, children‘s rights, right’s protection

Úvod

Je tomu již více než 18 let, co byla mezinárodním společenstvím přijata Úmluva o právech dítěte. Její text zdůrazňuje význam dětství jako velice podstatné období, kdy děti nejenže dospívají v dospělé, ale především jsou nadány právy jako lidské osoby a plnohodnotní členové společnosti. Všech 54 článků, které jsou směsicí ustanovení ochranných, podpůrných a participačních, v sobě nese ideu autonomie dítěte podpořenou mechanismem mezinárodní kontroly nad dodržováním práv dítěte, a sice prostřednictvím zpráv o realizaci ustanovení Úmluvy, které státy musí podávat a které jsou následně kontrolovány Výborem pro práva dítěte. Dle doporučení Výboru by Česká republika měla předložit třetí periodickou zprávu o plnění Úmluvy k 30. 6. 2008[1]. Aktuální dění u nás ukazuje, že kritika neexistence orgánu, který by problematiku práv dětí koordinoval a zastřešoval, je skutečností kritizovanou oprávněně.

Jedním z řešení usilujících o zlepšení fungování systému ochrany práv dětí je institut dětského ombudsmana, který v různých modelech a formách s úspěchem funguje ve skandinávských zemích, odkud se časem přenesl do právních úprav řady států a je možné se setkat i se snahami o vytvoření obdobné instituce na mezinárodní úrovni.

Předkládaný článek nastíní čtenáři situaci, za které se dětský ombudsman poprvé objevil v Norsku, pokusí se přiblížit základní principy, na kterých zde fungoval a také s jakými úspěchy byla jeho činnosti přijímána. Na příkladech vybraných států ukáže, jakým modifikacím byl původní vzor v národních legislativách jiných zemí vystaven. Zkušenosti získané několikaletým fungováním úřadů ombudsmana pro děti na celém světě jistě mohou posloužit jako inspirace pro úvahy nad koncepcemi a změnami navrhovanými českými nevládními organizaci a Výborem pro práva dítěte, které by prosazení novinky podobného typu do právního řádu České republiky uvítaly. Jejich snahy budou zhodnoceny v závěrečné části článku.

1. Norský model

Tak jako samotné slovo ombudsman, které ostatní jazyky v původní formě bez překladu přebírají, pochází ze skandinávských zemí, i první ombudsman pro děti začal zastávat svůj úřad zde, a sice v roce 1981 v Norsku, tedy již osm let před přijetím Úmluvy o právech dítěte. Oficiální překlad termínu „ombudsman“ je „komisař“, což je ovšem považováno za označení nepřesné, protože nepokrývá všechny aspekty, které činnost ombudsmana zahrnuje. „Ombud“ původně znamenalo „ambasádor“ nebo

[1] Dohnalová, R., Hrubá, K., Kloub, J., Kristová., V.: *Zpráva o vývoji práv dětí v ČR v letech 2003 – 2005*, s. 3, dostupné z http://www.llp.cz/_files/file/Zprava_deti.pdf

„delegát“ a bylo využíváno pro přenášení zpráv od krále k lidem, později pak jako pojmenování osoby nebo úřadu, který projednává stížnosti od určité definované skupiny lidí nebo jednotlivců a vystupuje zároveň jako jejich mluvčí s cílem zlepšit životní podmínky jednotlivce ve skupině nebo skupiny jako celku. První úřad ombudsmana byl zaveden ve Švédsku v roce 1809 s cílem chránit práva občanů proti zneužití ze strany parlamentu a krále, což se zde tehdy stávalo problémem velice aktuálním.

1. 1. Vznik úřadu

V Norsku vstoupil první ombudsman do úřadu v roce 1962, poměrně rychle začaly být vytvářeny dalších úřady ombudsmanů specializovaných úžeji na konkrétní agendu. V roce 1972 to byl ombudsman pro záležitosti spotřebitelů, v roce 1979 ombudsman pro rovný status žen a mužů (v návaznosti na mezinárodní rok žen) a jak jsem již zmiňovala, v roce 1981 ombudsman pro děti. Návrh na zřízení instituce chránící práva dětí byl neúspěšně předložen již v roce 1977. K důkladnějšímu hodnocení pak došlo podruhé v souvislosti s Mezinárodním rokem dítěte (1979), tentokrát úspěšněji především z toho důvodu, že oproti původnímu návrhu již do kompetence ombudsmana nespadalo řešení sporů vzniklých uvnitř rodin, proti čemuž aktivně bojovala některá hnutí s obavou o ztrátu části svých rodičovských oprávnění vůči dětem a také z přenosu odpovědnosti za děti z rodičů na společnost jako celek.

Jeden z důvodů, proč byl ombudsman pro děti poprvé zřízen v Norsku, a ne jiné skandinávské zemi je spatřován v tom, že norský systém sociálního zabezpečení klade oproti sousedním zemím nedostatečný důraz právě na dítě, ať už jde o chybějící zdravotnickou péči pro matky a děti, izolaci škol od ostatních služeb nebo systém dávek podporujících rodiny s dětmi. Jde o zemi s poměrně nízkou koncentrací obyvatel, kde silnou tradici má přesouvání správy z center na obce, což myšlence silného státu s řízeným a fungujícím systémem sociálního zabezpečení do jisté míry odporuje

Před vytvořením úřadu se objevily určité diskuse, zda je označení „ombudsman“ vhodné, protože v té době již existující úřady měly svou činnost často zaměřenou na úzce vymezený, přesně definovaný výčet legislativy. Oproti tomu vytvoření seznamu legislativy, která se alespoň v určitém svém aspektu dotýká práv dětí je snahou velice obtížnou, neboť naprostá většina zákonů má na děti v jistém smyslu dopad. Výstižnější termín se však nepodařilo najít.

Hlavním úkolem kanceláře ombudsmana pro děti se tak stalo obecné: „zabezpečení zájmů dětí vůči veřejným i soukromým autoritám a zajištění rozvoje podmínek, v kterých děti vyrůstají“ s výjimkou

individuálních konfliktů vznikajících v rámci rodiny a sporů řešených soudem.[2] Tím je tedy zároveň stanoveno, že norský ombudsman musí sledovat veškerou legislativu a rozhodnutí ve všech oblastech společnosti s možným dopadem na děti, varovat před situacemi, které by pro ně mohly být nebezpečné a navrhovat změny, které naopak dětem budou prospívat. Nemůže však vydávat žádná vlastní rozhodnutí, ani není nadán pravomocí rušit rozhodnutí úřadů jiných

1. 2. Argumenty pro a proti

Mezi hlavními argumenty pro zřízení instituce ombudsmana pro děti byla zejména zohledněna skutečnost, že děti jako skupina mají specifické potřeby, které musí být uskutečněny, toto uskutečňování navíc může vyžadovat speciální prostředky a vykazovat různá jiná specifika. Děti jako skupina v demokratické společnosti navíc:

- nemohou žádným způsobem ovlivnit výběr osob nebo složení orgánů, které rozhodují o podmínkách, v nichž děti vyrůstají. Nemohou si vybrat kandidáta, který nejlépe reprezentuje jejich zájmy, možnosti obrátit se na soud jsou také omezené
- ve srovnání s touto skutečností mají dospělí vedle svého volebního práva navíc i jiné prostředky, pomocí kterých mohou vyvolávat debaty a měnit tím, alespoň do určité míry, názory veřejnosti (média, …)
- legislativa, která se věnuje výhradně právům dítěte je nesrovnatelně méně početná oproti legislativě upravující práva dospělých. Práva dětí jsou navíc většinou konstruována nepřímo, kdy výkon práva je v zájmu dítěte svěřen dospělému, nejčastěji rodiči nebo podmíněně, tedy např. jen pokud existuje osoba nebo orgán, které je určitá povinnost vůči dítěti adresována. Stává se i, že právo neexistuje vůbec, i když jím dospělí za obdobných podmínek nadáni jsou.

Názory oponentů myšlenky zřízení nového úřadu pak lze rozdělit do čtyř skupin:

- činnost kanceláře může ohrozit autoritu rodičů
- ostatní instituce mohou svými prostředky agendu práv dětí pokrýt stejně dobře
- jde o příliš nákladnou záležitost
- zřízení kanceláře znamená především nárůst byrokracie

V březnu roku 1981 nicméně norský parlament uznal nezbytnost a oprávněnost hlasů volajících po nutnosti hájit práva dětí a současně, že práva dětí pokrývají tak velké množství oblastí, že již existující

[2] Flekkoy, M. G.: *The Ombudsman for children, Conception and development* ve Franklin, B.: *The New Handbook on Children's Rights*, s. 405

úřady a instituce nemohou nezbytnou ochranu a dohled nad jejich dodržováním poskytnout komplexně a dostatečně účinně.

1. 3. Pozměňovací návrhy a jejich oprávněnost

Záhy se objevily návrhy snažící se změnit formu, jakou bude ochrana práv dětí poskytována, jako například vytvoření státní rady specializované na tuto problematiku a patřící pod určené ministerstvo. Tato forma však byla vyhodnocena jako nevhodná vzhledem k nedostatečné míře nezávislosti. Zřízení většího počtu úřadů na lokální úrovni bylo odmítnuto rovněž, mělo sice účinněji fungovat jako určitý mediátor ve sporech mezi rodiči a dětmi, náklady na fungování úřadu tohoto typu by však byly nesrovnatelně vyšší. Ani zastřešení problematiky činností nevládní organizace nebylo zvoleno jako nejlepší řešení, dobrovolnictví nemá v Norsku pro tento typ práce tradici a dle obecného konsensu by v takto významném a důležitém oboru mělo přece jen jít o veřejnou instituci. Několik nevládních organizacích majících jako svůj hlavní cíl prosazování práv dětí navíc v té době v Norsku již existovalo, zajímavé je, že žádná z nich podobnou koncepci sama nenavrhla, možná proto, že všechny chtěly setrvat na své nezávislé pozici, kdy za své cíle sice mohou bojovat, tyto cíle však nejsou blíže specifikovány žádnou vnější autoritou ani tedy nikým limitovány.

Zvolenému modelu byl pro první rok činnosti schválen rozpočet $US 30.000, s kterým hospodařili čtyři zaměstnanci, což je jen pro představu jeden zaměstnanec na milión obyvatel nebo 250 tisíc dětí. Skutečnost, že je možné zabezpečit fungování takto významné instituce s minimálním počtem zaměstnanců a velice nízkým rozpočtem byla velice kladně hodnocena, i když do dnešní doby samozřejmě oba tyto údaje významně narostly. To na druhou stranu svědčí o uznání důležitosti dětského ombudsmana v očích odborné i laické veřejnosti. V průběhu prvních osmi let kancelář ročně projednala v průměru 2.500 podnětů, v roce 1999 už jich bylo 20.000. O možnosti obrátit se na ombudsmana vědělo 75% dětí ve věku 7 let a více než 90% čtrnáctiletých. Se zrušením úřadu souhlasila pouze 2% populace[3].

Z uvedeného vyplývá, že norské řešení je možné jednoznačně považovat za úspěšné, posloužilo ostatně jako významná inspirace pro řadu zemí z celého světa. Malfrid Grude Flekkøy, klinická psycholožka, vychovatelka dětí předškolního věku a první nositelka funkce ombudsmana pro děti, vidí jako nejvýznamnější aspekt fungování svého úřadu skutečnost, že slouží jako určitý komunikační kanál mezi dětmi a autoritami z oblasti zdravotnictví, školství, sociálního zabezpečení a vlastně kýmkoli, kdo může

[3] tamtéž, s. 409

rozhodovat o jejich statutu. Jako „mluvčí“ dětí může zároveň jejich přání a potřeby zpřístupnit veřejnosti, což samozřejmě funguje i opačným směrem, kdy dětem postupuje informace, které jsou naopak nutné pro ně. Významným ale není jen přenos informací, podstatnou úlohou ombudsmana je i dohled nad tím, aby dětmi vyjádřené pozice byly brány v potaz.

2. Přebírání modelu ve světě

V porovnání s norským vzorem existují ve světě tři další modely, a sice:

- ombudsman nadán různou mírou pravomocí tak, aby lépe vyhověl místním podmínkám, nicméně stejně jako v Norsku jde o oficiální veřejnou funkci, která má legislativně vymezený vztah k parlamentu (Costa Rica, Nový Zéland, Německo, Izrael, Rakousko, Austrálie)
- pravomoci se naopak více podobají norskému ombudsmanovi, i když je v tomto případě zřízen se soukromé iniciativy, tedy bez statutu oficiálního orgánu státu (Velká Británie, Belgie, Švédsko)
- jiné cesty, jak se s právy dětí pracuje, které již mají s norským modelem méně společného

Podívejme se nyní blíže, alespoň v základech, na některé zajímavé shody i rozdíly v právních řádech zemí, kam institut dětského ombudsmana pronikl nejdříve a které nám často nabízejí hodnotné podněty pro případné úvahy nad vytvářením úřadů nových, co nejefektivnějších.

Costa Rica

Na Costa Rice byla „Defensoria de la Infancia“ zřízena pod jurisdikcí ministerstva spravedlnosti prezidentským dekretem v září 1987, přičemž zákon upravující činnost skupiny ombudsmanů, mezi nimi i toho pro děti, byl vydán až v roce 1990. Prvním ombudsmanem zde byl, podobně jako v Norsku, jmenován psycholog. Jeho úkolem je bránit práva, ne zájmy, dětí, což do určité míry limituje agendu, kterou se zde ombudsman zaobírá.

Nový Zéland

Do právního řádu Nového Zélandu přinesl „Komisaře pro děti“ zákon o dětech, mladých lidech a rodinách z května roku 1989. Tento zákon vyjmenovával čtyři ministerstva, do jejichž pravomocí patřily i zájmy specifických skupin obyvatel a vytvořil 5 úřadů, které měly vyřizovat individuální stížnosti obyvatel. Prvním komisařem zde byl jmenován dětský lékař, přirozeně se tak částí jeho agendy staly i

případy související se zdravotnictvím a vzděláváním. Na Novém Zélandu se poprvé setkáváme s tím, že je stanovena fixní doba, po kterou má komisař svůj úřad zastávat, a sice pět let.

Německo

Německo s cílem zabránit negativním dopadům, které by na děti mohla mít legislativa, vytvořilo na jaře roku 1988 speciální orgán – „Komisi pro záležitosti dětí“, do které vyslala jednoho zástupce každá strana zastoupená v Bundestagu. Z toho plyne i předmět činnosti této komise, hodnotí a vyjadřuje se ke všem návrhům zákonů, které práva dětí mohou nějakým způsobem ovlivnit.

Švédsko

Veřejný „Barnmiljørâdet“ (poradní orgán pro záležitosti dětí) se ve Švédsku vyvinul z nezávislé rady ministerstva sociálních věcí. Jeho činnost zahrnuje vydávání doporučení, vedení veřejných seminářů a informačních kampaní a prohlubování formálních i neformálních kontaktů s úředníky a politiky.

Izrael

Projekt ombudsmana pro děti a mládež byl v Izraeli vytvořen v roce 1986 s tím, že půjde o úřad financovaný ze soukromých zdrojů, který bude vystupovat jako advokát a lobbista za práva dětí v Jeruzalémě (vidíme tedy, že zde došlo k vytvoření úřadu na úrovni města, podobně jako třeba ve Vídni). Bude vyřizovat individuální stížnosti a eventuelně působit i jako mediátor mezi dětmi a jejich rodiči. Nezávislost na jakékoli veřejné instituci, i co se týče financování byla na jedné straně kladně hodnocena pro volnost a neomezenost v předmětu kauz, kterým se ombudsman může věnovat. Kritizována naopak byla pouhá dobrovolnost spolupráce s ním.

2. 1. Ombudsman na mezinárodní úrovni

S šířením myšlenky zřízení instituce ombudsmana pro děti v právních úpravách jednotlivých států časem přišla i idea vytvoření podobné instituce na mezinárodní úrovni, konkrétně pak Ombudsmana pro děti ve válečných oblastech a Ombudsmana pro děti fungujícího jako oficiální orgán OSN. U obou je mimořádně důležité zvolit vhodný model pro stanovení vzájemných vztahů mezi ombudsmanem a jinými orgány organizace, míra nezávislosti nebo například možnost intervenovat na národní úrovni.

Pro zodpovězení těchto otázek bude jistě přínosné zohlednit zkušenosti, které již řada států s fungováním vlastního ombudsmana má.

Evropská unie, v které zatím funguje ochránce práv zabývající se stížnostmi týkajícími se nesprávného úředního postupu institucí a orgánů EU, zřízení ombudsmana pro děti zvažuje rovněž. Přeje si to organizace IFM-SEI, sdružující 57 občanských sdružení a jiných organizací prosazujících práva dětí. Podle jejich názoru se Evropská unie otázce práv dětí a mládeže nevěnuje dostatečně, kdy důkazem je pro ně například nepoměr v rozpočtu EU. Ochránce by měl mít hlavně dva úkoly: dohlížet na tvorbu evropské legislativy a přijímat stížnosti od mládežnických organizací i jednotlivců[4].

V této části článku jsem se snažila ukázat, jak se myšlenka zřízení úřadu ombudsmana pro děti šířila po celém světě a jak se v podmínkách jednotlivých legislativ původní švédský model měnil. Za silný podnět pro přijetí podobné úpravy je považován Mezinárodní rok dítěte (1979), ratifikace Úmluvy o právech dítěte (1989), rostoucí nespokojenost veřejnosti se stávajícím systémem ochrany, většinou se jednalo o reakci na aktuální dění ve společnosti spíše než o dlouhodobý záměr vlády. Politická vůle však vždy nesporně byla a zůstává faktorem velice významným.

3. Úvahy o ombudsmanovi v podmínkách České republiky

U nás byl dohledem a kontrolou nad dodržováním práv dětí pověřen Výbor pro práva dítěte, který je jako poradní a pracovní orgán vlády součástí Rady vlády pro lidská práva. Výbor pro práva dítěte OSN ale činnost českého výboru kritizuje, jeho pravomoci považuje za naprosto nedostatečné, nemohou stačit na kontrolování, monitorování a koordinování nejen ministerstev, ale i jednotlivých institucí zabývajících se dětmi, především pak v oblasti spolupráce s nevládními organizacemi. Vzhledem k roztříštěnosti kompetencí mezi ministerstva práce a sociálních věcí, školství, mládeže a tělovýchovy a zdravotnictví lze obtížně hledat účinný nástroj nápravy, neboť není snadné zkoordinovat činnost všech těchto resortů a vnímat problém komplexně ze všech jeho aspektů. Zároveň se tak práva dětí těžko mohou stát prioritou kteréhokoli ze zmíněných ministerstev, v pravomoci má vždy jen určitý jejich aspekt.

Koncem ledna 2003 zveřejnil Výbor pro práva dítěte OSN po projednání druhé periodické zprávy vlády ČR závěry a doporučení, v kterých sice ocenil jisté pokroky, kterých bylo v oblasti ochrany práv dítěte

[4] Pap kar: *Evropská unie by měla zřídit ombudsmana pro děti*, ČTK dostupné z http://iporadna.cz/psycho/clanek.php?article[articleid]=9753

dosaženo, zdlouhavost procesu legislativní reformy, otázky práv romských dětí, problémy ústavní výchovy, péče a ochrany týraných, zanedbávaných a sexuálně zneužívaných, zdravotně postižených dětí, nezletilých žadatelů o azyl a trestního stíhání mladistvých byly ovšem stále hodnoceny jako nedostatečné. Doporučil zajistit vhodné programy pomoci obětem zneužívání a vytvořit vhodné podmínky k tomu, aby oběti násilí nebyly dále poškozovány současným systémem vyšetřování. Nabádal také k výslovnému zákazu tělesných trestů, k zachování hranice trestní zodpovědnosti na současném věku 15 let a na aktivním monitoringu a vyhledávání ohrožených dětí a práci s nimi[5].

3. 2. Plán vlády

Kritizovaná roztříštěnost systému sociálně právní ochrany dítěte, kdy jednotlivé její aspekty spadají do kompetencí čtyř ministerstev a je tedy velice málo flexibilní a účinná, v současné době zaměstnává vládu, která na sjednocení systému pracuje. Koncepce péče o ohrožené děti a děti žijící mimo rodinu již byla vypracována Ministerstvem práce a sociálních věcí, pod pravomoc tohoto ministerstva by měl být nový modernější a účinnější systém ochrany dětí také sjednocen.

Ministryně pro lidská práva a národnostní menšiny, Džamila Stehlíková, představila v souvislosti s aktuálním děním v České republice, především pak tzv. kuřimskou kauzou a lepším fungováním orgánů, které mají na starost dohled a kontrolu nad dodržováním práv dítěte návrh na zřízení instituce dětského ombudsmana. Koncepce paní ministryně je ve stádiu příprav, měl by však především kontrolovat, „zda jsou dodržována dětská práva“, protože stát v mnoha situacích nedbá na to, co je nejlepší pro dítě.[6] Každopádně by se měl v jednotlivých kauzách výrazně angažovat, apelovat na úředníky, aby koordinovali svou práci a plnili povinnosti, které jim náleží, zároveň by mu příslušelo iniciovat změny legislativy. Vystupoval by zároveň i jako jakýsi mluvčí dětí, který by jejich potřeby tlumočil nejen příslušným orgánům a institucím, přispěl by zároveň i k širšímu obecnému povědomí o problémech, které děti trápí. Jeho pravomoci by ale působily i opačným směrem, a to vůči dětem, které by seznamoval s podstatou práv jich se týkajících a významem, které pro jejich každodenní život mají.

Závěr

[5] Sobotková, J.: *Výbor OSN vyzývá českou vládu k důslednější ochraně práv dětí*. Dostupné z http://zpravodajstvi.ecn.cz/index.stm?x=118506

[6] Martinek, J.: *Plán vlády: dětský ombudsman*. Lidové noviny z 22. 5. 2007, dostupné z http://www.zeleni.cz/4704/clanek/plan-vlady-detsky-ombudsman/

Nedostatečné respektování práv dětí v České republice je dlouhodobě kritizováno ze strany Výboru pro práva dítěte OSN i nevládních organizací. Naše země je podle studie Dětského fondu OSN zařazena do skupiny sledovaných států s nejvyšším výskytem týraných a utýraných dětí[7], kdy děti samy se mohou obracet pouze na orgány ochrany dětí, Policii České republiky eventuelně Linku bezpečí či jiné nevládní organizace.

Jak bylo zmíněno výše, vedle roztříštěnosti kompetencí a nedostatečné koordinace činnosti jednotlivých úřadů zabývajících se právy dětí není zařazení agendy pod úřad stávajícího ombudsmana považováno za dostatečné, neboť na ni nezbývá potřebný prostor. Vedle toho současný úřad zaměstnává řadu právníků, zatímco odborníků na oblast výchovy, vzdělávání nebo mládeže je v ní zastoupeno minimum.

Oponenti s ohledem na skutečnost, že dětský ombudsman by měl stejné kompetence jako veřejný ochránce práv, kterého již máme, namítají zbytečnost zřízení zcela nové instituce. Vytvoření nového úřadu považují za neúčelně nákladnou a byrokratickou cestu. Účelnější by bylo vyčlenění speciální sekce v rámci již existujícího úřadu, která by se věnovala výhradně právům dětí a vedle právníků zaměstnávala i specialisty z jiných oborů.

Pod kompetence instituce podobného charakteru lze zařadit především práva participační, jako přístup k informacím nebo právo na vyjádření vlastního názoru, na tomto poli by nepochybně mohl být velice přínosný, dal by dětem „hlas“ a podpořil veřejnou diskusi.

Všechny naznačené skutečnosti ukazují, jak citlivě je nutné přistupovat k problematice práv dětí. Jsou sice celosvětově zakotvena a uznána, podmínky dnešního světa však jejich aplikaci stále ztěžují. Problémem zůstává, že i při sebelepší vůli mohou být pravomoci ombudsmana vztaženy pouze na určité aspekty dětských práv a jeho úřad problém komplexně řešit může jen stěží.

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HISTORICKÉ A PRÁVNE ASPEKTY OSOBITNÝCH PRÁVNYCH PREDPISOV O TRESTNOM KONANÁ PROTI MLADISTVÝM PÁCHATEĽOM TRESTNÝCH ČINOV

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Abstrakt

Vo svojom príspevku som sa zamerala na historické a právne aspekty trestného konania proti mladistvým páchateľom trestných činov. Analyzovala som dva právne predpisy, ktoré boli prijaté v roku 1913 a 1931. V týchto osobitných právnych predpisoch bolo upravené trestné konanie ale aj trestné súdnictvo, ktoré rozhodovalo v prípade mladistvých. Výnimočnosť týchto zákonov spočíva v tom, že dosahovali vysokú odbornú úroveň, výchovný princíp trestného konania a v období po druhej svetovej vojne na území Slovenska už nikdy neboli prijaté osobitné zákony, ktoré by sa touto problematikou zaoberali.

Kľúčové slová

trestné konanie, mladiství páchatelia, Zákonný článok VII z roku 1913, Zákon 48 z roku 1931

Abstract

In my article I have been concentrated on historical and legal aspects of criminal proceeding against youthful offenders. I have been analyzed two legal regulations passed in 1913 and 1931. In these individual legal regulations has been regulated criminal procedure but also criminal justice that these cases decided. Uniqueness of these codes lies in high specialized level of these acts and educational principle of criminal procedure. In the terms after Second World War nevermore in the area of Slovak republic were passed legislation that dealt with issues of youthful offenders by the individual legal regulation.

Keywords

Criminal procedure, youthful offenders, Legal article VII from 1913, Act 48 from 1931

Situácia v práve Rakúsko - Uhorska pred prijatím zákonného článku č. VII z roku 1913 o súde mladých

Aby som mohla priblížiť problematiku trestného konania proti mladistvým v období Rakúsko-Uhorskej ríše, je potrebné najskôr načrtnúť pomery v spoločnosti a práve v Uhorsku počas Dualizmu. Práve do tohto obdobia spadajú základy modernizácie trestného práva aj samotného konania proti mladistvým páchateľom trestných činov.

Za absolutizmu platilo v Uhorsku rakúske trestné právo, najprv zákonník z roku 1803 a neskôr z roku 1852. Po Rakúsko-Uhorskom vyrovnaní sa ešte viac prehĺbila právna neistota a zložitý stav v oblasti trestného práva, ale aj trestného súdnictva, ktorý dosiahol takú úroveň, že odkladanie vypracovania trestného zákona už neprichádzalo do úvahy . Ministerská komisia predložila návrh zákona v roku 1873, ktorý musel byť niekoľkokrát prepracovaný a do života vstúpil až v roku 1878 ako zákonný článok V. z roku 1878 pod názvom Uhorský trestný zákonník o zločinoch a prečinoch. Tento zákonník v mnohom splnil očakávania modernejšej koncepcie, nakoľko bol liberálnejší, humánnejší a jeho dikcia bola stručná, jasná a jednoduchá. Účinnosť nadobudol 1. septembra 1880 a neskôr bol niekoľkokrát novelizovaný. Najrozsiahlejšia novelizácia však bola vykonaná v roku 1908, keď bol novelizovaný nielen trestný zákon, ale aj poriadok. Práve táto novelizácia položila základy trestného konanie proti mladistvým, nakoľko upravila osobitné zmiernenia a spôsoby prerokúvania trestných činov mladistvých. Aj v oblasti trestného práva procesného sa práve v tomto období pristúpilo k modernizácii trestného procesu a jeho priblíženie k vyspelým západoeurópskym štátom. Stalo sa tak zákonným článkom č. XXXIII z roku 1896. [1]

VII. Zákonný článok z roku 1913 o súde mladých

Reforma trestného súdnictva nad mladistvými bola formálne dovŕšená v roku 1913 keď bol uverejnený špeciálny zákonný článok, ktorý upravoval trestné konanie proti mladistvým páchateľom trestných činov. Práve vytvorením samostatného zákonného článku sa zefektívnilo trestné konanie proti mladistvým a to aj napriek určitej zložitosti a ťažkopádnosti tejto právnej úpravy. Prínos tejto právnej úpravy sa týkal najmä skutočnosti, že už v roku 1913 sa našlo dostatok vôle na úplnú reformu oblasti trestného konania proti mladistvým páchateľom. V prípade, že niektorú oblasť trestného konania tento zákonný článok neupravoval alebo ho upravoval iba sčasti, až subsidiárne sa použili všeobecné normy

[1] Pozn.: Trestný poriadok sa nazýval Pravotný poriadok a vzorom mu bol francúzsky trestný poriadok v takej podobe , ako ho využívali v oblastiach nemeckého práva.

trestného poriadku. V praxi to znamenalo, že sudcovia vždy museli brať tieto ustanovenia do úvahy a museli ich aj uplatňovať.

Súd mladých

Zákonným článkom č. VII z roku 1913 boli položené základy nielen špeciálnej úprave konania proti mladistvým ale aj špeciálneho súdnictva, ktoré sa problematikou mladistvých páchateľov trestných činov zaoberalo. Súd mladých sa musel zriadiť pri každej kráľovskej stolici, ktorá súdila trestné veci. Práve to bol jeden z prínosov samostatnej úpravy otázky mladistvých. Pri každom súde mladých vymenoval minister spravodlivosti jedného sudcu mladých a to na tri roky, ale takéto vymenovanie sa mohlo zopakovať. Tam, kde by to vzhľadom na väčší počet prípadov bolo potrebné, mohol minister vymenovať aj sudcov viac.[2] Príslušnosť súdu mladých sa určovala miestom, kde bol skutok spáchaný, bydliskom alebo stálym miestom zdržiavaním sa zákonného zástupcu alebo opatrovateľa mladistvého, alebo miestom, kde sa mladistvý zdržoval. V prípade kompetenčného konfliktu, rozhodovala okolnosť predídenia a tento súd mohol len na návrh prokurátora preložiť prípad na druhý kompetentný súd ak to vyžadoval záujem mladistvého alebo záujem pokračovania trestného konania. Ak si mladiství nezvolil obhajcu a ak je jeho obhajoba nutná, určil súd mladistvému obhajcu sám.

Pravidlá všeobecného pokračovania

Na konanie pred súdom museli byť použité pravidlá trestného konania vzťahujúce sa na konanie pred okresným súdom, samozrejme s odchýlkami plynúcimi z tohto zákonného článku. Ak by záležitosť mladistvého bola v spojení so záležitosťou dospelého obvineného, bolo treba konanie oddeliť. To neplatilo, ak by to bolo na ujmu pokračovania konania. Ak bol ten istý mladistvý upodozrievaný z viac trestných činov, tieto záležitosti sa mali spojiť a proti mladistvému bolo treba pre všetky skutky aplikovať jedno ustanovenie. V trestnej záležitosti mladistvého bolo potrebné upovedomiť kompetentnú sirotskú stolicu a oznámiť jej konečný výrok.

Pokračovanie v trestných záležitostiach mladých pred súdom mladých

I. Predbežné pokračovanie

[2] Pozn.: Súdy mladých však nesúdili iba páchateľov trestných činov. Na základe § 3 mali právomoc vykonať opatrenia v prípade, že sa trestného činu dopustili deti mladšie ako 12 rokov a neboli preto trestne zodpovedné. Súd takéto dieťa odovzdal zákonnému zástupcovi na domáce pokarhanie alebo školskej vrchnosti na školský trest. Taktiež mal súd právomoc urobiť ochranné opatrenia v prípade mladistvých, ktorí sú vo svojom okolí vystavení mravnej skaze a spustnutiu ak nedovŕšili ešte vek 18 rokov.

O každom mladom, ktorý bol upodozrievaný zo spáchania trestného činu, bolo treba urobiť oznámenie na súde mladých. Súd potom upovedomil prokurátora mladých a urobil neodkladné opatrenia až do doby, kým prokurátor podal žalobu. Vyšetrovanie viedol sudca mladých.[3]

Sudca sa musel v prvom rade presvedčiť o totožnosti mladého a presne určiť jeho vek. Musel si zadovážiť všetky skutočnosti potrebné pre konečné poznanie osobnosti páchateľa, stupňa duševného a mravného vývoja a životných pomerov. Taktiež mohol predvolať mladého a za svedka mohol predvolať aj jeho rodičov, toho v koho domácnosti mladý žil a iné osoby od ktorých si mohol zadovážiť potrebné informácie. O povahe a životných pomeroch mohol žiadať vysvetlenie od sirotskej vrchnosti, od dozornej vrchnosti mladých, od administratívnej a školskej vrchnosti, od kompetentného duchovného, zamestnávateľa obvineného, od jeho lekára atď..

Ak si okolnosti nevyžadovali iné pokračovanie, sudca mladého predvolal. Ak sa mladý nedostavil a ak spolu s ním predvolaný[4] nedokázal, že za to nemôže, sudca mohol takejto osobe udeliť pokutu dvadsať korún, ktorá však mohla byť zmenená na zatvorenie. Ak sudca uznal za vhodné, mohol ho dať vyšetriť jednému alebo aj viacerým lekárskym znalcom alebo ho mohol za účelom preskúmania jeho duševného stavu dať pozorovať v ústave. Závery znalca boli záväzné.

Po zistení spomenutých faktov a vypočutí mladistvého pristúpil súd k nariadeniu prípadných ochranných opatrení.
Súd mladých ďalej previedol potrebné ochranné opatrenia. Súd mohol, ak uznal za vhodné, vzhľadom na telesné alebo mravné nebezpečenstvo hroziace mladému, vziať mladého z jeho doterajšieho prostredia a zveriť ho niektorému jeho príbuznému, inej vhodnej osobe, niektorému deti chrániacemu spolku, alebo ho mohol umiestniť v štátnom nápravnom ústave alebo v štátnej detskej opatrovni. Bolo to dočasné nariadenie, ktoré mohol súd previesť počas celého priebehu konania, ale mohol ho aj kedykoľvek zmeniť.

Zadržaných mladých bolo potrebné bezodkladne odovzdať kompetentnému súdu mladých. Ak mladého nebolo možné pred súd predviesť hneď, policajná vrchnosť alebo riadny súd ho mohol z vážnych príčin strážiť. Takéto stráženie ale nemohlo presiahnuť 48 hodín.
Ak sudca nemohol z príčiny veku, mravného úpadku, nebezpečnej povahy mladého alebo v blízkosti nemožno nájsť k jeho opatere vhodnú osobu, spolok alebo ústav, či z inej vážnej príčiny urobiť

[3] Pozn.: V tejto fáze mal sudca mladých také iste oprávnenia ako vyšetrovací sudca a policajná vrchnosť mohla bez úpravy sudcu previesť iba neodkladné vyšetrovacie opatrenia.

[4] Pozn.: zákonný zástupca, rodič alebo osoba, v domácnosti ktorej mladý žije

opatrenia, mohol dať mladého strážiť v miestnostiach sudcovského vezenia. Doba stráženia bola najviac 15 dní, v ťažkých prípadoch mohol senát mladých predĺžiť dobu stráženia o jeden mesiac. Mladého bolo nutné držať oddelene od ostatných zavretých a prácou zamestnávať.

Po zozbieraní relevantných faktov súd mladých odovzdal spisy prokurátorovi mladých. Prokurátor mohol odstúpiť od podania žaloby ak mladý v dobe spáchania skutku nemal potrebnú duševnú a mravnú vyvinutosť, alebo ak bol spáchaný skutok malej váhy a ak bolo v záujme budúceho mravného vývinu a chovania mladého žiaduce, aby sa od trestného konania upustilo.

II. Zakončenie pokračovania

Skončiť trestné konanie bolo možné dvoma spôsobmi. Bez formálneho pojednávania alebo pojednávaním. Súd mohol skončiť konanie bez formálneho pojednávania v podobe výroku a to takto: mohol aplikovať § 16 trestnej novely bez ohľadu na to, či mladý mal potrebnú duševnú a mravnú vyvinutosť[5], mohol mu určiť skúšobnú dobu, mohol ho v čase od osem hodín ráno do osem hodín večer nechať strážiť v niektorej miestnosti súdu s určitými obmedzeniami (napr.: bez jedla,...) po dobu od troch do dvanásť hodín, a nakoniec mohol zastaviť konanie ak bol skutok nepomerne malej váhy. Súd však mohol rozhodnúť len vtedy, ak mladého vypočul.

Ak neprichádzalo do úvahy rozhodnutie súdu bez pojednávania, súd nariadil pojednávanie. K pojednávaniu bolo nutné predvolať aj zákonného zástupcu mladého. Ak by jeho dostavenie bolo spojené s veľkými ťažkosťami, alebo by nebolo žiaduce, súd miesto neho predvolal inú blízku osobu mladého. Ďalej súd predvolal toho, v domácnosti ktorého mladý žil a samozrejme aj tých, ktorý mohli prispieť k objasneniu veci. O termíne pojednávania bol upovedomený prokurátor mladých, obhajca, protektor mladého alebo ten patronátny spolok , ktorý ho vyslal. Pojednávanie bolo nutné oddeliť od iných pojednávaní tak, aby mladý nemohol prísť do styku s odrastenými obžalovanými.

Sudca rozhodoval, či bude pojednávanie prebiehať verejne alebo s vylúčením verejnosti. Proti rozhodnutiam o verejnom pojednávaní alebo o vylúčení verejnosti nebolo možné sa odvolať.
V neprítomnosti prokurátora a obžalovaného nebolo možné viesť pojednávanie ani vyniesť rozhodnutie. Ak by sa bolo treba obávať, že svedecká výpoveď niektorého zo svedkov mohla by na obžalovaného neprajne vplývať, sudca mohol nariadiť, aby obžalovaný na túto časť pojednávania

[5] Pozn.: Rozhodol, aby mladého jeho právny zástupca, príbuzný, alebo iná osoba držala pod domácim dohľadom alebo stanovil, aby mladý podstúpil domáci alebo školský trest. Ak takýto mladý bol vo svojom doterajšom prostredí vystavený mravnej skaze, súd nariadil nápravnú výchovu.

opustil prejednávaciu miestnosť a proti takémuto rozhodnutiu nebolo možné sa odvolať. Po vrátení sa obžalovaného, sudca mohol ale nemusel obžalovaného oboznámiť s výsledkami výsluchu.

Súd mladých na základe pojednávania rozhodol niektorým z nasledujúcich konečných rozhodnutí:

1. vyniesol rozsudok, v prípadoch ak proti mladistvému nariadil pokarhanie, väzenie, štátne väzenie, zavretie alebo peňažnú pokutu alebo ak obžalovaného oslobodil
2. rozhodol výrokom, ak nariadil výchovné opatrenie alebo keď trestné konanie zastavil

III. Opravné prostriedky

Proti rozhodnutiam súdu bolo možné odvolanie, ktoré však nemalo odkladný účinok. Sudca však mohol, v záujme mladého, vykonanie rozhodnutia odložiť. Odvolať sa mohli prokurátor, mladý alebo súkromný žalobca. Aj proti vôli mladého tak mohli urobiť jeho zákonný zástupca, rodič, manžel, a obhajca. Toto právo však patrilo aj tým, ktorých sa rozhodnutie týkalo. Tí sa mohli odvolať proti tej čiastke rozhodnutia, ktoré sa ich bezprostredne dotýkalo.
Ak prokurátor nepodal odvolanie, ostatní oprávnení mohli iba vtedy podať odvolanie, keď súd aplikoval nápravnú výchovu, väzenie, štátne väzenie alebo zavretie. Odvolanie bolo prípustné proti skutkovým zisteniam alebo pre nedodržanie podstatných ustanovení zákona. Príčinu odvolania bolo treba oznámiť pri podaní návrhu.

Rozhodnutia súdu mladých revidoval stály trojčlenný senát kráľovskej súdnej stolice (súdno-stoličný senát mladých). Tento senát mohol konečné rozhodnutie súdu mladých potvrdiť, zmeniť alebo zrušiť a vyniesť namiesto neho nové rozhodnutie alebo mohol prípad vrátiť na nové pojednávanie súdu mladých, aby vyniesol nové rozhodnutie, aby osvetlil jednotlivé okolnosti alebo doplnil jednotlivé fakty.

Súdno-stoličný senát v záležitosti odvolania rozhodoval na pojednávaní v prípadoch, že konečné rozhodnutie súdu mladých senát zmenil na trest odňatia slobody alebo zvýšil dobu trvania trestu odňatia slobody.[6] V iných prípadoch rozhodoval v senáte. Ak smerovalo odvolanie proti rozhodnutiu o trovách trestného konania, súkromnoprávnym nárokom alebo iným otázkam rozhodoval senát v tajnom zasadaní. Súdno-stoličný senát mladých preskúmal odvolanie v senáte po vypočutí prokurátora a ak to bolo bez väčších ťažkostí možné aj mladého, jeho zákonných zástupcov alebo rodičov alebo toho, v koho domácnosti mladý žil.

[6] Pozn.: Ak nižší súd neaplikoval väzenie alebo štátne väzenie, súdno-stoličný senát a kráľovská tabuľa mohli takýto trest aplikovať iba vtedy, keď to prokurátor v odvolaní navrhol alebo navrhol na pojednávaní. To isté platilo aj o dobe trvania trestu odňatia slobody.

Na pojednávaní pred súdno-stoličným senátom mladých, musel mať mladý, ktorý ešte nedovŕšil 18 rok veku a nemá zvoleného obhajcu, obhajcu ustanoveného súdom .

Proti druhostupňovému konečnému rozhodnutiu súdno-stoličného senátu mladých bolo možné sa odvolať prostredníctvom tzv. nulity. Nulitu mohol požadovať:

1. prokurátor pre nedodržanie podstatných ustanovení zákona
2. mladý, jeho zákonný zástupca a obhajca pre nedodržanie podstatných ustanovení zákona, keď súd uložil trest nápravnej výchovy, väzenia alebo štátneho väzenia.

Všeobecné aspekty konania proti mladistvým páchateľom trestných činov po vzniku prvej Československej republiky

Aj po vzniku Československej republiky v roku 1918 platili na jej území zákony z obdobia Rakúsko – Uhorskej ríše. V Čechách a na Morave to bolo právo rakúske a na Slovenku Uhorské právo. Ponechaním dovtedajších právnych noriem znamenal dualizmus v práve. Recepčnou normou sa konštituoval československý právny poriadok, ktorý však naďalej pozostával z právnych predpisov rakúskych aj uhorských. V aplikačnej praxi to znamenalo, že na Slovensku platilo uhorské právo, jeho zákony, nariadenia, obyčajové právo kuriálne, ako aj právna prax v akom platili pred vznikom Československej republiky. Práve dualizmus práva spôsoboval problémy, ktoré sa potom prejavili nielen pri aplikácii prevzatých noriem, ale aj pri zavádzaní nových, jednotných noriem, nakoľko v odlišnom právnom prostredí, s odlišnými predpismi, sa mohli uplatňovať len s odlišnými výsledkami. Už onedlho po vzniku Československej republiky sa preto začali snahy o unifikáciu právneho poriadku a tieto snahy trvali prakticky počas celej doby trvania republiky. Bez unifikovaného zákonodarstva, resp. vytvorenia nového funkčného poriadku, nebolo možné dokončiť integráciu. Po vydaní recepčnej normy sa právo na území republiky postupne menilo a dopĺňalo novými unifikovanými normami, československými zákonmi, nariadeniami ale aj súdnou praxou Najvyššieho súdu ČSR. Na základe týchto zmien sa postupne právny poriadok skladal z recipovaných právnych noriem a z noriem, ktoré boli prijaté po vzniku republiky a boli súčasťou československého poriadku. Od svojho vzniku boli platné a účinné na celom území Československej republiky

V prípade trestného konania proti mladistvým, platil na území Slovenska Uhorský trestný zákonník o zločinoch a prečinoch – zákonný článok V/1878, trestná novela z roku 1908 a samozrejme samostatný zákonný článok o súde mladých – zákonný článok VII/1913. Práve tento zákonný článok upravoval na Slovensku trestné konanie proti mladistvým páchateľom trestných činov až do prijatia nového zákona,

platného na celom území Československej republiky a to zákona číslo 48/1931 o trestnom konaní proti mladistvým.

Zákon č. 48 z roku 1931 o trestnom súdnictve nad mládežou

Filozofiou a základnou myšlienkou tohto zákona je výchova mladistvého páchateľa trestného činu. Zákon je postavený na myšlienke, samotné potrestanie páchateľa nestačí, ba čo viac je nežiaduce. Presadzuje myšlienku, že trestanie páchateľov ešte neodstráni príčiny kriminality u mladistvých a používať trest ako druh odplaty za spáchaný skutok, neodstráni príčinu protiprávneho konania mladistvého a dokonca môže z neho vychovať v budúcnosti recidivistu. Nie je žiaduce aby spoločnosť len trestala, ale aj vychovávala. Je tu badať snahu o uprednostňovanie výchovného princípu a samotná snaha o prevýchovu mladistvého pred kriminalizáciou a plošným trestaním mladistvých previnilcov.

Týmto zákonom sa Československo zaradilo medzi krajiny, ktoré si uvedomili naliehavosť a dôležitosť úpravy trestného konania proti mladistvým a preto pristúpili k vytvoreniu samostatnej právnej úpravy v tejto oblasti, aby tak podčiarkli význam trestného konania proti mladistvým.

Samozrejme sú aj prípady v ktorých by samotná prevýchova nestačila a je nutné razantne zakročiť a ukázať pevnú ruku. „ Úlohou kriminálnej politiky a súdnej praxe musí byť u mládeže zabraňovanie zločinnosti opatreniami a prostriedkami, ak ide o zlo intenzívne prejavované, hlavne však napravovať zlo menej intenzívne prejavované, viac však skryté a hroziace zhubným prepuknutím bez včasných výchovných opatrení. Pretože previnenie mladistvého je veľakrát iba výkričníkom jeho ocitnutia sa na šikmej ploche, z ktorej musí byť rozumne a kriminálno–politicky odvrátení, aby neklesol navždy. “ [7]

Zmenou oproti predchádzajúcej právnej úprave z roku 1913 bola aj oblasť trestnej zodpovednosti mladistvých. V prvom rade boli v tomto zákone veľmi presne formulované výchovné princípy na ktorých bol celý zákon postavený. Napríklad to znamenalo zvýšenie hranice trestnej zodpovednosti z 12 na 14 rokov a začalo sa rozlišovať medzi nedospelými a mladistvými. Osoby, ktoré v čase spáchania trestného činu nedovŕšili 14 rokov sa označovali ako nedospelí a neboli zodpovedný podľa trestných zákonov. V prípade, že sa nedospelí dopustili činu inak trestného, mohli im byť uložené iba výchovné a liečebné opatrenia. Rozhodoval o tom poručenský súd a pri svojom rozhodnutí si mohol vyžiadať odborný pedagogický alebo lekársky posudok. Medzi tieto opatrenia najmä patrilo : pokarhanie,

[7] Ečer, R.: Hlavní intence zákona o mladistvých. In Soudcovské listy. 1932. str.23

umiestnenie v inej rodine, nariadenie ochranného dozoru alebo ochrannej výchovy. V prípade, že sa dopustil nedospelý starší ako dvanásť rokov skutku, za ktorý zákon stanovoval trest smrti alebo trest odňatia slobody na doživotie, nariadil poručenský súd jeho ochrannú výchovu vo výchovnom ústave alebo umiestnenie v liečebnom ústave.

Upustenie od potrestania

Súd odsudzujúci mladistvého mohol upustiť od potrestania, ak išlo o čin menšieho významu, ktorého sa mladistvý dopustil z nerozvážnosti alebo vplyvom inej osoby alebo ak bol zvedený príležitosťou alebo hospodárskou tiesňou. Ďalej ak sa dopustil činu z ospravedlniteľnej neznalosti právnych predpisov a po tretie ak by mu mal súd uložiť iba nepatrný peňažný trest alebo nepatrný trest na slobode. Práve ospravedlniteľná neznalosť zákona ako jedna z podmienok upustenia od potrestania vyvolala po schválení tohto zákona vlnu polemiky. Hovoríme o akejsi špecialite zákona z roku 1931, ktorá sa nenachádzala ani v úprave z roku 1913 ani sa už v neskôr prijatých predpisoch nezaviedla. Na jednej strane tu boli obavy, ako by sa dalo zistiť, či mladistvý skutočne splnil požiadavku ospravedlniteľnej neznalosti zákona a či sa toto ustanovenie nebude zneužívať. V tomto smere bol vyslovený názory, že: „ ustanovenie môže mať demoralizujúci význam pre mladistvých...“.[8] Dr. Pintera autorovi týchto slov odpovedal: „ Podľa môjho názoru ospravedlniteľná neznalosť zákona bude sa môcť brať do úvahy iba vtedy, keď pôjde o mladistvého cudzinca alebo ak sa bude týkať predpisov veľmi zložitých... Svedomitý obhajca bude túto okolnosť namietať aj v tom prípade, kedy by to malo význam len podporný, napríklad ako poľahčujúca okolnosť pri výmere trestu a vždy bude záležať na voľnom uvážení sudcu či je táto námietka odôvodnená. Práve tak by mohlo mať demoralizujúci význam všeobecné tvrdenie obhajcu, že mladistvý je nevinný! “ [9] Upustenie od potrestania malo účinky odpustenia trestu a od prepadnutia veci súd taktiež upustil, ale iba v prípade, ak tomu nebránil verejný záujem alebo dôležitý súkromný záujem. Takéto odsúdenie sa nezapisovalo do trestného registra.

Senát mládeže, sudca mládeže a žalobca mládeže

V trestnom konaní pre trestné činy spáchané mladistvými osobami rozhodoval na krajskom súde senát mládeže. V senáte mládeže zasadali dvaja sudcovia z povolania (sudcovia mládeže), z nich jeden predsedal a jeden bol prísediaci. Vo veciach, ktoré by inak patrili do kompetencie porotného súdu, konalo sa hlavné pojednávanie pred senátom mládeže, v ktorom zasadali dvaja sudcovia mládeže a dvaja prísediaci. Ak porovnáme toto ustanovenie s právnou úpravou platnou v predchádzajúcom

[8] V.S.: K zákonu o mladistvých č. 48/1931 Sb. z a nař.. Soudcovské listy. 1932. str. 4
[9] Pintera, R.: K zákonu o mladistvých č. 48 (1931 Sb. z. a n.). Soudcovské listy. 1932. str. 38

období zistíme, že predtým trojčlenné senáty sa zmenili na senáty štvorčlenné a mohlo tak dochádzať k parite hlasov. Prípravné konanie vykonával sudca mládeže. On taktiež poskytoval právnu pomoc v trestných veciach proti mladistvým.
Sudca mládeže na okresnom súde bol príslušný v trestnom konaní proti mladistvým vo veciach, ktoré spadali do výlučnej kompetencie tohto súdu.

Sudcami mládeže mali byť ustanovení tí sudcovia, ktorí svojimi vlastnosťami a svojou povahou sa zvlášť hodili pre tento úrad. Pri ich ustanovení malo byť prihliadnuté taktiež k ich vzdelaniu odbornému, najmä pedagogickému a k ich dovtedajšej činnosti. To isté platilo aj o prísediacich, ktorý museli byť okrem toho spôsobilí k úradu porotcu a poznať sociálnu starostlivosť o mládež.[10]

Aké by teda malo byť trestné konanie proti mladistvým? Aký by mal byť jeho účel?
Úprava trestného konania proti mladistvým by mala byť v každom ohľade kvalitná, v aplikačnej praxi správne uplatňovaná, trestné konanie by malo byť rýchle a mladistvý by mal mať možnosť využiť svoje práva. Iba tak možno dosiahnuť spravodlivé rozhodnutie a účel trestného konania ako aj zvolenej sankcie. Účelom trestného konania, ako som už viackrát spomenula, by malo byť pokúsiť sa napraviť čo sa napraviť dá. Mladú osobnosť nezničiť, ale zachrániť. Základom kvalitnej právnej úpravy trestného konania je samostatný právny predpis, ktorí by sa zaoberal trestným konaním proti mladistvým. Osobitná právna úprava v špeciálnom právnom predpise umocňuje váhu, ktorá sa problematike venuje. V roku 1913 aj 1931 existovali samostatné zákony, ktoré sa zaoberali trestným konaním proti mladistvým a súdom mladistvých. V roku 1931 sa dokonca podarilo vytvoriť zákon, ktorý viac hľadel na osobu mladistvého ako na čin samotný. Naplno uplatňoval výchovné princípy a dával im prednosť pred trestaním a zastrašovaním. V závere by som chcela spomenúť názor, s ktorým sa stotožňujem: „ Dnešná mládež je psychicky veľmi zložitá, takže častejšie radikálny trest má omnoho škodlivejší následok, ako jemu primerané výchovné opatrenie. Je lepšie mladú dušu poučiť a vychovávať prácou alebo inou metódou, ako ho odsudzujúcim rozsudkom jednoducho zničiť. Týmto totiž zločinnosť neklesá, ale často narastá na škodu všetkých. “[11]

[10] Pozn.: Prijať a zastávať úrad prísediaceho bolo občianskou povinnosťou. Profesori stredných škôl a učitelia nemohli z dôvodu svojho povolania odmietnuť úrad porotcu. Ak vyjde najavo, že prísediaci je nespôsobilý na tento úrad, odvolá ho minister spravodlivosti z úradu. To isté platilo aj v prípade odmietnutia alebo zrieknutia sa úradu z dôvodu, pre ktorý sa úradu bolo možné zrieknuť alebo ho odmietnuť alebo z dôvodu, ktoré minister spravodlivosti uznal za závažný.
[11] Ečer, R.: Hlavní intence zákona o mladistvých. Soudcovské listy. 1932. str.24

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[2] Pintera, R.: K zákonu o mladistvých č. 48 (1931 Sb. Z. a n.). Soudcovské listy. 1932

[3] V.S.: K zákonu o mládistvých č. 48/1931 Sb. z. a nař.. Soudcovké listy, 1932

[4] Zákonný článek č. VII z roku 1913 o súde mladých

[5] Zákon č. 48/1931 Sb. z. a n. o trestnom súdnictve nad mládežou

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PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY V BRNĚ

Abstrakt

Cílem příspěvku je postižení nejvýznamnějších aspektů v životě otroka v antickém Řecku. Jednak by mělo dojít k vymezení právního postavení otroka v Řecku, tedy k uvedení, jaká kritéria obecně vedou k charakteristice otroků, jednak ale také k postižení základních rozdílů mezi otrokem řeckých městských států a otrokem římským. Nedílnou součástí je také nastínění základní problematiky přístupu dvou nejvýznamnějších řeckých států, Athén a Sparty, na tomto poli.

Klíčová slova

Otrok, otroctví, propuštěnec, nesvoboda, azyl, otrokář, zajatec, perioikové, heilóti, metoikové, otrok státní, otrok soukromý, Athény, Sparta

Abstract

The aim of this contribution should be the infliction of the most significant aspects of the slave life in ancient Greece. Partly it is to define the legal status of the Greek slave, it means to show in what criteria generally lead towards slaves characteristics, partly to show in also the basic differences between the slave of the Greek city states and the Roman slave. The integral part of it is also the adumbration of the basic questions in the access of the two most significant Greek states, Athens and Sparta, in this field.

Key words

Slave, slavery, dischargee, submission, asylum, slaver, captive, perioics, helots, metics, public slave, private slave, Athens, Sparta

Úvod

Otázka právní pozice otroka ve starém Řecku je nepochybně zajímavou oblastí. Už jen v tom smyslu, že je možné srovnat jeho pozici s otrokem žijícím ve starém Římě. Toto srovnání se přitom nabízí: Řím je chápán jako příklad klasicky otrokářského státu. Už z tohoto pohledu je jistě zajímavé se ptát, zda bylo právní, a potažmo faktické postavení otroka v Řecku lepší, nebo horší, než tomu bylo u Římanů.

Spíše bychom se asi domnívali, že se řecká kultivovanost promítne mimo jiné také do zacházení s otroky: že se tedy s otroky nakládalo lépe než ve starém Římě. Římská společnost je sice obdivuhodná z řady hledisek, ovšem je-li něčím proslulá negativním způsobem, pak určitě přístupem k otrokům- snad nikde jinde nebyli otroci používáni v tak masovém měřítku. A snad nikde s nimi nebylo nakládáno s takovou nelítostí (ačkoli často panovaly v postavení otroků značné rozdíly).

Proto mě zajímá, zda také Řekové zacházeli se svými otroky podobně zle, anebo zda se na jejich přístupu k nim projevilo vysoce rozvinuté filozofické myšlení a pozoruhodně rozvinutá kulturní úroveň. Chtěla bych tedy některé aspekty postavení otroka v Římě srovnat s podmínkami v Řecku – je mi ovšem jasné, že ne všude v rámci řeckého světa budou podmínky tytéž, jelikož v rámci Řecka nalezneme řadu městských států a už jen nejznámější dva státy, Sparta a Athény, jsou známy svým rozdílným přístupem v mnohém ohledu.

Obecně o postavení otroka v Řecku

Přes výše uvedené je vždy třeba při úvahách o postavení starověkého otroka uvažovat z pohledu premisy, že není a nemůže být rovnoprávnou lidskou bytostí, že je vždy na něj nahlíženo jako na „něco“, s čím lze manipulovat jako s jakoukoli jinou věcí. Dále je jisté, že hlavním zdrojem, z něhož starověkým státům plynou otrocké síly, jsou války (dalším významným zdrojem je pirátství).[1]

Je nepochybné, že také antické Řecko, přestože bývá nazýváno kolébkou demokracie, bylo společností otrokářskou, chápeme-li společností otrokářskou takovou, která využívá otrocké síly a která uznává kvalitativní rozlišení lidí na svobodné a ty, kteří žádná práva nemají – a nejsou tedy ani lidmi. Ostatně tento předpoklad byl živen názory filozofů: Aristotelés vnímá takové uspořádání jako jedině možné: jsou totiž práce (manuální), pro jejichž výkon je ruka hrdého řeckého občana příliš vznešená, a tak jsou otroci přirozenou součástí života.

[1] Řečtí otrokáři dávali přednost cizozemským otrokům: nemohli totiž lehce uniknout a pro neznalost jazyka se ani nemohli sjednocovat k hromadným akcím proti otrokářům. Tuto skutečnost potvrzuje Meier, Ch.: Athen- ein Neubeginn der Weltgeschichte, Berlin: Fiedler Verlag, 1993, s. 302, 412 a násl., jakož i Sergejev, V. S.: Dějiny starověkého Řecka, Praha: Nakladatelství Rovnost, 1952, s. 120. Aristotelés počítá k otrokům všechny barbary, tedy cizince – Neřeky. Více k tomuto: Žukov, J.M.: Dějiny světa v deseti svazcích, Praha: Státní nakladatelství politické literatury, 1959, s. 39 a násl.

V tomto smyslu jsou antické řecké městské státy skutečnými otrokářskými zřízeními. Vždyť i nejrozvinutější řecký stát, Athény, se v době klasické, tedy v 5. - 4. století př. Kristem, vyznačoval tím, že proti polovině plnoprávných občanů tu stála polovina otroků.[2] Může se to zdát podivné právě proto, že historie vnímá Athény v době jejich rozkvětu jako jako kolébku demokracie – ovšem tehdejší člověk chápal otroctví jako přirozené – každá nová generace se rodila do tohoto smýšlení, a ani tedy neměla možnost uvažovat jinak. Poněvadž si otroky mohl dovolit téměř každý, bylo skutečností, že je také každý měl.

Výsledkem toho bylo, že počet otroků byl zde zřejmě obrovský. Jejich potřeba tomu odpovídala – byli využíváni ke všem typům práce. Navíc počet otroků úzce souvisí se stupněm hospodářského rozvoje: pokud má město (a stejně tak občané) prostředky, nakupuje otroky. Jelikož nebyla příliš podporována představa, že by si otroci zakládali vlastní rodiny, je nasnadě, že jejich přísun musel plynout odjinud.

Zdá se ovšem, že počty otroků ve starých řeckých státech je velmi obtížné určit: Řekové se příliš nezabývali tím, koho lze vlastně za otroka považovat. Měli pro ně více výrazů, čímž je zřejmě vyjádřeno i to, že otroci zde byli značně nesourodou skupinou. Pro otroka se objevuje jednak výraz dúlos, který je protikladem svobodného člověka, ale také andropos (tj. „člověk s tlapami“, čímž se zřejmě chce vyjádřit pohrdání otrokem, kterého dáváme na roveň se zvířetem).[3]

Není tedy jednotná definice toho, koho můžeme v řeckých poměrech nazvat otrokem, ovšem mezi znaky, které by nám jej mohly definovat aspoň zčásti, bude určitě patřit jeho směnitelnost, jako je tomu u jiného zboží (je zde tedy patrná podoba s římskoprávním chápáním otroka jako věci), jakož i to, že neexistuje žádná smlouva, v níž by nesvobodná osoba s tímto svým postavením souhlasila. Zde je tedy podstatným prvkem nesouhlas se zotročením. Lze se domnívat, že se tím naráží na skutečnost, že v Římě bylo možné, aby občan upadl do dočasného otroctví poté, co nesplnil dluh, přičemž souhlasil pro tento případ s dočasným zotročením. Dnes by takováto smlouva pochopitelně nebyla platná, neboť se

[2] Oliva je ale přesvědčen o tom, že za řecko – perských válek připadlo na každého občana ve Spartě alespoň sedm heilótů. Mimoto jsou známy zprávy, že v Attice bylo na přelomu 4.a 3. stol. př. Kr. dokonce dvacetkrát víc otroků než občanů. Ostatně historik Moses Finley při vyčlenění pěti hlavních otrokářských společností jmenuje vedle Říma, Spojených států amerických do pol. 19. století, Brazílie a koloniální Antily právě také Řecko v klasickém období. Viz k tomu: L´ Historie: Dějiny otroctví - otroci v řecké demokracii. 100+1 zahraniční zajímavost. Ročník 41, č. 11 (2004), str. 52. Oliva, P.: Sparta a její sociální problémy, Praha: Academia, 1971, s. 52-24. Velišský, F.: Život Řekův a Římanův, Praha: Nákladem spisovatelovým, s. 250. Ovšem odhady počtu otroků v Attice kolem 5. století se různí. Žukov, J.M.: Dějiny světa v deseti svazcích, Praha: Státní nakladatelství politické literatury, 1959, s. 38, uvádí, že oproti metoikům a svobodným zde byl dvojnásobný počet otroků.

[3] Mj. thérapon, oikétés, pais a další. Už skutečnost, že existovala řada výrazů pro pojmenování otroka, svědčí o tom, že jejich postavení bylo dost rozdílné. Tamtéž, s. 52-53.

protiví dobrým mravům. S tímto znakem z velké části souhlasí také další charakteristika: pán může otroka ze své vůle kdykoli propustit.

Dalším ukazatelem toho, že můžeme hovořit o otrokovi, je také jeho původ: většinou pochází z jiného kraje, než kde byl zakoupen (zde by se snad dalo dovodit, že tato skutečnost koreluje s tím, že nejpřínosnějším zdrojem otroků bylo válečné zajetí).[4] V klasickém období měl největší podíl otroků svůj původ v oblasti černomořské.

Nabízí se domněnka, že stejně jako tomu bylo v Římě, také zde bylo možné status otroka změnit. Ostatně jsem již uvedla, že pojmovým znakem pánovy moci nad otrokem, je také to, že ho může propustit. Nápodoba s římským pojetím je dále i v tom, že propuštěný otrok nemá postavení plnoprávného občana: musí bývalému pánovi odevzdávat část úrody. Pouze výjimečně může nabýt občanství: zejména tehdy, když se významným způsobem zasloužil o rozvoj města apod. Většinou ale zůstal ve svém postavení někde mezi nevolníkem a občanem, popř. dosáhl pozice podobné jako metoik.[5]

Jako jeden z ukazatelů některých aspektů otrokova života v řecké oblasti mohou sloužit zákony z Gortýny (nacházela se na Krétě). Pochopitelně otrok není předmětem zájmu tohoto zákonodárného aktu – nalezneme v něm některá ustanovení, která se otroků týkají, sledujíc ovšem zájmy otrokáře. Součástí zákonů je například postup za situace, kdy se dva svobodní přou o to, kdo je vlastníkem určitého otroka. Zákon určuje, že se má v takovém případě přistoupit k výpovědi svědka (podle ní má pak soudce rozhodnout); jestliže svědek není, má soudce rozhodnout podle svého svědomí.[6]

Jiná ustanovení těchto zákonů mají obdobnou podobu, jako tomu bývá i v jiných právních předpisech, které se dotýkají otroctví: většinou se liší přísnost trestu za nějaké protiprávní jednání ve srovnání se svobodnými, pochopitelně v neprospěch otroka. I toto je ale okolnost, kterou známe z Říma.

Rozdíly v pojetí otroka v Řecku a Římě

Z dosud uvedeného se zdá, že postavení otroka v Řecku bylo velmi blízké postavení otroka ve starém Římě. Zajímá mě ovšem nyní, zda v této oblasti existují také vůbec nějaké rozdíly.

[4] Tamtéž, s. 53. Pán svému otrokovi dává také jméno, které nekoresponduje s jeho jménem rodným. Tyto znaky ale už nepovažuji za natolik specifické: je zřejmé, že pokud má pán nad otrokem moc, může mu vybrat také nové jméno.
[5] Propouštění otroků nikdy nebylo v Řecku masovou záležitostí, ale přesto se stávalo, že bylo otrokovi přislíbeno propuštění za účast ve válce. Meier, Ch.: Athen- ein Neubeginn der Weltgeschichte, Berlin: Fiedler Verlag, 1993, s. 249. Bengtson, H.: Griechische Geschichte, München: C. H. Beck´sche Verlagsbuchhandlung, 1950, s. 485.
[6] Lewy, H.: Altes Stadtrecht von Gortyn auf Kreta, Berlin: R. Gaertners Verlag, 1885, s. 5. Tyto zákony jsou datovány do 7.-5. století př. Kr.a týkají se zejména občanského a procesního práva.

Za významný rozdíl považuji předně to, že pro římský stát platilo, že pán má absolutní moc nad otrokovým životem a smrtí, tj. disponuje právem nazývaným ius vitae necisque, v souladu s kterým může otroka nejen libovolně fyzicky trestat, ale také jej zabít. Ovšem nebylo tomu tak ve starověku vždy a všude. Zmíněným právem pán nedisponuje právě například v námi zkoumaných Athénách (vedle toho ale také například ve starověkém Izraeli).

Podle athénských zákonů tedy bylo nepřípustné, aby pán svého otroka zabil.[7] Dovolil-li si to, čekal jej za takové počínání soud. Ovšem pokud k tomu došlo, nešlo o zločin, ale jen o přečin. Když někdo usmrtil cizího otroka, bylo to chápáno jako neúmyslné zabití. Jistě je to znak vyššího stupně humánního smýšlení, než panoval právě v Římě, nebo také ve Spartě. Sparta byla specifická velmi brutálním nakládáním s otroky; tím více ale překvapí, že zde nebylo klasické právo nad životem a smrtí heilóta (okolnosti uvádím níž).

Pokud nakládal otrokář s otrokem skutečně nelidským způsobem, existovala zde také jiná možnost: otrok mohl utéct a hledat pomyslný azyl v chrámě (tento postup známe ale z Říma také). Důsledky azylu nalezneme také v gortýnských zákonech. V nich se uvádí, že pokud otrok prohrál spor o svou osobu, přičemž právě požíval azylového práva v chrámě, může ho jeho pán povolat zpět před dvěma svědky a poté si může pro něj do onoho chrámu dojít, popř. pro něj poslat. Neučiní-li tak ovšem do jednoho roku (zřejmě myšleno po rozsudku o tom, že otrok náleží pánovi), již se nemůže později otroka zmocnit.[8]

Otázkou je, odkdy řecké dějiny, které probíhaly nejprve v kmenových zřízeních, otroctví, alespoň v jeho klasické podobě, znaly. Například Velišský nesouhlasí s názorem, že rané období řeckých dějin není s využíváním otrocké práce spjato. Ve své publikaci o životě řecké a římské společnosti zdůvodňuje toto své stanovisko tím, že ačkoli Hérodotos ve svém díle tvrdí, že zpočátku nebyla řecká společnost otrokářská, podle Velišského tomuto názoru nenasvědčuje otroctví líčené Homérovými básněmi.[9]

Tomu ale neodpovídá stanovisko jiného autora, G. Thomsona.[10] Ten připomíná, že pokud padl do rukou některého řeckého kmene zajatec (popisuje tedy nejstarší fázi řeckých dějin, kmenové zřízení), byl buď

[7] O této skutečnosti pojednává mj. Sergejev, V. S.: Dějiny starověkého Řecka, Praha: Nakladatelství Rovnost, 1952, s. 222.
[8] Altes Stadtrecht von Gortyn auf Kreta, Berlin: R. Gaertners Verlag, 1885, s. 6-7. Další ustanovení těchto zákonů se týkají zejména oblasti rodinného práva, kde je občas ovšem otrok také zmíněn, zejména jde o situace, kdy otrok někomu způsobí škodu apod.
[9] Toto stanovisko hájí Velišský v zajímavé publikaci, která mapuje život v antice. Velišský, F.: Život Řekův a Římanův, Praha: Nákladem spisovatelovým, 1876, s. 247. Podobný názor je zastáván i jinde: Simons, W: Werkzeug mit Seele. Sklaven in der Antike, Wien: Petronell-Carnutum, 1994, 3-304-300565-7, s. 3.
[10] Thomson, G.: O staré řecké společnosti, Praha: Rovnost, 1952, s. 82, 130.

zabit, nebo byl adoptován. Zajatec tedy nebyl nikdy zotročen.[11] Ostatně rod měl vůbec právo adoptovat cizince, který tak dostal plné členství jako ti, kdo jej adoptovali. Thomson kromě toho při vysvětlování významu otrokářství v éře městských států poukazuje na Aristotelovu Politiku, kde se uvádí, že jádrem společnosti je manželský pár, který podporuje otrocká práce. Opět tak dokládá skutečnost, že hospodářský význam otroků byl nepopiratelný.

Výše uvedenému rozdílu v postavení otroka v Řecku a Římě, který spočíval v tom, že v Řecku neměl pán právo nad otrokovým životem, odpovídá také rozdílné nakládání s otrokem. Římskou nezměrnou krutost zmiňuje řada autorů se zdůrazněním římské koncepce vnímání otroka jako res, tj. věci. Velišský[12] také zdůrazňuje, že v době římské republiky nevznikl žádný zákonný předpis, který by otroky před svévolí jejich pánů chránil. Také v Řecku mohl pán zacházet s otrokem v podstatě jak chtěl (mimo úmyslného zabití), ale nutno říct, že k tomu nedocházelo tak často a v takové míře.

Pokud jde o rozlišení vzniku nebo povahy otroctví, v Řecku existovalo taktéž dlužní otroctví, které známe z Říma. Zde bylo ale blíže spíš dočasné služebnosti a bylo zrušeno Solónem.[13] Dále mimo otroků, jejichž práce je využívána v domácnostech, jsou zde známí také otroci veskrze státní (tyto dvě kategorie rozlišují i gortýnské zákony). Ti většinou konají nepříliš ctěná povolání: slouží jako kati, drábové, pochopové: mají ovšem lepší postavení. Mohou se sami hájit u soudu, mohou také mít určitý majetek ve vlastní správě.

Označení otroků se lišilo jednak podle území, kde se nacházeli, jednak podle oblasti, v níž pracovali. V zemědělských oblastech tak nepracovali na polích jen heilóti, ale také penesti, klaroti, afamioti.[14] Uvedení jejich kategorie je významné proto, že měli mírně odlišné postavení než klasický athénský otrok: byli poměrně samostatní, přičemž samozřejmě odevzdávali otrokáři velkou část sklizně. Další zvláštní skupinou byli pak demosiové[15], kteří byli využíváni jako příslušníci městské stráže, ale také jako písaři a podobně. Podstatné je, že vzhledem k tomu, že se o ně staralo město, mohli požívat ochrany zákona (na rozdíl od otroků, kteří byli v soukromém vlastnictví).

[11] Stanovisko Velišského je jiné: nazývá postup, při němž je zajatec zotročen, „starým obyčejem“, z čehož je patrné, že tento postup vnímá jako velmi starý. Ostatně potvrzuje to i zmínkou o tom, že záhy Řekové upouští od zotročování zajatců a propouštějí je za výkupné. Velišský, F.: Život Řeků a Římanův, Praha: Nákladem spisovatelovým, s. 249.

[12] Naproti tomu v Řecku i v pozdější době přetrvává spíše patriarchální charakter otroctví, často jsou otroci bráni jako součást rodiny. Tamtéž, s. 251, 265.

[13] Problematiku zákonů přibližuje Ruschenbusch, E.: Die Fragmente des Solonischen Gesetzwerkes, Wiesbaden: Franz Steiner Verlag GmbH, 1966, 140 s., Sergejev, V. S.: Dějiny starověkého Řecka, Praha: Nakladatelství Rovnost, 1952, s. 160-167. Přesto je dlužní otroctví známo i v helénismu, jakož i situace, že svobodný člověk sám sebe prodá do otroctví. Žukov, J.M.: Dějiny světa v deseti svazcích, Praha: Státní nakladatelství politické literatury, 1959, s. 237.

[14] V zemědělství pracovali také svobodní občané. Řekové totiž, na rozdíl od práce řemeslné, kterou vykonávali častěji otroci v tzv. ergasteriích, zemědělskou prací nepohrdali. Žukov, J.M.: Dějiny světa v deseti svazcích, Praha: Státní nakladatelství politické literatury, 1959, s. 40-42.

[15] Tamtéž, s. 40.

Z období helénismu je nutné uvést další specifickou skupinu – šlo o tzv. laoi (lidé)[16], kteří byli sice příslušníky občiny, ale byli k ní připoutáni a byli povinni obdělávat půdu krále nebo šlechty. Laoi sice mohli uzavírat smlouvy, nejeví se tedy jako klasičtí otroci, ale de facto byli absolutně podřízeni zvůli krále, ačkoli jejich pozice připomíná spíš postavení římských kolonů nebo středověkých nevolníků.

Rozdílné životní podmínky otroků ve Spartě a Athénách

Dva nejvýznamnější starověké řecké státy byly známé svou odlišnou orientací v mnoha oblastech života.[17] Rozdílná filozofie obou států a spartská orientace na tuhou kázeň a vojenství se odrážela také v pojetí otroctví. Právě ve Spartě bylo chování vůči otrokům nesmírně brutální. Otroků zde bylo tolik, že panoval všeobecný strach z otrockých povstání.
Ten byl tak silný, že vedl k vzniku nechvalně známých krypteií – jakýchsi příležitostných honů na nejzdatnější otroky, kteří byli přitom zabíjeni.[18]

Ovšem nejen ve Spartě panoval všeobecný strach z otroků – heilótů; podobně tomu bylo i v Athénách. Také tady se občané snažili zabránit tomu, aby došlo k větší koncentraci otroků. Báli se taktéž toho, že jim otroci svou prací začnou konkurovat.[19]

Oba nejznámější řecké státy rozlišovaly obyvatelstvo do zvláštních skupin, které v římských dějinách nenalezneme. Ve Spartě byli početnou skupinou heilóti[20], kteří měli pozici od římských otroků mírně odlišnou (navíc měli zřejmě specifický původ – vedle domácích otroků, tedy potomků předdórského podmaněného obyvatelstva, mezi ně totiž patřili podmanění Meséňané). Historikové chápou význam tohoto pojmu nejednotně; ovšem i tato okolnost přispívá k tvrzení, že pozice heilóta bude mít skutečně

[16] Žukov, J.M.: Dějiny světa v deseti svazcích, Praha: Státní nakladatelství politické literatury, 1959, s. 232. Laoi byli často posléze zotročeni úplně, dokonce v té míře, že v ptolemaiovském Egyptě byla vydána nařízení zakazující je kupovat či brát do zástavy.
[17] Také v mnohých jiných městských státech a oblastech je otroctví známo. Dokonce existuje řada označení pro otroky: například Héraklejští otroky nazývají „dodavateli darů", aby je ušetřili klasického potupného pojmenování. Podobně i Thesálové mají pro otroky vlastní jméno, nazývají je penesty. Nováková, J., Pečírka, J.: Antika v dokumentech. I. díl- Řecko, Praha: Státní nakladatelství politické literatury, 1959, s. 113.
[18] I o okolnostech významu a podobě krypteií se vedou spory: jako logický se mi jeví závěr, že mohla vzniknout jako odpověď na otrocká povstání. Objevuje se ale také názor, že jde o záležitost, která vznikla již za rané Sparty, za vlády Lýkurgovy. K dalším stanoviskům viz Oliva, P.: Sparta a její sociální problémy, Praha: Academia, 1971, s. 46 an.
[19] Proto nebyl uskutečněn jeden z Xenofontových návrhů, podle něhož měl stát dosáhnout vyšších zisků tím, že by nakoupil množství otroků, a tito by pak byli pronajímáni občanům na práci. Xenofón: Řecké dějiny, Praha: Nakladatelství Svoboda, 1982, s. 311.
[20] Jinou skupinu tvořili perioikové, kteří sice nebyli plnoprávní jako Sparťané, ale disponovali osobní svobodou. K tomu viz Klimecká, Jaroslava: Postavení otroka v antickém světě. Rigorózní práce, PrF UJEP, Brno 1980, s. 49-50. Oliva, Pavel: Sparta a její sociální problémy. Academia, Praha 1971, s. 38-54.

svá specifika, díky kterým jej nelze nazvat klasickým otrokem se všemi jeho znaky, tak jak jej známe jednak z Říma, jednak ale i z jiných oblastí starověkého světa.[21]

Heilóti ovšem stáli někde mezi státním a soukromým otrokem a podle toho se k nim pán musel chovat: je tedy patrné, že koncepce toho, kdo je otrokovým vlastníkem, je zde poněkud odlišná od toho, co známe z Říma: heilót stojí pod formálním vlastnictví polis. Xenofón[22] popisuje heilóta jako zvláštní typ zemědělského otroka, který je spartskému občanovi přidělován spolu s půdou jako živý inventář.

Asi nejvýznamnějším následkem toho, že heilót není striktně ve vlastnictví otrokáře, je nemožnost beztrestného zabití otroka pánem (srovnejme s římským ius vitae necisque!). Heilóti byli jednotlivým občanům přiřazováni podobně jako půda, takže lze konstatovat, že byli vlastně součástí odměny státu například za to, že se občan měl připravovat na účast ve válce.

Polis v podobě lakedaimónského zřízení si určitým způsobem zachovávala dohled nad vztahem domnělého pána a heilóta. Vždyť i o výši naturální dávky odváděné heilóty rozhodoval stát. Když si připomeneme situaci v Římě, zde by byl podobný postup nemyslitelný.[23] Každopádně ale platí, že heilóti byli protipólem Sparťanů. Samozřejmě jim to Sparťané ukazovali velmi rádi- heilóti museli právě za účelem svého odlišení chodit v jiném oděvu, pro připomínku svého postavení byli každoročně bičováni atd. Proto nelze uzavřít, že s nimi jen ze skutečnosti, že jsou označováni jiným výrazem než otrok, bylo zacházelo lépe.

I Athény měly svá specifika, pokud jde o některé vrstvy obyvatelstva. Vyskytují se tu tzv. šestidílníci[24], kteří svůj název dostali zřejmě proto, že museli odvádět pět šestin sklizně. Problém nastal, jestliže nezaplatili včas, protože mohli i se svými dětmi upadnout do otroctví. Tady jde tedy o specifikum, které z Říma neznáme (ačkoli bychom jistě našli blízký institut: i v popsaném případě jde vlastně o jakýsi

[21] Jestliže Platón je odlišuje od jiných otroků a vnímá je jako otroky kupované, například Plútarchos je od otroků odděluje úplně. Jiní autoři heilótii považují dokonce za nevolnictví nebo poddanství. Blíže viz: Oliva, P: Sparta a její sociální problémy, Praha: Academia, 1971, s. 39. http://en.wikipedia.org/wiki/Slavery_in_ancient_Greece.

[22] Xenofón: Řecké dějiny, Praha: Svoboda, 1982, s. 285-286.

[23] Spartskou podobu otroctví nazývá Oliva otroctvím nerozvinutým. Ovšem sporné je nadále nejen to, jestli je heilóty možné chápat jako klasické otroky: jasný není ani etnický původ heilótů, a dokonce ani to, jestli je heilót spíš otrokem soukromým nebo státním. Někdy je chápán athénský otrok jako otrok státní, zatímco lakónský heilót jako soukromý, jindy je v případě heilóta naopak jako hlavní vnímáno jeho vlastnictví obcí. In Oliva, Pavel.: Sparta a její sociální problémy. Academia, Praha 1971, s. 44.

[24] Klimecká, Jaroslava: Postavení otroka v antickém světě. Rigorózní práce, PrF UJEP, Brno 1980, s. 61. Hésiodos je také uvádí (usuzuji z toho, že píše o sedlácích, kteří žili z jedné šestiny výtěžku práce a zbylou část odevzdávali); stávalo se, že neměl-li jak krýt dluh, prodával děti do otroctví do ciziny. Ovšem pokud nebyl věřitel spokojen, upadnul do otroctví také samotný sedlák. Hésiodos: Práce a dni, Praha: Rovnost, 1950, s. 13.

specifický typ dlužního otroctví, a to z Říma známe také). Také dlužní otroctví jako takové zde bylo pochopitelně velkým nebezpečím.[25]

Stejně jako jsem u Sparty uváděla zvláštní postavení skupin perioiků a heilótů, tady jsou zvláštní kategorií mimo šetidílníků také metoikové. Tito byli osobně svobodní, nicméně bez politických práv a ve značné míře byli omezeni.[26] Za Solóna došlo k zlepšení jejich postavení, protože byla provedena řada reforem, mezi nimiž například výše jmenovaní „šestinoví" rolníci byli zbaveni dosavadních dluhů. Solón dále nedovolil za své závazky ručit vlastní svobodou, jak jsem již uvedla výš.

V této době už pozorujeme podobné prvky v moci otrokáře nad otrokem, které známe z Říma, například dispozice tělesnými tresty. Na rozdíl od římského pána ale athénský nedisponoval také hrdelním právem, jak uvedeno výš. Hrdelní právo zde spadalo pod kompetence soudu. Tato skutečnost je mimořádnou vůbec v rámci celého starověkého světa- v jiných řeckých státech (mimo spartských heilótů) takové ustanovení neplatilo. Pán v případě, že svého otroka zavraždil, odpovídal stejným způsobem, jako by se dopustil neúmyslného zabití svobodného člověka.[27] Ovšem útěky otroků se netolerovaly: jen ve výjimečných případech mohli uprchlí otroci prosit o to, aby byli přeloženi k méně krutému otrokáři. Pro otroky ovšem často útěk znamenal jedinou naději. Proto hojně využívali možnosti přeběhnout na protivníkovu stranu za válek.

O otrocích v tomto městském státě se dočteme také v Aristotelově Ústavě athénské. Aristotelés je zmiňuje na několika místech, ovšem jde spíš o situace, které nějakým způsobem mohou souviset s postavením otroka; není zde ucelená úprava jeho postavení. Specifickým způsobem je zde upravena situace, kdy otrok urazí svobodného občana, tj. poškodí jeho čest. Ústava uvádí, že se v tom případě podává žaloba za urážku na cti u thesmothetů (úředníků), nikoli jako v jiném případě u sboru čtyřiceti soudců. Rovněž státní otroci jsou zde zmiňováni skutečně útržkovitě a není jim přikládán žádný význam: v ústavě jsou například na jiném místě stanoveny práce státních otroků.[28]

Závěr

[25] Hésiodos, který žil na přelomu 8.a 7. století př. Kr., byl velkým kritikem tehdejší bohaté vrstvy, která ve velkém pěstovala lichvu a prodávala také své spoluobčany do otroctví. Často se stávalo, že byli sedláci, ale i jejich ženy, vyhnáni z půdy a poslání na těžkou práci do dolů. Hésiodos: Práce a dni, Praha: Rovnost, 1950, s. 25.
[26] Zdá se, že metoikové, ostatně stejně jako otroci, byli pro athénský stát ekonomicky výhodnou složkou obyvatelstva. Každý dospělý metoikos musel totiž platit státu daň, tzv. metoikeion. Xenofón: Řecké dějiny, Praha: Svoboda, 1982, s. 310.
[27] Sergejev, V. S.: Dějiny starověkého Řecka, Praha: Nakladatelství Rovnost, 1952, s. 228.
[28] Aristotelés: Ústava athénská, Praha: tiskem a nákladem Aloisa Wiesnera, 1900, s. 82 a násl., 104 a násl.

Účelem příspěvku rozhodně nebylo postihnutí všech charakteristik právního postavení otroka v antickém Řecku. Takový úkol by jistě potřeboval větší prostor. Snahou tohoto článku bylo spíše postižení toho, v čem tkví hlavní rozdíly a specifika postavení otroka právě zde, oproti otrokům žijícím v jiných oblastech starověkého světa.

Musím konstatovat, že moje hlavní premisa, tj. skutečnost, že se humánní filozofické myšlení starého Řecka promítne také do zacházení s otroky (a to s legislativou patřičně pozměněnou právě vzhledem k těmto humanizujícím tendencím), se potvrdila jen zčásti.

Pravdou je, že jako morálně i jinak vyspělý městský stát byly chápány hlavně Athény. Svými prioritami stály na opačném protipólu, než tomu bylo u Sparty, tedy druhého nejvýznamnějšího řeckého státu. Právě v oblasti právního postavení otroků se projevilo toto humanistické zaměření Athéňanů (zákaz zabíjení spartských heilótů sledoval spíše zájem státu vzhledem k jejich specifickému postavení). Ustanovení o pánově potrestání za usmrcení svého otroka se zdá být velmi ojedinělým. Pochopitelně je nemožné zjistit, jaká byla situace konkrétně v tomto ohledu ve všech ostatních městských státech, ale přesto lze tvrdit, že toto opatření je skutečně v antickém světě mimořádným, už jen ve srovnání s římskou realitou.

Dalším aspektem, který je podstatný vzhledem ke zkoumané oblasti, je existence specifických skupin obyvatel, které na jednotlivých územích vznikly. V příspěvku jsem se snažila o jejich stručné představení.

Závěrem je však přes výše uvedené nutno konstatovat, že ačkoli by se jistě při srovnání právního, a potažmo i faktického stavu otroka v Řecku a Římě našly některé zvláštnosti a odchylky, obecně lze tvrdit, že tyto dvě podoby otroctví mají zcela jistě více paralel, než rozdílů, nacházejících se navíc spíše v rovině faktické, neboť pro oba starověké státy byla stěžejní koncepce otroka jako objektu právních vztahů, z níž veškerá další realita související s otroky vycházela.

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ZWISCHENFALL IN TIENTSIN – EIN STÜCK DER DOPPELMONARCHIE IN CHINA IM JAHRE 1917

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Abstract

Österreich-Ungarn war absolut keine Kolonialmacht, dennoch hatte ein quasi Mini-Kolonie im Fernen Osten. Nach dem Boxeraufstand erwarb ein Gebiet am Peiho-Ufer: Österreich-Ungarn bekam ein Konzession in Tientsin. Obwohl die Rentabilität der österreichischen Niederlassung nicht ganz eindeutig war, die Monarchie investierte Summen um ein Settlement gegenüber der japanischen und neben der italienischen Niederlassung auszubauen.

Mit China hatte übrigens die Monarchie seit Mitte des 19. Jahrhunderts einen nicht bedeutenden Kontakt, in dessen Rahmen wurde ein Handelsvertrag geschlossen. Im Pachtgebiet bestand natürlich laut dieses Vertrages von 1868 eine gewisse Exterritorialität, was beinhaltet auch die Konsulargerichtsbarkeit in betreff der österreichisch-ungarischen Angehörigen.

Key words

Tientsin, China, Österreich-Ungarn, Niederlassungen und Settlementen in 1917, Die Doppelmonarchie in China, Ungarisches Staatsarchiv, Emmanuel Skalitzky.

I.

Am 1917, also während des Ersten Weltkrieges sind seltsamen Ereignissen geschehen im österreichisch-ungarischen Gebiet. Als an der europäischen Front der Grosse Krieg tobte, im Ostasien waren die kriegführenden Mächte zum gewissen Modus Vivendi gezwungen. Die internationalen Städte, und die Gebiete der Niederlassungen und Settlementen[1], also die Städte die mehr europäischen als chinesischen Orten waren, als neutralen Zonen ausser den Kriegsaktionen standen. Diese Lage gab eine gewisse Möglichkeit um hinter den Kulissen einen geheimen Krieg zu führen: es beinhaltete die

[1] Zur Rechtslage der Settlementen und Niederlassungen: Nr. 4783 Bülow an Ges. von Radolin (26. Januar 1901.) und Nr. 4782 Aufzeichnung des Direktors der Kolonialabteilung des Auswärtigen Amtes Stuebel. Berlin, 25. jan. 1901. (282-283) in: *Die Grosse Politik der Europäischen Kabinette 1871-1914. Sammlung der Diplomatischen Akten des Auswärtigen Amtes*. Im Auftrage des Auswärtigen Amtes. Hsg. JOHANNES LEPSIUS, ALBRECHT MENDELSSOHN BARTHOLDY, FRIEDRICH THIMME. Deutsche Verlagsgesellschaft für Politik und Geschichte M. B. H. in Berlin. 1924. 16. Band: *Die Chinawirren und die Mächte 1900-1902.*

finanzielle Unterstützung die turbulenten Gruppen und Grüppchen im Gebiet des Feindes, und auch die geheime Waffenlieferung in und durch die Konzessionsgebieten.
Die Territorien der europäischen Mächte waren damals Inseln des europäischen Rechtes: die europäischen Staaten haben erlangt die Exterritorialität für deren Angehörigen, und das bedeutet, dass die Wohnviertel der Europäer und die Staatsbürger praktisch gar keinen Kontakte mit der chinesischen amtlichen Organe hatten. Die erwähnte Exterritorialität hat sich manifestiert hauptsächlich im Konsulargerichtsbarkeit, also im Recht um europäischen oder gemischten Instanz zu wenden.[2]

Für Österreich-Ungarn diese Exterritorialität und die Konsulargerichtsbarkeit in China wurde nach Unterzeichnung des „*Freundschafts-, Handels und Schiffahrtsvertrag zwischen der österreichisch-ungarischen Monarchie und dem Kaiserthume China*" garantiert[3], und danach vom Gesetz von 1891 über die Konsulargerichtsbarkeit präzisiert.[4]
Der Boxeraufstand gab für Österreich-Ungarn neue Möglichkeiten, nähmlich mit dem Sieg der Alliierten eine Niederlassung zu gründen. Da fast alle europäischen Mächte– ausser die Doppelmonarchie und Italien - schon ein Gebiet in China hatte, es schien die letzte Chance für eine Niederlassung zu erwerben. So ist die Besitzergreifung einer engbegrenzten Zone erfoglen am 1. Februar 1901.[5],[6]
Das Boxer-Protokoll liess für die Alliierten im wichtigsten Punkte Detachemente garnisonieren. Das bedeutet, dass im pekinger diplomatischen Viertel, und auch in Tientsin befindeten sich k.u.k. Truppen.[7]
Die Monarchie hat in tientsiner Niederlassung ein Konsulat eröffnet im 1902.[8] Mit diesem Konsulat hatte die Monarchie insgesamt drei Konsulaten in China: ein Generalkonsulat in Shanghai, ein Konsulat in Tientsin und ein Vizekonsulat in Chefoo.[9] Laut des Vertrages von 1866, und des Gesetzes über der Konsulargerichtsbarkeit (1891) es war das Generalkonsulat in Shanghai, das die Gerichtsbarkeit übte in China in den Rechtssachen zwischen der österreichisch-ungarischen Angehörigen, und auch in deren Strafsachen.[10]

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[2] HANS VON FRISCH: *Der völkerrechltiche Begriff der Exterritorialität*. Wien, 1917., Alfred Hölder., DR. LERS, VILMOS: *A konzuli bíráskodás intézménye. Nemzetközi jogi tanulmány.* Budapest, 1904. Lampel.
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[5] GEORG LEHNER – MONIKA LEHNER: *Österreich-Ungarn und der „Boxeraufstand" in China.* Mitteilungen des österreichischen Staatsarchivs. Sonderband 6. Herausgegeben von der Generaldirektion. Studienverlag, Wien, 2002. 610.
[6] THEODOR RITTER VON WINTERHALDER: *Kämpfe in China. Eine Darstellung der Wirren und der Betheiligung von Österreich-Ungarns Seemacht an ihrer Niederwerfung in den Jahren 1900-1901.* Wien und Budapest, A. Hartleben's Verlag, 1902. 538-540.
[7] *Protocole final entre les puissances étrangères et la Chine pour la reprise des relations amicales, signé à Pékin le 7 septembre 1901.*, 9. art. – Recueil international des traités du XX[e] siècle. (Descamps- Renault) Année 1902. Paris, Arthur Rousseau. – 1[er] année. 80-86. (RIT)
[8] JÓZSA, SÁNDOR: *Kína és az Osztrák-Magyar Monarchia*. Akadémiai, Budapest, 1966.
[9] *A Cs. és Kir. Osztrák-Magyar konzuli hivatalok jelenlegi állományainak és kerületi beosztásának átnézete.* Különlenyomat a "Közgazdasági Értesítõ" 1915. évi február hó 11-én kelt 6. számából. Budapest, Pesti Könyvnyomda Részvény-Társaság. 1915.
[10] 1871:XXXV. tc. XXXIX. cikk, 1891:XXXI. tc. (für Ungarn)

Nach der Kriegserklärung Chinas an die Mittelmächte die Konsulate beendeten ihre Arbeit, und der Schutz der österreichisch-ungarischen Angehörigen wurde von Niederlanden übernommen.

II. Über die folgenden Archivalien

Obwohl keine direkte Verbindung zwischen Budapest und der shanghaier Konsulat von der Niederlanden war, vermutungweise auf Grund der Angehörigkeit der Teilnehmer geriet eine Akte über der Fällen verschiedenen Ungarn ins Ungarisches Staatsarchiv.
Die Akte befindet sich im Ungarischen Staatsarchiv, in der Sektion des Ausseren. Die bezüglichen Urkunden machen nur einigen Seiten aus, dennoch geben eine wichtige Momentaufnahme aus dem Leben der österreichisch-ungarischen quasi-Kolonie während der Kriegszeiten.
Also mit der Auswahl der zwei Aktenstück würde ich beiden (pressen und geheimen) Seiten dasselbes Ereignisses vorstellen.

Es handelt sich um ein Komplott und ein Mord. Man stiftete einen Komplott gegen die österreichisch-ungarischen Präsenz – oder lieber für einen nicht bestimmten Vorteil. Die Teilnehmer waren ein Intellektuelle, ein Glücksritter, mehreren Matrosen und Deserteuren.
Der Zeuge, der österreichische Emmanuel Skalitzky hat sich in die unerwarteten Ereignissen meliert, deren Auslauf, als seinen Geständis abgelegt hat, noch nicht klar war.

III.
„Protokoll

aufgenommen bei dem k.u.k. Generalkonsulate zu Shanghai, den 3. August 1917. Gegenwaertig die Gefertigten.

Es erscheint – unvorgeladen – der hieramts bekennte oesterreichische Staatsangehoerige Emmanuel Skalitzky und gibt Folgendes zu Protokoll:

Vorige Woche, etwa Montag, den 23. Juli 1917 kamen ein gewisser Josef Marecek, welchen ich aus Wladiwostok her kenne und ein mir bisher unbekannter Herr, namens Bernat, ein Ungar zu mir in das Geschaeft Shanghai, No. 772, Broadway. Sie erkundigten sich ueber den Geschaeftsgang und machten mir schliesslich den Vorschlag eine zu gruendende Schuhfabrik zu leiten, in der fuer russische Militaerzwecke Stiefel und Schuhe angefertigt werden sollten. Die Fabrik sollte in Tientsin errichtet werden. Ich solle sogleich mitfahren und die Leitung uebernehmen. Ich sollte fuer jeden Tag meiner Anwesenheit in Tientsin s 3.- taeglich erhalten, bis der Kontrakt ausgefertigt sei. Ich nahm schliesslich das verlockende Angebot an

und fuhr Freitag, den 27. Juli von Shanghai nach Tientsin ab. Marecek fuhr mit mir von Shanghai ab, waehrend Bernat bereits zwei Tage frueher nach Tientsin abgereist war.

Auf dem Shanghaier Bahnhofe traf ich Herrn Generalkonsul Dr. Karl Bernauer und gruesste ihn. In Nanking sah ich ihn wieder und auf der Pukower Seite sprach er mich an und fragte mich, wo ich hinfahre. Ich erzaehlte ihm von meinem in Aussicht stehenden Posten als Leiter einer groessertn Schuhfabrik in Tientsin.

Um ½ 11 Uhr nachts (ich kann mich auf den Namen der Station nicht erinnern) stieg Herr Marecek aus und sagte mir ich sollte weiter fahren und direkt zu Bernat, Tientsin, 26 Cousins Road gehen, wohin er am naechsten Tag auch kommen werde. Da in Shanghai seine Abreise mit mir nicht ganz sicher war, schrieb er mir den Brief, welchen ich hiemit zu den Akten lege.

In Tientsin angekommen, nahm ich einen Rickshaw und liess mich nach der mir bezeichneten Adresse fahren. Auf dem Wege traf ich Bernat, der mich in einem Kafeehause in der Cousins Road (Carlton Cafee) unterbrachte. Das war Samstag abends.

Ich ging hierauf mit Bernat in sein Haus, No. 28, Cousins Road wohin ein gewisser Ivan Ivanovich und Josef Schubert kamen. Anwesend im Hause Bernat's waren bereits zwei Ungarn (Deseteure vom Detachement in Peking). An diesem Abend wurde weiter nichts besprochen.

Am darauffolgenden Sonntag ging ich mit Schubert spazieren, um das mir bisher unbekannte Tientsin kennen zu lernen.

Gegen 6 Uhr abends kehrte ich in Begleitung Schuberts in das Haus Bernat's zurueck, wo wir 4 Italiener und einen Franzosen antrafen. Um etwa 9 Uhr kamen 6 Mann ins Haus, welche angeblich vom k.u.k. Marine Detachement in Peking desertiert waren. Sie trugen weisse Zivilkleider. Um ½ 10 Uhr kam noch ein Franzose in einem Militaerautomobil angefahren. Wir sassen um Tisch herum, ohne zu wissen, um was es sich handeln wuerde, obwohl jeder das Gefuehl hatte, dass irgend etwas besonders in der Luft haenge.

Um Mitternacht erschien der mir aus Shanghai bekannte Zahnarzt Max Kindler, welcher in Tientsin im Astor House wohnt. Er verweilte etwa eine Viertelstunde mit Bernat im Nebenzimmer, begruesste die Deserteure und fuhr sodann mit dem Franzosen in dem Militaerautomobil weg. Gegen 3 Uhr morgens kam er wieder und brachte 8-10 Revolver mit. Andere Revolver waren bereits im Hause verwahrt. Die Revolver wurden sohin heimlich im Nebenzimmer an die bekannten Leute verteilt sodass etwa die Haelfte der Anwesenden bewaffnet war. Nachdem wieder alle um Tisch Platz genommen hatten, stand Kindler auf einmal auf und sagte: „Wir sind Revolutionaere, wir wollen die oesterreichische Konzession ueberrumpeln, wer nicht mit uns geht, wird erschossen." Bei dieser Rede hielt er seinen Revolver in der Hand, waehrend die mit Waffen Beteiligten sie gleichfalls bereit in der Hand oder in der Tasche hielten. Es stand ein Mann mit schwarzem Schnurbart auf und sagte Kindler glatt auf den Kopf, dass er bei dieser Sache nich mittun

werde. Daraufhin sagten auch die andern Unbewaffneten, dass sie nicht daran dachten Kindler Folge zug eben, worauf ein grosser Durcheinander entstand, in dem Kindler und mehrere andere, die Leute zu ueberreden trachteten. Es ist hauptsaechlich italienisch und ungarisch gesprochen worden, wovon ich nur wenig verstand. Mich hat man anscheinend im Tumult ganz vergessen, denn es hat sich niemand direkt an mich in der Sache gewendet.

Der Streit ging schliesslich bis gegen ½ 5 Uhr morgens weiter. Als es etwas ruhiger wurde, meinte Kindler, fuer heute waere es ohnedies zu spaet, man solle sich morgen abends wieder hier versammeln. Bernat hatte Angst dass irgend jemand der Leute etwas von den Plaenen verraten wuerde und wollte niemandem gestatten, das Haus zu verlassen. Kindler sagte ihm jedoch, dass er den ganzen Haufen Leute wohl kaum den ganzen Tag in seinem Hause behalten koennte, es waere besser sie zu warnen nichts zu sagen und abends wieder zu kommen. Bernat sowohl wie auch Kindler bedrohten uns hierauf mit dem Revolverund verlangte unsere Versicherung nichts zu verraten und sicher wieder zu kommen. Sollte einer am Abend fehlen oder irgend etwas ausgesagt haben, so wuerde er gesucht und wo immer gefunden auf der Stelle erschossen werden. Wir verliessen hierauf das Haus. Ich begab mich in mein nahe gelegenes Kaffeehaus und legte mich nieder. Bernat sagte mir noch, ich sollte das Haus nicht verlassen bis ich abgeholt werden wuerde.

Schubert suchte mich gegen 4 Uhr nachmittags auf und erkundigte sich ueber meine Ansicht ueber den Plan. Ich sagte ihm, dass ich als verheirateter Mann mich solchen tollen Streichen nicht hergeben koenne und auch gar nicht die Absicht habe wieder in das Haus Bernat zu gehen. Als Schubert wegging versuchte ich zum k.u.k. Konsulat zu gehen, konnte aber nicht, da vor dem Hause Nr. 28 Cousins Road immer Leute standen, welche mich gesehen haben wuerden. Auch rueckwaerts konnte ich nicht entweichen, weil kein Weg vom Hause ins Freie fuehr.

Schubert erzaehlte mir anlaesslich seines Besuches, dass die Sache ohnedies ins Wasser gefallen zu sein scheint, weil vier Leute davongelaufen seien, welche sicher den Plan verraten werden. Ich bin jedenfalls daheim.

Am Dienstag nachmittags lag ich auf dem Divan, als ich ploetzlich zwei Schuesse auf der Strasse hoerte. Ich sprang auf und sah durch das Fenster wie zwei mir aus Bernats haus bekannte ungarische Deserteure ueber die Strasse liefen, welche Revolver in der Hand hielten. Hinter ihnen liefen zwei chinesische Polizisten und eine ganze Menge Chinesen. Die Polizisten versuchten ihre Gewehre im Lauf zu laden, was ihnen jedoch nicht gelang. Die fluechtenden Deserteure erreichten Bernat's Haus und liefen hinein. Die Polizisten wurden von den im Haus anwesenden Leuten mit Revolvern bedroht und getrauten sich nicht in das Haus einzudringen. Es entstand ein grosser Auflauf in der Cousins Road, welcher hierauf von der Polizei geperrt wurde. Ich sah spaeter den englischen Polizeidirektor mit einem Fahrrad ankommen und ins Haus gehen.

Mein Wirt erzaehlte mir, dass die beiden von mir gehoerten Schuesse eine Chinesen getroffen hatten, der sofort tot war.

Mittwoch vormittags kam Ivan Ivanovich in mein Kaffehaus und erzaehlte mir von den Vorgaengen in Hause Nr. 28, weil er nicht ahnte, dass ich ohne-dies alles weiss. Er erzaehlte mir noch, dass aus Peking bereits 80 Mann vom k.u.k. Detachement in Tientsin eingetroffen seien. Ich habe diese Leute nicht gesehen. Ich sagte ihm, dass ich fuer Racine, Ackermann in Shanghai Schuhe an die russische Regierung verkaufen wollte, konnte jedoch meine Absichten nicht durchfuehren, weshalb ich heute noch nach Shanghai abzufahren gedenke. Ivan Ivanovich fuhr auch zur Bahn und erzaehlte mir noch, dass es jetzt nich moeglich sei, Schuhe nach Sibirien einzufuehren, da die Grenze gesperrt sei. Es gelang mir schliesslich unbehelligt aus Tientsin wegzukommen.

Marecek ueberbrachte mi ram Tage vor meiner Abreise aus Shanghai die ihm von Bernat uebergebenen $ mex. 30.- mit dem Bedeuten, dass alles, was ich brauchen werde von Marecek bezahlt werden wuerde.

Gestern abends kam ich hier an und beeilte mich gleich heute morgens meine Tientsiner Erlebnisse dem k.u.k. Generalkonsulate zur Kenntnis zu bringen.

[Unterschrift: Skalitzky]
Shanghai, den 3. August 1917."[11]

Die Angestellten des Konsulates wussten kaum mehr über die Situation als Skalitzky, als der Artikel des „Deutschen Zeitung für China" erschien über der Erschiessung einen Chineser im Zusammenhang mit der Dr. Kindler's Verschwörung.
Die internationalen- und Pacht- und Konzessionsgebieten gaben eine bedeutende Mobilitätsmöglichkeit für die in China ansässenen Europäer. Da zwischen die verschiedenen Zonen kein Grenzkontroll war, die verdächtigen Elemente könnten fast anstandslos pendeln. In Tientsin, und in anderen Pachtgebieten die Polizeibehörden der Konzessionshälter dienten mit gemischtem Personal. Praktisch auch während der Kriegszeiten könnten die gegenseitigen Polizisten zusammenarbeiten, dies erklärt den nächsten Bericht:

„Ein merkwürdiger und bedauerlicher Zwischenfall.
Das „Tageblatt für Nord-China" vom 1sten August schreibt.
„Gestern nachmittag ereignete sich hier ein bedauerlicher Vorfall, der sich, nach unseren Informationen, wie folgt zugetragen hat: Auf dem Weg von der österreichischer nach der deutschen Niederlassung wurde

[11] Magyar Országos Levéltár (Ungarisches Staatsarchiv, MOL) K672-1-1917-1381

der österreichisch-ungarische Matrose Richter, der Briefschaften befördern sollte, in der englischen Niederlassung von vier Zivilisten angehalten. Einer davon war ein hier ansässiger Ungar namens Gönnert, die andern waren österreichisch-ungarische Sibirienflüchtlinge, die schon mancherlei auf dem Kerbholz hatten und die be denn genannten Gönnert in der englischen Niederlassung wohnen. Als sie den Matrosen anhielten, forderten sie ihn auf, mit in ihre Wohnung zu kommen, wo sie ihm gut zu essen und trinken geben wollten, einer drohte aber gleich mit dem Revolver, falls sich Richter weigern sollte mitzukommen. Der Matrose, der die Leute kannte, fuhr in einer Rickscha durch die Taku Road der englischen Konzession bis zur Cousins Road. Dort sprang er aus der Rikscha und lief eiligst bis zur Mummstrasse, wo er im deutschen Polizeigebäude Schutz suchte. Die Anderen verfolgte ihn und schossen, ohne ihm zu treffen. Aber an der Ecke Takustrasse-Mummstrasse, wo sie den letzten Schuss abfeuerten, trafen sie einen des Wegs daher kommenden chinesischen Polizeigestellten der deutschen Niederlassung, der sofort hinfiel. Der Matrose hatte sich in die deutsche Polizei gerettet. Die Uebeltäter wurden in der Cousins Road von der englischen Polizei festgenommen und in Haft gefürht. Es ist zu hoffen, dass die Leute ihrer Strafe nicht entgehen, sondern alsbald an die österreichisch-ungarische Behörde ausgeliefert werden. – Wie wir hören, war der getroffene Chinese einer der besten und zuverlässigten Angestellten der deutschen Polizei, dessen Verlust sehr zu bedauern ist."[12]

Den Fall etwas näher zu bringen ist es zu wissen, dass schon am Anfang August erschienen Nachrichten über die an der Schwelle stehende Kriegserklärung Chinas.[13] Je die politische Lage gespannt wurde, desto leichter war es möglich Leute an unvernünftigen Abenteuern zu ziehen, und die Urkunden zeigen uns, dass die Flüchtlinge, die Matrosen und auch die Gegenmächte in Bewegung, in Aktion waren.
Die amtlichen Organen der Monarchie funkzionierten noch in einwandfreier Weise in dieser Übergangsperiode: am 9. August drei Verhaftungs- und Auslieferungsbefehl im Zusammenhang mit diesem Mord gegen ungarischen Deserteuren erlasst wurde.[14] Während das Konsulat versuchte die Verschwörung aufzurollen, von grossen Nachrichtenagenturen kamen weiteren (falschen) Nachrichten über die bereits deklarierten Krieg.[15]

Epilog

Unsere letzte Nachricht von Tientsin datiert Ende August. Nach der Kriegserklärung Chinas die Konsularbehörden hatten keine Möglichkeiten mehr, den Strafprozess gegen die Verschwörer zu verfahren.

[12] ebd.
[13] Pesti Hírlap (PH) 1917. aug. 5.
[14] MOL K672-1-1917-1638
[15] PH 1917. aug. 8.

Was in diesem Fall sicher ist, dass einen der Verschwörer, einen gewisser J. Goennert (alias Krempatzky) von dem Shanghai Municipal Police an dem Gemischten Gerichtshof ausgeliefert wurde.[16]
Der ehemalige Konsul, Bernauer schrieb einen Brief an den niederländischen Kollegen am 30. August 1917., in dem er bittet ihn im Namen des Konsuls von Tientsin, um alles Mögliches zu machen um dieser Verdächtigte nicht freilassen werden können.
Ob der Stafprozess fortgeführt und beendet wurde, wissen wir nicht. Das Konsulatpersonal verliess China, und die Niederlasssungen, Settlementen sowie Pachtgebieten für immer verloren sind.

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[16] Zur Rechtslage des Gerichthofes: *Chine, France et Grande-Bretagne - Regles provisoires concernant la compétence des cours mixtes des quartiers internationaux et français*. A Shanghai, en date du 10 juin 1902. - RIT 1902, 659-660.

PRÁVNÍ ÚPRAVA OCHRANY LIDSKÉHO ŽIVOTA V HISTORII SAMOSTATNÉHO ČESKOSLOVENSKA

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Abstrakt

Jedním ze základních lidských práv je právo na život. Toto právo je však provázáno řadou sporných momentů, o kterých nepanuje celospolečenská shoda. I dnes se vedou četné diskuse o uplatnění práva na život před narozením (v souvislosti s prováděním umělého přerušení těhotenství, výzkumu na embryonálních kmenových buňkách atd.) nebo v případě euthanasií a uplatňování trestu smrti. Přístup k ochraně lidského života má za sebou dlouhý historický vývoj mimo jiné i vzhledem ke zmiňovaným kontroverzním tématům. Ve svém příspěvku se budu věnovat relevantní právní úpravě v období od vzniku Československa do současnosti.

Klíčová slova

Lidská práva, lidský život, právní ochrana lidského života, umělé přerušení těhotenství, euthanasie, trest smrti

Abstract

Right to life is one of the fundamental human right. It is connected with a number of controversial moments, witch causes social disagreements. Even in this time there are many discussions about right to life before birth (in asociation with intentional abortion or research on embryonal stem cell) or in case of euthanasia or death penalty as capital punishment. There are long historical development in attitude to legal protection of human life even in connection with controversial moments previously mentioned. In my paper there will be mentioned legal regulation since the establishment of Czehoslovakia untill present days.

Key words

Human rights, human life, legal protection of human life, intentional abortion, euthanasia, death penalty

I. Úvod

Lidský život je pro každého člověka a občana hodnotou nejvzácnější a je v zájmu jednotlivce, ale i v zájmu veřejném, aby tato hodnota byla patřičně chráněna. Právo na život a jeho ochranu je jedním ze základních lidských práv. Ochrana lidského života však není ve všech směrech absolutní, respektive v každém stupni vývoje, vzpomeneme-li kontroverzní okolnosti provádění umělého přerušení těhotenství, euthanasie nebo také trest smrti jako sankce za závažné trestné činy. Lidská práva mají své místo v právních řádech velkého počtu demokratických států již pár století. Míra ochrany, zvláště v těch kontroverzních momentech, o nichž se vedou vášnivé debaty, je rozdílná a v průběhu doby či se změnou režimu (jak tomu bylo v našich podmínkách) se více či méně razantně mění.

Přístup k ochraně lidského života má za sebou dlouhý historický vývoj. Až v dnešní společnosti můžeme hovořit o tom, že lidskému životu je přisuzována natolik vysoká hodnota, která je chráněna předpisy ústavními i zákonnými. Nicméně i v dnešní společnosti existuje tendence dívat se na lidský život v termínech funkčnosti. Když se ohlédneme do historie, musíme ale přiznat, že v našich dějinách bylo pohrdání lidským životem zcela běžné.

V tomto příspěvku se pokusím zhodnotit úroveň práva na život a jeho ochrany v našich podmínkách zejména v kontextu historického vývoje od vzniku samostatného Československa. Mou snahou je zmapovat právo na život jako takové v období Československa, tedy od vzniku samostatného státu v roce 1918 až do současnosti. Nebude tedy chybět ani současná právní úprava pro dotvoření ucelené představy o vývoji dané problematiky. Vedle toho se v tomto příspěvku zaměřím na jednotlivé aspekty práva na život, tedy jednotlivé kontroverzní momenty práva na život, na které ani v dnešní době nepanuje jednotný názor na způsob právní úpravy, což je patrno i ze změn, které lze v právním řádu v postupu doby od roku 1918 zaznamenat. Konkrétně mám na myslí otázky umělého přerušení těhotenství, provádění euthanasií, či uplatňování trestu smrti.

II. Ústavní ochrana práva na život

První ústavní listinou v období samostatného československého státu je ústava z roku 1920. V tomto dokumentu je stanoveno, že: „Všichni obyvatelé republiky Československé požívají v stejných mezích jako státní občané této republiky na jejím území plné a naprosté ochrany svého života i své svobody, nehledíc k tomu, jakého jsou původu, státní příslušnosti, jazyka, rasy nebo náboženství. Úchylky od této

zásady jsou přípustny jen, pokud právo mezinárodní dovoluje.“ Toto ustanovení je dále konkretizováno ustanovením o osobní svobodě. Ústava z 9. května roku 1948 obsahuje již ustanovení znějící takto: „Osobní svoboda se zaručuje. Může být omezena nebo odňata jen na základě zákona.“ V této lidově demokratické ústavě z roku 1948 nebylo právo na život jednoznačně vyjádřeno, ve své podstatě však bylo vysvětlováno na základě demokratických zásad první československé ústavy[1]. V roce 1960 byla přijata socialistická ústava v jejímž článku 30. najdeme ustanovení, které stanovuje, že: „Nedotknutelnost osoby je zaručena.“ Právo na život tedy není jednoznačně vyjádřeno, nýbrž skryto v tomto vyjádření. Konkrétní zakotvení práva na život se do našeho ústavního pořádku vrací až po vzniku České republiky k 1. 1. 1993 v Listině základních práv a svobod.

V našem platném právním řádu je ochrana života dána na ústavní úrovni ustanovením v hlavě druhé oddílu prvním Listiny základních práv a svobod, který je nadepsán „Základní lidská práva a svobody“. Čl. 6 Listiny stanovuje:

> (1) Každý má právo na život. Lidský život je hoden ochrany již před narozením.
> (2) Nikdo nesmí být zbaven života.
> (3) Trest smrti se nepřipouští.
> (4) Porušením práv podle tohoto článku není, jestliže byl někdo zbaven života v souvislosti s jednáním, které podle zákona není trestné.[2]

Není pochyb, že lidský život je pro každého jedince jednou z nejvíce ceněných hodnot, která je hodna ochrany ústavní tak i zákonné. Právo na život je jako princip přímo aplikovatelné, zároveň však vyžaduje konkretizaci v právním řádu například předpisy práva trestního. Z historického hlediska lze konstatovat, že právo na život bylo vždy zakotveno v ústavách československého státu, i když různě vyjádřeno i realizováno.

III. Ochrana lidského života v trestním právu

Ochrana lidského života v trestním právu prošla svým vývojem, byť bylo vždy chování ohrožující lidský život kvalifikováno jako trestný čin a lidský život byl vždy v sledovaném historickém vývoji trestním právem chráněným objektem. Konkrétní ustanovení, která měla chránit před útoky ohrožující život člověka byla obsažena v době vzniku ČSR v zákoně č. 117/1852 o zločinech, přečinech a přestupcích. Tento rakouský zákon byl převzat tzv. recepční normou, která stanovila, že rakousko-uherský právní

[1] Zimek, J., *Právo na život*, Brno: Masarykova univerzita v Brně, 1995, s. 7
[2] Usnesení č. 2/1993 Sb., o vyhl.LZPS jako součást ústavního pořádku ČR, Listina základních práv a svobod

řád je nadále platný i po vzniku ČSR a tím zajistila kontinuitu právního řádu. Konkrétní ustanovení o vraždě a zabití najdeme v § 134, který zní: „Kdo jedná proti člověku v obmyslu, aby ho usmrtil, takovým způsobem, že z toho nastane smrt jeho nebo jiného člověka, dopustí se zločinu vraždy; i když výsledek tento nastal jen pro osobní povahu toho, jemuž ublíženo, nebo pouze pro nahodilé okolnosti, za nichž byl čin spáchán anebo jen z příčin vedlejších náhodou k tomu přistoupivších, pokud tyto příčiny byly přivoděny činem samým.“[3] V následujícím ustanovení vymezuje tento zákon jednotlivé druhy vražd. Šlo zejména o vraždu úkladnou, do této kategorie zákon řadil otrávení jedem či jiným „potměšilým“ způsobem. Dalším druhem vraždy byla vražda loupežná, která je podmíněna zmocněním se cizí movité věci. Rovněž vražda zjednaná byla vražda provedená nájemním vrahem či někým, kdo byl k takovému činu pohnut třetí osobou. Posledním druhem vraždy je vražda prostá, která nespadá do žádné z výše zmiňovaných kategorií. V dalších ustanoveních tento zákon trestal zabití prosté, loupežné a při rvačce, jakož i vyhnání plodu vlastního a cizího.

Zákon z roku 1852 v Československu platil, navzdory řadě pokusů o rekodifikaci trestního práva v roce 1926 a 1937, až do roku 1950, kdy byl přijat zákon 86/1950 Sb., trestní zákon. Teprve až tento zákon odstranil právní dualismus na území Československa. V tomto zákoně najdeme ustanovení k ochraně života člověka v hlavě šesté upravující trestné činy proti životu a zdraví. § 216 stanovil: „Kdo jiného úmyslně usmrtí, bude potrestán odnětím svobody na patnáct až pětadvacet let.“[4] Další odstavec pak určuje kvalifikovanou formu trestného činu vraždy. Ani v tomto zákoně z roku 1950 nechybí ustanovení k ochraně života dítěte před narozením. Oproti předcházející úpravě zde nalézáme zásadní rozdíl, a to ten, že pachatelem, čili subjektem trestného činu v případě této skutkové podstaty může být pouze matka. K dalšímu tímto zákonem trestanému jednání proti lidskému životu je účast na sebevraždě, upravená v § 226. Můžeme říci, že navzdory tomu, že tímto zákonem bylo trestní právo inovováno, je tento předpis alespoň co se týče trestných činů vražd přežitkem minulosti.[5] Zvláštností tohoto zákona odpovídající tehdejší době bylo ustanovení § 104 Vražda na ústavním činiteli, který jasně vypovídá o tom, že vražda osoby z vládnoucí vrstvy je považována za skutek závažnější než vražda jakékoliv jiné osoby. Tento zákon však platil pouhých 11 let, až do přijetí zákona č. 140/1961 Sb., jež platí až dodnes, navzdory skutečnosti, že v současné době je předložen již druhý návrh rekodifikace trestního zákona.

Právo na život vyžaduje, jak bylo výše již zmíněno, konkretizaci v právním řádu, například předpisy práva trestního. V oblasti ochrany lidského života hraje trestní právo důležitou roli, neboť jeho úkolem je zejména zabránění porušení či ohrožení právem chráněného objektu, v tomto případě lidského

[3] Zákon č. 117/1852 ř.z. ze dne 27. května 1852 o zločinech, přečinech a přestupcích
[4] Zákon č. 86/1950 Sb.Trestní zákon ze dne 12. července 1950
[5] Zachar, A. *Historický vývoj trestnoprávnej úpravy vrážd od prvopočiatkov po prijatie zákona č. 140/1961 Zb.,* Trestní právo 1/2007

života, hrozbou trestněprávních sankcí a zároveň samotným uplatňováním trestněprávních sankcí tam, kde již k porušení či ohrožení lidského života došlo. Trestněprávní ochranu lidského života najdeme v našem platném právním řádu v zákoně č. 140/ 1961 Sb., kde ve zvláštní části, hlavě VII. jsou upraveny skutkové podstaty trestných činů proti životu a zdraví. Z těch, které jsou namířeny přímo proti lidskému životu, můžeme označit vraždu. Ta je upravena v § 219 odst. 1) a zní následovně: „Kdo jiného úmyslně usmrtí, bude potrestán odnětím svobody na deset až patnáct let." V odst. 2) je upravena kvalifikovaná skutková podstata vraždy. Dalším ustanovením je vražda novorozeného dítěte matkou upravena v § 220, které zní: „Matka, která v rozrušení způsobeném porodem úmyslně usmrtí své novorozené dítě při porodu nebo hned po něm, bude potrestána odnětím svobody na tři léta až osm let." Dále do této kategorie patří nedovolené přerušení těhotenství (§ 227 a násl.) a účast na sebevraždě (§230), tato ustanovení však budou blíže zmíněna v tomto příspěvku v souvislosti s problematikou interrupcí a euthanasií.

V ustanovení čl. 6 odst. 4 Listiny základních práv a svobod připouští, aby byl někdo zbaven života v souvislosti s jednáním, které podle zákona není trestné. Tato jednání blíže konkretizuje Trestní zákon v § 13 ustanovením o nutné obraně a v § 14 ustanovením o krajní nouzi.[6] Krajní nouzí se podle trestního zákona rozumí čin jinak trestný, kterým někdo odvrací nebezpečí přímo hrozící zájmu chráněnému tímto zákonem. V takovýchto případech nejde o trestný čin, navzdory tomu, že by byl v souvislosti s odvracením hrozícího nebezpečí zmařen lidský život. Nebezpečí by však muselo představovat hrozbu mnohem horších ztrát. Naopak o o krajní nouzi nejde v případě, že bylo možno toto nebezpečí za daných okolností odvrátit jinak anebo způsobený následek je zřejmě stejně závažný nebo ještě závažnější než ten, který hrozil (srov. § 14 TZ). V případě nutné obrany je stanoveno, že čin jinak trestný, kterým někdo odvrací přímo hrozící nebo trvající útok na zájem chráněný tímto zákonem, není trestným činem. Nejde o nutnou obranu, byla-li obrana zcela zjevně nepřiměřená způsobu útoku (srov. § 13 TZ). Obdobně jako u krajní nouze, i v tomto případě je nutno předpokládat okolnosti, kdy se nelze vyhnout ztrátě na lidském životě a stanovit tak beztrestnost.

IV. Historie ukládání trestu smrti

Jakkoliv je ustanovení Listiny týkající se práva na život před narozením nejasná, nebo lépe řečeno záměrně zastřená, v případě trestu smrti je ustanovení Listiny jednoznačné: trest smrti se nepřipouští. Toto ustanovení jasně svědčí o úrovni ochrany práva na život, které není zpochybňováno uplatňováním sankce trestu smrti za závažné trestné činy.

[6] Zákon č. 140/1961 Sb., Trestní zákon, §13 a § 14

Tento stav trvá již 18 let, neboť 1. července roku 1990 nabyla účinnosti novela trestního zákona č. 175/1990 Sb., která až do té doby uplatňovaný trest smrti nahradila ustanovením v § 29, jímž byl trest smrti nahrazen alternativou odnětím svobody na doživotí s možností podmíněného propuštění po 20 letech výkonu trestu. Další alternativou je trest odnětí svobody v sazbě od 15 do 25 let.[7] Na ústavní úrovni je nepřípustnost trestu smrti v platném ústavním pořádku České Republiky zakotvena v článku 6 Listiny základních práv a svobod vyhlášené ústavním zákonem č. 2/1993 Sb., tedy až o tři roky později než změna Trestního zákona.

Žijeme dnes ve společnosti, která přikládá lidskému životu vysokou hodnotu, což nebylo vždy samozřejmostí. Dnešní úroveň ochrany lidského života je výsledkem dlouhého historického vývoje a vlivů různých myšlenkových proudů včetně křesťanství.

Nicméně v historickém vývoji samostatného Československa bylo ukládání trestu smrti vždy přípustné až do jeho zrušení v roce 1993. V době vzniku samostatného Československa bylo přejato právo rakousko-uherské monarchie. Navzdory snahám o sjednocení roztříštěného trestního práva došlo, jak bylo již výše naznačeno, k přijetí nového trestního zákona až v roce 1950 (zákon č. 86/1950 Sb.). Další rekodifikací je až trestní zákon z roku 1961 (zákon 140/1961 Sb.) Všechny tyto zmíněné trestní předpisy trest smrti připouštěly.

Říšský zákon o zločinech a přečinech z roku 1852 trest smrti upravoval v hlavě druhé nadepsané „O trestání zločinů vůbec“, kde v § 12 mezi hlavními tresty stanoven právě trest smrti, který se vykonával jediným způsobem, který tehdejší zákon povoloval, a to provazem. Záhy po vzniku samostatného Československa ve snaze odstranit právní dualizmus v důsledku přijetí říšských zákonů, byl v roce 1926 předložen návrh rekodifikace trestního práva hmotného, podle něhož měl být trest smrti pro oblast obecných trestných činů zrušen, zejména z důvodu nemožnosti nápravy justičního omylu.[8] Namísto ukládání trestu smrti měl být ukládán doživotní žalář. Tento návrh však nikdy nebyl realizován. V pozdějším návrhu trestního zákona z roku 1937 se navrhovalo zpřísnění trestních sazeb, přičemž trest smrti by byl ukládán za závažné trestné činy. Avšak ani tento návrh nebyl nikdy uveden do života.

Ani přijetí nového trestního zákona v roce 1950 neznamenalo upuštění od provádění trestu smrti. Naopak v § 18 vymezoval tzv. hlavní druhy trestů, mezi něž patřil trest smrti, odnětí svobody a

[7] Hlinkovská, Iveta. *Trest smrti*. Praha: Univerzita Karlova, vydáno jako interní tisk PF UK, 1998, s. 67.
[8] Fenyk, J., *Návrh trestního zákona České republiky, příčiny a důsledky jeho nepřijetí (Odlišný vývoj a osud projektů trestních zákoníků od vzniku samostatného Československa)*, Trestní právo 6/2006

nápravné opatření. Co se týče způsobu provedení trestu smrti, ustanovení tohoto předpisu se nelišilo od předchozí úpravy, neboť stanovil, že trest smrti se vykoná oběšením. Odlišností však je, že v době zvýšeného ohrožení vlasti může být vykonán trest smrti zastřelením. Z hlediska ochrany lidského života je zároveň důležité ustanovení, které nedovoluje uložit trest smrti těhotné ženě. Nutno podotknout, že trestní právo bylo zejména v době socialismu „nástrojem převýchovy" politické opozice, nicméně již po roce 1956 za politické delikty trest smrti uplatňován nebyl, a to ani po roce 1968 s příchodem vojsk Varšavské smlouvy, kdy se situace vrátila do starých kolejí a byly hojně uplatňovány tresty za politické delikty.

V roce 1961 byl národním shromážděním přijat nový trestní zákon č. 140/1961 Sb., který byl na svou dobu dosti pokrokový. Nicméně i podle tohoto zákona bylo přípustné ukládání trestu smrti. Na příklad za trestný čin vraždy byl stanoven trest odnětí svobody až na 15 let nebo trest absolutní. Důležitou v tomto ohledu byla novela trestního zákona č. 45/1977 Sb., která stanovila nový druh mimořádných trestů, a to trest odnětí svobody od 15 do 25 let. Tyto tresty bylo možno uplatnit namísto trestu smrti, což způsobilo značný pokles počtu vykonaných absolutních trestů. Tato situace trvala až do účinnosti novely trestního zákona č. 175/1990Sb., kterou bylo uplatňování trestu smrti zrušeno.

V. Přípustnost umělého přerušení těhotenství a ochrana života

Dalším kontroverzním tématem, kde ani dnes nepanuje shoda v názorech na míru ochrany nenarozeného života, je provádění umělého přerušení těhotenství. I zde však prošla právní úprava v historii samostatného Československa určitým vývojem.

V době vzniku Československého státu platil Trestní zákon z roku 1852 č.117, jímž byl potrat legalizován v případech krajní nouze a k zachování života ženy. V ostatních případech byla žena trestána za pokus o potrat vězením od šesti měsíců do 1 roku. Při dokonaném provedení interrupce zavedl sazbu odnětí svobody 1-5 let pro ženu, vykonavatele potratu, eventuálně i otce dítěte, pokud mu byla prokázána spoluvina. Při ohrožení života ženy nebo jejího zdraví byla sazba odnětí svobody od pěti do deseti let.[9] Vedle skutkové podstaty vyhnání plodu vlastního tento zákon znal i druhou skutkovou podstatu, tou bylo vyhnání cizího plodu, tedy proti vůli matky. Tresty se v obou případech příliš nelišily.

[9] Karhan, J., Kovář, P., *Stav a vývoj zákonodárství umělého přerušení těhotenství ve světě a u nás*, (citováno 18.2.2006), dostupné z: http://www.planovanirodiny.cz/view

V historii samostatného Československa se setkáváme s problémem interrupcí v trestním zákoně z roku 1950 č.86, kde byla formulována trestní ochrana lidského plodu. Od předešlé úpravy se však příliš nelišil. Tehdejší trestní zákon trestal usmrcení lidského plodu, stanovil však beztrestnost pro tzv. indikaci lékařskou a eugenickou.[10] Z hlediska sankcí snížil sazbu na 1 rok pro těhotnou ženu, ale zato zvýšil sazbu až na 10 let pro toho, kdo zákrok provede, s tou výjimkou, jedná-li se o lékaře a je-li jiným lékařem zjištěno, že by donošení plodu nebo porod vážně ohrozily život těhotné ženy.[11] Takový právní stav znamenal velký počet kriminálních potratů, které s sebou nesly i všechna negativa, jako například různé nemoci, následnou sterilitu, případně i úmrtí žen.

Zlomovým byl proto rok 1957, kdy došlo k liberalizaci potratů. Byl přijat zákon č.68 o umělém přerušení těhotenství. Zákon připustil socioekonomické důvody k interrupci, zavedl institut interrupčních komisí, indikace rozšířil na zdravotní důvody a důvody „zvláštního zřetele hodné“[12] (např. pokročilý věk ženy). Potrat, který byl proveden jinak než způsobem přípustným podle tohoto zákona, byl kvalifikován jako trestný. Podmínkou pro přerušení těhotenství byl souhlas těhotné ženy, ale také bylo nezbytné předchozí povolení komise. Až na některé výjimky byla maximální hranice přerušení těhotenství tři měsíce.

Interrupční komise, povolující přípustnost přerušení těhotenství v souladu s právními předpisy, měly podle původních představ zákonodárce na ženy výchovně působit a propagovat účinné prostředky a způsoby zábrany nechtěného početí.[13] Činnost interrupčních komisí se ukázala být velmi problematickou. Jejich úkolem mělo být posouzení každého jednotlivého případu se zřetelem na zájmy ženy, plodu, ale i společnosti. K rozhodnutí dochází teprve po uvážení všech okolností. V důsledku toho však komise způsobovaly ženám často traumatizující zkušenost, neboť se zabývaly zcela soukromými okolnostmi, a tím i často citlivými záležitostmi. Původním záměrem bylo, aby komise působily na těhotnou ženu výchovně, ale ve skutečnosti jednání před interrupční komisí vyvolávalo v ženách až neurologické potíže. V praxi se rovněž ukázalo, že jejich preventivní a pomocná funkce je bezvýznamná. Výsledkem jejich činnosti bylo, že celých 95% všech žádostí bylo vyřízeno kladně. Samotná existence těchto komisí, jak postupně vyšlo najevo, bránila rozšíření nových metod provádění interrupcí – tzv.

[10] Černý,M. a Shelleová, I., *Právní úprava umělého přerušení těhotenství,* Praha: Eurolex Bohemia, 2003, s. 15
[11] Barták, A., *Umělé přerušení těhotenství*, (citováno 28.2.2006), dostupné z: http://www.volny.cz/a.bartak/upt.html
[12] Karhan, J., Kovář, P., *Stav a vývoj zákonodárství umělého přerušení těhotenství ve světě a u nás*, (citováno 18.2.2006), dostupné z: http://www.planovanirodiny.cz/view
[13] Kühn, Z., *Ochrana lidského plodu v trestním právu, Praha: Institut pro další vzdělávání soudců a státních zástupců*, 1998, Praha: Institut pro další vzdělávání soudců a státních zástupců, 1998 s. 20

miniinterupcí, které vyžadují, aby časový interval od početí k provedení úkonu byl co nejkratší.[14] Potrat prováděný právě miniinterrupcí znamená výrazné snížení rizik zdravotních následků.

Další změnou, ale i dalším krokem k liberalizaci je zákon č. 66/1986 Sb. Úprava tohoto zákona vychází z práva ženy rozhodovat o jejím mateřství. Zrušila roli interrupčních komisí a výrazně posílila rozhodovací volnost samotné ženy. Zákon rozlišuje jednak interrupci na žádost ženy (bez zdravotních důvodů) a interrupci ze zdravotních důvodů, která ovšem může být provedena pouze se souhlasem ženy nebo z jejího podnětu. Existují však určitá právní omezení provedení interrupce ve vztahu k věku ženy.[15] Novým aspektem bylo i v roce 1992 zavedení zpoplatnění interrupce jako placené služby. Dnes jsou ze zdravotního pojištění hrazeny pouze potraty se zdravotní indikací.

VI. Právní úprava euthanasie

Problematika euthanasie je téma aktuální nejen v dnešní době, je to jedno z nejdiskutovanějších témat a zároveň z nejsložitějších. Právní úprava, která by euthanasii legalizovala u nás nikdy přijata nebyla, nicméně už ve 20tých letech 20. století můžeme zaznamenat pokusy o prosazení mírnějších trestních sankcí za usmrcení nevyléčitelně nemocného trpícího člověka ze soucitu a z útrpnosti.

Právní úprava platná v době vzniku Československa v roce 1918 provádění euthanasie legální formou nepřipouštěla. Konkrétně šlo o již zmiňovaný rakouský trestní zákon z roku 1852 o zločinech, přečinech a přestupcích, podle něhož by bylo provedení euthanasie kvalifikováno jako vražda prostá.[16] Nově vzniklá republika se s problémem, jaké právo bude platit v novém státě, vypořádala ve svém prvním zákoně č. 11/1918 tzv. recepční norma. Ta stanovila že veškeré dosavadní zemské a říšské zákony zůstávají prozatím v platnosti.[17] Důsledkem toho však bylo, že v ČSR platily dva různé předpisy, neboť na Slovensku byl převzat trestní zákon uherský. Proto tak jako v jiných právních odvětvích dochází i v trestním právu po celé období existence první ČSR ke snahám o unifikaci práva.[18] Ve 20tých letech 20. století probíhaly intenzivní snahy o rekodifikaci trestního zákona, v roce 1920 byla vytvořena Komise pro reformu trestního zákona. Tyto snahy vyústily v roce1926 v předložení Osnovy trestního zákona o zločinech a přečinech, v nichž se předpokládalo zavedení privilegované skutkové podstaty zabití, pro

[14] Černý,M. a Shelleová, I., *Právní úprava umělého přerušení těhotenství,* Praha: Eurolex Bohemia, 2003, s. 16
[15] Karhan, J., Kovář, P., *Stav a vývoj zákonodárství umělého přerušení těhotenství ve světě a u nás*, (citováno 18.2.2006), dostupné z: http://www.planovanirodiny.cz/view
[16] Zákon č. 117/1852 o zločinech, přečinech a přestupcích, § 134 upravuje zločin vraždy, § 135 pak stanovuje jednotlivé druhy vraždy – úkladná, loupežná, zjednaná a prostá
[17] Vlček, E., *Dějiny trestního práva v českých zemch a v Československu,* Brno: Masarykova univerzita, 2006, str. 36
[18] Vlček, E., *Dějiny trestního práva v českých zemch a v Československu,* Brno: Masarykova univerzita, 2006, str. 36

případy, že viník usmrtil někoho ze soucitu, aby uspíšil jeho nedalekou smrt a tím jej vysvobodil z krutých bolestí způsobených nezhojitelnou nemocí nebo z jiných tělesných muk, proti nimž není pomoci (§ 271 odst. 3).[19] V těchto případech se zároveň předpokládalo s ukládáním mírnějších trestů nebo dokonce s upuštěním od potrestání. Vzhledem k tehdejší společenské a hospodářské situaci, zejména hospodářské krizi na konci dvacátých let 20. století nebyla zamýšlená rekodifikace trestního zákona nikdy realizovaná.

Od unifikačních pokusů však ani v dalším vývoji upuštěno nebylo. V roce 1937 byl připraven nový návrh rekodifikace trestního zákona. Oproti předešlému návrhu z roku 1926 byla původní podstata usmrcení ze soucitu rozčleněna na dvě samostatné skutkové podstaty. V prvním případě se předpokládalo zavedení privilegované skutkové podstaty usmrcení na žádost, ta však nebyla podmíněna soucitem, nýbrž značným vzrušením mysli na přímo předcházející výslovnou a vážnou žádost usmrceného. V druhém případě návrh počítal se zavedením přečinu usmrcení ze soucitu. Nutnou podmínkou je v tomto případě rovněž přímo předcházející výslovná a vážná žádost usmrceného, rozdílem je podmínka soucitu, aby uspíšil neodvratnou smrt a vysvobodil trpícího z krutých bolestí, proti kterým není trvalé pomoci. Také tato osnova trestního zákona z roku 1937 zůstala nerealizována. Příčinou byla hluboká společenská krize způsobená rozdělením Československa a nástupem totalitního nacistického zřízení.[20]

Dualizmus v trestním právu se podařilo odstranit až v roce 1950 přijetím nového Trestního zákona č. 86/1950 Sb. Problematika euthanasie v něm nijak zohledněna nebyla a její provádění bylo klasifikováno buď jako vražda (§ 216) nebo účast na sebevraždě (§ 226). Obdobnou úpravu najdeme i v Trestním zákoně 140/1961 Sb., jež platí až do dnes, trestný čin vraždy upravuje § 219 a účast na sebevraždě nalezneme pod § 230.

Dalším pokusem o rekodifikaci trestního zákona z relativně nedávné doby je rozsáhlý návrh předložený vládou, jež byl projednávám v parlamentu v roce 2005 a 2006. Podle tohoto návrhu by usmrcení nevyléčitelně nemocného na jeho přání bylo upraveno jako nová skutková podstata trestného činu (§ 115 Usmrcení na žádost), za který by byla uložena nižší trestní sazba, a to v maximální výši 6 roků. Návrh zákona byl schválen dne 30. 11. 2005 Poslaneckou sněmovou ČR, ale zamítnut Senátem ČR dne 8. 2. 2006. O návrhu vráceném Senátem ČR bylo hlasováno 21. 3. 2006, Poslanecká sněmovna ČR však návrh nepřijala. Jedním z důvodů nepřijetí rekodifikace Trestního zákona byla právě problematika

[19] Fenyk ,J., *Návrh trestního zákona České republiky, příčiny a důsledky jeho nepřijetí (Odlišný vývoj a osud projektů trestních zákoníků od vzniku samostatného Československa)*, Trestní právo 6/2006
[20] Fenyk, J., *Návrh trestního zákona České republiky, příčiny a důsledky jeho nepřijetí (Odlišný vývoj a osud projektů trestních zákoníků od vzniku samostatného Československa)*, Trestní právo 6/2006

týkající se euthanasií, resp. skutkové podstaty trestného činu usmrcení na žádost. V návrhu byly dány požadavky na to, aby čin byl spáchán ze soucitu, což bylo kritizováno zejména z toho důvodu, že jde o příliš subjektivní kategorii, která se nemusí vztahovat jen k utrpení jiného, ale například k míře jeho bezmocnosti, psychickému stavu, atd.[21] Další podmínkou byl dostatečně určitý projev vůle, čili žádost usmrcovaného a také somatická nemoc, jejíž bližší označení vzbuzovalo rovněž značnou pochybnost. Mimo to řadu neshod vyvolalo nevhodně zvolené rozpětí trestní sazby do 6-ti let s možností případné beztrestnosti pachatele, což se nedalo považovat za kompromis vzhledem k příliš přísným ustanovením o vraždě a omezenými možnostmi jeho zmírnění.

V současné době projednávaný návrh Trestního zákona již neobsahuje ustanovení, které by upravovalo provádění euthanasie. Takové jednání bude nadále subsumováno pod skutkovou podstatu vraždy, případně účasti při sebevraždě.

Současná právní úprava euthanasií je zachycena jak na ústavní úrovni v Listině základních práv a svobod, zejména v čl. 6 (právo na život), čl. 31 (právo na ochranu zdraví a na zdravotní péči) a v čl. 10 (právo na zachování lidské důstojnosti), tak také na úrovni zákonné. Euthanasie v podobě usmrcení na žádost či ze soucitu je v České republice považována za vraždu. Toto ustanovení najdeme v zákoně č. 140/1960, Sb., Trestní zákon § 219. Lze ovšem podle dosavadní právní úpravy počítat s určitým materielním korigováním závažnosti některých jednání v závislosti na míře protiprávnosti, resp. společenské nebezpečnosti činu. Dále je provedení euthanasie trestáno podle § 230, účast na sebevraždě, přičemž Trestní zákon zde rozlišuje dva typy jednání naplňující znaky skutkové podstaty trestného činu. Jednak pachatel jiného k sebevraždě pohne, jednak jinému k sebevraždě pomáhá.[22]

VII. Závěr

Pro celkovou představu o úrovni ochrany lidského života je důležité zmapovat právní úpravu práva na život jako takového, ale neméně důležité je zaměřit se i na právní úpravu ochrany lidského života v souvislosti s jeho kontroverzními aspekty, jako jsou okolnosti jeho počátku a konce. Právo bezesporu odráží celkový přístup společnosti k dané právem upravované problematice. O to náročnější je úloha práva, pokud ani ve společnosti nepanuje názorová shoda, jako tomu je v případě umělého přerušení těhotenství, euthanasií či problematiky ukládání trestu smrti. Neméně důležitý je i historický pohled na

[21] Fenyk J., *Návrh trestního zákona České republiky, příčiny a důsledky jeho nepřijetí (Odlišný vývoj a osud projektů trestních zákoníků od vzniku samostatného Československa)*, Trestní právo 6/2006

[22] Fenyk, J. *Stručné zamyšlení nad trestností usmrcení na žádost a z útrpnosti a v případě tzv. asistované sebevraždy (euthanasie),* Trestní právo 6 / 2004

vývoj právní úpravy v jednotlivých aspektech ochrany lidského života. Právě historický exkurz nám může nastínit přístup tehdejší společnosti k hodnotě lidského života, ať už jde o uplatňování trestních sankcí nebo o ochranu nenarozeného života a zároveň nastínit posun právní úpravy v průběhu sledovaného údobí.

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SELHÁNÍ VOJENSKÉ ASISTENCE V OSLAVANECH V PROSINCI 1920

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Abstrakt

V prosinci 1920 došlo ke komunisty organizované generální stávce, jejímž cílem bylo vyvolání politických změn ve státě. K tomuto nedošlo, avšak na některých místech se dělníkům podařilo obsadit důležité státní budovy či továrny. V Oslavanech se jim navíc podařilo odzbrojit četnictvo a vojenskou asistenci, která mu byla vyslána na pomoc. Situaci se podařilo vyřešit až následujícího dne za pomoci nového vojenského oddílu. Příspěvek se zabývá průběhem celé události a důvody selhání asistence, včetně dalších následků.

Klíčová slova

Vojenská asistence, prosincová generální stávka, 1920, Oslavany, komunismus, armáda, četnictvo, zbraně.

Abstract

In December 1920 the comunists in the Czechoslovakia organized the general strike to the change of state´s esstablishement. At some place the workmen occupated state buildings and factories. Police and gendarmerie needed military assistence, but in Oslavany the gendarmerie and the military assistence were unarm by strikers. The situation was pacify one day later by use of massiv military power. The article discribe the situation in Oslavany and the reasons of the failing and its after-effects.

Keywords

military assistence, the December general strike, 1920, Oslavany, comunists, army, gendarmerie, weapons

Vojenské asistence

Vojenská asistence je právní institut v současné době našemu právnímu řádu neznámí, jakkoliv historicky jej u nás můžeme doložit již od konce 17. stol.[1] a existoval /byť pod označením vojenská výpomoc/ až do r. 1990, resp. do r. 1999.2 Označovalo se jím dočasné přidělení vojenských oddílů veřejným úřadům (orgánům), ve výjimečných případech i soukromým osobám.[3] Podstata významu slova „asistence" spočívala v tom, že vojsko nejednalo přímo jako orgán správy, nýbrž mělo pouze tomuto jednání dodávat svou přítomností vážnost a poskytnout tomuto orgánu patřičnou pomoc. Armáda takto poskytovala pomoc při mimořádných událostech – jako třeba při povodních, nebo při požárech atp., ale také za účelem udržení bezpečnosti. A to za situace, kdy bezpečnostní složky státu již nebyly sami s to situaci zvládnout. Jakkoli i v současné době armáda je povolána k plnění takovýchto úkolů[4] /k tomu srovnej ustanovení §§14-24a zákona č. 219/1999 Sb**.,** o ozbrojených silách České republiky v platném znění/, bohužel neexistuje jednotný právní termín, který by souhrn těchto činností označoval.5

Vojenské asistence za účelem udržení pořádku se v historii označovaly pojmem asistence ozbrojené a je pravdou, že právě tyto zásahy vždy vyvolávaly nejvíce pozornosti ze stran civilního obyvatelstva a logicky tak též i politiků. Šlo především o otázku použití zbraní vojenskou asistencí. Z historie známe mnoho úspěšných zásahů, kde vojenská asistence pomohla nastolit pořádek, byť v řadě případů se to neobešlo bez zraněných či dokonce mrtvých.[6] Často však docházelo i k selhání asistence, tedy k situaci, kdy se bezpečnost obnovit nepodařilo, popř. kdy došlo ke zbytečnému krveprolití. Ještě z dob Rakousko-Uherska zde můžeme jmenovat zásah jednotky 49. pěšího pluku při brněnských bouřích r. 1905.[7] Nejznámější a také nejkrvavějším selháním je však zásah při hladových bouřích v Prostějově r. 1917, kde nedostatečně vycvičení nováčci obávající se svého velitele zahájili palbu do davu.Někteří

[1] Wilfling, Administrativer Waffengebrauch der öffentlichen Vollzugsorgane und des Militärs. In: Mischler, E., Ulbrich, J., Österreichisches Staatswörterbuch, Handbuch des gesamten österreichischen öffentlichen Rechtes 4.Band. 2.vydání, Wien 1905, s. 866.

2 Pojem vojenské výpomoci zrušen již v r. 1990 novelou branného zákona č. 72/1990 Sb., jak uvádí důvodová zpráva k zákonu č. 161/1995 Sb., kterým se mění a doplňuje zákon č. 480/1992 Sb., o hmotném zabezpečení vojáků a žáků škol ozbrojených sil a jejich odpovědnosti za škodu, ve znění zákona č. 308/1993 Sb. Pokud se však podíváme na tuto novelu, pak nic takového z ní nevyplývá a tento pojem se objevuje v předpisech až do konce devadesátých let.

[3] Zde se mají na mysli především podnikatelské subjekty, např. železnice.

[4] A můžeme dokonce říci, že tyto úkoly jsou s vojenskými úkoly přibližně rovnocenné Kubeša, M., Jaké operace může Armáda České republiky v budoucnosti vest. Vojenské rozhledy 1999, č. 1,
[18. 11. 2001, 15 hod.]. Dostupný z: http://www.army.cz/vti/vojroz/1999_1/kubesa.htm.

5 Hovoří se o nebojové činnosti armády, ale objevují se i pojmy jako „nevojenská obrana" a nebo „podpůrná operace" – tyto termíny jsou však termíny ryze vojenskými a s právní úpravou nemají nic společného. Tento termín vychází z pojmů používaných v novém polním řádu pozemního vojska USA FM 100-5. Kubeša, M., Způsob použití Armády České republiky. Vojenské rozhledy 1998, č. 1 [18. 11. 2001, 15 hod.]. Dostupný z: http://www.army.cz/vti/vojroz/1999_1/kubesa.htm.., též viz Doktrína Armády České republiky. Vojenské rozhledy 2001, č. 1, s.58an.

6 Z období časově blízkému našemu příběhu je to např. asistence v Jihlavě nebo asistence v Kraslicích.

[7] Pernes, J., Nejen rudé prapory aneb pravda o revolučním roce 1905. Brno: V. Reitterová – Stilus, 2005, s. 108an.

mířili i do vzduchu, což ale mělo za následek, že střeli zasáhli i osoby na vzdálených místech a na akci nezúčastněné. Výsledkem bylo dvacet čtyři mrtvý a kolem sedmdesáti zraněných.[8]

K obvinění ze selhání vojenské asistence však často docházelo i za první republiky, zejména v prvních letech státu. Na druhou stranu až na výjimky nebyla tato selhání spojena se zbytečným krveprolitím.[9] Každé obvinění bylo vyšetřováno, přičemž až na výjimky nebyla vina shledána na straně asistenční jednotky. Nejčastěji byl jako viník selhání shledán orgán, který měl s asistencí spolupůsobit, nicméně neučinil tak /např. nikdo z příslušného úřadu se nedostavil, nevydal asistenci pokyn atp./.[10] Na druhou stranu je třeba říci, že často byla vina i na straně asistence, byť tyt případy nejsou zas tak časté.[11] Důvodem je jistě i skutečnost, že již v dobách Rakousko-Uherska platila přísná pravidla, která určovala, jací vojáci mohou, či naopak nemohou být na asistenční zásah nasazeni. Podmínkou byl nejen ukončený výcvik,ale i otázka, jak jsou vojáci spolehliví. Nemyslelo se tím pouze "politicky" spolehliví, nýbrž i do jaké míry jsou schopni sebekázně. U vojenské asistence víc než kde jinde bylo potřeba potlačit unáhlené jednání, které pak skutečně mohlo mít nedozírné následky, tak jako třeba onen zásah v Prostějově, kde tato pravidla respektována nebyla. Pečlivým výběrem tedy procházel nejen velitel asistence, ale i nasazované mužstvo.

Jestliže jsme mluvili o tom, že ve většině případů se prokázalo, že selhání zásahu nebylo způsobeno asistencí,12 pak u zásahu v Oslavanech je tomu přesně naopak.

Prosinec 1920

Od nástupu bolševiků k moci v Rusku se i jinde začali projevovat mnohem více levicoví radikálové. Konec konců Maďarská a pod jejím vlivem vzniklá Slovenská republika rad byly v prosinci 1920 víc než

8 Přehled literatury k tomuto tématu viz Marek, P., Bibliografie okresu Prostějov. Prostějov: Muzeum Prostějovska, 1990, s. 115-116. Nejvíce pak viz Polišenský, J., Hosák, L., Stuna, R, Materiály a dokumenty k dějinám Prostějovského masakru 26. dubna 1917. Časopis matice moravské, 1952, č. 3-4, s. 341an.

9 Prakticky u všech asistenčních zásahů, kde počátkem 20-tých let 20. stol. byla prolita krev, bylo konstatováno, že vojáci použili zbraní až v krajní situaci, prakticky až ve chvíli, kdy byli donuceni se bránit. Jediným případem, se kterým jsem se seznámil a jehož vyšetřování ve mně vzbudilo pochybnost, byl případ dvou obětí na demonstraci stoupenců A. Hlinky v Námestovu. K tomu viz Vojenský ústřední archiv Praha, fond presidium MNO 1918-1923, karton 12, poř. č. 38.

10 Např. při demonstraci v Pardubicích dne 15. 12. 1918 bylo vojenské asistenci vytýkáno, že nezasáhla, když dav zaútočil na budovu okresního úřadu. Když dorazila asistence, která měla jeho okolí zablokovat, nejen že se nesetkala s úředníkem, kterému měla být k dispozici, ale navíc ještě její pouhá přítomnost ještě více rozvášnila dav, který obklopoval okresní úřad. Po poradě se starostou tedy byla asistence na rozkaz jejího velitele stažena. Vojenský ústřední archiv Praha, fond presidium MNO 1918-1923, K 169, sign. 8199.

11 K tomu např. již výše zmiňovaný zásah v Námestovu, kdy nebylo ze strany armády sice shledáno pochybení v otázce zásahu /sic!/, nicméně bylo zde shledáno několik jiných pochybení – především skutečnost, že se vojáci účastnili politického shromáždění, což konec konců také zavdalo příčinu následnému průběhu celého případu.

12 Na jaře roku 1920 víme pouze o dvou odepřeních poslušnosti, a to v Nymburce, kdy se vojáci přidali na stranu demonstrujících, a v opavských kasárnách. I Vojenské dějiny, vyšlé v období komunismu, přiznávají, že v tomto období k odepření poslušnosti docházelo jen výjimečně. Kol., Vojenské dějiny Československa. III. díl (1918-1939). Praha: Naše vojsko, 1987, s. 125, 127an.

v čerstvé paměti. Také v Československu se situace radikalizovala a vyvrcholila rozkolem v sociálně demokratické straně, jež byl završen obsazením Lidového domu v Praze levým křídlem sociálně demokratické strany. Strana sociálně demokratická, resp. její pravé křídlo požádalo státní orgány o zásah, který byl proveden dne 9. prosince 1920. Stoupenci levého křídla následně vyhlásili dne 10. prosince generální stávku, ta však byla následujícího dne konferencí důvěrníků ukončena. Požadavky stávky byly zaměřeny jednak směrem k Lidovému domu /body1-3/, jednak ekonomicky /zvýšení mezd, kontrola nad zásobováním, vydání nevyužitých bytů dělnictvu – body 6-7/ a obecné požadavky politické /odstoupení vlády, úplná tisková svoboda, spolčovací a shromažďovací – body 4-5/.[13] Dne 12. prosince bylo rozhodnuto o obnovení stávky od 13. prosince 1920.[14]

Situace v Oslavanech

Na Moravě nebylo centrem levicového hnutí kupodivu Ostravsko, kde si většinovou podporu zachovalo pravé křídlo sociální demokracie, nýbrž Oslavansko. Oslavany leží asi dvacet kilometrů od Brna a jsou jedním z center uhelné Rosicko-oslavanské pánve. Uhlí se zde začalo těžit intenzivně od poč. 19. stol., přičemž hlavní odběratelem byly Brněnské továrny. Od r. 1913 značnou část uhlí spotřebovávala také místní elektrárna. Tato elektrárna svým proudem zásobovala nejen město Brno, ale také všechny brněnské továrny.[15] To se ukázalo právě 10. prosince, kdy řada brněnských továren, i když se dělníci ke stávce nepřipojili, pracovat nemohla, neboť zaměstnanci elektrárny stávkovali.

Význam elektrárny si tak velmi dobře uvědomila i politická správa a téhož večera, kdy se rozhodovalo o obnovení stávky, bylo také rozhodnuto o vyslání vojenské asistence. Zásahem v Oslavanech byl pověřen jeden prapor 10. pěšího pluku pod vedením majora Jana Zázvorky. Jeho hlavním cílem byla ochrana tamní elektrárny, neboť právě z této elektrárny bylo zásobováno město Brno. V pondělí 13. prosince 1920 v půl druhé ráno se asistenci doprovázené dvaceti četníky podařilo obsadit bez problémů oba cíle – tedy elektrárnu a poštu. Velení armády ani politická správa situaci nepodceňovaly. Zázvorkovi bylo v rozkaze připomínáno, že má za každou cenu držet oddíly co nejvíce pohromadě a netříštit síly, aby nemohly být oddíly přemoženy.[16]

[13] Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 30-34.
[14] Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 40.
[15] Franěk, O., Rosicko-oslavansko v roce 1920. Praha: Krajské středisko státní památkové péče a ochrany přírody v Brně, 1975, s. 3.
[16] Bylo tak učiněno rozkazem ZVV v Brně pres. č. 16095/gštb z 12. prosince 1920, přičemž tento rozkaz odkazoval na ustanovení o vojenské asistenci uveřejněná v rozkaze ZVV v Brně č. 74. Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 42.

Jakkoliv prvotní efekt byl úspěšný – vojenské jednotky bez odporu obsadily jednotlivé důležité body – železniční stanici, poštu a elektrárnu, během dne se situace horšila. V Oslavanech se konal tábor lidu, který byl postupem vojska pobouřen, a to zejména obsazením elektrárny a vzetím rukojmích ze strany dělníků.[17] Okolo jedenácté hodiny se asi pětitisícový dav vydal částečně k železniční stanici, částečně k elektrárně. Podle vojenské správy byl nejprve odzbrojen oddíl vojáků hlídající poštu pod vedením četníka Winklera (ten zde patrně zastupoval civilní orgány – pozn. autor).[18] Stejně tak byla odzbrojena i posádka na stanici (důstojník a 22 vojáků).[19] Podobný osud potkal i posilu pod vedením poručíka Zezuly, a stejně dopadla rota vojáků, která dorazila do Oslavan na ochranu stávkokazů. Byla ozbrojena prakticky v okamžiku, kdy vystoupila na nádraží z vlaku. Sto padesát ozbrojených dělníků tak zaútočilo na elektrárnu, kterou bez výstřelu obsadilo. Odzbrojili pak všechny vojáky a také četníky. Jejich kořist byla ohromující - získali 4 kulomety, 305 pušek a 25.000 nábojů. A několik vojáků se patrně přidalo na stranu vzbouřenců.[20]

Druhý asistenční zásah

Pod vlivem těchto zpráv v Brně zavládla panika, že by revoluční plamen mohl přeskočit i sem. Strážní služba byla svěřena dobrovolníkům z řad branných a sportovních organizací (Sokol, Orel, DTJ) a do Oslavan byl vyslán nový asistenční oddíl, jemuž velel pplk. Hynek Sponner, velitel 24. pluku. Síly jeho asistenční jednotky byly dosti impozantní: II. prapor 3. pluku, I. prapor 27. pluku a III. prapor 24. pluku, dále pak lehká dělostřelecká baterie 6. dělostřeleckého pluku, četa světlometů a spojovací četa II. telegrafického praporu. Od leteckého pluku č. 2 byly na demonstraci síly nad Brnem a Oslavany povolány odpoledne tři *„aparáty".21* Rozkaz zněl: *„Obsaďte s touto skupinou Oslavany a zjednejte státní pořádek, když třeba násilím, v revíru rosicko-oslavanském."* Sponner pak svými vojáky postupně dobýval jeden dělnický opěrný bod za druhým, takže během dopoledne 14. prosince již byly celé Oslavany obsazeny vojskem, přičemž nedošlo ke ztrátám na životech.

Boj byl poměrně rychlý, především díky tomu, že armáda se nedala zastrašit palbou povstalců a naopak začala palbu opětovat a postupovala dále. Nato se většinou vzbouřenci dali na útěk. Je třeba říci, že

[17] Šlo o čtyři čelní představitele oslavanského dělnictva A. Remundu, T. Krásného, C. Krýdla a Fr. Suka. Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 43.
[18] V publikaci Oslavanská stávka však o tomto nenalezneme ani zmínky.
[19] Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 44.
[20] Minimálně o jednom máme důkaz - mělo jít o voj. Jana Žáka z 10. roty III. praporu pěšího pluku č. 10. Bylo na něj z tohoto důvodu také zahájeno vyšetřování vojenským prokurátorem, nicméně celý případ patrně vyzněl do ztracena. Vojenský ústřední archiv Praha, fond Prezidium MNO 1918-1923, karton 269, sign. 25 837.
21 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 27 sign. 47 7/1. Výtah z deníku posádkového velitelství v Olomouci týkající se opatření v tamní posádce ve dnech 11. až 17. prosince 1920. Stroje odstartovaly po druhé hodině odpoledne a vrátily se kolem čtvrt na pět. Jeden z nich však při přistání havaroval a pilot se těžce zranil v obličeji.

celkově odzbrojení vojáků bylo spíše dílem náhodné příležitosti, než plánovaného aktu, což ostatně dokazuje i skutečnost, že této situace dělníci nedokázali lépe využít. Svědčí o tom řada kroků, které podnikli, či naopak nepodnikli.Předně ve své vzpouře zůstali de facto osamoceni, nesnažili se na svou stranu získat ani okolní zemědělce, ani vojáky. Zemědělcům naopak často proti jejich vůli také zabavili zbraně[22], což jim na sympatiích rozhodně nepřidalo. Pokud jde o vojáky, tak je po odzbrojení propustili a nechali jít, takže velitel asistence hlásil v 15hod. 45 min. ze stanice Tetčice, že se vrací beze zbraní. Malá část jich pak využila situace a dezertovala a ještě méně se jich přidalo na stranu dělníků.[23] Pomoc, která přišla z okolí tak byla jen minimální a celá oslavanská akce tak působila dojmem výkřiku do tmy.

Při zásahu došlo ke zranění jednoho četníka a osmi vzbouřenců. Zatčeno bylo 220 vzbouřených dělníků.24 V Oslavanech bylo vyhlášeno stanné právo a asistenční jednotka tam zůstala ještě déle než měsíc.

Zjednání pořádku

Situaci v Oslavanech se tedy podařilo zvládnout a v následujících dnech tam byl již klid, nicméně jak velitel asistenční jednotky pplk. Sponner připomíná, *„zdejší obyvatelstvo je co nejvíce prosáklé bolševismem... obávám se, že při odvolání vojenské asistence v nejbližší době vzpoura zase povstane. Obyvatelstvo o tom veřejně mluví a s dychtivostí ji očekává.“*25 Rovněž z května následujícího roku nacházíme z pera pplk. H. Sponnera plán na případné vojenské obsazení Oslavan. Vedle náčrtku a předpokládaných počtů jednotek zpráva obsahuje i osoby, na něž se je možné v dané oblasti spolehnout (správce elektrárny, obvodní lékař, správce velkostatku, hostinský blízko elektrárny...).26

Dne 12. ledna 1921 byly jednotlivé útvary vystřídány, aby nedošlo k ohrožení disciplíny. V té době stále ještě chybělo z ukořistěných zbraní 128 pušek, jeden kulomet a 280 bajonetů.27

Celá situace měla mít pak i trestní následky, krom již výše zmíněného Jana žáka bylo vyšetřování zahájeno i proti velitelům zásahu, především proti por. Brichtovi a patrně i proti por. Zezulovi, ale také proti mjr. Zázvorkovi, veliteli pluku, od něhož byla asistence vyslána. Avšak již 13. ledna 1921 byl jejich

[22] Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 45.
[23] Durdík , J., Durdíková, L., Oslavanská stávky. Praha: Naše Vojsko, 1951, s. 45.
24 Kol., Vojenské dějiny Československa. III. díl (1918-1939). Praha: Naše vojsko, 1987, s. 130-132.
25 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 27 sign. 47 7/1 – 24 Hlášení pplk. Sponnera z 13. ledna 1921 o asistenčním zásahu v Oslavanech.
26 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 127, sign. 1 1/3 2.
27 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 27 sign. 47 7/1 – 24 Hlášení pplk. Sponnera z 13. ledna 1921 o asistenčním zásahu v Oslavanech.

případ odložen v souladu s ustanovením § 138 vojenského trestního řádu s tím, že jim není možné přičítat trestný čin. Generální vojenský prokurátor však 24. února 1921 nařídil, aby bylo proti mjr. Zázvorkovi a por. Brychtovi zahájeno řízení s tím, že se měli dopustit trestného činu neuposlechnutí důležitého služebního rozkazu z nedbalosti dle § 151 vojenského trestního zákona /zákon č. 19/1855 ř.z. , ve znění pozdějších novel/.[28] Zároveň byl divizní soud požádán o urychlené řízení.

Za co nejráznější a nejrychlejší uzavření této kauzy se přimlouval 25. února 1921 zemský vojenský velitel v Brně, gen. Podhájský, který se obával, že by mohlo nedostatečné potrestání viníků způsobit opakování této situace.29

Důvody selhání

Je otázkou, proč selhaly jednotky desátého pluku a jednotky pod Sponnerovým velením naopak obstály a splnily svůj úkol bez většího krveprolití. Jakkoliv je zřejmé, že jednotky pod Sponnerovým velením byly masivní, skutečnou příčinu je třeba hledat jinde. Svou roli bezesporu bude mít lidský faktor – tedy osobní kvality jednotlivých velitelů. Je možné, že útvary nasazené pod Sponnerovým vedením byly skutečně považovány za *„nejspolehlivější jednotky, jež mělo ZVV Brno k dispozici.“*30

O nasazení jednotek a jejich velitelů svědčí i skutečnost, že např. velitel I. baterie 6. děl. pluku, npor. Fox, na tři hodiny upadl do bezvědomí poté, co pomáhal svým vojákům s přesunem děl a celkem osmkrát (s každým svým oddílem) v zimě a ostrém větru absolvoval výstup na vrch Hlína, kde jeho jednotka zaujal pozice.*31* Na druhou stranu zde můžeme uvést hlášení velitele 6. divize, plk. Krejčího, který uvádí, že ve Sponnerových jednotkách byla řada nováčků, kteří ještě neměli zcela ukončený výcvik a nezúčastnili se ještě žádného většího vojenského cvičení.

Důvody selhání 10. pluku a úspěch Sponnerovy asistenční skupiny viděl plukovník Krejčí v něčem jiném. Podle něj bylo důvodem nesamostatné chování vojáka, který je na jednu stranu poslán na vojenskou asistenci a na druhou stranu je mu zakázáno použít zbraň, *„byť i k pouhému neškodnému, ale přece energickému zakročení. Voják měl býti strážcem zákona, ale musil nečinně přihlížeti, jak se zákon ruší,*

[28] §151 zní: *„Žalářem od jednoho až do tří roků buď potrestán též příslušník bojovného stavu, který neprovedl služebního rozkazu veliké důležitosti z nedbalosti nebo zapomenutosti, a způsobil tím škodu pro službu. Když nevznikly žádné škodlivé následky, nebo byly-li odvráceny přičiněním jiných, potrestán buď vinník žalářem od šesti měsíců až do jednoho roku.“* /citováno dle aspi/.

29 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 27 sign. 47 7/1 – 25.

30 Kol., Vojenské dějiny Československa. III. díl (1918-1939). Praha: Naše vojsko, 1987, s. 131.

31 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 27 sign. 47 7/1 – 31. Na návrh H. Sponnera z 20. prosince 1920 byla celé baterii i jejímu veliteli vyslovena pochvala. Jednotka sice přímo do bojů o Oslavany nemusela zasáhnout, nicméně v náročném terénu držela na přesunu krok s pěšími útvary a podílela se na následné pacifikaci oslavského revíru.

dokud na něho samotného nebyl podniknut útok. Stálé zdůrazňování mírnosti vedlo k otupění vojenského citu a hrdosti vojáků a k faktu, že voják, který nebyl než theoreticky, nikoliv ale v praktických případech poučen, aby se na zbraň spolehl a jí si proto vážil, vydá tuto bez velkých výčitek svědomí, nejsa si ani plně vědom, co svým činem způsobil."32 Pravdivost Krejčího slov potvrzuje i hlášení pplk. Sponnera, kde se výslovně uvádí, že důstojníci a vojáci byli poučeni o tom, že je třeba dobýt Oslavan za každou cenu a *„že pan ministr národní obrany každé jejich energické chování kryje." 33*

Již na začátku příspěvku bylo řečeno, že otázka použití zbraní asistencí byla vždy ostře sledována. Pokud k tomu došlo, byť ani nebyla třeba prolita krev, musela o tom být informována kancelář prezidenta republiky. Neklidné období r. 1919 a krveprolití při protičeskoslovenských demonstrací německého obyvatelstva vedly armádu k snaze skutečně co nejvíce omezit možnost použití zbraně. Až zarážejícím způsobem působí rozkaz Čs. zemské velitelství pro Čechy v Praze, pres. čís. 6391/oddíl A z dubna 1919: *„S ohledem na současné mimořádné poměry smí být zbraní použito jen v nejkrajnějším případě, není-li jiné možnosti a je-li oddíl ohrožován tak, že došlo ke zranění vojínů. Výkřiky, ale i plané výstřely (nedošlo-li ke zranění vojínů), nemají zavdat příčinu k použití zbraní, zejména ne střelných."34* Není proto divu, že vojáci měli strach zbraně použít, nebyli si to tiž jisti, jestli za to nebude následovat nějaký postih. Tento přístup pak měl za následek selhání asistence, teprve když bylo vojákům jasně zdůrazněno, že jim za použití zbraně nebude hrozit postih, jejich postup byl rázný a úspěšný.

Závěrem

Případ selhání vojenské asistence v Oslavanech je asi nejznámějším případem selhání armády při asistenci v období tzv. první republiky. Otázka použití zbraní asistencí byla vždy ožehavou a do značné míry byla i politickým tématem. Tak tomu bylo samozřejmě již za Rakousko-Uherska, nicméně v první republice zejména po potlačení demonstrací v pohraničí v r. 1919 hrála roli i národnostní otázka. Vojáci tak byli stavěni do velmi složité situace, kterou navíc nijak nezlehčovala skutečnost, že v tomto období

32 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 20 Sign. 33 3/10 5, hlášení velitele 6. divize ze dne 15. prosince 1920.
33 Vojenský ústřední archiv Praha, fond ZVV Brno, karton 27 sign. 47 7/1 – 24 Hlášení pplk. Sponnera z 13. ledna 1921 o asistenčním zásahu v Oslavanech.
34 Vojenský ústřední archiv Praha, fond Prezidium MNO 1918-1923, karton 89, sign. 47/28.

byly zásahy vojenských asistencí upravovány změtí přežívajících předpisů rakouských a nových předpisů přijímaných často ad hoc.[35]

Aby však byl splněn cíl vojenské asistence, musela být vojákům dána jistota, že pokud nebude zbytí, může být zákrok razantní. Ve chvíli, kdy vojáci byly svým velitelem ujištěni, že jejich postup má podporu pana ministra, již se nebáli zbraň použít. V souvislosti s tím je třeba upozornit na §§ 25 a 26 směrnice G-10 /směrnice pro vojenské asistence/ z r. 1923, které říká, že vojáci by si měli být vědomi, že pokud by se nechali bez odporu odzbrojit, mohou se sami vystavit trestnímu stíhání.[36] Toto ustanovení, jakkoliv to nikde z jednání přímo nevyplývá, je bezesporu ohlasem právě na odzbrojení asistence v Oslavanech.

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[3] Kol., Vojenské dějiny Československa. III. díl (1918-1939). Praha: Naše vojsko, 1987.

[4] Pernes, J., Nejen rudé prapory aneb pravda o revolučním roce 1905. Brno: V. Reitterová – Stilus, 2005. ISBN 8090355021.

[5] Wilfling, Administrativer Waffengebrauch der öffentlichen Vollzugsorgane und des Militärs. In: Mischler, E., Ulbrich, J., Österreichisches Staatswörterbuch, Handbuch des gesamten österreichischen öffentlichen Rechtes 4.Band. 2.vydání, Wien 1905.

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[35] Jako příklad zde mohou sloužit speciální směrnice o asistencích při rekvizicích potravin Vojenský ústřední archiv Praha, fond presidium MNO 1918-1923, karton 264, sign. chybí, inv. č. 4298, čj. 49519 pres. voj.

[36] Pinkas, O., Erhart., J., Sbírka četnických předpisů. Kroměříž 1923, kupon č.4, s.139. Viz §§25 a 26 směrnice G-10, směrnice pro vojenské asistence.

DISTRICT OF COLUMBIA V. HELLER – „ZAVRŠENÍ EVOLUCE“ DOKTRINÁLNÍCH PŘÍSTUPŮ K INTERPRETACI DRUHÉHO DODATKU AMERICKÉ ÚSTAVY?

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Abstrakt

Autor tohoto článku poukazuje z různých úhlů pohledu na problematiku interpretace druhého dodatku americké Ústavy. Vedle detailního rozboru samotného textu zvýrazňuje především historické souvislosti jeho přijetí a doktrinální pojetí jeho inkorporace. Podstatná část této práce je věnována soudním rozhodnutím, která se týkají práva „držet a nosit“ zbraň, přičemž jsou zde zdůrazňovány především základní aspekty vývoje chápání a ochrany tohoto práva. V poslední části autor načrtává teoretické a filozofické přístupy ke zmíněným právům a zároveň poukazuje i na jejich politické dimenze a rozdílné chápání v americkém a evropském právním prostředí.

Klíčová slova

Právo „držet a nosit“ zbraň – inkorporační doktrína – individuální právo – kolektivní právo – regulovaná milice – druhý dodatek – čtrnáctý dodatek – „due process“ klauzule – „práva nebo svobody“ klauzule.

Abstract

The author of this article is pointing out the difficulties of interpreting the Second Amendment of the American Constitution. While analyzing Second Amendment text, he emphasizes many historical connections related to this Amendment including the meaning of incorporation doctrines. Essential part of this article is dedicated to Second Amendment cases and evolution of protection of these rights. Last but not least, the author focuses on theoretical and philosophical approach to the Second Amendment's rights and on political aspects of "the right to keep and bear arms". He also pinpoints the differences between American and European approach to this issue.

Key words

Right to Keep and Bear Arms – Incorporation Doctrine – Individual Right – Collective Right – Well Regulated Militia – Second Amendment – Fourteenth Amendment – Due Process Clause – Privileges or Immunities Clause.

1. Obsah a interpretace druhého dodatku americké Ústavy

Pro objektivní interpretaci textu druhého dodatku americké Ústavy,[1] je třeba se věnovat přinejmenším historickým souvislostem, teoretickým aspektům moderního demokratického státu, názorům akademiků, judikatuře Nejvyššího soudu Spojených států Amerických[2] a v neposlední řadě samotnému textu tohoto dodatku. Pro jeho aplikaci jsou však nejdůležitější stanoviska nejvyšších soudců. To potvrzují i slova bývalého předsedy Nejvyššího soudu Hughese: „**Ústavou je jen to, za co ji prohlásí Nejvyšší soud**."[3]

Před analýzou vývoje interpretace 2. dodatku Nejvyšším soudem, považuji za důležité rozebrat jeho text. Originální verze začíná slovy: „*A well regulated Militia, being necessary to the security of a free State,…*". Hovoří tedy o regulované „milici", resp. zeměbraně. V této souvislosti je vhodné poukázat na názor, že výraz „regulated" měl v angličtině 18. století odlišný význam než má nyní. Nebyl chápán jako výraz autoritativní regulace, nýbrž znamenal „vybavenost", resp. vnitřní organizovanost.[4] Nicméně, ohledně tohoto tvrzení neexistuje všeobecný konsensus. Text dále pokračuje slovy: „*…, the right of people to keep and bear Arms, shall not be infringed.*"[5] Při aplikaci prosté jazykové hermeneutické metody, lze tomuto dodatku rozumět, jako zákazu porušovat právo, resp. zasahovat do práva lidí držet a nosit zbraň, stejně jako zasahovat do organizované milice, která je zřízena pro bezpečnost svobodného státu.

Použitá interpretační metoda ovšem neodpovídá na to, kdo se má zdržet zásahů do stanovených práv, a zdali mají právo nosit zbraně všichni lidé či jen pouze někteří, resp. jen ti, kteří jsou členy organizované milice a zdali je mohou nosit za všech okolností či je jen vlastnit, ale být v jejich nošení omezeni. Interpretaci rozvíjejí až následná rozhodnutí Nejvyššího soudu.

2. Inkorporační doktríny ve vztahu k druhému dodatku

Druhý dodatek je součástí skupiny prvních deseti dodatků americké Ústavy, souhrnně nazývané „The Bill of Rights". Ta byla přijata v roce 1791, jako reakce na absenci zakotvení základních lidských práv

[1] Dále jen "2. dodatek".
[2] Dále jen Nejvyššího soudu.
[3] Spaeth, H. J., The Constitution of United States, 13. vydání, New York : HarperCollins Publishers, 1991, s. 24.
[4] The Sight web : What the Founding Fathers Meant with Militia ? [citováno dne 10. 4. 2008]. Dostupné z: http://www.sightm1911.com/lib/rkba/ff_militia.htm.
[5] Původní verze postrádá čárku před slovem "being". O významu čárek níže v textu.

v samotném textu ústavy.[6] Předseda Nejvyššího soudu John Marshall stanovil v případu *Barron v. Baltimore* (1833), že prvních deset dodatků zavazuje pouze federální moc,[7] což vysvětlil tím, že „Ústava dává pravomoci jen federálním orgánům, a tedy jen je může zavazovat."[8]

Pozdější soudní praxe však postupem času stanovila, že většina[9] z prvních deseti dodatků je závazná i pro jednotlivé státy, a tedy obrátila předchozí pravidlo vyplývající z Marshallova rozhodnutí. Tento proces rozšíření působnosti prvních dodatků, nazývaný „**incorporation doctrine**", je jedním z nejdiskutovanějších témat v americkém ústavním právu.

Jeho počátky se váží k přijetí 14. dodatku Ústavy Spojených států v roce 1868, který obsahuje dvě známé klauzule, jejichž význam pro vývoj chápání konceptu lidských práv dalece překračuje území USA. Jedná se od „**priviliges or immunities clause**" a „**due process clause**". Prvně jmenovaná zakazuje jednotlivým státům „přijmout zákon,[10] který by omezoval práva nebo svobody[11] občanů Spojených států" a klauzule druhá jednotlivým státům federace brání v tom, aby „připravily jakoukoliv osobu o život, svobodu či majetek bez due process of law".[12] V této souvislosti je třeba uvést, že pojem „due process" lze chápat v procesním i hmotném pojetí, leč v obou těchto případech se jedná o požadavek souladnosti postupu orgánů státních mocí, resp. samotného obsahu objektivního práva, se základními principy právního státu.[13]

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[6] Skutečnost, že Federalisté nezahrnuli do samotného textu Ústavy zakotvení základní lidských práv a svobod (až na několik výjimek: zákaz zákonodárné moci přijmout „ex post facto laws", tedy trestněprávní předpisy se zpětnou účinností [pravá retroaktivita], dále zákaz tzv. „bills of attainder", což jsou akty moci zákonodárné, kterými je rozhodováno o vině a trestu jednotlivců, aj.) okomentoval Thomas Jefferson slovy: „Listina základních práv a svobod je něco, k čemu jsou oprávněni lidé na celém světě, ve vztahu ke svým vládám." Více na: Kansas City School of Law web : The Bill of Rights, Its History and Significance [citováno dne 1. 4. 2008]. Dostupné z: http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/billofrightsintro.html.

[7] Anglický výraz "Federal Government" bude dále překládán jako "Federální moc". Doslovný překlad "Federální vláda" je totiž užšího významu. Pojem zahrnuje veškeré federální orgány.

[8] Schweigl, J., Tauchen, J. První dodatek americké Ústavy v praxi, in MEKON 2008, CD příspěvků X. ročníku mezinárodní konference Ekonomické fakulty, VŠB – TU Ostrava, Ostrava : VŠB – TU Ostrava, 2008, s. 3.

[9] Konkrétně se jedná o: 1.dodatek – inkorporován zcela; 3. dodatek – stále chybí stanovisko Nejvyššího soudu, pouze „2nd Circuit Court" ho označil za inkorporovaný; 4. dodatek – zcela inkorporován; 5. dodatek – inkorporován pouze z části; 6. dodatek – zcela inkorporován; 8. dodatek – zčásti inkorporován. Více na: Kansas City School of Law web : The Incorporation Debate [citováno dne 2. 4. 2008]. Dostupné z: http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm.

[10] V originálním textu je výraz „law", který má širší význam než zákon, může se jednat o jakýkoliv právní předpis či rozhodnutí soudu.

[11] V originálním textu je psáno „priviliges or immunities". Domnívám se, že nejpřesnějším překladem do jazyka českého jsou výrazy „práva nebo svobody". Tyto pojmy v sobě již obsahují status aktivus a status negativus, který vyplývá i z anglických termínů. Na druhou stranu je nutné upozornit na to, že, jak uvádí prof. Filip, část americké teorie i rozhodování amerických soudů stojí na stanovisku, že Ústava USA zná jen negativní práva. Filip, J. in Filip, J., Svatoň, J., Zimek, J., Základy státovědy, 4. vydání, Brno : Masarykova univerzita, 2006, s. 140.

[12] Více v: 14th Amendment of US Constitution.

[13] Více: Schweigl, J., Tauchen, J. První dodatek americké Ústavy v praxi, in MEKON 2008, CD příspěvků X. ročníku mezinárodní konference Ekonomické fakulty, VŠB – TU Ostrava, Ostrava : VŠB – TU Ostrava, 2008, s. 2 – 4.

Již pět let po přijetí 14. dodatku bylo v případech obecně nazývaných „Slaughterhouse cases" Nejvyšším soudem řečeno, že prostřednictvím „priviliges or immunities clause" 14. dodatku, jsou práva a svobody garantované prvními dodatky, závazná i pro jednotlivé státy federace. Pozdější vývoj se ovšem přikláněl k inkorporaci prostřednictvím „due process clause", což se ovšem do dnes setkává se značnou kritikou.[14]

Inkorporační doktríny lze rozdělit do tří skupin a to na (1) **selektivní inkorporační doktrínu** (představitelem např. soudce White), jejíž myšlenkou je, že pouze některé specifické části prvních dodatků se staly závaznými i pro jednotlivé státy; (2) **úplnou inkorporační doktrínu** (soudce Murphy), která tvrdí, že všechna práva a svobody, která mají občané ve vztahu k federální moci, mohou uplatňovat i proti mocím svých států; a (3) **doktrínu inkorporaci popírající** (soudce Frankfurter), jež zpochybňuje závaznost prvních dodatků pro jednotlivé státy.[15] Nicméně v současné době převládá pojetí teorie selektivní inkorporace.

Pro účely této práce je ovšem klíčové to, že 2. dodatek není obecně chápán jako závazný pro jednotlivé státy. Naopak, Nejvyšší soud opakovaně stanovil, že 2. dodatek moc jednotlivých států nezavazuje.[16] Právě řečené stručně a výstižně komentuje prof. Spaeth: „Tedy státní a místní vlády mají Ústavou danou volnost přijímat zákony, které regulují držení zbraní."[17] V podobném smyslu se vyjadřuje i Chemerinsky: „…Nejvyšší soud nikdy neinterpretoval 2. dodatek, jako právo jednotlivce držet střelnou zbraň."[18]

3. Právo držet zbraň v judikatuře amerických soudů

Mezi jedno z prvních soudních rozhodnutí, které se týkalo 2. dodatku, patří případ *United States v. Cruikshenk* (1875). Jeho hlavní myšlenku lze vystihnout výrokem z rozhodnutí: „**Druhý dodatek deklaruje, že toto [právo nosit zbraň] nemá být rušeno, ovšem toto neznamená víc než to, že nemá být rušeno Kongresem.**" V podstatě identické pravidlo se objevuje i v případu *Presser v. Illinois* (1886), kde je však dále rozvíjeno. Především je v tomto rozhodnutí konstatováno, že ačkoliv může stát omezit právo jednotlivce vlastnit zbraň, musí vždy **zvážit míru a dosah takového omezení**, protože

[14] Tamtéž.
[15] Kansas City School of Law web : The Incorporation Debate [citováno dne 2. 4. 2008]. Dostupné z: http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm.
[16] Naposledy tak učinil ovšem v roce 1886 v případu Presser v. Illinois.
[17] Spaeth, H. J. The Constitution of United States, 13. vydání, New York : HarperCollins Publishers, 1991, s. 120.
[18] Chemerinsky, E. Constitutional Law, Principles and Policie, New York : Aspen Publisher, Inc., 1997, s. 383.

jinak by mohl připravit Spojené státy o „výhodu," kterou v určitých případech mohou právě ozbrojení občané představovat v případě nutnosti kolektivní obrany.

Dalším důležitým soudním rozhodnutím je případ *United States v. Miller* (1939). Zde bylo řečeno, že puška s krátkou, resp. upilovanou hlavní (sawed-off shotgun) není zbraní, kterou používá organizovaná milice a tudíž se na ni 2. dodatek nevztahuje.[19] Myslím si, že zde je vhodné zdůraznit tu skutečnost, že soud nepopřel právo jednotlivce vlastnit a držet zbraň „in genere", nýbrž jen svým rozhodnutím vymezil určitou skupinu zbraní, která se nevztahuje mezi ty, které jsou chráněny 2. dodatkem. Široké rozpětí interpretačních možností 2. dodatku bylo částečně specifikováno, ovšem odpovědi na nejdůležitější otázky zůstaly stále nezodpovězeny.

Jestliže se výše uvedené případy shodují v tom, že interpretují 2. dodatek způsobem, který znemožňuje Kongresu, jakožto orgánu moci federální, jakkoliv zasahovat do práv občanů vlastnit a držet zbraň, pak obrat nastává v případu *Lewis v. United States* (1980), ve kterém soud svojí interpretací 2. dodatku umožňuje i Kongresu, aby omezil právo vlastnit zbraň, a to osobám, které byly pachateli trestného činu: „Tento soud již opakovaně projevil názor, že moc zákonodárná může v souladu s Ústavou, zakázat pachatelům trestných činů vykonávat i činnosti, které jsou mnohem více fundamentálního rázu, než právo nosit zbraň."

Podstatnou součástí judikatury týkající se 2. dodatku, je i relativně nedávný případ *United States v. Emerson* (2001), který byl řešen Pátým odvolacím soudem.[20] Ten stanovuje, že **i jednotlivec, který není členem žádné organizované milice**, má právo vlastnit zbraň. Toto pravidlo bylo však vzápětí popřeno rozhodnutím Devátého odvolacího soudu[21] a to v případu *Silveira v. Lockier* (2002), kde bylo jasně vyřčeno, že **právo vlastnit zbraň není právem jednotlivce, ale pouze milice**, jako organizovaného sboru. Také Desátý odvolací soud[22] se v rozhodnutí *United States v. Haney* (2001) vyslovil k právu jednotlivce nosit zbraň zamítavě. Na tomto případu je zajímavé, že se obžalovaný Haney, který si vyrobil dvě automatické pušky, šel sám udat na policii, aby v průběhu soudního jednání prokázal, že zákon zakazující jednotlivcům vlastnictví automatických pušek, je v rozporu s 2. dodatkem Ústavy. Nicméně, odvolací soud konstatoval, že: „**federální zákon, který kontroluje držení zbraní není v rozporu s 2. dodatkem, pokud neomezuje možnost jednotlivých států zřídit si a spravovat**

[19] Toto rozhodnutí bylo mnohokrát citováno i v následných rozhodnutích. Cf: Prinz v. United States (1997), Lewis v. United States (1980), Adams v. Williams (1972), Atlanta Motel v. United States (1961), Koenigsberg v. State Bar (1961).
[20] Fifth Circuit Court of Appeals.
[21] Ninth Circuit Court of Appeals.
[22] Tenth Circuit Court of Appeals.

organizovanou milici“, což doplnil konstatováním, že nečiní žádný překvapivý závěr, jen „otevřeně cituje ustanovení 2. dodatku“.

4. Parker v. District of Columbia – přelom v interpretaci druhého dodatku

4.1. Výrok odvolacího soudu

V roce 2003 byl skupinou šesti obyvatel Washingtonu D.C.[23] iniciován soudní proces, ve kterém mělo být poukázáno na to, že tamější zákon omezující držení zbraní,[24] který byl přijat již v roce 1975, je v rozporu s 2. dodatkem. Předmětem zmíněného zákonu byl zákaz držení ručních zbraní (side arms) a povinnost uchovávat ostatní zbraně nenabité, rozložené a se zajištěnou spouští. Poté, co se příslušný soud první instance[25] vyslovil k požadavku zamítavě, se případ dostal před federální odvolací soud ve Washingtonu D.C. Ten ve svém rozhodnutí označil některé části sporného zákonu za neústavní a navíc prohlásil, že právo držet a nosit zbraň se vztahuje i na jednotlivce: „Obecně vzato, dospěli jsme k závěru, že druhý dodatek chrání práva jednotlivců držet a nosit zbraň. Toto právo jako takové existovalo již před vytvořením vlády Ústavou a bylo založeno na soukromém užívání zbraní pro takové aktivity, jako například lov či sebeobrana. Druhé jmenované lze chápat jako svémocný odpor vůči protiprávnímu jednání jednotlivců či proti nepřístojným zásahům tyranské vlády.“ Dále je v rozhodnutí je uvedeno: „…aktivity chráněné [druhým dodatkem] se nevztahují pouze na milice a ani jednotlivcovo právo **není vázáno na trvající či příležitostné členství v milici**“.[26]

4.2. Akademické debaty

Tento rozsudek vyvolal bouřlivou akademickou debatu na zmíněné téma. Bývalý generální prokurátor Spojených státu Ashcroft se shoduje s ikonou Harvardské právnické fakulty prof. Tribem, ale i prof. Amarem z Yale univerzity v tom, že jakkoliv se právo nosit zbraň vztahuje i na jednotlivce, tak musí být

[23] Na to jak důležitá je v tomto případě skutečnost, že je případ řešen ve federálním distriktu poukazuje i Levy, poradce právního zástupce účastníka řízení Hellera a spolupracovník CATO institutu. Tvrdí, že federální distrikt byl vybrán i proto, že tím byla eliminována složitost, která by vyplývala z jinak nutného posuzování možnosti inkorporace druhého dodatku i vůči jednotlivým státům. Federální distrikt není považován za stát. Více na: Ferrara, L. Mother Jones web : The Way of the Gun [citováno dne 10. 4. 2008]. Dostupné z: http://www.motherjones.com/interview/2007/02/robert_levy.html.

[24] Firearms Control Regulations Act of 1975.

[25] United States District Court for the District of Columbia.

[26] Soudní rozhodnutí dostupné z: http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf. S. 46. Autor částeně čerpal i z: Wikipedia web: District of Columbia v. Heller [citováno dne 10. 3. 2008]. Dostupné z: http://en.wikipedia.org/wiki/District_of_Columbia_v._Heller.

bráno v úvahu, že **toto právo není absolutní a měly by být stanoveny jasné podmínky, za nichž je možné ho limitovat**. Absolutní zákaz, který ovšem představuje zákon federálního distriktu je ovšem neakceptovatelný.[27] Podobně se vyjadřuje i poradce právního zástupce účastnice řízení Parkerové, advokát Levy: „Toto není rozumné a vhodné omezení založené na určité charakteristice. Toto není omezení. Toto je zákaz."[28]

Z jiného pohledu přistupuje k problematice prof. Chemerinsky,[29] který tvrdí, že samotná skutečnost, že odvolací soud prohlásil, že práva 2. dodatku se vztahují i na jednotlivce, neodpovídá na otázku zkoumání možnosti omezení těchto práv. Sám se domnívá, že omezení práva nosit zbraň by se mělo do určité míry shodovat s ostatními ústavně konformními omezeními jiných základních práv. Tedy omezení by vždy mělo mít akcesorickou povahu, existenční i funkční, a to k určitému „**legitimnímu vládnímu účelu**". Z právě řečeného dále vyvozuje, že požadovaným účelem zde byla snaha snížit kriminalitu odvíjející se od držení zbraní a tudíž zmiňovaný zákon nepovažuje za neústavní.[30]

S názorem, že 2. dodatek zakotvuje právo jednotlivců držet zbraň otevřeně vystupuje kongresman Ron Paul, který se ho snaží vysvětlovat především jako nástroj demokracie k potlačování zárodků tyranie: „…zbraň vlastněná jednotlivci může být užita k ochraně občanů před [čistě hypoteticky předvídanou] tyranií ze strany státu."[31] Jak podotýká již výše zmíněný prof. Tribe, tak v úvahu je nutné brát i to, že z debat Kongresu, které předcházely přijetí „The Bill of Rights" vyplývá, že za hlavní úlohu 2. dodatku jeho tvůrci považovali prevenci před zásahy federální moci do působnosti státních milicí.[32] To ovšem neznamená, že druhotným záměrem nebylo toto právo garantovat i jednotlivci. Toto tvrzení lze opřít o skutečnost, že Kongres se usnesl zamítavě k návrhu, že slovní spojení „právo nosit zbraň" by mělo být doplněno slovy „pro společnou obranu".[33]

4.3. Řízení u Nejvyššího soudu

Odvolání obou stran případu *Parker v. District of Columbia* (2007) je nyní řešeno americkým Nejvyšším soudem pod označením *District of Columbia v. Heller* a konečné rozhodnutí se očekává v průběhu léta 2008. Otázku, která má být zodpovězena, formuloval po zvážení návrhů účastníků sám Nejvyšší soud:

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[27] Levy, R. NRO web : A Woman's Right [citováno dne 8. 4. 2008]. Dostupné z: http://www.nationalreview.com/comment/comment-levy042403.asp.

[28] Answers web : Parker v. District of Columbia [citováno dne 10. 4. 2008]. Dostupné z: http://www.answers.com/topic/parker-v-district-of-columbia?cat=biz-fin#wp-_note-11.

[29] Profesor amerického ústavního práva na Duke University.

[30] Chemerinsky, E. Washington Post web : A Well-Regulated Right to Bear Arms [citováno dne 5. 4. 2008]. Dostupné z: http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031301508.html.

[31] Paul, R. Freedom under Siege, The U.S. Constitution after 200 years, Lake Jackson, TX : Foundation for Rational Economics and Education, Inc., 1987, s. 27. Dostupné v elektronické podobě z: http://www.mises.org/books/freedomsiege.pdf.

[32] Tribe, L. American Constitutional Law, 2. vydání, USA : The Foundation Press, Inc., 1988, s. 299.

[33] Tamtéž.

„**Porušují následující části zákona** …[zkráceno autorem] **právo jednotlivců, kteří nejsou členy státem organizované milice, držet ruční a jiné střelné zbraně pro soukromé užití ve svých domovech?**“[34]

První jednání proběhlo před Nejvyšším soudem 18. 3. 2008.[35] Každé ze stran bylo dáno třicet minut na uvedení svých stanovisek k věci a přizván byl i zástupce federální vlády, který představil její stanovisko. Před samotným jednáním bylo Nejvyššímu soudu zasláno zhruba sedmdesát tzv. „amicus curiae“, tedy dopisů někdy nazývaných jako „přátelé soudu“.[36] Většina z nich Nejvyššímu soudu doporučuje, aby rozhodnutí odvolacího soudu potvrdil. Jedním ze signatářů jednoho z těchto dopisů je i Richard Cheney, viceprezident Spojených států.

5. „Right to Keep and Bear Arms“ jako fundamentální lidské právo

5.1. Význam slov a interpunkce

Snažit se předpokládat jakým způsobem Nejvyšší soud v průběhu nadcházejícího léta rozhodne je asi v této chvíli, pro účely tohoto článku, nedůležité. Ovšem domnívám se, že je vhodné poukázat alespoň na některé teoretické koncepce chápání práv 2. dodatku, jež mohou být Nejvyšším soudem brány v úvahu.

Jak již bylo zmíněno výše, tak originální text 2. dodatku, postrádá čárku před slovem „being“. Důležitost každé čárky v textu zvýraznil i výrok odvolacího soudu v případu *Parker v. United States*, když své tvrzení o tom, že garantovaná práva jsou individuální, podepřel hlavně o myšlenku, že čárka za slovem „State“ rozděluje dodatek do dvou hlavních klauzulí, na tzv. úvodní (prefatory) a hlavní (operative), přičemž toto rozdělení údajně jasně naznačuje, že právo občanů nosit zbraň má být chápáno, jako právo individuální, nezávislé na účastenství ve státem organizované milici. Jiný pohled na věc ovšem přináší Freedman, který tvrdí, že v osmnáctém století nemělo užívání interpunkce žádný řád, k čemuž dodává: „Tato situace byla dokonce ještě horší v právu, ve kterém dlouholetá anglická tradice stanovila, že interpunkční znaménka nejsou součástí zákonů (a tedy soudy se jimi při interpretaci zákonů nemohly

[34] Supreme Court web : District of Columbia v. Heller [citováno dne 10. 4. 2008]. Dostupné z: http://www.supremecourtus.gov/qp/07-00290qp.pdf.
[35] Zápis z jednání dostupný z: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf, video dostupné z: http://www.c-span.org/homepage.asp?Cat=Current_Event&Code=SCourt&ShowVidNum=12&Rot_Cat_CD=SCourt&Rot_HT=&Rot_WD=&ShowVidDays=365&ShowVidDesc=&ArchiveDays=365.
[36] Friend of Court. Více na: Techlawjournal web : Amicus Curie [citováno dne 1. 4. 2008]. Dostupné z: http://www.techlawjournal.com/glossary/legal/amicus.htm.

řídit).“[37] Další problém shledává v tom, že **ne všechny státy ratifikovaly verzi 2. dodatku se stejným počtem čárek**.

Neustále diskutovaným problémem je i význam jednotlivých slov 2. dodatku. Problém je spatřován především v mnohoznačnosti použitých slov: „keep, bear, arms, well-regulated, militia a infringe“ a dále v možném posunu jejich významu v průběhu více než 200 let od přijetí 2. dodatku. Profesor Rowland zanalyzoval použití slovního spojení „bear arms“ ve více než 300 dobových materiálech a dále i použití zhruba 200 jiných výrazů týkajících se nošení zbraní, přičemž zjistil, že výraz „bear arms“ byl používán výhradně ve vojenské terminologii, podobně jako výraz „keep arms“, který znamenal držet zbraň pro vojenské účely. Nicméně nevylučuje možnost, že výrazy mohly být míněny obrazně. Tato zjištění nasvědčují tomu, že práva 2. dodatku mohla být chápána jako práva kolektivní.[38]

5.2. Práva 2. dodatku, jako objektivním právem potvrzené morální a společenské normy či jako práva přirozená

Všimněme si, že formulace 2. dodatku explicitně nezakotvuje právo nosit zbraň. Pouze omezuje možnost zásahů do tohoto práva. Z toho lze usuzovat, že právo nosit, resp. vlastnit zbraň, mohlo být dle textu samotného dodatku apriorně chápáno jako právo všeobecně uznávané a předpokládané, a tedy více či méně odvislé od většinového přesvědčení obyvatel.[39] Považujeme-li tento předpoklad za pravdivý, pak pouze „předpokládané“ právo nosit zbraň je třeba chápat jako **subjektivní oprávnění vycházející z norem společenských, kulturních či mravních**, pro které je typická relativní neměnnost[40] a obecné akceptování většinou společnosti. Omezení moci federální zasahovat do této společenské normy, která je často lokálního charakteru, je vcelku srozumitelné, ovšem soustřeďme se při použití výše načrtnutého přístupu na pravomoci lokálních vlád. Především je důležité si uvědomit, že „stát není jen prázdná forma, je to soubor živých jedinců.“[41] Cítění těchto jedinců, které determinuje společenské normy se vyvíjí a mění společně s ekonomickým vývojem společnosti. Na vztah mezi normami

[37] Freedman, A. New York Times web : Clause and Effect [citováno dne 12. 4. 2008]. Dostupné z: http://nytimes.com/2007/12/16/opinion/16freedman.html?ex=1355461200&en=d4bb37ec081198eb&ei=5090.
[38] Rowland, J., K.The Potowmack Institute : Resettling the Terms of Debate on the Second Amendment [citováno dne 12. 4. 2008]. Dostupné z: http://www.potowmack.org/emerappa.html#300. Toto zjištění je ovšem více méně popíráno v práci Cramera a Olsona. Více: Cramer, C., Olson, J. Social Science Research Network : What Did “Bear Arms” Mean in the Second Amendment? [citováno dne 5. 4. 2008]. Dostupné z: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086176.
[39] Tuto myšlenku ve svém rozhodnutí předestírá i odvolací soud v případu Parker v. District of Columbia.
[40] To ovšem neznamená, že jsou absolutně rigidní. Viz. dále.
[41] Urbanová, M. in Harvánek, J. a kol. Teorie práva, 2. vydání, Brno : Masarykova univerzita, 2006, s. 45.

ústavními a společenskými poukazuje i prof. Filip: „…zvláštností norem ústavního práva je jejich velmi těsné spolupůsobení s jinými normativními systémy.“[42]

Domnívám se, že v této souvislosti je vhodné položit si otázku: Nejsou snad v demokratických moderních státech, ve kterých je na základě pozitiv plynoucích z dělby moci a protimocenských záruk typu „checks and balances“, společenské normy transformovány prostřednictvím orgánů státních, resp. lokálních mocí do objektivního práva v podobě právních norem? Jinými slovy, chápeme-li jako axiom při svých dedukcích to, že právo nosit zbraň je právem vycházejícím ze společenských a morálních norem, pak právě ta skutečnost, že **pouze občané konkrétních států** mohou prostřednictvím svých zástupců-legislativců do těchto práv skrze zákony s **pouze lokální působností** zasahovat, se zdá být jednou z možných odpovědí na položenou otázku oprávněnosti zásahů.

Právo nosit zbraň může ovšem být chápáno i jako právo přirozené a tudíž objektivním právem neomezitelné, resp. omezované jen právy stejné povahy ostatních jedinců . Jestliže prof. Rothbard chápe lidská práva jako vyjádření práv majetkových, pak právo nosit zbraň zde může být považováno za podmnožinu práva vlastnického. Samotné vlastnické právo je dle tohoto pojetí vnímáno, jako právo každého jednotlivce vlastnit svojí osobnost a výsledky její činnosti a tyto i samostatně bránit.[43]

Rothbard se dále domnívá, že: „I když je držení zbraní přísně omezeno či zakázáno, tak nemůžeme očekávat, že pachatelé trestných činů, na které je toto omezení mířeno, se začnou řídit právními předpisy.“[44] V této souvislosti poukazuje i na rozsáhlou studii, kterou uskutečnila Wisconsinská Univerzita v roce 1975, jejíž výsledkem bylo zjištění, že „zákony omezující držení zbraní nemají žádný individuální ani kolektivní efekt na snižování míry násilné trestné činnosti.“[45]

5.3. Politické aspekty práva držet zbraň

Teoretickou šanci zvítězit v nadcházejících prezidentských volbách má v současné době[46] za republikány kandidát John McCain[47] a na straně demokratů Hillary Clintonová či Barack Obama.

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[42] Filip, J. Ústavní právo České republiky, 4. vydání, Brno : Doplněk, 2003, s. 58.
[43] Rothbard, M. The Ethics of Liberty, 2. vydání, New York : New York University Press, 1998, s. 56 a 152-160. Dostupné i v elektronické podobě: http://mises.org/rothbard/ethics.pdf.
[44] Rothbard, M. For a New Liberty, 3. vydání, New York : Macmillan Publishing Co., Inc., 2002, s. 115.
[45] Tamtéž, s. 117.
[46] Duben 2008.
[47] Za republikánskou stranu kandiduje i texaský kongresman Ron Paul, který ovšem nemá šanci na nominaci za svoji stranu. Jeho přístup k 2. dodatku je nejliberálnější a o podporu práva jednotlivce držet zbraň se zasazuje dlouhodobě. Více: Paul, R. Hope for America web : The Second Amendment [citováno dne 16. 4. 2008]. Dostupné z: http://www.ronpaul2008.com/issues/second-amendment/.

McCainův přístup k druhému dodatku nelze popsat jako přísně vyhraněný a v průběhu jeho politického působení se již několikrát změnil. Na počátku své kariéry hlasoval proti tzv. „Clinton Crime Bill", který mimo jiné obsahoval ustanovení zakazující útočné zbraně (assault weapons). Nicméně, když v roce 2000 kandidoval v primárních volbách proti G. W. Bushovi, vyslovoval se k 2. dodatku spíše kriticky. V současné době lze označit jeho přístup k právu vlastnit zbraň za liberálnější.[48] Postoj H. Clintonové k 2. dodatku je nesmlouvavý. Již mnohokrát v průběhu svého politického působení hlasovala pro omezení práva jednotlivců nosit zbraň.[49] Velmi podobným způsobem se k 2. dodatku staví i B. Obama.[50]

Evropský přístup k právu jednotlivce vlastnit zbraň je od amerického v mnoha aspektech odlišný. Evropský parlament koncem roku 2007 novelizoval směrnici z roku 1991 o nabývání a držení zbraní. Jejím obsahem je především zpřísnění možnosti pořídit si zbraň, konkrétně pak zavedení dvacetileté lhůty pro uchování údajů a omezení možnosti získat zbraň přes internet. Dále zpřísňuje i způsob označování zbraní.[51]

Názor některých poslanců Evropského parlamentu lze shrnout výrokem Gisely Kalenbachové: „My v Evropě máme kulturu odlišnou od té americké a nepovažujeme svobodu koupit si zbraň za základní lidské právo."[52] V podobném smyslu se vyjádřil i německý europoslanec Alvaro: „Evropa nechce následovat Spojené státy, kde je velmi snadné, aby se střelná zbraň dostala do špatných rukou."[53]

Ačkoliv rozhodnutí právě probíhajícího procesu *District of Columbia v. Heller* nemůže zodpovědět s jistotou otázku, je-li právo vlastnit zbraň právem přirozeným, resp. fundamentálním, tak toto rozhodnutí snad alespoň zodpoví, zdali 2. dodatek chrání právo držet zbraň, jako právo individuální, a tím zamezí zbytečným, finančně nákladným soudním sporům, které pramení ze strohosti a nejednoznačnosti textu „milovaného" i „nenáviděného" dodatku americké Ústavy, a možná toto

[48] Více: Velleco, J. Gun Owners of America web : John McCain [citováno dne 16. 4. 2008]. Dostupné z: http://gunowners.org/pres08/mccain.htm.
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[52] Bilefsky, D. Herald Tribune web : EU legislators push tougher gun controls [citováno dne 14. 4. 2008]. Dostupné z: http://www.iht.com/articles/2007/11/29/europe/union.php.
[53] Tamtéž.

rozhodnutí potvrdí nebo vyvrátí i slova Jamese Madisona o tom, že Američané mají právo držet zbraň, na rozdíl od obyvatel jiných států, jejichž vlády ozbrojeným občanům nevěří.[54]

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NUCENÉ STERILIZACE VE TŘETÍ ŘÍŠI – ZLOČIN NA ZÁKLADĚ ZÁKONA

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Abstrakt

Cílem tohoto příspěvku je pojednání o právní úpravě nucených sterilizací v Německu v období národního socialismu. Právní základ tvořil zákon o obraně proti dědičně zatíženému potomstvu z roku 1933, který stanovil základní podmínky, za kterých mohl být jedinec zbaven své rozmnožovací schopnosti. Na nucených sterilizacích se podíleli jak němečtí lékaři, tak i němečtí právníci a soudci, neboť rozhodování o nařízení jejich provedení příslušelo soudům pro ochranu dědičného zdraví.

Klíčová slova

Nucená sterilizace – Třetí říše – eugenika – rasová hygiena – zákon o obraně proti dědičně zatíženému potomstvu

Abstract

The intention of this article is to treat scientifically the legal regulations of compulsory vasectomy in the Nazi Third Empire. These regulations were based on the Protection against Ancestors with an Inherited Defect Act from 1933 which had stated basic conditions on which an individual could have been sterilized. There were judges, attorneys and doctors who participated in compulsory vasectomies. The burden of decision making whether or not the vasectomy will be done, was placed on judges.

Key words

Compulsory vasectomy – The Nazi Third Empire – Eugenics – Racial Hygiene – The Protection against Ancestors with an Inherited Defect Act

Citát:

„Národní socialismus je aplikovaná nauka o rasách."
Rudolf Heß[1]

[1] Citováno dle: Iskraut, M. Grundgedanken der nationalsozialistischen Weltanschauung. Bielefeld, Leipzig : Velhagen & Klasing, 1938, s. 25.

1. Úvodem

Jak již výše uvedený citát napovídá, jednou ze stěžejních součástí ideologie národního socialismu, který byl uplatňován v Německu mezi léty 1933 – 1945, byla rasová hygiena a populační politika podporující reprodukci údajně „rasově hodnotnějších" a „dědičně zdravých" osob. Z tohoto důvodu národní socialisté usilovali o to, aby u lidí, kteří tuto vlastnost nesplňovali, byla jejich reprodukce omezena, zakázána či aby byli úplně fyzicky zlikvidováni. S touto nejhrůznější epochou německých dějin jsou spojeny pojmy: nucená sterilizace, nucená izolace a euthanasie. Tyto zločiny proti lidskosti nacisté prováděli s pověstnou „německou pečlivostí a důkladností" na základě právních předpisů, které tvořily právní základ těchto zločinů. Právě tímto tehdy platným pozitivním právem se snažili po skončení druhé světové války obhajovat ti, kteří byli zapojeni do sterilizačních programů či programů euthanasie. Cílem tohoto příspěvku je přiblížit právní úpravu, která upravovala jeden z nucených zásahů do fyzické integrity člověka a to je otázka nucených sterilizací. Tento článek rovněž přibližuje skutečnost, jaké místo zaujímaly nucené sterilizace v národně socialistické ideologii. V úvodu je nutné poukázat na fakt a snad i vyvrátit obecně rozšířenou skutečnost, že nucené sterilizace byly výsadou pouze národně socialistickou a německou. Myšlenka nucených sterilizací nevznikla dnem, ve kterém se národní socialisté chopili moc, nýbrž v teoretickém pojetí existovala již několik desetiletí před převzetím moci a to nejen v Německu a proto je nutné pro lepší pochopení nastínit v základních obrysech rovněž vývoj eugeniky - „rasové hygieny".

2. Pojem sterilizace a jeho historický vývoj

Sterilizací se rozumí umělé zbavení rozmnožovací schopnosti jedince, způsobené operativním přerušením vývodů pohlavních žláz a to protětím nebo podvázáním vejcovodů u žen či chámovodů u mužů.[2] Jiným způsobem, jakým bylo možné zbavit jedince plodnosti, byla kastrace, při níž byly operativně odstraněny zárodečné žlázy (varlata, vaječníky). Rozdíl mezi oběma způsoby spočíval v tom, že při sterilizaci nebyly odstraněny ani poškozeny samotné pohlavní žlázy, takže tvorba hormonů i chuť a schopnost pohlavního styku zůstaly zachovány.[3]

[2] Na základě Pátého prováděcího nařízení k zákonu o obraně proti dědičně zatíženému potomstvu z 25. února 1936 (RGBl. I. S.122) bylo možno u žen provést rovněž sterilizaci ozářením (rentgenem, radiem) v ústavech určených k tomuto účelu za splnění podmínek, že se jednalo o ženu starší 38 let nebo by jí hrozila při provedení chirurgického zákroku újma na zdraví a žena s tímto způsobem vlastní sterilizace vyjádřila souhlas. Jednalo-li se o ženu mladší 38 let, musel vydat souhlas rovněž vedoucí zdravotnického úřadu.

[3] Feldscher, W. Rassen- und Erbpflege im deutschen Recht. Berlin, Leipzig, Wien : Deutscher Rechtsverlag, 1943, S. 120.

Umělé zbavení plodnosti jedince je známo již z dávné historie. Z části sloužilo jako trest a z části bylo používáno jako akt odplaty na poraženém nepříteli. Kastraci znalo jak staroindické, tak staroegyptské trestní právo. Sterilizace byla používána jak v Řecku tak Římě a objevuje se rovněž jako druh trestu v právu germánském.[4] V období raného středověku bylo značně omezeno umělé zbavení rozmnožovací schopnosti jedince z důvodu stálého tlaku ze strany církve, až ke konci středověku nebylo již prakticky vykonáváno. Na konci 19. století se však o sterilizaci opět začalo uvažovat. Nejednalo se však již o trest, nýbrž nucená sterilizace měla sloužit k rasově – populačním účelům.

3. Eugenika a „rasová hygiena"

Pojmy eugenika a „rasová hygiena" nejsou od sebe jednoznačně vymezeny a byly používány jako synonyma, přičemž slovo „rasová hygiena" původně vzniklo jako německé označení pro eugeniku.[5] „Rasová hygiena" byla rovněž nazývána „učením o optimálním uchování lidské rasy", které bylo založeno na předpokladu, že tělo i charakter člověka jsou skutečně čisté pouze tehdy, když není „znečištěna" také jeho rasa.[6] Základ eugeniky tvoří tzv. sociální darwinismus prosazovaný od poloviny 19. století, tedy směr, který aplikuje Darwinovu evoluční teorii a přenáší teorii o „přežití schopnějšího" (*survival of the fittest, Kampf ums Dasein)* na lidskou společnost a na člověka. V období Třetí říše se stal sociální darwinismus společně s Mendelovou teorií dědičnosti základním pilířem, na kterém byla vystavěna národně socialistická rasová politika založená na podpoře rodin „zdravých a řádných lidí" a naopak na „vyhlazení lidí méněcenných".[7]

V Německu jako ostatně i v jiných zemích byla „rasová hygiena" pěstována již od počátku 20. století. „Živnou půdu" nalezlo eugenické hnutí především ve Spojených státech, kde se ukázalo jako úspěšné „polní tažení" za zavedení sterilizačních programů. První zákon o sterilizaci byl schválen v roce 1907 ve

[4] Wiesenberg, K. Die Rechtsprechung der Erbgesundheitsgerichte Hanau und Giessen zu dem „Gesetz zur Verhütung erbkranken Nachwuchses" vom 14. Juli 1933. Frankfurt am Main : J. W. Goethe Universität, 1986, s. 5.

[5] Pojem „rasová hygiena" byl poprvé použit pro eugeniku v roce 1895 v knize Alfreda Ploetze „Znamenitost naší rasy a ochrana slabých". Blíže: Schneider, Ch. Die Verstaatlichung des Leibes. Konstanz : Hartung-Gorre Verlag, 2000, s. 6.

[6] Bedürftig, F. Třetí říše a druhá světová válka. Přeložil Petr Dvořáček. Praha : Prostor, 2004, s. 403.

[7] Otázky dotýkající se rasy se prolínají celou knihu Mein Kampf Adolfa Hitlera. Otázce sterilizací a podpoře „dědičně zdravých" jedinců se věnuje na několika místech. Jako příklad, který dokumentuje postoj národních socialistů k duševně nemocným, poslouží následující úryvek: *„Stát se musí postarat o to, aby plodil děti pouze ten, kdo je zdravý; je pouze jedna hanba – přes vlastní nemoci a nedostatky přivádět děti na svět a nejvyšší čest, zřeknout se toho. Do služeb uvedených poznatků musí dát nejmodernější lékařské prostředky. Všechno, co je nějak viditelně nemocné a dědičně zatížené a tím dále zatěžující, musí stát prohlásit za neschopné plození a toto také prakticky prosadit. […] Kdo není tělesně a duševně zdráv a rodičovství hoden, nesmí své tělo zvěčnit v těle dítěte. […] Být nemocen a sláb není hanbou, nýbrž politováníhodným neštěstím. Je však zločinem a tedy současně i hanbou toto neštěstí vlastním egoismem zbavit cti tím, že je přenese na nevinnou bytost; že však naproti tomu svědčí o nejvyšší šlechetnosti a obdivuhodné lidskosti, když nevinný nemocný se zřekne nároku na vlastní dítě a svou lásku a něhu věnuje neznámé, chudé mladé ratolesti svého národa, která svým zdravím dává naději, že se stane silným článkem silného společenství."* Viz. Hitler, A. Mein Kampf. Přeložil Slavomír Michalčík. Pohořelice : Otakar II., 2000, s. 295 – 296.

státě Indiana[8] a v roce 1933 byly sterilizace upraveny zákonem celkem již v 28 amerických státech.[9] V evropských státech byly vydány sterilizační zákony nejdříve ve skandinávských zemích – v Dánsku (1929), Švédsku[10] a Norsku (1934), Finsku (1935), poté v Estonsku (1936), Lotyšsku (1937) a na Islandu (1938). Nucená sterilizace byla právně upravena dokonce i ve Švýcarském kantonu Waad, k její aplikaci v praxi však nikdy nedošlo.[11]

Co týče vzájemného vztahu eugeniků a národních socialistů, čtenáře asi nepřekvapí fakt, že „rasoví hygienici" sdružení v Německé společnosti pro rasovou hygienu založené v roce 1905,[12] uchopení moci národními socialisty 30. ledna 1933 uvítali. Adolf Ploetz jakožto jedna z klíčových postav eugenického hnutí v Německu v posledních 40 letech, vyslovil novému říšskému kancléři podporu osobním dopisem v dubnu 1933. Co se týče otázek rasové hygieny, nevytvořili národní socialisté nic nového, jen ochotně převzali již existující eugenická dogmata.

4. Zákon o obraně proti dědičně zatíženému potomstvu

Jako jedno z prvních „rasově hygienických" opatření umožňující nucené sterilizace bylo schválení zákona o obraně proti dědičně zatíženému potomstvu *(Gesetz zur Verhütung erbkranken Nachwuchses)* z 14. července 1933 (RGBl. I. S. 529). Vydáním tohoto zákonodárného aktu bylo tak učiněno za dost požadavkům „rasových hygieniků" jako byli Alfred Ploetz či Fritz Lenz, kteří především v období velké hospodářské krize vehementně volali po přijetí této právní úpravy. Zákon umožňují sterilizace, však požadovali již v roce 1932 i zástupci Německého spolku lékařů.[13]

V důvodové zprávě k zákonu o obraně proti dědičně zatíženému potomstvu uvádí říšský ministr vnitra Frick, „že jeho účelem je zastavit údajný propad porodnosti, přičemž podle jeho názoru by mohly německé ženy přivést na svět až o 30 % dětí více tak, aby německý národ zůstal zachován. Na druhou

[8] Gütt,A., Rüdin, E., Ruttke, F. Gesetz zur Verhütung erbkranken Nachwuchses vom 14. Juli 1933 nebst Ausführungsverordnungen. München : J. F. Lehmanns Verlag, 1936, s. 65.
[9] Ve Spojených státech bylo před rokem 1933 násilně sterilizováno kolem 15 tisíc lidí a do roku 1939 to byl dvojnásobek. Němečtí „rasoví hygienici" se ochotně odvolávali při ospravedlňování svého postupu na právní úpravu ve Spojených státech. Univerzita v Heidelbergu dokonce udělila čestný doktorský titul americkému eugenikovi Harrymu Laughlinovi za to, že navrhl v roce 1931 program na nucenou sterilizaci 15 milionů „méněcenných" Američanů. Blíže: Evans, R. Das Dritte Reich. Diktatur. Band 2/II. München : DVA, 2006, s. 623.
[10] Aby měl čtenář možnost srovnání mezi jednotlivými státy, uvádíme rovněž počty obětí nucené sterilizace ve skandinávských zemích. V první polovině 20. století bylo v Dánsku nuceně sterilizováno 5 tisíc, v Norsku 40 tisíc a ve Švédsku mezi léty 1935 – 1975 to bylo 63 tisíc lidí. Švédsko tvrdilo, že umělé zbavení rozmnožovací schopnosti jedince nebylo prováděno z důvodů rasových, nýbrž sociálních tak, aby se zabránilo dalšímu rozmnožování neproduktivních osob. Blíže: Evans, R. Das Dritte Reich. Diktatur. Band 2/II. München : DVA, 2006, s. 623.
[11] Schneider, Ch. Die Verstaatlichung des Leibes. Konstanz : Hartung-Gorre Verlag, 2000, s. 24.
[12] Benz, W. a kol. Enzyklopädie des Nationalsozialismus. München : dtv, 1997, s. 237.
[13] Evans, R. Das Dritte Reich. Diktatur. Band 2/II. München : DVA, 2006, s. 615.

stranu klasifikoval 20 % obyvatel Německa jako dědičně zatížené."[14] Ačkoliv byl tento zákon schválen říšskou vládou 14. července 1933 (5. prosince 1933 následovalo první prováděcí nařízení), tak účinnost byla stanovena až na 1. leden 1934. [15] Zveřejněn byl však v říšské sbírce zákonů až 25. července 1933 z důvodu, aby nenarušil uzavření konkordátu s Vatikánem. Až paradoxně může působit skutečnost, že jak zákon o obraně proti dědičně zatíženému potomstvu, tak konkordát s Vatikánem byly přijaty na stejném zasedání vlády.

Každá sterilizace vyžadovala vydání usnesení soudu. Justici tak byla přiznána rozhodující role při provádění zákona o obraně proti dědičně zatíženému potomstvu. Toto byla však velmi dobrá taktika národních socialistů, neboť lidé měli více důvěry k soudům, než ke stranickým či správním orgánům. Tím, že probíhalo řízení před soudem, bylo vyvoláno zdání o legitimnosti procesu a nehumánní zásahy byly považovány za spravedlivé a v souladu s právem.

4.1. Materiální předpoklady pro sterilizaci

Zákon o obraně proti dědičně zatíženému potomstvu rozlišoval mezi sterilizací provedenou na vlastní žádost (§ 2) a sterilizací nucenou (§ 12).

Sterilizace tedy byla uzákoněna a její provedení bylo umožněno pouze v případě, když se dalo podle zkušeností lékařské vědy s velkou pravděpodobností očekávat, že potomci dědičně zatížených osob budou trpět dědičným poškozením. Pokud byla tato podmínka splněna,[16] bylo možno provést sterilizaci ať již dobrovolně, či nuceně pouze u osob trpícími následujícími nemocemi: vrozenou slabomyslností, schizofrenií, manio-depresivní psychózou, dědičnou padoucnicí, dědičnou posunčinou, dědičnou slepotou a hluchotou či těžkými tělesnými deformacemi (lomivostí kostí, prvotním trpasličím růstem, vybočenou nohou či vrozeným vymknutím kyčlí). Sterilizován mohl být rovněž ten, kdo trpěl těžkým alkoholismem. Pokud by nedošlo ke splnění výše uvedených podmínek, jednalo by se o trestný čin a to těžké ublížení na zdraví.[17]

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[14] Schneider, Ch. Die Verstaatlichung des Leibes. Konstanz : Hartung-Gorre Verlag, 2000, s. 30.

[15] Tento zákon byl dvakrát novelizován, a to zákony o změně zákona obraně proti dědičně zatíženému potomstvu z 26. června 1935 (RGBl. I. S. 773) a z 4. února 1936 (RGBl. I. S. 119). Celkem bylo vydáno pět prováděcích nařízení, která stanovovala konkrétní podmínky pro soudní řízení a provedení lékařského zákroku. Jednalo se o: první prováděcí nařízení z 5. prosince 1933 (RGBl. I. S. 1021), druhé prováděcí nařízení z 29. května 1934 (RGBl. I. S. 476), třetí prováděcí nařízení z 25. února 1935 (RGBl. I. S. 289), čtvrté prováděcí zařízení z 18. července 1935 (RGBl. I. S. 1035) a páté prováděcí nařízení z 25. února 1936 (RGBl. I. S. 122).

[16] Ganssmüller, Ch. Die Erbgesundheitspolitik des Dritten Reiches. Planung, Durchführung und Durchsetzung. Köln, Wien : Böhlau Verlag, 1987, s. 43.

[17] Uhlich, G. Verfahrensgrundsätze des Gesetzes zur Verhütung erbkranken Nachwuchses. Dresden : Verlag M. Dittert & Co., 1939, s. 13.

4.2. Procesní podmínky pro sterilizaci

Sterilizace mohla být provedena pouze za předpokladu, že s ní soud pro ochranu dědičného zdraví *(Erbgesundheitsgericht)* vyslovil souhlas a to i v případě, že o ní požádala sama dědičně zatížená osoba. Pokud byla tato osoba zbavena svéprávnosti a nezpůsobilá k právním úkonům či jednalo-li se o osobu mladší 18 let, byl oprávněn podat návrh na zahájení řízení o sterilizaci její zákonný zástupce, který k tomuto návrhu potřeboval souhlas poručnického soudu. Byl-li plnoleté osobě ustanoven opatrovník, tak se vyžadoval i jeho souhlas s návrhem. Návrh na zahájení řízení bylo možno vzít zpět a bylo k němu nutno připojit osvědčení lékaře, ve kterém poučil pacienta o podstatě a následcích umělého přerušení jeho rozmnožovací schopnosti.

Vnitřní rozpornost, která je typická pro národně socialistické právní předpisy, se projevila rovněž v případě dalších osob, které byly oprávněny podat návrh na zahájení „sterilizačního" řízení. § 3 zákona o obraně proti dědičně zatíženému potomstvu uvádí, že úřední lékaři a přednostové ústavů jsou oprávněni (mohou) podat návrh u soudu na zahájení řízení. Tuto možnost však mění v povinnost První prováděcí nařízení k tomuto zákonu z 5. prosince 1933 (RGBl. I. S.1021). Každý aprobovaný lékař, který se při výkonu své činnosti dozví o osobě trpící dědičnou nemocí či těžkým alkoholismem, je povinen o tom informovat úředního lékaře. Stejná informační povinnost náležela každému, kdo se zabýval léčením, vyšetřováním či poradenstvím nemocných. Pokud úřední lékař uznal nutnost sterilizace jako oprávněnou, byl povinen působit na dědičně nemocnou osobu, aby podala sama nebo prostřednictvím svého zákonného zástupce návrh na zahájení soudního řízení. Pokud tuto osobu nepřesvědčil, byl povinen podat návrh sám. Nebyla-li splněna oznamovací povinnost vůči úřednímu lékaři, hrozilo uložení peněžitého trestu až do výše 150 říšských marek.[18] Zde tedy vidíme, že často v národně socialistických odborných pracích a komentářích[19] proklamovaná „dobrovolnost" sterilizací byla jen prázdným pojmem, neboť ve většině případů se jednalo o sterilizaci nucenou či vynucenou, což bude ještě dále demonstrováno na příkladě statistik soudního rozhodování.

4.3. Soudní řízení o sterilizaci

Jak již bylo uvedeno výše, soudní řízení, ve kterém se rozhodovalo o sterilizaci osob postižených dědičnou chorobou, bylo zahájeno na základě návrhu doplněným zdravotním posudkem před soudem pro ochranu dědičného zdraví, který byl organizačně přičleněn k obvodnímu soudu *(Amtsgericht)*. Jako

[18] § 11 prvního prováděcího nařízení k zákonu o obraně proti dědičně zatíženému potomstvu z 5. prosince 1933 (RGBl. I. S.1021).

[19] Např. Feldscher, W. Rassen- und Erbpflege im deutschen Recht. Berlin, Leipzig, Wien : Deutscher Rechtsverlag, 1943; Staemmler, M. Rassenpflege im völkischen Staat. München : J. F. Lehmanns Verlag, 1933.

druhoinstanční orgány byly zřízeny u vrchních zemských soudů *(Oberlandesgericht)* vrchní soudy pro ochranu dědičného zdraví.[20] Soudní senát se skládal z předsedajícího soudce, úředního lékaře a lékaře aprobovaného v Německé říši, který byl obzvláště dobře obeznámen s eugenickou teorií. Způsob a forma účasti dědičně nemocných osob na řízení se lišila podle jednotlivých soudů. Podle § 7 „sterilizačního" zákona mohl soud nařídit osobní účast těchto osob na soudním jednání. Ve většině případů tomu však tak nebylo a soudce rozhodoval pouze na základě lékařského posudku či provedeného testu inteligence.[21]

Mezi základní procesní zásady, které byly v tomto řízení uplatňovány, náležely: zásada neveřejnosti řízení, zásada vyšetřovací (inkviziční), zásada bezprostřednosti a zásada volného hodnocení důkazů. Soudní řízení nebylo veřejné, což odpovídalo charakteru řízení, neboť bylo nutno chránit osobní zájmy dotčených osob. Soud mohl provést potřebná vyšetřování, vyslechnout svědky a znalce, tak jako předvolat dědičně nemocnou osobu a nechat jí před soudem lékařsky vyšetřit. Lékaři byly povinni před soudem vypovídat, přičemž se na lékařské tajemství nebral ohled. Osoby, které se zúčastnili soudního řízení, či provedení chirurgického zákroku byly povinny dodržovat mlčenlivost. V případě jejího porušení jim hrozilo uložení peněžité pokuty či trest odnětí svobody až na jeden rok.[22]
Řízení bylo ukončeno vydáním usnesení, které buď návrh zamítlo, nebo nařídilo sterilizaci. O podobě tohoto rozhodnutí bylo rozhodováno hlasováním na základě principu většiny. Usnesení obsahovalo odůvodnění[23] a bylo podepsáno všemi členy soudního senátu.

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[20] Podle statistik existovalo v Německu v roce 1935 okolo 200 soudů pro ochranu dědičného zdraví a 30 vrchních soudů pro ochranu dědičného zdraví. Blíže viz. Ganssmüller, Ch. Die Erbgesundheitspolitik des Dritten Reiches. Planung, Durchführung und Durchsetzung. Köln, Wien : Böhlau Verlag, 1987, s. 48.

[21] Lékařské fakulty vypracovávali pro soudy znalecké posudky a testy inteligence. Jako příklady otázek lze uvést: „Jakou státní formu máme dnes?; Kdo to byli Bismarck a Luther?; Proč jsou domy ve městech vyšší než na vesnici?" Přitom se ale autoři těchto testů sami přivedli do potíží, neboť výsledky testů provedené na venkově ukázaly, že „údajně" normální školáci jsou na tom stejně, jako „údajné" slabomyslné" děti. Blíže viz. Evans, R. Das Dritte Reich. Diktatur. Band 2/II. München : DVA, 2006, s. 617.

[22] § 15 zákona o obraně proti dědičně zatíženému potomstvu ze dne 17. července 1933 (RGBl. I. S. 529).

[23] Literatura zabývající se problematikou nucených sterilizací ve Třetí říši často uvádí příklady odůvodnění usnesení o nařízení nucené sterilizace či návrhu na zahájení řízení, které se v praxi velmi často opakovali. Pro ilustraci uvádíme dva:
1. usnesení o sterilizaci z 2. 6. 1938, které vydal soud pro ochranu dědického zdraví Freiburg in Breisgau a ve kterém odůvodnil vrozenou slabomyslnost následujícím způsobem: *„Tato osoba zklamala již ve škole. Dvakrát propadla a musela proto vyjít ze šesté třídy. Je dědičně zatížená. V testech inteligence neprokázala samostatné myšlení při zodpovězení jednotlivých otázek. To samé se prokázalo rovněž při jejím výslechu před soudem. Dojem, který získal soud, jen potvrdil přesvědčení navrhovatele. Podle všeho nebude s největší pravděpodobností nikdy ve stavu, vykonávat jiné než podřadné práce a selže i v praktickém životě v případě, když po ní budou požadovány jiné nové činnosti, než ty, které obvykle vykonává. Na základě pravidel lékařské vědy lze s největší pravděpodobností očekávat, že její potomci budou dědičně zatíženi a proto je třeba vyhovět návrhu".* Toto rozhodnutí bylo otištěno v: Ganssmüller, Ch. Die Erbgesundheitspolitik des Dritten Reiches. Planung, Durchführung und Durchsetzung. Köln, Wien : Böhlau Verlag, 1987, s. 49.
2. Návrh na zahájení řízení o sterilizaci z důvodu „morální slabomyslnosti" ukazuje, že sterilizace byly navrhovány i ze sociálně a zdravotně politických důvodů: *„Jak ze zdravotní dokumentace vyplývá, jedná se o zchátralého žebráka a tuláka. Pobírá padesátiprocentní důchod určený pro osoby postižené válkou. Se svými penězi ale nedokáže hospodařit. Mnoho kouří a příležitostně se opíjí. Byl trestán za kladení odporu, rušení klidu, veřejné urážky a ublížení na zdraví. Často znemožňoval svým nepřístojným chováním činnost úřadu sociální péče a napadal jeho úředníky. Podle znaleckého posudku se jedná o duševně*

O volném hodnocení důkazů či soudcovské nezávislosti při rozhodování však nemůže být vůbec řeč. Soud sice nebyl povinen ve svém usnesení nařídit nucenou sterilizaci, nýbrž na soudce byl vyvíjen ze všech stran velký nátlak, což se také projevilo na jejich rozhodování. Ovlivnění soudců bylo dosaženo za pomoci následujících nástrojů: personální politiky, průběžného vzdělávání a školení soudců, řízení soudní moci výkonnou mocí prostřednictvím výnosů ministerstva spravedlnosti, vlivu komentáře k zákonu o obraně proti dědičně zatíženému potomstvu, zveřejňování soudních rozhodnutí v odborných časopisech a diskuze o volném prostoru pro uvážení soudce.

Současně s vytvářením soudů pro ochranu dědičného zdraví bylo započato s výběrem „vhodných" soudců pro výkon této funkce a s jejich školením. Nejen lékaři, ale i studenti právnických fakult, referendáři a soudci byli nuceni účastnit se kurzů „rasové nauky".[24] Pro soudce působících u soudů pro ochranu dědičného zdraví pořádalo ministerstvo spravedlnosti speciální vzdělávací kurzy, kterých se museli soudci minimálně jednou obligatorně zúčastnit. Soudcovská nezávislost byla ovlivňována zásahy moci výkonné, především prostřednictvím vydávání pokynů či výnosů říšského ministerstva spravedlnosti, jejichž účelem bylo přesvědčit soudce o nutnosti provedení sterilizace a zamezit tomu, aby soudci „sterilizační" návrhy zamítali. Rovněž jim bylo doporučeno, aby se při svém rozhodování řídili komentářem k zákonu o obraně proti dědičně zatíženému potomstvu.[25] Soudní rozhodování ovlivnila rovněž publikace vybraných zajímavých a sporných soudních usnesení v odborné literatuře.
V prvním roce účinnosti „sterilizačního" zákona (1934) bylo podáno 84 500 návrhů na zahájení soudního řízení, přičemž polovina z nich se týkala žen. Ještě v tom samém roce bylo rozhodnuto o 64 500 návrzích, přičemž v 56 000 případů byla nařízena sterilizace. Z tohoto počtu bylo projednáno ještě v roce 1934 skoro 4000 případů před druhoinstančním soudem, ten jich ale 3559 zamítl. Z těchto čísel vyplývá, že sterilizace byla nařizována v 90 % případů a opravný prostředek proti rozhodnutí prvoinstančního soudu byl zamítnut v 90 % . V prvních čtyřech letech účinnosti „sterilizačního" zákona bylo ročně uměle zbaveno rozmnožovací schopnosti kolem 50 tisíc osob, přičemž celkové číslo sterilizovaných osob za celou dobu vlády národních socialistů v Německu dosáhlo 360 tisíc.[26]

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méněcenné individuum, které je pro lidské společenství úplně bezcenné." Tento návrh je otištěn v: Evans, R. Das Dritte Reich. Diktatur. Band 2/II. München : DVA, 2006, s. 618.

[24] Staff, I. Justiz im Dritten Reich. Frankfurt am Main : Fischer Bücherei KG, 1964, s. 140 a následující.

[25] Gütt,A., Rüdin, E., Ruttke, F. Gesetz zur Verhütung erbkranken Nachwuchses vom 14. Juli 1933 nebst Ausführungsverordnungen. München : J. F. Lehmanns Verlag, 1936.

[26] Tyto statistické údaje byly převzaty z nejaktuálnější publikace zabývající se tímto tématem: Evans, R. Das Dritte Reich. Diktatur. Band 2/II. München : DVA, 2006, s. 616.
Přesné věrohodné statistické údaje o počtu sterilizací nebyly v období Třetí říše nikdy vypracovány, údaje publikované v literatuře se tedy zakládají pouze na výsledcích vlastního výzkumu jednotlivých autorů. Největší rozdíly existují v odhadech celkového počtu sterilizovaných osob, které se pohybují od 200 tisíc až do 2 milionů. Blíže k této otázce: Wiesenberg, K. Die Rechtsprechung der Erbgesundheitsgerichte Hanau und Giessen zu dem „Gesetz zur Verhütung erbkranken Nachwuchses" vom 14. Juli 1933. Frankfurt am Main : J. W. Goethe Universität, 1986, s. 66.

Proti usnesení o sterilizaci mohl být podán opravný prostředek k vrchnímu soudu pro ochranu dědičného zdraví ve lhůtě 14 dnů od doručení. K jeho podání byli oprávněni: ten, kdo podal návrh na zahájení řízení, úřední lékař či osoba trpící dědičnou chorobou. Opravný prostředek měl devolutivní účinek a soud druhé instance rozhodl o věci s konečnou platností. Proti jeho rozhodnutí nebyl žádný jiný řádný ani mimořádný opravný prostředek přípustný. Náklady soudního řízení byly hrazeny ze státního rozpočtu a náklady lékařského zákroku nesla zdravotní pojišťovna, ke které dotčená osoba náležela. Výkon rozhodnutí musel být proveden do 14 dnů po nastoupení právní moci usnesení. Pokud dotčená osoba neuposlechla výzvy, aby se dostavila k provedení chirurgického zákroku, mohla být předvedena policií do ústavu, který určil úřední lékař.[27] Zákrok však nemusel být proveden v případě, pokud osoba trpící dědičnou nemocí svolila se svou dobrovolnou internací v uzavřeném ústavu a zároveň sama nesla léčebné náklady. Usnesení o nucené sterilizaci však nebylo zrušeno, byla pouze odsunuta jeho vykonatelnost po dobu, kdy postižený pobýval v tomto léčebném zařízení.

5. Dobrovolná a nucená kastrace

Od nucené sterilizace je nutno striktně oddělovat kastraci *(Entmannung)*, která sloužila jinému účelu, což byla ochrana společnosti před hrozícími mravnostními delikty spojené s těžkou kriminalitou. Byla tedy prováděna ze sociálních důvodů, zatímco u sterilizace se jednalo o důvody „vyšlechťovací". Jak již bylo uvedeno výše, kastrace představovala mnohem závažnější zásah do lidského organismu, protože úplně zamezila možnosti pohlavního styku, a tím odstranila příčinu pro páchání kriminality.

Rozlišovalo se mezi dobrovolnou a nedobrovolnou kastrací. Právní základ pro nucenou kastraci tvořil zákon proti nebezpečným recidivistům z 24. listopadu 1933 (RGBl. I. S. 995) a prováděcí zákon ze stejného dne (RGBl. I. S. 1000), který novelizoval německý trestní zákoník. Kastrace nebyla trestem, nýbrž opatřením, které nařídil soud vedle trestu za následujících podmínek stanovených v § 42k trestního zákona: v době rozhodnutí musel obžalovaný muž dovršit 21. rok a muselo se jednat o těžké mravnostní delikty *(§ 176 odst. 1 č.1 - donucení ke smilstvu, § 176 odst. 1 č.2 - zločin zprznění, § 176 odst. 1 č.3 - smilstvo s dětmi, § 177 - znásilnění, § 183 - veřejné provádění nemravných činů, §§ 223 - 226 - úmyslné ublížení na zdraví, §§ 211 - 215 - vražda a zabití)*, za něž byl v minulosti již jednou pravomocně

[27] Čl. 6 odst. 5 Prvního prováděcího nařízení k zákonu o obraně proti dědičně zatíženému potomstvu z 5. prosince 1933 (RGBl. I. S.1021).

odsouzen. Za mravnostní delikt se nepovažovala homosexualita nebo soulož mezi příbuznými.[28] Kastraci nařizoval soud v trestním řízení.

Právním základem pro dobrovolnou kastraci tvořil § 14 odst. 2 zákona o obraně proti dědičně zatíženému potomstvu.[29] Jeho účelem bylo ochránit muže před možností, že spáchá v budoucnu mnohem závažnější trestný čin. Podmínkou byl souhlas muže, existence mravnostního trestného činu a znalecký posudek soudního lékaře, který potvrdil nebezpečí pachatelovu nebezpečnost.[30]

6. Závěrem

Již několik měsíců po 30. lednu 1933, kdy národní socialisté uchopili moc, začali prosazovat opatření své populační politiky projevující se zejména „vyšlechťováním" a produkcí údajně „rasově hodnotnějších" a „dědičně zdravých" osob.[31] Za pomoci přijatých právních předpisů a výrazného přispění německých lékařů a soudců, zasahovali národní socialisté do tělesné integrity lidí tak, aby je zbavili jejich rozmnožovací schopnosti. Nucená sterilace osob trpících dědičnou chorobou neprobíhala však jen v Německu, nýbrž i v několika dalších evropských zemích s části demokratickým i s části autoritářským režimem a ve Spojených státech. Důvody proč byly dotčené osoby nuceně sterilizovány, byly ve všech zemích stejné nebo obdobné. Vlastní rozdíl se ukázal až později po začátku druhé světové války, kdy národní socialisté nežádoucí osoby v Německu již nezbavovali jen jejich rozmnožovací schopnosti, nýbrž je začali vraždit. Není pochyb o tom, že k tomuto rovněž napomohli právníci, kteří pomáhali s přípravou zákonů a prováděcích nařízení a soudci, kteří ochotně umožňovali svými rozhodnutími realizovat národně socialistickou rasovou politiku.

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[28] Feldscher, W. Rassen- und Erbpflege im deutschen Recht. Berlin, Leipzig, Wien : Deutscher Rechtsverlag, 1943, s. 131.
[29] Tento paragraf byl do zákona o obraně proti dědičně zatíženému potomstvu zařazen však až jeho první novelou z 26. června 1935 (RGBl. I. S. 773).
[30] Blíže viz. Stumpf, G. § 42k RStGB. Die Entmannung nach ihren materiellen Voraussetzungen unter Beachtung älterer und fremder Rechte. Heidelberg : Universität Heildeberg, 1937; Vogel, K. Freiwillige Entmannung. Berlin : Universität Berlin, 1939.
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DNY PRACOVNÍHO KLIDU V ČESKOSLOVENSKÉM PRÁVNÍM ŘÁDU (1918-1938)

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Abstrakt

Příspěvek obsahuje přehled právních předpisů, upravujících počet a režim dní pracovního klidu (neděle, svátky) v dobách existence Československé republiky v letech 1918-1938. Pozornost je věnována jednak recipovaným právním předpisům, které ČSR zdědila na základě recepční normy (zákon č. 11/1918 Sb. z. a n.) po zaniklé habsburské monarchii, jednak nové československé úpravě této oblasti, přijaté po roce 1918 (československý zákon o svátcích z roku 1925).

Klíčová slova

právní režim dní pracovního klidu (neděle, svátky), Československá republika (1918-1938)

Abstract

This article contains the syllabus of the legal regulations addressed to the question of public holydays (Sundays, holidays) in the first Czechoslovak Republik (1918-1938). It turned to partly assumed legal regulations which the Czechoslovakia inherited along broken Habsburg Monarchy on the basis of the law Nr. 11/1918 of the Collection of Laws and Regulations, partly to the new Czechoslovak reglation of this sphere accepted after 1918 (The Czechoslovak Public Holiday Act 1925).

Key words

legal order of public holidays (Sundays, holidays), the Czechoslovak Republic (1918-1938)

1. Recipovaná právní úprava

Zhroucení habsburské monarchie v závěru roku 1918 mělo pro obyvatele českých zemí dalekosáhlé, především politické důsledky. Ty se pak odrazily také v celé řadě dalších oblastí – sociální, ekonomické, právní i náboženské. Na základě recepční normy (zákon č. 11/1918 Sb. z. a n. ze dne 28. října 1918) zůstal pro novou Československou republiku až na výjimky závazný rakousko-uherský právní systém, přičemž v historických zemích Koruny české platil právní řád předlitavský, na Slovensku a Podkarpatské Rusi zalitavský.

Recepční norma znamenala pro české země mj. také minimálně dočasné převzetí poměrně zdařilého a propracovaného kalendáře dní pracovního klidu, včetně režimu jejich ochrany. Vzhledem k tomu, že před rokem 1918 se asi 95 % obyvatelstva Čech, Moravy a Slezska hlásilo ke katolické víře, je pochopitelné, že rozložení dnů pracovního klidu bylo ovlivněno liturgickým kalendářem církve. Počet závazných církevních svátků byl před rokem 1918 naposledy výrazným způsobem upraven v dobách osvícenského absolutizmu. Na základě předběžné dohody s Vídní papež Klement XIV. dne 22. června 1771 zvláštním brevem stanovil pro podunajskou monarchii 17 církevních slavností, které se dělily do dvou základních kategorií:

a) pohyblivé – velikonoční neděle a pondělí, svatodušní neděle a pondělí, Nanebevstoupení Páně a Božího těla;

b) stabilní – Obřezání Páně (1. leden), Zjevení Páně (6. leden), Očišťování Panny Marie (2. únor), Zvěstování Páně (25. březen), sv. Petra a Pavla (29. červen), Nanebevzetí Panny Marie (15. srpen), Narození Panny Marie (8. září), Všech svatých (1. listopad), Neposkvrněné početí Panny Marie (8. prosinec), Narození Páně (25. prosinec) a sv. Štěpána (26. prosince).

Kromě těchto 17 slavností společných pro celou katolickou církev umožňovalo papežské breve z roku 1771, aby jednotlivé země mocnářství slavily též svátky svých nebeských patronů. Dvorním dekretem císařovny Marie Terezie ze dne 21. listopadu 1771 bylo určeno, že v Čechách jimi budou dny 16. května (sv. Jana Nepomuckého) a 28. září (sv. Václava). Morava zůstala poněkud ošizena – narozdíl od Čech jí byla povolena pouze jediná slavnost, a to 5. červenec (sv. Cyrila a Metoděje). V souladu s tisíciletou křesťanskou tradicí byly od dob prvních Přemyslovců dny pracovního klidu pochopitelně také všechny ostatní neděle v roce. Ve všech těchto dnech byly zakázány veškeré těžké polní a řemeslnické práce,

obchodníci měli povinnost neprovozovat během nich živnost, hostinští nesměli před polednem podávat lihové nápoje (pivo ovšem ano) a až do 16:00 nebylo dovoleno ani provozování hudebních produkcí nebo hry kulečníku, aby nic nebránilo věřícím účastnit se svátečních bohoslužeb.

Stěžejním právním předpisem, který na území předlitavské části Rakouska-Uherska upravoval režim dní pracovního klidu, byl zákon č. 21/1895 ř. z. ze dne 16. ledna 1895, o nedělním a svátečním klidu v živnostech (částečně novelizovaný zákonem č. 125/1905 ř. z.). Ten zaručil všem pracujícím právo účastnit se nedělních a svátečních dopoledních bohoslužeb (srov. čl. IX. a XIV. zákona č. 21/1895 ř. z.). Bylo pochopitelně na každém jednotlivci, jakým způsobem tohoto svého oprávnění využije. Nedělní klid měl „započít nejpozději o 6. hodině ranní každé neděle, a to současně pro celé dělnictvo každého závodu, a trvat alespoň 24 hodin."[1] Totéž pravidlo platilo i v případě zasvěcených svátků. Výjimky v některých provozech byly možné, nesměly se však stát pravidlem. Ochranná ustanovení o nedělním a svátečním klidu sice byla suspendována ministerským nařízením č. 184/1914 ř. z. ze dne 31. července 1914, a to v souvislosti s vypuknutím první světové války, k restituci stavu před rokem 1914 došlo částečně již v letech 1915-1918[2], úplně pak na jaře roku 1919, tj. krátce po vzniku samostatného československého státu.[3] Na přelomu 19. a 20. století, tedy v dobách raného kapitalizmu, šlo o důležité ochranné opatření ve prospěch zaměstnanců.

Kromě zákona o nedělním a svátečním klidu v živnostech z roku 1895 upravovalo právní režim dní pracovního klidu několik ustanovení dalších právních předpisů. Na základě interkonfesijního zákona z roku 1868 (č. 49/1868 ř. z.) se po dobu bohoslužeb v tyto dny nepovolovalo jednak jakékoli narušování jejich průběhu, jednak konání všech veřejných prací, pokud ovšem nebyly bezpodmínečně nutné (čl. 13 odst. 2 a 3 zákona č. 49/1868 ř. z.). Jinak ovšem nikomu nebylo bráněno, „aby v dny sváteční a slavné některé jiné církve nebo náboženské společnosti práce se zdržel."[4] Ministerská nařízení o noremních dnech č. 81/1868 ř. z. a č. 98/1868 ř. z. zakazovala v posledních třech dnech pašijového týdne (Zelený čtvrtek, Velký pátek, Bílá sobota) konání veřejných zábav, divadel a koncertů. Vedle toho nesměla být divadelní představení provozována o slavnosti Božího těla; o Božím hodu vánočním, velikonočním a svatodušním pak jen k charitativním účelům a na základě individuálního úředního povolení. V tyto dny se nesměly pořádat ani veřejné plesy. Podle občanského soudního řádu (zákon č. 113/1895 ř. z.) v neděli a ve svátek bylo možné doručovat písemnosti jen se souhlasem

[1] čl. II. zákona č. 21/1895 ř. z.
[2] nařízení č. 403/1915 ř. z. ze dne 28. prosince 1915, nařízení č. 376/1918 ř. z. a č. 377/1918 ř. z. ze dne 22. října 1918
[3] nařízení č. 150/1919 Sb. z. a n. ze dne 21. března 1919
[4] čl. 13 odst. 1 zákona č. 49/1868 ř. z.

soudu[5] a nesměly být konány soudní roky.[6] Připadl-li konec zákonné nebo soudní lhůty na nedělní nebo sváteční den, posouval se na nejbližší všední den; jinak na jejich začátek a běh neměly neděle a svátky vliv.[7] Předlitavská právní úprava nedělního a svátečního klidu byla tak precizní, že neopomíjela jeho význam ani v trestním právu, speciálně v případě výkonu trestu smrti. Podle předlitavského trestního řádu (zákon č. 119/1873 ř. z.) den popravy nesměl v žádném případě připadnout „na neděli či svátek, ani na takový den, který podle náboženského vyznání odsouzeného jest dnem svátečním, aby výkonu v určený den vůbec nic nepřekáželo."[8]

2. Útok na církevní svátky

Krátce po pádu Rakouska-Uherska v české společnosti propukly silné protikatolické nálady (byť se přes 80 % populace nadále hlásilo ke katolické víře!), přičemž jejich zdůvodněním bylo především spojení špiček katolické církve se svrženým císařstvím (austrokatolicizmus). Ve vypjaté atmosféře roku 1919 bylo přijato několik právních předpisů, otevřeně nebo skrytě mířících proti katolické církvi nebo její nauce (např. „kazatelnicový paragraf", zákon o fakultativním pohřbu žehem, novela obecného občanského zákoníku umožňující do té doby zakázanou rozluku katolických manželů apod.). Zdálo se, že zásadní změny nastanou i u dní pracovního klidu, jejichž církevní původ byl trnem v oku českých nacionalistů, socialistů a liberálů, které 28. říjen 1918 vynesl k moci.

Na konci března roku 1919, tedy necelého půl roku po zhroucení monarchie, byl Národnímu shromáždění ČSR předložen skupinou levicových poslanců (mj. též Aloisem Jiráskem) návrh zákona, kterým se měly rušit svátky církevní a zavádět svátky národní a občanské (tisk č. 705 ze dne 26. března 1919). Jeho navrhovatelé považovali za bezpodmínečně nutné, „aby veškeré veřejné zřízení bylo proniknuto duchem doby a zbavilo se přežilých pozůstatků dřívějších dob,"[9] mezi něž podle nich patřilo i svěcení církevních svátků. Podle jejich poznatků, shrnutých v důvodové zprávě k návrhu zákona, chyběl převážné většině národa vnitřní vztah k těmto významným dnům. Je otázka, zda k tomuto tvrzení nesbírali dotčení poslanci podklady pouze ve svých stranických sekretariátech nebo zda nevyužili fabulačního talentu spolupředkladatele Aloise Jiráska. Je zcela nesporné, že tehdy (a snad

[5] § 100 odst. 1 zákona č. 113/1895 ř. z.
[6] § 221 odst. 1 zákona č. 113/1895 ř. z.
[7] § 126 odst. 1 a 2 zákona č. 113/1895 ř. z.
[8] § 403 odst. zákona č. 119/1873 ř. z.
[9] Národní shromáždění ČSR, tisk č. 705 ze dne 26. března 1919

i dnes) až na výjimky všichni obyvatelé českých zemí, Slovenska a Podkarpatské Rusi slavili (a slaví) minimálně vánoční svátky, o jejichž křesťanských kořenech nemůže být sporu.

Uvedený poslanecký návrh měl následující dvě teze: Za prvé – všechny církevní svátky měly být bez výjimky zrušeny a přeměněny na klasické pracovní dny. Za druhé – jako náhrada za zrušené církevní slavnosti měly být nově zavedeny „tyto dny, které v dějinách českého lidu mají svůj velký význam: 1. květen, 6. červenec a 28. říjen,“[10] přičemž nepoměr mezi zrušenými a novými svátky měl být pracujícím kompenzován každoroční placenou dovolenou v délce 5-7 dní.

Navrhovatelé kromě averze k víře trpěli také syndromem centralizmu a bohemocentrizmu, neboť zcela opomenuli zařadit do kalendáře dny, které pokládal za významné slovenský národ. Tato reforma kalendáře, zcela ignorující historii, tradice a přesvědčení většiny obyvatelstva ČSR, nakonec legislativním procesem naštěstí neprošla. Poté na několik let přestala být tato otázka aktuální a znovu byla otevřena až téměř s šestiletým odstupem.

3. Československý zákon o svátcích z roku 1925

Na počátku roku 1925 byl vládou ČSR Poslanecké sněmovně Národního shromáždění předložen komplexní návrh zákona o nedělích, svátcích a památných dnech (NS ČSR, Poslanecká sněmovna, tisk č. 5061 ze dne 5. března 1925). S nepatrnou změnou názvu tato osnova úspěšně prošla oběma komorami československého zákonodárného sboru a byla pod č. 65/1925 publikována ve Sb. z. a n. Nedělí se nakonec netýkala, takže i nadále zůstal zachován jejich statusdnů pracovního klidu, nastavený již před rokem 1918.

Uvedený právní předpis prohlásil za svátky tyto dny (§ 1): 1. leden (Obřezání Páně); 6. leden (Tří králů); pohyblivé slavnosti Nanebevstoupení Páně a Božího Těla; 29. červen (sv. Petra a Pavla); 15. srpen (Nanebevzetí Panny Marie); 1. listopad (Všech svatých); 8. prosinec (Panny Marie počaté bez poskvrny dědičné viny) a 25. prosinec (Narození Páně). Je pozoruhodné, že ač se o nich zákon č. 65/1925 Sb. z. a n. vůbec nezmiňoval, zůstaly volnými dny také velikonoční a svatodušní pondělky, jakož i 26. prosinec (sv. Štěpán). Československá právní úprava svátkového práva byla až na drobné

[10] Národní shromáždění ČSR, tisk č. 705 ze dne 26. března 1919

výjimky převzata z Kodexu kanonického práva z roku 1917, předepisující povinnou účast katolických věřících mimo neděle také v nejdůležitější slavnosti církevního roku.[11]

Kromě svátků zaváděl československý zákon o svátcích z roku 1925 (§ 2) kategorii památných dní Československé republiky, a to: 5. červenec (sv. Cyril a Metoděj), 28. září (sv. Václav), 6. červenec (Mistr Jan Hus), jehož první oficiální oslava za aktivní účasti hlavy státu vedla k diplomatické roztržce mezi Prahou a Vatikánem, a 1. květen (Svátek práce). K nim byl přiřazen i 28. říjen, který získal tento statut již roku 1919 na základě zákona č. 555/1919 Sb. z. a n. ze dne 14. října 1919. Z těchto dní byl slaven 5. červenec dosud pouze na Moravě, 6. červenec naposledy v dobách před rokem 1620 a 1. máj až od devadesátých let 19. století.

Jak na svátky, tak s drobnými výjimkami na památné dny se vztahovala „ustanovení o klidu nedělním, pokud jde o veřejné úřady, ústavy, podniky a školy veřejné, jakož i školy s právem veřejnosti,“[12] především tedy zákona o nedělním a svátečním klidu z roku 1895. Československým zákonem o svátcích z roku 1925 (§ 5) došlo také ke zrušení tzv. noremních dnů, které s ohledem na liturgickou dobu zakazovaly pořádání zábav (srov. nařízení č. 81/1868 ř. z. a č. 98/1868 ř. z.), a několika svátků, aniž by byl uveden jejich výčet. Především šlo o christologické a mariánské svátky 2. únor (Uvedení Páně do chrámu, nazývaný též Očišťování Panny Marie nebo lidově Hromnice), 25. březen (Zvěstování Páně) a 8. září (Narození Panny Marie), významné především pro Slovensko, a také 16. květen, tj. český zemský svátek sv. Jana Nepomuckého, jehož kult se právě po roce 1918 stal terčem útoků agresivních nepřátel katolické víry (např. prezidentova blízkého spolupracovníka Jana Herbena), neustále demagogicky a neprávem stavějících tuto osobnost do protikladu s Janem Husem. Třebaže roku 1925 byl vydán nový interkonfesijní zákon (č. 96/1925 Sb. z. a n.), nepřinesl žádnou novinku, neboť byl jen opakováním zásad obsažených v poměrně kvalitním předlitavském interkonfesijním zákonu z roku 1868. Dalších recipovaných zákonů někdejšího Předlitavska (např. občanského soudního řádu z roku 1895 nebo trestního řádu z roku 1873) se nová československá právní úprava z roku 1925 nijak nedotkla.

4. Závěr

[11] srov. can. 306 CIC/1917
[12] § 4 zákona č. 65/1925 Sb. z. a n.

Výběr a forma slavení svátků spolehlivě ukazuje na to, jaké má společnost priority a na co klade důraz. O orientaci a duchovním stavu národů svědčí také způsob zachovávání ostatních dní pracovního klidu, v euroatlantickém kulturním okruhu především nedělí. Vedlejším produktem změn politických systémů zcela zákonitě bývají zásahy do kalendáře, obvykle velice rychlé a zcela nebo alespoň částečně negující předchozí vývoj.

Prvorepubliková právní úprava počtu a režimu dní pracovního klidu sice přinesla oproti dobám před rokem 1918 některé změny (zavedení svátků občanských a určitá redukce církevních), tyto změny však byly provedeny velice zdařile a citlivě. V českých dějinách 20. století však šlo spíše o výjimku. Díky poměrně častým změnám režimů po roce 1938 a jejich úsilí o maximální sebezviditelnění a sebeoslavování se tak většině obyvatelstva Čech, Moravy a Slezska spolehlivě podařilo zatemnit obsah a význam jakéhokoli svátku. Úspěšná sekularizace většiny české společnosti, na níž se podílelo více faktorů (především český nacionalizmus přelomu 19. a 20. století, důsledky 2. světové války, komunistický režim, „zcela volně řádící ruka trhu“ po roce 1989) pak znamenala podobné snížení významu nedělí.

Porovnáme-li prvorepublikový systém ochrany dní nedělního a svátečního klidu se současným, je nutno konstatovat, že došlo k výraznému posunu k horšímu. Dnešní poměrně běžná praxe, kdy některé obchodní společnosti (zejména nákupní řetězce a poskytovatelé služeb) s tichým souhlasem státu a odborářských předáků (nezřídka s neukojenými politickými ambicemi) prakticky zlikvidovaly neděle a svátky jako dny pracovního klidu, by v letech 1918-1938 nebyla možná. Je nepochybně pravda, že klima ve společnosti a poptávka tu také hraje nepřehlédnutelnou roli. V první polovině 20. století však ještě panovalo určité povědomí, a to i mezi zákonodárci, že neděle a svátky mají nejen náboženský, ale i sociální, kulturní, a společenský význam a že jejich zachování je nanejvýš účelné a vhodné, byť pochopitelně není možné ve všech provozech (doprava, zdravotnictví, sociální služby).

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VYBRANÉ ASPEKTY SOFTWAROVÉHO PIRÁTSTVA

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Abstrakt

Softwarové pirátstvo spôsobuje každoročne Softwarovým firmám miliardové straty. Na skúmanie skutočného a očakávaného správania jednotlivcov sa v súčasnosti stále viac používa teória hier. V tomto príspevku sa pokúsim použiť teóriu hier na skúmanie správania užívateľov a na nájdenie odpovede na otázku, prečo užívatelia používajú nelegálny software. Následne sa pokúsim definovať úlohu práva ako nástroja ochrany legálneho softwaru a navrhnúť niekoľko riešení.

Kľúčové slová

Softwarové pirátstvo, teória hier, väzňova dilema, spolupráca, zrada, nashove equilibrium

Abstract

The software piracy makes every year a billion dollars damages to the software business. In research of the true and expected behavior of the individuals there is at the present more utilized the game theory. In this contribution I will try to use a game theory to research the behavior of the users and to find an answer to question why the users utilize illegal software. Subsequently I will try to define a task of the law as an instrument of the protection of the legal software and to suggest some solutions.

Key words

The Software piracy, the Game theory, the Prisoner`s Dilemma, cooperate, defect, the Nash equilibrium

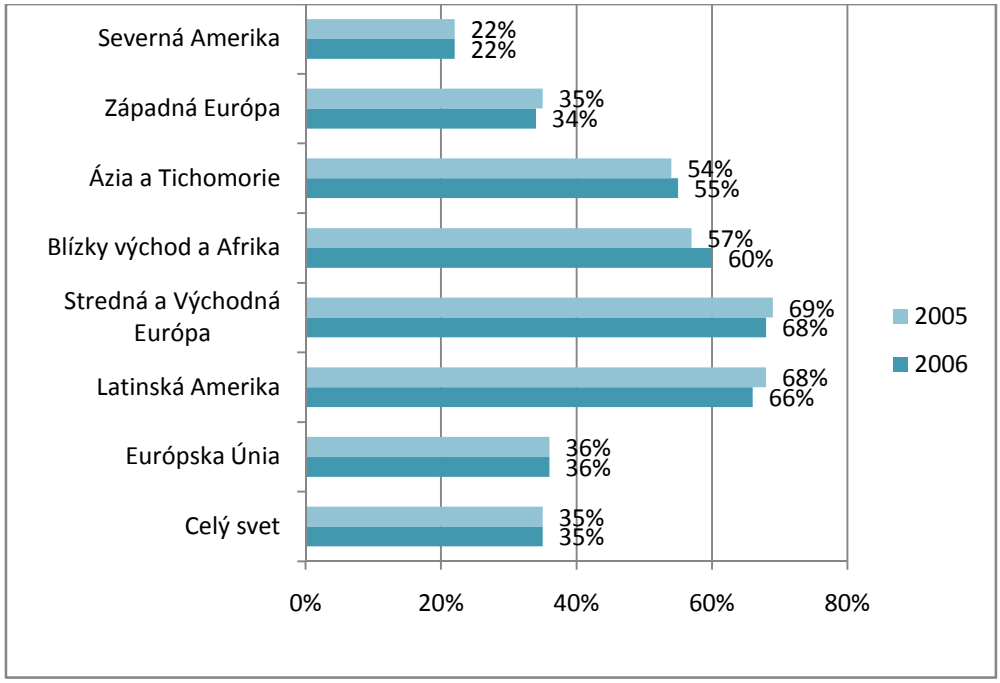
Softvérové kriminalita a zvlášť softvérové pirátstvo sú fenoménmi modernej spoločnosti. Ide o špecifický druh kriminality, líšiaci sa od iných druhov trestnej činnosti. Pri skúmaní a hľadaní riešenia na daného problému môžeme vychádzať z dvoch prístupov.

Prvý spočíva v hľadaní konkrétneho riešenia, ktoré je na daný problém najlepšie aplikovateľné. Tento prístup sa zameriava na nachádzanie najefektívnejších riešení podľa účinkov a špecifík jednotlivého

problému, ale nedáva odpoveď na otázky, prečo daný problém vzniká a ako sa vyvíja. Druhým prístupom je skúmanie samotného problému (javu), príčin jeho vzniku a jeho vývoja. I keď tento prístup primárne nesmeruje k nájdeniu riešenia na daný problém v mnohých prípadoch z tohto prístupu vzišlo riešenie.

Pri skúmaní softwarového pirátstva som vychádzal z druhého východiska, nakoľko sa domnievam, že nemôžeme dlhodobo znížiť mieru softwarového pirátstva bez toho, aby sme poznali odpovede na otázku prečo softvérové pirátstvo vzniká. V tomto kontexte musíme poznať jeho históriu a jeho smerovanie.

Podľa štatistík zverejnených Bussiness Software Alliance a International Data Corporation vo štvrtej výročnej globálnej štúdii o softwarovom pirátstve „celosvetová miera softwarového pirátstva v roku 2006 dosiahla 35%. Hodnota mediánu je 62%, čo znamená, že polovica krajín zapojených do štúdie má mieru pirátstva 62% alebo viac.“[1]. Na každé dva doláre zaplatené za legálny software teda pripadá jeden dolár straty, spôsobený nelegálnym softwarom. V roku 2006 počet počítačov, počítaných do globálnej štatistiky, prekonal jednu miliardu, čo pri súčasnej miere softwarového pirátstva má mimoriadny dosah.

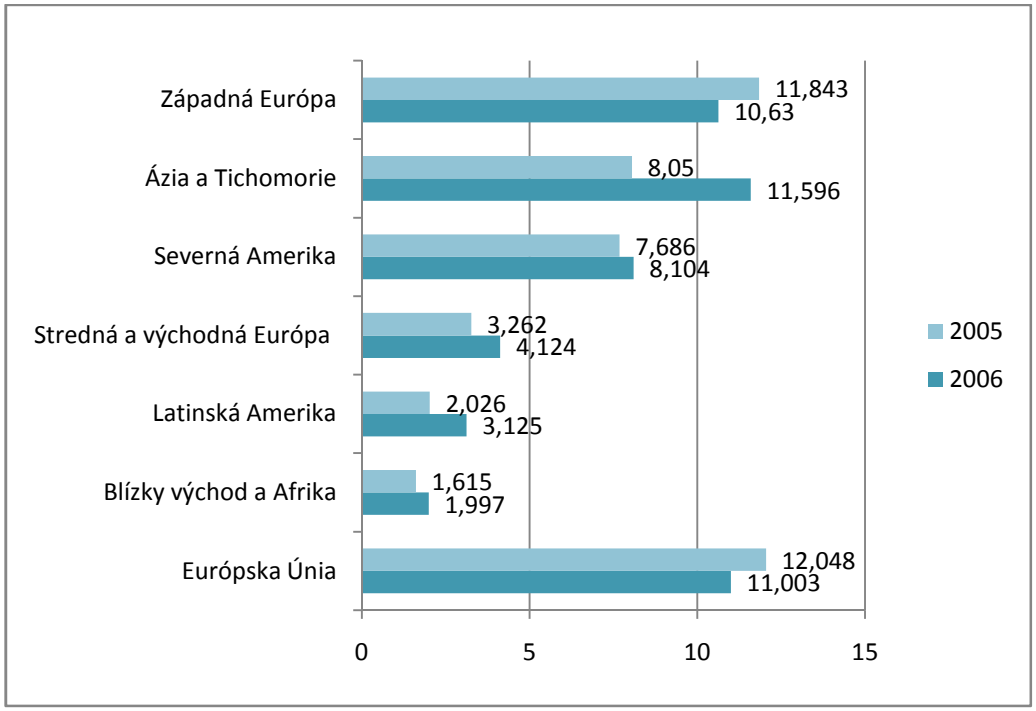


Graf č. 1: Miera softwarového pirátstva podľa regiónov

Straty spôsobené pirátstvom podľa výročnej globálnej štúdie dosiahli v roku 2006 39,576 miliónov USD. Uvedená suma predstavuje medziročný nárast o 5,104 miliónov USD oproti roku 2005. Z dôvodu medziročného nárastu objemu predaného softwaru ako aj z dôvodu nárastu počítačov na trhu narástli

[1]Štvrtá výročná globálna štúdia BSA a IDC o softvérovom pirátstve [http://w3.bsa.org/slovakia//upload/GlobalPiracyStudy2006SK.pdf]

straty spôsobné softwarovým pirátstvom o 15 %. Zaujímavým javom, ktorý si môžeme všimnúť z priložených grafov je, že straty spôsobené softwarovým pirátstvom sú najvyššie v regiónoch s pomerne nízkou mierou softwarového pirátstva (napríklad Severná Amerika alebo Európska Únia). Tento fakt vychádza zo skutočnosti, že tieto regióny predstavujú pomerne silný trh a aj nižšia miera pirátstva na týchto trhoch dokáže spôsobiť veľké straty v porovnaní z menšími trhmi.



Graf č. 2: porovnanie strát v rokoch 2005 a 2006 podľa regiónov (v mil. USD)

Ako bolo uvedené najvyššie straty spôsobilo softwarové pirátstvo v krajinách s relatívne nízkou mierou softwarového pirátstva. Tieto krajiny sa okrem iného vyznačujú aj pomerne dobrou a rozsiahlou právnou ochranou softwaru. Na ochranu softwaru boli vo svete prijaté mnohé medzinárodné zmluvy, napríklad zmluva TRIPS (trade-related aspects of intellectual property rights), WIPO Copyright Treaty a Bernský dohovor.

V rámci legislatívy Európskej Únie bola prijatá smernica Rady č. 91/250/EEC o právnej ochrane počítačových programov. Dokonca existoval návrh smernice, ktorá mala oficiálne umožniť patentovateľnosť počítačových programov, tento návrh však Európsky parlament neprijal. Na národnej úrovni bývajú počítačové programy chránené v rámci autorského práva a ochranu pred neoprávneným využívaním im poskytujú aj ustanovenia trestných kódexov. Napriek množstvu týchto právnych predpisov úroveň softwarového pirátstva je stále príliš vysoká a straty každoročne narastajú. Sú tieto právne predpisy neefektívne? Prečo užívatelia softwaru riskujú právne postihy a napriek hrozbe trestu naďalej využívajú nelegálny software? Ako sa dá znížiť miera softwarového pirátstva na prijateľnú úroveň a akú úlohu pri tom zohráva právo?

Softwarové pirátstvo je druh priamej počítačovej kriminality, ktorý spočíva v neoprávnenom protiprávnom používaní, kopírovaní, upravovaní, rozširovaní, alebo v inom protiprávnom nakladaní s počítačovými programami, resp. so softvérom, pričom nehrá úlohu či tento software, alebo počítačové programy boli získané legálnym, ale aj nelegálnym spôsobom. Za softwarového piráta môžeme považovať každého, kto protiprávne nakladá so softwarom, teda fyzické, ako aj právnické osoby. Voči právnickým osobám však nemožno uplatňovať za takéto protiprávne konanie trestnoprávne sankcie nakoľko tieto osoby nemajú v Slovenskom právnom poriadku trestnoprávnu subjektivitu. Business software alliance (ďalej len „BSA“) rozdeľuje softwarové pirátstvo aj podľa subjektov, ktoré sa ho dopúšťajú[2]. Softwarového pirátstva sa podľa čelenia uvedeného na stránkach BSA dopúšťajú napríklad koncoví užívatelia, predajcovia softwaru, ale napríklad aj výrobcovia softwaru. Najčastejšie sa však počítačového pirátstva dopúšťajú koncoví užívatelia softwaru.

Teraz by som sa rád pozastavil nad otázkou, prečo sa tieto subjekty dopúšťajú softwarového pirátstva. Pri softwarovom pirátstve, rovnako ako pri krádeži ide najmä o ekonomickú motiváciu. V tomto prípade najčastejším dôvodom softwarového pirátstva je práve bezplatné využívanie softwaru. Napomáha tomu aj povaha softwaru, ako nehmotného statku. Škodu, vznikajúcim neoprávneným využívaním softwaru nie je na rozdiel, napríklad od krádeže auta priamo vidieť. Keď susedovi ukradnete auto ten asi z toho nebude nadšený, nakoľko sa zmenší jeho majetok a nebude môcť svoje auto využívať. Avšak keď si od suseda odkopírujete počítačový program, ktorý si kúpil jeho majetok sa nezmenší, ani nestratí možnosť zakúpený software využívať. Priama škoda vzniká len výrobcovi softwaru tým, že predá menšie množstvo originálneho softwaru. Výrobcovi tak vzniká nebezpečenstvo, že peniaze vložené do vývoja softwaru sa nevrátia.

Softwarové pirátstvo podporuje aj skutočnosť, že kópiu softwaru je možné v dnešnej dobre vyhotoviť veľmi jednoducho s minimálnymi nákladmi. Ceny DVD/CD-RW mechaník sa dnes pohybujú pod úrovňou 1000,-Sk s DPH a média stoja menej ako 20,-Sk za kus. Na internete sa tiež dajú nájsť rôzne programy na napaľovanie a zálohovanie originálnych nosičov, dokonca aj takých, ktoré sú chránené proti kopírovaniu.

Na skúmanie skutočného a predpokladaného správania jednotlivcov sa v súčasnosti stále viac používa teória hier (Game Theory). Práve túto teóriu som sa rozhodol použiť pri skúmaní správania užívateľov a na hľadanie odpovede prečo užívatelia využívajú nelegálny software. Následne sa pokúsim definovať

[2]Druhy softwarovej kriminality [http://w3.bsa.org/slovakia//antipiracy/Types-of-Piracy.cfm]

úlohu práva, ako prostriedku ochrany legálneho softwaru.

Teória hier je odvetvím aplikovanej matematiky. Táto teória „Používa modely na skúmanie interakcií s formalizovanou štruktúrou pohnútok. Skúma predpokladané a skutočné správanie sa jednotlivcov v hrách, rovnako ako aj optimálne stratégie“.[3] Teóriu hier prvýkrát formulovali **John von Neumann** a **Oskar Morgenstern** v knihe *Teória hier a ekonomické správanie (Theory of Games and Economic Behavior, 1944)*. V teórii hier sa postupom času vytvorilo mnoho modelov hier a matematických rovníc, ktoré sa na tieto modely aplikovali. Pre svoju analýzu som sa rozhodol vybrať hru, nazvanú „väzňova dilema“. Túto hru spopularizoval matematik Albert W. Tucker a táto si našla uplatnenie v mnohých oblastiach vedy.

Pred aplikáciu väzňovej dilemy na konkrétne ľudské správanie, musíme sa ešte zastaviť pri teórii rozhodovania. Napred si však treba položiť si otázku či daný subjekt, ktorého rozhodovanie budeme skúmať sa dá považovať za racionálny, nakoľko väzňova dilema vychádza z toho, že subjekty hrajúce túto hru, sa budú chovať racionálne. Teória rozhodovania nám hovorí, že subjekt je racionálny vtedy, ak jeho rozhodovanie je uvedomelé, zamerané na dosiahnutie určitého cieľa („Goal“) a využíva všetky dostupné informácie a prostriedky na jeho dosiahnutie. Je teda správanie softwarových pirátov racionálne? Odpoveď je, že áno. Na dosiahnutie svojho cieľa, ktorým je bezplatné využívanie softwaru, využívajú všetky dostupné prostriedky, ako aj všetky svoje vedomosti a znalosti. To že cieľ je v rozpore s platnými právnymi predpismi, alebo morálkou nemá na racionalitu ich správania žiadny vplyv. Racionálne sa môžu chovať aj subjekty porušujúce právne, alebo morálne normy, ak tak konajú za účelom dosiahnutia svojho cieľa.

Klasická hra väzňovej dilemy má vždy dvoch hráčov. Hráči majú v tejto hre dve možné alternatívy správania a to: spolupracovať (cooperate) teda nasledovať rovnaký záujem, alebo zradu (defect), teda sledovať vlastné záujmy. Hra sa môže opakovať len raz, alebo môže mať viacero opakovaní. V prípade dvoch a viacerých hier hovoríme o opakovanej hre. Klasickou väzňovou dilemou sa dá nazvať situácia znázornená nasledujúca dvojmaticou:

	hráč 1	
	spolupráca	zrada

[3] Wikipédia – Teória hier [http://sk.wikipedia.org/wiki/Te%C3%B3ria_hier]

hráč 2	spolupráca	(výhra, výhra)	(veľká strata, veľká výhra)
	zrada	(veľká výhra, veľká strata)	(strata, strata)

Tabuľka č. 1: Dvojmatica väzňovej dilemy

pričom platí že:

veľká strata < strata < výhra < veľká výhra

Z uvedenej dvojmatice vyplýva, že sebeckým správaním t.j. zradou, môže niektorý z hráčov získať omnoho viac, než spoluprácou. V prípade, že súčasne s ním zradí aj druhý hráč, stratia obaja. Sebeckým správaním teda môže hráč veľa získať, alebo stratiť. Za takejto situácie je najvýhodnejším riešením pre hráčov spolupracovať. Spolupráca zaistí obom hráčom zisk. Tento síce nebude taký veľký, ako keby sa niektorý z nich zachoval sebecky ale je istý a nikto neprerobí. Spolupráca navyše motivuje hráčov opakovať tu istú a teda aj opakovanie získavať. Tento stav bude predstavovať tzv. rovnováhu (equilibrium).

V prípade, opakovaných hier, bude spolupráca vynútená samotným opakovaním hry, nakoľko účastník hry, ktorý v jednom kole prehral, nebude mať záujem hrať ďalšiu hru v prípade, že by mu nepriniesla výhru. Zradený hráč tiež môže mať snahu, oplatiť druhému účastníkovi jeho zradu v predchádzajúcej hre. Otázkou zostáva, či je možné považovať spoluprácu hráčov v tejto hre za tzv. Nashove equilibrium (rovnováhu). Nashova rovnováha predstavuje stav, keď každý hráč predpokladá, že pozná rovnovážnu stratégiu ostatných hráčov, a žiaden z hráčov nemôže získať viac zmenou svojej stratégie. Ak každý hráč má vybratú stratégiu a žiaden ďalší hráč nemôže profitovať zo zmeny svojej stratégie, zatiaľ čo iní hráči ponechajú ich stratégie nezmenené, potom súčasný súbor strategických volieb a príslušné odmeny (výhry) ustanovia Nashovu rovnováhu. Inými slovami povedané, pre to, aby sme mohli hovoriť o Nashovej rovnováhe, každý hráč musí odpovedať záporne na otázku: „Ak poznám stratégie iných hráčov a vykonanie týchto stratégii hráčmi je 100% iste, môžem profitovať zo zmeny mojej stratégie?"[4] Takto chápané Nashove equilibrium je možné považovať za stabilné, ak malá zmena v pravdepodobnostiach jedného hráča vedie k situácii, kde platia dve podmienky:

1. hráč ktorý neuskutočnil zmenu stratégie nemá lepšiu stratégiu s ohľadom na nové okolnosti

2. hráč ktorý uskutočnil zmenu, teraz hrá zo striktne horšou stratégiou

[4]Wikipedia – The Nash equilibrium [http://en.wikipedia.org/wiki/Nash_equilibrium]

Ak sú obe podmienky splnené, tak hráč, ktorý zmenil stratégiu, sa ihneď vráti k Nashovemu equilibriu. V našom prípade strach z trestu za zradu v predchádzajúcej hre, povedie účastníkov hry v ďalších kolách k spolupráci. Ak by sme takúto hru opakovali do nekonečna hráči budú mať tendenciu spolupracovať, a to aj napriek tomu že obaja hráči budú niekedy zrádzať. Strach z trestu za zradu ich však bude viesť k spolupráci. Tento stav potom vytvorí dokonalé Nashove equilibrium.

Ako však zabezpečiť spoluprácu hráčov a teda aj equlibrium v prípade, že nedôjde k opakovaniu hry. V tomto prípade teória hier predpokladá existenciu vynútiteľných pravidiel hry alebo aspoň existenciu dohôd, ktorých dodržiavanie sa dá vynútiť. Vynútiteľnosť pravidiel hry, alebo dohôd hráčov predpokladá existenciu určitej autority, ktorá ma právomoc potrestať hráčov v prípade ich porušenia. Tu existuje priestor práve pre právo ako nástroj vymáhania existujúcich práv a povinnosti vyplývajúcich subjektom právnych predpisov alebo zo zmlúv.

Ak aplikujeme teda väzňovu dilemu na prípad dvoch užívateľov softwaru, títo budú mať na výber medzi legálnym softwarom a pirátskou kópiou. Dvojmatica tejto aplikácie pri jednom opakovaní hry bude vyzerať nasledovne:

		užívateľ 1	
		legálny software	pirátska kópia
užívateľ 2	legálny software	(užívanie softwaru, užívanie softwaru)	(pocit krivdy, bezplatné užívanie softwaru)
	pirátska kópia	(bezplatné užívanie softwaru, pocit krivdy)	(bezplatné užívanie, bezplatné užívanie)

Tabuľka č. 2: Dvojmatica väzňovej dilemy aplikovaná na softwarové pirátstvo

Kde: pocit krivdy < užívanie softwaru < bezplatné užívanie softwaru

Z uvedenej dvojmatice sa javí, že používaním pirátskeho softwaru môžu užívatelia len získať. Treba si však uvedomiť, že bezplatné užívanie softwaru nesie v sebe riziko právneho postihu, vrátane trestného stíhania. Bezplatné užívanie softwaru však môže byť pre obidvoch užívateľov výhodné len pri jednom

opakovaní hry. Bezplatným užívaním softwaru síce samotným užívateľom škoda nevzniká, ale vzniká škoda výrobcom a distribútorom softwaru. Pri opakovaní hry treba brať do úvahy, že straty spôsobené softwarovým spoločnostiam nelegálnym užívaním softwaru kumulatívne každým opakovaním hry rastú a tieto finančné prostriedky im môžu chýbať pri vývoji a ďalšom zdokonaľovaní softwaru. V konečnom dôsledku budú tieto straty viesť k zdražovaniu softwaru a k znižovaniu jeho kvality, ako aj kvality služieb s ním poskytovaným. Nakoniec tieto straty môžu viesť až k zániku softwarových spoločností.

Softwarové pirátstvo teda netreba chápať izolovane, ale treba si uvedomiť širšie súvislosti, ako aj jeho dôsledky, vrátane tých ekonomických. Argumenty typu keď: naplatia ostatní, prečo by som mal platiť ja, nie sú v tomto prípade akceptovateľné. Je samozrejme pochopiteľné, že tí, čo za software zaplatili, sa cítia ukrivdení tým, že niekto bezplatne využíva to, za čo oni zaplatili. Ľudia si musia uvedomiť, že softwarové pirátstvo sa dotýka každého z nás, a že nie je len otázkou výrobcov a distribútorov softwaru a ich loby. Ako paralelu si dovolím použiť porovnanie s čiernymi pasažiermi v MHD. Treba si uvedomiť, že v podstate sa vozia za peniaze tých, čo platia a straty z toho vzniknuté sa prejavia v zvýšovaní cestovného. Nakoniec, keď nebude nikto za MHD platiť, doprava sa zruší a všetci budú musieť chodiť pešo, alebo taxíkom.

Pri používaní softwaru dochádza k opakovaniu tejto hry vo veľkom meradle. Celosvetovo máme už vyše miliardu užívateľov softwaru a tisícky softwarových produktov. Pri takomto objeme užívateľov a narastajúcich stratách, ako aj nákladoch na vývoj softwaru je len otázkou času, kedy straty produkované softwarovým pirátstvom sa dotknú platiacich užívateľov. V súčasnosti vzhľadom na klesajúcu cenu doláru, ako aj vzhľadom na to, že výrobcovia softwaru našli spôsoby, ako znížiť náklady na distribúciu situácia ešte nie je kritická. Náraste strát nad neudržateľnú úroveň je však len otázkou času, kedy sa softwarové pirátstvo dotkne každého jedného užívateľa softwaru bez ohľadu na to či užíva software legálne alebo nie.

Pri opakovaní tejto hry, by malo práve využívanie legálneho softwaru predstavovať Nashove equilibrium. V súčasnosti sa však toto equilibrium stále nedosahujeme. Postupom času, ako budú narastať straty softwarových spoločnosti a ako sa pirátstvo bude negatívne dotýkať všetkých užívateľov, budú títo nútení dosiahnuť equilibrium. Dovtedy však softwarovým spoločnostiam vzniknú miliardové škody a mnohé z týchto spoločností zaniknú. Je teda žiadúce, aby sme nečakali na dosiahnutie equilibria prirodzenou cestou. Musíme nájsť spôsoby ako donútili užívateľov dosiahnuť equilibrium skôr.

Ako však toto equilibrium dosiahnuť? Treba si uvedomiť, že základný kameň úrazu je v nás ľuďoch. V tom, ako vnímame prostredie okolo nás, a ako si vážime svoje okolie, prírodné bohatstvo, ako aj prácu

iných ľudí. V dnešnej dobre, keď stojíme pred globálnymi problémami, ako je globálne otepľovanie, potravinová kríza, chudoba nemôžeme si dovoliť pokračovať v sebeckom správaní. Ako prvé, by sme mali prehodnotiť svoj postoj k svojmu správaniu a prestať byť bezohľadní a chovať sa tak, ako by to nebol nás problém. Ďalším krokom, by malo byť zvýšenie vzdelanosti a informovanosti o probléme softwarového pirátstva. Čo sa týka práva, ako prostriedku zabezpečenia ochrany softwaru, netreba produkovať ďalšie právne normy, ale treba posilniť vymáhateľnosť a aplikovateľnosť noriem už platných, nakoľko ich vymožiteľnosť je minimálna. Treba vytvoriť špeciálne policajné útvary a jednotky zaoberajúce sa softwarovým pirátstvom a zabezpečiť ich potrebným vybavením a právomocami. Taktiež je potrebné zlepšiť cezhraničnú spoluprácu policajných a justičných orgánov pri boji so softwarovým pirátstvom, nakoľko pirátstvo nie je problémom jednej krajiny, ale je globálnym problémom.

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STÁTNÍ ZASTUPITELSTVÍ V CIVILNÍM ŘÍZENÍ DLE JUDIKATURY ESLP

RADOVAN DÁVID

PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY, KATEDRA OBČANSKÉHO PRÁVA

Abstrakt

Již od roku 1850 je státní zastupitelství na území České republiky oprávněno aktivně zasáhnout do probíhajícího občanského soudního řízení či toto řízení svým návrhem iniciovat. V současné době tak státní zastupitelství disponuje poměrně širokými oprávněními jak v oblasti vstupové, tak i v oblasti návrhové v rámci výkonu své činnosti. Účast tak netypického prvku, jakým je právě státní zastupitelství v podobě „třetího subjektu" v řízení, se však dostává do střetu se základními procesními zásadami, zejména s právem na spravedlivý proces ve smyslu čl. 6 odst. 1 Úmluvy o ochraně lidských práv a základních svobod.

Klíčová slova

Státní zastupitelství, civilní řízení, veřejný zájem, spravedlivý proces, rovnost účastníků, judikatura, Evropský soud pro lidská práva

Abstract

The public prosecutor's office has been entitled to participate in the civil proceeding and to initiate such proceedings since 1850. Presently it disposes of wide competences in both forms of its participation. The public prosecutor's offices in the civil proceedings are the typical signs of the legal regulations of many European countries, both democratic and transforming. The participation of such an atypical subject in the proceeding must come into conflict with the basic procedural principles, especially the right to a fair trial in accordance with the article 6 (1) of The Convention for the Protection of Human Rights and Freedoms.

Key words

Public prosecutor's office, civil proceeding, fair trial, equality of parts, practice of the courts, European Court of Human Rights

Státní zastupitelství, resp. státní zástupce, je v dnešní době společností vnímáno jako jeden z orgánů činných v trestním řízení, kdy ve spolupráci s Policií České republiky a soudy v trestním soudnictví hájí společenský zájem na stíhání trestné činnosti. Vedle této převažující působnosti je však státnímu zastupitelství svěřena i působnost na úseku netrestním.

Působnost státního zastupitelství v civilním řízení

V současné době státní zastupitelství disponuje poměrně širokými oprávněními, na základě nichž může aktivně zasáhnout do občanského soudního řízení.

Základem působnosti státního zastupitelství v občanském soudním řízení je čl. 80 Ústavy České republiky[1], který stanoví, že státní zastupitelství na základě zákona vykonává vedle veřejné žaloby i další úkoly. Zákon o státním zastupitelství[2] pak konkrétněji v § 4 odst. 1 písm. c) a § 5 stanoví, že státní zastupitelství působí i v jiném než trestním řízení. Tato jeho působnost je dále upravena občanským soudním řádem[3]. Dle ustanovení § 35 odst. 1 může státní zastupitelství vstoupit do zahájeného řízení ve věcech:

- určení, zda je třeba souhlasu rodičů dítěte k jeho osvojení,
- uložení výchovného opatření podle § 43 odst. 1 a 2 zákona o rodině,
- nařízení ústavní výchovy a prodloužení ústavní výchovy,
- pozastavení, omezení nebo zbavení rodičovské zodpovědnosti,
- způsobilosti k právním úkonům,
- prohlášení za mrtvého,
- vyslovení přípustnosti převzetí nebo držení v ústavu zdravotnické péče,
- umoření listin,
- obchodního rejstříku, rejstříku obecně prospěšných společností, nadačního rejstříku a rejstříku společenství vlastníků jednotek,
- některých otázek obchodních společností, družstev a jiných právnických osob
- v nichž se řeší dlužníkův úpadek nebo hrozící úpadek, včetně incidenčních sporů, a moratoria,
- společenství vlastníků jednotek,
- vyslovení neplatnosti dražby.

Dle ustanovení § 35 odst. 1 občanského soudního řádu však nejsou dotčena oprávnění státního zastupitelství dle zvláštních právních předpisů. Vedle možnosti zasáhnout do občanského soudního

[1] Ústavní zákon č. 1/1993 Sb., Ústava České republiky.
[2] Zákon č. 283/1993 Sb., o státním zastupitelství, ve znění pozdějších předpisů.
[3] Zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů.

řízení vstupem tak může státní zastupitelství dokonce samo podat návrh na zahájení řízení, např. ve věcech popření otcovství Nejvyšším státním zástupcem dle § 62 a § 62a zákona o rodině[4] či určení nezákonnosti stávky a výluky dle § 21 a § 29 zákona o kolektivním vyjednávaní[5].

Společným znakem obou forem intervence státního zastupitelství v civilním řízení je nutnost hájení, resp. existence veřejného zájmu. Státní zastupitelství je tak oprávněno do řízení zasáhnout jedině tehdy, shledá-li, že jeho aktivní zásah je objektivně nutný z pohledu veřejného zájmu. V současné době tak intervence státního zastupitelství stojí na neurčitém právním pojmu „veřejný zájem", jehož výklad vlastně ovládá rozsah působnosti. Úvahy o možné taxativní úpravě je nutné striktně odmítnout, potenciální úprava výčtem demonstrativním je rovněž nevhodná.[6] Ustáleným pravidlem, jež se uplatňuje v případě vstupu státního zastupitelství do řízení je skutečnost, že soud nepřezkoumává stanovisko státního zastupitelství, nicméně ani toto pravidlo nelze nepodrobit kritice z možného opětovného pojetí státního zastupitelství jako strážce zákonnosti či dokonce kontrolora soudů.

Procesní postavení státního zastupitelství

Procesní postavení státního zastupitelství je závislé na způsobu, kterým státní zastupitelství do řízení zasáhlo. Jestliže státní zastupitelství samo podá návrh na zahájení sporného řízení, stává účastníkem dle první definice účastenství, tedy žalobcem. Podá-li státní zastupitelství návrh na zahájení řízení nesporného, stává se účastníkem dle druhé, resp. třetí definice účastenství, je tedy navrhovatelem. V těchto řízeních tak státní zastupitelství je účastníkem, a disponuje proto všemi procesními oprávněními.

Vstoupí-li státní zastupitelství do řízení již zahájeného, nestává se účastníkem, neboť § 35 odst. 2 uvádí, že státní zastupitelství je v takovém řízení oprávněno ke všem úkonům, které může vykonat jeho účastník. Stejně tak i úprava podání opravných prostředků, konkrétněji odvolání dle § 203 odst. 2 a žaloby pro zmatečnost dle § 231 odst. 2 občanského soudního řádu uvádí oprávnění státního zastupitelství samostatně, odděleně od oprávnění účastníků.

Vstupová činnost státního zastupitelství

V případě vstupové činnosti státního zastupitelství je nadmíru důležité vyjádřit se ke vztahu této intervence k možnému ohrožení základních procesních zásad, zejména pak rovnosti, kontradiktornosti a projednací.

[4] Zákon č. 94/1963 Sb., o rodině, ve znění pozdějších předpisů (dále jen „zákon o rodině").
[5] Zákon č. 2/1991 Sb., o kolektivním vyjednávání, ve znění pozdějších předpisů.
[6] V případě taxativního výčtu by nemuselo dojít k pokrytí dosud neuvažovaných situací. Výčet demonstrativní by pak mohl do působnosti zahrnout i věci s nižší intenzitou nutnosti zásahu, což by způsobilo intervenci i v řízeních, v nichž aktivita státního zastupitelství není nutná.

Vymezení postavení státního zastupitelství v občanském soudním řízení není jednoznačné. Vzhledem ke skutečnosti, že se nejedná ani o účastníka řízení, ani o účastníka hmotněprávního vztahu, je nutné konstatovat, že státní zastupitelství není součástí pevné struktury základních procesních vztahů mezi soudem a účastníky. Musí však být alespoň ve vztazích potenciálních, neboť musí být zachováno právo účastníků reagovat na procesní úkony státního zastupitelství, bez čeho by tato intervence byla v přímém rozporu se zásadou práva na spravedlivý proces.

Zejména v případech sporných řízení tak státní zastupitelství může významným způsobem zasáhnout do základních procesních zásad, neboť řízení nesporná přece jen nejsou závislá na dodržení zásad kontradiktornosti a projednací.

Co se týče zásady rovnosti, lze se ztotožnit se závěrem Ústavního soudu, jenž uvádí, že „*Princip rovnosti zbraní vyžaduje, aby každé straně byla poskytnuta rozumná možnost hájit svou věc za podmínek, které ji podstatně neznevýhodňují ve vztahu k jejímu oponentovi*“.[7] Státní zastupitelství tak svým vstupem nesmí zapříčinit výhodnější ani nevýhodnější postavení pro některého z účastníků, což zejména v řízeních sporných může být problematické. Ačkoliv státní zastupitelství pouze hájí veřejný zájem, není prakticky možné, aby byť jeho jediný procesní úkon nestranil některému z účastníků.

V řízeních sporných je nutné dále přihlédnout k zásadě kontradiktornosti. V případě, že existuje žalobce, který prosazuje své v žalobě uvedené nároky, a žalovaný, který uplatňuje nároky protikladné, vyvstává otázka, kde se nachází státní zastupitelství, jež vlastně není ani účastníkem řízení. Mezi stranami, které jsou „*aktivními činiteli řízení*“[8] se tak nachází nestálý prvek státního zastupitelství. Každá z těchto stran sleduje svůj vlastní zájem, státní zastupitelství sleduje zájem veřejný. Jak lze však nahlížet na jeho pozici? Určitě nedochází k vytváření pomyslného trojúhelníku, kdy by státní zastupitelství bylo účastníkem procesního vztahu vůči stranám a strany by byly ve vztahu navzájem. Státní zastupitelství totiž neuplatňuje nárok hmotněprávní a jako takové není se stranami ve sporu, kontradiktornost se tedy nedotýká státního zastupitelství. Nicméně se opět dostáváme k problému, že státní zastupitelství každým svým procesním úkonem straní některému z účastníků, ačkoliv tak může činit nevědomě a vždy směřujíc k hájení veřejného zájmu. Proto k původní podstatě kontradiktornosti, tedy že žalobce trvá na uspokojení uplatnění žalobních nároků a žalovaný uplatňuje zájem protikladný[9], lze doplnit, že vedle nich v uvedených řízeních stojí také státní zastupitelství, jež procesními úkony rovněž vyvíjí procesní aktivitu, nicméně původní podstatu kontradiktornosti nikterak neohrožuje, neboť ta spočívá v „*soupeření dvou protikladných stran*“.

Poslední z ohrožených zásad je zásada projednací. Státní zastupitelství ve sporném řízení může navrhovat důkazy, nicméně vzhledem k existenci sporu mezi stranami, je nutné konstatovat, že každý

[7] Nález Ústavního sodu ze dne 19. 4. 2007, sp. zn. II. ÚS 114/06.
[8] Stavinohová, J., Hlavsa, P. Civilní proces a organizace soudnictví. Brno: Masarykova univerzita, 2003, s. 175.
[9] Tamtéž, s. 174.

důkaz, který státní zastupitelství navrhne, bude vždy důkazem ve prospěch některé ze stran, i když samozřejmě oficiální závěr zní, že státní zastupitelství postupuje v řízení k důslednému hájení veřejného zájmu. Otázka projednací zásady tak vlastně může být upravena do té míry, že sice účastníci řízení jsou povinni označit důkazy k prokázání svých tvrzení dle ustanovení § 120 odst. 1 občanského soudního řádu, nicméně je nutné také reflektovat účast státního zastupitelství, jež může tuto důkazní aktivitu stran doplňovat, event. suplovat, i když samozřejmě hlavním cílem státního zastupitelství není suplování aktivity procesních stran. Státní zastupitelství tak v případech, kdy nedojde k navržení důkazu některou ze stran, může projevit iniciativu a navrhnout důkaz samo, čímž vlastně zmírňuje závěr, že pouze sami účastníci řízení nesou výlučnou odpovědnost za náležité shromáždění skutkového stavu. Zásada projednací je tak i v případech, kdy státní zastupitelství vstoupilo do sporného řízení, dodržována, nicméně státní zastupitelství může doplňovat aktivitu procesních stran, avšak za důsledného dodržení povinnost postupovat pouze k hájení veřejného zájmu. Právě veřejný zájem může být jediným důvodem, který vysvětluje postup státního zastupitelství neoficiálně ve prospěch některé z procesních stran.

Státní zastupitelství tedy svojí účastí může ohrozit základní procesní zásady, což se může projevit zejména v ohrožení práva účastníků na spravedlivý proces ve smyslu mezinárodněprávní úpravy.

Úmluva o ochraně lidských práv a základních svobod

Dne 21. února 1991 se Česká a Slovenská Federativní Republika stala členem Rady Evropy a ve stejný den přijala velmi důležitý dokument, jehož oficiální název je Úmluva o ochraně lidských práv a základních svobod[10]. Došlo tak k završení rozchodu právního systému ČSFR s totalitním systémem, a tím i ke vstupu do „klubu evropských demokracií". Když 18. března 1992 úmluvu ratifikovala, přiznala všem osobám spadajícím pod její jurisdikci práva a svobody uvedené v této smlouvě a zároveň uznala možnost podání individuální stížnosti k Evropské komisi pro lidská práva, jakož i obligatorní jurisdikci Evropského soudu pro lidská práva, čímž se zapojila do mezinárodního a nadnárodního kontrolního systému. Stalo se tak transformací smlouvy do českého právního řádu formou sdělení tehdejšího federálního ministerstva zahraničí ve sbírce zákonů po číslem 209/1992 Sb., o Úmluvě o ochraně lidských práv a základních svobod. Následnické státy ČSFR, tedy Česká a Slovenská republika, prohlásily, že se považují za vázané touto úmluvou od 1. ledna 1993.

Hlavním cílem přijetí úmluvy v postkomunistických zemích bylo dotažení reforem, směřujících proti strnulosti institucí a tradic, do konce.

První mezinárodní institucí svého druhu se stal Evropský soud pro lidská práva. Ve skutečnosti byl nejvyšším a jediným „vykladatelem" úmluvy, jež je kromě České republiky závazná v dalších více než 40

[10] Sdělení č. 209/1992 Sb. MZV o Úmluvě o ochraně lidských práv a základních svobod ve znění protokolů č. 3, 5 a 8

zemích. Rozsudky Evropského soudu vyvolávají časté změny v legislativě, judikatuře i praxi členských zemí, zejména v oblasti soudního řízení a veřejných svobod. Je tedy nutné se zabývat jak samotným zněním konkrétních článků úmluvy, tak zejména judikaturou soudu. *„Úmluva celou řadu důležitých pojmů sama nedefinuje – jejich výklad je tak dán rozhodovací činnosti Evropského soudu pro lidská práva.“*[11]

Význam čl. 6 odst. 1 Úmluvy

Tento článek, dotýkající se největší měrou soudní ochrany soukromoprávních věcí prostřednictvím soudů, stanoví, že: „*Každý má právo na to, aby jeho záležitost byla spravedlivě, veřejně a v přiměřené lhůtě projednána nezávislým a nestranným soudem, zřízeným zákonem, který rozhodne o jeho občanských právech nebo závazcích nebo o oprávněnosti jakéhokoli trestního obvinění proti němu. Rozsudek musí být vyhlášen veřejně, avšak tisk a veřejnost mohou být vyloučeny buď po dobu celého nebo části procesu v zájmu mravnosti, veřejného pořádku nebo národní bezpečnosti v demokratické společnosti, nebo když to vyžadují zájmy nezletilých nebo ochrana soukromého života účastníků anebo, v rozsahu považovaném soudem za zcela nezbytný, pokud by, vzhledem ke zvláštním okolnostem, veřejnost řízení mohla být na újmu zájmům spravedlnosti*.“

Význam tohoto článku ve vztahu ke státnímu zastupitelství je však nutné chápat čistě z pohledu procesu civilního, nikoliv tedy trestního. Evropský soud pro lidská práva ve věci Editions Periscope konstatoval, že „*Občanské právo a závazek zahrnuje oblast jakýchkoliv sporů, které mají majetkový předmět a zakládají se na údajném zásahu do práv, jež jsou patrimoniální*[12]“. Samozřejmostí je rozšíření tohoto okruhu i na řízení nesporná, jež zaujímají podstatnou část působnosti státního zastupitelství.

Zajímavostí jistě není fakt, že dané ustanovení je nejčastěji domáhaným se ustanovením u soudu. Jde zejména o vymezení pojmu nezávislý soud, ochrana občanských práv a také spravedlivý proces. Výkladem tohoto článku ve vztahu k problematice účasti státního zastupitelství v civilním řízení se již několikrát zabýval Evropský soud pro lidská práva.

Judikatura Evropského soudu pro lidská práva

- *věc Lobo Machado proti Portugalsku*[13]

V roce 1989 dosáhl portugalský občan Lobo Machado důchodového věku, kdy více než 30 let pracoval u státní společnosti Petrogal. Od roku 1980 však pracoval na hůře placeném místě, jež nenáleželo do jeho vzdělanostní kategorie, což v podstatě zhoršovalo pracovní zařazení pana Machado pro budoucí vyplácení starobního důchodu. Proto se obrátil na průmyslový soud, jenž až v roce 1987 rozhodl v jeho

[11] Berger, V. Judikatura Evropského soudu pro lidská práva. Přeložil Bruno Jungwiert. Praha: IFEC, 2003, předmluva.
[12] Berger, V. Judikatura Evropského soudu pro lidská práva. Přeložil Bruno Jungwiert. Praha: IFEC, 2003, s. 175.
[13] Rozsudek Evropského soudu pro lidská práva ze dne 20. 2. 1996 ve věci Lobo Machado proti Portugalsku.

neprospěch. Tento rozsudek byl potvrzen i rozhodnutím soudu odvolacího, proto se v roce 1989 obrátil na dovolací soud. Ve věci byl o stanovisko rovněž požádán Nejvyšší státní zástupce Portugalska, jakožto orgán napomáhající hájit zájem státu na věcně i právně bezvadných rozhodnutích, jenž doporučil návrh zamítnout. Toto stanovisko nebylo panu Machadovi nijak oznámeno. Dovolací soud v této věci navíc rozhodoval bez nařízení jednání, avšak k neveřejným poradám senátu přizval také zástupce Nejvyššího státního zastupitelství Portugalska. Dovolání bylo v této věci zamítnuto, proto se pan Machado obrátil na Evropský soud pro lidská práva pro porušení čl. 6 odst. 1 Úmluvy.

Evropský soud pro lidská práva konstatoval, že nejvýznamnější otázkou je povaha jednotlivých subjektů řízení, zejména pak státního zastupitelství, jejíž význam se přenáší na sekundární otázku možného ovlivnění výsledku řízení. Evropský soud konstatoval, že ačkoliv byla role státního zastupitelství v civilních řízeních zakotvena v zákonných předpisech, není možné, aby jeho úloha spočívala v přímém ovlivňování soudu prostřednictvím právních rad a aby zasahovala do soukromoprávní sféry procesních subjektů. Vzhledem k tomu, že výše starobního důchodu se dotýká soukromoprávní sféry každého člověka, resp. jeho vlastnického práva, došlo **činností státního zastupitelství, jež nebyla panu Machadovi předem ani v průběhu řízení nijak oznámena**, k porušení práva pana Machado na spravedlivý proces dle ustanovení čl. 6 odst. 1 Úmluvy, dle něhož má každý právo vyjadřovat se ke všem tvrzeným skutečnostem i provedeným důkazům. **Porušení bylo rovněž shledáno přítomností státního zástupce na neveřejné poradě senátu dovolacího soudu**, neboť tato přítomnost, i když mohla být jakkoliv pasivní, byla zcela určitě schopna ovlivnit konečné soudní rozhodnutí. V tomto případě tak přítomností státního zastupitelství v řízení, jež ohrozila právo na spravedlivý proces, byla způsobena přímá hmotná škoda.

- *věc Van Orshoven proti Belgii*[14]

Belgický občan, lékař Van Orshoven byl rozhodnutím lékařské komory zbaven členství v komoře, na základě čeho nemohl po významnou dobu vykonávat svoji lékařskou praxi. Ve své věci se proto obrátil na obecný soud. Řízení se vedle pana Van Orshoven účastnila také lékařská komora a státní zastupitelství. Navzdory všem procesním pravidlům se závěrečné porady senátu zúčastnilo také státní zastupitelství, kdy byl posléze vydán zamítavý rozsudek. Vzhledem k tomu, že pan Van Orshoven neuspěl ani v opravném řízení, obrátil se na Evropský soud pro lidská práva pro porušení čl. 6 odst. 1 Úmluvy. Porušení Úmluvy shledal zejména v přítomnosti státního zastupitelství při závěrečné poradě, kdy na skutečný závěrečný návrh státního zastupitelství již nemohl reagovat, toto porušení je navíc utvrzeno skutečností, že návrh žádal zamítnutí žaloby. Belgický stát se však bránil tím, že účast státního

[14] Rozsudek Evropského soudu pro lidská práva ze dne 25. 6. 1997 ve věci Van Orshoven proti Belgii.

zastupitelství v řízení neohrožuje princip nestrannosti a nezávislosti soudů, neboť státní zastupitelství pomáhá pouze zajistit jednotnost judikatury.

Evropský soud se domnívá, že ačkoliv je působnost státního zastupitelství vykonávána nezávisle a nestranně, **samotná autorita státního zastupitelství jako významného státního orgánu je schopna významným způsobem ovlivnit konečné rozhodnutí soudu**. Přítomnost státního zastupitelství u závěrečné porady soudu tak výrazně ohrozila zásadu kontradiktornosti, neboť některý z účastníků byl omezen na svém právu seznámit se s návrhy jiných účastníků a na tyto návrhy reagovat. V tomto případě tak přítomností státního zastupitelství v řízení, jež ohrozila právo na spravedlivý proces, byla způsobena přímá hmotná škoda a ohroženo právo na nerušený výkon svého povolání.

- *věc APEH Üldözötteinek Szövetsége proti Maďarsku*[15]

Sdružení APEH Üldözötteinek Szövetsége (Sdružení pronásledovaných daňovým úřadem) podalo u krajského soudu návrh na zápis společnosti do rejstříku právnických osob. Do rejstříkového řízení vstoupilo také státní zastupitelství, nicméně účastníci řízení se o vstupu státního zastupitelství do řízení nedozvěděli a nebyli tedy schopni reagovat na jeho návrhy. Závěrečný návrh státního zastupitelství na zamítnutí návrhu pro jeho rozpor s právem na ochranu pověsti (státního daňového úřadu APEH) však byl účastníkům oznámen a bylo na něj možné reagovat. Soud návrh zamítl. Celá věc byla posléze projednávána v opravných řízeních, vždy za účasti státního zastupitelství, nicméně bez jakéhokoliv uvědomování účastníků řízení o jeho účasti a návrzích. Rozhodnutí dovolacího soudu rovněž konstatovalo nemožnost zápisu tohoto sdružení do rejstříku právnických osob, proto se sdružení obrátilo na Evropský soud pro lidská práva pro porušení čl. 6 odst. 1 Úmluvy.

Evropský soud vzal v úvahu existenci stávající maďarské právní úpravy, jež umožňuje státnímu zastupitelství vstup do nesporných řízení, nicméně nesouhlasil s názory maďarského státu na malou významnost subjektu státního zastupitelství. Konstatoval, že **státní zastupitelství, byť by v řízení nemělo žádný vliv na konečné rozhodnutí ve věci, nelze chápat jako prvek bezvýznamný**. Jde o subjekt řízení postavený na roveň ostatním účastníkům. **Princip rovnosti zbraní tak tedy nezávisí na konečném rozhodnutí, nýbrž konečné rozhodnutí by mělo záviset na principu rovnosti zbraní.** Je totiž věcí každé ze stran, aby posoudily, zda na návrh ostatních účastníků budou reagovat či nikoliv. Proto jakékoliv účelové podceňování významu státního zastupitelství v civilním řízení ze strany maďarského státu je nutné kategoricky odmítnout.

V tomto případě tak přítomnost státního zastupitelství v řízení znamenala porušení principu rovnosti zbraní, jakožto součásti práva na spravedlivý proces.

[15] Rozsudek Evropského soudu pro lidská práva ze dne 5. 10. 2000 ve věci APEH Üldözötteinek Szövetsége proti Maďarsku.

- věc K. D. B. proti Nizozemí[16]

Nizozemský občan D. K. B. byl vlastníkem dobytčí farmy. Vzhledem k tomu, že se na některých kusech dobytka potvrdilo krmení zakázanými směsmi, vydal státní zástupce dočasné opatření zákazu odvážení zvířat z farmy. Věc byla posléze řešena okresním soudem za současného vstupu státního zastupitelství do řízení. Tento soud zamítl návrh na zrušení opatření, proto se pan D. K. B. obrátil na Nejvyšší soud Nizozemí. Nejvyšší státní zástupce navrhl soudu zamítnutí návrhu, nicméně tento návrh nebyl panu D. K. B. nijak oznámen, resp. se o něm dozvěděl až po vydání zamítavého rozhodnutí soudu nejvyššího stupně. Obrátil se proto na Evropský soud pro lidská práva pro porušení čl. 6 odst. 1 Úmluvy.

Evropský soud se „*domnívá, že musí přisuzovat velký význam roli, v jaké státní zástupce vystupuje při řízení před nejvyšším soudním orgánem, obzvláště pak obsahu a důsledkům jeho návrhů.* ***Návrhy státního zástupce jsou zaštítěny autoritou státního zastupitelství. I když jsou objektivní a právně odůvodněné, nejsou o nic méně určeny k ovlivnění rozhodnutí Nejvyššího soudu****. Vzhledem k tomu, co bylo pro stěžovatele při řízení v sázce, a k povaze návrhu státního zástupce, se Soud domnívá, že neposkytnutí možnosti vyjádřit se k němu před Nejvyšším soudem bylo zneuznáním práva na kontradiktorní řízení* “[17] Proto účastí státního zastupitelství v civilním řízení došlo k porušení práva na kontradiktorní řízení, jakožto součásti práva na spravedlivý proces.

- věc Vermeulen proti Belgii[18]

V insolvenčním řízení zahájeném na návrh státního zastupitelství, rozhodl obchodní soud o úpadku společnosti pana Vermeulen. V tomto řízení soud přijal pouze názory státního zastupitelství, s panem Vermeulenem ve věci vůbec nejednal, neboť dle sdělení státního zastupitelství je proti němu vedeno trestní stíhání. Pan Vermeulen se proto odvolal. Odvolací soud skutečně věc znovu projednal, nicméně přihlédl k písemnému vyjádření státního zastupitelství, jež nebylo čteno na jednání. Proto se pan Vermeulen obrátil na soud dovolací, jenž však dovolání zamítl. Pan Vermeulen tedy využil svého práva stížnosti k Evropskému soudu pro lidská práva.

Evropský soud konstatoval, že dle belgického procesního práva je úlohou státního zastupitelství pomáhat soudům ve sjednocování judikatury a vydávat rozhodnutí věcně i právně bezvadná. Zdůraznil však striktní požadavek na jeho objektivitu. **V řízeních, jakkoliv jsou ovládána zásadou rovnosti, jsou soudy bezpochyby ovlivňovány názorem státního zastupitelství jako autority.** Přístup belgických soudů však nerespektoval ani základní procesní pravidla, resp. právo na rovnost zbraní, když prakticky vyloučil možnost stěžovatele reagovat na písemná sdělení státního zastupitelství. Tím státní zastupitelství nadaly možností podávat u soudu návrhy bez jakékoliv „obavy“ z případných reakcí

[16] Rozsudek Evropského soudu pro lidská práva ze dne 27. 3. 1998 ve věci K. D. B proti Nizozemí.
[17] Tamtéž.
[18] Rozsudek Evropského soudu pro lidská práva ze dne 20. 2. 1996 ve věci Vermeulen proti Belgii.

účastníků řízení. Tento postup je tak shledáván jako porušení práva na kontradiktornost řízení, jakožto součásti práva na spravedlivý proces.

Závěr

Na základě výše uvedených judikátů Evropského soudu pro lidská práva lze stručně uvést důležité závěry bezprostředně se dotýkající aplikace čl. 6 odst. 1 Úmluvy ve vztahu k účasti státního zastupitelství v civilním řízení:

- každý má právo na to, aby jeho záležitost byla spravedlivě, veřejně a v přiměřené lhůtě projednána nezávislým a nestranným soudem, zřízeným zákonem, který rozhodne o jeho občanských právech nebo závazcích,
- Úmluva celou řadu důležitých pojmů sama nedefinuje – jejich výklad je tak dán rozhodovací činnosti Evropského soudu pro lidská práva,
- Evropský soud zdůrazňuje význam čl. 6 odst. 1 Úmluvy v oblasti základního principu jistoty právních vztahů,
- účast státního zastupitelství v civilním řízení je otázkou čistě práva vnitrostátního, resp. záleží na procesních řádech jednotlivých členských států, zda jeho účast v řízení povolí či nikoliv; samotná účast státního zastupitelství neodporuje ustanovením Úmluvy,
- státní zastupitelství, jakkoliv je jeho úloha v civilním řízení označována za velmi nebo naopak málo významnou, je vždy vnímáno jako subjekt řízení, jenž může pouhou svojí přítomností ovlivnit konečné rozhodnutí soudu,
- z postavení státního zastupitelství zásadně rovného s postavením účastníků jasně vyplývá zákaz jakéhokoliv jeho privilegování před ostatními účastníky,
- každému účastníku řízení musí být umožněno reagovat na každý návrh či vyjádření státního zastupitelství (platí rovněž pro státní zastupitelství), soudy jsou tedy striktně povinny o každém procesním úkonu uvědomit i ostatní účastníky,
- účastí státního zastupitelství se soudy nemají zabývat účelově, tedy zda účast ovlivnila nebo neovlivnila meritorní rozhodnutí, nýbrž preventivně, tzn. zda mohla nebo nemohla ovlivnit meritorní rozhodnutí,
- porady a neveřejná jednání přísluší čistě soudcům a členům senátů, státní zastupitelství jako prvek netypický pro civilní řízení, zakotven navíc v moci výkonné, tak nesmí zasahovat do nezávislosti moci soudní.

Dle mého názoru je institut účasti státního zastupitelství v civilním řízení velmi důležitý, neboť hájí v řízeních zájmy společnosti nad zájmy jednotlivců, které by mohly vyvolat újmu ostatních. Tato účast je typická jak pro řízení sporná, tak i nesporná, nicméně zejména pro sporná řízení je nutné mít vždy na

paměti, že se neuplatňuje jen ochrana zájmu veřejného, ale také ochrana rovnosti a práva na spravedlivý proces. Proto je nutné k otázce dalšího rozšiřování působnosti státního zastupitelství o další sporná řízení přistupovat nejvýše opatrně. Státní zastupitelství už nikdy nesmí být chápáno jako orgán škodící. Musí být chápáno jako orgán stojící na straně práva a spravedlnosti, jenž má důvěru společnosti a neodporuje základním procesním principům zakotveným v mezinárodněprávních dokumentech.

Literatura:

[1] Stavinohová, J., Hlavsa, P.: *Civilní proces a organizace soudnictví*. Brno: Masarykova univerzita, 2003, ISBN 8021032715, 660 s.

[2] Berger, V.: *Judikatura Evropského soudu pro lidská práva*. Přeložil Bruno Jungwiert. Praha: IFEC, 2003, ISBN 8086412237, 769 s.

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ZMĚNY SMLUV VE VEŘEJNÝCH ZAKÁZKÁCH

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Abstrakt

Příspěvek se zabývá změnami smluv uzavřenými na základě zadávacích řízení podle zákona č. 137/2006 Sb., o veřejných zakázkách. Ačkoliv tyto smlouvy byly uzavřeny na základě specifických zadávacích postupů, jedná se o soukromoprávní smlouvy, které spadají do režimu občanského nebo obchodního zákoníku. Při změnách těchto smluv je však třeba vzít v úvahu skutečnost, že byly uzavřeny podle zákona o veřejných zakázkách, a proto tyto změny nesmí být se zákonem o veřejných zakázkách v rozporu či jej obcházet. V příspěvku jsou rozebrány změny smluvních stran, změny v předmětu a obsahu smluv a rozsah a podmínky, za nichž jsou přípustné.

Klíčová slova

Veřejné zakázky, změna smlouvy, postoupení pohledávky, převzetí dluhu, převod smlouvy, podstatné změny smlouvy, nepodstatné změny smlouvy

Abstract

The paper deals with the alteration of contracts concluded in award procedures according to the Czech Public Contracts Act. Although these contracts have been made in specific public procurement procedures they are standard civil contracts governed by Civil Code or Commercial Code. However, when these contracts are amended or altered it has to be taken into consideration that they have been concluded in compliance with the Public Contracts Act. Therefore, these amendments or alterations shall not contradict or circumvent the Act. The paper examines alterations both in contracting parties and subject-matter of contracts and extend and conditions under which they are admissible.

Key words

Public procurement, alteration of the contract, assignment of rights, acceptation of duties, cession of the contract, substantial alteration of the contract, unsubstantial alteration of the contract

1 Úvod

Předmětem tohoto příspěvku je otázka změn smluv, které byly uzavřeny na základě zadávacího řízení podle zákona č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů (dále jen „ZVZ“).[1]

Právní úprava zadávání veřejných zakázek reguluje pro stanovené subjekty (zadavatele) kontraktační proces odchylným způsobem od obecné úpravy občanského či obchodního zákoníku. Tento postup, který z velké části vychází z práva Evropských společenství[2], se vyznačuje mnohem větší regulovaností a ve značné míře omezuje smluvní volnost zadavatele ve vztahu k výběru druhé smluvní strany, a to s ohledem na snahu o zajištění hospodářské soutěže a efektivní vynakládání veřejných prostředků.

Na rozdíl od detailně propracované právní úpravy vlastního kontraktačního procesu (zadávacího řízení) je, poněkud paradoxně, stranou zájmu právní regulace otázka vlastních smluv, na jejichž základě jsou veřejné zakázky plněny. Smlouvy uzavřené na základě ZVZ jsou však standardními soukromoprávními smlouvami, které tak podléhají pouze obecnému režimu obchodního, případně občanského zákoníku. V případě jejich změn však je třeba vzít v úvahu, že byly uzavřeny na základě zadávacího řízení a nesmí proto být se ZVZ v rozporu či jej obcházet. Cílem tohoto příspěvku je proto prozkoumat, jakému režimu tyto smlouvy za stávající právní úpravy podléhají[3] a v jaké míře a za jakých podmínek jsou jejich změny možné a přípustné. Jedná tedy se v podstatě o nalezení vztahu mezi ZVZ na straně jedné a obecnými právními předpisy na straně druhé.

Změny smluv můžeme rozdělit pro účely jejich zkoumání na dvě základní kategorie, a to:

- změny v subjektech (smluvních stranách) a
- změny v předmětu a obsahu.

Příspěvek proto zachovává toto rozdělení s tím, že obě kategorie změn jsou rozebrány nejen ve vztahu k ZVZ a občanskému a obchodnímu zákoníku, nýbrž také s přihlédnutím k aktuální judikatuře Evropského soudního dvora (dále jen „ESD“) a k osnově nového občanského zákoníku[4].

[1] Závěry příspěvku se stejnou měrou vztahují i na smlouvy uzavřené podle předchozího zákona č. 40/2004 Sb., o veřejných zakázkách, a na koncesní smlouvy uzavřené na základě zákona č. 139/2006 Sb., o koncesních smlouvách a koncesním řízení (koncesní zákon), ve znění zákona č. 30/2008 Sb.

[2] Směrnice Evropského parlamentu a Rady 2004/18/ES ze dne 31.března 2004, o koordinaci postupů při zadávání veřejných zakázek na stavební práce, dodávky a služby, ve znění pozdějších předpisů, a směrnice Evropského parlamentu a Rady 2004/17/ES ze dne 31.března 2004, o koordinaci postupů při zadávání zakázek subjekty působícími v odvětví vodního hospodářství, energetiky, dopravy a poštovních služeb, ve znění pozdějších předpisů.

[3] Jde v podstatě o nalezení střední cesty mezi dvěma extrémy, tj. smlouvy uzavřené podle ZVZ nelze měnit vůbec na straně jedné a smlouvy, jakožto soukromoprávní smlouvy, lze měnit bez omezení na straně druhé.

[4] Osnova nového občanského zákoníku ve znění z prosince 2007 (http://www.justice.cz).

2 Změny v subjektech (změna v osobě zadavatele a dodavatele)

Občanský zákoník ani ZVZ (resp. evropské zadávací směrnice) cesi smlouvy, tj. situaci, ve které dochází ke změně subjektu celého závazkového vztahu, výslovně neupravuje. Občanský zákoník upravuje pouze změnu jednotlivých závazkových vztahů, jako změnu v osobě věřitele (postoupení pohledávky) nebo dlužníka (převzetí či přistoupení k dluhu), ve svých § 524 až 543. V praxi je však tato operace chápána zřejmě jako poměrně běžná, ačkoliv se lze setkat i s názory, které tuto možnost vylučují.[5] Změna v subjektu smlouvy uzavřené na základě ZVZ, jako synallagmatické smlouvy, však přesahuje pouhou kombinaci vzájemných pohledávek na poskytnutí plnění (dodávek, služeb či stavebních prací) a na poskytnutí úplaty za tato plnění a jím odpovídající dluhy. Ze smlouvy zejména vzniká celá řada dalších (akcesorických) závazků, přičemž nelze vyloučit, že některé z nich nelze v souladu s § 525 odst. 1 OZ postoupit. Cese smlouvy je však upravena v právních řádech některých zemí (italský, portugalský a holandský občanský zákoník), jiné ji uznávají i bez existence výslovné právní úpravy.[6] S postoupením smlouvy výslovně počítá v § 1620 a násl. i osnova nového českého občanského zákoníku.

Předmětem tohoto příspěvku však není obecný teoretický rozbor možnosti cese smlouvy, nýbrž specifické posouzení této možnosti s ohledem na smlouvy uzavřené na základě zadávacího řízení podle ZVZ. Rozbor proto vychází ze zjednodušujícího pohledu na věc, tj. smlouvy jako kombinace pohledávky zadavatele na poskytnutí plnění (dodávky, služby, stavební práce) a jí odpovídajícího dluhu dodavatele poskytnout tohoto plnění a zároveň pohledávky dodavatele na zaplacení úplaty a jí odpovídající povinnosti (dluhu) zadavatele tuto úplatu uhradit. Změna smluvních stran je pak zjednodušeně posuzována z pohledu kombinace cese a intercese a jejich možného rozporu se ZVZ.

2.1 Změna v osobě zadavatele

Cílem změny v osobě zadavatele je dosáhnout stavu, kdy příjemcem plnění z veřejné zakázky bude subjekt odlišný od subjektu, který toto plnění původně zadal[7]. Změna v osobě zadavatele je primárně (z hlediska účelu smlouvy uzavřené na základě ZVZ) postoupením pohledávky na poskytnutí plnění mezi původním a novým zadavatelem podle § 524 odst. 1 OZ, kterému dochází dohodou mezi původním a novým zadavatelem. Podle § 526 odst. 1 OZ je postupitel povinen postoupení pohledávky bez

[5] Viz např. Grulich, T.: K otázce přípustnosti tzv. cese smlouvy. Právní rozhledy, 2008, č. 6, s. 210.
[6] Pelikánová, I.: Aktuální otázky obligačního práva a jeho kodifikace v evropském i českém kontextu. Právní rozhledy, 2007, č. 18, s. 666.
[7] K tomuto kroku může zřejmě nejčastěji dojít v souvislosti se změnou kompetencí či úkolů jednotlivých zadavatelů; např. obec převede určitou smlouvu na účelově zřízenou municipální obchodní společnost.

zbytečného odkladu oznámit dodavateli, jinak se dlužník sprostí závazku plněním postupiteli (neprokáže-li mu postupník postoupení pohledávky).

Zároveň se jedná o převzetí dluhu (závazku poskytnout úplatu) novým zadavatelem podle § 531 odst. 1 OZ), ke kterému dochází dohodou mezi původním a novým zadavatelem za předpokladu, že k převzetí dá věřitel (tj. dodavatel) souhlas.

Z hlediska ZVZ je třeba zejména posoudit, zda některou z dohod či souhlasů vyžadovaných OZ nelze považovat za právní úkon, který by byl v rozporu se ZVZ a tudíž absolutně neplatný. V tomto směru přichází obecně v úvahu zřejmě pouze dohody mezi původním či novým zadavatelem a dlužníkem, které by bylo možno považovat za uzavření nové smlouvy[8], tj. zadání veřejné zakázky v rozporu s postupem stanoveným ZVZ.

V posuzovaném případě je jediným takovým úkonem souhlas dodavatele s převzetím dluhu. Byť se z hlediska českého právního řádu jedná o jednostranný právní úkon, vycházíme z toho, že z hlediska práva veřejných zakázek je třeba (zejména s ohledem na teleologický výklad právní úpravy uplatňovaný ESD) posoudit, zda v tomto úkonu není možné spatřovat de facto uzavření nové smlouvy, které by mohlo být v rozporu se ZVZ. Vzhledem k tomu, že se v daném případě nemění původní dodavatel, který byl vybrán v zadávacím řízení podle ZVZ (a k jehož výběru zadávací řízení primárně směřovalo) a za standardních podmínek by pokračoval v plnění smlouvy, nedochází zde podle našeho názoru k zadání nové veřejné zakázky, které by bylo v rozporu či obcházelo ZVZ, či podstatné změně, která by nové zadávací řízení vyžadovala.

Specifickým případem je však situace, kdy by původní a nový zadavatel podléhali odlišným pravidlům podle ZVZ (tj. například odlišné finanční limity a s tím spojené povinnosti v zadávacím řízení). V takovém případě nelze změnu provést, pokud by se v jejím důsledku nový zadavatel stal smluvní stranou smlouvy, která byla uzavřena podle méně přísných postupů, než ke kterým by byl povinen sám.[9]

Lze proto učinit závěr, že změna v osobě zadavatele je z pohledu ZVZ možná s výhradou převodu mezi zadavateli, kteří ve vztahu ke konkrétní smlouvě podléhají stejným povinnostem z hlediska ZVZ.

[8] Veřejná zakázka je v evropském právu chápána primárně jako úplatná smlouva mezi zadavatelem a dodavatelem (oproti poněkud tautologické definici veřejné zakázky v § 7 ZVZ).
[9] Nebude proto ve většině případů například možné převést smlouvu ze sektorového zadavatele na zadavatele veřejného.

2.2 Změna v osobě dodavatele

Změnou v osobě dodavatele dochází ke stavu, kdy plnění veřejné zakázky bude poskytovat subjekt odlišný od subjektu, který byl vybrán v původním zadávacím řízení.[10] Jak je zřejmé, jedná se z hlediska ZVZ o značně složitější situaci, než v případě změny zadavatele, neboť má dojít ke změně v subjektu, k jehož výběru zákonem stanoveným způsobem zadávací řízení podle ZVZ především směřuje.

Změna v osobě dodavatele je primárně (z hlediska účelu smlouvy uzavřené na základě ZVZ) převzetím dluhu (závazku poskytnout plnění) podle § 531 odst. 1 OZ, ke kterému dochází dohodou mezi původním a novým dlužníkem (dodavatelem). Ke změně je však třeba souhlasu věřitele (zadavatele).

Zároveň se jedná o postoupení pohledávky na poskytnutí úplaty mezi původním a novým věřitelem (dodavatelem) podle § 524 odst. 1 OZ, k níž dochází dohodou mezi původním a novým věřitelem (dodavatelem).

Stejně jako v případě změny v osobě zadavatele je třeba z hlediska ZVZ posoudit, zda některou z dohod či souhlasů podle OZ, nelze považovat za právní úkon, který by byl v rozporu se ZVZ a tudíž absolutně neplatný. V tomto směru je při změně v osobě dodavatele podle našeho názoru nejproblematičtější souhlas zadavatele s převzetím dluhu, který by bylo možné považovat za de facto uzavření nové smlouvy s novým dodavatelem, byť se z hlediska českého právního řádu se jedná o jednostranný právní úkon. Z hlediska ZVZ je poměrně problematickou skutečnost, že do závazkového vztahu má vstoupit nový subjekt, který nebyl vybrán v zadávacím řízení. Dodatečně proto nelze splnit některé povinnosti, které by jinak ze ZVZ vyplývaly (např. posouzení splnění kvalifikace), a zejména hrozí narušení hospodářské soutěže, neboť nový dodavatel není vybírán v soutěži s ostatními potencionálními dodavateli, nýbrž jeho volba je v podstatě záležitostí volního uvážení původního dodavatele či zadavatele. Z hlediska evropské právní úpravy zadávání veřejných zakázek je však otázkou, zda by tato změna nebyla, bez ohledu na její vnitrostátní konstrukci, chápána jako de facto uzavření nové smlouvy mezi zadavatelem a novým dodavatelem, která by měla podléhat novému zadávacímu řízení.

Lze se proto domnívat, že tato změna je v rozporu se ZVZ, a lze ji (pokud vůbec) připustit jen ve výjimečných objektivních případech, ve kterých lze mít za to, že zájem na pokračování plnění veřejné

[10] V praxi se může jednat o celou řadu případů; jako příklad lze uvést změnu v důsledku neschopnosti původního dodavatele plnit veřejnou zakázku (např. při vstupu do likvidace), ztrátu zájmu původního dodavatele plnit veřejnou zakázku (např. v důsledku změny činnosti) nebo změny, které nastávají ze zákona v důsledku jiné skutečnosti (např. přeměny společností).

zakázky převažuje nad primárním cílem ZVZ, tj. zajištěním hospodářské soutěže[11]; změny v osobě dodavatele, které by byly vedeny pouze volní úvahou stran podle mého názoru připustit nelze.

Tato otázka se stala předmětem zájmu i evropského práva veřejných zakázek, konkrétně je v současné době řešena ESD v rámci případu C-454/06 Pressetext Nachrichtenagentur GmbH, který je blíže rozebrán v kapitole 2.4.

Výjimkou jsou podle našeho názoru případy, ve kterých dochází ke změně v osobě dodavatele ze zákona v důsledku jiné právní skutečnosti, tedy změna dodavatele je pouze vedlejším důsledkem jiného úkonu. Zejména se jedná o přeměny společností podle § 69 a násl. ObchZ, případně smlouvu o prodeji podniku podle § 476 a násl. ObchZ. V těchto případech je třeba možnost změny připustit, neboť opačný výklad by v případě přeměny společnosti nebo převodu podniku de facto znamenal nutnost ukončení smluv uzavřených podle ZVZ a vypsání nového zadávacího řízení, což nelze z žádných ustanovení ZVZ dovodit.

Závěrem lze tedy konstatovat, že změny v osobě dodavatele u smluv uzavřených na základě zadávacího řízení podle ZVZ nejsou až na výjimečné případy přípustné. Výjimkou jsou situace, ve kterých dochází ke změně dodavatele ze závažných objektivních důvodů nebo v důsledku jiné právní skutečnosti.

2.3 Převod smlouvy podle osnovy nového občanského zákoníku

Osnova nového občanského zákoníku ve svých § 1620 až 1625 institut převodu smlouvy obsahuje. Zároveň upravuje v § 1612 možnost postoupení souboru pohledávek (tzv. globální cese).

Podle § 1620 osnovy může kterákoliv ze smluvních stran smlouvu postoupit, a to se souhlasem druhé smluvní strany.[12] Osnova tedy sice činí konec pochybnostem o tom, zda lze vůbec smlouvu jako celek převést na jinou osobu, avšak z hlediska ZVZ se výše uvedené závěry nemění.

[11] Může se jednat zejména o případy, ve kterých původní dodavatel ztratil schopnost plnit předmět veřejné zakázky krátce před zánikem smlouvy a výběr nového dodavatele by nebyl efektivní a hospodárný nebo ve kterých existuje nutnost zajistit kontinuální poskytování určité služby veřejnosti (v tomto případě by však měla být smlouva omezena na nezbytně nutnou dobu do výběru nového dodavatele na základě řádného zadávacího řízení).

[12] Ustanovení § 1620 odst. 1 osnovy zní: „*Každá ze smluvních stran může jako postupitel, souhlasí-li s tím druhá strana a nebylo-li dosud splněno, smlouvu postoupit. Postoupením smlouvy postupitel převádí třetí osobě svá práva a povinnosti ze smlouvy nebo z její části, ledaže to povaha smlouvy vylučuje.*“.

2.4 Stanovisko Generální advokátky ve věci C-454/06

Jak již bylo uvedeno výše, evropské právo veřejných zakázek obdobně jako český ZVZ upravuje pouze fázi výběru dodavatele pro uzavření smlouvy a změnami v subjektech uzavřených smluv se explicitně nezabývá; tyto otázky proto donedávna nebyly ani předmětem řízení před ESD.

Prvním případem, jehož předmětem jsou převážně změny dodavatele a změny smluvních podmínek veřejné zakázky je řízení o předběžné otázce C-454/06 Pressetext Nachrichtenagentur GmbH.[13] V tomto případu nebyl dosud vydán rozsudek, avšak dne 13. března 2008 bylo zveřejněno stanovisko Generální advokátky k tomuto případu[14]. Přestože se tedy vlastní rozhodnutí v této věci může od návrhu Generální advokátky lišit, je nepochybně zajímavé věnovat se některým jeho závěrům.

Předmětem jedné ze vznesených předběžných otázek bylo, zda je možný převod smlouvy na dceřinou společnost, kterou původní dodavatel ovládá a ve které vlastní 100 % obchodní podíl, a to i za situace, kdy není jisté, že bude vlastnit 100 % obchodního podílu po celou dobu trvání smlouvy. Generální advokátka v úvodu stanoviska nastolila domněnku toho, že obecně znamená změna dodavatele v průběhu plnění veřejné zakázky podstatnou změnu smlouvy, která vyžaduje provedení nového zadávacího řízení, neboť plnění veřejné zakázky by dále poskytoval subjekt, který se neucházel o plnění veřejné zakázky v konkurenci s ostatními potencionálními dodavateli a jehož výběr nebyl výsledkem srovnání nabídek s ostatními dodavateli; hrozilo by proto reálně narušení hospodářské soutěže a zvýhodnění tohoto nového dodavatele oproti ostatním potencionálním dodavatelům.[15]

Změna dodavatele však ve specifickém případě nemusí znamenat podstatnou změnu, a to při reorganizacích čistě interní povahy, v jejichž důsledku je realizace veřejné zakázky přenesena na dceřinou společnost a nad kterou původní dodavatel vykonává kontrolu obdobnou kontrole nad svými interními složkami.[16] V tomto případě se podle Generální advokátky jedná o operaci, která nenarušuje konkurenci a nemění podstatně podmínky smlouvy, přinejmenším z ekonomického hlediska. Na tom

[13] Předchozí (první) obdobný případ žádost o rozhodnutí předběžné otázky C-50/03 ve věci 1. Simrad GmbH & Co. KG, 2. Kongsberg Simrad AS vs. Ministerstvo vzdělávání, vědy a kultury Meklenburska-Předního Pomořanska byl nakonec vymazán z registru ESD.

[14] Stanovisko Generální advokátky J. Kokott ze dne 13. března 2008 ve věci C-454/06 Pressetext Nachrichtenagentur GmbH (http://curia.europa.eu).

[15] V tomto směru je zajímavé si povšimnout skutečnosti, že rakouské právo obsahuje principiálně obdobnou úpravu převzetí dluhu jako právo české, ke kterému je třeba jednostranného souhlasu věřitele. Přestože tedy nedochází formálně k uzavření nové smlouvy mezi zadavatelem a novým dlužníkem, je tento krok považován za podstatnou změnu smlouvy, která vyžaduje provedení nového zadávacího řízení.

[16] Zde je použita obdobná konstrukce jako u výjimky pro tzv. interní (in-house) poskytování, která umožňuje přímé zadání veřejné zakázky společnosti, nad kterou veřejný zadavatel vykonává kontrolu obdobnou kontrole nad svými interními složkami a která zároveň vykonává podstatnou část své činnosti ve prospěch tohoto veřejného zadavatele (viz zejména rozsudky ESD C-107/98 Teckal, C-26/03 Stadt Halle a C-340/04 Carbotermo a § 18 odst. 1 písm. j) ZVZ).

nemění nic ani skutečnost, že není zajištěno, že uvedené podmínky budou splněny po celou dobu trvání smlouvy. Podmínky je standardně třeba (zejména s ohledem na princip právní jistoty) posuzovat podle stávajícího stavu; proto by podle Generální advokátky opačný výklad přicházel v úvahu jen výjimečně, pokud by bylo v dané chvíli zřejmé, že ke konkrétní změně dojde.

Se závěrem týkajícím se změny dodavatele jako podstatné změny smlouvy nelze než souhlasit, neboť výběr dodavatele je primárním cílem zadávacího řízení. Zvolená konstrukce navíc umožňuje se vyhnout posuzování otázky z hlediska specifik jednotlivých národních právních řádů (odlišné úpravy cese, intercese či převodu smlouvy). Převod smlouvy na dceřinou společnost je podle našeho názoru problematičtější, protože dochází k vyvázání původního dodavatele ze závazkového vztahu a tedy odpovědnost za jeho plnění nese nový dodavatel. Je otázkou, zda je možné na situaci nahlížet jinak proto, že nový dodavatel je kontrolován dodavatelem původním.

3 Změny v předmětu či obsahu smluv

ZVZ (ani evropské zadávací směrnice) neupravují, až na níže popsané výjimky, ani postup změny v předmětu či obsahu smlouvy uzavřené na základě zadávacího řízení. Absence této výslovné úpravy však neznamená, že tyto změny jsou bez omezení možné. Naopak, obdobně jako v případě změn v subjektech těchto smluv je třeba vždy přihlížet k tomu, že tyto smlouvy byly (a musely být) uzavřeny v zadávacím řízení podle ZVZ a proto jejich změny s ním nesmí být v rozporu či ho obcházet, a to pod sankcí absolutní neplatnosti s poukazem na § 39 OZ[17].

Z hlediska ZVZ můžeme specificky rozlišit případy, kdy dochází:

a) k rozšíření předmětu veřejné zakázky a
b) k jiným změnám předmětu či obsahu smlouvy.

Důvodem tohoto rozlišování jsou ustanovení § 23 odst. 4 písm. a), odst. 5 písm. b) a odst. 7 písm. a) a b) ZVZ, které upravují možnosti zadat veřejnou zakázku konkrétnímu dodavateli v jednacím řízení bez uveřejnění. Jak již bylo uvedeno výše, jedná se o jediná ustanovení ZVZ, které se rozebírané problematiky týkají. Všechny tyto případy pak umožňují zejména rozšíření předmětu původní veřejné

[17] Tento důsledek byl specificky zakotven v § 90 odst. 1 předchozího zákona č. 40/2004 Sb., o veřejných zakázkách: *„Zadavatel nesmí učinit úkon, který svým obsahem nebo účelem odporuje tomuto zákonu nebo jej obchází anebo se příčí dobrým mravům. Takový úkon je od počátku neplatný.*". ZVZ toto ustanovení neobsahuje a většinovým právním názorem zřejmě je, že se v plném rozsahu uplatní obecná právní úprava (výslovné zakotvení speciální úpravy neplatnosti v ZVZ bylo vypuštěno při projednávání návrhu zákona v Legislativní radě vlády).

zakázky. Naproti tomu postup pro provedení jiných změn předmětu a obsahu (tj. bez rozšíření předmětu původní veřejné zakázky) ZVZ neobsahuje.

3.1 Rozšíření předmětu veřejné zakázky

Nejtypičtějším případem rozšíření veřejné zakázky je postup podle § 23 odst. 7 písm. a) ZVZ, který je umožněn ve vztahu k veřejným zakázkám na stavební práce a veřejným zakázkám na služby, a to za stanovených podmínek, mezi než patří nepředvídatelnost, nezbytnost k dokončení původní veřejné zakázky a rozsah do 20 % ceny původní veřejné zakázky (často se hovoří o tzv. vícepracích). Ve vztahu k veřejným zakázkám na dodávky tuto funkci plní ustanovení § 23 odst. 5 písm. b) ZVZ (jedná se možnost nakoupit dodatečné dodávky od původního dodavatele z důvodu „technické slučitelnosti", a to ve lhůtě 3 let od uzavření původní smlouvy).[18]

Do této kategorie patří rovněž postup podle § 23 odst. 7 písm. b) ZVZ ve spojení s § 99 ZVZ, které umožňuje zadavateli vyjednat si, na základě předchozí výhrady a ve lhůtě 3 let od uzavření původní smlouvy, rozšíření předmětu plnění ve vztahu ke stavebním pracím a službám o obdobná plnění (tzv. opční právo).

Rozšíření předmětu plnění je možné rovněž na základě § 23 odst. 4 písm. a) ZVZ, který umožňuje zadání veřejné zakázky v jednacím řízení bez uveřejnění konkrétnímu dodavateli na základě technických či uměleckých důvodů, z důvody ochrany výhradních (nejčastěji autorských) práv nebo z důvodů vyplývajících ze zvláštního právního předpisu. V tomto případě se však může rovněž jednat o zadání samostatné veřejné zakázky, a nikoliv o změnu již uzavřené smlouvy.

Ve všech případech uvedených výše jsou tedy podmínky i postup rozšíření smlouvy předvídané ZVZ a nepředstavují z hlediska sledované problematiky zásadnější problém; vzhledem k zaměření příspěvku se jím proto již dále nebudeme zabývat.[19]

[18] V této souvislosti je třeba (i pro další, níže uvedené případy) upozornit na rozdílné pojetí problematiky z hlediska práva veřejných zakázek a občanského a obchodního práva. Z hlediska právní teorie veřejných zakázek a konstantní rozhodovací praxe Úřadu pro ochranu hospodářské soutěže je každé rozšíření předmětu veřejné zakázky považováno za novou veřejnou zakázku, jejíž zadání musí být posouzeno standardním způsobem podle ZVZ (zejména tedy posouzení, zda je možné přímé zadání konkrétnímu dodavateli nebo je třeba rozšíření zadat standardním způsobem v hospodářské soutěži). Naproti tomu z hlediska smluvního se bude převážně jednat o změnu již existující smlouvy.

[19] S ohledem na zaměření příspěvku ponecháváme stranou rovněž otázku interpretace podmínek pro použití jednacího řízení v uvedených případech, která může být poměrně problematická (a byla rovněž předmětem řady rozsudků ESD i rozhodnutí Úřadu pro ochranu hospodářské soutěže).

V ostatních případech není postup ZVZ předvídán, lze však mít za to, že s ohledem na skutečnost, že z hlediska právní teorie veřejných zakázek je takové rozšíření považováno za novou veřejnou zakázku, musí být zadáno v některém ze zadávacích řízeních stanovených ZVZ.[20]

3.2 Jiné změny předmětu či obsahu smlouvy

Jak již bylo uvedeno výše, jedná se o případy, které ZVZ výslovně neupravuje a proto při jejich posuzování je třeba vycházet ze smyslu a základních zásad ZVZ (§ 6 ZVZ). Jedná se rovněž o kategorii zahrnující celou řadu rozličných případů, které bude vždy nutné posoudit ad hoc. Stejně jako v případě změny v subjektech smlouvy tato otázka přesahuje rámec českého právního řádu a stala se předmětem zájmu práva Evropských společenství.

Vzhledem k možné absolutní neplatnosti změn smluv uzavřených podle ZVZ s ohledem na § 39 OZ je zásadní otázkou, zda jsou vyloučeny jakékoliv změny uzavřené smlouvy. Evropské právo veřejných zakázek a rozhodnutí ESD v tomto směru rozlišují podstatné a nepodstatné změny, přičemž pouze podstatné změny nejsou připuštěny, respektive nejsou připuštěny bez toho, aby bylo provedeno nové zadávací řízení.[21]

Za podstatné změny je přitom třeba považovat takové změny, které omezují ve vztahu k dané veřejné zakázce konkurenci nebo zvýhodňují stávajícího dodavatele veřejné zakázky oproti ostatním potencionálním dodavatelům. Zejména se jedná o takové změny, u nichž nelze vyloučit, že by jiní dodavatelé mohli za změněných podmínek nabídnout (ať už v době zadání původní veřejné zakázky nebo v době uvažované změny) lepší podmínky než stávající dodavatel, případně, že by (potencionálně lepší) nabídku mohlo v důsledku změněných podmínek nabídnout více dodavatelů.[22]

Specifickou kategorií těchto změn představuje změna těch smluvních ujednání, které byly hodnotícími kritérii pro zadání veřejné zakázky (typicky nabídková cena, lhůta plnění či výše smluvní pokuty). Jejich změna představuje vždy změnu podstatnou a jako taková je bez nového zadávacího řízení v zásadě

[20] Pouze pro úplnost dodáváme, že teoreticky není zcela dořešena otázka, zda je při volbě postupu zadání možné vycházet pouze z předpokládané hodnoty (viz § 13 a násl. ZVZ) této nové části nebo je nutné vzít v úvahu předpokládanou hodnotu celé veřejné zakázky, tj. včetně původní již zadané části. Autor se domnívá, že situaci je třeba vždy posoudit ad hoc, avšak přiklání se spíše k druhé možnosti vzhledem k tomu, že v případě první možnosti by se mohlo jednat o nezákonné dělení předmětu veřejné zakázky (§ 13 odst. 3 ZVZ) s důsledkem aplikace méně přísného způsobu zadání, než kdyby zadavatel zadal všechny části společně.

[21] Viz např. rozsudek ESD C-337/98 Komise Evropských společenství vs. Francie, body 46, 50 a 51 nebo C-496/99 P Komise Evropských společenství vs. CAS Succhi di Frutta, bod 117.

[22] Naposledy viz stanovisko Generální advokátky J. Kokott ze dne 13. března 2008 ve věci C-454/06 Pressetext Nachrichtenagentur GmbH, body 48 a 49.

nepřípustná (podle § 82 odst. 2 věty druhé ZVZ musí zadavatel uzavřít smlouvu v souladu s návrhem smlouvy obsaženým v nabídce vybraného uchazeče). Změnu těchto ujednání lze připustit pouze z důležitých objektivních okolností (např. prodloužení lhůty pro realizaci díla z důvodu záplav, které znemožňovaly provádění prací).

Ostatní změny, které nelze kvalifikovat jako podstatné, tedy jsou nepodstatné a nevyžadují provedení nového zadávacího řízení; Lze je proto povést mimo postupy regulované ZVZ.

Další modelovou situací jsou případy, kdy nedochází k rozšíření, ale naopak ke zúžení předmětu veřejné zakázky. Vzhledem k tomu, že v tomto případě nedochází k realizaci části veřejné zakázky, která byla řádně zadána podle ZVZ, a tedy nedochází ke zvýšení výdajů zadavatele, mohla by tato situace svádět k závěru, že zúžení předmětu veřejné zakázky je nepodstatnou změnou. Tento závěr však nelze učinit paušálně a na každý konkrétní případ je třeba aplikovat kritéria uvedená výše. Zásadnější zmenšení předmětu veřejné zakázky by totiž mohlo (pokud by bylo známo již před uzavřením smlouvy) významně ovlivnit okruh uchazečů o veřejnou zakázku a tím i podané nabídky.[23]

V této souvislosti je třeba upozornit na další případ, k němuž v praxi často nesprávně dochází, a tím je vzájemné započítávání rozšíření a zúžení částí předmětu veřejné zakázky. Zadavatel tedy část původně zamýšleného předmětu plnění nerealizuje, ale místo něj rozšíří předmět plnění o jinou, původně nezamýšlenou část. Výdaj zadavatele se tedy zdánlivě nezmění (případně se dokonce sníží). Takový postup je ovšem nepřípustný, neboť každý z těchto kroků je třeba posuzovat samostatně, jak bylo naznačeno výše. V případě rozšíření předmětu plnění se musí jednat o některý z důvodů § 23 ZVZ pro použití jednacího řízení bez uveřejnění, zatímco v případě zúžení je třeba posoudit, zda se nejedná o nepřípustnou podstatnou změnu.

Tento příspěvek je věnován posouzení zejména těch změn smluv, ke kterým dochází dohodou smluvních stran. Pro úplnost je však třeba se zmínit i o změnách, které nastávají přímo ex lege či na základě externí objektivní skutečnosti, která je však ve smlouvě předvídána. Je zřejmé, že změny vyplývající přímo ze zákona jsou přípustné. Často se bude jednat pouze o technické úpravy smluvních ujednání (typicky přechod z národní měny na eura). Přípustné bez nového zadávacího řízení jsou rovněž změny, jejichž mechanismus je ve smlouvě předvídán. Obvykle se jedná o inflační doložku či vazbu nabídkové ceny například na cenu určité suroviny na komoditní burze. Přípustné jsou zřejmě i

[23] Velikost předmětu veřejné zakázky má často dopad do stanovení kvalifikačních kritérií (např. výše požadovaného obratu nebo referenčních zakázek), které omezují některé uchazeče v podání nabídky. Bez významu nejsou ani dopady zmenšení předmětu veřejné zakázky na nabídkovou cenu.

takové změny, které nejsou takto „matematicky přesně“ determinovány, avšak mechanismus jejich změny je předem stanoven a limitován (např. výpočet výše ceny za vodné a stočné, které jsou věcně usměrňovanými cenami, pravidla pro jejich výpočet jsou stanovena v cenovém věstníku Ministerstva financí a renegociace ceny je připuštěna pouze tehdy, pokud se významným způsobem sníží odběry vody či významně vzroste cena některého ze vstupů).

4 Závěr a úvahy de lege ferenda

Na základě výše uvedených úvah můžeme učinit závěr, že změny smluv uzavřených na základě zadávacího řízení ZVZ jsou v omezeném rozsahu možné. Právní úprava však v tomto směru není zcela jednoznačná, zejména není zcela zřejmý vztah ZVZ a obecných právních předpisů (zejména ve vztahu k § 39 OZ) a rovněž jejich vazba na právo ochrany hospodářské soutěže.

Ve vztahu ke změnám smluvních stran komplikuje situaci ne zcela jasné vymezení možnosti převodu smlouvy, avšak ani samotné posouzení možnosti provést změnu v osobě zadavatele nebo dodavatele není jednoznačné a bylo by možno de lege ferenda uvažovat i o speciální úpravě v ZVZ. Stejně nejasná je i situace v otázce změn v předmětu a obsahu smluv, u které je přípustnost či nepřípustnost změn nutné posuzovat s ohledem na rozsudky ESD ve vztahu k tzv. podstatným a nepodstatným změnám. Rovněž v této oblasti by bylo možné uvažovat o speciální úpravě v ZVZ. V obou případech však bude třeba vyčkat na rozhodnutí ESD ve věci C-454/06. Podle našeho názoru však zakotvení specifické právní úprav změn smluv není příliš vhodné (zejména protože, že by nutně muselo směřovat ke kasuistické úpravě nebo by se jednalo o velmi vágní ustanovení, která by výkladové problémy neodstranila) a doporučujeme ponechat tento výklad v rovině rozsudků ESD a rozhodnutí Úřadu pro ochranu hospodářské soutěže.

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CONSUMER PROTECTION IN THE HUNGARIAN COMPETITION LAW

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Abstract

This contribution analyses the legal provisions on consumer protection in the Hungarian competition law such as the Hungarian Competition Act and the Hungarian Advertising Act guaranteeing the fair treatment of consumers in the economic market. The legal practice is also shown through fraudulent market behaviors revealed in the credit card market. The contribution also deals with changes emerging shortly according to transposition of EC directives.

Key words

Hungarian competition law- Hungarian consumer law- Hungarian case law- transposition of EC directive

One of the significant elements of the economic competition is the battle to gain the consumers' confidence. In this "battlefield" consumers needed a special legal protection because their rights and interests were often violated by dishonest market behaviors in many different cases. To this end the state has established the frames of fair and free economic market. In Hungary the legal requirements being in force are in the Act LVII of 1996 with the title prohibition of unfair and restrictive market practices (furthermore: the Hungarian Competition Act). The aim of the regulation is to achieve a fair competition on the economic market with excluding behaviours having harmful effect on consumers' decision. Thus, the Hungarian Competition Act assures legal background of developing a highly informed customer society, whose members can make their buying choice under no unfair influence.[1]

[1] About Hungarian competition law see more: Miskolczi-Bodnár Péter: *Versenyjog*: Miskolc, Novotni Alapítvány, 2005, ISBN 963 9360 317

Legal provisions in the Hungarian Competition Act according to consumer protection

The Hungarian Competition Act dedicates an own chapter to the unfair manipulative activities, and in general it prohibits deceiving consumers in economic competition.

We can find more articles protecting the interests of customers. For example the prohibition on abuse of a dominant position particularly, when it limits production, distribution or technical development to the disadvantage of the consumers. The Hungarian Competition Authority will only permit a concentration of certain undertakings if, inter alia, they have no harmful effect on the interests of the consumers.

The Hungarian Competition Act specifies two behaviors that should not be allowed in any circumstances. The first prohibition pertains to the misleading of consumers. The second one is about those unjustified business methods that restrict the freedom of consumers' choice.

The Hungarian Competition Act also gives examples of the typical unfair business activities. Some sellers give false declaration or facts about their goods in order to convince the consumers that their product or service is the best, the most useful in the market. These declarations and facts are usually in connection with the price and main features of the goods. The essential features according to the Hungarian Competition Act are composition, use, effects on health and environment, handling, origin, source or method of purchasing of the goods. Another form of deception is giving false information about the sale and the distribution of the goods. This misleading information is usually about method of distribution, terms of payment, discounts or it holds the chance of winning or obtaining gifts. Consumers can also be deceived, when the seller conceal from the consumers that the offered product or service does not meet the legal or other usual requirements or they are not informed about the unaccustomed use. The Hungarian Competition Act also specifies and therefore prohibits those business activities that create the persuasion about a beneficial purchase based on false impression. Creating conditions which do not facilitate the objective evaluation and comparison of goods or offers is also prohibited. It should be remarked that this list is only setting some examples to make the application of law easier; the Hungarian Competition Authority has competence for intervention in other unfair manipulative situations as well.

Fraudulent behaviors in advertising

In many cases consumers make their decisions on the basis of the information passes by advertisements. These commercial massages usually intend to attract consumers' attention and to encourage them to buy or use that certain product. The number of advertising opportunities is boundless, and it is continually increasing due to the development of information and communication technology. The commercial messages mostly consist of persuasive pictorial and/or sound effects and some informational facts about the product. The advertisers do their best to increase sale and popularity. In some cases the chosen advertising practice can also be suitable to deceive consumers' rights. Thus, consumers' interests need legal protection in this field as well.

In Hungary the Act LVIII of 1997 (furthermore: Hungarian Advertising Act) contains the provisions concerning to the business advertising activity. The Hungarian Competition Authority also controls the application of the provisions on the comparative advertising[2] and on the prohibition of misleading advertising declared by the Hungarian Advertising Act. In other fraudulent cases the National Authority for Consumer Protection and in pharmaceutical advertising the National Institute of Pharmacy has competence to proceed.

In case of an infringement process, the Competition Council examines the reality of the facts stated in the advertisement. Sometimes even those ads containing accurate information can have a deceptive influence on consumers due to their pictorial appearance (small letters, colors merged into the background, insufficient time for reading). The whole impression created by the advertisement is also taken into account during the process. The types of advertising are considered as well. Different amount of information and message can extracted from flyers, TV screens, car doors, pages of magazines. Another relevant consideration is the fact that there are consumers who are well-informed and those who are not. In a lot of cases, the consumers can not repeat the details of the contract, although they concluded it personally. Other relevant aspects are for instance that it can not be expected from consumers to handle all excessive advertisements under protest and check their statements all the time. When the Competition Council judging a situation the aim of the advertisements also deserves attention: namely to generally inform potential customers about products and services in order to increase consumption. Consequently commercial messages are not suitable to cover all relevant information and facts.

The Competition Council particularly considers in case of imposing a fine:

– the duration and frequency of advertisement's appearance,

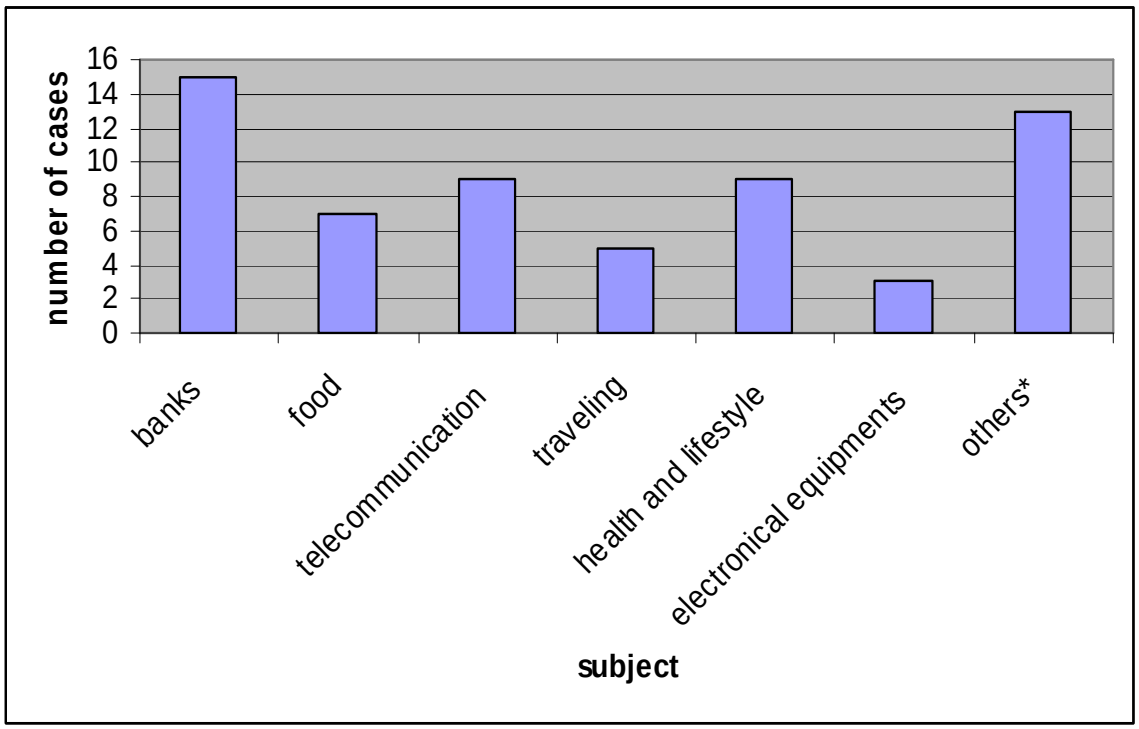
[2] See more: Péter Miskolczi-Bodnár: *Definition of comparative advertising*, In: European Integration Studies, , Volume 3., Number 1., Miskolc, Miskolc University Press, 2004, pp. 25-44., ISSN 1588-6735

- the role of the enterprise in the market,
- retentive power of fine according to the other competitors perspective,
- the sum of money spent on advertising,
- number of consumers who received the misleading information

Continuous misleading activities of banks

In 2007 the Competition Council of the Hungarian Competition Authority conducted all together 158 processes. More than 50% of these cases were in connection with the deception of consumers. The following graph shows a comparative view on these cases based on subject matters:

Graph 1: Cases in 2007



Source: www.gvh.hu

(*subjects occurred only once or twice in 2007)

It follows that most cases were in connection with misleading information about bank products and services. After the comparison, it can be concluded that most consumer-frauds occurred on the credit card market. The banks failed to give appropriate information about the use of credit cards, especially about the conditions of no-interest payments. At the end of the series of market cleaning investigation

processes the Hungarian Competition Authority imposed fines that total 268 Million HUF (approximately more than 1 Million €) on 7 banks.[3] In other cases, the reasons for conducting investigations against banks were incomplete guidance referring to the Standardized Deposit Interest Rates Index[4], promise of availing certain interest[5] and credits[6].

The importance of the consumer protection in this field is also emphasized in the report[7] of the Hungarian Financial Supervisory Authority. It draw the attention that

- most of the consumers do not know what the details of the interest free credit periods are,
- consumers usually do not consider that the interest free period will only apply, if the time limits of repaying the debt (for instance the annual cost of running the credit card, operational costs) are complied. The financial institutions usually fail to inform their customers about these provisions in the advertisements (although the contracts content them),
- Ads do not give all the necessary information to the consumers about credit cards. The details can be found in the general contracting rules or other documents that are usually very long and difficult for laymen to understand.
- Banks inform consumers on leaflets, ads, posters, homepage about the Standardized Deposit Interest Rates Index but detailed facts are failing.

After recognizing the imperfection of informing consumers about using credit cards in advertisements the Hungarian Financial Supervisory Authority decided to release online available guidelines and charts (making objective comparison between credit cards of certain financial institutes easier) for consumers.[8]

Foreseeable changes on the field of consumer protection in the Hungarian competition law

The European Union is also dealing with the insurance of fair economic competition. In 2005 the European Council and European Parliament adopted a directive called the "Unfair Commercial Practices Directive"[9]. In the following year the 2006/114/EC directive[10] was released. The reason was that

[3] Vj-78/2007/41, Vj-79/2007/189, Vj-76/2007/69, Vj-48/2007/43,Vj-49/2007/64,Vj-47/2007/58, Vj-113/2007/41
[4] 129/2007/14, Vj-17/2007/15
[5] Vj-114/2007/19
[6] Vj-53/2004/18
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[9] Directive 2005/29/EC of the European Parliament of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council ('Unfair Commercial Practices Directive) OJ L 149, 11.6.2005, pp. 22-39.

previously the laws of the Member States of the European Union concerning to these issues showed differences which could generate barriers against the functioning of the internal market. [11]

The Hungarian drafts according to the transposition of these directives are now among the items of legislative schedule of the spring session 2008 of the Parliament. The amendments will touch upon more Acts such as the Consumer Protection Act or Hungarian Competition Act. A unified Code will regulate the provisions and the restrictions on business advertising activities. A completely new Act related to the business-to consumer relationship is also among the drafts with the title "Act on Prohibition of Unfair Commercial Practices against Consumers".

The heading of chapter according to consumer protection in the Hungarian Competition Act will switch to "unfair manipulation of business decisions". The general prohibition will regard to the unfair manipulation of the *business partners'*[12] (instead of consumers') decisions in the economic market.

The drafted Code on business advertising activity intends to make changes on terms and definitions[13] and establish new ones such as the definition of enterprise, or the code of conduct. The draft would initiate more regulation to protect the interests of children. The provisions on tobacco and alcoholic beverages will be refined as well. A new chapter will deal with the misleading advertisements and the comparative advertisements.

The most significant alteration is referring to the distinct regulation of unfair market and trade practices from a consumer protection perspective. It adopts the role of self-regulation in the development of consumer protection. The general prohibition on unfair commercial behaviours stands in the centre of the draft. These activities can not meet the diligence of professional requirements and distortion of economic behaviour of consumers. The deceptive and aggressive behaviours are specially emphasized and elaborated in the draft. In accordance with the Unfair Market Practices Directive a "black" list is annexed to the draft that includes 31 examples of unfair commercial activities. The directive neither establishes sanctions nor the acting authority. The competence in the Hungarian draft is divided among

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[10] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, pp. 21-27.

[11] See more: Christian Handig: The *Unfair Commercial Practices Directive – A Milestone in he European Unfair Competition Law?* In: European Business Law Review, Kluwer Law International, 2005, pp. 1117-1132, or Jules Stuyck, Evelyne Terryn, Ton von Dyck: Confidence through fairness? The new Directive on unfair business-to consumer commercial practices in the internal market, In: Common Market Law Review, Vol. 43. Kluwer Law International, 2006, pp.107-152.

[12] According to the draft a business partner is anyone who is not a consumer.

[13] The definition of consumer according to the current regulation is „all natural and legal persons and companies with no legal personality on which the advertisement is targeted" in the Hungarian Advertising Act. The draft uses the term of "addressee of advertisement" instead of "consumer".

the National Authority of Consumer Protection, Hungarian Competition Authority and Hungarian Financial Supervisory Authority. Responsibility issues and conduction of infringement proceeding is also regulated.

It is doubtless that the current legal regulation needs changing in order to better serve the interests of consumers in the European Union. The reforms will concern to all participants of the economic market. It is still questionable whether the new system can redeem what is expected. One aspect will still remain: provisions on the protection of consumers in competition law will be declared in more Acts. It is worth deliberating with conformity of these acts to each other. Maybe it can not serve appropriately the interests of consumers if more Codes intend to protect them by "diffused" regulation. Time will probably give the solution, and it will also be emerged whether the business sector could get prepared to apply the new rules and meet the legal requirements.

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MEZINÁRODNÍ ÚNOSY DĚTÍ

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Abstrakt

Příspěvek se věnuje aktuální problematice mezinárodních únosů dětí na území ES. Zohledňuje právní úpravu obsaženou v Haagské úmluvě o občanskoprávních aspektech mezinárodních únosů dětí, nařízení Brusel II. bis a jejich vzájemné působení. Je poukázáno na několik problémů týkajících se řízení o navrácení dítěte.

Klíčová slova

Mezinárodní únosy dětí, Haagská úmluva o občanskoprávních aspektech mezinárodních únosů dětí, nařízení Brusel II. bis, řízení o navrácení dítěte, obvyklé bydliště

Abstract

The contribution puts mind on actual questions of international abduction of children on the territory of EU. It takes into account the legal regulation contained in the Convention on civil aspects os international child abduction, Council Regulation (EC) No 2201/2003 and their interference. Some problems of this theme is pointed in the contribution.

Key words

International abduction of children, Convention on civil aspects os international child abduction, Council Regulation (EC) No 2201/2003, proceedings for the return of children, habitual residence.

Dnešní svět je globalizován, cestovat za turistikou i mimo hranice státu či kontinentu je absolutně běžnou záležitostí, spolu s pádem železné opony a pozdějším otevřením Evropy v souvislosti s evropskou integrací se stejnou notorietou stává či stalo cestování za prací. Lidé se mohou především v rámci Evropských společenství pohybovat bez omezení, překážky pro pracovní trh jsou postupně odstraňovány. Spolu s dlouhodobým pobytem vznikají i mezinárodní vztahy nejenom na bázi obchodní, ale i osobní, jsou zakládána mezinárodní manželství či partnerství, z nich se rodí děti, které mají nebo mohou mít zázemí ve dvou či i více státech.

Není nic jednoduššího než že se vztah rozpadne a v tu chvíli vyvstává problém, jak vyřešit vazbu dítěte k oběma rodičům (styk dítěte s nimi), resp. právo dítěte být vychováváno a být ve styku svými rodiči a s tím spojené právo obou rodičů vychovávat své dítě a být s ním ve styku. V mnohých případech je věc vyřešena dohodou, popř. rozhodnutím orgánu k tomu určenému, většinou soudu. Objevují se však situace, kdy k tomuto „ideálnímu" řešení nedojde, jeden z rodičů vezme situaci do svých rukou a dítě odveze mimo jeho bydliště, typicky do země svého původu (odlišné od země předchozího dlouhodobějšího pobytu dítěte). V tu chvíli začínáme mluvit o mezinárodním únosu dítěte.

Celé posouzení věci je však daleko složitější, s ohledem na omezené rozsahové možnosti tohoto konferenčního příspěvku bude věnována pozornost zejména mezinárodním únosům v rámci území Evropy, resp. ES. Otázkou mezinárodních únosů dětí se zabývá především Úmluva o občanskoprávních aspektech mezinárodních únosů dětí, která byla přijata Haagskou konferencí mezinárodního práva soukromého se sídlem v Haagu dne 25. 10. 1980, přičemž platnosti dosáhla ke dni 1. 12. 1983. Jménem ČSFR byla podepsána dne 28. 12. 1992 1, ratifikace však proběhla až po poměrně dlouhém časovém období a pro ČR vstoupila Haagská úmluva v platnost až ke dni 1. 3. 1998. 2 (dále v textu jen jako „Haagská úmluva" nebo „Úmluva"). Důležitým aspektem, na něž je třeba upozornit je fakt, že se Úmluva vztahuje pouze na nezletilé děti mladší 16 let.

Pokud se tedy omezíme pouze na území ES, musíme zohlednit i úpravu obsaženou v nařízení Rady ES č. 2201/2003 ze dne 27. 11. 2003, o příslušnosti a uznávání a výkonu rozhodnutí ve věcech manželských a ve věcech rodičovské zodpovědnosti a o zrušení nařízení Rady ES č. 1347/2000. (dále v textu jen jako „nařízení Brusel II. bis")
Vztah nařízení Brusel II. bis a Haagské úmluvu 3 řeší samo nařízení ve svém článku 60, přičemž stanoví prioritu nařízení, pokud upravuje otázku shodnou s ustanoveními Úmluvy. Haagskou úmluvu však respektuje a podporuje její další používání s doplněním úpravy dle článku 11 nařízení, což deklaruje v preambuli v odstavci pod číslem 17. Další specifika jejich vzájemného působení budou rozebrána níže v textu.

1 Při podpisu byla k textu Haagské úmluvy vyjádřena výhrada k článku 26 odst. 2: „Česká republika nebude hradit výdaje uvedené v článku 26 odst. 2 Úmluvy, vzniklé účastí právního zástupce nebo poradce nebo jako náklady řízení, kromě nákladů, které je možné hradit podle její vlastní úpravy poskytování právní pomoci a poradenství"
2 Publikováno jako č. 34/1998 Sb.
3 Článek 60 nařízení Brusel II. bis se vypořádává i s kolizí úpravy nařízení a dalších mezinárodních úmluv a to následujících: Haagská úmluva ze dne 5. října 1961 o pravomoci orgánů a použitelném právu při ochraně nezletilých, Lucemburská úmluva ze dne 8. září 1967 o uznávání rozhodnutí týkajících se rozluky manželů, Haagská úmluva ze dne 1. června 1970 o uznávání rozvodů a zrušení manželského soužití, Evropská úmluva ze dne 20. května 1980 o uznávání a výkonu rozhodnutí o výchově dětí a obnovení výchovy dětí.

Nejdůležitějším pojmem v celé problematice je už samotný „mezinárodní únos“. Slovo „únos“ je chápáno jako něco velmi negativního a nežádoucím jevem jistě je, i když přemístění dítěte mimo místo/ stát jeho obvyklého bydliště může v některých případech mít pro něho i velmi pozitivní účinky. Proč? Haagská úmluva předpokládá jakýsi druh ideálního stavu. Dítě žije s rodiči, ať už jsou manželi či pouze kohabitujícím nesezdaným párem. Je také presumováno, že pokud je v rodině nějaký patologický stav od domácího násilí, zneužívání až po prostý rozpad vztahu rodičů, veškeré problémy budou vyřešeny právem daným způsobem, zasáhnou úřady, rodiče se dohodou např. na rozvodu apod. Systém však mnohdy z různých důvodů, jejichž příčinu je možné nalézt v hojných okolnostech, nezabrání všem negativním jevům, popř. je nepomůže vyřešit. Situace tak pro některého z rodičů může dospět do stádia, kdy ji již dle jeho názoru nelze řešit jinak než útěkem nejčastěji do země původu, kde s ohledem na znalost poměrů, blízkost rodiny apod. hledá bezpečí, podporu a doufá v pomoc místních orgánů. Útěk je však málokdy řešením v jakémkoli sporu. Dítě navíc bývá mnohdy využíváno jako rukojmí či zbraň jednoho rodiče vůči druhému v jejich sporech.

Ačkoli Úmluva o právech dítěte (dále v textu jen jako „ÚPD“) vznikla až o devět let po Haagské úmluvě 4, Haagská úmluva v mnohých ustanoveních prosazuje až později zakotvené principy. ÚPD mimo jiné zakotvuje, že dítě má právo na to být vychováváno oběma rodiči a že má být zabráněno nezákonnému přemisťování dětí za hranice jejich domovského státu a jejich nevracení zpět. 5
Mezinárodním únosem je dle dikce obou dokumentů protiprávní či neoprávněné přemístění/odebrání či zadržení dítěte mimo stát jeho obvyklého bydliště. Každý z pramenů práva podává svou vlastní definici, jsou si však v mnohém podobné a je zřetelná inspirace autorů textu nařízení v Úmluvě, přičemž text Nařízení je propracovanější a přehlednější.

Důraz je kladen právě na onu neoprávněnost či protiprávnost, která je spatřována v porušení práva péče o dítě, přičemž v době jeho přemístění bylo toto právo skutečně vykonáváno nebo by bylo vykonáváno, kdyby k přemístění nedošlo. 6 Stejný text definicí je oběma dokumenty vytvořen pro

4 20. 11. 1989, New York.

5 ÚPD čl. 7 odst. 1: „Každé dítě je registrováno ihned po narození a má od narození právo na jméno, právo na státní příslušnost, a pokud to je možné, právo znát své rodiče a právo na jejich péči.“
ÚPD čl. 18 odst. 1: „Státy, které jsou smluvní stranou úmluvy, vynaloží veškeré úsilí k tomu, aby byla uznána zásada, že oba rodiče mají společnou odpovědnost za výchovu a vývoj dítěte. Rodiče, nebo v odpovídajících případech zákonní zástupci, mají prvotní odpovědnost za výchovu a vývoj dítěte. Základním smyslem jejich péče musí přitom být zájem dítěte.
ÚPD čl. 11 odst. 1: „Státy, které jsou smluvní stranou úmluvy, činí opatření k potírání nezákonného přemísťování dětí do zahraničí a jejich nenavracení zpět.
ÚPD čl. 20 odst. 1: „Dítě dočasně nebo trvale zbavené svého rodinného prostředí nebo dítě, které ve svém vlastním zájmu nemůže být ponecháno v tomto prostředí, má právo na zvláštní ochranu a pomoc poskytovanou státem.

6 Tuto specifikaci obsahuje Nařízení již v definici neoprávněného odebrání či zadržení dítěte, v textu Haagské úmluvy ji nalezneme v článku 3.

určení obsahu práva péče o dítě (péče o osobu dítěte) se zvýrazněním práva určit jeho místo pobytu i pro podmínku faktické existence péče o dítě.

Dosud byla zmíněna pouze situace, kdy se jedná o únos dítěte mezi jeho rodiči, „poškozenou“ stranou však může být i další osoba odlišná od rodiče, instituce nebo kterýkoli jiný orgán, kterému svědčí zákonem, rozhodnutím správního či soudního orgánu nebo závaznou dohodou přiznané právo péče o dítě.

Haagská úmluva: Čl. 3

Přemístění nebo zadržení dítěte se považuje za protiprávní, jestliže:

a) bylo porušeno právo péče o dítě, které má osoba, instituce nebo kterýkoliv jiný orgán buď společně, nebo samostatně, podle právního řádu státu, v němž dítě mělo své obvyklé bydliště bezprostředně před přemístěním nebo zadržením,

b) v době přemístění nebo zadržení bylo toto právo skutečně vykonáváno, společně nebo samostatně, nebo by bylo takto vykonáváno, kdyby bylo nedošlo k přemístění či zadržení.

Právo péče o dítě uvedené v písmenu a) může vyplývat zejména ze zákonů nebo ze soudního nebo správního rozhodnutí nebo z dohody platné podle právního řádu daného státu.

Nařízení Brusel II. bis: Čl. 2 Definice

Pro účely tohoto nařízení: ….

11. "neoprávněným odebráním nebo zadržením" se rozumí odebrání nebo zadržení dítěte,

a) kterým je porušováno právo péče o dítě vyplývající ze soudního rozhodnutí, ze zákona nebo z právně závazné dohody podle právních předpisů členského státu, ve kterém mělo dítě své obvyklé bydliště bezprostředně před odebráním nebo zadržením,

a

b) za předpokladu, že v době odebrání nebo zadržení bylo skutečně vykonáváno právo péče o dítě, ať společně nebo samostatně, nebo by toto právo bylo vykonáváno, kdyby k odebrání nebo zadržení nedošlo. Péče o dítě se považuje za vykonávanou společně v případě, kdy podle rozhodnutí nebo ze

zákona jeden z nositelů rodičovské zodpovědnosti nemůže rozhodnout o místě bydliště dítěte bez souhlasu jiného nositele rodičovské zodpovědnosti.

Jak tedy probíhá samotná procedura „řízení o navrácení dítěte“?

Nařízení Brusel II. bis řeší ve svém článku 10 „Příslušnost v případě únosu dítěte“, toto ustanovení však nedopadá na samotné řízení o navrácení dítěte, Haagská úmluva stanoví příslušnost orgánu rozhodující o navrácení dítěte jako soudní nebo správní orgán státu, do kterého bylo dítě přemístěno, resp. ve kterém se nachází, což je logické s ohledem na např. procesní právo dítěte být vyslechnuto v řízení atd. Výše již byl popsán vztah nařízení a Úmluvy, kdy Úmluva je považována za základní pramen práva pro postup v řízení o navrácení dítěte, nařízení funguje jako jakýsi „lex specialis“, který pozměňuje Úmluvu v určitých ustanovením. Z tohoto vztahu bude vycházet i následující výklad.

Dle Haagské úmluvy vznikly v každém z členských států tzv. „Ústřední orgány“, jejichž úkolem je výkon povinností uložených Úmluvou. 7 Musí spolu navzájem spolupracovat a podporovat spolupráci mezi příslušnými orgány ve svých státech, aby byl zajištěn bezodkladný návrat dítěte a splnění dalších cílů Úmluvy. V ČR je tímto orgánem Úřad pro mezinárodně právní ochranu dětí se sídlem v Brně.

Tyto orgány, ať již jsou v místě obvyklého pobytu dítěte či v místě jeho nového protiprávního pobytu, jsou těmi, na koho se osoba „poškozená“ na svých právech péče o dítě může obracet. 8 Také jsou většinou první státní institucí, která se do sporu o místo pobytu dítěte zapojí. Haagská úmluva jako prioritu stanoví smírné vyřízení, resp. dobrovolné navrácení dítěte, Ústřední orgány učiní nebo zařídí, aby byla učiněna, všechna opatření k dosažení tohoto stavu ještě než je věc řešena soudní cestou. Evropská unie v tomto směru také podnikla určité kroky a zřídila post Zprostředkovatele Evropského parlamentu pro případy mezinárodních únosů dětí. V současné době je tímto zprostředkovatelem poslankyně Evropského parlamentu paní Evelyne Gebhardt. 9

Pokud selže smírné řešení, nezbude jiná možnost než podat návrh na zahájení řízení o navrácení dítěte k soudnímu nebo správnímu orgánu státu, kde se dítě nachází. 10

V celém řízení o návrat dítěte je kladen velký důraz na jeho rychlost v souladu s dalšími mezinárodními dokumenty zabývajícími se právy dítěte (např. článek 7 Evropské úmluvy o výkonu práv dětí). Haagská úmluva v souladu s nařízením Brusel II. Bis stanoví lhůtu 6 týdnů od zahájení řízení pro vydání rozhodnutí. Nařízení dále specifikuje, že rozhodující orgán (pro nařízení Brusel II. bis je to vždy soud) musí využívat nejrychlejší postupy, které mu vnitrostátní právo umožňuje. Pokud rozhodující orgán nevydá rozhodnutí ve stanovené lhůtě, může navrhovatel nebo Ústřední orgán žádat sdělení důvodů průtahů.

Tato ustanovení mají jednoduchý důvod. Není přípustné dále podporovat protiprávně nastavený stav. Navíc dětem běží čas úplně jinak než dospělým a velmi rychle si zvykají. Případný návrat do původního bydliště, ačkoli by byl maximálně v souladu s právem, by pro dítě byl dalším velkým traumatem. Samotné odloučení od jednoho rodiče a přítomnost pouze druhého – únosce skýtá valné nebezpečí

7 Blíže čl. 6 a 7 Haagské úmluvy.

8 Čl. 8 Haagské úmluvy: „Osoba, instituce nebo jiný orgán, který tvrdí, že dítě bylo přemístěno nebo zadrženo jednání porušujícím právo péče o dítě, může žádat buď ústřední orgán obvyklého bydliště dítěte, nebo ústřední orgán kteréhokoliv jiného smluvního státu o pomoc při zajištění návratu dítěte.

9 Zpráva o její činnosti je přístupná z: http://www.europarl.europa.eu/pdf/mediator_children/2007_05_16_midterm_report_combined_cs.pdf

10 „Poškozená“ strana většinou ví, kam bylo dítě přemístěno, resp. to alespoň tuší. Proběhne tak ono oslovení ústředního orgánu dle Haagské úmluvy a jedním z úkolů tohoto orgánu je mimo jiné zjistit místo pobytu dítěte. Pokud zjistí, že dítě je pravděpodobně v jiném členském státě, předají podnět tam.

ovlivnění mínění dítěte vůči nepřítomnému rodiči a vzniku tzv. syndromu zavrženého / odmítnutého rodiče.

Haagská úmluva v čl. 12 stanoví, že : „*Jestliže dítě bylo protiprávně přemístěno nebo zadrženo podle článku 3 a v den zahájení řízení před soudním nebo správním orgánem smluvního státu, v němž dítě je, uplynulo období kratší jednoho roku ode dne protiprávního přemístění nebo zadržení, nařízení příslušný orgán bezodkladné navrácení dítěte*.“, tedy bylo nařízeno navrácení dítěte musí být splněny tyto podmínky:

1/ přemístění či zadržení dítěte muselo být protiprávní v souladu s dikcí čl. 3,

2/ od tohoto přemístění do zahájení řízení o navrácení dítěte neuplynul 1 rok.

Z této „generální klauzule“ je však několik výjimek:

a/ i když uplynul rok od protiprávního přemístění, nařídí se navrácení dítěte, pokud se neprokáže, že se dítě s novým prostředím sžilo,

osoba či instituce, která nesouhlasí s navrácením dítěte, prokáže, že:

b/ navrhovatel ve skutečnosti nevykonával právo péče o dítě nebo souhlasil či se později smířil s přemístěním dítěte, nebo

c/ je vážné nebezpečí, že návrat by dítě vystavil fyzické nebo duševní újmě nebo je jinak dostal do nesnesitelné situace,

d/ dítě nesouhlasí s návratem a zároveň dosáhlo věku a stupně vyspělosti, v němž je vhodné přihlížet k jeho stanoviskům,

e/ návrat dítěte nedovolují základní zásady dožádaného státu o ochraně l idských práv a základních svobod. 11

Při hodnocení skutečností dle výše uvedených písmen d/ a e/ musí rozhodující orgány přihlédnout k informacím týkajícím se sociálního postavení dítěte poskytnutým ústředním orgánem nebo jiným příslušným orgánem státu obvyklého bydliště dítěte. 12

Při řízení o navrácení dítěte je tedy nutné zjistit, zda dítě bylo přemístěno protiprávně z místa obvyklého bydliště, a zda existuje – je prokázána - nějaká překážka jeho navrácení (viz výše písm. a/ - e/).

11 Blíže čl. 12, 13 a 20 Haagské úmluvy.

12 Zjištění celkových sociálních poměrů dítěte v místě obvyklého bydliště a důraz na velice pečlivě zjištěný skutkový stav, kdy by byla s nejvyšší mírou pravděpodobnosti vyloučena možnost vzniku pro dítě nesnesitelné situace, byl judikován Nejvyšším soudem v mnohém sporných rozhodnutích např. č. 30 Cdo 1931/2006 ze dne 28. 11. 2006.

Je velmi důležité si uvědomit, že řízení o navrácení dítěte není v žádném případě řízením ve věci samé o péči o dítě, není posouzením skutečnosti, kdo je lepší rodič, jeho výsledkem není rozhodnutí o meritu věci, jak říká článek 19 Haagské úmluvy. 13 Toto řízení řeší pouze situaci přemístění dítěte a s ní související důsledky.

Kdy je přemístění dítěte protiprávní, bylo řešeno již v předchozím textu. Obecně, v návrhu na zahájení řízení o navrácení dítěte musí být navrhovatelem uvedeny důvody, o které navrhovatel opírá svůj návrh. Rozhodující orgán si však ještě před svým rozhodnutím může od navrhovatele vyžádat, aby v zemi obvyklého bydliště dítěte u příslušného orgánu zajistil rozhodnutí či jiné zjištění, že dítě bylo přemístěno protiprávně. To však za předpokladu, že takový materiál získat lze. Při tomto mu může v rámci možností pomoci Ústřední orgány smluvních států. Většinou je však takové rozhodnutí již součástí prvního návrhu.

Stěžejním pojmem je však také „obvyklé bydliště dítěte". V mnohých případech je těžké takové bydliště nalézt, když například rodiče dítěte cestují za prací apod. K tomuto pojmu byla vydána rozsáhlá judikatura, která je přístupná z www.incadat.com. Dle judikatury soudů různých členských států, které rozhodovaly ve věci mezinárodních únosů dětí, se časová určení délky pobytu nutné pro vznikl „obvyklého bydliště" liší. Vždy je ale kladen důraz na dosažení dostatečného stupně kontinuity bydlení/pobytu dítěte v určité zemi. Dítě musí mít k určitému místu vytvořen vztah „domova", mít zde např. svého lékaře, chodit tam do školky či školy, mít zázemí kamarádů, popř. příbuzných, ztráta takového místa pro něho musí být traumatem.

Jelikož je únos dítěte z principu jevem negativním, jsou cíli Haagské úmluvy stanoveny zajištění bezodkladného návratu protiprávně přemístěných dětí a zajistit, aby práva týkající se péče o dítě a styku s ním dle právního řádu jednoho smluvního státu byla účinně respektována i v ostatních smluvních státech. Tyto cíle se nařízení Brusel II. bis snaží prosazovat ještě o něco důsledněji v tom ohledu, že velice omezil možnosti výjimek z pravidla bezodkladného návratu dítěte.

Nařízení stanoví, že nelze odmítnou nařízení navrácení dítěte dle čl. 13 písm. b/ Haagské úmluvy (výše uvedené písm. c/), pokud se prokáže, že byla přijata vhodná opatření k zajištění ochrany dítěte po jeho navrácení. 14 Toto ustanovení je velmi tvrdé a má jistě i své výjimky, ty jsou však daleko řidší než pouze při použití Haagské úmluvy. Důvod je nasnadě, EU sama sebe považuje za prostor bezpečný, kde by

13 Čl. 19 Haagské úmluvy: „Rozhodnutí o návratu dítěte, vydané podle této úmluvy, se nedotýká věcné úpravy práva péče o dítě."
14 Blíže čl. 11 odst. 4 nařízení Brusel II. bis.

dítěti nemělo hrozit tak velké nebezpečí, že by příslušné orgány státu obvyklého bydliště toto nebezpečí nemohly eliminovat. Dikce zmíněného ustanovení neříká, kdo má přijmout ona vhodná opatření, mnohdy za ně berou záruky samy orgány státu obvyklého bydliště dítěte.

Vedle tohoto specifika určuje nařízení další procesní podmínky, jež musí být nutně splněny. Dítě musí mít právo se vyjádřit, resp. musí být vyslechnuto v řízení o svém navrácení. [15] Dále musí být vyslechnuto osoba, jež o navrácení žádá. Pokud k jejímu slyšení nedojde, není přípustné vydat rozhodnutí o nenavrácení dítěte.

Je třeba ještě zmínit úpravu obsaženou v článku 16 Haagské úmluvy, jež znemožňuje vydání věcných rozhodnutí o péči o dítě poté, co orgány smluvního státu, na jehož území bylo dítě přemístěno, obdrží oznámení o protiprávním přemístění dítěte a to do doby než bude rozhodnuto o nenavrácení dítěte či pokud nebude podán návrh na zahájení řízení o navrácení dítěte v přiměřené lhůtě dle Haagské úmluvy. 16 Předchází se tak situacím, kdy rodič – únosce ihned po příjezdu do své většinou rodné země okamžitě podá návrh na svěření dítěte do své péče. Takovým rozhodnutím o péči by se de facto potvrdil protiprávně vzniklý stav, což není přijatelné, navíc by jistě utrpěla práva druhého rodiče.

V řízení dle Haagské úmluvy spolu s modifikace v souladu s nařízením Brusel II. bis je posléze vydáno rozhodnutí v několika variacích:

1/ Navrácení dítěte se nenařizuje.

- zde jsou dvě možnosti, s nimiž se rozhodující orgán musí vypořádat během řízení a shrnout je v odůvodnění – dítě bylo přemístěno legálně, navrácení se tak nenařizuje či dítě bylo přemístěno protiprávně, s ohledem na určité skutečnosti, jež musí být náležitě zdůvodněny, se návrat dítěte nenařizuje

2/ Nařizuje se bezodkladné navrácení dítěte.

Teprve po vydání (resp. právní moci) rozhodnutí ve věci navrácení či nenavrácení dítěte je možno rozhodnout o meritu věci – péči o dítě. Řízení o navrácení dítěte je totiž jakýmsi „předběžným řízením“, s tímto faktem počítá i nařízení Brusel II v článku 17 preambule. Stanovuje, že pokud bude vydáno rozhodnutí o nenavrácení dítěte, musí se tak stát pouze ve zvláštních, řádně odůvodněných případech. Poté však musí následovat rozhodnutí soudu země obvyklého bydliště dítěte, které ono předchozí

15 Další provedení práv přiznaných dítěti např. Evropskou úmluvou o výkonu práv dětí čl. 3 a 5.

16 Čl. 16 Haagské úmluvy: „Po obdržení oznámení o protiprávním přemístění nebo zadržení dítěte podle článku 3 soudní nebo správní orgány smluvního státu, do něhož bylo dítě přemístěno nebo v němž bylo zadrženo, nemohou věcně rozhodovat o právu péče o dítě, dokud nebude rozhodnuto, že dítě nemá být podle této úmluvy vráceno, nebo nebude – li podán návrh podle této úmluvy v přiměřené lhůtě po obdržení oznámení.“

„předběžné“ nahradí. Dítěti tak může být nařízen návrat i později a bude tak přemístěno, pouze jen z jiného titulu.

Jelikož rozhodnutí o nenavrácení dítěte do země jeho obvyklého pobytu je rozhodnutím velmi závažným, upravuje nařízení Brusel II. bis povinnost soudu, aby opis svého rozhodnutí ihned přímo či prostřednictvím Ústředního orgánu zaslal příslušnému soudu ve státem obvyklého pobytu dítěte. Zmíněný opis musí být doručovanému soudu dodán nejpozději do jednoho měsíce od vydání rozhodnutí o nenavrácení.

V současné době prochází legislativním procesem novela zákona č. 99/1963 Sb., občanský soudní řád, která reaguje mimo jiné na mediálně známé kauzy únosů dětí a na mezery, jež ztěžovaly řízení o nařízení navrácení dítěte. Novela přináší zakotvení speciálního řízení o navrácení nezletilého dítěte ve věcech mezinárodních únosů dětí a k němu několik zvláštností vyplývající z velmi krátké doby pro vydání rozhodnutí. Je také navrhována možnost, aby soud měl právo dítě rodiči – únosci odebrat a umístit je na dobu nezbytně nutnou ve vhodném prostředí a je posílena role mimosoudního smírčího řízení. Jelikož však novelizace ještě není plně schválena, je možné, že dozná změn.

Závěrem

Mezinárodní únosy dětí jsou velmi mediálně „zajímavou podívanou“, informace, které média zprostředkovala jsou tak mnohdy poupraveny, jelikož ona citovost a příběh zvyšují atraktivitu a prodejnost. Mezinárodní únosy dětí a velmi emočně zabarvené reportáže z exekučního vymáhání soudních rozhodnutích tak velmi rozvířily vody veřejného mínění, odborného i laického.

Již z principu je jasné, že náhlé přemístění dítěte z místa, kde je zvyklé, má tam zázemí, je to jeho domov, je pro něho velkým traumatem. Dítě má právo na to být s oběma rodiči a být oběma rodiči vychováváno. Toto si však rodič, který dítě takto vytrhne ze známých míst a z okruhu druhého rodiče a i jeho rodiny, neuvědomuje a svůj čin nepovažuje za jakkoli špatný či odsouzeníhodný. Je velmi smutné, že velkou roli ve známých případech hrály zastupitelské úřady, které nebyly schopny poskytnout rodičům, budoucím únoscům, potřebné informace a jejich kauzy dospěly až do takových rozměrů.

Je třeba znovu zopakovat, že rozhodnutí ve věci řízení o navrácení dítěte není rozhodnutím o péči o dítě. Haagská úmluva jasně deklaruje, že byla sjednána z důvodu zabránění protiprávním přemístěním nezletilých dětí, které jsou správně považovány za nepřijatelný způsob řešení sporů. Spory většinou vznikají pouze mezi rodiči a, i když jsou děti velmi senzitivní, jich samotných se většinou fyzicky nedotýkají. Pro dítě je prvním traumatem již samotný fakt (v drtivé většině případů) náhlého přestěhování do cizího prostředí, kde skoro nikoho nezná a kde se mluví jinou řečí než jaká byla jeho primárním jazykem dosud.

Protiprávním přemístěním dítěte do jiného státu vzniká, jak již vyplývá ze samotného názvu, stav contra legem. Není možné takový stav podporovat, proto byla Haagská úmluva vytvořena a její text se stal ještě „přísnějším" po zohlednění článku 11 nařízení Brusel II. bis. Dítě by se dle jimi deklarovaných cílů mělo co nejrychleji vrátit do místa jeho obvyklého bydliště, kde k tomu příslušné orgány meritorně rozhodnou o péči o dítě.

Ačkoli veškerá řízení týkající se dítěte a vlastně veškerá činnost týkající se dítěte (výchovu nevyjímaje) mají být vedena v zájmu dítěte, osobou, která nejvíce trpí celým koloběhem únosu a na navrácení, je právě dítě.

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Další zdroje:

www.umpod.cz

www.helcom.cz

www.incadat.com

www.hcch.net

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DISPOZITIVNÍ A KOGENTNÍ USTANOVENÍ OBČANSKÉHO ZÁKONÍKU

TOMÁŠ HÜLLE

MASARYKOVA UNIVERZITA, PRÁVNICKÁ FAKULTA

Abstrakt

Příspěvek pojednává o současné úpravě občanského zákoníku v otázce rozlišování kogentnosti norem. Otázka je aktuální vzhledem k diskuzi o návrhu nového kodexu, kde by měla úprava setrvat na obdobném principu. Příspěvek hodnotí v první části úpravu současnou a rozvádí teorii dělení norem. V druhé části potom přechází do úvahy o budoucí úpravě a otázce, jakým způsobem postupovat v novém občanském zákoníku (mjn. i s ohledem na judikát Ústavního soudu ze dne 19.3.2008 ve vztahu k Zákoníku práce).

Klíčová slova

kogentní normy, dispozitivní normy, občanský zákoník, obchodní zákoník, nový občanský zákoník, dualita norem, principy občanského práva, rozhodování soudů, zprostředkovaně kogentní normy, řešení ostatních právních odvětví.

Abstract

The contribution is written about current customization of Civil code in the case of recognition mandatory and directory provisions. The problem is very actual, because it is discussed in relation to the creation procedure of new Civil code in Czech republic, which will probably contain the similar principle as current one. In the first part is contribution about current situation and about process of recognition of individual norms. Second part than crosses into reflection about future situation and the way how to solve this problem in new Civil code (by the way with consideration to the rulling of Constitutional Court of Czech republic from 19th of March 2008 in relation to the Labor code).

Key words

Mandatory provisions, Directory provisions, Civil code, Commercial code, New Civil Code, Duality of norms, Principles of Civil law, Practice of the courts, Vicariously mandatory provision, Solution of other branches of law.

Úvod

Právo se v současné době stále vyvíjí a současně s tím dochází i k posunu základních postulátů, premis a teoretických východisek právní praxe. Jedním ze základních východisek je dodržování právních zásad, které při obrácení úvahy naopak budou definovat základní premisy i ostatní faktory práva. Právních zásad je mnoho, ale v této práci bych vzhledem k jejímu námětu rád rozebral jen několik z nich a to z toho důvodu, že tyto zásady samotné jsou určujícím faktorem pro tuto práci a její téma[1]. Na počátku se budu věnovat poněkud šířeji celé problematice, přičemž zmíním základní výstavbové kameny koncepce občanského práva, právní principy zde panující, abych se v další části mohl věnovat samotné práci a úvahám de lege ferenda vzhledem k blížící se rekodifikaci občanského práva v ČR, ale zejména úvahám de lege lata jak je prezentuje odborná literatura (v současnosti převážně komentáře k občanskému zákoníku) a jakou klasifikaci, resp. diverzifikaci právních norem občanského zákoníku (dále při některých příležitostech jen OZ), bych použil já.

Účelem příspěvku by potom mělo být poskytnutí uceleného přehledu v otázce volnosti subjektů v jednotlivých oborech soukromého práva, zejména pak práva občanského a taktéž poskytnutí návodu jakým způsobem pracovat v této otázce se současným občanským zákoníkem a taktéž pozastavení nad koncepcí zákoníku budoucího.

Druhy právních norem

Na začátku celé práce je třeba si ujasnit, co to kogentní a co dispozitivní právní norma je. Na tuto otázku může existovat vícero názorů, ale většinou zde nevzniká interpretační problém. Podíváme-li se do odborné literatury, tak většinou najdeme, že kogentní norma je normou, jejíž použití na právní poměry, které upravuje, nemůže být vyloučeno ani omezeno projevem odchylné vůle subjektu právního vztahu, ani jiných subjektů (nebo státních orgánů)[2]. S touto definicí lze plně souhlasit, avšak nalézt lze i definice jiné, kterých se však držet nebudu, protože mi přijdou nekomplexní jako je např. definice dispozitivní normy jako právní normy, jejíž použití může být vyloučeno souhlasným projevem vůle účastníků právního úkonu[3] [4].

[1] K zásadě smluvní svobody soukromého práva a jejich koncepcí ve světě viz.: *Salač, J.,* Smluvní svoboda nebo smluvní spravedlnost, Právní rozhledy, 1998, č.1

[2] Čapek, J., in *Boguszak,J., Čapek, J., Berlích, A.*: Teorie práva, 2.vydání, Praha: ASPI Publishing, 2004, s.88

[3] Nekomplexní ji shledávám ze dvou důvodů. Jednak je spekulativní v tom, jestli dispozice s právní normou je jen v rukách subjektů právního vztahu, či zde může zasáhnout i subjekt, jež není přímým subjektem tohoto vztahu (Např.orgány držitele kodexu dle směrnice 2005/29/ES či státní orgány pokud nevystupují v pozici rozporné s judikaturou – viz.níže). Druhý problém shledávám v nejednoznačnosti definice, zda-li se dá považovat za dispozitivní právní normu i norma, jež např.

Použijeme-li argument a contrario, tak by jsme měli dospět k tomu, že norma která není kogentní je normou dispozitivní, protože se zde většinou uplatňuje argument tertium non datur. S tímto však nelze z pohledu právní teorie souhlasit, protože nemůžeme hodnotit normu jako celek, ale jen jako skladbu právních vět, resp. právních norem nižšího řádu. Jestliže se takto odpoutáme od dlouhodobě prezentovaného názoru, že norma je kogentní nebo dispozitivní, tak můžeme mnohem snadněji posuzovat možnost subjektu odchýlit se svou vůli od dispozice právní normy. Otázkou tzv."děleného statusu právní normy" se však budu zabývat později.

Vzhledem k výše řečenému by se tedy nebylo vhodné nadále bavit jen o dispozitivních právních normách a normách kogentních, avšak pro zjednodušení práce se pokusím pokračovat v tomto duchu. Poukázat je však třeba na to, že výrazem norma zde nebudu myslet ustanovení paragrafu či článku zákona, ale pouze právní normu jako abstraktně vyjádřený způsob chování, který většinou definuje dispozice právní normy[5].

Úprava dispozitivnosti současného občanského zákoníku

Budeme-li dnes hledat konkrétní úpravu dispozitivnosti právních norem v občanském zákoníku, tak budeme hledat marně, protože v dnešní době se dovozuje z velice abstraktního ustanovení §2 odst.3 OZ, kde je řečeno, že účastníci občanskoprávních vztahů si mohou upravit vzájemná práva a povinnosti odchylně od zákona, pokud toto zákon výslovně nezakazuje nebo nevyplývá z povahy jeho ustanovení něco odlišného. Z toho se dovozuje, že se zde bude uplatňovat zásada autonomie vůle typická pro soukromé právo[6]. Ustanovení v sobě skrývá dvě možnosti, jak je možno shledat normu jako kogentní. První je výslovná zmínka v zákoně, která nevzbuzuje takřka žádné pochybnosti. Mnohem problematičtější je možnost druhá a to povaha ustanovení OZ. Zde je již situace nadmíru komplikovaná a interpretace tohoto ustanovení, ale zejména pak povaha jednotlivých norem, dělá právní vědě potíže

umožňuje uzavírat inominátní kontrakty dle §51 a která může být definičně považována za normu kogentní, přičemž některé zdroje uvádějí i tuto normu jako normu dispozitivní (viz. *Knappová, M. in Holub, M. a kol.* Občanský zákoník, Komentář 1.svazek §1-487, 2.vydání, Praha: Linde Praha a.s., 2003, s.36).

[4] *Plecitý,V., Kocourek, J*., Občanský zákoník, Praha, EUROUNION, 2004, s.13

[5] Samozřejmě však není nezbytné, aby se jednalo o způsob chování, tím spíše o vyjádření pouhé dispozice právní normy. Dispozitivnost, stejně jako kogentnost, může být vymezena kdekoliv v ustanovení zákona.

[6] *Hurdík, J., Fiala, J., Hrušková, M*.: Úvod do soukromého práva. Brno : Masarykova univerzita, 2002 a také judikát ÚS 387/99 (viz.níže).

již notnou řadu let[7] a stále není situace uspokojivě dořešena a vzhledem k novému návrhu občanského zákoníku[8] se dá očekávat, že obdobné interpretační problémy nastanou i po jeho přijetí.
V některých případech představují abstraktní ustanovení vhodnou cestu k úpravě právních vztahů, protože jsou schopny velice pružně reagovat na současný vývoj situace a zároveň nepředstavují velké riziko z pohledu jejich uchopení subjekty[9], jimž jsou určeny. Nemyslím si však, že je to právě tento případ, neboť právní jistota o možné úpravě je zcela zásadní a povaha ustanovení občanského zákoníku je v tomto případě až příliš abstraktní. I přes nesouhlas některých autorů[10] s tímto konstatováním se domnívám, že pravidla v současnosti vymezená pro interpretaci tohoto ustanovení jsou nedostatečná a tak je třeba se velice často uchylovat k výkladu formou judikatury soudů[11]. Bylo by proto vhodné zavést jednotná pravidla pro interpretaci, která nebudou vzbuzovat nejmenší pochybnost o povaze ustanovení, nebo zavést úpravu novou, která však bude již jednoznačnější v tom, kde se strany mohou a kde nemohou od dikce zákona odchýlit.

Právní principy a jejich projevy v občanském právu

Pro posuzování povahy ustanovení OZ je třeba znát principy, které se týkají dispozitivnosti současné občanskoprávní úpravy. Pro tuto práci jsou klíčové principy tři, a to jmenovitě princip autonomie vůle, právní jistoty a předvídatelnosti práva. Tyto principy se odlišují výrazným způsobem ve vztahu k této práci, protože zatímco princip autonomie vůle určuje samotnou dispozitivnost norem, zbývající dva principy je třeba při vytváření a interpretaci práva mít stále na zřeteli, aby plnilo svou původní funkci.

Princip autonomie vůle[12] je definován v českém právním prostředí i judikaturou, jmenovitě judikátem Ústavního soudu České republiky (dále jen ÚS) ÚS 387/99, kde je definována smluvní svoboda jako jeden ze základních principů soukromého práva. Projevuje se to ve volnosti subjektů při rozhodování,

[7] *Knappová, M. in Holub, M. a kol.* Občanský zákoník, Komentář 1.svazek §1-487, 2.vydání, Praha: Linde Praha a.s., 2003, s.36
[8] Ke stažení např. z internetových stránek www.juristic.cz [citováno dne 23.2.2008] Dostupný z: http://zcu.juristic.cz/download/rekodifikace/obcan/OZ_konsolidovana_verze_brezen_07.zip
[9] Jako příklad by mohla sloužit generální klauzule na ochranu proti nekalé soutěži, jež je obsažena v §44/1 obchodního zákoníku. Je typická pro většinu právních řádů kontinentální Evropy a naplňuje představu o moderním pojetí práva v boji proti nově se objevujícím projevům nekalého jednání (viz.*Kubáč, R.*, Právní úprava nekalé soutěže se zaměřením na klamavou a srovnávací reklamu v Německu, Rakousku a na Slovensku a porovnání s úpravou českou, Právní rozhledy, 2006, č.16, s.577), v poslední době zejména v prostředí internetu (viz. *Polčák, R.,* Nekalosoutěžní agrese na internetu, Právní rozhledy, 2006, č.13, s.473)
[10] Např. Důvodová zpráva k návrhu budoucího občanského zákoníku (citace viz.výše) či *Eliáš, K.,* Legendy o osnově občanského zákoníku, Právní rozhledy, 2007, č.17
[11] Což je však zcela nevhodné pro adresáty právních norem, protože je pro ně nepřehledná a pro subjekty ze zahraničí v dnešní době stále většinou zcela nedostupná.
[12] Více viz. *Hurdík, J. in Fiala, J. a kol.,* Občanské právo hmotné, Brno: Masarykova univerzita, 2002, s.18

zda-li a s kým smlouvu uzavřou, jaký bude její obsah, jaká bude její forma a taktéž jaký typ smlouvy uzavřou[13]. Z této zásady se hojně dovozuje taktéž příklon k dispozitivnosti právních norem[14], pokud dojde k pochybnostem o její povaze a tedy důležité pravidlo pro jejich interpretaci. Domnívám se, že tento interpretační princip je zcela klíčový pro vyplňování mezer v naší velice obecné úpravě. Je třeba tedy dovodit, že pokud vzniknou pochybnosti o kogentnosti úpravy, tak se bude vždy jednat o normu dispozitivní[15]. Tento princip je též velice úzce spjat se zásadami platících pro občanské právo, že vše je dovoleno, co není výslovně zakázáno a pacta sunt servanda[16].

Mezi další právní zásady občanského práva patří nesporně i obecné právní zásady předvídatelnosti a právní jistoty. Tyto dvě zásady nejsou typické jen pro právo soukromé. Na jejich působnost je třeba hledět při interpretaci ustanovení práva, aby nedocházelo k nesrovnalostem, nejednoznačnostem a tím i jejich popření. Tím spíše budou klíčové při tvorbě budoucího občanského zákoníku a definování smluvní volnosti stran a zjednodušování práva na maximální možnou úroveň, aby se nepotvrzovala slova skeptiků o čím dále větším odcizování práva a subjektů v něm působících od každodenní reality[17].

Judikatura k současné úpravě

V následující kapitole bych se rád zmínil jen velice stručně o současné judikatuře, která je důležitá pro posuzování kogentnosti norem občanského zákoníku. Bohužel stále neexistují judikaturou stanovená jednoznačná pravidla a tak lze dovozovat kogentnost jen ad hoc a to dle toho, jakým způsobem postupoval soud v každém jednotlivém případu a zda-li se dá použít stejné argumentace i pro jiná ustanovení OZ, což by mohlo být jednou z metod obdobnou co do způsobu fungování case law v anglo-americkém právu[18].

Zvolené judikáty nemají poskytovat komplexní přehled, ale jen ukázku důležitých pro tuto problematiku:

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[13] Důležitou poznámkou tohoto judikátu je i zmínka o předvídatelnosti smluv, což podporuje mimojiné princip předvídatelnosti práva, jež se právě v soukromém právu velice často nahrazuje vůlí subjektů smluvního závazkového vztahu.
[14] *Švestka, J. in Jehlička, O., Švestka, J., Škárová, M. a kol*. Občanský zákoník. Komentář. 9.vydání. Praha C.H.Beck, 2004, s.32
[15] O postupu v případě pochybností se zmíním ještě později.
[16] Všechny výše zmíněné právní zásady jsou zmíněny v judikátu Nejvyššího soudu České republiky SR č.7/2003
[17] Viz. Internetový blog jineprávo (dostupný z http://jinepravo.blogspot.com). Pro ilustraci např. články: *Molek, P.* Opět k nahotě císařově (4.února 2008); *Molek, P*. Legislativa hrou (19.března 2007) nebo *Kühn, Z*. Česká legislativa jako Hupity Dupity (15.března 2007) a další nejenom na tomto blogu.
[18] Viz. Základní pojednání o case law na anglické verzi internetové encyklopedie Wikipedia [citováno dne 29.2.2008] Dostupné z: http://en.wikipedia.org/wiki/Case_law

Nález ÚS ze dne 3.1.2000 sp.zn. IV.ÚS 387/99 – Judikát je citovaný již výše a je zcela zásadní pro definici a rozsah zásady autonomie vůle, protože stanovuje její jednotlivé formy, jak jsou v dnešní době uváděny většinou učebnic a materiálů určených k výuce občanského práva.

Nález ÚS ze dne 5.4. 1994 sp.zn. Pl.ÚS 29/93 – Tento judikát se věnuje vázanosti pronajímatele a nájemce pouze kogentními ustanoveními OZ a zákona o nájmu a podnájmu nebytových prostor. Taktéž je zde upravena zásada autonomie vůle a nemožnost upravit vztahy obecně závaznou vyhláškou, veřejnoprávním aktem, protože se jedná o právní úkony soukromoprávní povahy, čímž je zúžena možnost dispozice subjektů s dispozitivními normami OZ.

Nález ÚS ze dne 13.3. 2008 sp.zn. Pl.ÚS 83/06 – Judikát se věnuje problematice Zákoníku práce a návrhu na zrušení jeho podstatné části. Tomuto návrhu bylo částečně vyhověno, přičemž jedna ze zrušených částí se týká také problematiky kogentnosti v něm obsažené. Byla zde zrušena dosavadní úprava a ponechána pouze část, která je doslovným zněním úpravy současného Občanského zákoníku. Zajímavá jsou v tomto judikátu disentující stanoviska některých soudců ÚS[19], kteří podporují myšlenku zrušení i části úpravy, která definuje kogentnost stěžejních ustanovení zákona. Pakliže by byla tato myšlenka později zrealizována, tak by došlo k úplnému provedení do praxe úvah tohoto příspěvku vztahujících se k budoucí úpravě rozlišování kogentnosti norem a tak lepší předvídatelnosti práva.

Rozsudek Nejvyššího soudu ze dne 10.2. 1999 sp.zn. Cdo 568/96 – Jedná se o judikát týkající se kogentního ustanovení o držbě a vydržení v OZ (§§130 odst.1 a 134). Judikát upřesňuje dikci zákona v tom směru, že přítomnost dobré víry je třeba posuzovat v souvislosti se všemi právními skutečnostmi, jež mají za následek nabytí věci nebo práva. Z toho se dá taktéž např. dovodit, že uchopení držby nemovitosti na základě ústní smlouvy není postačující a to ani za předpokladu, že subjekt jednal ve víře, že není třeba písemné formy smlouvy.

Rozsudek Nejvyššího soudu ze dne 18.5. 1999 sp.zn. Cdo 1704/98 – Určuje jako kogentní ustanovení dikci §42a odst.1 věnující se odporovatelnosti právních úkonů in fraudum creditoris a zejména jejich vymahatelnosti.

Rozsudek Nejvyššího soudu ze dne 26.3. 2001, sp.zn. 33 Cdo 2994/99 – Stanovuje, že normy OZ upravující obecný proces uzavírání smluv jsou kogentní úpravy a jeho subjekty se od něj tedy nemohou projevem vůle odchýlit.

[19] Myšlena jsou zejména stanoviska Vojena Güttlera, Dagmar Lastovecké, Elišky Wágnerové (Naopak zcela opačné stanovisko ve vztahu k této části vyjádřili Jan Musil a Pavel Rychetský).

Rozsudek Nejvyššího soudu ze dne 1.3.2000, sp.zn. 26 Cdo 327/2000 – Jedná se o judikát stanovující §704 OZ, věnující se vzniku společného nájmu bytu manžely, jako normu kogentní.

Díky citovaným judikátům se dá shrnout, že ustanovení kogentní povahy jimi určená jsou vždy ustanovení, která jsou klíčová pro jednotlivé právní vztahy. Určují základní pravidla vzniku, průběhu či zániku právních vztahů a vzhledem k tomu se stávají i ustanoveními kogentní povahy dle interpretace soudů. Samozřejmě se nedá tímto způsobem generalizovat, ale pakliže dospějeme k obdobným závěrům jako soudy v těchto případech, tak se dá důvodně usuzovat, že právní norma obdobné povahy a významu bude taktéž normou povahy kogentní.

Druhy kogentních právních norem a způsob jejich rozlišení

Klíčovou otázkou celé práce je však posouzení, jakou povahu norma má. Jak jsem již předestřel výše, v současnosti neexistuje žádné jasné pravidlo, které by platilo za každých okolností, protože OZ je v této otázce značně neurčitý a odpověď se s jistotou nedá najít ani v judikatuře či odborné literatuře. Budu proto vycházet z tzv.možného děleného statusu normy a posuzování norem dle pravidel, která vysvětlím v této kapitole. Již teď se však dá předestřít, že ani tato má pravidla neposkytnou zcela jasný přehled, který by s jistotou dokázal označit normu jako kogentní či dispozitivní, což se ale domnívám nevadí, protože minimální míra abstrakce k právu patří[20].

Rozdělil jsem si možné kogentní normy do čtyř kategorií a to jmenovitě:

- Výslovně kogentní
- Zprostředkovaně kogentní
- Obsahově dispozitivní, avšak kogentní (tz.normy povahou smíšené)
- Účelově kogentní

Pakliže nebude norma spadat do jedné z těchto kategorií, tak se musí zákonitě jednat o normu dispozitivní vzhledem k výkladu §1 odstavci 2 OZ ve vztahu k čl.2 odstavci 3. Listiny základních práv a svobod. Z tohoto pravidla může existovat teoreticky výjimka v případě norem povahou smíšených[21].

[20] *Švestka, J. in Jehlička, O., Švestka, J., Škárová, M. a kol*. Občanský zákoník. Komentář. 9.vydání. Praha C.H.Beck, 2004, s.33

[21] Je to dáno především skutečností, že samotná vnitřní dispozitivnost ještě neurčuje kogentnost vnější. Dá se ale důvodně předpokládat, protože jinak by nebylo třeba vytváření normy s volnou vnitřní dispozitivnosti stran.

Tuto souvztažnost je třeba respektovat za všech okolností, protože jinak by došlo k návratu zpět na začátek k nejasnosti co do výkladu právních norem.

Výslovně kogentní normy – Jsou normy, ve kterých je výslovně stanoveno, že se strany nemohou od jejich dikce svým projevem vůle či jinak odchýlit. Jsou jedinou z kategorií norem u kterých je bez pochybností, že se jedná o normy kogentní. Výslovný příkaz se může v normě vyskytovat např.formou příkazu (např.§46 OZ), zákazu (např.§467 OZ) či třeba ustanovení, že každá dohoda stran odchylná od této normy je neplatnou (např.§40 OZ).

Zprostředkovaně kogentní normy[22] – Jedná se o druh norem, které mohou být svou povahou normami dispozitivními, ale za situace, kdy sami odkazují na normu kogentní se mohou stát dočasně či permanentně a jen v této relaci normami kogentními. Jako příklad mohou být uvedeny de facto všechny normy odkazující na ustanovení o formě právního úkonu, jelikož se z nich v této části stanou prostřednictvím odkazu na §40 OZ normy kogentní.

Normy povahou smíšené[23] – Za normy povahou smíšené je třeba považovat normy, které umožňují stranám se pohybovat volně v rámci dispozice právní normy, avšak se nemohou ze samotné dispozice právní normy vychýlit. Jako typický příklad považuji normy, které umožňují uzavírat inominátní smlouvy dle § 51 OZ[24]. Strany sice mohou určit obsah smlouvy, ale nemohou se odchýlit od dikce samotné normy, která určuje základní pravidla pro inominátní kontrakty. Podporu pro argument kogentnosti ustanovení inominátních kontraktů shledávám mjn. v nesporné[25] kogentnosti obdobného ustanovení §269 Obchodního zákoníku (dále jen ObZ).
Tento druh norem by se dal vzdáleně přirovnat např. k výběhu, kde jsou uzavřeny zvířata. Uvnitř této ohrady budou moci sice stále dělat takřka cokoliv, ale jejich dispozice je omezena právě ohradou, kterou již nemohou ani při své nejlepší vůli překročit, přeskočit, či se z ní jakýmkoliv jiným způsobem dostat. A obdobné je to i se subjekty inominátních kontraktů, kteří se nemohou odchýlit od dikce této normy.

Účelově kogentní normy – Situace v případě tohoto druhu norem je zdánlivě nejsložitější, protože nejdou jednoznačně vymezit. Jedná se o skupinu norem, které se dají určit např. teleologickým či

[22] Více viz.kapitola Zprostředkovaně kogentní normy
[23] I přes název samotné kategorie je třeba zdůraznit, že se stále jedná o normy kogentní a to i přes vnitřní možnost subjektů si zvolit své chování
[24] Tento můj názor je však zřejmě ojedinělý, protože současná právní věda určuje ustanovení § 51 OZ jako speciální druh norem dispozitivních. Tento názor je však podle mého chybný vzhledem k omezení smluvní volnosti samotnou normu. Opačný názor je vyjádřili *Fiala, J., Hurdík, J., Korecká, V., Telec, I.*, Lexikon, Občanské právo, 2.vydání, Sagit. 2001, s.48 nebo *Knappová, M. in Holub, M. a kol.* Občanský zákoník, Komentář 1.svazek §1-487, 2.vydání, Praha: Linde Praha a.s., 2003, s.36
[25] Nespornost je dána zahrnutím tohoto ustanovení to taxativního výčtu ustanovení §263 odst.1 ObZ

historickým výkladem celého odvětví občanského práva a které právě svou povahou zakládají základní vztahy a odchýlení se od nich by představovalo vážné narušení principů občanského práva nebo by působilo značný vnitřní chaos či nesoulad v OZ. Je však třeba pečlivě vykládat jejich povahu a důležitost, protože v případě pochybností se bude uplatňovat výše uvedené pravidlo o přednosti dispozitivnosti norem.
Jako příklad tohoto druhu norem by se dala uvést ustanovení, týkající se způsobilosti k právům či právní subjektivitě (§§7, resp.8-10 OZ). Tato ustanovení jsou natolik zásadní, že není myslitelné, aby se strany dohodly na tom, že subjekt například nabude způsobilosti k právním úkonům dříve než umožňuje zákon.

Domnívám se, že mnou navrhovaná klasifikace kogentních norem v občanském zákoníku je dostatečně komplexní a zároveň i srozumitelná. Dala by se zpracovat sice mnohem více kazuisticky, ale nedomnívám se, že by to výkladu ustanovení jakkoliv pomohlo. Navrhované řešení je sice velice náročné z pohledu subjektu, jelikož pro něj bude nutné znát alespoň dílčím způsobem právo, nicméně zákonodárcem zvolené řešení pravidel pro stanovení kogentnosti jinou možnost dnes nepřipouští a vzhledem k argumentům, které předkládám v poslední kapitole nejspíše ještě delší dobu ani připouštět nebude.

Norma zprostředkovaně kogentní

Budeme-li řešit problematiku kogentnosti, tak nám nezůstane, než se vypořádat i s argumentem vztahu kogentní a dispozitivní právní normy. Problém je v této situaci zřejmý a to je otázka, co se stane, pokud dojde k odkazu, resp. jakémukoliv využití normy kogentní normou dispozitivní a naopak, co se stane, pakliže norma kogentní bude na normu dispozitivní odkazovat.

Situace byla již v odborné literatuře diskutována[26], ale nedá poukázat na nějaký převažující názor. Osobně se přikláním k názoru, který je prezentován např. v citovaném článku a to je tzv.zprostředkování kogentnosti normy. Jestliže tedy dojde k tomu, že dispozitivní norma odkazuje na normu kogentní, tak dojde k přenosu charakteru normy a z dané normy se stane taktéž norma kogentní. Toto pravidlo samozřejmě nebude platit absolutně, tz.nedojde k situaci, kdy po jakémkoliv odkazu se dispozitivní norma stane normou kogentní, ale půjde jen o dočasnou kogentnost ad hoc. Jakmile se bude

[26] *Švestka, J., Kopáč, L.,* Lze v zástavní smlouvě platně ujednat propadnutí zástavy?, Právní rozhledy, 1995, č.5

norma posuzovat nezávisle na normě určující[27], tak se bude jednat stále o normu dispozitivní za předpokladu, že nenaplní jedno z dalších kritérií kogentnosti. Toto pravidlo platí dle mého názoru za každých okolností, protože jinak by taktéž narušovalo princip právní jistoty právních vztahů. Tato absolutní platnost bude narušena jen za předpokladu, že tento odkaz je naprosto marginální a určená norma nebude mít na vztah de facto žádný další vliv. Tento případ by měl být však skutečně naprosto výjimečný a dá se tedy konstatovat, že se bude jednat o zprostředkované přenesení kogentnosti.

Opačný proces není třeba řešit, protože pokud se nejedná o účelově kogentní normu, tak není důvod pro stanovení kogentnosti normy u určené dispozitivní normy. Určující kogentní norma tedy zůstane kogentní, jen dojde opět k možné vnitřní dispozitivnosti a dispozitivní norma si zachová svou dispozitivnost. Opačné řešení by bylo dle mého názoru nelogické, protože by postrádalo důvodnost.

Ostatní odvětví soukromého práva a jejich řešení

Tato kapitola by měla velice krátce a stručně představit řešení posuzování druhu norem ve zbývajících odvětvích soukromého práva (s výjimkou mezinárodního práva soukromého[28]).

Z pohledu rodinného práva je situace vymezena v ustanovení §104 Zákona o rodině, kde je stanoveno, že pro vztahy zde upravené se použije občanského zákoníku subsidiárně tehdy, jestliže není stanoveno v tomto zákoně jinak. Toto řešení je velice systematické a přehledné, protože výslovná úprava, jež se dá předpokládat při odlišném řešení, je naprosto zřejmá. Při interpretaci je třeba dbát rovněž na to, že pro rodinněprávní vztahy je dána a priori mnohem větší míra kogentnosti, než je tomu v případě vztahů některých dalších právních odvětví. Pro občanské právo je koncepce subsidiarity sice vzhledem k jeho obecnému zaměření a základu pro ostatní odvětví takřka nepoužitelná, ale i tak je tato úprava dle mého názoru jedna z nejlepších možných.

Obdobné konstatování by se dalo použít i pro pracovní právo, které i přes vytvoření nového Zákoníku práce[29] účinného od ledna 2007, je svázané normami kogentními ve srovnání s ostatními předpisy

[27] Pro tyto vztahy budu používat terminologie, kdy norma které odkazuje bude normou určující a norma na kterou se odkazuje bude normou určenou.
[28] Toto odvětví si dovolím ignorovat z toho důvodu, že vlastně není odvětvím soukromého práva, protože nevytváří subjektům práva nové normy chování či pravidla, dle kterých by se měly řídit, ale velice zjednodušeně pouze upravuje způsob„„„„ jakým budeme konkrétní chování posuzovat, tz.určí rozhodné právo pro daný právní řád. Výjimkou z pravidla by v tomto případě byly věcné normy mezinárodního práva soukromého„„„„„„ u kterých se dá předpokládat jejich kogence (Není to však pravidlem).
[29] Zákon č.262/2006 Sb., Zákoník práce

soukromého práva. Došlo sice k posunu k větší míře dispozitivnosti tím, že zde bylo zakomponováno ustanovení §2, které uvádí výčet podmínek, jež je nutno naplnit k tomu, aby se jednalo o ustanovení kogentní. Může se jednat o ustanovení z příkladného výčtu, může to vyplývat z jeho povahy, odkazu občanského zákoníku a dalších faktorů zde uvedených. Řešení použité pracovním právem mi přijde však velice složité, a tak si nejsem jist, jestli je vhodné k využití pro ostatní kodexy soukromého práva. Kompilace jednotlivých řešení je sice použitelná, nicméně jen za předpokladu, že bude rovněž snadná k orientaci a bude naplňovat znak úplnosti. Jestliže je tomu jinak, tak se opět jedná o naplňování známého českého pořekadla, že méně může být někdy i více. Tomuto konstatování nakonec přisvědčil i ÚS na počátku března tohoto roku, který sporná ustanovení Zákoníku práce zrušil a ponechal zde zcela totožnou koncepci, jaká je v aktuálním občanském právu. Za úvahu však stojí, zda-li i dikce dovětku §2 odst.1 není protiústavní s ohledem na zásady výše zmíněné. Jednalo by se však o zcela mimořádný zásah do koncepce soukromého práva, pro kterou nenašel ÚS zřejmě dostatek opodstatnění a odvahy. Důvodnost pro toto lze najít i u Viktora Knappa[30], jež výstižně ve své publikaci konstatuje: „Nejsnadněji se ius cogens a ius dispozitivum pozná tehdy, jestliže to zákon řekne rovnou, jako činí § 263 odst. 2 obchodního zákoníku. Jinak, zejména v právu občanském a pracovním, se to pozná hůř."

Posledním významným kodexem soukromého práva je Obchodní zákoník. Podrobněji se mu budu věnovat až dále, ale nyní bych rád zmínil základní konstrukci, která platí pro vztahy jím upravené. Směrodatná je dikce §263 ObZ, která obsahuje dvě části pro posuzování povahy norem v závazkové části obchodního zákoníku[31]. V prvním odstavci je taxativní výčet ustanovení, která jsou kogentní. K tomu je však nutné přidat ještě dikci odstavce druhého, jež rozšiřuje tento výčet o základní (tzv.definiční ustanovení)[32] jednotlivých smluvních závazkových typů a taktéž o ustanovení, jež určují pro závazkový vztah obligatorně písemnou formu. Zde mohou, stejně jako v OZ, vyvstávat nesrovnalosti o kogentnosti jednotlivých ustanovení. Jako příklad bych zmínil např. ustanovení §410 ObZ, které určuje zda-li je smlouva kupní smlouvou či nikoliv. Problémem zde může být, zda-li je i toto ustanovení ustanovením definičním či nikoliv vzhledem k tomu, že za definiční se většinou berou první ustanovení jednotlivých smluvních typů dle ObZ. V tomto případě panuje však názor že ano, protože nelze posuzovat definičnost jen dle tohoto zjednodušeného modelu prvního odstavce, ale vzít v potaz charakter, obsah a strukturu dané normy. Dalším příkladem by mohla být kogentnost ustanovení o tichém společenství[33].

[30] Knapp, V., O právu kogentním a dispozitivním (a také o právu heterogenním a autonomním), Právník č. 1/1995, s. 1 – citováno však přímo z Nálezu ÚS ze dne 13.3. 2008 sp.zn. Pl.ÚS 83/06

[31] Ve zbytku ObZ platí samozřejmě subsidiární úprava OZ jak je to definováno v §1/2 ObZ. Toto podtrhuje výše zmíněnou důležitost občanského zákoníku a jasné definice druhu právní normy, resp. způsobu posuzování.

[32] *Eliáš, K., a Havel, B., in Bejček, J., Eliáš, K., Raban, P. a kol.*: Kurs obchodního práva. Obchodní závazky. 4.vydání. Praha: C.H.Beck, 2007, s.14

[33] tamtéž

Příklad z obchodního zákoníku

Jak již bylo zdůrazněno v předchozí kapitole, není možné při posuzování kogentnosti norem vystupovat pouze z pohledu práva občanského, ale je třeba zvážit veškeré dopady i do ostatních právních odvětví. Nejklíčovější je zejména dopad pro právo obchodní, které je vzhledem k uplatnění zásady subsidiarity občanského zákoníku nejvíce postupem při posuzování kogentnosti dotčeno. Netřeba snad ani zmiňovat, že volba obchodního zákoníku je vzhledem k dispozitivnosti soukromého práva taktéž možná[34]. Posledním argumentem by mohla být již dlouhodobá provázanost těchto dvou odvětví, kdy jejich největší rozdílnost spočívá při značném zjednodušení zejména v kritériu dělení dle subjektů těchto vztahů, kdy u obchodního práva jsou jím zejména profesionální obchodníci při výkonu své činnosti, zatímco u občanského, až na výjimky, subjekty ostatní[35]. Proto je třeba respektovat např.i zásadu právní jistoty a právní vztahy v obchodním zákoníku upravit s maximální obezřetností a jasností, což právě uplatněním subsidiarity občanského zákoníku není příliš dodrženo.

Pro interpretaci bych zde uvedl příklad vzpomenutý prof.Bejčkem[36] v jeho článku a to možnost sjednání prekluze práv stanovených obchodním zákoníkem. Prekluze práva jako taková je institutem upraveným výlučně občanským zákoníkem bez zmínky v zákoníku obchodním. Na základě tohoto je možno dojít k úvaze, zda-li lze sjednat prekluzi pro vztahy upravené v ObZ? Občanský zákoník zde stanovuje v §583, jež je dle dikce normou kogentní, že k prekluzi může dojít jen za situace, jež je stanovena v zákoně. Vzhledem k absenci podobného ustanovení v ObZ by se dalo na základě smluvní svobody dovozovat, že zde nedojde k uplatnění subsidiarity a strany se mohou dohodnout na zániku práva[37]. S touto úvahou bych se ztotožnil, a tak bych zde upřednostnil v prvopočátku právní princip dispozitivnosti úpravy před kogentnosti norem určující pro vztahy ochranářské v právu občanském. Zde by dle mého názoru tedy došlo zejména ke střetu právní zásady s kogentním ustanovením zákona, jež představuje jeden z hlavních záměrů zákonodárce. Tento střet bych ale odmítnul interpretovat dle §1 odst.2 s poukazem na mnohem větší míru kogentnosti a vůbec koncepci občanského práva.

[34] Výslovně upravena v §262 ObZ
[35] Jako výjimku zde myslím např.vztahy řídící se zákoníkem práce nebo zákonem o rodině.
[36] *Bejček, J*. Nad přípustností smluvních odchylek od zákona, Právní praxe v podnikání, 1994, č.9
[37] Opačný přístup by mohl dovozovat, že tak není možno, protože strana by se dostala do rozporu s kogentní ustanovením občanského zákoníku, kterýž by se měl subsidiárně použít za předpokladu, že zákon nestanovuje výslovně jinak. Tento názor prezentuje i prof.Bejček ve svém článku (viz.odkaz výše)

V úvaze je nutno ale pokračovat a to zejména s ohledem na zásady poctivého obchodního styku dle §265 ObZ. Zde je stanoveno, že soud odmítne chránit subjekt, jenž jedná v rozporu s těmito zásadami, což by se projevilo i v tomto případě, a tak by nedošlo k možnosti zneužití možnosti prolomení ochrany subjektu, jež se chová v souladu s právem a obezřetně vůči někomu, kdo se snaží zneužít své pozice v obchodním styku a zneužívá tak maximální možné dispozitivnosti obchodního práva.

Na základě tohoto příkladu jsem se snažil dokázat důležitost vztahu norem občanského zákoníku k normám zákoníku obchodního. Můj názor na tento střet je čistě hypotetický, protože jsem zatím nenarazil na případ, kde by se soud musel s podobným problémem vypořádávat. Pokud by i norma zákoníku občanského v tomto případě byla povahy dispozitivní, tak by střet byl naprosto jasný ve prospěch smluvního ujednání. V tomto případě však jasnost ve vztahu k dispozitivnosti přidává na nejasnosti výkladu celého příkladu, jež sice není obsahem této práce, ale i tak svým způsobem prezentuje názor, že i dobrá myšlenka a propracované řešení může přispět ke špatným následkům.

Dělený status normy

Při řešení problematiky kogentnosti norem vycházím zejména z toho, že bych rád popřel jeden ze základních předpokladů dělení norem a to dělení jen na normy kogentní dispozitivní. Dle mého názoru je třeba brát celou problematiku mnohem více komplexněji a netřídit normy jen do těchto dvou kategorií[38]. Zpochybníme-li tedy tuto úvahu a prohlásíme, že norma může být i normou jiného druhu, tak by to mohlo vést k řešení celého problému.

Za současného stavu musíme vycházet z obdobné teorie jako uplatňuje mezinárodní právo soukromé při řešení problémů a zejména hledání hraničních určovatelů[39]. Není možno pohlížet na právní normu jako na jednotný celek, se kterým se nedá nadále pracovat a naopak je nezbytně nutné dokázat s ní pracovat jako se strukturou dále rozložitelnou na další jmenovatele, jmenovitě na právní věty či jejich části[40]. Za předpokladu, že tak učiníme nelze prohlašovat o normě, že je pouze kogentní či dispozitivní, ale že je např. částečně kogentní vlivem zprostředkování kogentnosti zákonem samotným nebo prostřednictvím další normy či jiných faktorů.

[38] *Bejček, J.* Nad přípustností smluvních odchylek od zákona, Právní praxe v podnikání, 1994, č.9 – Zde je tvrzeno v závěru celého článku, že normy je člení na kogentní a dispozitivní a uplatňuje se zde latinské spojení tertium non datur, tedy že norma nemůže být ničím jiným

[39] *Kučera, Z.,* Mezinárodní právo soukromé 6.vydání. Brno: Doplněk, 2004, s .117 a násl.

[40] Dal by se použít i termín právní norma nižšího stupně, jež jsem použil v úvodu celé práce

Takto se dá s normou pracovat mnohem operativnějším způsobem a zejména mnohem lépe interpretovat cíle zákonodárce, jež jsou stanoveny v základním ustanovení dispozitivnosti. Důvod pro tuto metodiku práce shledávám zejména v legislativní úrovni tvorby zákonů, kdy novelizace jsou prováděny velice nepřehledným způsobem a některé normy, resp.ustanovení norem jsou natolik dlouhé a složité, že s nimi nelze pracovat jako s celkem, ale je nutné je mnohem lépe stratifikovat.

Budeme-li mít tedy první normu o dvou částech a to A a B, část A je vzhledem k určovacím pravidlům kogentní a část B by byla částí dispozitivní. Po uplatnění děleného statusu norem bude výsledná norma částečně kogentní. Pokud by se uplatnila metoda současná, tak by se jednalo bezezbytku o normu kogentní a dalo by se tedy uvažovat o tom, zda-li je možné i v dispozitivní části B upravit daný vztah jiným způsobem, či zda se bude uplatňovat kogentnosti celé normy. Dle mého názoru by v tomto případě muselo převážit řešení druhé, protože norma byla jednoznačně určena jako norma kogentní a u tohoto druhu právních norem není odchylka od zákona možná za žádných okolností[41].

Zajímavá situace v tomto případě nastává u norem zprostředkovaně kogentních, jež byly jako druh popsány již dříve. Pokud by došlo k zprostředkovaní kogentnosti, tak by norma určující byla schopna dodat kogentnost částečnou i normě určené. Tato situace je dle mého názoru mnohem pravděpodobnější než situace popsaná dříve ve vztahu čistého předání kogentnosti a zároveň je i mnohem spravedlivější, protože podporuje mimo jiné princip dispozitivnosti norem soukromého práva a tedy zachování maximální možné smluvní volnosti stran v rámci předpisů soukromého práva.

Dal by se zde uplatnit argument ještě větší složitosti právního řádu a zejména rozlišování dispozitivnosti norem za předpokladu, že by se měly posuzovat dle tohoto způsobu. Jako protiargument ale poslouží více než dostatečně větší spravedlnost tohoto způsobu a zejména respektování principů soukromého práva. V současné době je úprava kogentnosti skutečně velice vágní ale i tak nezůstává než pracovat s ní a pokusit se vytvořit systém, jež by podporoval pokud možno jednoznačnost a spravedlnost řešení a současně by umožňoval stranám upravit poměry s maximální možnou mírou jistoty, což právě tento způsob umožňuje tím, že dodává normám maximální rozsah dispozitivnosti.

Co nám přinese budoucnost aneb úvaha de lege ferenda

[41] Toto by nesporně platilo za předpokladu, že by se určovala kogentnosti normy dle pravidel současného obchodního zákoníku – viz.výše.

Dnes se již zřejmě, vzhledem k vývoji na poli soukromého práva v České republice, nemá smysl pozastavovat nad možností zavedení nové koncepce rozlišování kogentnosti a dispozitivnosti norem občanského práva, protože se blíží mílovými kroky nový občanský zákoník, jehož návrh by měl být předložen poslanecké sněmovně k projednávání někdy v půli roku 2008[42]. Proto bych se spíše rád pozastavil nad koncepcí současnou a srovnal ji s koncepcí navrhovanou právě tímto budoucím kodexem a zamyslel se nad jinými možnostmi řešení.

Situaci v současném prostředí občanského práva jsem popsal již v dřívějších kapitolách a tak se jí již nebudu věnovat natolik podrobně. Zdůraznil bych snad jen fakt, že i přes metody a druhy norem, které jsem si zavedl v této práci mi přijde velice obecná, nepříliš právně předvídatelná a odporující zásadám soukromého práva jako takového, zejména zásadě právní jistoty a předvídatelnosti práva.

Naneštěstí obdobnou cestou se vydává i koncept nového občanského zákoníku[43] z pera Karla Eliáše a Michaely Zuklínové, kteří s jen minimální změnou přebírají koncepci zákoníku současného, kdy je řečeno, že ustanovení nového občanského zákoníku jsou dispozitivní, jestliže to nezakazuje tento zákon výslovně nebo pokud není tato dohoda v rozporu s veřejným pořádkem, dobrými mravy nebo právem na ochranu osobnosti[44]. Tato konstrukce až příliš připomíná současný stav a je na místě, obávat se opět nepředvídatelnosti práva a výrazného interpretačního zásahu ze strany soudů. V tomto bodě se nemohu než připojit k povzdechu Josefa Bejčka[45], jež se již několikrát zamýšlel z jakého důvodu nelze převzít úpravu, která byla jasná, předvídatelná a nezpochybnitelná ze starého Zákoníku mezinárodního obchodu, kde bylo řečeno, že strany se mohou od zákona odchýlit, pokud není zákonem výslovně stanoveno jinak. Proč vymýšlet složité konstrukce, které jsou krásné pro akademické prostředí z pohledu interpretačního, zejména např. s ohledem na práci komise vypracovávající koncepci nových principů evropského smluvního práva[46] , když odporují základní funkci práva a to pomáhat občanům při řešení jejich sporů. Je třeba si zde položit otázku: „Dokáže běžný občan bez pomoci odborníka rozpoznat, co je veřejným pořádkem či dobrými mravy?“. Tento koncept by mohl být vhodný v zákoníku obchodním, který je kodexem profesionálů, ale nikoliv zákoníku občanském. Nemám pochybnosti, že praxe si s problémem s odstupem času poradí, ale je třeba ještě tento koncept přinejmenším důkladně zvážit.

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[42] Více konkrétněji se tomuto tématu věnují autoři v poslední době například v časopise Právní zpravodaj.

[43] Lze nalézt např. internetových stránkách www.juristic.cz [citováno dne 23.2.2008] Dostupné z: http://zcu.juristic.cz/download/rekodifikace/obcan/OZ_konsolidovana_verze_brezen_07.zip

[44] Viz.§1 odst.2 Návrhu nového občanského zákoníku (Ke stažení viz.výše)

[45] Viz. např. *Bejček, J*., Pět poznámek (k návrhu obecné části občanského zákoníku), Justiční praxe, 2003, č.1 nebo také *Bejček, J*. Nad přípustností smluvních odchylek od zákona, Právní praxe v podnikání, 1994, č.9

[46] Jedná se o komisi Ole Landovu a znění dosavadní práce je dostupné např. zde [citováno dne 28.2.2008] Dostupné z: http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html

Druhou alternativou by mohlo být převzetí konceptu, jež užívá současný obchodní zákoník ve své části věnující se závazkovým vztahům[47], a který používá pro určení kogentnosti výčtovou metodu, kdy v odstavci prvním taxativním výčtem uvádí ustanovení, jež jsou v následující kapitole kogentní. K tomuto se vyjádřil i K.Eliáš ve svém návrhu zákoníku nového[48], kdy konstatuje, že toto pojetí v praxi selhalo a taktéž, že není schopno pružně reagovat na nové trendy. Reagoval bych jen na argument druhý, se kterým nesouhlasím, protože i zde se dá formou snadné novelizace, popř.rozšiřujícího dalšího ustanovení[49] udělat i tento způsob pružnějším bez ztráty silného pozitiva v podobě jasného výčtu kogentních ustanovení, což v novém návrhu schází. Naopak je tento způsob pro všechny adresáty velice snadno pochopitelný a předvídatelný a tedy respektující základní zásady občanského práva.

Z důvodů výše uvedených se domnívám, že nejvhodnějším budoucím způsobem jak upravit kogenci norem občanského práva by mohla být koncepce současného zákoníku obchodního, popř. minulého hospodářského zákoníku. S malou nereakceschopností na aktuální vývoj se dá bez větších problémů poradit formou rozšiřujícího ustanovení, jež může tuto schopnost poskytnout. Dokonce bych se ani příliš nebál prolnutí způsobů úpravy současného občanského zákoníku a obchodního, protože i v tomto případě se dá využít výčtové metody a v mnoha případech tak předejít nutnosti užití systematického, teleologického či historického výkladu[50] právních norem bez jednoznačného závěru, zda-li je skutečně tím správným. Toto neplatí samozřejmě o veskrze naprosto neflexibilní úpravu bývalého zákoníku mezinárodního obchodu, jež stanovoval, že strany se mohou od úpravy v tomto zákoně odchýlit, pakliže není výslovně stanoveno, že tomu tak není možné. Tato úprava sice postrádá reakceschopnost, nicméně poskytuje zase maximální možnou právní jistotu subjektům práva a zároveň je v ní podpořena základní zásada smluvního práva a to zásada autonomie vůle.

Pár poznámek závěrem

Téma příspěvku je nesmírně komplexní a pro jeho naprosto jednoznačné řešení by bylo zřejmě třeba věnovat každému z ustanovení občanského zákoníku část samostatného textu a postupovat tedy i při řešení zadání nesmírně kazuisticky. Touto cestou jsem se však rozhodnul nevydat a spíše analyzovat celou situaci v obecné rovině. Jako velice zajímavá myšlenka mně napadlo i zpracování obdobného

[47] Viz. §263 ObZ
[48] Komentář ke znění §1 návrhu budoucího občanského zákoníku
[49] Jak je to použito v současném obchodním zákoníku, který stanovuje, že kogentní jsou i základní ustanovení jednotlivých smluvních typů a ustanovení předepisující povinnou písemnou formu
[50] *Gerloch, A.,* in *Boguszak,J., Čapek, J., Berlích, A*.: Teorie práva, 2.vydání, Praha: ASPI Publishing, 2004, s.182

ustanovení jako je tomu u Obchodního zákoníku pro určování kogentnosti. Jakmile jsem ale dokončil kapitolu o zprostředkované kogentnosti, tak bylo zřejmé, že tento taxativní výčet by neměl ani v nejmenším šanci, aby skutečně taxativním byl. Nehledě na to, že pokud budeme normy chápat tak, jak je mým příspěvkem navrhováno, tz. jako normy nižšího stupně, tak je i tento výčet nemožné vytvořit.

Z tohoto důvodu tato práce obsahuje základní vodítka pro určování kogentnosti norem, přičemž jejich výčet je komplexní. Jako problém se může jevit rozlišování částečné kogentnosti, ale je to spíše metoda, která by měla být užívána v konkrétních vztazích než v obecné teorii, protože mnohde může dojít k odkazu i nepřímo.
Taktéž se domnívám, že má metodika by měla být s minimální obměnou použitelná i pro pravděpodobnou úpravu budoucí, která de facto přebírá způsob úpravy metody současné.

Můj příspěvek si tedy neklade cíl odpovědět na každou otázku, kterou může rozlišování kogentnosti a dispozitivnosti položit, ale spíše má podpořit možnou diskuzi a poskytnout přehled současných myšlenek v této oblasti práva, ale taktéž zejména přispět některými novými nápady a poznámkami. Již klasik pravil, že nedostatek iluzí, snaha snižovat a skepticizmus vedou ke stejně vážným omylům v hodnocení jako přemíra iluzí, nadšení a víra (Jean Dutourd). Cílem této práce bylo, po vzoru tohoto citátu, alespoň trochu osvětlit dnes stále ještě tmavý kout rozlišování dispozitivnosti a kogentnosti norem v občanském právu a to zejména stanovením reálných cílů, na které se dá odpovědět a nikoliv dobýváním Olympu, jež by mohlo trvat třeba i věčné časy. Dopustím se závěrem tedy trochy skepticismu i ve vztahu k mé práci a konstatuji, že i když se domnívám, že naplnila svůj účel a v úvodu stanovené cíle, tak i tak neposkytuje odpovědi na všechny otázky, jež současná právní teorie pokládá. I tak si ale autor tohoto článku musel položit otázku: „Je to při současné obecné úpravě vůbec možné“?

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ZNALECKÉ DOKAZOVANIE V SLOVENSKOM A NEMECKOM CIVILNOM PROCESE

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Abstrakt

Znalecké dokazovanie je pomerne často využívaným dôkazným prostriedkom. Súdy ho využívajú v prípadoch, keď pre posúdenie určitej skutočnosti sú potrebné odborné znalosti. Hoci podstata a vyššie uvedený účel jeho využitia sú v právnych úpravách rôznych právnych poriadkov identické, na dosiahnutie a zabezpečenie účelu znaleckého dokazovania sa využívajú rôzne spôsoby jeho úpravy. Autorka sa vo svojom príspevku zameriava na význam tohto spôsobu dokazovania, poukazuje a zvýrazňuje odlišnosti jeho úpravy v slovenskom a nemeckom civilnom procese a vychádzajúc z tejto komparácie sa snaží načrtnúť a predložiť východiská a možné riešenia pre zlepšenie jeho využitia.

Kľúčové slová

Znalec. Znalecký posudok. Zoznam znalcov. Ustanovenie znalca. Výsluch znalca.

Abstract

Expert evidence belongs to frequently utilized means of proof. It is exercised by courts in judicial practice provided that professional knowledge are necessary to review a certain fact. Although the nature and purpose of its usage as stated above are in legal orders of particular countries identical, different methods of its legal regulations are utilized to reach and ensure the purpose of this means of proof. In the article the author pays attention to the significance of the expert evidence, emphasizes and underlines the disparities of its regulation within the Slovak and German civil procedure and proceeding from the comparison of the both legal regulations seeks to lay down and present the starting points and potential solutions for the advancement of utilization of this means of proof.

Key words

Expert. Expert report. List of experts. Appointment of expert. Interrogation of expert.

Znalecké dokazovanie je jedným z hlavných dôkazných prostriedkov, a pre jeho význam a časté využitie

má právna úprava znaleckého dokazovania osobitné miesto v občianskom súdnom poriadku. Slovenská právna úprava za znalca označuje fyzickú osobu alebo právnickú osobu splnomocnenú štátom na vykonávanie činnosti podľa zákona o znalcoch, tlmočníkoch a prekladateľoch, ktorá je[51]

a) zapísaná v zozname znalcov, tlmočníkov a prekladateľov alebo
b) nezapísaná v tomto zozname, ak je ustanovená za znalca, prekladateľa alebo tlmočníka.

Nemecká právna úprava nedefinuje pojem znalca, avšak právna teória ho označuje ako osobu s osobitnými znalosťami.[52]

Osobu znalca využíva súd v konaní v prípadoch, keď sa v rámci dokazovania dostane do situácie, keď posúdenie skutkového stavu závisí od odborných znalostí a skúseností. Podľa jestvujúcej judikatúry[53] ako aj právnej teórie[54], súd je povinný ustanoviť znalca aj v prípade, ak predseda senátu, sudcovia prípadne prísediaci disponujú odbornými znalosťami, ktoré by dovoľovali odborne posúdiť predmet konania. Tieto znalosti by totiž nemohli nahradiť objektívne zistenie skutkového stavu mimo orgánu, ktorý o nich rozhoduje.

Na rozdiel od slovenskej právnej praxe a právnej teórie, nemecká právna teória a prax pripúšťa, aby sudca posúdil skutočnosti, pre ktoré sú potrebné odborné znalosti, pokiaľ sudca týmito odbornými znalosťami disponuje. Túto skutočnosť je však povinný oznámiť účastníkom konania.[55] Tu však vyvstáva otázka, ako sa s takýmto „odborným“ posúdením vysporiada senát odvolacieho súdu, v ktorom ani jeden člen nedisponuje potrebnými odbornými znalosťami, pričom je ťažko predstaviteľné, že by odôvodnenie rozsudku obsiahlo všetky skutočnosti ako písomne vyhotovený znalecký posudok.

Na rozdiel od svedka je znalec zameniteľný, pretože poznatky o určitých skutočnostiach založených na odborných znalostiach a odborných skúsenostiach môže v rámci občianskeho súdneho konania vykonať a podať každý, kto má na to potrebné odborné znalosti a skúsenosti. Znalcom môže byť fyzická osoba alebo i právnická osoba v podobe vedeckého ústavu alebo inej inštitúcie.

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[51] § 2 ods. 1 zákona NRSR č. 382/2004 Z.z. o znalcoch tlmočníkoch a prekladateľoch a o zmene a doplnení niektorých zákonov v znení neskorších predpisov
[52] Rechtswörterbuch, 18. Auflage, Verlag C.H. Beck München 2004, s. 1129
[53] R 1/1981 s. 4
[54] Mazák, J: Základy občianskeho procesného práva, IURA EDITION spol. a.s.o., 2002, s.261
[55] Balzer, Christian: Beweisaufnahme und Beweiswürdigung im Zivilprozess, Erich Schmidt Verlag GmbH&Co. Berlin 2001, s. 119

Podľa slovenskej právnej úpravy je znalec, ak ide o fyzickú osobu, povinný vykonávať znaleckú činnosť osobne, je oprávnený pri vykonávaní úkonu znaleckej činnosti pribrať na posúdenie čiastkových otázok konzultanta z príslušného odboru, avšak opodstatnenosť pribratia konzultanta musí v úkone znaleckej činnosti odôvodniť. Aj v takýchto prípadoch však znalec zodpovedá za celý obsah znaleckého posudku.

Podobne je to aj v nemeckej úprave, kedy znalec je povinný vykonať znalecké dokazovanie osobne. Samozrejme, niektoré čiastkové úkony môže prenechať svojim podriadeným, avšak je neprípustné, aby znalec prenechal podstatnú časť znaleckého dokazovania inej osobe. Znalec je povinný uviesť v znaleckom posudku, ktoré pomocné sily na ktorých častiach prác boli využité a aké je ich vzdelanie. Posudok, ktorý nebol vyhotovený ustanoveným znalcom nie je sám osebe použiteľný, a to ani ako listinný dôkaz. Ak ho však súd napriek všetkému chce použiť, musí o tom zároveň informovať sporové strany, aby sa mohli k tomuto vyjadriť. [56]
Rovnako prísne pristupuje nemecká úprava aj k tzv. „súkromnému posudku“, ktorý si dal vyhotoviť jeden z účastníkov konania. Takýto posudok je považovaný len za návrh účastníka.[57] „Súkromný posudok“ môže byť – takisto ako aj posudok z pripojeného spisu – považovaný za listinný dôkaz. Podmienkou však je, aby bol predmetom ústneho konania, t.j. aby mala protistrana možnosť sa k nemu vyjadriť priamo na pojednávaní a nežiadala vykonanie znaleckého dokazovania. Ak protistrana v spore protirečí vyhodnoteniu „súkromného posudku“ alebo znaleckému posudku z iného konania alebo (aj bez protirečenia) žiada o vyhotovenie nového znaleckého posudku, musí byť tejto požiadavke vyhovené. Pokiaľ ide o posudok obsiahnutý v pripojenom spise, ten je vždy považovaný za listinný dôkaz. Ak by súd takýto posudok nebral do úvahy ako listinný dôkaz, malo by to za následok išlo by o procesnú vadu, ktorá by mohla mať za následok nesprávne rozhodnutie vo veci samej.
V slovenskom právnom poriadku je činnosť znalcov upravená v samostatnom zákone[58]. Znaleckú činnosť vykonávajú zásadne znalci zapísaní do zoznamu znalcov, ktorý vedie Ministerstvo spravodlivosti SR. Zoznam znalcov je verejne prístupný aj na internete, na stránke ministerstva (www.justice.gov.sk). Osoby nezapísané do zoznamu môžu byť výnimočne ustanovené za znalca len v konaní pred súdom alebo inými orgánmi verejnej moci. Predpokladom ustanovenia takejto osoby za znalca je jej súhlas s ustanovením a zloženie sľubu pred orgánom, ktorý ho za znalca ustanovil. Ďalej musí ísť o prípad, keď v príslušnom odbore alebo odvetví nie je zapísaná žiadna osoba alebo osoba

[56] Schneider, Egon: Beweis und Beweiswürdigung, Verlaf Franz Vahlen München, 1994, s.314
[57] Balzer, Christian: Beweisaufnahme und Beweiswürdigung im Zivilprozess, Erich Schmidt Verlag GmbH&Co. Berlin 2001, s. 118

[58] zákon NRSR č. 382/2004 Z.z.

zapísaná v zozname nemôže úkon vykonať alebo vykonanie úkonu by bolo spojené s neprimeranými ťažkosťami. [59]

V prípade, že posudok vypracovala osoba, ktorá nezložila sľub v konaní o veci, v ktorej rozhodnutie závisí od posúdenia skutočností, na ktoré sú potrebné odborné znalosti ustanoveného znalca, ide o vadu konania, ktorá mohla mať za následok nesprávne rozhodnutie vo veci, ak súd pokladá za znalecký posudok a výpoveď znalca aj úkony ustanoveného znalca, ktorý dosiaľ nezložil znalecký sľub.[60] V tomto prípade môže isť len o listinný dôkaz.

V nemeckom súdnom konaní si znalca môžu vybrať samotní účastníci konania. Takýmto výberom je súd viazaný. Súd môže obmedziť výber strán len pokiaľ ide o počet znalcov.[61] V prípade, že sa strany nedohodnú na osobe znalca, ustanoví znalca súd, pritom môže strany požiadať o prípadné návrhy týkajúce sa osoby znalca. Pri výbere však musí uprednostniť verejne vymenovaných znalcov.

Právny základ verejne vymenovaných znalcov je obsiahnutý v § 36 Živnostenského poriadku (Gewerbeordnung) a § 91 Remeselníckeho poriadku (Handwerksordnung). Znalcov vymenováva na ich žiadosť verejnoprávny orgán (inštitúcia) určený vládou príslušného spolkového štátu alebo splnomocnený príslušným krajinským zákonom. Krajinská vláda môže splnomocniť orgány, ktoré sú príslušné podľa zákona vymenovávať znalcov, aby vydali predpisy stanovujúce predpoklady pre menovanie znalcov, ako aj ďalšie oprávnenia a povinnosti znalcov pri vykonávaní znaleckej činnosti.[62] Splnomocnenými orgánmi sú predovšetkým komory ako napr. priemyselná a obchodná komora, komora architektov, komora inžinierov, komora poľnohospodárov, a pod. Komory ako splnomocnené orgány sú oprávnené prijímať prísahu vymenovaných znalcov, čo je takisto ako na Slovensku predpokladom ich pôsobenia ako verejných znalcov.

Na rozdiel od Slovenskej republiky v Nemecku neexistuje centrálna evidencia znalcov. Súdy sa pri ustanovovaní znalcov obracajú na jednotlivé komory v prípadoch, keď samotné strany neoznačia osoby, ktoré by boli spôsobilé pre vykonanie znaleckého dokazovania. Ak sa strany zhodnú na osobe znalca, ktorá nie je verejne vymenovaná, podlieha táto osoba prísahe, ktorú skladá súdu pred alebo po vypracovaní znaleckého posudku.[63] V prípade, že ustanoveným znalcom je verejne vymenovaný znalec, nie je potrebné, aby takýto znalec znova skladal pred súdom prísahu, ale stačí jeho odvolanie sa na už zloženú prísahu, a to aj formou vyhlásenia v písomnom znaleckom posudku. [64]

[59] § 15 zákona NRSR 382/2004 Z.z.
[60] R 37/1973
[61] § 404 ods. 4 Zivilprozessordnung (ďalej len ZPO)
[62] § 36 GewO (Živnostenského poriadku)
[63] § 410 ods. 1, veta prvá ZPO
[64] § 410 ods. 2 ZPO

Slovenské súdy ustanovujú znalca uznesením[65], v ktorom mu zároveň uložia úlohy resp. naformulujú otázky, na ktoré ma znalec odpovedať. V prípade vysokoodbornej problematiky sa súdy v dôsledku nedostatočných odborných vedomostí a skúseností uchyľujú k všeobecnej formulácii otázok pre znalca, čo sťažuje prácu znalca a môže viesť u znalca k zameraniu sa na inú časť problematiky, než aká je pre posúdenie danej veci potrebná. Následkom toho je „predražovanie" znaleckého dokazovania, nakoľko takýto posudok si bude vyžadovať ďalšie doplnenie. Preto je vhodné, aby súd pred formulovaním otázok prekonzultoval danú problematiku so znalcom, a vyhol sa tak následným nejasnostiam, nákladom a zbytočnému predlžovaniu konania. Samozrejme, že každý jednotlivý prípad vykazuje svoje osobitosti a v ich kontexte treba pristupovať aj k formulovaniu úlohy znalca. Niekedy je dokonca vhodnejšie formulovať otázky znalcovi všeobecnejšie, avšak je potrebné uviesť, z akého skutkového stavu má znalec vychádzať, na čo má prihliadať a s čím sa má vysporiadať. Tam, kde výsledky dokazovania zatiaľ nesvedčia jednoznačne v prospech existencie alebo neexistencie určitej skutočnosti, z ktorej má znalec pri podaní posudku vychádzať, a kde konečný záver bude možné učiniť až v rozhodnutí vo veci samej, možno znalcovi uložiť, aby sa vyjadril alternatívne s prihliadnutím na obe možnosti. Inak by sám znalec hodnotil dôkazy a konal z nich závery, ktoré skutočnosti sú preukázané a ktoré nie, čo prináleží len súdu v odôvodnení rozhodnutia vo veci samej.[66]

Predpokladom ustanovenia znalca je, ako už bolo vyššie uvedené, existencia potreby posúdiť určité skutočnosti, resp. skutkový stav len pomocou odborných znalostí a skúseností. Nezáleží pritom, či osobu znalca navrhla sporová strana alebo k takémuto záveru došiel (na rozdiel od sporových strán) súd. Strany majú mať vždy možnosť pred ustanovením znalca sa k potrebe znaleckého dokazovania vyjadriť. Ich súhlas príp. nesúhlas však nemá v podstate žiadne procesnoprávne následky.

V nemeckom občianskom súdom konaní je možné ustanoviť znalca nariadením (Verfügung)[67] alebo prostredníctvom uznesenia o vykonaní dôkazu (Beweisbeschluss).[68] Forma ustanovenia znalca závisí od procesnej situácie. Ak má byť posudok podaný len ústne a je stanovený blízky termín pojednávania, tak sudca použije pre krátkosť času § 273 ods. 2, č. 4 (*predvolanie znalca na pojednávanie – pozn. autora)*: sudca sa telefonicky spýta znalca, či mu vyhovuje termín a v písomnom nariadení mu načrtne dôkazné otázky a podľa možností mu prenechá spis na krátke nahliadnutie.[69] Názor autora v tomto prípade je diskutabilný, nakoľko práve z dôvodu krátkosti času by mal mať znalec čo

[65] § § 170 ods. 2, 202 ods. 3, písm. a) Občianskeho súdneho poriadku
[66] R 1/1981
[67] §§ 144 alebo 273 ods. 2, č. 4 ZPO
[68] § 358a, č. 4
[69] Balzer, Christian: Beweisaufnahme und Beweiswürdigung im Zivilprozess, Erich Schmidt Verlag GmbH&Co. Berlin 2001, s. 122

najpresnejšie informácie, a to nielen ohľadne predmetu znaleckého dokazovania, ale aj v podobe konkrétne formulovaných otázok, na ktoré bude povinný na pojednávaní odpovedať.
Spravidla však súdy vydávajú uznesenie o vykonaní dokazovania. Súd je nielen oprávnený ale aj povinný riadiť činnosť znalcov a k forme a obsahu ich činnosti vydávať pokyny. [70] Nie je žiaduce, aby sudca predložil znalcovi celý spis bez formulovania konkrétnych otázok príp. špecifikácie skutkových zistení, ktoré má znalec poňať ako východiskové. V prípadoch, ak je skutkový stav sporný, súd určí, z ktorých skutočností má znalec vychádzať.[71] To znamená, že súd určí, ktorú z predložených (tvrdených) verzií má znalec považovať za východiskový základ (ev. obe verzie sporových strán). Takýto prípad však nastane len vtedy, ak nie je možné objasniť východiskový skutkový stav prostredníctvom svedeckých výpovedí.[72]
V zložitejších prípadoch, môže nastať situácia, keď sudca má v určitej oblasti minimálne odborné znalosti a skúsenosti. Preto môže súd v záujme správnej formulácie otázok znalcovi pred vydaním uznesenia o vykonaní dôkazu nariadiť vypočutie znalca, ktorý mu takýmto spôsobom poskytne pomoc za účasti procesných strán. Súd znalcovi objasní predmet sporu ako aj odlišné posúdenie sporu procesnými stranami alebo ho upozorní na kauzálne a dôkazné požiadavky. V prípade, že znalec má pochybnosti, resp. nejasnosti ohľadne svojej úlohy, môže kedykoľvek žiadať súd o vysvetlenie.[73]

Úlohou znalca nemá byť vykonávanie dôkazov ani právne posúdenie predmetu znaleckého dokazovania. Takáto úloha patrí výsostne len súdu a takúto úlohu súd ani nesmie znalcovi uložiť. Znalecké dokazovanie nemôže byť spôsobom, ktorým súd ponecháva vlastné rozhodnutie na odborníkov. [74]

Procesnoprávna úprava oboch krajín uprednostňuje ústne podaný znalecký posudok. Prax je však opačná. Slovenský civilný proces neobsahuje žiadne ustanovenia, ktorými sa má súd riadiť pri ústnom znaleckom posudku. Celá úprava je obmedzená len na konštatovanie, že v zápisnici sa uvedú aj údaje, ktoré obsahuje znalecká doložka. [75]

Nemecká právna úprava v prípade ústne podaného znaleckého posudku odkazuje na ustanovenia vzťahujúce sa na výsluch svedka. [76] V prípade, že ešte nebolo vydané uznesenie o vykonaní

[70] § 404a ods. 1 ZPO
[71] § 404a ods. 3 ZPO
[72] Balzer, Christian: Beweisaufnahme und Beweiswürdigung im Zivilprozess, Erich Schmidt Verlag GmbH&Co. Berlin 2001, s. 122
[73] § 404a ods. 2 ZPO
[74] Kóňa, I.: K niektorým otázkam znaleckého dokazovania v konaní na štátnom notárstve, Socialistické súdnictvo, 1984, s. 35
[75] § 17 ods. 4 zákona NRSR č. 382/2004 Z.z.
[76] § 402 ZPO

dokazovania, je ustanovenie znalca obsiahnuté v jeho predvolaní. Pred výsluchom ho sudca poučí, že má posudok podať nestranne, podľa svojho najlepšieho vedomia a svedomia. Je poučený o možnosti odopretia výpovede. Až po tom je oboznámený s predmetom dokazovania a jeho výpovede sú následne protokolované do zápisnice. Potom sú kladené znalcovi otázky najprv zo strany súdu, potom zo strany (právnych zástupcov) sporových strán ako je tomu pri výsluchu svedka.[77]

Formálne náležitosti písomne vyhotoveného znaleckého posudku sú obsiahnuté v § 17 ods. 3 zákona 382/2004 Z.z. podľa ktorého písomne vyhotovený znalecký posudok obsahuje titulnú stranu, úvod, posudok, záver, prílohy potrebné na zabezpečenie preskúmateľnosti znaleckého posudku znaleckú doložku. Zákon ďalej ustanovuje čo má byť obsahom vymenovaným častí znaleckého posudku. [78] To znamená, že znalci majú presný, zákonom stanovený návod, ako vypracovať kvalifikovaný znalecký posudok.

Naproti tomu nemeckí znalci majú sťaženú situáciu pri vypracovaní znaleckého posudku, nakoľko neexistuje žiadna zákonná úprava, ktorá by stanovovala, čo všetko má písomný znalecký posudok obsahovať. Znalec dostane od sudcu predtlačený formulár s poučením a príp. pokynmi, pokiaľ už nie sú obsiahnuté v uznesení o ustanovení znalca.[79] Pomocníkom pri vypracovaní posudku sú zostávajú len odborné publikácie vydané skúsenejšími znalcami.[80]

Význam a podstata znaleckého dokazovania je v oboch právnych úpravách zhodná. Občiansky súdny poriadok síce obsahuje len všeobecnú úpravu znaleckého dokazovania obsiahnutú v 4 odsekoch, naproti tomu zákon č 382/2004. Z.z. dostatočne upravuje podmienky výkonu znaleckej činnosti ako aj práva a povinnosti znalcov. Veľkým pozitívom a uľahčením práce súdu pri výbere osoby znalca je existencia oficiálnej evidencie znalcov, ktorá v Nemecku chýba. V Nemeckej úprave absentuje ustanovenie základných náležitostí písomného znaleckého posudku, teda nejakého návodu pre znalca, ktorý (ak nie je verejne menovaný) ani nemusí mať skúsenosti s vyhotovovaním posudku, čo v konečnom dôsledku (z dôvodu potreby následného doplňovania posudku) môže viesť k spôsobeniu prieťahov v konaní. Na druhej strane nemecká úprava pamätá na riešenie procesných otázok ako je výsluch znalca, podanie znaleckého posudku do zápisnice priamo na pojednávaní, kladenie otázok znalcovi a pod. hoci len odkazom na ustanovenia o výsluchu svedka. Slovenská právna úprava takéto

[77] Balzer, Christian: Beweisaufnahme und Beweiswürdigung im Zivilprozess, Erich Schmidt Verlag GmbH&Co. Berlin 2001, s. 125
[78] § 17 ods. 6 zákona NRSR č. 382/2004 Z.z.
[79] Balzer, Christian: Beweisaufnahme und Beweiswürdigung im Zivilprozess, Erich Schmidt Verlag GmbH&Co. Berlin 2001, s. 125
[80] Pozri najmä Bleutge, Peter: Der grichtliche Gutachtenaufrag, IHK Merkblatt für Sachverständige, DIHK, 2007

ustanovenie nemá, čo vedie k tomu, že sudcovia analogicky uplatnia ustanovenia o výsluchu svedka príp. zvolia iný procesný postup prostredníctvom uznesení o vedení konania.

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KARTELY A SOUKROMOPRÁVNÍ NÁHRADA

JIŘÍ JANEBA*

I. Úvod

V současné době se lze stále setkat s dohodami soutěžitelů, které porušují legální zákaz uvedený v § 3 odst. 1 zákona č. 143/2001 Sb., o ochraně hospodářské soutěže, ve znění pozdějších předpisů (dále jen „OHS"), a zejména některou skutkovou podstatu vypočtenou v odstavci 2 ustanovení § 2 OHS.

Ve společnosti stále není povědomí o možnostech obrany proti porušování soutěžního práva[1]. Tato společenská „nevědomost" má závažné důsledky, protože osoby, které jsou poškozeny protisoutěžním jednáním si toto poškození ani neuvědomují nebo ho mlčky akceptují, anebo s ohledem na neinformovanost se nedokáží účinně bránit. Ačkoliv v posledních letech jsou v rámci hospodářské soutěže snahy o rozšíření a zefektivnění kontroly kartelů[2], musíme uzavřít, že k výraznému posunu ohledně uplatňování práv, zejména v rámci uplatňování náhrady škody za protisoutěžní jednání nedochází[3].

S ohledem na uvedené je třeba říci, že je nutné, aby se v obecné rovině ve společnosti ukotvilo povědomí o tom, co je dovoleno a co je zakázáno na poli soutěžního práva, a zejména jaké možnosti jsou poškozeným osobám k dispozici při bránění a uplatňování jejich práv.

Tento článek si klade za cíl identifikovat nejčastěji se vyskytující tvrdé kartelové dohody, kdy bude věnována pozornost cenovým a segmentačním kartelům. V návaznosti na rozbor těchto kartelů bude řešena možnost soukromoprávní obrany proti protisoutěžnímu jednání.

II. Zakázané dohody

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[1] Neruda, R. Náhrada škody způsobené protisoutěžním jednáním jako způsob soukromého vymáhání antimonopolního práva. Právní rozhledy, 2005, č. 12, 437 s.

[2] Tichý, L. Změna paradigmatu evropského soutěžního práva a její význam pro Českou republiku. Právní rozhledy, 2004, č. 2, 61 s.; http://www.carteldamageclaims.com/english/files/Development_private_antitrust_enforcement_Europe.doc http://www.salans.com/Default.aspx?sID=995&cID=616&ctID=11&lID=0 http://www.shepwedd.co.uk/knowledge/article/715-1289/the-rising-tide-of-cartel-enforcement-who-will-get-the-first-eur-1bn-fine-/

[3] Neruda, R. Náhrada škody způsobené protisoutěžním jednáním jako způsob soukromého vymáhání antimonopolního práva. Právní rozhledy, 2005, č. 12, s. 441

Ustanovení § 3 odst. 1 OHS stanoví, že dohody mezi soutěžiteli, rozhodnutí jejich sdružení a jednání soutěžitelů ve vzájemné shodě (dále jen "dohody"), které vedou nebo mohou vést k narušení hospodářské soutěže, jsou zakázané a neplatné, pokud tento nebo zvláštní zákon nestanoví jinak nebo pokud Úřad pro ochranu hospodářské soutěže (dále jen "Úřad") nepovolí prováděcím právním předpisem z tohoto zákazu výjimku.

Výše uvedený odstavec § 3 je generální klauzulí, což znamená, že se jedná o obecné ustanovení, které v obecné rovině stanoví, co jest pokládáno za závadné, a tedy i zakázané jednání. Soutěžní předpisy jsou vybudovány na využití generálních klauzulí[4], jelikož jen tak je zajištěno, že v rámci výkladu a aplikační praxe bude možno postihnout i jednání, která by nebylo možno postihnout za situace, kdy by právní předpis pouze taxativně vypočetl zakázaná ujednání. Taxativní výčet by v takovém případě byl nedostatečný, protože by objektivně nemohl pokrývat veškerá ujednání mezi soutěžiteli, a právě z tohoto důvodu je struktura soutěžních předpisu vystavěna na využití generální klauzulí.

Ustanovení § 3 odst. 1 OHS, tedy generální klauzule, je doprovázena demonstrativním výčtem typických dohod mezi soutěžiteli, které jsou zakázané. Toto doplnění generální klauzule o demonstrativní výčet je typické, kdy dílčí skutkové podstaty uvedené v § 3 odst. 2 OHS byly převzaty z úpravy čl. 81 odst. 1 Smlouvy o Evropském společenství (dále jen „SES“)

Za nejvíce typická ujednání, která spadají pod skutkové podstaty uvedené v § 3 odst. 2 OHS, můžeme uvést ujednání o fixaci cen a o rozdělení trhu.

III. Cenové kartely

Cenové kartely[5] jsou uvedené pod písmenem a) odstavce 2 § 3 OHS jako ujednání o „přímém nebo nepřímém určení cen, popřípadě o jiných obchodních podmínkách“.

Dohody soutěžitelů ohledně určování cen jsou označovány jako tzv. tvrdé (hard core)[6] kartely, pro které nejsou výjimky. Nebezpečnost takovýchto smluvních ujednání vyplývá z toho, že na základě těchto ujednání dochází k poškozování spotřebitelů. Důsledky cenových ujednání, která jsou označována jako

[4] Munková, J., Kindl, J. Zákon o ochraně hospodářské soutěže. Komentář. 1. vydání. Praha : C.H. Beck, 2007, 30 s.
[5] Eliáš, K., Bejček, J., Hajn, P., Ježek, J. a kol. Kurs obchodního práva. Obecná část. Soutěžní právo. 4. vydání. Praha : C. H. Beck, 2004, 412 s.
[6] http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf

fixace ceny (price fixing)[7] spočívají v tom, že výsledná cena pro konečného zákazníka není určena trhem, ale je dána subjektem, který diktuje ceny odběratelům, čímž si omezuje ekonomické riziko ztrát.

V rámci dohod o cenách bývá užíván termín „resale price maintenance[8]", tedy určení pevné ceny pro další prodej. Je dohodou, která je absolutně zakázaná a je stižena v souladu s ustanovením § 3 odst. 1 OHS sankcí neplatnosti.

V rámci cenových dohod můžeme rozlišovat zda-li jsou uzavřeny mezi soutěžiteli, kteří působí na stejné úrovni trhu zboží nebo mezi soutěžiteli, kteří působí na různých úrovních trhu zboží. V prvém případě se jedná o horizontální cenové kartely a v druhém případě se jedná o vertikální cenové kartely[9].

Zákon v rámci skutkové postaty cenové dohody mezi soutěžiteli nepodává zda-li se jedná o ujednání na straně nabídky nebo poptávky. Z toho lze uzavřít, že je možné se setkat s oběma variantami, kdy však podstatně častější je cenové ujednání na straně nabídky, tedy např. výrobce.

V rámci smluvních ujednání je možno cenové dohody docílit nespočtem variant, kdy jedny můžeme označit jako určení přímé a druhé jako určení nepřímé. Za přímé určení[10] můžeme považovat ujednání, kdy jedna strana diktuje druhé straně ceny dle ceníku ze kterého vyplývají minimální prodejní ceny apod. Za nepřímé ujednání o ceně můžeme určit závazné vzorce pro výpočet ceny, ujednání o jednotlivých složkách ceny apod. Výsledkem jednoho i druhého typu dohod je efekt, že dochází k potlačení nebo eliminaci konkurenčního prostředí, jelikož soutěžitelé nejsou trhem tlačeni ke změnám cen v rámci konkurenčního boje o spotřebitele, ale svou dohodou si brání svůj zisk na úkor spotřebitelů, kteří jsou takovýmto jednáním soutěžitelů přímo poškozeni.

Z výše uvedeného vyplývá absolutní zákaz cenových kartelů, avšak na druhou stranu je třeba říci, že do

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[7] Raus, D., Neruda, R. Zákon o ochraně hospodářské soutěže. Komentář a související české i komunitární předpisy. Praha, Linde, 2004, 65 s.

[8] http://www.oecd.org/dataoecd/35/7/1920261.pdf; rozhodnutí Úřadu pro ochranu hospodářské soutěže, č.j. S 323/06-4242/07/620, „Dohody o určování prodejních cen (tzv. resale price maintenance – „RPM") pro další odběratele jsou jak Evropskou komisí, tak i Soudním dvorem vnímány jako závažné porušení ustanovení článku 81 odst. 1 Smlouvy ES, a to bez možnosti udělení výjimky. V rozhodovací praxi Evropské komise je jakýkoli zásah do svobodného obchodního rozhodování distributora v oblasti určování jeho prodejních cen považován za porušení soutěžních pravidel. V této souvislosti je možno uvést z rozhodovací praxe Evropské komise případ *Hennessy-Henkell* (rozhodnutí Evropské Komise ze dne 11.12.1980 č. 80/1333/EEC), kdy je za zakázanou klauzuli považována dohoda, ve které dodavatel požadoval, aby distributor jeho výrobků stanovil prodejní ceny v určitém rozpětí, ledaže distributor získá souhlas dodavatele ke stanovení odlišné ceny."

[9] Zde lze učinit poznámku, že s ohledem na oznámení Komise z roku 2001 (Oznámení komise o dohodách menšího významu, které výrazně neomezují hospodářskou soutěž podle článku 81 odst. 1 SES (de minimis), OJ 2001 C 368/07), které opustilo od terminologie vertikální a horizontální dohody a nahradilo je označením dohody mezi nekonkurenty a konkurenty

[10] rozhodnutí předsedy Úřadu pro ochranu hospodářské soutěže, č.j. R 68/2002 ze dne 10.11.2003, kterým zčásti změnil a z části potvrdil rozhodnutí Úřadu pro ochranu hospodářské soutěže, č.j. S 168/02-2274/02-VOI ze dne 18.10.2002 ve věci porušení ustanovení § 3 odst. 1 OHS „Český Telecom – Předmětem zkoumání ze strany ÚOHS byla rámcová kupní smlouva a podmínky prodeje a distribuce předplacených karet mezi Českým Telecomem a.s. a Českou poštou s.p. Všeobecné dodací podmínky v bodě 5.5. uváděly povinnost kupujícího prodávat a distribuovat předplacené karty za stanovenou nominální cenu. ÚOHS v této smluvní formulaci spatřoval porušení zákona když došlo k uzavření zakázaných dohod o přímém určení ceny. Českému Telecomu a.s. byla uložena pokuta ve výši 6.500.000,-Kč."

zákazu nemusí spadat veškeré dohody soutěžitelů. V prvém případě můžeme mluvit o ujednání soutěžitelů, které se týká ceny, ale není závadné. Za takovéto nezávadné ujednání je možno považovat ujednání o doporučených cenách. I takováto ujednání však mohou být zakázaná[11] za situace, kdy se sice jedná o doporučené ceny, ale v návaznosti na ně je stranami sjednáno např. „V případě, že kupující nedodrží doporučené ceny uvedené v příloze č. 1 – „Ceník", tak v případě zjištění takového nedodržení, se kupující zavazuje prodávajícímu uhradit smluvní pokutu ve výši …". V případě takového ujednání se zcela jistě bude jednat o zakázané ujednání, jelikož ve svých důsledcích nutí kupujícího pod sankcí smluvní pokuty dodržovat ceny, které určí prodávající. V druhém případě můžeme za nezávadné ujednání považovat, kdy prodávající stanoví maximální cenu zboží. V takové situaci, má kupující možnost zvolit si vlastní cenu, aniž by byl prodávajícím omezen ve své volnosti určovat cenu zboží. I v této situaci se uplatní to, co bylo uvedeno u prvního případu, kdy prodávající nastaví maximální cenu takovým způsobem, že kupujícího limituje ve volním stanovení ceny, popř. stanoví procentuální rozptyl ceny, který sankcionuje apod.

Skutečnost, že závadné cenové ujednání je pokládáno za velmi závažné protisoutěžní ujednání dokládá i to, že na takovéto ujednání nebude dopadat výhoda poskytnutá pravidlem de minimis stanovená v ustanovení § 6 OHS[12].

K protisoutěžnímu ujednání se striktně staví i Nařízení Komise (ES) č. 2790/1999 ze dne 22.12. 1999 o použití čl. 81 odst. 3 Smlouvy na kategorie vertikálních dohod a jednání ve vzájemné shodě (dále jen „Nařízení"). V článku 4[13] Nařízení jsou vypočtena tzv. tvrdá omezení[14], která v případě, že jsou

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[11] rozhodnutí předsedy Úřadu pro ochranu hospodářské soutěže, č.j. R 3/2001 ze dne 9. 11. 2001, kterým zčásti změnil a zčásti zrušil rozhodnutí Úřadu pro ochranu hospodářské soutěže, č.j. S 73/00-1800-210 ze dne 15.12.2000 ve věci porušení ustanovení § 3 odst. 1 OHS „Adidas ČR s.r.o. uzavíral se svými zákazníky – odběrateli zboží značky Adidas rámcové smlouvy, které obsahovaly ujednání, že nedodržení doporučené úrovně maloobchodních cen zákazníkem včetně maximálních slev z maloobchodních cen, je jedním z důvodů, které dává dodavateli (společnosti Adidas ČR s.r.o.) právo s okamžitou platností od rámcové smlouvy odstoupit. I v tomto případě shledal ÚOHS porušení zakázaných dohod."
rozhodnutí předsedy Úřadu pro ochranu hospodářské soutěže, č.j. R 18/200 ze dne 18.7.2001, kterým plně potvrdil rozhodnutí Úřadu pro ochranu hospodářské soutěže, č.j. S 35/00-1436/00-240 ze dne 31.7.2000 ve věci porušení ustanovení § 3 odst. 1 zákona č. 63/1991 Sb., o ochraně hospodářské soutěže, „Gillette Czech, s.r.o. se dopustila porušení zákona o ochraně hospodářské soutěže, že s velkoobchodními prodejci působícími ve smluveném území ČR jako aktivní velkoobchodní prodejci značky Gillette uzavřela dohodu podle níž se odběratel zavázal dodržovat doporučené ceny pro maloobchodní odběratele."

[12] Zákon pamatuje na dohody mezi soutěžiteli, jejichž dopad na soutěž je nepatrný (tzv.dohody de minimis); tyto jsou při splnění podmínek stanovených v § 6 OHS vyňaty ze zákazu dohod narušujících soutěž. Vynětí ze zákazu dohod však nelze (i při splnění podmínky společného podílu účastníků dohody na relevantním trhu nepřevyšujícího 15 %) uplatnit u vertikálních dohod, jejichž předmětem je přímé nebo nepřímé určení cen zboží kupujícímu pro další prodej. To samé platí pro vertikální dohody, i když společný podíl účastníků dohody na relevantním trhu nepřesahuje 10 %, avšak dohoda obsahuje ujednání o přímém nebo nepřímém určení cen.

[13] článek 4 Nařízení uvádí: „Výjimka podle článku 2 se nevztahuje na vertikální dohody, jejichž účelem je přímo nebo nepřímo, samostatně nebo společně s jinými faktory pod kontrolou stran: a) omezení způsobilosti kupujícího stanovit svou prodejní cenu, aniž je dotčena možnost dodavatele stanovit nebo doporučit nejvyšší prodejní cenu za předpokladu, že se tyto posledně jmenované ceny nerovnají pevné nebo nejnižší prodejní ceně v důsledku tlaku nebo podněcování jedné ze stran;"

[14] Obdobně jako ve výše uvedeném případě pravidla de minimis uvádí Nařízení (bloková výjimka pro vertikální dohody) ujednání, která patří k nejzávažnějším protisoutěžním ujednáním, jelikož jejich důsledky negativně deformují soutěž a mají nepříznivý dopad pro spotřebitele.

inkorporována do smlouvy, tak taková dohoda z důvodu dikce článku 4 Nařízení („výjimka podle článku 2 se nevztahuje…“) nebude profitovat z výhod plynoucích z blokové výjimky podle Nařízení.

Jak již bylo uvedeno výše, tak zakázaná cenová ujednání v rámci dohod mezi soutěžiteli mají negativní dopad jak na soutěž tak na spotřebitele[15]. V rámci takových ujednání se někdy soutěžitelé v pozici výhradních dodavatelů snaží vnutit odběratelům pevné ceny například z důvodu, že sami chtějí rozšířit své aktivity a působit nejen jako dodavatelé, ale i jako prodejci. V tomto případě se jim fixace cen velice hodí, jelikož v takové situaci nejsou ohroženi cenami od konkurence, kterým diktují ceny díky své dodavatelské pozici. Takovéto jednání narušuje konkurenční prostředí, jelikož je zde jeden subjekt dodavatel/prodejce, který diktováním cen účinně eliminuje svoji konkurenci.

Při sjednávání dohod mezi soutěžiteli je třeba velmi obezřetně přistupovat ke smluvním ujednáním týkajících se stanovení ceny, tak aby dohoda smluvních stran nevedla k tomu, že smluvní ujednání bude možno podřadit pod zakázané dohody o cenách. V takovém případě je velmi vhodné nechat si dohodu stran prověřit z pohledu konzultanta, např. advokáta, který by měl posoudit, zda ujednání soutěžitelů lze či nelze podřadit pod zakázané dohody o cenách.

V praxi se lze setkat s velmi nežádoucím jevem ze strany zejména odběratelů, že mlčky trpí závadné jednání ze strany dodavatelů, které je možné podřadit pod zakázané dohody o cenách, kdy argumentují zejména tím, že jim „nic jiného nezbývá“, protože když nepodepíší oni, tak se na trhu najde jiný odběratel, který nastoupí na jejich místo v rámci trhu.

IV. Segmentační kartely

V dohodách mezi soutěžiteli se můžeme setkat s tzv. segmentačními kartely[16]. Ustanovení § 3 odstavec 2 písmeno c) OHS uvádí, že rozdělení trhu nebo nákupních zdrojů je považováno za zakázanou dohodu, pokud vede nebo může vést k narušení hospodářské soutěže. Stejně jako u zakázaných cenových ujednání i segmentační kartely spadají pod tzv. tvrdé (hard core) dohody.

Právě tyto kartelové dohody je třeba přiřadit k závažným protisoutěžním ujednáním, jelikož jejich důsledkem je ve většině případů to, že mohou vést až k vyloučení soutěže a narušují tržní prostředí tím, že omezují soutěž jak na straně nabídky tak poptávky[17].

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[15] Munková, J., Kindl, J. Zákon o ochraně hospodářské soutěže. Komentář. 1. vydání. Praha : C.H. Beck, 2007, 42 s.
[16] Raus, D., Neruda, R. Zákon o ochraně hospodářské soutěže. Komentář a související české i komunitární předpisy. Praha, Linde, 2004, 68 s.; Bednář, J. Aplikace soutěžního práva v rozhodovací praxi. Z rozhodnutí Úřadu pro ochranu hospodářské soutěže, Komise a Evropského soudního dvora. Praha : C. H. Beck, 2005, 88 s.
[17] Raus, D., Neruda, R. Zákon o ochraně hospodářské soutěže. Komentář a související české i komunitární předpisy. Praha, Linde, 2004, 69 s.

V rámci segmentačních kartelů na horizontální úrovni[18] je narušení soutěže velmi typické, jelikož takové rozdělení trhu sebou nese tu skutečnost, že nedochází ke konkurenčnímu boji a takový efekt není v souladu se snahou o spotřebitelský blahobyt.

V případě, že ze strany dodavatele (např. výhradního) je snaha o rozparcelování území kam bude dodávat své produkty, je takové jednání nutno označit za velmi nebezpečné a nežádoucí. Důvod pro odsouzení takového jednání spočívá v tom, že dodavatel si vytvoří síť odběratelů, kteří sice budou profitovat na daném území, ale nebude jim umožněno rozšiřovat služby za hranice tohoto území. Dále můžeme zmínit, že takovéto počínání vede nebo může vést k tomu, že ostatním soutěžitelům bude znemožněn přístup na trh daného zboží.

Skutečnost, že závadné ujednání o rozdělení trhu je pokládáno za velmi závažné protisoutěžní ujednání dokládá i to, že na takovéto ujednání nebude dopadat výhoda poskytnutá pravidlem de minimis stanovená v ustanovení § 6 OHS[19].

K protisoutěžnímu ujednání se striktně staví i Nařízení Komise (ES) č. 2790/1999 ze dne 22.12. 1999 o použití čl. 81 odst. 3 Smlouvy na kategorie vertikálních dohod a jednání ve vzájemné shodě (dále jen „Nařízení"). V článku 4[20] Nařízení jsou vypočtena tzv. tvrdá omezení[21], která v případě, že jsou inkorporována do smlouvy, tak s ohledem na dikci článku 4 Nařízení („výjimka podle článku 2 se nevztahuje…") nebudou profitovat z výhod plynoucích z blokové výjimky podle výše uvedeného Nařízení.

Podobně jako tomu je u cenových kartelů, tak se zde můžeme setkat s vysokou latencí. Důvodem této latence je skutečnost, že přímé napojení na výhradního dodavatele ve většině případů odběrateli zaručuje, že při dodržení podmínek nemusí mít obavu ze vstupu konkurence na své území. Takovýto efekt je nežádoucí, jelikož v první řadě deformuje soutěžní prostředí tím, že se snižuje možnost vstupu na daný trh, a dále to může mít negativní důsledky pro spotřebitele, protože odběratel si může vůči spotřebitelům diktovat podmínky, které by vůči nim nemohl uplatňovat, kdyby tržní prostředí nebylo

[18] Ujednání mezi konkurenty, tedy mezi soutěžiteli, kteří působí na stejné úrovni trhu zboží; Komise svým oznámením z roku 2001 (Oznámení komise o dohodách menšího významu, které výrazně neomezují hospodářskou soutěž podle článku 81 odst. 1 SES (de minimis), OJ 2001 C 368/07) opustila od terminologie vertikální a horizontální dohody a nahradila je označením dohody mezi nekonkurenty a konkurenty.

[19] Zákon pamatuje na dohody mezi soutěžiteli, jejichž dopad na soutěž je nepatrný (tzv.dohody de minimis); tyto jsou při splnění podmínek stanovených v § 6 OHS vyňaty ze zákazu dohod narušujících soutěž. Vynětí ze zákazu dohod však nelze (i při splnění podmínky společného podílu účastníků dohody na relevantním trhu nepřevyšujícího 15 %) uplatnit u vertikálních dohod, jejichž předmětem je poskytnutí kupujícímu pro tento další prodej úplné ochrany na vymezeném trhu. To samé platí pro vertikální dohody, i když společný podíl účastníků dohody na relevantním trhu nepřesahuje 10 %, avšak dohoda obsahuje ujednání o rozdělení trhu, nákupních zdrojů nebo zákazníků.

[20] článek 4 Nařízení uvádí: „Výjimka podle článku 2 se nevztahuje na vertikální dohody, jejichž účelem je přímo nebo nepřímo, samostatně nebo společně s jinými faktory pod kontrolou stran: b) omezení týkající se území na kterém, nebo zákazníků, kterým může kupující prodávat smluvní zboží nebo služby, s výjimkou …;"

[21] Obdobně jako ve výše uvedeném případě pravidla de minimis uvádí Nařízení (bloková výjimka pro vertikální dohody) ujednání, která patří k nejzávažnějším protisoutěžním ujednáním, jelikož jejich důsledky negativně deformují soutěž a mají nepříznivý dopad pro spotřebitele.

deformováno tím, že de facto není konkurenčně ohrožován dalšími soutěžiteli.

V. Soukromoprávní obrana a vymáhání soutěžního práva ve vztahu k zakázaným dohodám

Vzhledem k tomu, že výše popsané skutkové podstaty v rámci kartelů jsou nejčastějším protisoutěžním jednáním, je nutno se zabývat i obranou proti takovému závadnému chování.

V rámci této části se zaměříme na soukromoprávní vymáhání v souvislosti s protisoutěžními ujednáními, která byla popsána výše. Záměrem je poukázat na vývoj v této oblasti a taktéž na možnosti, které soukromoprávní oblast poskytuje.

V rámci kontinentálního práva není zakořeněná tradice v souvislosti s vymáháním protisoutěžního jednání soukromoprávní cestou[22]. Oproti tomu můžeme poukázat na USA, kde je tradice soukromoprávního vymáhání protisoutěžního jednání. Soukromoprávní vymáhání (private enforcement) bylo zakotveno již v roce 1890, a to nejstarším antimonopolním zákonem – Sherman Act (následně převzato do Clayton Act[23]).

Soukromoprávní vymáhání antimonopolního práva však nezůstává dominantou USA, vývoj v této oblasti lze zaznamenat i v rámci Evropské unie a České republiky. V této souvislosti lze odkázat na několik rozhodnutí Evropského soudního dvora, a to zejména na „Courage v. Crehan" (Case C-453/99 [2001] ECR I-6297, para. 27)[24]. Z dalších případů, které se zabývaly soukromoprávním vymáháním antimonopolního práva můžeme uvést zejména „Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others'" (Joined Cases C-295/04 to C-298/04, para. 91[25]).

Aktuálnost soukromoprávního vymáhá lze vysledovat například v projevu, který pronesla evropská komisařka pro hospodářskou soutěž paní Neelie Kroes, kdy uvedla, že soukromoprávní vymáhání garantuje prospěšný efekt na pravidla hospodářské soutěže v rámci Evropské unie. Na druhou stranu uvedla, že stále ze strany poškozených je malé povědomí o možnostech soukromoprávního vymáhání antimonopolního práva. V této souvislosti dále uvedla, že tuto skutečnost je třeba změnit, aby poškozené

[22] „Autorovi není znám případ jakéhokoliv rozhodnutí českého soudu o náhradě škody způsobené protisoutěžním jednáním." in. Neruda, R. Náhrada škody způsobené protisoutěžním jednáním jako způsob soukromého vymáhání antimonopolního práva. Právní rozhledy, 2005, č. 12, 441 s.

[23] „Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws…"

[24] "Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."

[25] toto rozhodnutí odkazuje právě na případ „Courage v. Crehan", který uzavřel, že soukromoprávní vymáhání antimonopolního práva před národními soudy může přinést výraznou podporu efektivity soutěže v rámci ES.

subjekty mohly úspěšně bránit svá práva[26]. V neposlední řadě můžeme odkázat i na „European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules“, které pojednává o soukromoprávním vymáhání antimonopolního práva a stanoví si záměr otevřít debatu ohledně soukromoprávního vymáhání[27]. V této souvislosti můžeme odkázat i na Nařízení Rady č. 1/2003, kterým došlo k tomu, že soudy členských států mohou posoudit, zda-li se jedná o zakázanou dohodu či nikoliv. Toto je důležité zejména za situace, kdy soudu dojde žaloba o náhradu škody v souvislosti s porušením antimonopolního práva.

Výše uvedený rozsudek, tedy „Courage v. Crehan“, odkázal na aplikaci č. 81 SES a v této souvislosti vyslovil, že je nepřípustné, aby na národní úrovni existovala překážka k vymáhání nároků v souvislosti s porušením antimonopolního práva. Z toho můžeme dovozovat, že v případě, že nějaký subjekt bude poškozen např. zakázanou dohodou a vznikne mu tímto jednáním soutěžitelů škoda, nemůže mu být bráněno, aby uplatnil své škodní nároky[28] u národního soudu.

I přes výše uvedené rozhodnutí Evropského soudního dvora, nařízení a projevy evropské komisařky pro hospodářskou soutěž můžeme uzavřít, že zatím nedošlo k výrazné změně situace. Za hlavní negativní důvod považuji, že veškeré snahy nemají celospolečenský vliv, ale vedou „jen“ k odborným diskusím, aniž by došlo k rozšíření vědomosti o dané problematice v rámci celé společnosti[30]. Zde lze spatřovat hlavní rozdíl mezi Evropou a USA, kdy v právě v USA je široká povědomost o nárocích v souvislosti s protisoutěžním jednáním soutěžitelů, kdy kolem 90% antitrustových případů jsou spory soukromoprávní[31].

V případě, že se poškozená osoba rozhodne uplatnit škodu, která jí vznikla s ohledem na protisoutěžní jednání soutěžitelů, je třeba, aby tato škoda byla uplatněna u soudu, kde věcně příslušným k projednání takové žaloby bude krajský soud[31]. V této souvislosti je třeba odkázat na ustanovení § 135 zákona č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, na základě kterého buďto soud vychází z rozhodnutí např. Úřadu pro ochranu hospodářské soutěže nebo Evropské komise, o tom, že došlo k protisoutěžnímu jednání nebo si soud otázky, o nichž přísluší rozhodnout jinému orgánu, může

[26] http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en

[27] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en

[28] Mám za to, že náhrada škody bude posuzována podle obchodního zákoníku, kdy důvody pro aplikaci § 373 -386 zákona č. 513/1991 Sb, obchodní zákoník (dále jen „ObchZ“), ve znění pozdějších předpisů, jsou následující: ustanovení § 757 ObchZ uvádí, že „Pro odpovědnost za škodu způsobenou porušením povinností stanovených tímto zákonem platí obdobně ustanovení § 373 a násl.“. Za této situace je třeba uzavřít, že aplikace § § 373 - 386 ObchZ s odkazem na § 757 ObchZ je správná, jelikož § 41 ObchZ uvádí obecný zákaz zneužití účasti v hospodářské soutěži.

[30] V rámci členských států EU bylo během let 1962 - 2004 podáno pouze něco kolem 60 žalob na náhradu škody.

[31] http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Private%20Enforcement%20of%20Antitrust%20Law%20-%20Eger%20&%20Weise.pdf

[31] Věcnou příslušnost lze dovodit z § 9 odst. 3 písm. k) zákona č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, který stanoví, že krajské soudy rozhodují v obchodních věcech jako soudy prvního stupně ve věcech ochrany hospodářské soutěže.

posoudit sám.

Z toho vyplývá, že v České republice jsou dány zákonné možnosti pro uplatňování náhrady škody v rámci porušení soutěžního práva, avšak přes tyto možnosti ze strany poškozených subjektů nedochází k obraně vůči škodám, které jsou jim způsobeny protisoutěžním jednáním soutěžitelů.

VI. Závěr

V rámci tohoto článku bylo poukázáno na nejčastěji používané kartelové dohody mezi soutěžiteli. Je třeba, aby se smluvní strana, které je dána oferta, dostatečně zajímala i o případné soutěžněprávní aspekty. V případě podpisu smlouvy se i akceptant stává porušitelem a bude záležet na míře jeho odpovědnosti. V případě, kdy bude následně nárokovat škodu z dohody, kterou např. soud označí jako protisoutěžní, bude moci prokázat zejména to, že byl ve slabší ekonomické nebo vyjednávací pozici, tedy de facto mu nezbylo nic jiného než dohodu podepsat. Smluvní strany si stále nejsou plně ve všech případech vědomy, že jimi podepisovaná smlouva může mít i soutěžněprávní dopady.

Informovanost o možnosti nárokovat např. náhradu škody v souvislosti s protisoutěžním jednáním je naprosto mizivá. V rámci Evropské unie lze zaznamenat snahy o zvýšení informovanosti o možnosti nárokování náhrady škody v soukromoprávním řízení, ale zdá se mi, že tyto snahy nemají v rámci veřejnosti valný ohlas a troufám si říci, že v obecné rovině se mezi laiky o této možnosti vlastně nic neví. Mám za to, že zejména státní orgány by měly dostatečně šířit osvětu i tímto směrem, tedy informovat o možnosti soukromoprávních nároků v souvislosti s protisoutěžním jednáním. Důvodem proč by mělo být ve společnosti povědomí o možnosti uplatnit před obecnými soudy škodu v souvislosti s protisoutěžním jednáním je zejména v tom, že v takovém případě bude na soutěžitele vyvíjen další tlak, který může mít pozitivní efekt na soutěž samotnou.

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PŘÍMÝ A NEPŘÍMÝ STYK RODIČE S NEZLETILÝM DÍTĚTEM

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Abstrakt

Tato stať seznámí čtenáře s některými z možností, které nabízí praxe rodičům a soudům při úpravě styku v českých právních podmínkách. Příspěvek tedy zkoumá a stručně sumarizuje různé formy styku rodiče s dítětem. Rovněž se zabývá výhodami a nevýhodami jednotlivých forem a podob styku rodiče s dítětem. Přitom se zaměřuje zejména na přímý a nepřímý styk a styk rodiče s dítětem za účasti třetích osob.

Klíčová slova

Přímý styk, nepřímý styk, styk s dítětem za účasti třetí osoby,

Abstract

Parent-child contact has become one of the most important issues in the field of family law. This paper explores different forms and patterns of contact in Czech legal conditions. It offers definitions and descriptions of direct and indirect contact. Furthermore, it surveys which strengths and weaknesses each of them contains. Direct contact, as well as indirect, should appear in many forms, thus, courts and parents have to carefully select what is in the best interest of the child in a specific situation. This paper should provide some resolutions of above-mentioned problems.

Key words

Direct contact, indirect contact, supervised contact, supported contact

Styk rodiče s nezletilým dítětem je základním prostředkem udržování vzájemného vztahu v případech, kdy rodič nemá dítěte ve své péči. Přitom okolnosti, za kterých dítě není v péči rodiče mohou být různorodé, například po rozvodu rodičů a svěření dítěte do výchovy pouze jednoho z nich nebo při nařízení ústavní výchovy podle § 46 zákona č. 94/1963 Sb., o rodině ve znění pozdějších předpisů (dále i „ZR“). V teorii i praxi lze rozeznat celou řadu podob styku a následující text má poskytnout jejich přehlednou systematizaci a naznačit, v jakých situacích je vhodné jednotlivé formy využívat.

Podobu styku rodiče s dítětem určují v obecné rovině tři základní činitelé, kterými jsou rodiče, dítě a zájem dítěte. Role rodičů v tomto případě plyne z jejich postavení nositelů rodičovské zodpovědnosti podle § 31 a násl. ZR a také z § 27 odst. 1 ZR, který vyjadřuje preferenci dohody rodičů o styku s dítětem bez schválení soudu před soudní úpravou styku. Rovněž role dítěte je nezpochybnitelná, neboť dítěti náleží ve smyslu § 31 odst. 3 ZR právo o sobě do určité míry rozhodovat v rámci své rozhodovací autonomie.[1] Zájem dítěte má být podle čl. 3 Úmluvy o právech dítěte (Sdělení č. 104/1991 Sb.) klíčovým hlediskem při jakékoliv rozhodovací činnosti, která se nějakým způsobem dítěte dotýká. Rovněž § 27 odst. 2 ZR ukládá soudu povinnost o styku rozhodnout v případě, vyžaduje-li to zájem na výchově a poměry v rodině. Nesporně tedy platí, že uzavřou-li rodiče o styku s dítětem dohodu, která bude v rozporu s jeho zájmem, má soud povinnost zahájit ve smyslu § 81 OSŘ řízení o úpravě styku rodiče s dítětem.[2] Je tedy zřejmé, že pokud není mezi rodiči o styku možná dohoda, případě je dohoda v rozporu se zájmy dítěte, vstupuje na scénu jako další činitel soud.[3]

Jak bylo již naznačeno výše, dohodu o styku s dítětem není nutné podle § 27 odst. 1 ZR uzavírat v písemné formě a proto můžeme považovat proces jejího uzavíraní nebo případné změny za jednoduchý, neboť v zásadě postačí shoda obou rodičů. Navíc jsou-li rodiče schopni dohody ohledně podmínek a podoby styku, nebude pravděpodobně problém ani její následná realizace. Oproti tomu na soudní úpravu styku dojde s největší pravděpodobností zejména pokud jsou narušeny vzájemné vztahy a schopnost komunikace mezi rodiči, případně mezi rodičem a dítětem. Soudce se pak ocitá v komplikované situaci, kdy má jeho rozhodnutí korespondovat se zájmem dítěte, ale zároveň hledá řešení, které nezůstane pouze „na papíře“, ale bude ze strany rodičů i dítěte plněno, pokud možno dobrovolně. Případný výkon rozhodnutí nabízí jen výrazně limitované prostředky a často lze pochybovat o jejich účinnosti.[4]

Česká právní teorie ani právní řád nerozlišuje výslovně přímý a nepřímý styk, přičemž zpravidla pod pojem styk rodiče s dítětem subsumuje pouze formy zahrnující osobní kontakt.[5] Styk rodiče s dítětem ovšem probíhá v celé řadě různých podob a na základě určitých rozlišovacích kriterií je možné vysledovat dělící linii mezi formami styku, které jsou založeny na osobním setkání rodiče s dítětem a

1 K tomu srov. *Hrušáková, M., Králíčková Z.* České rodinné právo, 3. vyd., Brno: Doplněk, 2006, str. 242 nebo Nález ÚS ČR ze dne 19. 4. 2001, sp. zn. IV. ÚS 695/2001.
2 K tomu srov. Nález ÚS ČR ze dne 10. 3. 1998, sp. zn. I.ÚS 112/97.
3 K povinnosti soudu zahájit řízení shodně např. *Czigle, J.* Vzory s komentářem : Návrh na úpravu styku s dítětem. Právní rádce, 2005, č. 9, str. 79.
4 Viz *Králík, M.* Úprava styku s nezletilým dítětem, Právní rádce, 1999, č. 5, str. 10 a násl.
5 K tomu srov. *Průchová, B., Novák, T.* Omezený styk rodiče s dítětem. Právo a rodina, 2004, č. 3, str. 10 a násl., *Nová, H.* Problémy styku nezletilých dětí s rozvedenými rodiči. Právní rádce, 1995, č. 3, str. 12 a násl. nebo *Králík, M.* Úprava styku s nezletilým dítětem, Právní rádce, 1999, č. 5, str. 10 a násl.

formami styku, které probíhají bez osobního kontaktu. Přímý styk lze definovat jako osobní setkání rodiče s dítětem ve stejnou dobu na stejném místě, přičemž obvykle dochází mezi rodičem a dítětem k vzájemné interakci. Zřetelně je tedy přímý styk klíčovým nástrojem pro rozvoj vzájemného vztahu a realizaci rodičovské péče o dítě.[6] Oproti tomu pod pojem nepřímý styk zahrnujeme takové formy vzájemné interakce a komunikace mezi rodičem a dítětem, které nejsou založeny na osobním setkání. Samozřejmě i nepřímý styk přispívá k rozvoji vztahů a podle odborné literatury může v některých situacích dočasně nahradit přímý styk, nebo pomoci překonat komunikační bariéry mezi rodičem a dítětem.[7]

Z hlediska právní teorie je také sporné, zda můžeme pod pojmem nepřímý styk rozumět také právo rodiče na informace o dítěti.8 Zákon o rodině v § 26 odst. 4 vyčleňuje jako samostatné právo rodiče na pravidelnou informaci a nezahrnuje je pod pojem styk. Oproti tomu podle čl. 3 Úmluvy o styku s dětmi (sdělení č. 91/2005 Sb.m.s.) se stykem rozumí také právo rodiče na informace o dítěti a právo dítěte na informace o rodiči. Domnívám se, že právě s ohledem na Úmluvu o styku s dětmi je vhodné považovat právo na informace o dítěti za součást nepřímého styku rodiče s dítětem.

Přímý styk rodiče s dítětem

Přímý styk je základním prostředkem rozvíjení vztahu a realizace rodičovské role v situacích, kdy dítě a rodič nežijí společně. Dítě prostřednictvím přímého styku získává zejména pocit významu pro rodiče, zkušenosti s rozvíjením a navazováním důležitých mezilidských vztahů, osvojuje si celou řadu znalosti a dovednosti a v neposlední řadě může přímý styk pomoci napravit narušené citové vztahy.[9]

Odborná literatura používá pro rozdělení podob přímého styku různá kriteria. V tomto příspěvku nejprve rozčleníme podoby styku podle doby jeho trvání a frekvence, přičemž bude možné identifikovat celkem pět typových skupin.[10] Vzhledem k tomu, že přímý styk rodiče s dítětem může probíhat za přítomnosti dalších osob kromě oprávněného rodiče, vytvoříme na základě odlišnosti v tomto znaku další členění.

6 Viz *Gilmore, S.* Contact /Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision-Making. Int. Jnl. of Law, Policy and Family, 2006, Vol. 20, No. 3, s. 346, 347.

7 Srov. *Perry, A., Rayney, B.* Supervised, Supported and Indirect Contact Orders: Research Findings. Int. Jnl. of Law, Policy and Family, 2007, Vol. 21, No. 1, str. 25, 26.

8 Tamtéž, str. 26.

9 Srov. *Sturdge C., Glaser D.* Contact and Domestic Violence – The Experts´ Court Report´. Family Law, 2000. Cit. podle Making Contact Work : A Consultation Paper issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law [online] [cit. 11. 4. 2008]. str. 10. Dostupné z http://www.dca.gov.uk/family/abfl.pdf.

10 Členění převzato podle *Smyth, B.* Parent-Child Contact in Australia: Exploring Five Different Post-Separation Patterns of Parenting. Int. Jnl. of Law, Policy and Family, 2005, Vol. 19, No. 1, str. 1 a násl.

Přímý styk a doba a frekvence styku

První typová skupina se vyznačuje tím, že dítě tráví s rodiči zhruba **stejnou dobu**. V podmínkách ČR lze do této skupiny řadit pravděpodobně pouze ty případy, kdy je dítě soudem svěřeno do společné nebo střídavé péče obou rodičů. Úprava tímto způsobem může být v zájmu dítěte a poskytovat mu prospěch pouze v některých případech a za splnění určitých podmínek.[11] Je pojmově vyloučeno, aby styk rodiče s dítětem byl upraven v rozsahu typickém pro tuto skupinu, proto není třeba se mu dále věnovat.

V druhé skupině případu je styk upraven ve **„standardním" rozsahu**, což v českých reáliích znamená styk zhruba v každém druhém týdnu od pátku do neděle, jeden pracovní den v týdnu, několik dní v době vánočních, velikonočních a jarních prázdnin a dva až tři týdny v průběhu letních prázdnin.[12] Podle judikatury Ústavního soudu ČR přitom není možné tento zažitý vzorec úpravy styku nadřazovat zájmu dítěte a je nezbytné vždy styk nastavit tak, aby maximálně odpovídal zájmu dítěte.[13] Styk rodiče s dítětem v tomto rozsahu může poměrně dobře zajistit zachování a rozvoj vztahů rodiče a dítěte, a je proto vhodný, pokud nejsou dány podmínky pro střídavou péči na jedné straně, a ani pro omezení či zákaz styku na straně druhé.[14] Bude tedy ideálním řešením zejména, když jsou rodiče schopni alespoň minimální spolupráce a jejich bydliště nejsou od sebe příliš vzdálena.

Pokud rodiče a dítě dělí velká vzdálenost, například žijí-li v různých státech, není obvykle vhodné ani možné styk upravit ve standardním rozsahu. Pak většinou styk probíhá pouze v období, kdy má dítě dlouhodobější **prázdniny**. Takto řídký kontakt může způsobit mezi rodičem a dítětem velké napětí a odcizení.[15] Proto je vhodné doplnit tento způsob přímého styku o některé z forem nepřímého styku probírané dále.[16] Přestože nejsou k dispozici statistiky, které by ozřejmily, mezi kolika rodiči a dětmi v ČR probíhá styk tímto způsobem, pravděpodobně to nebude příliš často a to i s ohledem na tradičně nízkou pracovní mobilitu obyvatel.

Na opačném pólu proti střídavé nebo společné péči, pokud jde o dobu, kterou tráví rodič s dítětem společně, stojí **malý nebo žádný styk**. Tuto skupinu tvoří především případy, kdy se rodič s dítětem nestýká, protože mu brání objektivní překážky, jako velká vzdálenost případně omezení či zákaz styku soudem podle § 27 odst. 3 ZR nebo subjektivní překážky, jako nezájem o dítě nebo bránění ve styku

11 Viz *Hrušáková, M., Novák T.* Reálně o společné či střídavé porozvodové výchově. Bulletin advokacie, 1999, č. 30, str. 32-34.
12 K tomu srov. *Nová, H.* Problémy styku nezletilých dětí s rozvedenými rodiči. Právní rádce, 1995, č. 3, str. 12.
13 Viz Nález ÚS ČR ze dne 20. 1. 2005, sp. zn. II. ÚS 363/03.
14 Viz *Nová, H.* Problémy styku nezletilých dětí s rozvedenými rodiči. Právní rádce, 1995, č. 3, str. 12.
15 Viz *Smyth, B.* Parent-Child Contact in Australia: Exploring Five Different Post-Separation Patterns of Parenting. Int. Jnl. of Law, Policy and Family, 2005, Vol. 19, No. 1, str. 12.
16 Tamtéž.

druhým rodičem. V rámci této skupiny je často pozorován rozpad citového vztahu dítěte a nerezidentního rodiče se všemi důsledky.[17] Nutno upozornit, že nemusí jít o důsledek nedostatečného styku, ale o vyústění z událostí, které se odehráli ještě před rozdělením rodiče a dítěte.[18]

Styk může být někdy nastaven tak, že dítě tráví s rodičem čas **pouze v denní dobu** a nepřespává u něj. Takový styk je obecně kvalitativně horší než styk, který zahrnuje také dobu noční. Je tomu tak zejména proto, že pokud dítě zůstává s rodičem přes noc, lze realizovat řadu činností, které k rodinnému životu patří a mohou upevnit vzájemné vztahy. Mezi takové činnosti patří například ukládání dítěte ke spánku, čtení před spaním nebo probouzení a oblékání dítěte.[19] Kontakt s rodičem, který zahrnuje i přespání, pomáhá dítěti získat pocit, že jeho domov je také u rodiče, se kterým trvale nežije a není u něj pouze na návštěvě.[20]

Přímý styk a přítomnost dalších osob

V praxi se lze bezesporu nejčastěji setkat s tím, že se rodič s dítětem setkává pravidelně v určité době, na určitém místě stanoveném dohodou rodičů nebo soudním rozhodnutím, **bez přítomnosti jiných osob**. Samozřejmě v téže době a na stejném místě může probíhat styk rodiče s více dětmi zároveň, což bude časté a vhodné zejména pokud půjde o sourozence. Takto probíhající styk je vhodný pro rozvoj vzájemného vztahu, zejména pokud již není vztah výrazněji narušen problémy a animozitou mezi rodiči nebo mezi rodičem a dítětem. Pokud má oprávněný rodič nového partnera, případně děti, je třeba zvážit, zda a v jaké míře budou do styku zainteresovány i tyto osoby. Vždy bude záležet na konkrétních okolnostech, ale v obecné rovině lze říci, že je vhodné, aby bylo dítě, pokud možno co nejpřirozenější formou, alespoň částečně vtaženo také do nové rodiny svého rodiče.

Styk rodiče s dítětem může probíhat také za **účasti druhého rodiče** nejčastěji v místě bydliště dítěte. Lze souhlasit se závěry odborné literatury, která považuje úpravu styku takovýmto způsobem za spíše nevhodnou, neboť přítomnost obou rodičů může přispívat ke gradaci konfliktu a negativní atmosféra musí v důsledku velmi významně ovlivnit i vztah dítěte k rodiči.[21] Soud by měl k úpravě styku

17 Tamtéž, str. 9-10.
18 Například může jít o důsledek domácího násilí. K tomu srov. *Johnston, J. R.* Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child. Family Law Quarterly, 2005, Vol. 38, No. 4, str. 763.
19 *Smyth, B.* Parent-Child Contact in Australia: Exploring Five Different Post-Separation Patterns of Parenting. Int. Jnl. of Law, Policy and Family, 2005, Vol. 19, No. 1, str. 14.
20 Tamtéž.
21 K tomu srov. *Průchová, B., Novák, T.* Omezený styk rodiče s dítětem. Právo a rodina, 2004, č. 3, str. 11-12.

takovýmto způsobem přistupovat velmi obezřetně, aby nezpůsobil faktické vytěsnění rodiče ze života dítěte.

Oproti tomu se v odůvodněných situacích jako vhodnější jeví taková úprava styku, kdy se rodič s dítětem setkává za účasti **třetí osoby**, nejčastěji psychologa nebo jiného odborníka, obvykle na neutrální půdě. V současnosti probíhá takový styk nejčastěji v krizových centrech a nejsou k dispozici pracoviště, která by se přímo specializovala na zprostředkování nebo dohled nad stykem rodiče s dítětem.[22] Problematická je taková úprava styku z pohledu stávající právní úpravy, podle které nelze třetí osobě uložit povinnost účastnit se styku, a pokud by se tato účasti bránila, nebylo by vůči ní rozhodnutí vykonatelné.[23] Přesto lze mít za to, že v případě špatného vztahu rodičů nebo dítěte a rodiče, se kterým se má dítě stýkat, je takový způsob styku o mnoho vhodnější, než styk za účasti druhého rodiče. Upozorněme ovšem, že v i v tomto případě může být psychika dítěte významně zatěžována zejména proto, že styk probíhá v neznámém a cizím prostředí a je na rodičích dítěte a na odbornících, za jejichž účasti styk s dítětem probíhá, aby vytvořili atmosféru, která dítě nebude frustrovat.

Můžeme rozlišovat, zda má přítomnost třetí osoby pomoci styk uskutečnit, nebo kontrolovat jeho průběh.[24] Toto rozlišení v zásadě napomáhá identifikovat dva základní účely, kterým může takový styk sloužit. Účast třetí osoby může primárně pomoci vytvořit, obnovit nebo znovu navázat vtah mezi rodičem a dítětem. Soud může také upravit styk výše zmíněným způsobem potřebuje-li si ověřit a kontrolovat, jakým způsobem probíhá interakce mezi rodičem a dítětem, případně nakolik je styk rodiče s dítětem v zájmu dítěte.[25] Pak třetí osoba slouží zejména jako určitá pojistka chránící dítěte a jako zdroj informací pro soud. Do určité míry je toto členění otázkou teorie a v praxi se rozdíly mohou smazávat a nebude neobvyklé, že třetí osoba při styku rodiče s dítětem plní obě role. Nemělo by zůstat bez povšimnutí, že styk rodiče s dítětem za účasti třetí osoby je z povahy věci řešením dočasným a po určité době by mělo být učiněno nové rozhodnutí reflektující výsledky dosažené prostřednictvím takto probíhajícího styku.

Nepřímý styk rodiče s dítětem

22 Krizových center, které styk zprostředkovávají, je celá řada. Na území města Brna je to například Krizové centrum Spondea. Viz Spondea.cz [online] http://www.spondea.cz/ [cit. 21.2. 2008].

23 K tomu srov. *Hrušáková, M. a kolektiv.* Zákon o rodině: komentář. 3. vyd., Praha : C. H. Beck, 2005, str. 99-100.

24 Zahraniční literatura hovoří o *supported contact* a *supervised contact*. K tomu srov. *Perry, A., Rayney, B.* Supervised, Supported and Indirect Contact Orders: Research Findings. Int. Jnl. of Law, Policy and Family, 2007, Vol. 21, No. 1, str. 26 nebo *Bainham, A.* Children – The Modern Law. 3rd ed., Bristol : Jordan Publishing Limited, 2005, str. 518 a násl.

25 Kontrola styku rodiče s dítětem je podle mého názoru odůvodněná například, pokud měl rodič v minulosti problémy z alkoholismem nebo násilným chováním. K tomu srov. *Perry, A., Rayney, B.* Supervised, Supported and Indirect Contact Orders: Research Findings. Int. Jnl. of Law, Policy and Family, 2007, Vol. 21, No. 1, str. 26.

Nepřímý styk může probíhat v celé řadě forem a podob, přičemž nejčastěji bude přirozeným doplňkem přímého styku. V některých případech, by mohl soud přistoupit k upravě styku pouze v některé z nepřímých forem, například pokud se domnívá, že přímý styk není v zájmu dítěte, ale zároveň je potřeba zachovat pro něj do budoucna otevřený prostor.[26] V rámci nepřímého styku lze rozpoznat linii oddělující formy styku, které zahrnují některou z forem komunikace mezi rodičem a dítětem a formy styku, které mají rodiče pouze informovat o záležitostech tykajících se dítěte. Poznamenejme, že styk zahrnující pouhé sdělování informací o dítěti nemá sám o sobě potenciál vytvořit nebo zachovat mezi rodičem a dítětem vzájemný citový vztah. Avšak doplňuje-li vhodně jiné formy přímého nebo nepřímého styku, může k jeho rozvoji přispět.

Nyní se zaměřím na způsoby nepřímého styku, které zahrnují komunikaci a interakci mezi rodičem a dítětem. Dlouhodobě se za jednu z vhodných forem nepřímého styku považuje komunikace prostřednictvím **telefonických hovorů**. V tomto ohledu je nejvhodnější, pokud rodič hovoří s dítětem aniž by musel být v kontaktu s druhým rodičem, aby se předešlo konfliktům mezi rodiči. Ideální je, pokud má dítě k dispozici mobilní telefon, pak by ale neměla stranou zůstat otázka jeho financování.[27] Mobilní telefon mohou rodič a dítě navíc využívat k vzájemnému zasílání textových nebo multimediálních zpráv. V posledních letech se významně zvýšily možnosti, které na poli nepřímého styku nabízí **počítač** s odpovídajícím hardwarovým vybavením a s připojením k internetu. Pokud jej mají rodič i dítě k dispozici, lze využít celou řadu možností, které jim tento prostředek nabízí.[28] Zahraniční literatura dokonce hovoří o nové generaci komunikace mezi rodičem a dítětem.[29] Rodič a dítě mohou být ve vzájemném kontaktu prostřednictvím internetových telefonických hovorů nebo videohovorů,[30] chatu, e-mailu, mohou spolu hrát prostřednictvím internetu hry, rodič může pomáhat dítěti s úkoly a podobně. K využití „virtuálního kontaktu" musí být dítě i rodič schopni nabídnutých prostředků využít a bude tedy problematické zejména ve vztahu k dětem nižšího věku.[31] S ohledem na rozvoj techniky budou v současnosti ke styku využívány v daleko menší míře **psané dopisy**, které však může nahradit právě zasílání emailů.

Hlavním účelem nepřímého styku, který nezahrnuje vzájemnou komunikaci, je udržet rodiče informovaného o záležitostech týkajících se dítěte. Nejčastěji jde o informace, týkající se zdravotního

26 Tamtéž, str. 37.
27 K tomu srov. *Nová, H.* Problémy styku nezletilých dětí s rozvedenými rodiči. Právní rádce, 1995, č. 3, str. 15.
28 K potřebnému vybavení a internetovému připojení pro účely styku rodiče s dítětem srov. *Shefts, K. R.* Virtual Visitation: Next Generation of Options for Parent-Child Communication. Family Law Quarterly, 2002, Vol. 36, No. 2, str. 312-317.
29 Ibid, str. 303.
30 Řada těchto možností je k dispozici zdarma. Například s pomocí programu Skype. K tomu srov. How do you hello? [online] [cit. 21. 2. 2008]. Dostupné z http://www.skype.com/intl/en/useskype/.
31 Viz *Shefts, K. R.* Virtual Visitation: Next Generation of Options for Parent-Child Communication. Family Law Quarterly, 2002, Vol. 36, No. 2, str. 319.

stavu dítěte, školy a volnočasových aktivit. Typicky může jít o zasílání lékařských zpráv, vysvědčení, fotografií, nebo videonahrávek, zachycujících dítě při jeho činnostech. Do této skupiny forem nepřímého styku může patřit také zasílání dárků dítěti.[32]

Závěrem

Styk rodiče s dítětem může být účinným nástrojem pro zachování nebo rozvoj vztahu rodiče s dítětem. K tomu je ovšem zapotřebí, aby byly vhodným způsobem využity možnosti, které nabízí jeho jednotlivé formy. Přitom leží zejména na rodičích a případně na soudu břemeno správného rozhodnutí. Bohužel zejména řešení soudu, která by zahrnovala některé z forem nepřímého styku budou v praxi bez spolupráce rodičů velmi špatně realizovatelná, protože možnost jejich výkonu je výrazně omezenější než v případě přímého styku.[33] Zůstává tedy dosud nevyřešenou otázkou, zda lze vhodným způsobem zajistit vykonatelnost nepřímého styku. S ohledem na problematičnost výkonu přímého styku, přestože k tomu soudy disponují širší škálou nástrojů, lze k využití nepřímých forem styku v soudní praxi zaujmout spíše skeptické stanovisko. Přesto by neměly, z v této stati zmíněných důvodů, nepřímé formy styku zůstat zcela mimo pozornost právní praxe.

Literatura:

[24] Bainham, A. *Children – The Modern Law*. 3rd ed., Bristol : Jordan Publishing Limited, 2005

[25] Czigle, J. *Vzory s komentářem : Návrh na úpravu styku s dítětem*. Právní rádce, 2005, č. 9

[26] Gilmore, S. *Contact /Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision-Making*. Int. Jnl. of Law, Policy and Family, 2006, Vol. 20, No. 3

[27] Hrušáková, M. a kolektiv *Zákon o rodině: komentář.* 3. vyd., Praha : C. H. Beck, 2005

[28] Hrušáková, M., Králíčková Z. *České rodinné právo,* 3. vyd., Brno: Doplněk, 2006

[29] Hrušáková, M., Novák T. *Reálně o společné či střídavé porozvodové výchově.* Bulletin advokacie, 1999, č. 3

[30] Johnston, J. R. *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child.* Family Law Quarterly, 2005, Vol. 38, No. 4

32 Viz Rozsudek ESPL z 13. 12. 2000, *Glaser v. The United Kingdom*, § 26 (stížnost č. 32346/96).

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HLADANIE CESTY K NEZAUJATOSTI SUDCU V CIVILNOM KONANÍ

ALEXANDRA KOTRECOVÁ

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Abstrakt

Predkladaný príspevok sa zaoberá inštitútom, ktorý má slúžiť najmä na zachovanie garancií spravodlivého konania v smere nestrannosti osoby, ktorá v ňom rozhoduje o právach a oprávnených záujmoch fyzických osôb a právnických osôb. Je ním inštitút vylúčenia sudcu. Časté novely zákona č. 99/1963 Zb. Občiansky súdny poriadok, v znení neskorších predpisov, ktoré sa dotýkajú práve danej problematiky majú za cieľ, v tomto smere, precizovať legálnu právnu úpravu. Naskytá sa však otázka vhodnosti tejto intenzívnej frekvencie zásahov zákonodarcu. Snahou o zodpovedanie predmetnej otázky je daný príspevok

Kľúčové slová

Nezávislosť a nestrannosť sudcu, vylúčenie sudcu (sudcov), civilné konanie, právo na spravodlivý súdny proces

Abstract

The introduced article is dealing with an institute, which should serve mainly for maintenance of fair process guarantees towards neutrality of person, who decides about rights and claimed interests of civil persons in it is the judge exclusion institute. Frequent amendments N° 99/1963 Statute-book. The Civil court order, in version of later regulations, which are meeting the given question have the aim to elaborate legal juridical adaptation. Thought there occurs a question of adequacy of this intensive frequency of lawgiver's interventions. This article is an effort to answer the subject question.

Key words

Independence and impartiality of a judge, judge exclusion institute, civil proceeding, right to a fairly trail

Súd je miestom, kde sa napĺňa základná úloha, základné poslanie civilného konania, ktorým je poskytovanie ochrany právam a oprávneným záujmom a to spôsobom vymedzeným v relevantných právnych predpisoch. Súd ako imateriálna inštitúcia, zhmotnená v súdnej budove vykonáva svoju činnosť prostredníctvom subjektov, ktoré svojou prácou napĺňajú aspekty práva na súdnu ochranu. Sú to zároveň osoby nesúce v spoločnosti osobité postavenie tým, že reprezentujú jednu zo zložiek pôsobnosti v rámci usporiadaného systému trojdelenia štátnej moci, platnom v každom demokratickom štáte.

Napĺňanie poslania vyplývajúceho z pozície sudcu, pri pomyselnom hľadaní spravodlivosti, sa uskutočňuje jeho činnosťou. Nejde však o výkon neobmedzený a neohraničený. Jeho realizácia sa pohybuje v pretrvávajúcich a vymedzených hodnotách, ktoré zaručujú, že váha justície zostane pevne vyvážená mierou rovnosti.

Jednou z takýchto hodnôt, ktorú musí sudca rešpektovať a vyznávať v rámci výkonu vlastnej pôsobnosti je jeho vlastná nezaujatosť. Rovnako je možné zhodne použiť termín nestrannosť sudcu. Sudcovská nezávislosť a sudcovská nestrannosť sú pojmami blízkymi, navzájom sa prelínajú a dopĺňajú. Sudcovská nestrannosť predstavuje jednu zo záruk sudcovskej nezávislosti.

Nestrannosť sudcu je daná nedostatkom jeho vnútorného psychického vzťahu ku konkrétnej prejednávanej veci (subjektívny aspekt nestrannosti), ako aj neexistenciou okolností, ktorý by mohli viesť k pochybnostiam o tom, že sudca takýto vzťah k veci nemá (objektívny aspekt nestrannosti). Nestranný je len taký sudca, ktorý podľa svojho svedomia a vedomia je nezávislý na prejednávanej veci a na stranách sporu v tom zmysle, že je voči nim neutrálny, že voči nim nemá predsudky, sympatie ani antipatie, že strany sporu sú v jeho očiach úplne rovné, že žiadna z nich nemá v jeho očiach a priori žiadnu výhodu ani nevýhodu, prednosť ani nedostatok, že k právnemu vzťahu, ktorý rieši nezískal vzťah ešte predtým, ako mu bola vec zverená na rozhodnutie a že preto bude môcť posudzovať vec absolútne nezávisle a slobodne.[1] Objektívna nestrannosť sa neposudzuje podľa subjektívneho stanoviska sudcu, ale podľa objektívnych symptómov. Sudca môže subjektívne rozhodovať absolútne nestranne, ale napriek tomu jeho nestrannosť môže byť subjektívne vystavená oprávneným pochybnostiam so zreteľom na jeho status alebo funkcie, ktoré vo veci vykonával. Uplatňuje sa tu teória zdania, podľa ktorej nestačí, že sudca je subjektívne nestranný, ale musí sa ako taký objektívne javiť v očiach strán.[2] Všetko v súlade so sentenciou prijatou Európskym súdom pre ľudské práva „spravodlivosť musí byť nielen poskytovaná, ale musí sa tiež javiť, že je poskytovaná.“[3]

Podľa ustálenej judikatúry Európskeho súdu pre ľudské práva sa subjektívna nestrannosť sudcu prezumuje, pokiaľ sa nepreukáže opak.

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[1] Mokrý, A.: *Nezávislost a nestrannost soudce – vzájemná souvislost a podmíněnost pojmu*, Právní praxe, 1993, s. 459

[2] Drgonec, J.: *Ústava Slovenskej republiky, Komentár, 2. Vydanie,* Šamorín: Heuréka, 2007, s. 446, s. 1197, ISBN 80-89122-38-8.

[3] „Justice must not only be done, it must also be seen to be done.“ (rozhodnutie Delcourt v. Belgicko, Publiation o the European Court of Human Rights, Series A, č. 11, s. 17, § 31).

Primárnu záruku vyššie spomenutých hodnôt predstavuje v civilnom konaní inštitút vylúčenia sudcu (sudcov).[4] Z historického pohľadu, sám prešiel výrazným vývojom a to od veľmi všeobecnej a hypotetickej formulácie v ustanoveniach § 21 - § 23 zákona č. 142/1950 Zb., o konaní vo veciach občianskoprávnych (občiansky súdny poriadok)[5] až po dnešnú právnu úpravu obsiahnutú v § 14 až § 16 zákona č. 99/1963 Zb. Občiansky súdny poriadok, v znení neskorších predpisov (ďalej len O. s. p.).

Pri retrospektívnom pohľade na posledné novely vykonané v civilnoprocesnom kódexe, možno dospieť k jednoznačnému záveru, že sú to práve ustanovenia dotýkajúce sa inštitútu vylúčenia sudcov, na ktoré zákonodarca sústreďuje svoju primárnu pozornosť cestou modifikácie ich znenia. Na mieste je príznačná otázka. Čo je tým, čo vedie normotvorcu k takémuto konania? Prečo je týmto smerom zameraný jeho rozhodujúci záujem?

Pri hľadaní odpovedí, sa možno zamyslieť nad všeobecnými motívmi zákonodarcu v civilnom konaní z posledného obdobia, ktorými sa primárne snaží naplniť účel civilného konania podľa § 6 O. s. p, s cieľom zaistenia účinnej a rýchlej ochrany účastníkom konania. Prostredníctvom daných legálnych krokov sa preto nevyhnutne snaží predovšetkým o rýchle a hospodárne dosiahnutie spravodlivosti – rozhodnutie v konkrétnom konaní. Tento zámer je zdôraznený aj v dôvodových správach k jednotlivým zákonom, ktoré sa podieľali na zmene občianskeho súdneho poriadku v poslednom období.

Pri štúdiu dôvodových správ, ktoré modifikovali rozhodné paragrafy dotýkajúce sa vylúčenia sudcov, môžeme sa stretnúť s konštatovaniami, že civilnoprocesný kódex neobsahuje žiadne alebo len málo účinné prostriedky predovšetkým na zamedzenie zneužívania námietok zaujatosti zo strany účastníkov. Tí ho často krát využívajú ako obštrukčný nástroj na zdržiavanie konania. Preto nová právna úprava mala prispieť k urýchleniu súdneho konania, najmä v situáciách, kedy mohlo dôjsť k neopodstatneným pochybnostiam o nezaujatosti sudcu[6].

Azda najvhodnejšie je poukázať konkrétne na istý okruh relevantných zmien a tým upriamiť na ich vlastný prínos alebo naopak na ich neopodstatnenosť resp. nevhodnú nadbytočnosť.

Jedno z prvých relevantne významných nóv dotýkajúcich sa ustanovení § 14 - § 16 O. s. p., bolo vykonané zákonom č. 353/2003 Z. z. ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o doplnení zákona č. 328/1991 Zb. o konkurze a vyrovnaní v znení neskorších predpisov. Ním okrem iného, bolo nanovo formulované znenie § 15 ods. 1 O. s. p.

[4] Podľa súčasne platnej právnej úpravy možno sudcov vylúčiť z prejednávania a rozhodovania veci z dvoch dôvodov, a to pre zaujatosť alebo preto, lebo sa zúčastňovali na konaní o tej istej veci na rôznych stupňoch súdov.

[5] § 21 ods. 1 zákona č. 142/1950 Zb. o konaní vo veciach občianskoprávnych: „Sudcovia (sudcovia z ľudu) sú vylúčení z vykonávania sudcovského úradu, ak so zreteľom na ich pomer k veci alebo k účastníkom, k ich zákonným zástupcom alebo splnomocnencom možno pochybovať o ich nepredpojatosti.“ § 21 ods. 2: „ Vo vyššej stolici sú okrem toho vylúčení sudcovia (sudcovia z ľudu), ktorí sa zúčastnili na rozhodovaní alebo konaní v nižšej stolici.“

[6] Dôvodová správa k zákonu č. 353/2003 Z. z. ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o doplnení zákona č. 328/1991 Zb. o konkurze a vyrovnaní v znení neskorších predpisov

Podľa predmetnej formulácie, ktorá prakticky nedotknutá zostala v danej podobe zachovaná dodnes: „Len čo sa sudca dozvie o skutočnostiach, pre ktoré je vylúčený, oznámi to neodkladne predsedovi súdu; V konaní môže zatiaľ urobiť len také úkony, ktoré nepripúšťajú odklad; predseda súdu môže prideliť vec inému sudcovi, v súlade s rozvrhom práce, ak s tým sudca o ktorého vylúčenie ide, vysloví súhlas; Ak ide o vylúčenie sudcu podľa § 14 ods. 1[7] a predseda súdu má za to, že nie je dôvod pochybovať o nezaujatosti sudcu, predloží vec na rozhodnutie súdu uvedenému v § 16 ods. 1.“[8]

Predmetné znenie pojednáva o situácií, kedy sám sudca oznámi nevyhnutnosť vlastného vylúčenia, kedy sa sám dozvie, resp. má vedomosť o skutočnostiach, ktoré v predmetnom konaní, pri prejednávaní alebo rozhodovaní konkrétnej veci, môžu alebo by mohli spôsobovať to, že nebude môcť konať a napokon aj decidovať nestranne. Je to práve sudca sám, ktorý by mal v uvedenom smere, v súlade s princípmi sudcovskej etiky veľmi citlivo vnímať povinnosť vylúčiť sa z jemu napadnutého konania. Mal by vedieť z hľadiska svojho profesionálneho postavenia rozlíšiť, kedy je skutočne namieste nechať sa z prejednávanej veci vylúčiť a tým zachovať a chrániť hospodárnosť a plynulý chod ďalšieho konania, bez vzniku zbytočných vád.

Oznámenie o daných okolnostiach, ako sme už uviedli, v takomto prípade smeruje voči predsedovi súdu, ktorý má zákonnú povinnosť vyporiadať sa so vzniknutou situáciou a to nasledovnými riešeniami. Pokiaľ nemá dôvod pochybovať, vzhľadom na všetky okolnosti o nestrannosti sudcu, predloží vec na rozhodnutie nadriadenému súdu. Ak má, ale za to, že okolnosti vylúčenia sú objektívne dané môže prideliť vec, so súhlasom sudcu[9], ktorého nestrannosť je namietaná na prejednanie a rozhodnutie inému sudcovi.[10] Predsedovi príslušného súdu je týmto spôsobom daná možnosť posúdiť a vyhodnotiť vykonané oznámenie a na základe toho rozhodnúť o ďalšom postupe.

Problematickou v tejto súvislosti sa javí povinnosť obsiahnutá v § 15 ods. 1 tretia veta O. s. p., kde sa vyžaduje explicitné vyjadrenie súhlasu sudcom, ktorý oznámil v prejednávanej veci svoju zaujatosť, s pridelením veci inému sudcovi.[11] Takéto znenie pôsobí značne nezmyselné a paradoxné. Protichodne

[7] § 14 ods. 1 O. s. p., sudcovia sú vylúčení z prejednávania a rozhodovania veci, ak so zreteľom na ich pomer k veci, k účastníkom alebo k ich zástupcom možno mať pochybnosti o ich nezaujatosti

[8] § 16 ods. 1, súd predloží vec nadriadenému súdu... . O vylúčení sudcov Najvyššieho súdu Slovenskej republiky rozhodne iný senát tohto súdu.

[9] Táto formulácia obsiahnutá v § 15 O. s. p. vyžadujúca explicitné vyjadrenie súhlasu sudcom s pridelením veci inému sudcovi sa javí viac ako paradoxná. Pri spätnom pohľade do minulosti nachádzame obdobné znenie v § 22 ods. 4 zákona č. 142/1950 Zb. o konaní vo veciach občianskoprávnych (občiansky súdny poriadok). Predmetné ustanovenia však bolo úplne v inom kontexte. V súčasnosti možno považovať za vysoko nepravdepodobné, že osoba sudcu, ktorá sama namietala svoju zaujatosť v konkrétnej veci nebude súhlasiť aby tá bola pridelená na prejednanie a rozhodnutie inému sudcovi tunajšieho súdu. Pokiaľ by s pridelením inému sudcovi nesúhlasil nezostáva iná možnosť len tá, že predseda daného súdu bude povinný predložiť rozhodnutie o vylúčení sudcu nadriadenému súdu.

[10] Pridelenie zabezpečí podľa § 51 zákona č. 757/2004 Z. z. o súdoch a o zmene a doplnení niektorých zákonov, v znení neskorších predpisov.

[11] Pri spätnom pohľade do minulosti nachádzame obdobné znenie v § 22 ods. 4 zákona č. 142/1950 Zb. o konaní vo veciach občianskoprávnych (občiansky súdny poriadok). V tomto období však oprávneným na rozhodnutie o námietke zaujatosti, pokiaľ súhlas zo strany sudcu, ktorý urobil svoje oznámenie smerom k vylúčeniu, nebol udelený rozhodoval jeho „domovský súd“. Nebola tu teda daná povinnosť zo strany predsedu súdu predložiť túto vec na rozhodnutie súdu nadriadenému.

namierené vlastnému účelu. Možno považovať za vysoko nepravdepodobné, že osoba sudcu, ktorá sama namietala svoju zaujatosť v konkrétnej veci, nebude súhlasiť, aby tá bola pridelená na prejednanie a rozhodnutie inému sudcovi tunajšieho súdu. Pokiaľ by, ale s pridelením inému sudcovi nesúhlasil, nezostáva iná možnosť len tá, že predseda daného súdu bude povinný predložiť vec na rozhodnutie o vylúčení sudcu nadriadenému súdu. Stráca sa samotný účel tohto postupu.

Už vyššie spomenutá novela civilnoprocesného kódexu, nanovo formulovala aj ustanovenie § 15a O. s. p.,[12] podľa ktorého prislúcha účastníkom právo na vylúčenie sudcu, prostredníctvom vznesenia námietky zaujatosti v samotnom konaní. V dovtedajšom znení daného ustanovenia absentovalo časové a vecnoprávne hľadisko pri podávaní námietok zo strany účastníkov konania.[13] Z časového hľadiska bola preto určená presná lehota, v ktorej musí účastník vzniesť námietku zaujatosti. Z vecnoprávneho hľadiska sa vymedzili presné formálne náležitosti podania, ktorého obsahom je námietka zaujatosti a rovnako sa deklarovalo presné uvedenie dôvodov, čo už bolo viac menej známe zo súdnej praxe.[14]

Zákonodarca však považoval za potrebné do takto formulovaného znenia zasiahnuť s cieľom už pripomenutým, urýchliť a zhospodárniť konanie cestou odstránenia obštrukcií zo strany osôb vznášajúcich námietku zaujatosti. Z toho dôvodu zákonom č. 428/2004 Z. z. ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a menia a dopĺňajú niektoré ďalšie zákony, s účinnosťou od 1. januára 2005 doplnil znenie § 15a ods. 3, tak že v prípade námietky zaujatosti vznesenej zo strany účastníka, sa ustanovenie § 43 O. s. p nepoužije. Súd na základe tejto formulácie nebol povinný vyzývať účastníka na opravu resp. na doplnenie podania. V aplikačnej praxi sa však postupne začal vynárať nejednotný názor súdov na otázku ďalšieho postupu, v prípadoch, ak námietka zaujatosti nebola perfektná. Na základe tohto poznatku bolo potrebné nájsť správne a efektívne riešenie. Zákon č. 757/2004 Z. z. o súdoch a o zmene a doplnení niektorých zákonov, predmetnú vetu s účinnosťou od 1. apríla 2005 vypustil. Z hľadiska životnosti platilo uvedené vymedzenie štyri mesiace.

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[12] § 15a O. s. p. v znení zákona č. 353/2003 Z. z. ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o doplnení zákona č. 328/1991 Zb. o konkurze a vyrovnaní v znení neskorších predpisov,:
(1) Účastníci majú právo z dôvodu podľa § 14 ods. 1 uplatniť námietku zaujatosti voči sudcovi, ktorý má podľa rozvrhu práce vec prejednať a rozhodnúť. O tomto práve súd účastníka poučí. (manudukačná povinnosť súdu bola zrušená novelou vykonanou zákonom č. 341/2005 Z. z. , ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o zmene a doplnení niektorých zákonov, pozn. autora)
(2) Účastník môže uplatniť námietku zaujatosti podľa odseku 1 najneskôr na prvom pojednávaní, na ktorom sa zpčastnil sudca, o ktorého vylúčenie ide, alebo do 15 dní od kedy sa mohol dozvedieť o dôvode, pre ktorý je sudca vylúčený. Na neskôr podanú námietku zaujatosti súd prihliadne len vtedy, ak účastník nebol poučený podľa ods. 1.
(3) V námietke zaujatosti musí byť uvedené, proti komu smeruje, dôvod pre ktorý má byť sudca vylúčený, kedy sa účastník podávajúci námietku zaujatosti o dôvode vylúčenia dozvedel a akými dôkazmi môže byť preukázaný; účastník je povinný predložiť dôkazy, ktorými disponuje zároveň s námietkou zaujatosti.
(4) Na opakované námietky zaujatosti podané z toho istého dôvodu súd neprihliadne, ak už o nich rozhodol.

[13] Dôvodová správa k zákonu č. 353/2003 Z. z. ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o doplnení zákona č. 328/1991 Zb. o konkurze a vyrovnaní v znení neskorších predpisov

[14] Účastník občanského soudního řízení, který navrhuje vyloučení soudce (soudcu) z projednávaní a rozhodování věci, musí ohledně každého soudce jehož podjatost namítá, úvést konkrétní skutečnosti, pro než má za to, že je z projednávaní a rozhodování vyloučen (R 30/1980).

V neposlednom rade, predpokladom na zvýšenie plynulosti a efektívnosti civilného konania sa malo uskutočniť aj prostredníctvom zavádzania presných lehôt pri rozhodovaní o námietke zaujatosti nadriadeným súdom podľa § 16 O. s. p.

Stanovením istého času, v danom prípade v podobe konkrétnej lehoty na vykonanie resp. rozhodnutie určitej skutočnosti, sa sledovalo bezprostredné dosiahnutie efektívneho výsledku v spojitosti s pertraktovaným inštitútom.

Pôvodná redakcia podľa zákona č. 353/2003 Z. z. ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o doplnení zákona č. 328/1991 Zb. o konkurze a vyrovnaní v znení neskorších predpisov, hovorila o povinnosti prvostupňového súdu predložiť vec na rozhodnutie o námietke zaujatosti do desiatich dní od jej podania nadriadenému súdu. Nadriadený súd mal ďalej v senáte rozhodnúť v lehote desiatich dní od predloženia veci.[15]

Aj napriek rozhodnej snahe najmä po ekonomickej stránke urýchliť celý proces rozhodovania o „diskvalifikácií" sudcu, opätovne sa z praktického pohľadu vyskytli relevantné problémy. Zákonodarca bol nútený reagovať na vzniknutú situáciu a modifikovať, ním samým konštruovanú lehotu. Aplikačná prax, upozorňovala najmä na problematickosť splnenia povinnosti predkladať námietku zaujatosti v tak krátkej existujúcej lehote, v prípade, že jej podanie bolo spojené zároveň s odvolaním. Pri zachovaní pôvodnej 10 dňovej lehoty, dochádzalo k nedodržaniu zákona a to buď § 16 ods. 1 alebo § 209 O. s. p., pretože skutočnosť, že uplynutie desať dňovej lehoty od podania námietky zaujatosti a uplynutie desaťdňovej lehoty po uplynutí lehoty na podanie odvolania len výnimočne pripadlo na jeden deň.[16] S účinnosťou od 1. júla 2007 tak prišlo k prolongácií z desiatich na pätnásť dní.[17]

Zákonodarca sa musel v dôsledku existencie lehoty v predmetnom ustanovení reflektovať aj na zmeny, ktoré nastali zhodne k tomu istému dátumu, v zákone na inom mieste. Súdom prvého stupňa bola totiž prinavrátená činnosť v odvolacom konaní podľa § 209 a 209a O. s. p., kedy tie aktuálne vykonávajú isté procesné úkony, pred predložením veci na rozhodnutie o odvolaní nadriadenému súdu. V takom prípade sa povinnosť dodržania 15 dňovej lehoty neukladá a vec sa predloží až po vykonaní vyššie uvedených úkonov odvolacím súdom.

Vo všeobecnosti na margo týchto zákonom vytvorených lehôt možno konštatovať, že aj napriek ich existencii predstavujú len nadnesenú a ideálne vytvorenú predstavu zákonodarcu, ako rýchlo by sa malo o námietke zaujatosti rozhodnúť. Pokiaľ však ide o formu sankcie za jej nedodržanie, tá by

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[15] bližšie pozri § 16 ods. 1 O. s. p. v znení zákona 353/2003 Z. z.

[16] Zhodne aj dôvodová správa k zákonu č. 273/2007 Z. z. , ktorým sa mení a dopĺňa zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov a o zmene a doplnení niektorých zákonov

[17] § 16 ods. 1 O. s. p. v súčasne platnom znení: „ Súd predloží vec nadriadenému súdu s vyjadrením sudcu na rozhodnutie o námietke zaujatosti do 15 dní od jej podania. Ak sa spis zároveň predkladá odvolaciemu súdu na rozhodnutie o odvolaní, vec sa predloží až po vykonaní úkonov spojených s predložením veci odvolaciemu súdu. O tom, či je sudca vylúčený, rozhodne do desiatich dní od predloženia nadriadený súd v senáte; touto lehotou nie je súd viazaný ak rozhoduje zároveň o odvolaní.

prichádzala do úvahy iba vtedy, ak by bolo rozhodnuté o vzniku prieťahov v rámci konania o námietke zaujatosti. Snahu zákonodarcu o urýchlenie vybavenie námietky zaujatosti nemožno uprieť, otázkou ale naďalej zostáva, či je takto komplikovaná konštrukcia skutočne aj z praktického pohľadu efektívna.

Aj po naznačenom a demonštratívnom poukázaní na doterajšie zmeny v relevantných ustanoveniach zákona, ktorých prijatie a následná modifikácia poukazuje na ich nie vždy efektívnu účelnosť, existuje zjavný predpoklad, že aj najbližšie pripravovaná novela civilnoprocesného kódexu sa opakovane nevyhne ani paragrafom upravujúcich inštitút vylúčenia sudcu.

Na tomto mieste považujeme za potrebné poukázať najmä na navrhované znenie § 16 O. s. p., ktoré by sa malo doplniť o nový odsek štyri. Podľa predmetnej formulácie: „Podanie námietky zaujatosti nebráni súdu prejednať vec alebo uskutočniť iné úkony pred jej uplatnením nadriadenému súdu podľa odseku 1[18], ak sa sudca domnieva, že námietka nie je dôvodná; pred rozhodnutím o námietke zaujatosti sudca nemôže vydať rozhodnutie vo veci samej alebo rozhodnutie, ktorým sa konanie končí.“ Dôvodová správa k predmetnému ustanoveniu uvádza, že nebýva ničím neobvyklým, že tesne pred pojednávaním, alebo v priebehu pojednávania účastník namieta zaujatosť sudcu, aby docielil oddialenie rozhodnutia, preto sa navrhuje možnosť sudcu zvážiť dôvodnosť námietky a vec predložiť až tesne pred rozhodnutím. Vyvodzuje, že práva účastníka nebudú nijako dotknuté, pretože vec sa nadriadenému súdu predloží.[19]

Domnievame sa, že voľba takejto legálnej konštrukcie nie je veľmi šťastná. Problematickosť možno badať v skutočnej spôsobilosti sudcu objektívne posúdiť a zhodnotiť, či námietka zaujatosti vznesená zo strany účastníka je skutočne dôvodná. [20] V tejto súvislosti možno pripomenúť aj jedno z rozhodnutí Ústavného súdu Slovenskej republiky, kde sa uvádza, že: „...Z toho hľadiska preto nezáleží ani na tom, že sudca sa k návrhu na jeho vylúčenie vyjadrí v tom zmysle, že sa vnútorne necíti alebo cíti byť zaujatý. Rozhodujúce nie je jeho stanovisko, ale existencia objektívnych skutočností, ktoré vrhajú pochybnosti na jeho nestrannosť v očiach strán a verejnosti.“[21] Okrem iného máme za to, obsah námietky zaujatosti, ak už je podaná, bez ohľadu na jej formu, či obsah by mal asi vždy posúdiť nadriadený súd.[22]

Pokúsme sa navodiť situáciu, kedy v priebehu začatého pojednávania, jeden z účastníkov vznesie námietku zaujatosti. Sudca toto vyjadrenie vyhodnotí tak, že sa domnieva, že nie je splnená dôvodnosť takejto výhrady. V priebehu pojednávania teda uskutoční isté procesné úkony, napr. vypočuje

[18] § 16 O. s. p. pozn. autora

[19] Dôvodová správa k návrhu novely O. s. p., bližšie pozri www.justice.gov.sk

[20] Právna úprava hovorí výslovne: „ak sa sudca domnieva“. Pod výrazom domnievať sa rozumieme mať istú predstavu o niečom, usudzovať, mať dojem, mieniť. Všetky tieto synonymá v sebe nesú prítomnosť čisto subjektívneho prvku. Pisarčíková, M., Považaj, M.: *Synonymický slovník slovenčiny, druhé, opravené vydanie*, Bratislava: Veda, Vydavateľstvo Slovenskej akadémie vied, 2000, s. 998, ISBN 80-224-0585-X

[21] III. ÚS 47/2005, Nález Ústavného súdu Slovenskej republiky z 11. mája 2005, Zbierka nálezov uznesení Ústavného súdu Slovenskej republiky, 2005, s. 316-317

[22] Domnievame sa, že z pohľadu nadriadeného súdu je menej problematické a jednoduchšie posúdiť a rozhodnúť, či sudca je alebo nie je vylúčený.

účastníkov, vypočuje prítomných svedkov a následne pojednávanie odročí, nakoľko vo veci samej rozhodnúť nemôže. Námietku vznesená účastníkom konania bude následne predložená nadriadenému súdu v súlade s postupom podľa § 16 ods. 1 O. s. p. Nadriadený súd z odôvodneného podania účastníka vyvodí, že dôvody na vylúčenie sudcu z konania sú dané. Nezostáva preto nič iné, len prideliť vec novému sudcovi, ktorý bude musieť zopakovať procesné úkony, ktoré pred ním uskutočnil už nateraz vylúčený sudca. Problematická by následne mohla byť aj hodnovernosť opätovných svedeckých výpovedí svedkov, ktorí po vlastnej výpovedi zotrvali v pojednávacej miestnosti počas výsluchu svedkov iných.

Otázna môže byť aj praktická životnosť predmetného ustanovenia, nakoľko možno predpokladať, že v prípade vznesenia námietky zaujatosti zo strany účastníka sudca skôr ako by sa mal domnievať o jej neopodstatnenosti, radšej, „pre istotu" pojednávanie odročí.[23]

Spoločným elementom všetkých vyššie formulovaných úvah je otázka prínosu alebo naopak nadbytočnosti prijímania legálnych zmien smerom k inštitútu, ktorý vďaka svojim dôsledkom je významným procesným zásahom, ktorého zmyslom a účelom je garantovať účastníkom konania právo na nezávislého a nestranného sudcu. V tomto smere rozhodne nie je možné uprieť snahu zákonodarcu o eliminovanie možnosti zneužitia tohto procesného nástroja cestou stanovenia presných pravidiel pri jeho využití, ako aj pri rozhodovaní o ňom samotnom. Snaha zabrániť obštrukciám a vznášaniu nedôvodných procesných podaní zaujatosti zo strany účastníkov, však v niektorých prípadoch smeruje nad rámec vlastného zámeru, čím do istej miery narúša aj samotný účel civilného konania.

Účastníci sú v priebehu konania zaujatí vlastným sporom, svojou pravdou a sú veľmi citliví na akýkoľvek náznak nevhodného, nestrannosti nasvedčujúceho správania zo strany sudcu.[24] Bedlivo sledujú každý jeho prejav, reagujú na každé sudcovo počínanie v priebehu konania.

Domnievame sa z toho dôvodu, že skôr ako častým a neorganickým novelizáciám je potrebné sa venovať vzdelávaniu, tréningom sudcov a to nielen v oblasti aplikácie procesných predpisov, ale aj apelu na sudcovskú zodpovednosť vo vzťahu k výkonu tohto špecifického povolania. Zdôrazňovať potrebu pristupovať ku všetkým veciam rovnako zodpovedne so zachovaním neutrálneho postavenia, so zachovaním prirodzenej ostražitosti. Zvýrazňovať nevyhnutnosť sudcovskej etickej zodpovednosti pri prejednávaní a rozhodovaní každej individuálnej veci.

Akákoľvek, hoc aj tá najprecíznejšia úprava nemôže zabrániť zrušeniu veci z dôvodu, že vo veci rozhodoval vylúčený sudca, nakoľko inštitút vylúčenia sudcu (sudcov) je objektívnou kategóriou.

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[23] Podľa § 117 ods. 1, pojednávanie sa môže odročiť, len z dôležitých dôvodov, ktoré sa musia oznámiť. Možno konštatovať, že vznesenie námietky zaujatosti takýmto dôležitým dôvodom bude, nakoľko rozhodovanie nezaujatým sudcom je jednou z podmienok konania.

[24] Osobitou kategóriou sú súdni kverulanti, permanentní sťažovatelia, ktorým bez ohľadu na konanie nevyhovie nikto a to už len z dôvodu, že sa nekoná tak, ako by si želali oni sami. To v nich samotných vyvoláva pocit, že sudca voči nim vystupuje nestranne, nevhodne a preto aj zaujato.

Základným princípom súdnictva, ktorý sa výrazným spôsobom premieta v civilnom konaní je nezávislosť a nestrannosť súdnictva. Záruka možnosti vylúčiť sudcu z prejednávania a rozhodovania veci, pokiaľ nespĺňa atribúty nezávislosti a nestrannosti je a musí byť bezvýhradne zaručená v každom demokratickom právnom poriadku. Podstata a skutočná využiteľnosť tejto, okrem iného významnej ústavnoprávnej garancie, musí spĺňať zo strany sudcov význam správnej interpretácie, ktorá je následným a skutočným predpokladom ich správnej aplikácie. Musí napĺňať podstatu, že sudca je závislý len na vlastnom svedomí a zákonoch. Zákonoch, z ktorých aj laická verejnosť pozná skutočný význam a rozmer tohto inštitútu.

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PRÁVNÍ PRINCIPY

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ODBORNÝ ASISTENT KATEDRY OBČANSKÉHO A PRACOVNÍHO PRÁVA PRÁVNICKÉ FAKULTY UNIVERZITY PALACKÉHO OLOMOUC

SOUDCE OKRESNÍHO SOUDU V OLOMOUCI

Abstrakt:

Příspěvek pojednává o principech v právu. V úvodu je termín „princip“ jazykově vymezen. Následuje vymezení chápání principů v právu u vybraných autorů, upozorňuje se na vývoj pozitivistické koncepce po r. 1945. V návaznosti na toto vymezení se pak příspěvek zabývá stavem chápání principů v českém prostředí, stávající možností Ústavního soudu a obecných soudů je aplikovat v rozhodovací činnosti. Formuluje další otázky, které v důsledku existence principů aktuálně vnikají.

Klíčová slova:

Právní princip – pozitivismus- přirozené právo.

Abstract:

The paper disserts on principle in law. At the beginnnig the term „principle“ is linguistically determinated, followed by the scope of the understanding of the term principle in law by chosen authors, highlighting the development of the positivism conception after 1945. Related on this detrermination put my paper mind to the status of the understanding of the term principle in czech background, current possibilities of the constitutional court and common courts to aplicatte principle in the decision process. It formulates other questions, which in the consequence of the existence of the principle currently occure.

Key words:

Law principle – positivism- ius naturae.

I. Termín „princip“ a jeho jazykové vymezení.

Otázka právních principů či právních zásad je otázkou aktuální. Nejprve k terminologii. V právní vědě se používá termín „princip“ i termín „zásada“. Někteří autoři je vnímají jako synonyma, někteří autoři tyto termíny odlišují, přičemž termín „princip“ je chápán jako obecnější, pro vyjádření zásad obecnějších, vlastních celému systému práva. I tato základní terminologie si zaslouží pozornost.[1]

V první polovině minulého století bylo mezi těmito pojmy důsledně rozlišováno. Velký Ottův slovník naučný definoval princip jako všeobecnou větu, která slouží za východisko pro další vysvětlování a důkaz. Má-li tedy býti správně postupováno, musí být dán v principu důvod buď samozřejmý nebo dokázaný.[2] Dále dodává, že každá věda má své principy, otázka principů nejvšeobecnějších, všem vědám společných, náleží filosofii.

Od těchto principů odlišuje principy konání. To jsou důvody, které pokládáme za dostatečné, aby motivovaly to které jednání, popřípadě mravní přesvědčení vůbec. V této formě principy slují zásadami konání čili maximami. Princip čili idea práva je vůdčí myšlenkou prává, zdrojem práva, pramenem práva. V případě přirozeného práva, je zdrojem práva lidská přirozenost. V případě práva pozitivního je zdrojem práva vůle suverénní moci lidu – státu.[3]

Zásada je chápána ve smyslu mravním a znamená pravidlo konání, jehož závaznost pro sebe uznáváme. Stává se pohnutkou vůle.[4] I

V současnosti se pod pojmem princip rozumí původ, základ, zásada, základní myšlenka, základní obecný zákon, z něhož se vychází při odvozování dalších poznatků.[5] Právní principy jsou termín označující teoretické zásady tvorby a realizace práva.[6]

Tyto terminologické rozdíly mohou být vnímány jako nedůležité. Svůj význam ale mají, zejména při studiu pramenů z období před r. 1948. Právní teorie do tohoto období byla poměrně precizní při formulaci svých závěrů.[7] Jsou tedy i důležité pokud nyní právní teorie, resp. filosofie práva hodlá vysvětlovat pojem práva, pro samotný právní diskurzu, a to nejen v rámci české právní diskuse, ale i při

[1] Tyto termíny používá jako synonyma např. prof. J. Hurdík in Hurdík.J.:Zásady soukromého práva. Brno: Pr.F.MU,1998, str. 11.
[2] Ottův slovník naučný ,Praha Agro 2000, díl dvacátý, str. 696
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komunikaci překračující hranice našeho právního systému. Ostatně pojmová nejednotnost je dnes jevem poměrně běžným. Projevuje se i při přebírání cizojazyčných teoretických závěrů.

II. Pozitivismus a koncepce přirozeného práva.

Dále při formulaci obsahu právních principů a určení jejich místa v právu, právním řádu je třeba rozlišovat, ke kterému směru v právním myšlení se autor hlásí, zda je právním pozitivistou či zastáncem práva přirozeného.

Právní pozitivismus se rozšířil v 19. století v několika formách a přispěl k posílení formální právní jistoty a zákonnosti liberální éry. Již od počátku 20. století je ale kritizován pro svůj formalismus, zůstává však stále jedním z nejrozšířenějších směrů právní teorie i praxe. Pozitivismus je vnímán jako vůdčí směr i naší českou právní teorií. Tato česká pozitivistická tradice je i důsledkem činnosti brněnské normativní školy.

Zastánci práva přirozeného chápou práva jako obsahově pevně dané právo, které není vytvářeno společností samou, ale má svůj původ např. v řádu přírody, lidské přirozenosti, je ve své podstatě neměné.

Od druhé světové války se objevují snahy o oživení přirozenoprávního myšlení a argumentaci. Proč? Odpověď je nasnadě a vychází z výše uvedeného, dále též ze společenského vývoje v letech nacismu, tedy doby totalit, kdy bylo zapotřebí překonat zjevné bezprávní práva pozitivního. Šlo rovněž o reakci na obsahovou prázdnotu právního formalismus a snahu o jeho překonání.

Odkazuji závěry významného německého právníka Gustava Radbrucha obsažené v tzv. Radrbuchově formuli. Podle něj lze pozitivní systém norem jen tehdy a potud nepovažovat za právo, když a pokud je zjevně v rozporu se základními a obecně uznávanými zásadami spravedlnosti, přirozeného práva. Konflikt mezi spravedlností a právní jistotou patrně lze řešit jen tak, že pozitivní právo, zajišťované předpisy a státní mocí, má přednost i tehdy, pokud je obsahově nespravedlivé a neúčelné, vyjma případu, kdy rozpor mezi pozitivním zákonem a spravedlností dosáhne tak nesnesitelné míry, že zákon musí jako nenáležité právo (unrichtiges Recht) spravedlnost ustoupit.[8] Tyto závěry se uplatňují v judikatuře Spolkového soudu Spolkové republiky Německo. Jde v podstatě o prioritu přirozeného práva před pozitivním.

[8] citováno dle Holländer, P: Ústavněprávní argumentace ohlédnutí po deseti letech Ústavního soudu, Praha, Linde, 2003, 1 vydání, str. 14

V druhé polovině minulého století se znovu a s větším zájmem právní teoretikové začínají věnovat studiu a formulaci právních principů. Je samozřejmě nutné odlišit, zda autor pochází ze země s anglosaskou právní tradicí či tradice kontinentální. Toto ukotvení autora má vliv na to, jak je schopen principy v právu vnímat.

III. Právně teoretické vymezení principů v rámci přirozeného práva.

Za stěžejní práci lze považovat práci Ronalda Dworkina, která vyšla v r. 2001 pod českým názvem Když se práva berou vážně. Dworkin definuje jednak termín „princip"(principle) jako druhové označení celého souboru standardů jiných, tj. odlišných od pravidel.[9] Princip je standard, který se má dodržovat nikoli proto, že to pomůže zajistit něco lepšího, ve smyslu utilitárním, z pohledu jedince, či skupiny osob, ale proto, že to požaduje spravedlnost (justice), slušnost (fairness), nebo nějaké jiné dimenze morálky (morality), např. nikdo nesmí mít prospěch ze svého protiprávního jednání. Vidíme zde tedy posun od vnímání termínu „princip" jak byl uveden v úvodu toho příspěvku.

Dále užívá termín „politika" (policy). Jde o kategorii odlišnou od principu, standard, který určuje cíl, jehož se má dosáhnout, zpravidla zlepšení určité ekonomické, politické nebo sociální kvality společnosti. Rozdíl mezi právními principy a právními pravidly spočívá dle Dworkina v logice věci. Pravidla je třeba aplikovat metodou všechno nebo nic. Pravidlo pro danou situaci platí, nebo neplatí.[10] Principy nestanoví právní důsledky, jež nastanou automaticky. Princip stanoví důvod, který ukazuje určitým směrem, žádné konkrétní rozhodnutí však nevyvolává.[11] Každý princip má svoji důležitost (weight), dochází-li mezi nimi ke konfliktu, musí soudce přihlédnout k důležitosti každého z nich. Pravidla tuto dimenzi nemají, hovoří se o funkcionální důležitosti, jedno pravidlo z důvodu své větší váhy nemůže nahradit druhé. Odporují-li si, pak se konflikt řeší odkazem na pravidlo, které tuto kolizi řeší.

V praxi jsou někdy obtížně rozlišitelná pravidla a principy. Některé ustanovení může fungovat logicky jako pravidlo (uvozeno např. slovy „přiměřeně užije") a reálně jako princip (posuzuje ostatní aspekty, a z toho dovodí, zda je či není přiměřené). Pak může být aplikace pravidel závislá na principech. Právní principy jsou zvláštním druhem standardů, je jich mnoho, největší význam mají v obtížných sporech (hard cases). Principy hrají klíčovou roli v argumentaci soudu (jiného aplikujícího), při zdůvodňování svého rozhodnutí (právního závěru). Dworkinův přistup je přístupem

[9] Dworkin, R.: Když se práva berou vážně. Praha: Oikoymenh, 2001, str. 43
[10] Dworkin,R.: Když s práva berou vážně. Praha: Oikoymenh, 2001, str. 46
[11] Dworkin, R.: Když se práva berou vážně. Praha: Oikoymenh, 2001, str. 49

hledání přirozenosti práva a tu spatřuje ve schopnosti soudců brát práva jedinců vážně. Dworkinův přístup je přístupem přirozenoprávním.

IV. Právně teoretické vymezení principů v rámci právního pozitivismu.

I pozitivisté si uvědomují existenci principů. Těmito otázkami se ve svých pracích zabývají např. H. L. A. Hart, Robert Alexy i Ota Weinberger.

Dworkinův přístup je kritikou koncepce H.L.A.Harta[12] a tedy pozitivismu. Na tuto kritiku Hart reagoval. Hart rovněž připouští existenci principů. Od pravidel se odlišují tím, že jsou obecné, nespecifické, přičemž více dílčích principů může ve svém souhrnu tvořit jeden princip hlavní, základní. Dále principy někdy více, někdy méně vyjadřují svůj účel, význam, obsah. Určení těchto vlastností závisí na úhlu pohledu.[13]

Německý právní teoretik Robert Alexy rovněž připouští existenci principů. Kritizuje však přístup Dworkinův. Podle Alexyho Dworkinovo pojetí neobstojí, protože ani u pravidel nelze v jejich hypotéze postihnout všechny výjimky (a to zejména s ohledem na určení okruhu principů, jež mohou způsobit výjimku z pravidla). Logický rozdíl mezi pravidlem a principem lze proto stanovit v případě kolize. Pokud je řešení dáno poměřováním obou v kolizi stojících norem, pak se jedná o principy. Pokud je aplikace dána jednoznačně, jde o pravidla. Termín princip používá ne pouze pro individuální práva, ale i pro kolektivní dobro. Pro Alexyho jsou principy příkazy k optimalizaci. Princip je definován schopností poměřování v kolizi a svým aproximativním a nikoli absolutním charakterem. Klíčovým principem v důsledku nutnosti poměřování v kolizi stojících norem je princip proporcionality. Tedy dojde-li ke kolizi dvou principů, je nutné je aplikovat (rozhodnout) tak, aby oba aplikované principy byly uplatněny v maximální možné míře.[14] Alexy k principům řadí i veřejná dobra, např. ochrana veřejného pořádku, ochrana státní bezpečnosti.

Weinberger řadí principy do množiny právních pravidel. Formuluje názor, že principy mohou a mají být, mají-li být vyjádřeny explicitně, dovozeny ze souboru platných právních norem, a to jejich zobecněním. V systému práva je zapotřebí spatřovat určitý celek, který je smysluplně uspořádán, a to podle svého účelu. Jeho součástí jsou i abstraktní pravidla, která jsou označována jako právní zásady, nebo obecné právní principy. Principy představují vedoucí zásady pozitivní právní regulace, jsou to prvky tvorby a odůvodnění právních rozhodnutí. Zdůrazňuje tedy jejich význam při interpretaci a

[12] Dworkin, R.: Když se práva berou vážně. Praha: Oikoymenh, 2001, str. 40
[13] Hart, H.L.A.: The Koncept of Law. Oxford:Clarendon Press, 1994, str.260

[14] Holländer, P.: Filosofie práva.Plzeň: Aleš Čeněk, 2006, str. 145 a násl.

aplikaci práva, zejména v tzv. problematických případech (hard cases). Weinberger poznamenává, že teorie právních principů doposud není rozvinuta, je zapotřebí provést přesnou kategorizaci, když jejich charakter je rozdílný, podle toho, k jakému právu se vztahují. Weinberger vymezuje základní charakteristiku principů následovně: Jde o abstraktní pravidla, přispívají k řešení právních vztahů, jejichž posouzení je závislé na hodnocení soudce, soudcovském uvážení. Mohou se týkat jednoho a téhož případu, ale mohou vést k přijetí různých, či dokonce opačných rozhodnutí. Důraz klade na to, aby bylo prokázáno, že jsou platným právem. Jako platné právo (pozitivní právo) mohou existovat tak, že jsou obsaženy v platných právních předpisech, případně se stávají se platným právem jako rationes descidendi precedentů, případně je lze odvodit abstrahováním ze souboru předpisů, nebo jsou vytvořeny soudem na základě jeho právotvorné kompetence. [15]

V. Vnímání právních principů v českém právu.

Česká právní praxe je praxí právně pozitivistickou, někdy se setkáváme i s termínem vypjatý právní pozitivismus. Mající svůj původ v době komunistické totality.[16] Soudce se striktně držel psaného práva. V případě konfliktu právních norem se nepokusil dotvářet právní normy, ale přenést vyřešení konfliktu z jeho vlastní jurisdikce, obvykle na soud stupně vyššího. Česká právní praxe se také musela vypořádat s tím, jak aplikovat pozitivní právo platné a účinné z doby před r. 1989. Kolizi v duchu výše citované Radbruchovy formule řešil i Ústavní soud ČR.

Ústavní soud se v současnosti jednoznačně přiklání k závěrům plynoucím z úvah Roberta Alexyho, přiznává existenci principů. Zdrojem principů je pro něj Ústava ČR, resp. Listina základních práv a svobod, z nichž lze existenci principů dovodit. (S ohledem na čl. 10 Ústavy ČR[17] lze pak právní principy v souladu s tímto přístupem hledat i v mezinárodních smlouvách?)

Prostřednictvím těchto pramenů ústavního práva pak právní principy, zde obsažené prozařují do ostatních právních norem tvořících právní řád, tedy např. i do práva občanského. Hovoří o tzv. prozařování.[18] Vedle principů takto obsažených v ústavním pořádku jsou pro jeho rozhodovací praxi měřítkem i veřejná dobra. Tedy to, co jinak R. Dworkin nazývá termínem politika (policy). Z takového

[15] Weinberger, O.: Norma a instituce (Úvod do teorie práva). Brno: Masarykova univerzita, 1995, str. 80, 81
[16] Kühn, Z.: Aplikace práva soudcem v éře středoevropského komunismu a transformace. Analýza příčin postkomunistické právní krize. Praha: C.H.Beck, 2005, str. 105 a násl.
[17] Čl. 10 Ústavy ČR: Vyhlášené mezinárodní smlouvy, k jejichž ratifikaci dal Parlament souhlas a jimiž je Česká republika vázána, jsou součástí právního řádu; stanoví-li mezinárodní smlouva něco jiného než zákon, použije se mezinárodní smlouva.
[18] Holländer, P: Ústavněprávní argumentace ohlédnutí po deseti letech Ústavního soudu, Praha, Linde, 2003, 1 vydání, str. 16, str. 82 a násl.

pojetí principů, principu proporcionality se podává, že jde o postup, jímž dosahujeme vytčeného cíle (v širším smyslu slova), postup, jež volíme, abychom dospěli určitých-vědeckých- poznatků, popř. je zařadili a utřídili ve vědní celek.(užší smysl slova). Jde tedy o redukci ideje na metodu?[19]

Argumentace ústavněprávní má svá specifika, plynoucí z rozdílného místa Ústavního soudu v systému státních orgánů. Ústavní soud je orgánem ochrany ústavnosti[20], předmět jeho působnosti je vymezen Ústavou[21] na rozdíl od vymezení místa a působnosti obecných soudů.[22] V případě konfliktu normy tzv. jednoduchého práva s Ústavou je obecný soud povinen předložit věc k posouzení Ústavnímu soudu.[23] Je tedy zřejmé, že obecný soud nemůže sám argumentovat v případě řešení např. konkrétního civilního sporu Ústavou oproti právnímu předpisu (normě jednoduchého práva), k tomu je povolán pouze Ústavní soud. Jde o normu procedurální, tedy vylučující jakýkoli jiný postup. Cestou v tomto případě může být pouze výklad normy tzv. jednoduchého práva ústavně konformním výkladem a nikoli výkladem s ústavou nekonformním. Je ale otazné, zda pouze tento způsob výkladu tvoří pro obecné soudy dostatečný prostor pro uplatnění principů v jeho rozhodování.

V naší právní teorii se dále objevuje snaha hledat cestu z výše naznačené změny chápání pozitivního práva jako jediného pramene práva i cestou právní komparace, zdůrazněním aspektů fungování anglosaského právního systému tak, aby bylo možno, zřejmě z důvodu snahy inspirovat praktikující právníky, odpoutat naše právo od doslovného znění zákona, směrem k posílení role interpretace práva a právní argumentace v rámci jednotlivých soudních rozhodnutí (precedentů).[24] I tyto snahy lze hodnotit pozitivně. Nicméně je nutno zdůraznit, že i anglosaský právní systém má svá negativa. Právo je značně relativizováno, je příliš pragmatické.

VI. Namísto závěru řada otázek.

Názorový vývoj po r. 1945 jasně ukázal, že pozitivismus již nadále není schopen popírat existenci přirozeného práva. Právní pozitivista 19 st. vnímal právo pouze jako systém právních norem, jako úžasný technický vynález, krásný nový efektivní stroj, který podle návodu pozitivistické právní teorie

[19] Ottův slovník naučný nové doby,Dodatky k velkému Ottovu slovníku naučnému, Díl čtvrtý svazek prvý Argo, Paseka 2002, str. 206-207
[20] čl. 83 Ústavy ČR ú.z. č. 1/1993 Sb
[21] čl. 87 odst. 1,2 Ústavy ČR ú.z. č. 1/1993 Sb
[22] čl. 90 a čl. 91 Ústavy ČR ú.z. č. 1/1993 Sb
[23] čl. 95 odst. 2 Ústavy ČR ú.z. č. 1/1993 Sb
[24] např. Kühn, Z.: Aplikace práva soudcem v éře středoevropského komunismu a transformace. Analýza příčin postkomunistické právní krize, 1. vydání, Praha, C.H.Beck, 2005

zkoumá, objevuje jeho součásti a funkce pouhou empirií. Právo však není přírodním jevem, technickou záležitostí. Právo patří do skupiny věd společenských, věd o společnosti o člověku. Člověka však nelze vnímat pouze technicistickým způsobem jako něco co funguje podle určitých pouze empiricky uchopitelných pravidel. Pozitivismus opomíjel i duchovní stránku lidské osobnosti a to, jak člověka v průběhu jeho života ovlivňuje.

Z doposud konstatovaného je zřejmé, že vedle práva v podobě systému práva ať už kontinentálního nebo anglosaského má své místo i právní filosofie. Tento pojem použil poprvé právní teoretik a historik G. Hugo v učebnici, kterou nazval Učebnice přirozeného práva jako filosofie pozitivního práva. Chtěl zdůraznit, že zkoumání práva musí být hlubší, nelze se zabývat pouze právem přirozeným. Takový přístup, který považuje obě formy práva (přirozené i pozitivní) za rovnocenné, nazval právní filosofií. [25]

Při těchto úvahách nelze dospět k jednoduchému a jednoznačnému výsledku, k řešení tohoto problému. Takové řešení by nepochybně bylo řešením prvoplánovým a zcela určitě nevědeckým. Lze souhlasit s tím, že stojíme u zrodu nového právně teoretického paradigmatu. (?).[26]

Lze dosáhnout lepšího právního systému syntézou nejlepších prvků obou, myšleno pozitivismu a přirozenoprávní teorie? Domnívám se, že nikoli. Nelze spojit nespojitelné. Z vývoje práva je zřejmé, že přirozené právo existuje. Přirozené právo bylo a je základem jako kontinentálního tak i anglosaského systému práva. Pozitivismus z něj vyšel, vymezil sám sebe v kritice vůči němu, byl technicistickou koncepcí vzniklou a mající svůj význam v dané době, právě jako garant tehdy moderních výdobytků společenského vývoje. Tyto výdobytky, jsou dnes již dostatečně fixovány, interiorizovány, nepotřebují zvláštní ochranu.

Je tu znovu společenská potřeba koncepce pozitivismu v podobě tvorby jednotného evropského práva? V rámci snahy o vytvoření jednotného evropského práva?[27] Má proto pozitivismus stále mít své místo?

V neposlední řadě je nyní vrcholně praktickou otázkou, zda a jak navázat v procesu normotvorby na právní kontinuitu právního řádu v místě, kde byla přetržena, zda je to možné, a to s ohledem na prostý fakt uplynutí sedmdesáti let, doby uplynulé právě od tohoto přetržení v r. 1939?[28] Zda neprovést

[25] citováno dle Machalová. T.: Tradice a perspektivy racionalistického právního myšlení, MU Brno, 2004, 1. vydání, str. 324
[26] Holländer, P: Ústavněprávní argumentace ohlédnutí po deseti letech Ústavního soudu, Prah, Linde, 2003, 1. vydání, str. 11 až 23
[27] např. The Principles of Europian Civil Law (PECL), The Principles of Europian Tort Law (PETL)
[28] po r. 1945 následovalo příliš krátké období let 1946 a 1947, které v sobě již skrývalo zárodky vývoje období po r. 1948

hlubokou reflexi současného stavu a z ní vycházet. Prosté navázání v budoucnu povede k hluboké revizi v důsledku rozvoje právní filosofie (právní vědy). Onen rozvoj totiž už začal.

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A PREDATOR IN AMERICA'S MIDST: A LOOK AT PREDATORY LENDING AND THE CURRENT SUBPRIME MORTGAGE CRISIS

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Abstract

In this article, the author seeks to highlight the issue of predatory lending in America, and its ongoing affect on the subprime mortgage market. The author will first examine what exactly occurs when a person receives a predatory loan, then the author looks at how these loans not only affect the homeowner's ability to keep his or her home, but also its affect on the economy of the United States as a whole. Finally, the author examines three new proposals to Congress, and assesses where America's next step should be when trying to combat the current recession and foreclosure crisis.

Key words

Predatory Lending- Discrimination-Foreclosure- Subprime Mortgage Market- Secondary Mortgage Market- Housing Boom- Recession- FHA Housing Stabilization and Homeowner Retention Act- The Neighborhood Stabilization Act of 2008- The Subprime Borrower Protection Plan

The United States of America is being confronted with an economic crisis of epic proportions. A period of economic history once marked with a housing, construction, and credit boom; it seemed for a few years that everyone in America found themselves as one of the lucky few to obtain a satisfactory loan to obtain their dream home. However, interest rates and finance terms that once made the subprime mortgage market seem anything if not lucrative, has now seen the last of its glory days. Foreclosures and bankruptcy claims are coming in by the thousands, and it is not just those from the lower class. Even people living in the most affluent neighborhoods in the country are also finding their homes close to the auction block. But with the Federal Housing Administration (FHA) stating that it will run a deficit for the first time in its 74- year history, the near and distant future looks grim.[1]

[1] Rachel L. Swarns, *Looming Deficit Impedes Federal Housing Agency*, *The New York Times*, *available at*: http://www.nytimes.com/2008/04/09/business/09fha.html ?_r=2&scp=1&sq=FHA&st=cse&oref=slogin&oref=slogin, (last accessed: 26 April 2008).

How could the American government, a government that prides itself on the principles of homeownership and fair play, allow such a predator to stalk its own citizens? Who shall come to the rescue of the thousands who may lose their homes and all that they have worked towards?

This article seeks to analyze the affects of predatory lending on the recent housing and mortgage crisis in America. The article will analyze what predatory lending means, who are the victims of these loans, and how banks and financial institutions set themselves up for over $200 billion dollars of defaulted mortgage debt. Furthermore, the article will look at what this recent crisis means for American laws relating to lending and homeownership. The article will look at newly introduced legislation to the United States Congress, and what this new legislation might mean for the American people.

I. What is Predatory Lending?

According to a report issued by the United States Department of Housing and Urban Development (herein referred to as "HUD"), predatory lending loans can be "characterized by excessively high interest rates or fees, and abusive or unnecessary provisions that do not benefit the borrower, including balloon payments or single- premium credit life insurance, large prepayment penalties, and underwriting that ignores a borrower's repayment ability."[2] However, predatory lending is often not only characterized by the terms of the loan, but also characterized by who exactly is the prey in the situation.

According to a recent study published by New York University in an October 18, 2007 article in the New York Times, in New York City alone the issuing of so-called "subprime" and "predatory lending loans" were more often than not given to people in lower income brackets, or racial minorities.[3] When looking at the neighborhoods in the New York City area, the 10 neighborhoods with the highest rate of subprime borrowing occurred in the neighborhoods with the highest number of black or Hispanic residents.[4] However, the lowest rate of subprime borrowing occurred in neighborhoods with non-Hispanic whites.[5] When looking at data from the Home Mortgage Disclosure Act (HMDA) of 1975, an Act designed to obligate banks, mortgage lending, and financial institutions to report how many and what types of loans they are giving out, even when looking at blacks, Hispanics, and whites who earn substantial incomes, 24 percent of non-Hispanic whites took out a subprime mortgage, compared to 52

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[2] Carr, James H. & Kolluri, Lopa, *Predatory Lending: An Overview*, 2001.

[3] Manny Fernandez, *Study Finds Disparities in Mortgages by Race*, *The New York Times*, *available at:* http://www.nytimes.com/2007/10/15/nyregion/15subprime.html ?_r=3&pagewanted=1&ei=5088&en=a9978e04a9864642&ex=1350187200&partner=rssnyt&emc=rss&oref=slogin, (last accessed: 26 April 2008).

[4] Id.

[5] Id.

percent Hispanics and 63 percent of non-Hispanic blacks who did.[6]

Another study cited in the Times article, done by the Center for Responsible Learning, saw that after looking at 50,000 subprime loans nationwide, "black and Hispanics were 30 percent more likely than whites to be charged higher interest rates, even among borrowers with similar credit ratings."[7] This could go on to show that loan originators are not just targeting the minority poor, but targeting minority groups in general.

The targeting of racial groups in the housing and loan industry is not a new phenomenon. So-called "redlining" or "blockbusting" has always been a reoccurring problem within the American housing market. Title VIII of the Civil Rights Act of 1968 (this section commonly referred to as, "The Fair Housing Act") explicitly prohibited any person or group of persons from engaging in so called "blockbusting" or "redlining," which is defined as: "For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin."[8] In *U.S. v. Bob Lawrence*, the Supreme Court upheld this provision of the Fair Housing Act as constitutional, and further explained that this section of the Act was included in order to eliminate, "the badges and incidents of slavery in the United States."[9] Furthermore, the court found the practice of steering minorities to certain housing locations, because of their race, is repugnant to the Constitution and continued segregation of the races.[10] The anti-blockbusting provision was placed in the Fair Housing Act to insure that ever person, regardless of race or protected status, will be allowed to have the same opportunity as a white person to purchase a home wherever the person shall choose. This same phenomenon has been occurring with the way banks and lending institutions continually dole out subprime mortgages, with hidden fees and payments, to America's less fortunate populations.

II. The Effect of a Subprime Mortgage

If a subprime mortgage seems so bad from the beginning, the first major question to be addressed is: Why would a bank ever want to originate a subprime loan if the consequences are so poor to the borrower?

The answer is most accurately given in a two-fold response: (1) The subprime mortgage allows a less than fortunate individual, normally a person with a less desirable credit rating, to obtain a loan to purchase a home and (2) The prospect of loaning out the money gives (a) the mortgage lender a fee and (b) allows for greater liquidity for investors on the secondary market, where these investors invest in

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[6] *The Home Mortgage Disclosure Act*, *available:* http://www.ffiec.gov/hmda/history.htm

[7] Id.

[8] 42 usc 3604(e) (1968).

[9] *See, e.g., U.S. v. Bob Lawrence Realty*, 474 F.2d 115 (5th Cir. 1973), *Jones v. Mayer*, 392 U.S. at 439 (1968).

[10] Id.

mortgage-backed securities.

To begin, it is essential to look at how a person comes to afford a home in the first place. Ordinarily, there are many aspects of a person's financial status in society that a bank or lending institution will consider prior to issuing a loan to a person. One of the most important, and often make it or break it signs that a person will receive a specific type of loan, is his or her credit rating. A credit rating, generated by a person's history of debt, debt repayment, and mainly how the person is apt to spend money, is a huge indicator for a bank or financial institution regarding whether or not that person will be likely or unlikely to handle the newly acquired mortgage and whether or not the person will be able to make payments on time. Along with a credit rating, a person's annual income and savings are often looked at in order to assess how much capital a person has in his or her possession. These factors, along with others, go into lending institutions formula into decided what type of loan to originate.

A subprime mortgage loan is a risk, both for the lender and the borrower. The borrower risks the inability to pay every month, due to the terms of the subprime mortgage, while the lender risks losing a substantial amount of money if he must foreclose on a property where the amount owed will be greater than the amount the institution could receive for the sale. However, a subprime mortgage, which gives the borrower an interest rate below the prime mortgage rate, is often the only place where a person with little money or a poor credit history can go in order to obtain any mortgage at all.

For the borrower, a subprime mortgage is often characterized with an adjustable rate mortgage (ARM), rather than a fixed rate mortgage (FRM). An ARM often times makes it easier, in the beginning, on both the borrower and the lender. It allows the borrower to have low monthly payments in the beginning, and allows the lender to receive a fee from the borrower, and allows the institution to acquire an ARM, which will give the institution the prospect of acquiring enough money to avoid an asset-liability mismatch.

For the borrower a rise in interest rates, even 1%, could cause payment problems. For instance, according to HUD: "Over the 30- year life of an $81,000 home mortgage, one additional percentage point could add nearly $21,000 to the cost for the home buyer—not including the additional higher processing fees subprime loans typically carry."[11]A huge problem of subprime lending is that the bank or mortgage lender is never upfront with the borrower on the consequences of an ARM.

A subprime mortgage loan is often characterized by a lower monthly payment at the beginning, but an increase in monthly payments when the interest rate will rise. However, often times the rise in interest rate will lead to negative amortization. Negative amortization occurs when, "interest is not amortized over the life of the loan and the monthly payment is insufficient to pay off the accrued interest. The principal balance therefore increases each month and, at the end of the loan term, the borrower may

[11] Carr, James H. & Kolluri, Lopa, *Predatory Lending: An Overview*, 2001.

owe more than the originally borrowed amount."[12] The loan is also characterized by, "inflated and padded costs, such as excessive closing or appraisal charges, high origination and other administrative fees, and exorbitant prepayment penalties that trap lower-income borrowers into the subprime market."[13] All of these characteristics can spell trouble for an uneducated borrower.

Furthermore, the bank or lending institution is at risk by giving a borrower a subprime mortgage; however, this risk can be made minimal by selling the loan on the secondary market. In order to make more money, so a lending institution can make more loans available to borrowers, an institution will package these loans and sell them to an investor in the secondary market.[14] One of the largest packagers of these loans for the secondary market is Freddie Mac, which is backed by the federal government. Freddie Mac will buy the loans from the lending institutions, package them, and then sell them to investors on the secondary market.[15] All of this is to increase liquidity, in order for the original lender not to have to hold the loan in its own portfolio, again allowing it to make more loans available to borrowers.[16]

In an ordinary economic cycle, the number of subprime borrowers would more likely than not balance out the risk that both borrower and lender will have to make by giving the loan. However, when a period of economic boom is followed by a sharp decrease in home prices, lower consumer spending, and a larger than usual default on mortgage loans; no one, borrower, lender, or investor, can finish as a winner.

III. The Housing Boom and the Fall-Out

In the early 2000s, the American economy was marked by low interest rates, huge construction increases, inflated home prices, and a period of huge consumer spending and debt retention. During this period, many Americans were becoming first-time home buyers, refinancing their own homes to take out a second mortgage so they could have some cash, and selling their homes because they were being appraised at an inflated value. What would lead to an overvaluation in home prices and a rush to refinance?

The simple answer comes from the Federal Reserve Bank of the United States. After the 2001 recession, and in order to spur the economy, the Federal Reserve Bank began lowering interest rates at record

[12] Id.
[13] Id.
[14] *Problems loans to home buyers with less than top credit has become a big threat to the markets - and the economy*, *available at:* www.cnnmoney.com (last accessed: 26 April 2008).
[15] Jean Cummings & Denise DiPasquale, *A Primer on the Secondary Mortgage Market*, National Community Development Initiative Meetings, 1997.
[16] Id.

speed.[17] At its lowest, a 1% interest rate meant big dreams for many Americans who had enough equity in their home to refinance and use the second mortgage to lower their payments and free up some money. This also made it easier for lower income, often minorities, to cash in on the low interest rate and receive a subprime mortgage. However, there were costs to this. First off, as described above, these subprime mortgages, characterize by hidden fees, payments, and ARMs, were often used to target lower income, less qualified borrowers and used to talk them into a risky financial situation. According to the Home Mortgage Disclosure Act, subprime lending became big business, and even bigger business in poorer and often uneducated markets.[18] In the HUD article, researchers found that, "subprime loans are three times more likely in low-income neighborhoods than in high-income areas, and five times more likely in black neighborhoods than in white neighborhoods."[19] Also, mortgage lenders often target the elderly, who are less educated on financial matters.[20] Specifically, this means that although many Americans could realize their American dream of homeownership, many banks and lending institutions were capitalizing on racial minorities, possibly hoping that they could not keep payments and the bank would have to foreclose and then reap the benefits of the sale of the home at an inflated price.

All good things must come to an end, and so must all economic bubbles. In 2005, construction halted, home prices began to fall, people stop buying and selling homes, mortgage rates went up, and the bubble began to burst. A slow in the economy can often lead to job loss, reduced consumer spending, fears of inflation, and people may have to stop paying their bills. When the Federal Reserve decided to raise the interest rate, this pushed many of these subprime, ARM borrowers well beyond their means. Many already possessed a loan for their down payment; a loan for their home, and most likely did not have enough capital in the bank to continue paying their monthly payment when the first jump in interest came along. This is exactly what happened to the subprime mortgage market. Many of those Americans felt the crunch of their ARMs and they could not keep up with the rising level of their monthly house payment.

Although foreclosure is never a good sign for anyone, it is an exceptionally bad sign when banks must foreclose on a home with hardly any equity and where the bank will lose a large sum of money on the loan, and the homeowner will have to lose his or her home. In 2007 alone, 2.2 million foreclosures were cited.[21] Along with the foreclosures, 25 subprime lenders filed for bankruptcy or exited the scene during the first few months of 2007, according to an article in Business Week.[22] This also meant that not only

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[17] *See*, http://www.federalreserve.gov/fomc/fundsrate.htm, (last accessed 27 April 2008).
[18] *The Home Mortgage Disclosure Act*, *available:* http://www.ffiec.gov/hmda/history.htm
[19] Carr, James H. & Kolluri, Lopa, *Predatory Lending: An Overview*, 2001.
[20] Id.
[21] *See*, http://www.realtytrac.com/ContentManagement/pressrelease.aspx
?ChannelID=9&ItemID=3988&accnt=64847 (last accessed: 27 April 2008).
[22] Mara Der Hovanesian & Matthew Goldstein, *The Mortgage Mass Spreads*, *available at*: http://www.businessweek.com/investor/content/mar2007/pi20070307_505304.htm

were homeowners and lenders feeling the pain, but also secondary market investors who had backed all of the subprime lending just a few years before.[23] According to one of the Mortgage Bankers Association (MBA) surveys, in 2006, even though only 6.8% of mortgages were of the subprime, ARM type; they accounted for 43% of the total foreclosures.[24] In short, many of those poor, elderly, and minority populations who fell victim to the flashy advertisements, zero down payments, lower monthly payments, and hidden fees, are the largest percentage of people to lose their homes.

Once the subprime mortgage market had become riddled with delinquent payments, foreclosures, and lost profits for banks, investors, and the federal government; this crisis could only lead the American economy deeper into a recession.

IV. The Clean Up

Now that millions of Americans have been deceived into a less than perfect American dream, and now that the banks are losing money by the millions, and consumer spending has all but come to a halt; the American government must take its time in order to pick the most effective bail out. Along with looking for the most well liked solutions from all sides of the coin.

The Bush Administration, at the end of August 2007, called for a bail out of those mortgages who belong to borrowers with good credit who, because of the rise in interest rates, are now unable to make payments.[25] This bail out was entitled, "FHASecure."[26] Its aim was to help around 240,000 American families keep their homes by allowing them to refinance.[27] In turn, the government hopes that this will push lenders into offering Federal Housing Administration (FHA) loans, which do not come with the pitfalls of many predatory lending loans seen in the past.[28] Also, FHASecure would also try to increase liquidity in the system by using these loans, packaging them, and having Ginnie Mae-another federal program, securitize them.[29]

This plan may help thousands of Americans who, without the recent recession, would have maintained payments and who already have a good credit history. But, what about the thousands of others who were taken for a ride with a subprime mortgage because, unlike usual procedures that are used for mortgage lending, a bank or institution decided to look the other way from a less than great credit score, decided to not demand certain documents, and decided to lend to people who are not your average American?

?chan=rss_topStories_ssi_5 (last accessed: 27 April 2008).

[23] Id.

[24] *See*, http://www.mbaa.org/NewsandMedia/PressCenter/58758.htm

[25] *See*, HUD News Release No. 07-123, *available at*: http://www.hud.gov/news/release.cfm?content=pr07-123.cfm (last accessed: 27 April 2008).

[26] Id.

[27] Id.

[28] Id.

[29] Id.

Despite pressure from the financial sector and despite often cited free market principles, it would seem that the Federal Government should seize the opportunity to officially enact predatory lending, mortgage fraud, and consumer protection laws to insure that many Americans do not find themselves without a home. There are many bills still in committee, and this paper will analyze three such proposed laws and will assess whether or not they may, in the short or long run, stop the bleeding from the gaping wound in the mortgage market.

A. FHA Housing Stabilization and Homeowner Retention Act

This bill, first proposed by Chairman of the House Committee on Financial Services, Barney Frank, will offer much needed assistance to borrowers. The bill would give $300 billion dollars to many of the at-risk borrowers who are in the severe situation of losing their homes.[30] This money would go towards helping these borrowers refinance their now unmanageable mortgages into a type of mortgage that they would be reasonable for them.

The lender would have to agree to reduce the value of the home, and then take a loss on the original loan, but the lender would then receive a payment from the new loan, which would have to be FHA-guarantee.[31] This requirement, of a FHA guarantee, is most likely aimed at the egregious predatory loans that have affected much of America's poor and minority populations. The new loan must have reasonable terms, that the borrower can actually pay, and the borrower must promise to share future appreciation of the home with the government if the borrower decides to sell or refinance.[32]

A borrower must first contact an FHA-approved lender, the lender must agree to take the reduced value of the home, and if the lender does agree to do this then the existing mortgage, discounted now through the $300 billion bail out, will be paid off by the lender.[33] The borrower will be able to keep his home, and the lender will, with hope, be able to recover some of the money he would have lost had the property gone into foreclosure.

In order to be eligible for this new loan, a borrower would have to meet certain criteria:

1. Borrower must be the owner of the residence and it must be the borrower's principal residence.
2. Borrower must promise that he or she has not "intentionally defaulted" on the mortgage, and the mortgage to debt-to-income ratio must be no less than 35 percent as of the 1st of March of 2008.
3. Those lenders, who agree to a new loan, must waive all penalties and fees that may exist from the original loan, and must accept payments towards the new loan as payments in full.
4. Lenders must then accept that they will suffer a significant losses, and these losses must be enough to satisfy and:

[30] H.R. 5830, 110th Cong., 2d Sess. (2008)
[31] Id.
[32] Id.
[33] Id.

a. Establish a 3% reserve for the FHA from these loan losses
b. Pay the origination and closing costs of this new loan, up to 2%
c. The lender must then bring down the loan-to-value ratio, to a new and fairer appraised value of the home, so the borrower can experience less debt.[34]

As well, there will be new requirements for the FHA loan:

1. The new loans must be based on new and more current appraised value of the home (not the inflated price from the original loan) and must be based on the borrower's income.
2. The new loan must decrease the borrower's debt.
3. The new loan must meet FHA limits for the duration of this program.
4. There will be an oversight board, which will set caps and limits on interest rates and fees.
5. The government, in order to insure that a borrower will not just automatically sell or change the loan without any penalty, will retain a future stock in the home price. Thus, if the borrower refinances or sells the home, the governments is entitled to:
    a. An *ongoing* exit fee that is equal to 3 percent of the original FHA loan; or
    b. A percentage of any profit that the borrower may make, although this percentage will decline with respect to how many years the borrower stays in the home without selling or refinancing.[35]

Also, these loans will still be able to be packaged, and backed by the Ginnie Mae program, and this loan program will run for 2 years, and will allow money for education and money for legal aid.

Although the program may help some borrowers and some lenders, it may feel too constricting to some lenders who would rather renegotiate new loans under their own terms. This may help the bank or lending institution maximize profits in such a dire situation. Too much control over percentages and loan requirements may mean that some people will be locked into a government backed loan, with the promise to repay the government a share of the value, because of lack of other options. As well, a lender must first allow a borrower to enter into this new loan and must accept a loss for the previous mortgage. For the borrower this may seem like a good deal, but many lenders may just as soon foreclose and pay the cost of the defaulted mortgage down a different way. This could still leave many borrowers, who would like a new and more affordable loan, no choice and they could still lose their homes.

B. The Neighborhood Stabilization Act of 2008

This Act, introduced by Maxine Waters who is Chairwoman of the Subcommittee on Housing and Community Opportunity, has four specific aims:

1. To establish a loan and grant program administered by the Department of Housing and Urban Development to help States purchase and rehabilitate owner-occupied, foreclosed homes with the goal of stabilizing and occupying them as soon as possible, either through resale or rental to qualified families;
2. To distribute these loans and grants to areas with the highest foreclosure levels;
3. To provide incentives for States to use the funds to stabilize as many properties as

[34] Id.
[35] Id.

possible; and

4. To provide housing for low- and moderate- incoming families, especially those that have lost their homes to foreclosure.[36]

In total, the bill would give a total of $15 billion dollars to States so that they could administer the grants and help restabilize neighborhoods that have been made vacant because of high foreclosure rates.[37] Half of this money would be for grants and half of the money would go to giving the 25 most populous cities in the country loans that they could use and give to housing authorities in order to occupy these empty homes. The grant money could be, "used toward property taxes and insurance during the pre-occupancy phase; operating costs such as property management fees, property taxes, and insurance during the period a property is rented; property acquisition costs; and State and grantee administrative costs. Grants could also cover closing costs."[38] This money would be able to insure that properties will stay in good legal standing, and to make it easier for people to transition into these homes with ease.

The loan money, however, would go to cities in order for them to, "finance acquisition and rehabilitation costs." [39] It would be so the city could then market the foreclosed home to sellers, and possibly market apartments to prospective renters. The sellers and renters, however, must meet certain qualifications in order to purchase one of those homes. Under the proposed law, the State would be required to try and help out those who had lost their homes and the homes could not be sold to a family with a median income that exceeded 140 percent of the area median income.[40] Also, properties that are purchased to then be rented out must be rented to families with an income at or below the area median income.[41]

The new law is also designed to help the lowest income families, and to help members in the community such as, "income-eligible veterans, teachers, workforce, and homeless persons."[42]

The Federal Government would be paid back by the proceeds from the resale of the home or paid from the refinancing if it is a rental property, and the government would receive 20 percent of the appreciation cost, if there were appreciation, at the resale.[43]

This new law is designed to help those neighborhoods, which are rapidly losing people to foreclosure and too much debt, to help regain population and to help those who have already lost their homes to move back into the neighborhood. This law may help many areas in the country that may be faced with many vacant homes, and a recession in local economies because of the loss of homeowners and renters. These areas may also be suffering from depletion in property taxes, depreciation in home prices, and this law is designed to ensure that neighborhoods remain stable through the current recession.

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[36] H.R. 5818, 110th Cong. 2d Sess. (2008).
[37] Id.
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Id.

However, this law may also pose some problems. Areas that have lost many homes to foreclosures, are more likely than not to be areas where predatory lending was also prevalent. A real assessment of the problem, should not just involve the government giving money to certain areas to do with what they wish, but the real move would be to begin to enforce, already existing laws, against banks and mortgage lenders who gave many of these families the loans in the first place. The money should be going towards fixing the lending system, instead of just fixing the current problem without thinking about the long-term effects. Without any real punishment to banks and mortgage lenders, and without any real consumer education, it is more likely than not that America's minority, elderly, and poor will remain the lending industry's main target for predatory lending.

C. The Subprime Borrower Protection Plan

This plan has not been introduced to the United States Congress through a bill, but has been recently discussed in the Senate Committee on Banking, Housing, and Urban Affairs on April 10, 2008 by Dean Baker.[44] Dean Baker is one of the co-founders of the Center for Economic and Policy Research (CEPR). The CEPR is a think-tank in Washington, D.C. that is devoted to research and policy making in order to further democratic and social change in America. Dean Baker gave testimony to the United States' Senate on a program he calls, "The Subprime Borrower Protection Plan." Dean Baker's proposal addresses not only the recent economic crisis and rise in foreclosures, but also addresses the issue of predatory lending. In Baker's plan, homeowner's will be given the option to rent their home, instead of losing it. As well, this plan will not come with a hefty billion-dollar price tag, but will instead be administered by a judge. A homeowner will be allowed to remain in his or her own home and pay a fair market value rent. An appraiser will appraise the house for its current market rate and will determine the rent, and if a person is not happy with the rate they can choose to have it appraised a second time to determine the correct rental price. As well, even though the person will not own the home anymore, the bank or lender is free to sell off the mortgage to another person, but that person must understand that the former homeowner can indefinitely remain a tenant. The seven steps in total can be found on the CEPR's website.[45]

This proposal allows for a homeowner to stay in there home, and it allows also for the market to decide current rental rates. It also allows for the mortgage lenders to still have freedom with their mortgages. However, it does not directly punish or assess how to fix the problem of predatory lending, the plan does not give any help, money or options to a bank or mortgage lender that may have been engaging in predatory lending. It does not even give the lender the option of being able to engage in another subprime, predatory loan. It actually forces the lender to accept the previous homeowner as a tenant,

[44] *See*, http://www.cepr.net/index.php/publications/reports/turmoil-in-u.s.-credit-markets/ (last accessed: 4 May 2008).
[45] *See*, http://www.cepr.net/index.php/op-eds-columns/op-eds-columns/the-subprime-borrower-protection-plan/ (last accessed: 4 May 2008).

and although they can sell or manage the property themselves, it still means that they must suffer the consequences of losing money and, at the same time, being unable to flip foreclosed houses in order to recoup maximum profits.

Some may find the idea of rebuilding neighborhoods in America, through an own-to-rent plan as dangerous. Having neighborhoods with a high percentage of renters may increase property values and property standards. However, Dean Baker's plan points out that the people living in the homes will be previous owners and long-term renters. Both of these aspects will mean that the tenant will continue to keep the property in good condition, because they will feel a certain connection with being the home's previous owner.

The plan also does not assess what will become of the lost equity, and the lost mortgages to the banks and lending institutions. Although it may keep people in their homes for a monthly rate they can afford, they will not be getting anything from it. The idea of homeownership is so the owner can have the asset and equity in the home so the owner can use this for when he may later need to sell the home, or may need to use this equity for repairs or other financial reasons. Likewise, banks and lending institutions thrive on the advantages of being able to lend money and use these mortgages to bundle and sell on the secondary market. In order to have enough money in the banks to loan for mortgages, there must be liquidity in the market. With Baker's plan, this could mean that banks and institutions will lose a large amount of money that could be used to fund an increase in mortgages, which could also help to get the weakening housing market back on track.

V. Conclusion

As the United States economy continues to fall deeper into a recession, the only satisfactory response is to help. However, the real question to answer is how to help in the most effective way. As can be seen from the above analysis, the problems that are now surfacing in the United States economy can be partially attributed to a practice and pattern of discrimination through predatory home loans. By targeting the less educated, less wealthy, elderly, and minority populations in America, the banks and lending institutions received fast capital, but will now have to endure the long-term effects that will come from numerous foreclosures. The United States Congress and other economists have come to the rescue with laws and proposals that may amount to help, or they might just amount to a quick fix of the problem. The real answer might just have to come from time and the market itself. Home prices will have to now be reappraised at a more realistic price, while banks and other lenders will have to readjust their loan programs and may begin to think about their lending practices and what it may mean for the future.

For now, more Americans will lose their homes, possibly their jobs, and will continue to spend less and less money in the economy. Without a long-term plan regarding predatory lending, subprime

mortgages, foreclosures, and credit problems, the current crisis may only be fixed for a short period of time. Without real enforcement, real punishment, and real consumer education it will only be a matter of time before the lending predators once again begin to stalk their unassuming consumer prey.

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PAVEL PETR

VYSOKÁ ŠKOLA BÁŇSKÁ – TECHNICKÁ UNIVERZITA OSTRAVA, KATEDRA SPOLEČENSKÝCH VĚD

Abstrakt

Práce se zabývá vymezením pojmu byt v občanskoprávních předpisech v České republice a mírou působení superficiární zásady (*superficies solo cedit*) na vymezení bytu jako věci v právním smyslu. Byt není věcí v právním smyslu obecně, ale jen v režimu zvláštního zákona. Pojmovým znakem bytu je jeho právní, nikoliv faktické, vymezení. V závěru je nastíněn režim bytu coby nemovitosti.

Klíčová slova

Byt – superficiární zásada – superficies solo cedit – nemovitost – věc v právním smyslu – předmět právních vztahů

Abstract

The issue deals with the problemacy of flat in the civil legal regulations in the Czech Republic and the impact of *superficies solo cedit* principle on determination of flat as a legal matter. The flat is not a legal matter generally but in a special statute regime. The essential mark of flat is its legal not an actual qualification. In the end of this work a regime of flat as a real property is mentioned.

Key words

Flat – superficies solo cedit prinicple – real property – legal matter

Doba, ve které české soukromé právo čekají zásadní změny, skýtá příležitost pozastavit se nad různými, často zcela bezproblémově používanými, termíny. K těmto bezpochyby patří i výraz *byt*. Občanský zákoník[1] tohoto pojmu využívá hned na několika místech[2].

Absence definice v samotném zákoníku není ideální. Nalézáme ji v režimu zákona č. 72/1994 Sb, o vlastnictví bytů, který v § 2 písm. b) *rozumí bytem místnost nebo soubor místností, které jsou podle*

[1] Zákon č.40/1964 Sb., v platném znění (dále jen ObčZ).
[2] Příkladmo § 118 odst. 2 ObčZ, § 125 odst. 1 ObčZ nebo celý oddíl čtvrtý hlavy sedmé § 685 an. ObčZ aj.

rozhodnutí stavebního úřadu určeny k bydlení. Ovšem odkazovat na obecnou platnost definice zákona o vlastnictví bytů nelze[3].

Imanentním znakem jakýchkoliv definic bytů je upřednostňování stavu právního před faktickým. Jinými slovy, je-li místnost či jejich soubor užíván k trvalému bydlení aniž by byl jako byt dle rozhodnutí příslušného úřadu k tomuto účelu určen, o byt nepůjde. Stejně tak *vice versa*.

Samotné vymezení bytu coby předmětu právních vztahů s sebou přináší otázku zda je vůbec možné součást jiné věci – domu, jako samostatnou věc chápat. Je nutné upozornit na rozdílné chápaní pojetí nemovitostí, resp. jejich hranic v právních řádech různých zemí. Z velké části otázka uznání bytu za věc v právním smyslu závisí na skutečnosti, jak se zákonodárce vypořádal se zásadou superficies solo cedit.

Superficiární zásada

Touto zásadou rozumíme římskoprávní princip *superficies solo cedit*[4]. Jak už to v právu bývá, její uplatnění není vždy jednoznačné a můžeme nalézat různé variace a výjimky z ní. Zásadu zmiňuje jak Gaius, tak později Ulpianus[5], resp. kritiku zásady Paulus[6].

Nemovitými věcmi (*res immobiles*) byly výhradně pozemky. Samostatnými věcmi se pozemky stávaly ohraničením. Za součást pozemku, a tedy věc nemovitou, považovali Římané i všechny movité věci, které jsou s pozemkem trvale spojeny (domy, stromy, rostliny aj.) Pozemek měl vždy charakter věci hlavní. Proto vlastník pozemku byl zároveň i vlastníkem budovy na něm stojící.[7]

Postavit a zároveň užívat dědičně dům na cizím pozemku bylo ovšem možné v rámci zvláštního věcného práva zvaného *superficies*. Oprávnění se velmi podobalo postavení vlastníka věci. Superficies (právo stavby) spočívalo v možnosti postavit na cizím pozemku stavbu a platit vlastníku pozemku pravidelná plat. Toto právo lze chápat jako věcné právo k věcí cizí a ojedinělé prolomení principu, že povrch ustupuje půdě.[8]

[3] Srov. dikci § 2 písm. b) zákona č. 72/1994 Sb., o vlastnictví bytů – *Pro účely tohoto zákona se rozumí (...).*
[4] V překladu značí: Co je pevně spojeno s půdou, patří vlastníkovi půdy; Gaius, Kniha 2.
[5] ULPIANUS D 9,2,50.
[6] PAULUS Op. cit. sub 5.
[7] KINCL, J.; URFUS, V.; SKŘEJPEK, M. *Římské právo.* Praha : C.H.Beck, 1995, s. 86. ISBN 80-7179-031-1.
[8] KINCL, J., op. cit. sub 7.

Romanisté[9] uvádějí, že byty ve starověkém Římě existovali v podobě tzv. *insulae*, což byly uzavřené bytové jednotky (skládající se i jen z jedné místnosti). Bytů (*insulae*) bylo údajně až 23000 ve zhruba tisícovce domů, které měly i 7(!) pater.

Tradiční pojetí římského práva neuznávalo, v souladu se superficiární zásadou, domy coby samostatné věci, proto tedy *a maiori ad minus* jimi nejsou ani byty. Zástupci[10] tzv. idealistické teorie práva ovšem přiznávají *insulae* postavení věci v právním smyslu. Odkazují přitom zejména na Paulem[11] zdůrazňovaný rozpor s *ius naturale*. Toto chápání je třeba odmítnout neboť římské prameny o bytech jako věcech nehovoří. Nebylo by to ani logické s ohledem na existenci superficiární zásady.

Stejně jako v dobách římského státu míval *pater familias* právo nad životem a smrtí[12] své rodiny, tak v současných podmínkách má absolutizace zásady *superficies solo cedit* obdobný dopad na uznání bytu coby věci v právním smyslu.

Byty jako předměty právních vztahů se v právních řádech objevují zejména na počátku 19. stol. Důvodem je předně odmítnutí superficiární zásady právní doktrínou této doby. Naopak nástup 20. století odmítá toto nazírání a vrací se k prosazování zásady a upírá bytu postavení věci v právním smyslu.[13]

V dosahu českého práva se superficiární zásada uplatňovala v rámci recipovaného ABGB (Allgemeines Bürgerliches Gesetzbuch Všeobecný občanský zákoník z r.1811). Zvrat nastal až s přijetím tzv. středního kodexu[14]. Ten zrušil zásadu[15] jako součást našeho právního řádu.[16]

Byt

Institut vlastnictví bytů byl do českého právního řádu zaveden až v 60.letech 20. století. Konkrétně pak zákonem č. 52/1966 Sb., o osobním vlastnictví k bytům. Bylo uznáno toliko nabývání vlastnického práva *in favorem* osob fyzických (dobovou terminologií označovaných jako „občané“) a dále bylo možno nabýt jen jeden byt, resp. rodinný domek. Do účinnosti novely zákona o osobním vlastnictví k bytům z roku

[9] H. JORDAN; J.BELOCH citovaní in Luby, Š. *Vlastníctvo bytov.* Bratislava: Vydavateľstvo Slovenskej akadémie vied, 1971, s. 15.
[10] KUNTZE, J.E.; BATTLE-VÁSQUEZ, M. citovaní in Luby, Š. *Vlastníctvo bytov.* Bratislava: Vydavateľstvo Slovenskej akadémie vied, 1971, s. 16.
[11] PAULUS op. cit. sub 5.
[12] *Potestatem vitae necisque.*
[13] Savignyho pojetí dokonce chápe vlastnictví bytů jako absolutní nesmysl.
[14] § 25 zákona č.141/1950 Sb. Občanský zákoník.
[15] Důvodem byla zejména kolektivizace zemědělství.
[16] Nález Ústavního soudu České republiky ze dne 24.května 1994 ve věci návrhu na zrušení zákona č. 183/1993 Sb.

1978[17], bylo možné takto nabývat jen byty v domech, v nichž byly prodány všechny byty. Dle dobové literatury[18] bylo takto „zprivatizováno“ jen cca 8000 bytů a další asi stejné množství bytů, resp. rodinných domků vystavěno.

Z pohledu demokratického státu nastala změna s účinností velké novely[19] občanského zákoníku. Byt byl zařazen mezi věci v právní smyslu, ovšem výhradně v režimu zvláštního zákona[20]. Opačné stanovisko zastává ojediněle judikatura[21], ale i část odborné veřejnosti[22].

Domníváme se, že byt není samostatnou věcí mimo režim zvláštního zákona. Byty v domech, které nebyly vymezeny dle zákona o vlastnictví bytů rozhodně nejsou samostatnými věcmi.[23]

Byt není obecně ani nemovitostí. Nevyhovuje legální definici obsažené v § 119 odst. 2 OZ. Přesto dle ustanovení § 3 odst. 2 zákona o vlastnictví bytů se na jednotku (byt, jako vymezená část domu dle zákona o vlastnictví bytů), není-li stanoveno jinak, použijí ustanovení právních předpisů o nemovitostech.

Pro futuro se předpokládá znovupřijetí superficiární zásady. V důsledku čehož se stavba, nejedná-li o stavbu jen dočasnou, prohlašuje za součást pozemku. Osnova[24] návrhu nového občanského zákoníku (dále jen osnova) upravuje byty a nemovitosti v § 424 a násl.

K.Eliáš[25] líčí, že osnova předpokládá, že nemovitá věc je též byt, stanoví-li tak zvláštní zákon. Zároveň přiznává, že v tomto je osnova nepřesná a nesystémová, což opět povede k dílčí úpravě.

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[17] Zákon č. 30/1978 Sb.
[18] ZUKLÍNOVÁ, M. Několik úvah o osobním vlastnictví bytů. *Právník*, 1979, č. 5, s. 479.
[19] Zákon č. 509/1991 Sb.
[20] Zákon č. 52/1966 Sb., o osobním vlastnictví k bytům; zákon č. 72/1994 Sb., zákon o vlastnictví bytů.
[21] Rozhodnutí Krajského soudu v Brně sp. Zn. Ca 254/93.
[22] PROCHÁZKA, A. Byt jako předmět občanskoprávního vztahu s přihlédnutím k restituci. *Bulletin advokacie.* 1999, č. 5, s. 26-29.
[23] Fiala, J. a kol. *Zákon o vlastnictví bytů. Komentář*. 3. vydání. Praha: C.H.Beck, 2005, s.8. ISBN 80-7179-337-X.
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[25] ELIÁŠ, K. Věc jako pojem soukromého práva. *Právní rozhledy.* 2007, č. 4, s. 126.

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[5] FIALA, J. a kol. *Zákon o vlastnictví bytů. Komentář*. 3. vydání. Praha: C.H.Beck, 2005, s.500. ISBN 80-7179-337-X.
[6] KINCL, J.; URFUS, V.; SKŘEJPEK, M. *Římské právo.* Praha : C.H.Beck, 1995, s. 386.
[7] ISBN 80-7179-031-1.
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UZNANIE A VÝKON ROZHODNUTIA

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Abstrakt

Tento príspevok sa venuje aplikácií Nariadení Brusel I., Brusel II. bis a Návrh - Nariadenie Rady o právomoci, rozhodnom práve, uznávaní a výkone rozhodnutí a o spolupráci vo veciach vyživovacej povinnosti v Slovenskej republike v otázke uznania a výkonu rozhodnutia.

Kľúčové slová

Nariadenie, uznanie, výkon, Brusel I., Brusel II. bis, Zákon o medzinárodnom práve súkromnom a procesnom

Abstract

The article is dealing with the application of Regulations Brussels I., Brussels II. bis and the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations in Slovak republic, especially in case of recognition and enforcement of judgements.

Key Words

Regulation, recognition, enforcement, Brusel I., Brusel II. bis, The Code of International private Law and Process Law

Úvod

V tomto príspevku by som sa rada zaoberala uznaním a výkonom cudzieho rozhodnutia, rozhodnutia vydaného v členskom štáte Európskej únie podľa Nariadení Brusel I. a Brusel II. bis a Návrh -

Nariadenie Rady o právomoci, rozhodnom práve, uznávaní a výkone rozhodnutí a o spolupráci vo veciach vyživovacej povinnosti**.** Všetky tri nariadenia majú spoločný prvok, ktorým je výživné ako majetkový nárok oprávneného.

Otázka uznania a výkonu rozhodnutia má svoj pôvod v štyroch základných slobodách, na ktorých je postavené Európske spoločenstvo (ES), konkrétnejšie predovšetkým na slobode voľného pohybu osôb[1]. Zmyslom slobody voľného pohybu osôb boli v minulosti hlavne otázky pracovného práva a práva sociálneho zabezpečenia. S vývojom v ES a s postupom globalizácie sa migrácia obyvateľstva zvýšila a priniesla nové problémy, s ktorými sa potýkajú ES. Posun nastal i vo význame jednotlivých inštitútov ako je štátne občianstvo, ktoré ustúpilo inšitútu trvalého alebo obvyklého pobytu, ktoré nadobudlo na význame a odzrkadlilo sa to i na právnej úprave ES.

Nariadenie Brusel I.

Nariadenie Rady (ES) č. 44/2001 z 22.12.2000 o právomoci a o uznávaní a výkone rozsudkov v občianskych a obchodných veciach[2] je celý názov nariadenia známeho ako Brusel I.. Nariadeniu Brusel I. predchádzal Bruselský dohovor z 27.9.1967 o právomoci a výkone rozsudkov v občianskych a obchodných veciach. Následne 16.9.1988 uzavreli členské štáty a štáty EFTA Lugánsky dohovor, ktorý vytvoril paralelu k Bruselskému dohovoru z roku 1968. V situácii, kedy existovali dva dohovory upravujúce rovnakú problematiku Rada vykonala revíziu textov[3]. Pretože popri Bruselskom dohovore existuje nariadenie Brusel I. bolo nevyhnutné ustanoviť i prechodné ustanovenia. Prioritou zákonodárcu bolo ustanoviť nariadenie Brusel I. prednostné postavenie pred Bruselským dohovorom, i keď umožňoval zmluvným stranám dohovoru, aby plnili záväzky (hlavne úprava špecifických otázok, neupravených týmto nariadením) vyplývajúce z danej medzinárodnej úpravy.

Nariadenie Brusel I. bolo prijaté pre potreby kvalitného fungovania jednotného trhu, hlavne v závislosti na slobode pohybu osôb, ktorá bola do určitej miery obmedzovaná odlišnosťami vnútroštátnych právnych noriem. Preto bolo nevyhnutné zjednodušiť formálne náležitosti na účely rýchleho a jednoduchého uznávania a výkonu rozsudkov členských štátov viazaných týmto nariadením[4]. Forma právnej úpravy v podobe nariadenia takto dosahuje požadovaný účinok, ktorý táto forma poskytuje. V prvom rade sa jedná o jeho záväznosť a priamu použiteľnosť členskými štátmi.

[1] Rozehnalová, N., Týč, V.: *Evropský justiční prostor (v civilních otázkach)*, Brno: Masarykova univerzita, 2003, str. 9
[2] UL L 12, 16.1.2001, str. 1
[3] Brusel I. Preambula, ods. 5
[4] Brusel I. Preambula, ods. 2

Celou svojou právnou úpravou spadá toto nariadenie do justičnej spolupráce v občianskych veciach podľa článku 65 Zmluvy[5] . Ďalším ustanovením Zmluvy, ktoré určuje obsah nariadenia je článok 5, ktorý vyjadruje zásady subsidiarity a proporcionality a predznamenáva, že táto konkrétna právna úprava a teda dosiahnutie cieľa vytýčeného týmto nariadením je možný len na úrovni Spoločenstva a nie jednotlivých členských štátov[6].

Ďalším účelom nariadenia je harmonický výkon súdnictva a teda vylúčenia alebo aspoň minimalizovania možnosti súbežných konaní a zaručiť, že sa v dvoch členských štátoch nevydajú nezlučiteľné rozsudky[7]. Základné ustanovenia nariadenia Brusel I. vyjadrujú dôveru vo výkon súdnictva v ES, ktorá má za následok automatické uznávanie rozsudkov vydaných v členskom štáte bez ďalšieho konania. Z tohto dôvodu musí byť konanie smerujúce k výkonu rozsudku vydaného v jednom členskom štáte na území iného členského štátu účinné a rýchle. Vzhľadom na vyjadrenú dôveru v súdnictvo v ES by mal byť vyhlásený rozsudk za vykonateľný takmer automatické – len po výlučne formálnej kontrole predložených dokladov, bez možnosti, aby súd z úradnej povinnosti skúmal ktorýkoľvek z dôvodov nevykonateľnosti uvedených v nariadení[8].

Samotná právna úprava uznania a výkonu rozsudku sa nachádza v Kapitole III, články 32 až 56 nariadenia Brusel I.. Ako už bolo uvedené vyššie v nariadení sa spomína „rozsudok“ ako druh rozhodnutia, ktorý sa má uznať a vykonať. V zmysle čl. 32 sa jedná o každé rozhodnutie súdu alebo tribunálu členského štátu, bez ohľadu na jeho označenie.

Samotné uznanie rozsudku[9], ktorý bol vydaný v členskom štáte, má byť bez osobitného konania, ale ak je uznanie rozsudku predmetom sporu môže účastník navrhnúť vydanie rozhodnutia o uznaní rozsudku.

Dôvody neuznania rozsudku sú taxatívne vymedzené a jedným z hlavných dôvodov je zjavný rozpor s verejným poriadkom. V súdnej praxi ESD[10] je pojem verejný poriadok reštriktívne vysvetľovaný z ohľadom na prax členských štátov, ktoré majú tendenciu sa „chrániť“ voči zásahom zo strany iných štátov alebo ES. Ďalším dôvodom je vydanie rozsudku bez účasti žalovaného v dôsledku nedoručenia písomnosti, ktorou sa začalo konanie v dostatočnom čase a takým spôsobom, aby si mohol zabezpečiť

[5] Zmluvy o založení Európskeho spoločenstva – konkrétne článok 65 písm. a
[6] Brusel I. Preambula, ods. 4
[7] Brusel I. Preambula, ods. 15
[8] Brusel I. Preambula, ods. 17
[9] Autorka sa bude pridržiavať označenia uvedeného v nariadení Brusel I. v článku 32
[10] Európsky súdny dvor: http://curia.europa.eu/sk/index.htm

obhajobu. Tretím dôvodom je, že rozsudok, ktorý sa má uznať je nezlučiteľný s rozsudkom vydaným v spore medzi rovnakými účastníkmi v členskom štáte, v ktorom sa žiada o uznanie. Posledným dôvodom je res iudicata v inom členskom štáte alebo v treťom štáte.

Najdôležitejšou podmienkou uznania rozsudku členského štátu je, že súd členského štátu, kde sa má rozsudok uznať neskúma rozhodnutie vo veci samej, ale venuje svoju pozornosť len splneniu formálnych podmienok.

Najzaujímavejším ustanovením nariadenia Brusel I. považujem čl. 37 ods. 1, kde sa uvádza, že súd členského štátu, v ktorom sa žiada o uznanie rozsudku vydaného v inom členskom štáte, môže prerušiť konanie, ak sa proti rozsudku podal riadny opravný prostriedok. Z tejto dikcie nariadenia potom vyplýva, že členský štát bude následne uznávať každé nové cudzie rozhodnutie čo podľa môjho názoru neprispieva k právnej istote účastníkov. Ďalším bodom, ktorý nadväzuje na uznanie cudzieho rozhodnutia je jeho samotný výkon.

Výkon rozsudku prebieha v štáte, kde bol vyhlásený za vykonateľný na návrh zainteresovaného účastníka[11]. Návrh na výkon rozsudku sa vrámci SR podáva na príslušný Okresný súd určený podľa miestnej príslušnosti odporcu – povinného. Celý výkon rozsudku postupuje podľa právneho poriadku členského štátu, v ktorom sa o výkon rozsudku požiadalo. Povinnosťou oprávneného je uviesť adresu na doručovanie písomností v obvode súdu, na ktorý podal návrh na výkon rozsudku, prípadne, vzhľadom na právny poriadok členského štátu si určí procesného zástupcu[12].

Nariadenie Brusel II. bis

Nariadenie Rady (ES) č. 2201/2003 z 27.11.2003 o súdnej právomoci a uznávaní rozsudkov v manželských veciach a vo veciach rodičovských práv a povinností, ktorým sa zrušuje nariadenie (ES) č. 1347/2000 [Brusel II.].

Podobne ako nariadenie Brusel I. i toto nariadenie bolo vydané pre potreby plynulého fungovania jednotného trhu s dôrazom na slobodu voľného pohybu osôb. Druhým dôvodom vzniku tohto

[11] Čl. 38, ods. 1 nar. Brusel I.
[12] Čl. 40, ods. 2 nar. Brusel I.

nariadenia bolo stretnutie Európskej Rady v Tampere, kde bola schválená zásada vzájomného uznávania súdnych rozhodnutí ako základu pre vytvorenie skutočného justičného priestoru[13].

Tak ako v prípade nariadenia Brusel I. i v prípade nariadenia Brusel II. bis predchádzal mu Dohovor vytvorený na základe článku K.3 Zmluvy o EÚ o právomoci a uznaní a výkone rozhodnutia vo veciach manželských z roku 1998.

Postup uznania a výkonu cudzieho rozsudku je podobný až zhodný s postupom upraveným v nariadení Brusel I.. Odlišnosťou v tomto nariadení sú samostatne upravené postupy, konkrétne dôvody pre ktoré sa rozsudok neuzná, samostatne pre veci manželské a samostatne pre rodičovské práva a povinnosti. Úprava rodičovských práv a povinností je podrobnejšia nakoľko sa sleduje hlavne záujem (maloletého) dieťaťa a jeho potreby.

Návrh - Nariadenie Rady o právomoci, rozhodnom práve, uznávaní a výkone rozhodnutí a o spolupráci vo veciach vyživovacej povinnosti

Tento návrh už konkrétne rieši spôsob výkonu rozhodnutia a to hlavne formou zrážok zo mzdy a bankových účtov dlžníkov výživného. Prostriedkom na dosiahnutie tohto cieľa je úzka spolupráca medzi členskými štátmi a ich štátnymi orgánmi prostredníctvom výmeny informácii na účely zistenia pobytu dlžníkov výživného, ich majetku a zdrojov a zároveň plne rešpektovať ochranu osobných údajov[14].

Samotné ustanovenia návrhu sa už nezaoberajú uznaním a výkonom rozsudku, ale priamo upravujú vykonateľnosť rozhodnutí (Kapitola V) a výkon rozhodnutia (Kapitola VI)[15]. V tomto návrhu sa úplne odstránil *exequatur* a priamo sa ustanovuje, že rozhodnutie je vykonateľné bez potreby vyhlásenia za vykonateľné a bez možnosti namietať proti jeho uznaniu[16].

Jednotlivé ustanovenia už jasne definujú samotné vykonávacie konanie, písomnosti, ktoré je potrebné doložiť, právnu pomoc až po jednotlivé inštitúty výkonu rozhodnutia. Táto navrhovaná právna úprava

[13] Brusel II. bis, Preambula, ods. 2
[14] Návrh - Nariadenie Rady o právomoci, rozhodnom práve, uznávaní a výkone rozhodnutí a o spolupráci vo veciach vyživovacej povinnosti, Preambula, ods. 21
[15] Zmena v terminológii kedy sa namiesto „rozsudku“ používa pojem „rozhodnutie“, ktoré považuje autorka za vhodnejšie a na účely právnej úpravy správnejšie
[16] Čl. 25 Návrhu nariadenia Rady

podľa môjho názoru má predpokladané náležitosti štandardnej právnej úpravy vnútroštátneho charakteru v porovnaní s právnou úpravou SR.

Uznanie a výkon rozhodnutia v Slovenskej republike

Napriek tomu, že Slovenská republika sa stala členským štátom Európskej únie v roku 2004 a na základe tejto skutočnosti prebrala právne normy EÚ do svojho právneho poriadku je aplikácia priamo účinných noriem EÚ, hlavne nariadení, veľmi otáznou.

I keď sa zákonodárca EÚ snažil o vytvorenie jednoduchej a prehľadnej právnej normy, ktorá by poskytovala priamu pomoc, ochranu oprávenému subjektu a uľahčovala by jeho situáciu kedy sa snaží o výkon svojho práva v inom členskom štáte a súčasne súdy, ktoré priamo používajú danú právnu normu vo svojej činnosti, nie vždy je tomu tak.

Vo všeobecnosti možno konštatovať, že slovenské súdy majú určité potiaže s používaním – aplikáciou právnych noriem EÚ vo svojej činnosti a to i napriek edukácii uskutočňovanou Ministerstvom spravodlivosti SR. Ďalším faktorom, ktorý nie je nezanedbateľný je i kvalita prekladov, ktoré spôsobujú nejasnosti a nepresnosti pre použitie danej normy. Posledným - dôležitým všeobecným momentom je jazyková vybavenosť sudcov. Je zrejmé, že sudcovia, ktorí vrámci rozvrhu práce na tom-ktorom súde priamo prichádzajú do kontaktu s nariadeniami EÚ majú omnoho väčšie skúsenosti s aplikáciou právnych noriem EÚ a preto i riešenie otázky uznania a výkonu rozhodnutia je jednoduchšie.

Samotné Nariadenia vo svojich konkrétnych ustanoveniach predstavujú postup, ktorého realizácia by mala byť v inom členskom štáte rovnako jednoduchá ako v štáte vydania rozhodnutia, ale v skutočnosti tomu tak nie je.

Súdy sa s touto otázkou, nakoľko sa jedná o ustanovenia procesnoprávne, vysporiadávaju použitím Občianskeho súdneho poriadku (OSP), Zákon č. 543/2005 Z.z. o spravovacom a kancelárskom poriadku pre okresné súdy, krajské súdy, Špeciálny súd a vojenské súdy, Zákon o rodine (ZoR) a Zákon č. 97/1963 Zb. o Medzinárodnom práve súkromnom a procesnom (ZMPS).

Zákon o medzinárodnom práve súkromnom a procesnom poskytuje vo svojich ustanoveniach nástroj pre aplikáciu ustanovení nariadení Brusel I. a Brusel II. bis vzhľadom na to, že sa jedná o konanie sui generis a Občiansky súdny poriadok, ktorý predstavuje všeobecnú úpravu procesného práva, množstvo

otázok týkajúcich sa uznania a výkonu cudzieho rozhodnutia neupravuje. Konkrétne v oddiely 3, §63 a nasl.. Úprava ZMPS bola novelizovaná zákonom č. 589/2003 Z. z., ktorá reflektovala na vstup SR do EÚ 1.5.2004.

Konkrétne § 63 ZMPS upravuje uznanie a výkon cudzích rozhodnutí. Uznané budú tie rozhodnutia orgánov cudzieho štátu, [ktorých predmetom boli občianskoprávne a rodinné vzťahy], o ktorých v Slovenskej republike rozhodujú súdy a majú v Slovenskej republike účinnosť ak boli uznané slovenskými orgánmi[17].

Uznanie podľa Nariadení a podľa ZMPS prebieha bez osobitného rozhodnutia súdu, tj. uznávajúci orgán preskúma podmienky uznania cudzieho rozhodnutia, ak nie je daná žiadna z prekážok uznania a teda prizná mu právne účinky. Väčšinou sa tak stane v spojení s nariadením výkonu cudzieho rozhodnutia[18].

Prekážkou uznania cudzieho rozhodnutia podľa ZMPS §64 písm.b je ak rozhodnutie, ktoré sa má uznať nie je právoplatné alebo vykonateľné v štáte, v ktorom bolo vydané. Toto ustanovenie bolo doplnené oproti pôvodnému ustanoveniu §64 a podmienka právoplatnosti bola prevzatá z pôvodného §63 ZMPS. Novou podmienkou je vykonateľnosť cudzieho rozhodnutia, hlavne v otázke predbežne vykonateľných[19]. Po novelizácii týchto ustanovení je možné uznanie a vykonanie rozhodnutia, ktoré je predbežne vykonateľné, čo má za následok zvýšenie ochrany oprávneného a to hlavne v otázke výživného, ktorého účelom je zabezpečiť výživu väčšinou maloletého dieťaťa.

Ďalším dôvodom pre rozšírenie ustanovenia §64 ZMPS je i fakt, že v niektorých štátoch nie je známy inštitút právoplatnosti rozhodnutia, ale je možné zo strany účastníka preukázať, že dané konkrétne rozhodnutie, o ktorého uznanie a výkon má právny záujem, je v štáte vydania vykonateľné. Týmto spôsobom má oprávnený možnosť požiadať o uznanie a výkon cudzieho rozhodnutia v SR.

Prekážkou, ktorá má za následok neuznanie cudzieho rozhodnutia, je i res iudicata upravená v §64 písm.d ZMPS. Toto ustanovenie bolo tiež novelizované zákonom č. 589/2003 Z.z. pretože bolo nutné reagovať na zmeny, ktorými prechádzala Slovenská republika ako i na právnu úpravu EÚ. Podľa môjho názoru sa v tejto otázke slovenský zákonodárca kvalitne vysporiadal s ustanoveniami Nariadení, ktoré v situácii res iudicata spôsobovali nejasnosti a zaviedol prehľadný systém postupnosti uznania a výkonu cudzieho rozhodnutia. Dôvodom, pre ktorý považuje danú právnu úpravu ZMPS za prehľadnú je, že

[17] §63 ZMPS
[18] Dôvodová správa zákona č. 589/2003 Z.z., §63
[19] Dôvodová správa zákona č. 589/2003 Z.z., §64

ustanovenie §64 písm.d priamo odkazuje na predchádzajúce uznané právoplatné rozhodnutie cudzieho štátu alebo rozhodnutie, ktoré spĺňa podmienky na uznanie. Týmto sa zvyšuje právna istota účastníkov v situácii, kedy sa jedná o majetkové nároky.

Zákon o medzinárodnom práve súkromnom a procesnom upravuje i konanie o uznaní cudzieho rozhodnutia v §§68a až 68i. Vzhľadom na priamo aplikovateľné ustanovenia Nariadení a ich prílohy, kde je uvedený príslušný súd, i ZMPS odzrkadľuje danú situáciu a ustanovuje Okresný súd, v ktorého obvode má dieťa bydlisko, prípade v ktorého obvode sa zdržuje[20].

Konanie o uznaní cudzieho rozhodnutia sa začína na návrh, na ktorého podanie je oprávnený ten, kto je v cudzom rozhodnutí označený ako účastník. Účastníkmi konania sú navrhovateľ a tí, voči ktorým sa má cudzie rozhodnutie uznať. Ak má navrhovateľ bydlisko v cudzine, musí si na príjmanie písomností určiť zástupcu s bydliskom na území SR[21].

Návrh na uznanie cudzieho rozhodnutia musí spĺňať základné náležitosti návrhu podľa OSP a ďalej musí obsahovať označenie cudzieho rozhodnutia, názov orgánu, ktorý ho vydal, dátum právoplatnosti alebo údaj o vykonateľnosti a zoznam listín, ktoré sa pripájajú k návrhu. Listiny, ktoré sa pripájajú sú: samotné cudzie rozhodnutie, potvrdenie o právoplatnosti alebo vykonateľnosti cudzieho rozhodnutia alebo o tom, že rozohdnutie už nie je možné napadnúť riadnym opravným prostriedkom, listinné dôkazy o neexistencii prekážok podľa §64 písm.d ZMPS a úradne osvedčené preklady pripojených listín do slovenského jazyka[22].

Dôležitým ustanovením ZMPS je §68d, ktoré upravuje prerušenie konania o výkone rozhodnutia až do ukončenia konania o uznaní predmetného cudzieho rozhodnutia a zároveň preberá ustanovenia Nariadení o možnosti prerušenia konania o uznanie cudzieho rozhodnutia, ak v štáte vydania cudzieho rozhodnutia bolo dané rozhodnutie napadnuté riadnym opravným prostriedkom.

Občiansky súdny poriadok vzhľadom na to, že celé konanie o uznaní a výkone cudzieho rozhodnutia je upravené v Zákone o medzinárodnom práve súkromnom a procesnom, predstavuje len základnú právnu úpravu. Táto sa nachádza v §352b – Siedma časť. „Iná činnosť súdu“, ktorá sa zaoberá hlavne európskym exekučným titulom.

[20] §68a, písm.b ZMPS
[21] §68b ZMPS
[22] §68c ZMPS

Zákon o rodine ako hmotnoprávna úprava sa len okrajovo zaoberá vzťahmi s cudzím prvkom a preto ani neobsahuje konkrétnejšiu právnu úpravu uznania a výkonu rozhodnutia podľa Nariadení. Vo svojim ustanoveniach postupuje hlavne podľa inštitútu štátneho občianstva a nie podľa inštitútu trvalého alebo obvyklého pobytu, ktorý je v súčasnej dobe základným inštitútom práva EÚ.

Záver

Tento príspevok mal za účel poukázať na aplikáciu práva EÚ vo vnútroštátnom systéme práva členského štátu Európskej únie, konkrétne dvoch nariadení a jedného návrhu nariadenia, kde spoločným prvok je výživné a samotné konanie o uznanie a výkon cudzieho rozhodnutia v členskom štáte EÚ.

Na základe vykonanej analýzy jednotlivých Nariadení je možné konštatovať, že právo EÚ má za cieľ sa stať prednostným prameňom práva v členských štátoch EÚ a to i vzhľadom na problematiku úpravy a na úroveň zjednotenia a zjednodušenia právnych noriem požadovanú na členských štátoch. Otázne je len nakoľko je možné pokračovať v nastolenom kurze aj s ohľadom na historický vývoj v ES.

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EXKURZ DO ŠPANĚLSKÉ PRÁVNÍ ÚPRAVY ADVOKACIE

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Abstrakt

Níže uvedený příspěvek představuje exkurz do právní úpravy advokacie ve Španělském království. Ve stručnosti je zachycena španělská právní úprava advokacie v historickém kontextu jejího vývoje až po současnost. V rámci platné právní úpravy je popsána organizace španělské advokacie na principu samosprávy, předpoklady pro její výkon a způsoby výkonu, práva a povinnosti advokáta. Závěr je věnován otázce disciplinární odpovědnosti. Při tvorbě příspěvku bylo využito metody mezinárodní komparace, pomocí níž autor provedl srovnání španělské právní úpravy s úpravou v České republice a v této souvislosti se rovněž zamyslel nad českou právní úpravou advokacie de lege ferenda.

Klíčová slova

Španělsko, historie, platná právní úprava, organizace advokacie, předpoklady pro výkon, způsoby výkonu, práva a povinnosti advokáta, odpovědnost.

Abstract

The under-mentioned paper is devoted to the excursion into the legal regulation of advocacy in Spain. Spanish legal regulation of advocacy is described in the historical context including the concurrent status of advocacy. Within the scope of the valid legal regulation, the organisation of advocacy built on the principle of self-administration, the conditions for providing legal services, the manners of exercise of legal counsel, the rights and liabilities are included. The conclusion is focused on the question of disciplinary liability of attorney-at-law. An author used the method of international comparison and compares Spanish legal regulation of advocacy with the regulation in the Czech Republic. In this context the author concentrated on Czech legal regulation of advocacy de lege ferenda.

Key words

Spain, history, valid legal regulation, the organisation of advocacy, the conditions for providing legal services, the manners of exercise of legal counsel, the rights and liabilities of attorney-at-law, the disciplinary liability.

Historie

První zmínky o španělské advokacii se datují, stejně jako v případě české advokacie, do období raného středověku. Již v polovině 10. století se v některých klášterech jako Albelda, Ripoll, Silos nebo La Cogolla setkáváme s počátky výuky základů právnických otázek označovaných jako „*lecciones de leyes y decretos*“, které se staly východiskem pro studium práva na univerzitě v Salamance na počátku 13. století. Pomineme-li drobné právní texty z doby, kdy Španělsko zažívalo invazi arabských bojovníků, je prvním významným pramenem zákon „**De avocatis**“, který byl schválen v roce 1247 a potvrdil svobodné označení advokátů. V 15. století královský rádce Alfonso Díaz de Montalvo upravil podrobně problematiku advokacie, avšak tato kompilace stejně jako nařízení „**Ordenanzas de Abogados**“z roku 1495 výkon advokacie zkomplikovaly a advokacie v očích veřejnosti ztratila důvěru. Tento stav trval až do poslední čtvrtiny 16. století, kdy byly ve Španělsku vytvořeny komory advokátů (*los Colegios de Abogados*). První taková komora vznikla v Zaragoze a její první nařízení se datují do roku 1578. Poté následovaly komory ve Valladolidu, Madridu, Seville, Granadě či Valencii. V roce 1534 bylo rozhodnuto očistit advokacii poskvrněnou Montalvovými nařízeními a tyto snahy vyvrcholily o třicet let později v dokumentu **La Nueva Recopilación de las Leyes del Reino**, který kromě 34 zákonů upravil otázku zápisu do seznamu advokátů vedeného příslušnou advokátní komorou. Takto nastavená právní úprava platila v drobných obměnách až do 19. století. Pro 19. století byla příznačná politická nestabilita a oslabená státní moc, která se negativně podepsala i na svobodném výkonu advokacie. Vítězství Fernanda VII. nakonec znamenalo znovuobnovení činnosti advokátních komor a stanovení povinného členství v nich, ze kterého se stala v polovině roku 1844 condicio sine qua non pro výkon advokacie. V této podobě se advokacie prezentuje i v nařízeních z roku 1895, 1982 a rovněž v aktuálním znění článku 11 Královského výnosu č. 658/2001.[1]

1. Platná právní úprava

Španělská ústava zakotvila právo občanů na obhajobu a odbornou pomoc ve svém čl. 24 odst. 2. Tato činnost, která náleží výlučně advokátům, je dále rozvíjena zákonnými a podzákonnými právními předpisy. **Zákon č. 2/1974 ze dne 13. února o profesních komorách** (**Ley 2/1994 de 13. febrero de Colegios Profesionales**) stanoví, že profesní komory se řídí vlastními nařízeními a pravidly vnitřního řádu, aniž by tak byly porušeny zákony, které se vztahují k příslušné profesi. Dále hovoří o tom, že generální rady vypracují pro všechny komory jedné profese obecné vyhlášky, které budou

[1] PÉREZ VAQUERO, L. La edad de la abocacía. [citováno 21. března 2008]. Dostupný z http://www.othlo.com.

prostřednictvím kompetentních ministerstev předloženy ke schválení.[2] V této podobě byl dne 22. června 2001 přijat shora uvedený **Královský výnos** neboli **Real Decreto n. 685/2001**, kterým byla přijata nová **Obecná vyhláška o advokacii** (**Estatuto General de la Abogacía Española**) jako stěžejní předpis španělské advokacie.

Tato nová vyhláška posiluje a podporuje deontologické a etické povinnosti advokátů, poprvé se zabývá vztahy mezi advokáty a ostatními odborníky a vytváří podmínky pro společné poskytování odborných služeb ve prospěch klienta. S cílem modernizace systému členství v advokátních komorách je do obecné vyhlášky o advokacii začleněn princip členství v jedné advokátní komoře. Dalším podstatným krokem souvisejícím se snížením nákladů soudního řízení je určovaní pouze orientační výše honorářů profesní komorou, což umožňuje větší konkurenci a zlepšení poskytovaných služeb. Do přijetí vyhlášky totiž komory stanovovaly minimální honoráře, které musel klient advokátovi uhradit. Obecně vzato vyhláška obsahuje celou řadu jednotlivých změn, které ve svém celku vedou k zefektivnění poskytování právních služeb.[3]

Advokacie je ve Španělsku považována za uznávanou a ctěnou profesi, čemuž nasvědčuje i průzkum provedený v lednu roku 2003, kdy Španělé označili advokacii za osmou nejcennější veřejnou „instituci".[4] Dle statistik je v 83 advokátních komorách v celkem 17 španělských provincích zapsáno přes 100.000 advokátů. Vzhledem k faktu, že Španělsko má 40 milionů obyvatel, pak na jednoho advokáta připadá 400 obyvatel, což je téměř čtyřikrát méně než v České republice.

2.1 Organizace španělské advokacie

Pro českou i španělskou advokacii je společný princip samosprávy, avšak samotná vnitřní organizace je již poněkud odlišná. Jestliže v České republice existuje jedna komora (Česká advokátní komora), ve Španělsku je takových komor hned několik.

Generální rada španělské advokacie (Consejo General de la Abogacía Española) sídlící v Madridu je nejvyšší zastupující, koordinační a výkonný orgán španělských advokátních komor. Je

[2] BALÍK, S., KRÁL, V., SONNEWENDOVÁ, S., WURSTOVÁ, J. Advokát v EU. Právní předpisy o advokacii v zemích Evropské unie. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2004, s. 341.
[3] SEGIMÓN ESCOBEDO, J. L. La Abogacía Española y su concreción en el Nuevo Estatuto General. Abogacía Española. Derecho y Sociedad, 2001, č. 20, s. 14
[4] Autor neuveden. Los españoles situan a los abogados en el 8º lugar de las instituciones más apreciadas, con el 7,3 de satisfacción general. [citováno 21. března 2008]. Dostupný z http://www.cgae.es.

veřejnoprávním sdružením s právní subjektivitou. Řídícími orgány Generální rady jsou **plénum** (El Pleno del Consejo General)**, stálá komise** (La Comisión Permanente) a **předseda** (El Presidente). V čele těchto orgánů stojí *Carlos Carnicer Diéz*, jako současný předseda Generální rady, kterému je zároveň udělen čestný titul předsedy soudcovského sboru Nejvyššího soudu. Funkce Generální rady španělské advokacie jsou vymezeny v čl. 68 Obecné vyhlášky o advokacii (dále jen „vyhláška o advokacii") a patří sem zejména zastupování španělské advokacie navenek, vydávání povolení ke zřízení vzdělávacích institucí, svolávání národních[5] a mezinárodních kongresů advokátů, vypracovávání vyhlášek, rozhodování o dovolání proti rozhodnutím orgánů advokátních komor, rozhodování v disciplinárním a arbitrážním řízení, udělování vyznamenání a celá řada dalších činností.

Na místní úrovni v jednotlivých španělských provinciích pak působí jedna nebo i více **advokátních komor** (**Colegios de Abogados**).[6] Řízení advokátních komor je založeno na principech demokracie a autonomie. Advokátním komorám přísluší obvyklé značení a dále přívlastek „*ilustre*" (slavný) a předsedům advokátních komor pak titul „*ilustrísimo seňor*" (nejváženější pán). Předsedům advokátních komor, v jejichž sídlech se nacházejí soudcovské sbory nejvyššího soudu, předsedům rady advokátních komor v jednotlivých autonomních oblastech a členům Generální rady advokacie náleží titul „*excelentísimo seňor*"(jeho excelence). Tyto osoby mají rovněž právo nosit na taláru během veřejného slyšení nebo při slavnostních příležitostech okruží a také odznaky a atributy odpovídající funkce.[7] Hlavní úkoly jednotlivých komor zahrnují například úpravu vykonávání advokátní profese, její výhradní zastupování, ochranu profesních zájmů členů komory, trvalé odborné vzdělávání advokátů, kontrolu práv a povinností advokátů, podporu a zlepšování soudní správy a jiné. I z tohoto jen demonstrativního výčtu lze vidět, že náplň činnosti španělských advokátních komor je obsahově širší, ale přesto v mnohých rysech obdobná jako u České advokátní komory. Pokud jde o orgány místních advokátních komor jsou jimi **předseda** (El Decano)**, řídící výbor** (La Junta de Gobierno) a **valná hromada** (La Junta General). **Řídící výbor** plní takové funkce jako v České republice představenstvo, kontrolní rada a kárná komise České advokátní komory dohromady. Je jakýmsi univerzálním orgánem „pro všechno", od rozhodování o přijetí advokátů do komory přes dohlížení, zda dodržují právním řádem stanovená práva a povinnosti až po disciplinární pravomoc. Mimo to výbor vybírá, rozděluje a spravuje finanční prostředky, svolává řádné a mimořádné valné hromady, apod. **Valná hromada** advokátní komory se svou povahou, nikoliv však obsahem činnosti, podobá sněmu České advokátní komory, zasedá však častěji, a to dvakrát za rok, pokud stanovy komory neustanovují přímo **stálé**

[5] Národní kongres španělské advokacie je její nejvyšší poradní instancí a její rozhodnutí mají pro jednotlivé orgány advokacie určující význam. Svolává ho Generální rada advokacie nejméně jednou za pět let.
[6] Jejich aktuální seznam lze najít: Abogacía Española. Derecho y Sociedad, 2006, č. 41, s. 58
[7] BALÍK, S., KRÁL, V., SONNEWENDOVÁ, S., WURSTOVÁ, J. Advokát v EU. Právní předpisy o advokacii v zemích Evropské unie. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2004, s. 345-346.

shromáždění (La Asamblea Colegial). V takovém případě se uskuteční pouze jedna valná hromada během první poloviny roku. Právo zúčastnit se valné hromady mají všichni členové komory. Na pořadu jednání valné hromady jsou nejdůležitější události související s advokátní komorou za uplynulý rok, přezkoumávání a odhlašování příjmů a výdajů za uplynulé období, návrhy, žádosti a dotazy. Mimořádná valná hromada schvaluje stanovy komory a vyslovuje nedůvěru řídícímu výboru nebo jeho členům. Dle čl. 66 odst. 1 je možné v autonomních oblastech na základě souhlasu minimálně tří čtvrtin členů příslušné advokátní komory vytvořit **radu advokátní komory** (Los Consejos de Colegios), jejíž kompetence stanoví Generální rada španělské advokacie.

Vnitřní organizace advokacie na území Španělského království by mohla do jisté míry působit velmi inspirativně i pro případnou úpravu de lege ferenda v České republice. Novelou zákona o advokacii č. 284/2004 Sb., byla zřízena pobočka České advokátní komory (dále jen „Komora“) se sídlem v Brně, která je určena pro více jak třetinu všech advokátů zapsaných do seznamu advokátů v České republice. Její vznik navazuje na historii moderní advokacie, která se datuje od 16. srpna 1849, kdy vznikla komora advokátů, která měla sídlo v Brně, a to až do roku 1948. Z náplně činnosti brněnské pobočky je však patrno, že je spíše jakýmsi administrativním „subjektem“ ve vztahu ke Komoře s okleštěnými pravomocemi a nemající vlastní orgány. Lze konstatovat, že by ku prospěchu a zefektivnění organizace advokacie v České republice, po vzoru právní úpravy ve Španělsku, mohlo být i zřízení pobočky Komory v Ostravě – pro advokáty ze Slezska. Poté by přicházela v úvahu delegace některých pravomocí z Komory na eventuelně zřízené orgány „poboček“, a to by vedlo k celkovému usnadnění a urychlení celé řady procedur od těch jednodušších jako je například zápis do seznamu advokátů či složení slibu do rukou předsedy Komory až po ty složitější jako je například kárné řízení.

2.2 Předpoklady pro výkon advokacie a způsoby jejího výkonu

„*La abogacía es talento a la intemperie.*“[8] Překlad této krátké věty zní: „Advokacie je nadání do nepohody.“ Víme však, že k výkonu advokacie nestačí pouhý talent, ale je třeba splnit celou řadu dalších podmínek, které jsou ve Španělsku zakotveny v čl. 6 a následující již zmíněné vyhlášky o advokacii.

Označení advokát přísluší výhradně osobě, která dosáhla hodnosti licenciát práv a na profesionální úrovni hájí práva stran ve všech typech procesů, poskytuje právní pomoc a poradu (čl. 6). Ve Španělsku neexistuje princip numerus clausus, a tak je advokátní profese po splnění následujících podmínek přístupná všem bez rozdílu. Pro přijetí budoucího advokáta do některé z místních komor je

[8] GAY MANTALVO, E. La abogacía es talento a la intemperie. Abogacía Española. Sociedad y Derecho, 2006, č. 40, s. 48.

požadováno, aby byl **plnoletým** a **právně způsobilým španělským státním příslušníkem** nebo **státním příslušníkem některého členského státu Evropské unie nebo státu Dohody o společném hospodářském prostoru**, vlastnil **akademický titul licenciát** (obdoba našeho titulu magistr) nebo některý **zahraniční akademický titul,** odpovídající španělskému titulu a **uhradil vstupní poplatek**, který komora požaduje. Advokát, který chce aktivně vykonávat advokátní praxi, musí dále být **trestně bezúhonný**, **nesmí být proti němu vedeno soudní řízení ve věci inkompatibility nebo zákazu výkonu advokacie** a **musí vstoupit do Vzájemného příspěvkového sdružení advokátů** (Mutualidad General de la Abogacía), **Vzájemného příspěvkového sdružení sociální péče** (Mutualidad de Previsión Social) s pevně stanovenou výší příspěvků, popřípadě **do režimu sociálního zabezpečení** (Régimen de Seguridad Social) v souladu s platnými právními předpisy. Vyhláška rovněž vymezuje **překážky inkompatibility,** spočívající v zákazu výkonu veškerých veřejných funkcí, včetně všech činností, které by mohly narušit svobodu, nezávislost a důstojnost advokátní profese. Před zahájením výkonu advokacie je advokát povinen **složit přísahu** nebo **slib** před řídícím výborem advokátní komory, do které vstupuje, přičemž pro výkon advokacie na celém území Španělsku postačí přijetí do jedné komory v jediném nebo hlavním sídle advokáta.

Vyhláška o advokacii taktéž zakládá možné způsoby výkonu advokacie. Shodný s naší právní úpravou je **samostatný výkon advokacie**, výkon advokacie **v pracovním poměru** a **ve sdružení**. Samostatně vykonává advokacii advokát na vlastní účet jako majitel advokátní kanceláře nebo jako spolupracovník individuální nebo společné kanceláře. K výkonu advokacie na cizí účet za zvláštních podmínek spolupráce je nutné výslovné písemné ujednání, které stanoví podmínky, délku trvání, rozsah a finanční podmínky spolupráce (čl. 27 odst. 3). Na cizí účet je rovněž možné v podmínkách pracovního práva vykonávat advokacii na základě pracovní smlouvy, která však musí respektovat svobodu a nezávislost této profese. Advokáti si mohou zvolit jako způsob výkonu sdružení, vytvořené podle kterékoli zákonem přípustné formy, včetně obchodních společností. Výhradním cílem sdružení však musí být jen výkon advokacie a členy sdružení musí být pouze advokáti, jejichž počet není omezen. Honoráře při tomto typu výkonu však náleží celému kolektivu, s výhradou vnitřních pravidel jejich rozdělení, nikoliv každému advokátovi jednotlivě. Advokát, který je účastníkem sdružení nemůže zároveň vykonávat advokacii samostatně.

Zvláštností španělské úpravy, která nemá analogii v České republice, je tzv. **multioborová spolupráce**, v jejímž rámci se advokáti mohou sdružovat s jinými svobodnými odborníky bez omezení počtu a k čemuž mohou využít kteroukoli zákonem uznanou formu, včetně obchodní společnosti. Cílem takového sdružení je poskytovat předem stanovené specifické právnické služby doplněné o další

odborné činnosti. Institut multioborové spolupráce je možno ve značně zjednodušené podobě vysledovat i v činnosti větších renomovaných advokátních kanceláří v České republice sídlících především v Praze, které usilují o zkvalitnění jimi poskytovaných právních služeb právě za pomoci a ve spolupráci s odborníky z různých vědních oborů. Tzv. multioborovou spolupráci lze vnímat jako velmi významný podnět k zamyšlení v rámci způsobů výkonu advokacie v České republice.

2.3 Práva a povinnosti advokáta

Španělská, stejně jako česká advokátní profese, má silnou tradici kodifikovaných pravidel týkajících se práv a povinností advokátů. Tato pravidla najdeme nejen **ve vyhlášce o advokacii (čl. 30 až 43),** ale také v období našeho etického kodexu, jímž je **Código Deontológico de la Abogacía Española** ze dne 27. září 2002.

Práva a povinnosti advokátů jsou ve vyhlášce členěny jako u nás, a to **ve vztahu k advokátní komoře, jiným advokátům, k soudům, ke klientovi** a **k protistraně**. Uveďme si jen základní odlišnosti od české právní úpravy. Španělský advokát z důvodu váženosti profese má právo na všechny pocty, které jsou tradičně advokacii ve Španělsku přiznávány. Pokud usoudí, že jeho poslání, svobodnému a nezávislému vystupování není prokazována náležitá úcta, může podat svou stížnost soudu, aby zjednal nápravu. **Ve vztahu ke komoře** má advokát povinnost oznámit všechny případy neoprávněného nebo protiprávního vykonávání advokátní profese, o nichž se dozví. Taktéž je povinen komoře sdělit veškeré případy napadení svobody, nezávislosti nebo důstojnosti advokáta při vykonávání funkcí, které mu přísluší.

V souvislosti s jednáním před soudy je advokát povinen být oděn do tógy, popřípadě baretu bez distinkcí s výjimkou znaku komory, jíž je členem. Při vstupu a odchodu ze soudní síně a také v okamžiku, kdy žádají o svolení promluvit, jsou povinni smeknout. Advokáti sedí v soudní síni uprostřed, a to na stejné úrovni jako tribunál, před kterým vystupují. Po celou dobu řízení zastupují Ministerstvo spravedlnosti a španělskou advokacii a podle toho je s nimi i jednáno. Mimo to v sídlech soudů musí být k dispozici důstojné a dostatečně velké prostory určené pouze advokátům pro výkon jejich funkcí.

Na území České republiky otázka „povinnosti slavnostního oděvu advokátů“ v řízení před soudy vyvolala na jaře roku 2007 velmi bouřlivou vnitrostavovskou diskusi o tom, zda se po šedesátileté přestávce mají součástí advokátního života znovu stát taláry a případně v jaké míře. Na stránkách

Bulletinu advokacie[9] vydávaného redakcí České advokátní komory zaznělo nespočet názorů kladných i záporných. Osobně se pak ztotožňuji se skupinou advokátů, která prosazuje povinnost advokáta být oděn do taláru v trestním řízení, a to přinejmenším z důvodů optické rovnosti stran při jednání a zachování důstojnosti advokátního stavu. Rovněž by k důstojnosti české advokacie mohlo přispět zřízení zvláštních místností v budovách soudů určených pouze advokátům, ve kterých by kupříkladu mohly být uschovávány i shora uvedené taláry. I v tomto směru by se španělská právní úprava mohla stát pro českou právní úpravu vzorem.

Jedná-li se o často diskutované problémy **meze publicity a reklamy advokáta**, byla tato otázka v roce 1998 liberalizována a reklama jako taková je podle současné španělské úpravy dovolena kromě způsobů výslovně zakázaných a pod podmínkou přiměřenosti, objektivních a pravdivých informací.[10] Jde o úpravu obdobnou úpravě české. Navíc vyhláška zakazuje nabízení služeb advokáta prostřednictvím třetí osoby obětem nehod nebo neštěstí, jejím dědicům nebo zmocněncům v okamžiku, kdy tyto osoby se nemohou vlivem emocí zcela svobodně a v klidu rozhodnout o volbě výběru advokáta (čl. 25 odst. 2 písm. c)). Rovněž se zakazuje propagace, která slibuje výsledky, jejichž dosažení nesouvisí výlučně s činností advokáta či forma reklamy, která užívá znaků nebo symbolů komory nebo znaků a symbolů podobných a zaměnitelných. Advokáti, kteří poskytují své služby trvale nebo příležitostně podnikům, jsou povinni požadovat, aby tyto podniky nerealizovaly vzhledem k takovým službám reklamu, neboť by to bylo v rozporu s vyhláškou o advokacii.

Zajímavostí a zcela určitě i inspirací pro českou právní úpravu advokacie je **oprávnění předsedy komory** nebo jeho zástupce, je-li o to požádán na základě právního předpisu nebo výzvy soudu, **provést kontrolu v kanceláři některého advokáta**, zda jsou advokátem dodržovány veškeré povinnosti. U ostatních práv a povinností lze konstatovat shodné rysy s českou právní úpravou.

2.4 Odpovědnost španělského advokáta

Právně je disciplinární odpovědnost zakotvena **ve vyhlášce o advokacii v čl. 80 až 93** a v předpisu odpovídajícím našemu advokátnímu kárnému řádu, kterým je **Reglamento de procedimento disciplinário** z roku 2004.

[9] Celou řadu názorů lze najít v článku s názvem „*Diskuse: Taláry ano či ne*?“ otištěném v Bulletinu advokacie, 2007, č. 9, na straně 9 až 18.
[10] POKORNÁ, H. Poskytování právní služeb advokátem a meze publicity. Bulletin advokacie, 2001, č. 6-7, s. 46.

Ve Španělsku funkce obdoby naší kárné komise plní hned několik orgánů. Obecně oprávnění provést disciplinární řízení mají **předseda komory** a **řídící výbor**. **Generální rada advokacie** vede řízení vůči členům Generální rady, členům řídících výborů advokátních komor a pokud to právní předpisy umožňují, vůči členům rad advokátních komor autonomních oblastí. Sankce jsou ukládány dle závažnosti a povahy advokátem porušené povinnosti. Vyhláška o advokacii rozlišuje **velmi vážné, vážné a lehké přestupky** a podle toho také stanovuje sankce, a to v podobě **ústního a písemného napomenutí, dočasného zákazu výkonu advokacie po dobu minimálně dvou let** a **vyloučení z advokátní komory.** Španělská vyhláška oproti českému zákonu o advokacii nezná veřejné napomenutí ani institut pokut. Proti rozhodnutí vydaném v disciplinárním řízení je možné podat ve lhůtě jednoho měsíce od vydání rozhodnutí **námitku** ke Generální radě, nerozhodovala-li v prvním stupni. Není vyloučen ani **soudní přezkum rozhodnutí**. Kromě disciplinární pravomoci jednotlivých orgánů komor přichází v úvahu i disciplinární pravomoc soudu v souladu s procesním právem. Disciplinární sankce nebo potrestání, které soud advokátovi uloží, budou uvedeny v jeho osobní složce, které po uplynutí lhůt uvedených v čl. 93 vyhlášky mohou být zrušeny na žádost potrestaného nebo ex offo.

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DŮSLEDKY REVIZE EVROPSKÉ ÚMLUVY O OSVOJENÍ DĚTÍ NA NOVELU OBČANSKÉHO ZÁKONÍKU

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Abstrakt

V současné době je aktuálním tématem na půdě soukromého práva rekodifikace občanského zákoníku s cílem vytvoření komplexního soukromoprávního kodexu, mimo jiné zahrnujícího i rodinné právo. Koncepce nového soukromoprávního kodexu má být postavena na zásadě diskontinuity a je otázkou míra reflexe modernizačních novel jednotlivých soukromoprávních kodexů. Aktuálně Rada Evropy připravuje revizi Evropské úmluvy o osvojení dětí a je třeba, aby byla zohledněna i tato revize textu, která je výrazným posunem úpravy osvojení na základě cca čtyřicetileté zkušenosti s původním textem.

Klíčová slova

Občanský zákoník, soukromé právo, rekodifikace, Evropská úmluva o osvojení dětí, revize

Abstract

At present the recodification of civil code aimed at the creation of comprehensive civil law codex, including inter alia family law too, is actual theme in field of private law. Conception of new civil-law codex shall to be built on principle of discontinuity and the question is volume of reflection of modernizing novels of each civil-law codexes. Currenty the Council of Europe is preparing revised European Convention on the Adoption of Children and it is necessary to take in account this revision, which is significant movement of amendment the adoption based on c. forty years long experiences with original text.

Key words

Civil code, private law, recodification, European Convention on Adoption of Children, revision

V souvislosti se závěrečnými úpravami textu návrhu novely občanského zákoníku vznesl minitým pro rodinné právo na svém zasedání ze dne 6.3.2008 několik koncepčních připomínek k novému připravovanému textu části občanského zákoníku, která se zabývá rodinným právem. Dvě z těchto

koncepčních připomínek směřovaly do oblasti náhradní rodinné péče, a to jak do části osvojení, tak i do části pěstounské péče. Minitým pro rodinné právo pověřil doc. JUDr. Zdeňku Králíčkovou, Ph.D. a doc. JUDr. Senta Radvanová, CSc. vypracováním alternativní koncepce úpravy pěstounské péče a prof. JUDr. Milanu Hrušákovou, CSc. a mě vypracováním alternativní koncepce úpravy osvojení.

S žádostí o konzultaci a odbornou pomoc při přípravě alternativní koncepce jsme spolu s prof. Hrušákovou oslovili odborníky z praxe, a to PhDr. Lenku Průšovou, Ph.D. (etopedku a sociální pracovnici Dětského domova v Dobřichovicích, dříve vedoucí oddělení sociálně-právní ochrany dětí Ministerstva práce a sociálních věcí), MUDr. Pavla Biskupa (ředitele Dětského domova ve Stráncicích) a JUDr. Helenu Svobodovou (soudkyni Obvodního soudu pro Prahu 4). Na závěr prací na koncepci proběhla diskuze se soudci pražských obvodních soudů, z nichž bych zejména rád jmenoval, a poděkoval tímto i za účast a hodnotné připomínky, JUDr. Hanu Novou (soudkyni Obvodního soudu pro Prahu 9).

Při přípravě alternativní koncepce jsme se rozhodli vycházet z textu připravované revidované Evropské úmluvy o osvojení dětí. Základem práce však bylo vypracování kritického pohledu na nám předložené znění návrhu občanského zákoníku ve verzi k 12.2.2008. Z textu této konsolidované verze, resp. z obsahu důvodové zprávy k danému návrhu, vyplývá, že hlavními myšlenkovými zdroji nové úpravy jsou kritické vyhodnocení vývoje občanského a soukromého práva, kritické vyhodnocení závažnějších občanských kodexů z okruhu evropské kontinentální kultury vč. moderních i mimoevropských úprav (Quebec) a kritické vyhodnocení závažnějších občanských kodexů z okruhu evropské kontinentální kultury. Hlavní zásadou tvorby návrhu je pak myšlenka diskontinuity s předchozí právní úpravou. Ač chápu zájem na co nejpřísnějším odtržení se od socialistického zákonodárství, je paradoxní, že tato snaha má své vyvrcholení až prakticky 20 let po konci období před rokem 1989. Oblast úpravy osvojení prošla v důsledku přístupu ČR k řadě mezinárodních dokumentů od roku 1989 výraznou modernizací, a to pak zejména vzhledem k přijetí Evropské úmluvy o osvojení dětí z roku 1963, jejímž nutným důsledkem je harmonizace hmotného práva smluvních států dle úmluvou stanovených obecných standardů platných především v „nekomunistické“ (vzhledem k době přijetí úmluvy) Evropě. V současné době je v ČR účinná úprava, které odpovídá, sice již starší, nicméně stále efektivně fungující a řadu států oslovující úpravě připravené Radou Evropy. Navíc současná úprava reflektuje vývoj náhradní rodinné péče dle jeho dlouhodobého a i mezinárodně uznávaného vývoje, který je založen na odborných prací, nikoliv právníků, ale nestorů české náhradní rodinné péče jako jsou prof. Matějček, prof. Dunovský nebo doc. Koluchová.

Z uvedeného vyplývá, že, ač nepovažuji současnou právní úpravu za zcela ideální a jistě je možné v dané oblasti stále zlepšovat jednotlivé instituty, myšlenku absolutní diskontinuity nepovažuji za bez dalšího ideální. Ostatně při čtení konsolidované verze návrhu rekodifikace občanského zákoníku ze dne 12.2.2008 je patrné, že autor úpravy osvojení se snažil promítnout současnou právní úpravu do myšlenek nového občanského zákoníku, když je seznatelné, že zůstávají zachovány základní kameny současné právní úpravy, jako dělení osvojení na zrušitelné a nezrušitelné, možnost nahrazení souhlasu rodičů s osvojením zvláštním druhem řízením o nezájmu, rozsahem práv nezletilého rodiče a omezováním možností osvojení mezi příbuznými v řadě přímé. Přesto, a to za situace, kdy si autoři návrhu rekodifikace občanského zákoníku vytkli před závorku jako jeden z hlavních myšlenkových zdrojů i návrhy mezinárodních úmluv a pramenů komunitárního práva, je, dle mého názoru, chybou to, že nebyly reflektovány hlavní idee připravované revize Evropské úmluvy o osvojení dětí. To je i prvním závěrem kritického hodnocení navrhované úpravy.

Další kritické závěry následně směřovaly do jednotlivých ustanovení a ne vždy byl důvodem kritiky jejich rozpor, případně nereflektování navrhované nové evropské úpravy. Ač uvedené rozpory nejsou předmětem tohoto textu, přesto bych si alespoň na některé dovolil upozornit. Prvním, a vzhledem k systematice návrhu i nejkřiklavějším, je vzájemná možná kolize ust. § 679 (Osvojením se rozumí přijetí cizí osoby za vlastní.), § 681 odst. 2 (Osvojuje-li osvojitel své přirozené dítě, má se za to, že osvojení je dítěti ku prospěchu.) a § 690 (Osvojení je vyloučeno mezi osobami spolu příbuznými v přímé linii a mezi sourozenci.) – tedy pokud je osvojením přijetí cízí osoby za vlastní a osvojení je vyloučeno v přímé linii, jak tedy může osvojitel osvojit své přirozené dítě (rozuměj tedy otec či matka své vlastní dítě).

Druhým příkladem je otázka vzájemného vztahu ust. § 681 (…mezi osvojitelem a osvojencem se vytvořil vztah, jaký obvykle bývá mezi rodičem a dítětem…), § 689 (Mezi osvojitelem a osvojovaným dítětem musí být přiměřený věkový rozdíl.) a § 734 (ustanovení umožňující zrušení nezrušitelného osvojení za účelem uzavření manželských svazků mezi osobami, mezi kterými by bylo osvojení překážkou uzavření manželství). Je evidentní, že zatímco ust. § 681 a § 689 směřují do obecně správného a ideálního cíle osvojení, tedy vytvoření rodiny, která bude na základě právního aktu stejná jako rodina vzniklá na základě biologického aktu, ust. § 734 tuto koncepci nabouává. V rámci biologicky vzniklých vztahů je možnost manželství mezi blízkými příbuznými vyloučena. Obdobně je třeba přistupovat i k vztahům vzniklým právně. Dle mého názoru, by naopak úprava ust. § 734 mohla vést ke zcela absurdním případům, kdy si osvojitel osvojí např. roční holčičku, vychovává ji jako vlastní a buduje vztah rodič dítě (zákonná povinnost), v pubertě se do své právní dcery zamiluje, dejme tomu, že ona jeho city bude

opětovat (vzniká otázka, jak to jde dohromady s budováním vztahu rodič dítě), osvojitel záhy ovdoví a po dosažení zletilosti dcery požádá soud o zrušení nezrušitelného osvojení a své dítě si osvoji.

Dalšími příklady by mohly být i ustanovení, kde jsme nesouhlasili s použitou terminologií, ale tyto rozpory mohou být způsobeny odlišným názorem na používanou termilogii v občanském zákoniku jako celku, případně náhledem na charakter jednotlivých institutů, ke kterým se použitý termín vztahoval. Snad pouze jeden příklad za vše ust. § 681 odst. 1, a to *Osvojení se zakládá rozhodnutím soudu na návrh osoby, …* a naproti tomu námi navrhované znění ust. § 680 odst. 1 *O osvojení nezletilého rozhodne soud na návrh …*, resp. odst. 2 téhož ustanovení *O osvojení zletilého rozhodne soud na návrh …* .

K vlastním kritickým poznámkám ve vztahu k revizi Evropské úmluvy o osvojení dětí. Pracovní skupna Rady Evropy CJ-FA-GT1 pro revizi Evropské úmuvy o osvojení začala svou práci v roce 2003 a skončila v roce 2006. Ministerstvo spravedlnosti ČR bylo, stejně jako ostatní příslušné orgány členských států Rady Evropy, dotazováno při přípravě revidované úmluvy a mohlo vznést případné připomínky a event. zapracovat připravovaný text revidované úmluvy do návrhu občanského zákoníku. Předem je třeba konstatovat, že práce, které provedla pracovní skupina na revidovaném textu úmluvy, jsou rozšířením původního textu, nikoliv jeho zásadním přepracováním. Nicméně, vzhledem k současné koncepci tvorby úmluv Rady Evropy, jsou vyloučeny k revidované úmluvě výhrady a bude tedy nutné promítnout do příslušného právního předpisu celý text revidované úmluvy.

První koncepční změnou, kterou jsme navrhli, bylo vytvoření jakési generální klauzule osvojení, která mimo definiční ustanovení obsahuje i zákaz nepřiměřených finančních zisků a povinnost vzdělávání všech profesionálů podílejících se na osvojení. Zákaz nepřiměřených finančních zisků je v současné době standardním ustanovením mezinárodních smluv, které má bránit nedovoleným manipulacím s nezletilými dětmi. Tímto ustanovním nemají být vyloučeny všechny zisky, které by mohly být potenciálně získány v souvislosti s osvojením, nicméně takové zisky mají být nutně takové, aby zabezpečily chod a přiměřený výdělek pro např. osoby zprostředkující osvojení v systému, kde je povoleno zprostředkování osvojení soukromými subjekty. Významu nabývá dané ustanovení zejména i ve vztahu k Haagské úmluvě o ochraně dětí a spolupráci při mezinárodích osvojeních.

Povinnost vzdělávání profesionálů se netýká pouze sociálních pracovníků, ale i soudců, právníků, lékařů, psychologů a cílem je, aby, zejména v právnické obci byla dostatčná znalost okolností souvisejících s procesy duševními a sociáními a lékařských otázek souvisejících s osvojením.

Návrh občanského zákoníku v nám předložené verzi vůbec nepracoval v části osvojení s pojmem nejlepší zájem, resp. nejlepší zájmy dítěte. Souhlas osvojení s nejlepšími zájmy dítěte je dnes chápán již jako idiom. Přesto je však nutné neustále tuto základní zásadu stále dokola opakovat a zdůrazňovat její význam. Samotný princip nejlepších zájmů dítěte není mezinárodními dokumenty, tedy ani revidovanou úmluvou exaktně vykládán. Je brán jako základní a nejvyšší kritérium pro posuzování všech otázek souvisejících s osvojením a je promítnut do ostatních principů, na kterých je revidovaná úmluva vybudována. Přesto není, dle mého názoru, možné vynechat odkaz na princip nejlepších zájmů dítěte v moderním rodinněprávním kodexu v souvislosti s osvojením, což lze považovat za jednu z oblastí, kde je nejvíce akcentován veřejný prvek v rodinném právu.

V souladu s požadavky revidovaného textu úmluvy jsme navrhli zavedení pevných věkových hranic. Pro osvojitele je stanovován minimální věk 18 let, stejně tak jako dítě je vymezena osoba, která nedosáhla věku 18 let. Koncepce minimálního věkového rozdílu je založena na pevné hranici 16 let, která však může být snížena za podmínek stanových zákonem nebo na základě rozhodnutí soudu. Další zaváděnou věkovou hranicí je minimálně věk, od kterého je nutný souhlas osvojovaného dítěte, a to 14 let. Stanovení konkrétních věkových hranic je podrobně zdůvodněno ve výkladové zprávě k návrhu revidované úmluvy a při tvorbě návrhu občanského zákoníku měly být vzaty jako fakt a diskutovat pouze o konkrétní výši takové hranice.

Minimální věková hranice 18 let pro osvojitele je dána v zásadě už dnes navázáním možnosti stát se osvojitelem na dosažení plné způsobilosti k právním úkonům. Čili pokud zákonná úprava zakotví jako podmínku dosažení 18 let, nedochází k žádné změně, ale pouze ke konkretizaci. Státu je umožněno úmluvou tuto hranici posunout výše, nicméně takový postup by nekorespondoval se současným stavem. V současnosti má ČR k obdobnému ustanovení výjimku.

V případě vymezení pojmu dítě se jedná o standardní úpravu zavedenou již Úmluvou o právech dítěte.

Mezi kolegy, se kterými jsme vedli diskuzi o připravovaných změnách existovala výrazná názorová neshoda ohledně věku, od kterého má být souhlas nezletilého dítěte nutnou podmínkou osvojení. Názory se lišili od 12 do 14 let, přičemž většina se nakonec přiklonila v vyššímu věku, nicméně základní argument pro věk nižší, tedy vstup do puberty a schopnost dítěte již v tomto věku adekvátně rozhodovat, má stále svou relevanci.

Dílčích změn doznala i úprava souhlasových povinností, zejména bylo výslovně zakotveno, které osoby musí s osvojením souhlasit a podmínky, za kterých není jejich souhlas zásadně vyžadován.

Ač si každý najde v textu občanského zákoníku svou důležitou část, pro mě osobně, jako osobu, která se podílela dlouhodobě na zprostředkování osvojení, bylo nejdůležitější zaměřit se na promítnutí revidované úmluvy do zákonné úpravy preadopční péče.

Myšlenka osvojení je od počátku založena na premise, že při osvojení se jedná o imitaci, fikci biologického svazku rodičovství přirozeného (*adoptione natura imitatur*). Důsledkem je statusová změna významná jak pro právo soukromé tak i veřejné[1]. Vzhledem k významu takové změny je nutné, aby byl celý proces významně ovlivněn veřejným prvkem směřujícím k ochraně práv slabšího subjektu vztahu, tedy nezletilého dítěte. Prvotní myšlenkou při osvojení by nemělo být „pouze" zajistit dítěti náhradní výchovné prostředí, případně náhradní rodinnou péči, byť je osvojení systematicky i logicky řazeno mezi instituty náhradní rodinné péče, ale vůdčím hlediskem by měla být vůle vytvořit rodinu[2], což osvojení činí jedinečným institutem náhradní rodinné výchovy, neboť ostatní instituty by měly vycházet z předpokladu návratu dítěte do původní, biologické, rodiny po opadnutí překážky, která znemožňuje ponechání dítěte v původním rodinném prostředí.[3] Z uvedeného důvodu je charakter preadopční péče naprosto nezastupitelný, neboť právě v jejím průběhu má rozhodující orgán získat dostatek odůvodněných indicií vedoucích nakonec k závěru, že mezi budoucím osvojitelem a osvojencem se vytvořil vztah, který je mezi rodiči a dětmi, a tím je splněna základní podmínka pro osvojení jako takové.

V návrhu revidované Evropské úmluvy o osvojení se předpokládá povinnost provést šetření ohledně vhodnosti osvojitele, schopnosti být osvojitelem a okolnostech a motivech budoucího osvojitele již předtím, než je dítě svěřeno do péče budoucího osvojitele. I toto zamýšlené ustanovení jen podtrhuje význam preadopční péče jako nezastupitelného prvku procesu osvojení a zároveň zdůrazňuje povinnost prověřit základní otázky spojené se subjekty již v této fázi, tedy fakticky před přemístěním dítěte do rodiny budoucího osvojitele, a proto jsme se pokusili v zásadě přenést úpravu úmluvy do textu návrhu občanského zákoníku.

V našem návrhu jsme se pokusili odstranit současnou dvoukolejnost rozhodování o preadopční péči, kdy o ní rozhodují dílem soudy a dílem orgány sociálně-právní ochrany dětí. Dle námi navrhovaného

[1] Hrušáková, M., Králíčková, Z.: České rodinné právo: České rodinné právo, 3. vydání

[2] srov. ust. § 63 odst. 1 Osvojením vzniká mezi osvojitelem a osvojencem takový poměr, jaký je mezi rodiči a dětmi, a mezi osvojencem a příbuznými osvojitele poměr příbuzenský. Osvojitelé mají rodičovskou zodpovědnost při výchově dětí (§31 až 37b).

[3] srov. Hrušáková, M., Králíčková, Z.: České rodinné právo, 3. vydání, ohledně svěření do péče třetí osoby strana 320, ohledně pěstounské péče strana 326

ust. § 709 odst. 2 o předání dítěte do péče osvojitele před osvojením rozhoduje na jeho návrh soud. Soud před rozhodnutím provede šetření ohledně:

a) osobnosti, zdravotního stavu a sociálního prostředí osvojitele, zejména jeho bydlení a domácnosti a jeho schopnosti pečovat o dítě;

b) motivace osvojitele k osvojení;

c) důvodů proč manžel osvojitele se nepřipojil k návrhu, pokud pouze jeden z manželů chce osvojit dítě;

d) vzájemné vhodnosti dítěte a osvojitele a doby, po kterou bylo dítě v péči osvojitele;

e) osobnosti, zdravotního stavu a sociálního prostředí dítěte, prostředí, ze kterého pochází a jeho statusových práv;

f) etnického, náboženského a kulturního prostředí dítěte a osvojitele.

Významnou řešenou otázkou bylo také zrušení osvojení. Revidované úmluva předpokládá, že osvojení po uplynutí právem smluvního státu předpokládané doby nebude možno zrušit. S touto otázkou jsme byli nuceni též vyrovnat a zvolili jsme řešení, které na jedné straně zachovává dispozitivnost současné úpravy, tedy možnost osvojitele podat návrh, na jehož základě bude osvojení prohlášeno za nezrušitelné, a na druhé straně řeší případnou pasivitu osvojitele, neboť pokud tohoto svého oprávnění osvojitel nevyužije, bude automaticky provedena konverze osvojení ze zrušitelného na nezrušitelné po uplynutí zákonem pevně stanovené lhůty.

Uvedený výčet změn je přehledem těch nejdůležitejších výhrad, které jsme měli k textu navrhované novely občanského zákoníku. Faktem ale zůstává, že změn jsme navrhli více, nicméně řada z nich byla skutečně terminologická nebo promítala ustanovení revidované úmluvy o osvojení, případně jiných mezinárodněprávních dokumentů (haagské úmluvy o ochraně dětí a spolupráci při mezinárodním osvojení nebo úmluvy o právech dítěte) spíše okrajově nebo zpřesňujícím vyjádřením. Přesto závěrem bych rád poukázal ještě na jednu věc, a to návrh k návratu k terminologii „rodičovská zodpovědnost“ na místo „rodičovská práva a povinnosti“. Pojem „paternal responsibility“ je v současné době pojmem bez problémů používaným a jeho obsah je dlouhodobě chápán a vyjasněn. I v české termilogii pojem rodičovská zodpovědnost je již v zásadě pojmem zdomácnělým a změna na dříve používanou terminologii rodičovská práva a povinnosti se nám nejevil vhodný. Nicméně tato změna se týká celého textu občanského zákoníku, resp. minimálně části zaobírající se rodinným právem a nikoliv pouze částí o osvojení.

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PŘEZKUM SPOTŘEBITELSKÉHO ACQUIS V KONTEXTU ČESKÉHO PRÁVA DE LEGE LATA

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Abstrakt

Příspěvek pojednává o přezkumu spotřebitelského acquis, které zahrnuje osm směrnic chránících spotřebitele (směrnice 85/577/EHS, směrnice 90/314/EHS, směrnice 93/13/EHS, směrnice 94/47/ES, směrnice 97/7/ES, směrnice 98/6/ES, směrnice 98/27/ES a směrnice 1999/44/ES). Důraz je kladen na vytyčení nejzásadnějších problematických částí implementace směrnic v našem právním řádu.

Klíčová slova

Přezkum spotřebitelského acquis, ochrana spotřebitele, fragmentární implementace.

Abstract

The article deals about the review of consumer acquis. The consumer acquis cover 8 directives that protected consumers (Directive 85/577/EEC, Directive 90/314/EEC, Directive 93/13/EEC, Directive 94/47/EC, Directive 97/7/EC, Directive 98/6/EC, Directive 98/27/EC and Directive1999/44/EC). The author tries to find the most serious problematic parts of implementation directives in the Czech Law.

Key words

Consumer protection, review of consumer acquis, implantation of directives.

Moderním trendem současného civilního práva je prosazování ochrany spotřebitele, jakožto slabší strany právního vztahu, v soukromoprávních vztazích. Bylo by mylné domnívat se, že ochrana spotřebitele pronikla do našeho právního řádu až díky implementaci směrnic ES prosazujících ochranu spotřebitele. V jistém aspektu předlistopadová ochrana spotřebitele (např. prodej zboží v obchodě) byla striktnější, než jak je vyžadováno právem ES (směrnice 1999/44/ES). Jednalo se však spíše o kasuistickou ochranu, resp. obecná zásada ochrany spotřebitele (srov. § 55 OZ, směrnice 93/13/EHS, směrnice 2005/29/ES) v našem právním řádu zavedena nebyla.

Ochranu spotřebitele je však třeba dle mého názoru vnímat a řešit komplexně, nikoli kasuisticky; to mimo jiné dosvědčuje trend legislativních postupů užívaných v současné době v rámci směrnic ES. Směrnice 2005/29/ES opouští do té doby evropským normotvůrcem užívaný kasuistický přístup (vertikálním přístup) a počíná regulovat ochranu spotřebitele horizontálním přístupem, který by měl být integrovanější. Ve své podstatě evropský zákonodárce opouští regulaci jednotlivostí a obrací svou pozornost obecným zásadám či principům. Již staří scholastikové totiž věděli, že je třeba při přemýšlení o entitách postupovat od obecného k speciálnímu, od zásad či obecných zakotvujících principů k jednotlivostem, k jednotlivým institutům. Teprve pokud jsou jednotlivé instituty prosazující ochranu spotřebitele zařazeny, pružně obtékány či subsumovány pod obecné zásady či principy ochrany spotřebitele (typu zákaz nekalých ujednání, zákaz nekalých obchodních praktik, klamavých či agresivních obchodních praktik, výkladový princip ve prospěch ochrany spotřebitele apod.), které vyvažují, eliminují a postihují výjimky či odchylky, které nemůže postihnout kasuistická právní úprava vzhledem ke své definiční omezenosti, může být právní regulací společenských vztahů dosaženo vytýčeného cíle, kterou je vyvážená ochrana spotřebitele.

ES si je vědoma roztříštěnosti ochrany spotřebitele a snaží se na danou neutěšenou situaci reagovat přezkumem alespoň těch nejzákladnějších směrnic prosazujících ochranu spotřebitele, které zařazuje pod pojem „spotřebitelské acquis“ (směrnice 85/577/EHS, směrnice 90/314/EHS, směrnice 93/13/EHS, směrnice 94/47/ES, směrnice 97/7/ES, směrnice 98/6/ES, směrnice 98/27/ES a směrnice 1999/44/ES)[1]. Přezkum spotřebitelského *acquis* započal v roce 2004 a jeho směřování či základní cíle jsou naznačeny ve sdělení Evropské smluvní právo a přezkum *acquis*: cesta vpřed[2], který přímo navazuje na Akční plán[3] z roku 2003. Částečné výsledky přezkumu byly prezentovány v První výroční zprávě o pokroku v oblasti evropského smluvního práva a přezkumu *acquis* z roku 2005[4], v Zelené knize o přezkumu spotřebitelského *acquis* z roku 2006[5] a v Zelené knize o přezkumu spotřebitelského *acquis* z roku 2007[6].

[1] Zelená kniha o přezkumu spotřebitelského acquis, Úř. věst. C 61, 15. 3. 2007, s. 2, poznámka pod čarou č. 2 (v českém znění, v anglickém znění poznámka pod čarou č. 3) [citováno 9. ledna 2008]. Dostupné z: http://eur-lex.europa.eu/LexUriServ/site/cs/oj/2007/c_061/c_06120070315cs00010023.pdf

[2] Sdělení Komise Evropskému parlamentu a Radě – Evropské smluvní právo a přezkum acquis: cesta vpřed, KOM/2004/0651 v konečném znění [citováno 9. ledna 2008].
Dostupné z: http://eur-lex.europa.eu/LexUriServ/site/cs/com/2004/com2004_0651cs01.pdf

[3] Akční plán [citováno 9. ledna 2008]. Dostupné v angličtině z: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf

[4] První výroční zpráva o pokroku v oblasti evropského smluvního práva a přezkumu acquis; KOM/2005/0456 v konečném znění. [citováno 9. ledna 2008] Dostupné z: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/progress05_cs.pdf

[5] Zelená kniha o přezkumu spotřebitelského acquis, KOM/2006/0744 v konečném znění. [citováno 9. ledna 2008] Dostupné z: http://eur-lex.europa.eu/LexUriServ/site/cs/com/2006/com2006_0744cs01.pdf

[6] Zelená kniha o přezkumu spotřebitelského acquis, Úř. věst. C 61, 15.3.2007, čl. 4.2, s. 5. [citováno 9. ledna 2008] Dostupné z: http://eur-lex.europa.eu/LexUriServ/site/cs/oj/2007/c_061/c_06120070315cs00010023.pdf

Ideálním cílem revize spotřebitelského *acquis* je stav, kdy nebude záležet na tom, v kterém státě ES se spotřebitel nachází, protože jeho základní práva jsou v kterémkoli členském státě stejná[7]. S touto ideou je však v přímém rozporu dosud užívaná zásada minimálního standardu, tj. že každý členský stát implementuje danou směrnici v kontextu svého právního řádu s tím, že je povinen ctít minimální standard obsažený v dané směrnici; poskytne-li však ochranu širší, striktnější, je taková implementace v souladu s právem ES. Naproti této zásadě se vyskytují názory na prosazení tzv. maximálního standardu či povinného standardu, tj. členský stát musí implementovat danou směrnici přesně v tom rozsahu, v jakém to vyžaduje směrnice. Smyslem a účelem povinného standardu má být jednotná ochrana spotřebitele ve všech členských státech ES (např. jednotné lhůty pro právo na odstoupení od smlouvy, jednotná práva v případě uplatnění odpovědnosti za vady apod.) a tudíž jednodušší uplatňování práv spotřebitelů v rámci jednotného vnitřního trhu ES; v případě tzv. povinného standardu vyvstává otázka, zdali by nebylo lepší povinný standard ochrany spotřebitele zavést spíše nařízením, než směrnicí.

V naší právní úpravě nacházíme implementaci směrnic, které jsou součástí spotřebitelského acquis takto: Směrnice 85/577/EHS ze dne 20. prosince 1985 o ochraně spotřebitele v případě smluv uzavřených mimo obchodní prostory byla v našem právním řádu implementována v § 57 OZ. Směrnice Rady 90/314/EHS ze dne 13. června 1990 o souborných službách pro cesty, pobyty a zájezdy je v našem právním řádu provedena ve dvou předpisech. V OZ (§ 852a a násl.) a kromě toho i v zákoně č. 159/1999 Sb., o některých podmínkách podnikání v oblasti cestovního ruchu ve znění pozdějších předpisů. Směrnice Rady 93/13/EHS ze dne 5. dubna 1993 o nepřiměřených podmínkách ve spotřebitelských smlouvách je v našem právním řádu implementována v ust. § 52, 55 a 56 OZ. Implementaci směrnice Evropského parlamentu a Rady 94/47/ES ze dne 26. října 1994 o ochraně nabyvatelů ve vztahu k některým aspektům smluv o nabytí práva k dočasnému užívání nemovitostí nalézáme rovněž v OZ a to v ust. § 58 – 65. Směrnice Evropského parlamentu a Rady 97/7/ES ze dne 20. května 1997 o ochraně spotřebitele v případě smluv uzavřených na dálku, ve znění pozdějších předpisů byla do našeho právního řádu provedena ust. § 53 – 54 OZ. Směrnice Evropského parlamentu a Rady 98/6/ES ze dne 16. února 1998 o ochraně spotřebitelů při označování cen výrobků nabízených spotřebiteli je směrnicí, která byla v našem právním řádu implementována v rámci veřejného práva, tj. v zákoně č. 526/1990 Sb., o cenách ve znění pozdějších předpisů. Směrnici Evropského parlamentu a Rady 98/27/ES ze dne 19. května 1998 o žalobách na zdržení se jednání v oblasti ochrany zájmů spotřebitelů, ve znění pozdějších předpisů nacházíme v našem právním řádu provedenu v zákoně č. 634/1992 Sb., o ochraně

[7] Zelená kniha o přezkumu spotřebitelského acquis, Úř. věst. C 61, 15. 3. 2007, s. 1—23. [citováno 9. ledna 2008] Dostupné z: http://eur-lex.europa.eu/LexUriServ/site/cs/oj/2007/c_061/c_06120070315cs00010023.pdf, čl. 2.1, s. 2,

spotřebitele ve znění pozdějších předpisů. Směrnice Evropského parlamentu a Rady 1999/44/ES ze dne 25. května 1999 o některých aspektech prodeje spotřebního zboží a záruk na toto zboží byla do našeho právního řádu transponována v rámci ustanovení o prodeji zboží v obchodě (§ 612 a násl. OZ).

Přezkum acquis a české právo de lege lata

V rámci zamyšlení nad implementací směrnic chránících spotřebitele v kontextu české právní úpravy de lege lata, můžeme vytýčit stěžejní nesouladnosti či přímo kolize. Rozpor provedení směrnic v naší právní úpravě můžeme shledávat jak se smyslem a účelem směrnic, příp. s textem směrnice, tak i s judikaturou ESD.

Základní problém či nekonzistentnost provedení směrnice 85/577/EHS můžeme nalézt v samotném věcném vymezení působnosti směrnice (mimo prostory obvyklé), které je poměrně „nejasné" či „příliš široké" či „zavádějící"; nemůžeme však dovozovat dle mého názoru nesprávnou implementaci, spíše širší či nejasnou věcnou působnost. Poměrně zásadní vadou implementace směrnice 85/577/EHS v našem právním řádu však je nesprávné provedení práva na odstoupení od smlouvy, resp. zachování lhůty; naše vnitrostátní právo totiž neobsahuje zakotvení zachování lhůty v případě, že jednostranný adresný úkon byl ve lhůtě na odstoupení odeslán (výslovně implementováno např. § 54c OZ pro případ smluv o finančních službách sjednaných distanční formou), což není možné dle mého názoru odstranit ani výkladem (opačný názor zastává Hulmák[8]).

Problematickou částí implementace směrnice 90/314/EHS může být diskriminační provedení informační povinnosti (§ 10 odst. písm. i) zák. č. 159/1999 Sb.) či otázka náhrady imateriální újmy v případě poskytnutí zájezdu (srov. C-168/00 Simone Leitner).

Zásadním problémem implementace směrnice 93/13/EHS je stíhání vadnosti právního úkonu pouze relativní neplatností (srov. § 55 a 56 OZ), ačkoli byl-li by činěn obdobný právní úkon, který by nemohl být charakterizován jako spotřebitelská smlouva (B2B, C2C), právní řád by takovou vadu stíhal absolutní neplatností (typicky rozpor s dobrými mravy). Rovněž tak stíhání nekalosti (nemravnosti) smluvní podmínky ve spotřebitelské smlouvě relativní neplatností, které se musí dotčený subjekt dovolávat, je přímo v rozporu s judikaturou ESD (C-240/98 až C-244/98 Océano Grupo).

[8] ŠVESTKA, J., SPÁČIL, J., ŠKÁROVÁ, M., HULMÁK, M. et al. *Občanský zákoník I. § 1 – 459. Komentář.* 1. vydání. Praha : C.H.Beck, 2008, str. 502.

Implementaci směrnice 97/7/ES náš právní řád obsahuje v ust. § 53 – 54 OZ a stěžejním problémem této implementace můžeme dle mého názoru spatřovat v tom, že právo de lege lata neobsahuje výslovný zákaz reálné oferty, což by bylo v souladu se směrnicí 97/7/ES ve znění pozdějších předpisů, ale pouze opravňuje spotřebitele k tomu, aby neobjednané plnění, které obdržel, nemusel vrátit. Reálná oferta tak je legálním způsobem kontraktace spotřebitelských smluv a vznikne-li spotřebitelský právní vztah na základě smlouvy sjednané formou reálné oferty, svědčí stricto senzu dodavateli právo na zaplacení ceny, což je opět přímo v rozporu se směrnicí 97/7/ES. Dalším problémem naší implementace směrnice 97/7/ES je dle mého názoru nesprávné provedení předsmluvní informační povinnosti týkající se charakteru poskytovaných informací. Směrnice obecně vyžaduje, aby spotřebitel obdržel jasné a srozumitelné předsmluvní informace bez toho, že by bylo v rámci směrnice rozlišováno, zdali se jedná o předsmluvní informace, které jsou nebo nejsou součástí oferty. Povinnost dodavatele poskytnout spotřebiteli předsmluvní informace určitě a srozumitelně nacházíme v rámci implementace směrnice 93/13/ES pouze pro předsmluvní informace, které jsou součástí oferty (je možné stíhat absolutní neplatností právního úkonu podle § 37 OZ, takže implementace zdá se být pro tento případ nadbytečná). Povinnost pro dodavatele poskytnout předsmluvní informace, které nejsou součástí oferty, jasným (určitým) a srozumitelným způsobem zakotvena není, a dle mého názoru lze toto pochybení charakterizovat jakožto nesouladnost se směrnicí 97/7/ES.

Jak již bylo zmíněno výše, implementaci směrnice 1999/44/ES nacházíme v ustanovení o prodeji zboží v obchodě (§ 612 a násl. OZ) a samotné věcné vymezení pouze na koupi a prodej můžeme označit jako fragmentární implementaci, neboť směrnice 1999/44/ES vyžaduje, aby se rovněž vztahovala na provedení díla, což v našem právním řádu nenalézáme.

Závěrem

Jedním z cílů přezkumu spotřebitelského acquis je jednotná ochrana spotřebitele napříč členskými státy ES. Naše vnitrostátní právo v současné podobě obsahuje nesprávnou či fragmentární implementaci směrnic podléhajících přezkumu a revizi, kterou je třeba pro futuro odstranit. Souladnost našeho vnitrostátního práva by však měla být realizována citlivými legislativními změnami nejen v kontextu závěrů, které vyplynou z přezkumu spotřebitelského acquis napříč členskými státy ES, ale i v kontextu obecných soukromoprávních institutů obsažených v právní úpravě de lege lata.

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[2] ŠVESTKA, J., SPÁČIL, J., ŠKÁROVÁ, M., HULMÁK, M. et al. *Občanský zákoník II. § 460 – 880. Komentář.* 1. vydání. Praha : C.H.Beck, 2008. 1085 s. Velké komentáře. ISBN 978-80-7400-004-1.

[3] ŠVESTKA, J., SPÁČIL, J., ŠKÁROVÁ, M., HULMÁK, M. et al. *Občanský zákoník I. § 1 – 459. Komentář.* 1. vydání. Praha : C.H.Beck, 2008. 1085 s. Velké komentáře. ISBN 978-80-7400-004-1.

[4] SCHULTE-NÖLKE, H., TWIGG-FLESNER, CH., EBERS, M. EC Consumer Law Compendium – Comparative Analysis. (Prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299: "Annotated Compendium including a comparative analysis of the Community consumer acquis"), 2007. Dostupné na http://www.eu-consumer-law.org/study_en.cfm. [Citováno 3. 5. 2008].

[5] FIALA, J. et al. Občanské právo hmotné, 3. vydání. Brno : Doplněk, 2002.

[6] Sdělení Komise Evropskému parlamentu a Radě „Evropské smluvní právo a přezkum acquis: cesta vpřed. KOM (2004) 651 v konečném znění.

[7] Zelená kniha o přezkumu spotřebitelského acquis (2007/C 61/01), Úřední věstník Evropské unie C 61, s. 1 - 23.

[8] První výroční zpráva o pokroku v oblasti evropského smluvního práva a přezkumu acquis; KOM/2005/0456 v konečném znění.

[9] Zelená kniha o přezkumu spotřebitelského acquis, KOM/2006/0744 v konečném znění.

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PRINCIP TRANSPARENTNOSTI DLE SMĚRNICE O NEPŘIMĚŘENÝCH PODMÍNKÁCH

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Abstrakt

Příspěvek se zabývá principem transparentnosti ve spotřebitelských smlouvách tak, jak je stanovená směrnicí o nepřiměřených podmínkách. Současná situace na trhu vedla k právní úpravě, která má zaručit, aby nejasné a nesrozumitelné podmínky nebyly ve spotřebitelských smlouvách užívány. Výslovně uváděným následkem inkorporace takových podmínek je automatické použití výkladu, který určuje, že v případě pochybností co do významu, se použije výklad pro spotřebitele nejpříznivější. Cílem práce je rozbor zmíněné právní úpravy.

Klíčová slova

Princip transparentnosti, jasný a srozumitelný jazyk, směrnice o nepřiměřených podmínkách

Abstract

The paper deals with the transparency principle as is set under the Unfair Contract Terms Directive. The current market situation led to the legal regulation that seeks to prevent the use of unclear and unintelligible clauses in consumer contracts. The consequence of the incorporation of these terms is the contra proferentem rule stating that in case of any doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. The aim of this work is to provide the basic study of the aforementioned issue.

Key words

Transparency principle, plain and intelligible language, Unfair Contract Terms Directive

1. Právně teoretické východisko

Před 35 lety poznamenal kanadský profesor, že moderní trhy se vyznačují třemi nerovnostmi mezi spotřebiteli a dodavateli. První nerovnost spočívá v nerovnováze vyjednávací síly, druhá

v nerovnoměrnosti znalostí a poslední v neúměrnosti zdrojů mezi zmíněnými stranami.[1] Spotřebitel vystupuje ve vztazích na trhu ve slabší pozici. Spotřebitel má zpravidla méně vyjednávací síly, informací i zdrojů. Zejména pro velké dodavatele je tak snadné nastavit podmínky v neprospěch protistrany vztahu, aniž by je druhá strana mohla ovlivnit.

U velkých obchodních transakcí jako jsou fůze, se podmínky zpravidla sjednávají individuálně.[2] Avšak u běžných spotřebitelských smluv o zřízení účtu u bankovního ústavu, o půjčce automobilu či uzavření pojistné smlouvy spotřebitelé nemají jinou možnost než smlouvu přijmout nebo odmítnout jako celek.[3] Takovou formu mají i všeobecné obchodní podmínky, které nacházejí v praxi čím dál větší využití.[4]

Formulářové smlouvy jsou psány ve většině případů právníky. Právníci však využívají jazyka, který je sice srozumitelný jiným právníkům, ale laici mohou mít s porozuměním v mnohém obtíže. Právnický jazyk je funkční variantou přirozeného jazyka se svými zvláštními znaky a odlišnostmi.[5] Je pro něj typická snaha o preciznost použití zvolených slov a o vyhnutí se dvojznačnosti. Úsilí o zamezení připuštění odlišné interpretace vedlo k úzkému vymezení termínů a odlišného stylu jazyka.[6] Srozumitelnost, jasnost a přehlednost smluv je pro laiky nedostatečná, což může laikům způsobovat problémy, a profesionálům umožňovat skrytí nepřiměřených podmínek v neprospěch spotřebitele.

Na nastalou situaci reagovala směrnice Rady 93/13/EHS ze dne 5. 4. 1993 o nepřiměřených podmínkách ve spotřebitelských smlouvách.[7] Směrnice je primárně zaměřena na zákaz užití nepřiměřených podmínek. Z článku 5 však dále vyplývá, že v případě smluv, v nichž jsou všechny nebo některé podmínky nabízené spotřebiteli předloženy v písemné podobě, musí být tyto podmínky napsány jasným a srozumitelným jazykem.[8]

2. Subjektivní a objektivní meze aplikace

[1] Zeigel, J. The Future of Canadian Consumerism. Can Law Rev, 1973, č. 51, s. 193.
[2] Korobkin, R. Bounded Rationality, Standard Form Contracts and Unconscionability. The University of Chicago Law Review, 2003, ročník 70, č. 4, s. 1203.
[3] Fráze má anglickou podobu ve formě „Take it or leave it." Spotřebitel nemůže obsah práv a povinností ovlivnit. Smlouva je předem upravena k podpisu, kdy stačí doplnit často jen identifikační údaje druhé strany, které má o nabídku zájem.
[4] Rozšířenosti užívání předem připravených smluv (zejména ve formě tzv. všeobecných obchodních podmínek) nahrává ekonomická výhodnost. V každém jednotlivém případě se nemusí znovu vyjednávat a sepisovat rozdílné smlouvy, a šetří se náklady a čas oběma stranám.
[5] Matilla, H. Comparative Legal Linguistics. Aldershot: Ashgate Publishing Limited, 1988, s. 3.
[6] Gibbons, J. Language in the Law. Nové Dilí: Orient Longman Private Limited, 2004, s. 3.
[7] Dále jen „Směrnice"
[8] Zmíněné pravidlo je pro účel práce označováno jako princip transparentnosti. Jsem si vědom, že princip transparentnosti je možné vykládat šířeji, o čemž bude pojednáno dále.

Směrnice stanoví, aby byly podmínky psané jasným a srozumitelným jazykem. Směrnice se však nevztahuje na kterékoli subjekty smlouvy, ani na všechny smlouvy. Aplikace směrnice je omezena subjektivně, tak i objektivně. Na tomto místě je však nutné poznamenat, že směrnice je založena na principu minimální harmonizace, což znamená, že státy mohou zvolit úpravu, která zajistí větší míru ochrany.[9]

Aplikace Směrnice je limitována na smlouvy uzavřené mezi spotřebitelem a dodavatelem. Spotřebitelem je dle článku 2 Směrnice jen fyzická osoba, která ve smlouvách, na které se směrnice vztahuje, jedná pro účely, které nespadají do rámce její obchodní nebo výrobní činnosti nebo povolání. Definice spotřebitele tak vychází nejen z osobní charakteristiky, ale je též spoluurčována i obsahem právního úkonu.[10] Dodavatelem je fyzická i právnická osoba, která naopak ve smlouvách jedná pro účely související s její obchodní nebo výrobní činností nebo povolání. Je nutno dodat, že na vymezení spotřebitele a dodavatele se vztahuje mimo jiné i rozhodnutí Evropského soudního dvora[11] Johann Gruber,[12] v němž se rozhodovala otázka určení subjektu, který smlouvu sjednává zároveň pro obchodní a osobní účely. Je nutné podotknout, že v souladu s výše zmíněnou zásadou minimální harmonizace je v některých státech, včetně České republiky[13], pojem spotřebitel rozšířen i na osobu právnickou. V případě rozšíření ochrany i na právnickou osobu jednající mimo sféru své obchodní nebo výrobní činnosti a povolání se vychází převážně z principu, že daný subjekt je rovněž ve slabším postavení vůči dodavateli vzhledem k tomu, že na rozdíl od dodavatele nepatří předmět plnění smlouvy do jeho profesionální činnosti. S tímto názorem se ztotožňuji, neboť právě pravidlo vyslovené v rozhodnutí Johann Gruber by mělo zajistit možnost zneužívání fiktivního vystupování v pozici spotřebitele.

Směrnice se vztahuje pouze na ujednání, která nebyla individuálně sjednaná.[14] Smlouva obsahující neindividuálně sjednané podmínky je pojmem užším k pojmu všeobecné podmínky.[15] Směrnice tak

[9] Stephen Weatherill v EC Consumer Law and Policy. New York: Longman, 1997, s. 86-87 poukazuje, že princip minimální harmonizace byl použit i s ohledem na možná rizika, která mohla vyvstat ve státech, kde byla dosud silnější ochrana, a v důsledku směrnice by došlo k jejímu oslabení.

[10] Tichý, L. Pojem spotřebitele jako smluvní strany v evropském a českém právu." In Spotřebitelská legislativa EU a její implementace do práva členského a kandidátského státu (na příkladu Francie a České republiky), Praha: CeFRes, 2001, s. 141-142.

[11] Dále jen „ESD".

[12] Rozsudek ve věci C-464/01 ze dne 20. 1. 2005, Gruber v. Bay Wa [2005] ECR I-439. Dvůr rozhodl, že taková osoba není považována za spotřebitele, ledaže je obchodní účel zanedbatelný.

[13] Detailnějšímu porovnání úprav v jednotlivých státech se věnuje Schulte-Nölke, H., Twigg-Flesner, Ch., Ebers, M. EC Consumer Law Compendium-Comparative Analysis, 2007, s. 339-340. Dostupné na http://www.eu-consumer-law.org/study_en.cfm [citováno 4. 4. 2008].

[14] Určení, zda se jedná o individuálně sjednanou podmínku, může být komplikované. Blíže v Wilhelmsson, T. The Scope of the Directive: Non-negotiated Terms in Consumer Contracts (Art. 1§1, 3§1, 4§2) in Sborník z Konference „The Directive on « Unfair Terms », five years later - Evaluation and future perspectives," 1999, s. 94-102. Dostupné na http://ec.europa.eu/consumers/rights/gen_rights_en.print.htm [citováno 9. 4. 2008].

reguluje i podmínky určené byť pro jedno použití. Dlužno podotknout, že česká právní úprava se vztahuje i na podmínky, které jsou sjednány individuálně. Ačkoli Směrnice zmiňuje výslovně jen zboží a služby, a tak by byly dle striktního výkladu vyloučeny z objektivního rámce aplikace nemovité věci, je zřejmé, že se aplikace vztahuje i na nemovitý majetek.[16] Na druhé straně jsou však z regulace v souladu se Směrnicí vyjmuty určité typy smluv. Jedná se například o smlouvy týkající se zřizování společností.

3. Požadavek užití jasného a srozumitelného jazyka

Princip transparentnosti je dle článku 5 Směrnice zásada stanovící, že každá podmínka předložená v písemné formě, musí být sepsána jasným a srozumitelným jazykem. Princip není v komunitárním právu ani v rozhodovací činnosti Evropského soudního dvora ničím novým.[17] Princip je založen na otevřenosti, a cílem je, aby měl spotřebitel reálnou možnost seznámit se se smlouvou, k níž se zavazuje, a tak si byl vědom svých práv a povinností, což je bezpochyby jeho právo.[18]

V průběhu vytváření měla Směrnice několik variant znění. Nakonec převládlo užší pojetí transparentnosti s tím, že je vyžadováno „jen" znění písemných podmínek, které je psáno jasným a srozumitelným jazykem. Nejšířeji může být zásada interpretována tak, že obsahuje navíc požadavek jasného způsobu prezentace podmínek a jejich dostupnost pro spotřebitele.[19]

Požadavky jasnosti a srozumitelnosti se vzájemně doplňují a částečně i překrývají. Zatímco jasnost se týká spíše formy podání, srozumitelnost se váže více na obsah podání čili na lingvistický aspekt vyjádření konkrétních práv a povinností ze smlouvy vyplývajících. Obě vzájemně se doplňující kritéria musí být naplněny kumulativně; porušením jednoho z nich dojde k nevyhovění požadavku.

Kritérium formy vyžaduje, aby předkládaný návrh byl co nejvíce přehledný. Struktura smlouvy a styl a formátování písma by se měly upravit tak, aby standardu vyhověly. Strukturou je míněna zejména délka a členění textu dle obsahu. Stylem a formátováním je myšlena nejen velikost písma, ale i barevné provedení dokumentu. Délka smlouvy by měla odpovídat její povaze. Smlouva by měla být stručná, aby

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[15] Nebbia, P. Unfair Contract Terms in European Law: A Study in Comparative and EC Law. Portland: Hart Publishing, 2007, s. 115.

[16] ESD neřešil ve věci C-237/02 ze dne 1. 4. 2004, Freiburger Kommunalbauten [2004] ECR I-3403, problém neaplikovatelnosti Směrnice, ač se věc týkala nemovitého majetku, a tak implicitně potvrdil aplikaci i na smlouvy o nemovitých věcech.

[17] Nebbia, P. Unfair Contract Terms in European Law: A Study in Comparative and EC Law. Portland: Hart Publishing, 2007, s. 136. Například článek 3 odst. 2. směrnice 90/316/EHS o souborných službách pro cesty, pobyty a zájezdy uvádí požadavek jasného, čitelného a přesného uvedení stanovených informací.

[18] Office of Fair Trading. Unfair Contract Terms.Bulletin č. 2. East Molesey: Office of Fair Trading, 1996, s. 8.

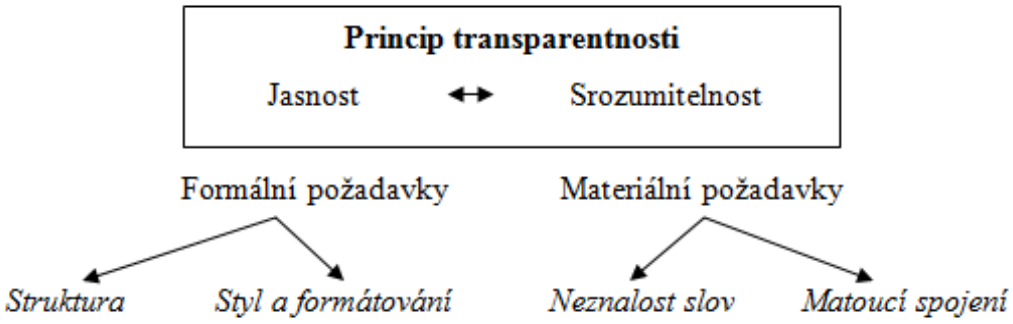
[19] The Law Commission and Scottish Law Commission. Studie číslo LAW COM č. 292 a SCOT LAW COM č. 199 „Unfair Terms in Contracts," 2005, s. 35. Dostupné na http://www.lawcom.gov.uk/unfair_terms.htm [citováno 9. 4. 2008]

její obsáhlost nebránila přehlednosti a zbytečně neodrazovala spotřebitele od možnosti seznámení se s ní. Obsáhlost smlouvy by samozřejmě sama o sobě nemohla vést k názoru o nevyhovění principu transparentnosti, neboť některé typy smluv nezbytně obsahují řadu podmínek. Na druhou stranu však značná nepřiměřenost délky smlouvy společně s dalšími prvky mohou vést k úsudku o její nejasnosti. Stejný závěr by bylo možné učinit i u smluv, kde by bylo zjevné, že navrhovatel neučinil náležité úsilí, aby se vyvaroval použití odkazů napříč dokumentem.[20] Velikost písma je pro vyhovění standardu jasnosti rovněž určující.[21] Volba použití malého písma značně odrazuje adresáta smlouvy od jejího přečtení, a ve výjimečných případech může vést až k její nečitelnosti. Zmíněný závěr platí zejména v případech, kdy je navíc rozdíl barvy písma od barvy podkladového materiálu nevýrazný. Dodavatelé by se též měli vyhnout volbě většího počtu barev v jednom dokumentu, neboť v takovém případě se koncentrace čtenáře upoutá na celkový vzhled na úkor obsahu sdělení. Výkladem *a contrario* lze shrnout, že formálním požadavkům nejlépe odpovídá smlouva, která je přiměřeně rozsáhlá, rozčleněná do oddílů dle tématiky, neobsahující mnoho křížových odkazů, a jejíž přehlednost je zvýrazněna správnou volbou velikosti písma, barevné kombinace a zvýraznění nejdůležitějších částí dokumentu.

Kritérium formy vyjádření je doplněno požadavkem srozumitelného vyjádření práv a povinností (materiální čili obsahové požadavky), které se vztahuje spíše na vyjádřený obsah podmínek než na formu jejich vyjádření. Vyhovění principu transparentnosti v tomto ohledu znamená vyvarování se pro běžného spotřebitele neznámým slovům a matoucím slovním konstrukcím. Smlouvy jsou psány právnickým jazykem, který je, jak již bylo zmíněno výše, specifický vzhledem ke svému účelu a podstatě. Text smlouvy by měl obsahovat co nejméně výrazů z právnického žargonu, neboť jejich přesný obsah nemusí být laikům znám.

Zdrojem nesrozumitelnosti je často právnický žargon, který je užíván jako forma zkrácení textu. Rozsáhlost sama o sobě ovšem standardem posuzování není a nemůže být, a proto by neměla být prosazována na úkor srozumitelnosti.[22] Běžná slovní spojení mají být volena co nejčastěji. Užití běžných výrazů však není dostatečné. Je nutné předejít užití komplikovaných a zevrubných definicí, složitým souvětím, cizojazyčným výrazům (například *vis maior*) a zastaralým slovním spojením.

[20] Tamtéž, s. 396-398.
[21] David Mellinkoff v How to Make Contracts Illigible. Standford Law Review, 1953, ročník 5, číslo 3, strana 418-419 poznamenal, že dle výsledků průzkumu Minessotské univerzity, je pro spotřebitele nejpřijatelnější písmo odpovídající cca velikosti 11 písma Times New Roman.
[22] Office of Fair Trading. Unfair Contract Terms.Bulletin č. 2. East Molesey: Office of Fair Trading, 1996, s. 10.



Obrázek 1: Schéma principu transparentnosti

4. Měřítko transparentnosti

Princip transparentnosti má zajistit, aby podmínky ve smlouvách byly jasné a srozumitelné nejen pro profesionální právníky, ale zejména pro laiky z řad běžných občanů. Jasnost a srozumitelnost jsou standardy, které se vždy váží k určitému měřítku. Pro určení standardu je nezbytné vymezit právě toho domnělého spotřebitele, který je určující. Rozhodovací praxe ESD vytvořila koncepci přiměřeně informovaného, pozorného a opatrného spotřebitele.[23] Proti tomu stojí koncepce slabého spotřebitele, která je prosazovaná zejména v Německu. Německý přístup předpokládá spotřebitele málo informovaného, který je neznalý svých práv, a proto potřebuje být o svých právech jasně poučen. Obě koncepce nezahrnují všechny osoby spotřebitelů, ale jen vymezenou skupinu. Druhá z nich je však pro interpretaci z pohledu spotřebitele výhodnější.

Ratio směrnice jistě není chránit každého spotřebitele. Podmínky nemusí být jasné a srozumitelné všem spotřebitelům stejně. Takového cíle by ostatně ani nebylo možné docílit. Směrnice sama nestanoví, jakým způsobem se hodnotí jasnost a srozumitelnost podmínek, avšak dle cílů směrnice je možné vyvodit, že se rozhodovací praxe ESD bude vztahovat i na výklad k směrnici o nepřijatelných ujednáních a měřítkem bude právě přiměřeně informovaný, pozorný a opatrný spotřebitel.[24] Je pak na národním soudu, aby určil, o jakého spotřebitele v daném státě jde. Národní soudy mohou jako vodítka pro své rozhodnutí přihlédnout k výzkumům veřejného mínění a zprávám odborníkům. V praxi by tak soudy měly hodnocení srozumitelnosti a jasnosti interpretovat v tom smyslu, jak by jej vykládal průměrný spotřebitel.

5. Následky porušení principu transparentnosti

[23] Rozhodnutí C-210/96 ve věci Gut Springenheide GmbH and Rudolf Tusky proti Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung [1998] ECR I-4657 ze dne 16.6.1998

[24] Stejný závěr potvrzuje i fakt, že i nedávno přijatá směrnice 2005/29/ES o nekalých obchodních praktikách odkazuje na spotřebitele, který má dostatek informací a je v rozumné míře pozorný a opatrný.

Jediný přímý následek stanovený směrnicí v případě nevyhovění použití jasného a srozumitelného jazyka je aplikace pravidla *in dubio contra proferentem*.[25] Pravidlo vychází ze zásady spočívající v tom, že nastane-li pochybnost o významu některé podmínky, má převahu výklad, který je pro spotřebitele nejpříznivější. Zásada nejenže stanoví, která ze stran bude zvýhodněna, ale těžiště tkví i ve volbě slova „nejpříznivější."[26] Budou-li tedy možné tři výklady, bude platit ten, který poskytuje spotřebiteli největší výhody.

Pravidlo se však uplatní jen v individuálních sporech, kde je zpravidla zájem, aby smluvní vztah pokračoval za pro spotřebitele výhodnějšího výkladu. U sporů zahájených příslušnými osobami (tzv. collective litigation – nejde o individuální spory), jejichž cílem je vydání rozhodnutí zakazující další užití podmínek ve smlouvách, se pravidlo vylučuje. Takové orgány zahajují pře ve prospěch spotřebitelů a pravidlo, které by v případě víceznačnosti umožňovalo příznivější výklad, by nebylo na místě, jelikož by mohlo zabránit prohlášení napadené podmínky soudem za nepřijatelnou, a tak by orgán mohl spor prohrát. V takových případech je na místě spíše převzít podobu, která by automaticky vzala v potaz interpretaci pro pověřené orgány nejnepříznivější, aby se pravděpodobnost úspěchu ve věci zvýšila.

Někteří autoři se domnívají, že netransparentní podmínku je možné prohlásit za nepřiměřenou beze všeho.[27] S tímto názorem se však nemohu ztotožnit. Interpretační pravidlo sice samo od sebe nevylučuje možnost posouzení netransparentní podmínky v individuálních sporech jako nepřiměřené a tudíž neplatné. Avšak k danému závěru musí dojít i přesto, že byl použit výklad pro spotřebitele nejpříznivější, a i za tohoto výkladu podmínka v rozporu s dobrými mravy způsobuje značnou nerovnováhu v právech a povinnostech v neprospěch spotřebitele. Jinými slovy je třeba dle aktuální úpravy aplikovat článek 3 Směrnice na všechny, tedy i na netransparentní podmínky.

Směrnice obsahuje pravidlo týkající se výkladu netransparentní podmínky, která je schopná interpretace. Nepodává však odpověď na případy, kdy je podmínka úplně nesrozumitelná.[28]

5. Doporučení a závěr

[25] Interpretační pravidlo je obsaženo i v zásadách The Principles of European Contract Law dostupných na www.lexmercatoria.org.
[26] § 55 odst. 3 občanského zákoníku (OZ) zmiňuje preferenci interpretace „příznivější" a nikoli „nejpříznivější", tak jak je stanoveno ve Směrnici. Proto se domnívám, že Směrnice nebyla v tomto ohledu správně transponována.
[27] Viz například Schulte-Nölke, H., Twigg-Flesner, Ch., Ebers, M. EC Consumer Law Compendium-Comparative Analysis, 2007, s. 333. Dostupné na http://www.eu-consumer-law.org/study_en.cfm [citováno 20. 3. 2008].
[28] V českém právním řádu je nesrozumitelná podmínka neplatná dle § 37 OZ, a tudíž by se k ní nepřihlíželo.

Směrnice ukládá členským státům Evropské Unie, aby princip transparentnosti provedly do právních řádů. Je zřejmé, že pro dosažení cílů směrnic není vždy nutné přijímat legislativní opatření. Na druhou stranu však národní právní řád musí zajistit, aby právo bylo dostatečně přesné a jasné, a aby si spotřebitelé mohli být vědomy svých práv.[29] V případě České republiky je zpochybňováno, zda je provedení směrnice v občanském zákoníku dostačující.[30] Domnívám se, že pro vyhovění cíle směrnice by bylo vhodné transponovat princip transparentnosti do občanského zákoníku explicitně.

Požadavek užití jasného a srozumitelného jazyka je pro ochranu spotřebitele klíčový. Otázkou zůstává, do jaké míry jsou si spotřebitelé principu vědomi a do jaké míry se dodržuje v praxi. Objevily se též návrhy na rozšíření ochrany[31] do té míry, že by Směrnice výslovně stanovila, že již samotné porušení principu transparentnosti mělo být sankcionováno neplatností podmínky tak, jako je tomu v případě její nepřiměřenosti. Zpráva Evropské komise rovněž zvažovala umožnění oprávněných osob zahájit soudní řízení s konkrétním dodavatelem s cílem zakázat mu použití nesrozumitelných či nejasných podmínek ve smlouvách, čímž by se rozšířila možnost tzv. kolektivních litigací.[32] Dle mého názoru by zahrnutí nesrozumitelných či nejasných podmínek nemělo vést beze všeho k závěru o jejich nepřiměřenosti, ale tato skutečnost by se měla stát dalším explicitně označeným kritériem při posuzování přiměřenosti podmínek. Rád bych závěrem zdůraznil, že úspěch směrnice v mnohém závisí na informovanosti spotřebitelů a přístupu odpovědných orgánů, a proto doporučuje vést informační kampaň a více se zaměřit na aktivní přístup orgánů oprávněných zahájit s dodavateli řízení ve věci zákazu užívání nepřiměřených podmínek.

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[29] Rozhodnutí ESD C 365/93 Komise proti Řecku [1995] I-499.

[30] Uvedený závěr platí zejména s ohledem na rozhodnutí ESD C-144/99 Komise proti Nizozemské království ECR [2001] I-3541, kde bylo judikováno, že princip transparentnosti musí být proveden zcela jednoznačně.

[31] The Law Commission and Scottish Law Commission. Studie číslo LAW COM č. 292 a SCOT LAW COM č. 199 „Unfair Terms in Contracts," 2005, s. 44. Dostupné na http://www.lawcom.gov.uk/unfair_terms.htm [citováno 9. 4. 2008].

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THE NEW APPROACH IN THE REGULATION OF NOMINAL CAPITAL IN COMPANY LAW: FUNDAMENTAL CHANGES OR DEADLOCK?

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Abstract

1. The Traditional Concept of Nominal Capital in Continental Laws (Basic typology of companies: companies with unlimited liability of partners and limited liability companies – their effect on the regulation of nominal capital) *2. Functions and Aims of Regulating Nominal Capital* (The traditional reasoning of capital and creditor protection and the analysis of its correctness) *3. Competition of Company Laws* (After 2004 a new chapter of competition has started among the newly accessed member states to draw more and more foreign investments and promote small and medium-sized enterprises – the increasing role of company law and the regulation of nominal capital) *4. New Dawn Breaks?* (New tendency is examined to abandon the traditional concept of nominal capital regulation) *5. Summing Up*

Key words

Company law, nominal capital, limited liability, registration of companies, competition

1. The Traditional Concept of Nominal Capital in Continental Laws

It is believed that the regulation of nominal capital plays a major role in company law, fulfilling various functions (detailed below) and thus serving the common good. First of all, let us sketch what we mean by the „traditional concept" of nominal capital.

Basically there are two types of business/commercial companies, regardless of the applicable law. The first group is characterized by the unlimited liability of the partners for the debts of the company. In other words, in this type of companies, there is at least one partner who personally, with his personal means, is held liable for debts exceeding the company's capital. The legislative approach towards these companies is simple: given that at least one partner bears unlimited liability, there is no practical need to introduce mandatory rules on the company's nominal capital. The unlimited liability of the partners

makes unnecessary to state nominal capital minimums. The above idea is reflected practically in every national laws all over Europe, e.g. in German law (see the *offene Handelsgesellschaft* and the *Kommanditgesellschaft*), in French law (see the *société en nom collectif* and the *société en commandité*), in British law (see the partnerships), in Czech law (see the *veøejná obchodní spoleènost* and *komanditní spoleènost*) and in Hungarian law (*közkereseti társaság, betéti társaság*), and so on.

The second group can be distinguished from the first with respect to the liability of the partners for in this group the partners (members, shareholders) are not liable – with narrow and strict exceptions – for the debts of the company. Their liability is limited to their initial contributions and assets in the company[1]. This is the point where we reach the core of the traditional concept of nominal capital regulation. Regulations usually consider important, as a quid pro quo for the limited liabilty of the partners, to state mandatory rules on nominal capital minimums. Nominal capital minimums are in most cases substantial amounts. This concept is present in many national codes of company law, eg. in Germany, Austria and Switzerland) (*Gesellschaft mit beschränkter Haftung, Aktiengesellschaft*), in Italy (*societá a responsabilitá limitata, societá per azioni*) Spain (*sociedad limitada, sociedad por acciones*) Poland (*spółka z ograniczoną odpowiedzialnoscią, spółka akcyjna*), Czech Republic (*společnost s ručením omezeným, akciová společnost*) or in some sense in Hungary (*korlátolt felelősségű társaság*, *részvénytársaság*) this idea is reflected in continental laws, however, is not that clearly followed in the Anglo-Saxon world. There is, indeed, a mandatory regulation on the minimum nominal capital for companies limited by shares, but this regulation follows from Great Britain's accession to the European Community and has not much to do with common law traditions. Private companies, not being subject to the unification and harmonization of European company law, still can be set up with any amount of nominal capital – eg. one pound.

The basic idea behind this regulation is that creditors are deprived of the possibility to seek satisfaction for their claims against the members of the company, the sole basis for satisfying their claims being the company assets[2]. Thus, if we regulate the minimum amount of nominal capital of companies operating under the limited liability of its shareholders and partners, creditors are given at least a slight ray of hope to settle their claims, at least in part. In other words: the regulation of nominal capital is stemming from the noble idea of creditor-protection in company law and thus serving the purposes of creditor-protection.

[1] BODOR, MÁRIA: *Korlátolt felelősségű társaság* (Budapest, 2001, 34. p.); FÖLDES, GÁBOR (ed.): *Pénzügyi jog* (Budapest, 2001, 56. p.); Act C. of 2000., Art.35., chapter (3).
[2] KISFALUDI, ANDRÁS: *A társasági jog* (Budapest, 1996, 48. p.)

The above idea seems reasonable and correct. However, we have to ask: is it true?

2. Functions and Aims of Regulating Nominal Capital

To answer our question, we have to first have a look at what we have believed earlier concerning the functions and aims of the regulation of minimum nominal capital for companies with partners with limited liability.

It is believed by some that the regulation of nominal capital minimums plays a filter-role: filters promoters and only the capable, the economically potent is allowed to proceed and set up a company and at the same time enjoy limited liability. In this sense, nominal capital is the redemption-price of limited liability. This approach also states that nominal capital regulation can secure the required „seriousness" of establishing a company[3]. If promoters risk a substantial amount, they are by all means more serious in their business conduct and thus the regulation of nominal capital guarantees prudent business operations better.

The basic reasoning for the necessity of nominal capital-minimums is creditor-protection. According to this concept, the larger minimum on nominal capital is set forth in our codes, the larger level of protection creditors can enjoy. We must agree to some extent – creditor-protection is – and always has been[4] – indeed a top priority in company law and a goal company law should promote.

Considering all the above and acknowledging that this kind of reasoning can be considered partially right, we believe that the traditional concept of nominal capital regulation, as interpreted and sketched above is unnecessary, a viewpoint that has already had its day. Even our company law in force discredits its fundamental components: nominal capital is not qualified security deposit for the risks of business activity[5]. It goes without saying that nominal capital is a part of the company assets (the company capital – equity capital), nevertheless companies are free to use their nominal capital to their own ends.

Our point of view is that there is no convincing reasoning to maintain a company law with madatory rules on nominal capital minimums, especially on private companies (limited liability companies). (The

[3] E. g. KOMÁROMI, GÁBOR: A korlátolt felelősségű társaság (In JUHÁSZ JÓZSEF (ed.): *Korlátolt felelősségű társaságok kézikönyve*, Budapest, 1990, 38. p.)
[4] FEHÉRVÁRY, JENŐ: *Magyar kereskedelmi jog rendszere* (1941, Budapest; 254. p.)
[5] Our company law in force states no requirements to treat nominal capital as safety deposit and after examining our Companies Act, we can adamantly state neither the concept of our code, nor the particular rules require such treatment.

legal approach towards companies limited by shares should be somewhat different and should set forth rules on share capital minimums.) We strongly believe that the regulation of nominal capital minimums can not serve the purposes of creditor-protection and thus is considered improper and inadequate means to reach its goals in this aspect.

3. Competition of Company Laws

Following the 2004 accession of ten new member-states[6] to the European Union, a new chapter of economic competition has started, which has been enhanced after the latest expansion-round[7]. Prior to the accession of the former socialist block, a considerable competition also existed to draw foreign investments and efforts were made in the then-candidate countries to make themselves more attractive for foreign capital than the others. In the 1990's candidates had many means to reach their goals, basically offering considerable tax allowances or even tax-exemptions to spur up economic growth and thus contribute to the economic transition and closing-up.

In the EU the above means are no longer disposable, there is only a limited arsenal to benefit from, for only techniques in full conformity with European law are allowed. This results in the new chapter of rivalism, the competition of member states. In this competition company law has started to play an incresing role. The age of tax-allowances seems to have passed. Company law has to promote investements and supply as much level of freedom for promoters and partners as possible. At the same time, a modal shift in EU policy on company law has been realised: creditor-protection has lost considerable ground in favour of the preferential treatment of small- and medium sized enterprises.

This new situation rises the value of competition law regulation: the more competitive a company law is, the more competitive the country's economy can be. Company law is of course only one element of a complex web of means to strengthen economic growth, but it is clearly seen, that it is playing a larger role than it played before 2004 and the competition is more fiery in the former socialist states, however, it carries over to other member states too.

4. New Dawn Breaks?

[6] 1 May, 2004. The following countries accessed the Union: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.

[7] 1 January, 2007 with Bulgaria and Romania. With respect to the commitment of the EU in favour of the West-Balkan region, further expansions can be foreseen.

It seems that some legislations started to realize the vital importance of the above and started to take measures to modernize their company laws, with respect to the regulation of nominal capital also. At the new millenium, the below nominal capital minimums were in force in some European company laws on private/limited liability companies:

- France: 7. 500 euros[8]
- Portugal 5. 000 euros[9],
- Czech Republic: 200. 000 Czech korún[10]
- Slovakia: 200. 000 Slovakian korún[11]
- Slovenia: 2.100.000 tolar[12] (approx. 8.000 euros)
- Lithuania: 10. 000 lita[13] (approx. 1.820 euros),
- Estonia: 40. 000 Estonian krona[14] (approx. 2.470 euros),
- Bulgaria: 5. 000 leva[15] (approx. 1.200 euros),
- Poland: 50. 000 zloty[16] (approx. 12.000 euros).
- Switzerland: 20. 000 francs[17],
- Germany: 25. 000 euros[18],
- Austria 35. 000 euros[19].
- Hungary: 3.000.000 forints (approx 12.000 euros).

The British and Irish private companies were allowed to operate without mandatory regulation on their nominal capital minimum.

In recent years the outlines of a new trend could be seen: moving further from what we defined as the traditional approach towards nominal capital. It is hard to decide whether this „trend" will become a constant tendency or not. What we can observe is that more and more legislations change their viewpoint on nominal capital and to a little extent handle the old approach on nominal capital minimum regulations as barriers to market entry and obstacles to run small or medium sized enterprises. This matter has not been dealt with independently and isolated from other important rules affectring SME's

[8] SÁRKÖZY, TAMÁS (ed.): Társasági *törvény, cégtörvény 2006.* (Budapest, 2006,, 31. p.)
[9] *Decreto – Lei no. 262/1986: Código das Sociedades Comerciais*, 276. §
[10] CZIRFUSZ, GYÖRGY – HULKÓ, GÁBOR: Korlátolt felelősségű társaság alapítása Csehországban (In: *Fiatal Oktatók Tanulmányai* Vol. 2., Győr, 2004, 190. p.)
[11] *Zakón c. 513/1991 Sb. Obchodní Zakoník*, 108. §
[12] 30/1993 *Zakon o Gospodarskih Družbah*, 410. § (1)
[13] Companies Act, (VIII – 1835/2000.) 2. § 4.
[14] Estonian Commercial Code, (*Riigi Teataja* 1995, 26-28, 355), 136. §
[15] *Търгоски закон*, 1991. 06. 18., 117. §
[16] *Ustawa z dnia 15 wrześniz 2000. r.: Kodeks spólek handlowych*, Art. 154. § 1.
[17] *Bundesgesetz betreffend die Ergänzung des Scweizerisches Zivilgesetzbuches (Fünfter Teil: Obligationenrecht),* Art. 773. B.
[18] *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, 1892. 04. 20.), 5. § (1)
[19] 58/1906 *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*), 6. § (1)

market position. Changes were usually carried out hand in hand with an overall simplification of both substantial and procedural rules, including the introduction of more favourable registration deadlines and registration fees[20].

In Spain, the new „simplified" private company was introduced, along with many new rules to encourage the will to enterprise, however, the nominal capital of 3.012 euros was left unamended[21]. From 2003 it is possible in France to set up a limited liability company *(société à responsabilité limitée*) with symbolic nominal capital of one euro – thus practically the strict regulation of nominal capital minimum was abolished completely.[22] It is worth to keep an eye open on the Japanese reforms in company law: reflecting global trends, promoters are free to establish a „one-yen-company", a private company with a nominal capital of at least one yen.[23] As we know, there are considerable efforts in Germany to reduce the nominal capital minimum of the GmbH to 10.000 euros – after realizing that approximatelly 15.000 companies of German interest are set up in Great Britain each year to capitalize on the divergences between the German and British company laws. In the Netherlands, a proposal for reforms in this sphere is also in the works.[24]

Can we call it a new dawn? Or is it just the trend of the present and will be forgotten soon? We believe that it is rather the first than the second, however, we can not decide. Nevertheless, we should stress that finally the Hungarian legislation started to follow the path beaten by the above countries and decided to reduce nominal capital minimums. During the preliminary works of our new Companies Act[25], efforts were made to bear through the concept of the „thousand-forint limited company"[26]. These efforts finally turned out to be unsuccesful, Act IV. of 2006 left the former rules on nominal capital unamended. But then, out of the blue, with a 2007 alteration of the code, the nominal capital limits changed radically, however not that radically as aimed earlier.

With respect to our current law in force, the nominal capital minimum on limited liability companies was reduced to 500.000 forints (and 100.000 forint if it is a single member company). The minimum nominal capital of 20.000.000 forints on joint-stock companies was reduced to 5.000.000, applicable only to private companies, the limit of 20 million is still in force on public companies.

[20] See Act LXI of 2007, considerably amending both the Companies Act and the act on registration procedure.
[21] FERNANDO JUAN MATEU: The Private Company in Spain – Some Recent Developments (*European Company and Financial Law Review*, 2004/1)
[22] SÁRKÖZY: op. cit. 2006, 31. p.
[23] SÁRKÖZY: op. cit. 2006, 53. p.
[24] SÁRKÖZY: op. cit. 2006, 31. p.
[25] Act IV of 2006.
[26] See SZEGEDI, ANDRÁS: Az „ezerforintos" kft. védelmében (Gazdaság és Jog, 2007/3)

5. Summing Up

We believe that the basic goal of company law is to draw up an equilibrium between the rightful expectations of creditor-protection and the promotion of freedom concerning the establishment and operation of companies. However, we strongly feel that the basic goals of creditor-protection can be reached through traditional means of civil law, basically contract law and the arsenal company law employs is not necessary adequate to supply the same level of protection. In this sense, company law can not guarantee anything but a rather limited success in creditor protection.

On the other hand, rules of creditor-protection, if not serving their real purposes, can be considered considerable barriers to market entry for SME's and can be treated as anticompetitive measures. Anticompetitive in the sense of the competitiveness of companies and in the sense of anticompetitiveness of company law. That is why we support the idea of the reduction of nominal capital limits in company law. We are of course aware of the fact that this measure in itself is not able to supply competitive advantages, but can play a major role even in a symbolic way. However, we urge reforms be carried out completely and steadily and thus modernise company law.

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REFORM OF THE HUNGARIAN INSURANCE LAW

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Abstract

There is a relevant lawmaking process in Hungary, the codification of the new Civil Code. The Hungarian Ministry of Justice and Law Enforcement and its experts stated, that their work is in final stage, so it's time to talk about the latest tendencies and improvements in a nutshell, focusing mostly on insurance contract law. In this paper I would like to deal only with matter of principles.

Introduction

There are countries with separate Act of Insurance Contract Law, for example the so called "Versicherungsvertraggesetz" in Germany, but in Hungary the lawmaker chose another way keeping the current dual system of codes: one for the private and one for the public law.

The **Hungarian Civil Code** was enacted in 1959, but came into force in 1960. At this time only one insurer existed, the so called State Insurer (ÁB – Állami Biztosító), which was a part of the social security system. The State Insurer was a monopoly, so there was no competition until 1988, when ÁB divided into two state owned insurance companies (Állami Biztosító and Hungária Biztosító).

Today there are 26 insurance private limited companies with registered office in Hungary, and two other companies have authorization of foundation. 35 insurer associations exist, 8 foreign companies have branch offices, and 200 insurers from EU member states [1] provide cross-border insurance services.

The first Act of Insurance (Act XCVI of 1995 on Insurance Institutes and Insurance Activities) contained mostly rules of public law, and this act was replaced by the second Act of Insurance (Act LX of 2003 on Insurers and the Insurance Business), which came into force on the first day of Hungary's EU membership (1 May 2004). This date was not coincidence, this act made Hungary's insurance law conform to the EU rules. (This dual system was extended by the Act CLIX 2007 on Reinsurers.)

The second Act of Insurance enables to create insurance co-operatives, but there is no one on the Hungarian insurance market, so we can say, that all Hungarian insurance companies are profit-oriented, and the principle of **solidarity** is almost missing. There are a few exceptions however, for example The Insurance and Friendly Society of the Hungarian Attorneys helps for the orphans of its former members. This act contained contractual and other rules of private law, for example the minimum content requirements for insurance contracts, duty of disclosure etc.

The main goal of the original proposition was to separate consequently private and public rules, but the concept has changed during the codification, to make the Civil Code an abstract act, all rules with secondary importance will be promulgated on a lower hierarchical level.

The rules of electronic commerce, voluntary mutual insurance funds and private pension funds remain the field of sector-specific lawmaking.

The Hungarian Civil Code deals only with insurance contracts (characterized by the concept of risk-distribution), and says nothing about insurance associations with legal personality, which has to be revised, because there are insurance legal relationship on the ground of association's membership.

One-sided cogency

The question of using dispositive or cogent (mandatory) rules is always hard to answer. The principle of freedom of contract is often competes with the principle **of insurer and customer protection**. The definition of customer and customer contracts of the current Hungarian Civil Code are the followings:

Section 685. d) 'consumer' shall mean any person who is a party to a contract concluded for reasons other than economic or professional activities.

Section 685. e) 'consumer contract' shall mean any contract concluded by a consumer and a person acting within the scope of his economic or professional activities.

There is a trend in the EU to label micro ventures, or rather small and medium enterprises (SME) as customers, but the insurance sector has a promise from the under-secretary of the Ministry of Justice and Law Enforcement to label only natural persons as customers in connection with insurance contract law.

Of course there is a great need to create an effective customer protection but today there is almost a separate civil law of customer's so it's wise to define the requirement's of being customer as precisely as possible.

There are three main areas of one-sided cogency [2]: customer protection, insurance contract law and labour law. In all three legal fields the main goal of the regulation is to protect the weaker party of the legal relationship. The customer [3], the insured person and the employee are presumed indisputably to be weaker than the other party (insurer, employer etc.) from an economical point of view, but today it's not always true in insurance contracts. The rules of insurance contract law was modelled for community contracts with the State Insurer in 1959, but today in **business to business** (B2B) contractual relationships the insured (legal) persons are often stronger than the insurers.

For example banks and other financial institutions have mostly more ability of economic interest-enforcement, which is clearly demonstrated by the fact, that only one (the largest) insurer (Allianz) owns a bank, but several banks own an insurer company.

Insurers almost always operate with general contract terms, and a natural person can hardly achieve its modification, but when the insurers are contracting with powerful transnational companies, the high amount if premium makes it possible to create discrete contract, differing from general contract terms [4].

Next to the economic size, the other argument of using one-sided cogency is the question of laymanship. The insurer is a professional, who works daily with damage statistics, mortality tables, using knowledge of **insurance mathematic** and insurance law. The insurance company is an employer of a leader actuary, a leader lawyer specialized in insurance law, but an average insured person (mostly without a university / college degree) has no experience in the field of insurance contracts.

One-sided cogency is almost a Hungary-specific term, because it limits the freedom of contract of the parties, and makes is impossible to create a flexible agreement according to the interests of the parties.

This rule is likely to by revised, and its scope will be reduced relevantly: it will be mandatory for costumer insurance contracts, but it will be exceptional in business to business contracts. Of course an

insurer being a legal person will be not defenseless, in case of unfair contract terms he can bring an action on the court against the insurer.

Formal requirements of the insurance contracts

The **written form** is necessary to the conclusion of insurance contract, and it will remain the main rule for the amendment of contract and resignation too. This written form is indispensable to all legal statements with legal consequences, but it's too strict rule for all will statements from an economic point of view. Sending letters by recorded delivery is very expensive considering the high amount of their clients and insurance policies (in Hungary the postal service is still a monopoly, but it will change in the near future). There are also problems with some modern ways of communication. Sending documents via fax or via email with qualified electronic signature is a good way to create written legal statements, but in that case only the date of sending is can be verified. Concerning the typical method of regulation, we can say, that almost all act and other legal instruments deal with the date of reception, so this modern ways of sending legal statements are not fully compatible with the legal requirements mentioned above.

Formation of the insurance contract with implicit conduct

In Hungary the insurer has fifteen days to answer its contractual offers, because there is a relevant sanction in case breaching the obligation mentioned just before.

Section 537. (2) A contract shall also be created if an insurer does not respond to an offer within fifteen days. In such a case, the contract shall be created retroactively as of the date on which the offer is conveyed to the insurer or its representative.

This rule sanctions the breaching of the principle of cooperation in the civil law, if the insurer is lazy to answer to the proposal, then the contract will be formed as a consequence, and it's irrelevant, if the proposition disagrees with the custom of trade or with the insurer's **commercial practice**. In that case the assumption of risk in the discrete insurance is in contrast to the principles of insurance mathematic and statistic, so the insurer will probably resign the contract. Of course in the practice the insurer makes the contractual offer, and not the client.

This rule will be reduced to customer insurance contract, and it will apply only to proposals which fit the general contract terms of the insurer's. In my opinion this change is very rational, because in business to business relations – according to the high insured value and complexity of perils – there should be more time for the insurer to answer, not to mention the principle of freedom of contract.

Liability insurance

The insured party shall be entitled, under a liability insurance contract, to request the insurer to exempt him, up to the limit specified in the contract, from paying for damages for which he is legally liable [5].

The liability insurance contract evolved firstly to protect the **tortfeasor**, it helps not to be cleared out in case of small negligence and high amount of damage, but today it protects the aggrieved person at least so much in case of the tortfeasor's ability or will to pay is missing [6].

Property insurance

The insurance contract can cover the so called self-damages, when the tortfeasor causes loss to himself. At first look it seems to be a matter of liability insurance, but there is no legal provision to pay self-damages (an owner can do everything with his property), so it's surely property insurance. The main differences between first party insurance compared with tort liability are the following:
1. Insurance: almost entirely optional
2. Insurance does not provide 'full compensation'
3. The negligence on the part of the insured will often not affect a first party insurance claim. [7]

The duty of damage prevention

From an economic point of view, it's extremely important to avoid property damages. The **doctrine of insurable** interest provides that an insured person should not make any net profit from the event should only receive coverage for the actual loss. The duty of damage prevention binds the insured not only during the completion of the agreement, but before forming a contract too. Insurers generally make such requirements for contracting, for example the installation and usage of mechanical / electronical safety devices.

The concrete types of the security devices mentioned above depend on the type of perils and the insured sum too, for example to avoid damages of theft could be useful installing a GPS (general positioning system), and to protect food from spoiling there can be ordered to install some kind of cooler device.

While the installment of the safety devices is easy to verify, it's much harder to check, whether this instruments were functioning or not at the time of the damage (mostly, when the hull was perished or stolen). The existence of the facts has to be certified by the interested party, but in this case in my opinion only the theft can't conduct the failure of the insured's lawsuit.

Naturally the costs have to be beared by the insured, although insurers take off relevant load from the shoulders of their clients with – generally together with the state authorities - checking regularly the on the market buyable security devices, and giving certificate of „recommended", guaranteeing the quality of the product, and the conformity with the general contract terms of the insurers.

During the accomplishment of the contract of carriage of goods, the carrier has to follow with attention the duty of damage prevention in his decisions, especially in case of choosing the appropriate hull, direction, resting-place, and – when the goods are valuable – keeping the parameters (price, destination, guarding etc.) of the freight in secret. In that case special legal regulations concerning dangerous goods make it impossible, but insurance law shouldn't tolerate marketing-inspirited steps in my opinion.

The duty of damage prevention is an obligation of performance in connection with the installment and usage of the safety devices, thus only their lack can be labeled as a breach of the contract, in connection with the resulting of the insured events we can speak of only a duty of care, because the most careful enforcement of the duty of damage prevention is only capable of lowering the chance of damaging events, and not of full exclusion (especially in case of vis maior).

"The unique characteristic of warranty is that materiality and causation are irrelevant. It is submitted that the rationale of warranty is that the insurer only accepts the risk provided that the warranty is fulfilled. The doctrine of warranty was necessary when it was introduced into common law over three hundred years ago; however, today it causes great hardship for the insured in both marine and non-marine insurance contracts." [8]

The duty of mitigation of damages

Under this principle the insured is obliged to lower the amount of the damages as small as possible. The obligation of mitigation of damages is secondary to the duty of damage prevention. The period of the duty mentioned above lasts after the materialization of the damaging event until the termination of the insurance contract.

This statement could be amazing first time, because the duty during the materialization of the insured event can be labeled notorious, but the other case can be grounded adequately too.

Amongst the classic obligations of mitigation of damages can be mentioned the fire service, the pumping of leaked ship, and the traction of a stranded ship etc.. At this point the damaging event has occurred, but its amount can be lowered yet.

In my opinion it's useful to rule the bearing of costs to be beared by the insurer, in case of both successful and what is more the unsuccessful efforts to mitigate damages. It can assist the insured to give a rational resolution, and he shouldn't hesitate about the economic efficiency and chance of his mitigation of damages.

(Naturally the insurer's mentioned obligation shall not cover irrational cases, misuse of rights, for example when the pilot maneuvers the burning truck straight into the river instead of using a fire-extinguisher.)

It's possible the reduce the damages posteriorly too, especially in case of theft / robbery the accusation and the seizure warrants of the hull's, watching the parameters of the integrated GPS could at least partially lower the materialized damages.

The duty of cooperation

The duty of cooperation is a classic principle of civil law [9], which influences – to correspond with the duty of disclosure – the whole insurance legal relationship, from contract's formation to the termination of the contract. In my opinion the most relevant form of this principle is the procedure of loss adjustment, where after asserting a claim the insured has several concrete duty to inactivity and sufferance.

The insured can hardly modify the field and parameters of the insured event, only in case of damage prevention and mitigation of damages. The insured has to create the possibility for the representative of the insurer, the check the damaging event. In that case the insurer can't verify the circumstances and parameters of the insured event, and can't create the real calculation of the damages.

According to the duty of cooperation the insured person has to provide **notice of loss** (immediately after the occurrence of a loss) and **proof of loss** for the insurer.

Summary

There is much to do with the codification [10], and of course it's hard to choose the correct solutions acceptable by both insurers and – especially customer – insureds too. Their direction is unquestionable good, and I hope that their self-sacrificing work will be successful, and call forth a well-working Civil Code.

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EUROPEIZACE SOUKROMOPRÁVNÍCH DELIKTNÍCH VZTAHŮ

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Abstrakt

Tento příspěvek je věnován právním aspektům europeizace soukromoprávních deliktních vztahů. Cílem příspěvku je poukázat na jednotlivé způsoby sbližování deliktního práva na evropském kontinentu. Harmonizace deliktního práva je podmíněna jednak regulativními procesy prostřednictvím nařízení a směrnic ES a dále cestou spontánní europeizace soukromoprávních deliktních vztahů. Do kategorie spontánní europeizace deliktního práva lze zařadit i projekt Principů evropského deliktního práva vypracovaný Evropskou skupinou deliktního práva.

Klíčová slova

europeizace práva, regulativní europeizace deliktního práva, spontánní europeizace deliktního práva, Principy evropského deliktního práva

Abstract

This article deals with legal aspects of europeisation of tort law. The aim of this paper is to show individual methods of harmonization of tort law. Harmonization of european tort law is conditional on regulatory processes by way of EC regulations and directives and furthemore by way of spontaneous europeisation of tort law. Principles of European Tort Law project, drawn up by European Group on Tort Law, belongs to the category of spontaneous europeisation of law.

Key words

Europeisation of law, regulatory europeisation of tort law, spontaneous europeisation of tort law, Principles of European Tort Law

Pojem europeizace

I přes jistá zakolísání integrační vývoj Evropských společenství na konci 20. století a na počátku 3. tisíciletí zrychlil. S tím souvisí i nárůst kompetencí jejich orgánů a rozšiřování politické dimenze

integrace vedle dosud nejvýraznějšího ekonomického rozměru. Rozvoj a upevnění pozice ES/EU v ekonomické, politické a právní oblasti vynesl do popředí otázku působení EU na členské státy a jejich právní řády a odhalil natolik významné odlišnosti, že v různých společenskovědních disciplínách začala krystalizovat specifická oblast poznání označovaná jako studium *europeizace*.[1]

Problematický může být již samotný překlad tohoto nově se objevujícího pojmu, neboť se vyskytuje hned v několika podobách – europeizace, evropeizace, euizace, europeanizace. Při bližším seznámení se s konkrétním textem často zjistíme, že jsou všechny tyto termíny synonymické. My se v následujícím příspěvku přidržíme pojmu *europeizace*, neboť podle našeho názoru nejvěrněji vystihuje podstatu a význam tohoto slova, a kromě toho s tímto pojmem pracuje i podtitul konference.

Z vědeckého hlediska lze pojem europeizace analyzovat ze dvou úhlů pohledu. V prvním případě se hovoří o tzv. základním významu. Europeizace v tomto smyslu představuje široké spektrum procesů politických, právních, ekonomických, sociálních a jiných s cílem vytvořit silnou a jednotnou Evropu přes upevňování určitého politického stylu, kulturních tradic, náboženství, politických a právních principů i identity na evropském kontinentu a jejich šíření do jiných částí světa. V tomto směru je europeizace tvořena procesy konstrukce, rozptylování a institucionalizace formálních a neformálních pravidel, procedur, paradigmat, stylů, způsobů uspořádání různých záležitostí a sdíleného přesvědčení norem, které se nejprve definují a konsolidují v politických procesech na úrovni EU a posléze dochází k jejich vtělení do logiky domácího (státního a substátního) diskurzu a veřejných politik.[2]

Pro nás je ovšem zajímavější druhý úhel pohledu označovaný jako systematizovaný koncept. Tento koncept vyjadřuje myšlenku, že jednotlivé odborné disciplíny s pojmem europeizace pracují svým způsobem a nabízejí tím i svůj intradisciplinární přístup. Ze systematizovaného konceptu vychází i následující text.

Regulativní europeizace práva

V právním slova smyslu lze proces europeizace práva charakterizovat jako fundamentální změny v systémových zdrojích práva v jednotlivých právních řádech EU, nebo jako proces sbližování (aproximaci, harmonizaci, unifikaci) právních řádů členských států EU, nebo jako proces změny

[1] Srov. *Zemanová, Š.* Europeizace – aktuální problémy a perspektivy. Mezinárodní vztahy, č. 4, 2007, s. 30.
[2] *Radaelli, C. M*. Europeanization: Solution or problem? European integration online Papers, vol. 8, 2004 n. 18, p. 4.

v metodologických postupech právní vědy.[3] Je třeba říci, že většinově je mezi právnickou veřejností chápán proces europeizace práva ve smyslu harmonizace či unifikace jednotlivých právních řádů EU. I Evropská komise, hovoří-li o europeizaci práva, má nejčastěji na mysli sbližování národních právních úprav.

Sbližování práva je velmi často prezentováno jako důležitý předpoklad liberalizace evropské ekonomiky s tím, že různá pojetí pojmů v národních právních řádech mohou způsobit problémy v přeshraničním obchodním styku.[4] Zároveň je právo integrální součástí společenské kultury a národní právní identity každého státu, proto je otázka europeizace práva v mnohých evropských státech vnímána jako velmi citlivá záležitost, neboť některé významné soukromoprávní kodexy bývají občany těchto států vnímány jako nositelé národní právní identity, osvědčených tradic či historické paměti národa.

V závislosti na předmětu právní úpravy, metodologii tvorby a technice přijímání právních pravidel lze rozlišovat regulativní (regulatorní) a neregulativní (spontánní) metody rozvoje deliktního práva v rámci evropského soukromoprávního prostoru. V případě regulativních metod se jedná o organizovaný a cílevědomý proces, v rámci EU charakterizovaný přijímáním nařízení a směrnic jako forem sekundárního komunitárního práva. Neregulativními metodami, které nemají donucující charakter, jsou instrumenty *soft law*, samoregulace, sektorové dohody, koordinace finanční intervence, informační kampaně aj.[5]

Zastavíme-li se u regulativních metod v oblasti civilně právní odpovědnosti, zjistíme, že právní úprava soukromoprávních deliktních vztahů (kromě určité výseče mezinárodního práva soukromého[6]) je doposud věcí vnitrostátní legislativy. Právní předpisy ES mají v této oblasti pouze omezenou roli, proto se komunitární úprava odpovědnostních vztahů zaměřila spíše na několik málo specifických oblastí, které přímo ovlivňují společný trh nebo volný pohyb osob a zboží.[7] Velmi často se jedná o právní úpravu navazující na některé harmonizované smluvní vztahy, například spotřebitelské.

[3] *Ziller, J.* L'Européisation Du Droit: De L'Élargissement Des Champs Du Droit De L'Union Européenne À Une Transformation Des Droits Des États Membres. EU Working Paper LAW, No. 19, 2006, abstrakt.
[4] *Wagner, G.* The Project of Harmonizing European Tort Law. In: Koziol, H. (ed.) Tort and Insurance Law Yearbook – European Tort Law 2005. European Centre of Tort and Insurance Law, Wien: Springer, 2006. p 650 - 682.
[5] *Tomášek, M.* Lesk a bída „europeizace" občanského práva. Právník, č. 1, 2004, s. 2.
[6] Europeizace mezinárodního práva soukromého např. in *Rozehnalová, N.* Internacionalizace a europeizace v mezinárodním právu soukromém. Mezinárodní a srovnávací právní revue/International and Comparative Law Review, č. 9, 2003, s. 75 – 79.
[7] *Doležel, T.* Europeizace právních úprav náhrady škody na zdraví a náhrady imateriální újmy. Právník, č. 4, 2007, s. 425.

Vazby na odpovědnostní vztahy vykazují zejména tyto směrnice ES:

- Směrnice Rady 85/374/EHS o sbližování právních a správních předpisů členských států týkajících se odpovědnosti za vadné výrobky;
- Směrnice Evropského parlamentu a Rady 1999/44/ES o určitých aspektech prodeje spotřebního zboží a záruk na spotřební zboží;
- Směrnice Rady 90/314/EHS o souborných službách pro cestování, pobyty a zájezdy.

Zejména pokud jde o první směrnici, patří mezi stěžejní předpisy na ochranu hospodářských zájmů spotřebitele, když z pohledu právní úpravy náhrady škody je významná z toho důvodu, že umožňuje spotřebitelům uplatňovat nároky v soudním řízení před domácími soudy.[8]

Soukromoprávních deliktních vztahů se okrajově týkají i tzv. motorové směrnice:

- Směrnice Rady 72/166/EHS o sbližování právních předpisů členských států týkajících se pojištění občanskoprávní odpovědnosti z provozu motorových vozidel a kontroly povinnosti uzavřít pro případ takové odpovědnosti pojištění;
- Směrnice Rady 84/5/EHS o sbližování právních předpisů členských států týkajících se pojištění občanskoprávní odpovědnosti z provozu motorových vozidel;
- Směrnice Rady 90/232/EHS o sbližování právních předpisů členských států týkajících se pojištění občanskoprávní odpovědnosti z provozu motorových vozidel;
- Směrnice EP a Rady 2000/26/ES o sbližování právních předpisů členských států týkajících se pojištění občanskoprávní odpovědnosti z provozu motorových vozidel a o změně směrnic Rady 73/239/EHS a 88/357/EHS;
- Směrnice Evropského parlamentu a Rady 2005/14/ES, kterou se mění směrnice Rady 72/166/EHS, 84/5/EHS, 88/357/EHS a 90/232/EHS a směrnice Evropského parlamentu a Rady 2000/26/ES o pojištění občanskoprávní odpovědnosti z provozu motorových vozidel.

Účelem těchto „motorových směrnic" je vytvořit zvláštní opatření použitelná pro poškozené, jež mají nárok na náhradu škody nebo zranění v důsledku nehody v jiném členském státě než ve členském státě bydliště nebo sídla poškozeného, jež byly způsobeny provozem vozidel pojištěných a majících obvyklé stanoviště v členském státě.

[8] Směrnice Rady 85/374/EHS o sbližování právních a správních předpisů členských států týkajících se odpovědnosti za vadné výrobky, byla do českého právního řádu transformována zákonem č. 59/1998 Sb., o odpovědnosti za škodu způsobenou vadou výrobku. Z literatury srov. např. *Král, R.* Provedení směrnic do národního práva na příkladu odpovědnosti za škodu způsobenou vadou výrobku. In: Tichý, L.(ed.) Europeizace národních právních řádů. Soubor příspěvků přednesených na Symposiu o rozšiřování Evropské unie ve dnech 15. – 17. 11. 1999 na PrF UK. Praha: Univerzita Karlova, 2000, s. 216 a násl. *Fiala, J.* Důsledky zákona č. 136/2002 Sb. pro určení odpovědnosti za vady při prodeji v obchodě. Právní zpravodaj, 2003, č. 1, s. 1 a násl.

Pouze pro úplnost se sluší dodat, že po delších tahanicích mezi Evropských parlamentem a Evropskou komisí bylo dne 11. července 2007 přijato nařízení Evropského parlamentu a Rady 2007/864/ES o právu rozhodném pro mimosmluvní závazkové vztahy (Řím II), které se vztahuje na mimosmluvní závazkové vztahy občanského a obchodního práva v případě kolize právních řádů. Svou povahou patří toto nařízení do rámce mezinárodního práva soukromého, a proto se mu nebudeme blíže věnovat.

Ze stručného výčtu jednotlivých regulativních nástrojů vyplývá, že oblast civilně právních odpovědnostních vztahů není v současné době výrazněji europeizována. Jedná se pouze o fragmentární úpravu některých dílčích oblastí, zejména spotřebitelské věci a pojištění občanskoprávní odpovědnosti z provozu motorových vozidel. Tyto směrnice se však týkají deliktních vztahů pouze okrajově. Předmětem jednotlivých směrnic je vždy toliko určitá výseč deliktního práva. Tato technika úpravy není příliš šťastná, protože v konečném důsledku může vést k nepřehlednosti, ale i případným vnitřním rozporům, včetně problémů nejednotnosti interpretace a aplikace.[9]

Spontánní europeizace práva

Přes veškeré přirozeně determinované tendence směřující k integračním, harmonizačním či unifikačním snahám v oblasti evropského soukromého práva se zdá, že bruselská politická realita je nakloněna zatím pouze omezenější „unifikaci" občanského a obchodního práva prostřednictvím instrumentů *spontánní europeizace* soukromého práva.[10] Spontánní europeizace soukromého práva (tzv. *soft law*) je paralelou cílevědomého procesu europeizace práva „klasickou" regulativní metodou prostřednictvím sekundární legislativy práva ES. Tento spontánní proces má své hluboké kořeny v tradičním kontinentálním systému práva, neboť již v dobách rozkvětu římského práva a později v období kanonickém a osvícenském, tvořily „soukromé" sbírky podstatnou část právního poznání.

V odborné právnické literatuře se hovoří o tom, že jedním z motivů spontánního vývoje evropského práva je znovuobjevení společné evropské tradice, neboť právní základy jsou společné všem národním

[9] Blíže *Hurdík, J., Fiala, J., Ronovská, K.* Východiska a tendence vývoje českého občanského práva po vstupu České republiky do Evropské unie, In: Hurdík, J., Fiala, J., Selucká, M. Evropský kontext vývoje českého práva po roce 2004. Brno: Masarykova univerzita, 2006, s. 158.
[10] *Ronovská, K.* Unifikační tendence na poli sjednocené Evropy. Časopis pro právní vědu a praxi, č. 3, 2007, s. 217-221.

systémům evropského soukromého práva. Na první pohled se zdá, že společná římskoprávní tradice utrpěla vznikem národních kodifikací, které jsou svébytným výrazem národní identity, ovšem pravdou je, že se tyto kodifikace[11] samy dovolávají obecných právních zásad, což bylo podmíněno osvícenským a přirozenoprávním základem těchto epochálních kodexů soukromého práva.[12]

I v dnešní době hraje proces spontánní europeizace práva významnou úlohu ve všech právních řádech evropských států. Přesto, že pramenem práva v kontintálním právním systému není literatura, těší se komentáře základních kodexů velké oblibě a stále častěji se v soudních rozhodnutích objevují odkazy na časopisecké články významných odborníků právní vědy a praxe. Mezi přední přispěvatele odborných periodik patří i současní tvůrci české jurisprudence. Právníci mezi sebou prostřednictvím těchto textů navzájem šíří zkušenosti s konkrétními soukromoprávními případy, které v rámci své praxe řeší. Literatura tak sice formálně právně není pramenem práva a ani materiálně právně se nevyrovná síle váhy stěžejních precedentů, na druhou stranu je třeba přiznat, že již dnes tvoří nezanedbatelnou součást české právní vědy a její prorůstání do právně aplikační praxe nezadržitelně roste.

Cílem spontánních kodifikací není snaha o vytvoření jednotného práva, jehož pramenem budou právní normy, které v jednotlivých smluvních státech budou bezprostředně aplikovány v oblasti jejich působnosti na konkrétní právní vztahy. Spontánní kodifikace jsou zaměřeny na vytvoření obecných (obecně přijatelných) základů jednotné úpravy. Mají proto buď formu tzv. modelového zákona, který je vzorem národní kodifikace, anebo formu určitých zásad, obsahujících shrnutí obecně přijatelného poznání v dané oblasti právní úpravy.[13]

Někteří autoři v této souvislosti upozorňují na drobná úskalí spontánní europeizace, která sice mohou vést k vytvoření společných principů určité oblasti civilního práva, ne vždy však zaručují, že přijaté řešení bude také odpovídat aktuálním potřebám společnosti.[14] Zajisté je potřebné věnovat těmto pochybnostem náležitou pozornost, nemyslím si však, že by právě tyto spontánní kodifikační snahy nereflektovaly recentní společenský vývoj. Naopak jsem přesvědčen, že většina soukromých sbírek obligačního práva výrazněji odráží aktuální společenskou realitu, neboť z ní sama vyvěrá a navíc jsou

[11] Srov. čl. 7 rakouského ABGB, čl. 3 italského Codice Civile, čl. 65 španělského Código Civil. Výjimkou je francouzský Code Civil ve své původní edici, v němž převažuje pozitivněprávní myšlení a který na přirozenoprávní zásady neodkazuje, což ovšem neznamená, že je v mnohých případech nereflektuje.
[12] *Tichý, L.* Spontánní europeizace soukromého práva. Evropské právo. Příloha Právních rozhledů, 2000, č. 2, s. 2.
[13] *Tichý, L.* op. cit., s. 1. Srov. též *von Bar, Ch.* O celoevropské odpovědnosti národní kodifikační politiky. In: Švestka, J. Dvořák, J. Tichý, L. (eds.) Sborník statí z diskusních fór o rekodifikaci občanského práva. Praha: ASPI, 2006, s. 11 a násl.
[14] Srov. např. *Hurdík, J., Fiala, J., Ronovská, K.,* op. cit. sub. 9, s. 169.

velmi často spontánní projekty tvořeny samotnými účastníky soukromoprávních vztahů, proto je vysoce pravděpodobné, že obsah projektů odpovídá i jejich potřebám. Rozhodně tyto spontánní snahy vykazují mnohem více moderních společenských rysů než mnohé z legislativních pokusů státních či nadnárodních institucí, které jsou často ve vleku společenské reality.

Mezi projekty charakterizované metodou spontánní europeizace práva patří zejména UNIDROIT Principy mezinárodních obchodních smluv, Principy evropského smluvního práva (PECL), Evropský občanský zákoník (ECC) a rovněž i pro nás stěžejní Principy evropského deliktního práva (PETL).[15] Třem prvně jmenovaným projektům se blíže věnovat nebudeme, jelikož by to přesáhlo možnosti této práce, a proto pouze odkážeme na dnes již poměrně bohatou - i českou - literaturu.[16]

Spontánní europeizace civilně právních odpovědnostních vztahů

Přesto, že oblast soukromoprávních deliktních vztahů není v rámci evropského prostoru, až na fragmentární výjimky, kodifikována, ukazuje se, že v oblasti náhrady škody a mimosmluvní odpovědnosti neexistuje mezi jednotlivými národními právními řády tolik rozdílů. Zdá se, že základní pojmy z oblasti deliktního práva jako protiprávnost, škoda, příčinná souvislost či zavinění, mají v právních řádech evropských států podobný obsah a je s nimi v právně aplikační praxi obdobně zacházeno. Samozřejmě, že některé rozdíly stále přetrvávají, zejména pokud jde o anglosaský přístup v podobě *tort law*, na druhou stranu se zdá, že se jedná pouze o jiný způsob často vedoucí k dosažení téhož cíle. Nadále však přetrvávají podstatné rozdíly v členských státech, především pokud jde o otázky protiprávnosti, objektivní (absolutní) odpovědnosti, obsahu a rozsahu náhrady škody nebo otázky promlčení.

Poznatek o vzájemné obsahové podobnosti fundamentálních dílčích institutů z oblasti deliktního práva může být vnímán jako povzbuzující stimul ke spontánní europeizaci této části soukromého práva. Ve prospěch budoucí kodifikace deliktního práva hovoří rovněž předmět a charakter úpravy. Je třeba zdůraznit, že na rozdíl od smluvního obligačního práva založeného na autonomii vůle subjektů právního

[15] Ačkoliv se již na počátku 90. let minulého století pokusil Evropský parlament vyzvat Evropskou komisi k podnícení procesu europeizace soukromého práva, Evropská komise zůstala v té době ještě nečinná. Úkolu se dobrovolně chopili nadšení akademikové, kteří prvně zpracovali významnější publikaci týkající se možné europeizace soukromého práva v rámci evropského prostoru. Srov. *Hartkamp, A. S.* et al. Towards a European Civil Code. Nijmegen: Kluwer Law International, 2. vyd., 1998, s. 288.

[16] Z české literatury lze zejména doporučit komparativní srovnání In: *Pelikánová, I.* Aktuální otázky obligačního práva a jeho kodifikace v evropském i českém kontextu. Právní rozhledy, č. 17, 2007, s. 656-669.

vztahu a převažující dispozitivnosti úpravy, je pro deliktní právo typická omezenost vůle adresátů právních norem a rovněž i kogentnost právní úpravy.[17]

V současnosti patrně nejvýznamnější počin v rámci spontánní europeizace civilně právních odpovědnostních vztahů tvoří Principy evropského deliktního práva (PETL), kterým bude v následující části příspěvku věnována bližší pozornost.

Za zmínku rovněž stojí, že v současné době vrcholí práce tří pracovních skupin[18] na tzv. Společném referenčním rámci (The Draft Common Frame of Reference).[19] Společný referenční rámec má kromě jiného obsahovat i právní úpravu mimosmluvních odpovědnostních závazků. Na rozdíl od obdobných projektů (např. PETL) nepracuje pouze s principy evropského soukromého práva, ale snaží se zachytit konkrétní pravidla soukromoprávní regulace, včetně pravidel soukromoprávních deliktních vztahů.[20]

Principy evropského delitkního práva (PETL)

Principy evropského deliktního práva jsou výsledkem několikaletého snažení skupiny předních civilistů pracujících pod gescí Evropské skupiny deliktního práva (European Group on Tort Law). Předchůdcem této platformy byla tzv. Tillburská skupina založená roku 1992. Na pravidelné konferenci ve Vídni v roce 2005, byly Principy evropského deliktního práva prezentovány společně s průvodním komentářem.

Skupina Evropského deliktního práva a její iniciativa vystihuje situaci v Evropském společenství, kde je na straně jedné pociťována silná potřeba jednotné nebo alespoň harmonizující úpravy deliktního práva, zároveň však na straně druhé existuje nechuť a nedostatek pravomoci k takové iniciativě uvnitř ES.[21] Je potřeba zdůraznit, že PETL principy nejsou produktem práva ES a rovněž nejsou prostorově omezeny pouze na členské státy EU. Na jejich přípravě se nepodílely pouze evropští civilisté, ale přizváni byli i významní odborníci ze zámoří a z jiných mimoevropských destinací.

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[17] Blíže *Markenisis, B.* General Theory of Unlawful Acts. In: *Hartkamp, A. S.* et al. Towards a European Civil Code. Nijmegen: Kluwer Law Interanational, 2. vyd., 1998, s. 258.
[18] The Study Group, The Acquis Group, The Insurance Law Group.
[19] Metodologicky blíže in: *von Bar, Ch.* Working Together Toward a Common Frame of Reference. Juridica International, vol. X., roč. 2005, p. 17-26.
[20] V podrobnostech odkazuji na *von Bar, Ch., Clive, E., Schulte-Nölke, H.* et al. Study Group on Eruropean Civil Code and research Group on EC Private Law (Acquis Group). Principles, definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Interim Outline Edition. Münich: European Law Publishers, 2008, 406 p. Tento čerstvě zveřejněný dokument obsahuje konečný, zatím jen interní a neoficiální, návrh Společného referenčního rámce. Po registraci jej lze stáhnout na www.law-net.eu.
[21] *Tichý, L.* op. cit. sub 12, s. 4.

Podle tvůrců PETL mají tyto principy sloužit jako společný základ pro rozvoj a sbližování právní úpravy soukromoprávních deliktních vztahů v rámci celé Evropy. Principy se netají svou ambicí stát se prvním krokem ke skutečnému společnému deliktnímu právu v evropském prostoru.[22]

Základní východisko principů PETL opětovně vyzdvihuje starou římskou parémii *casum sentit dominus.* Jinými slovy, každý subjekt práva si nese škodu mu způsobenou sám, pokud ovšem nenastanou zákonem předvídané skutečnosti (důvody), se kterými je spojeno přenesení odpovědnosti za škodu na jiný subjekt. Pouze v případě dostatečného odpovědnostního důvodu je povinen nahradit tyto škody někdo jiný.

PETL vycházejí z koncepce subjektivní odpovědnosti založené na zavinění a v tom se samozřejmě shodují s českou právní úpravou, na druhé straně však přinášejí některé inovativní prvky např. v pojetí protiprávnosti, rozsahu náhrady škody a v úpravě příčinné souvislosti mezi protiprávním jednáním a škodou.[23]

V současnosti probíhající práce na osnově nového českého občanského zákoníku tyto evropské vývojové tendence reflektují, nicméně stále ještě platí, že návrh civilního kodexu není PETL principy příliš zasažen, přesto se nedá říci, že by základní koncepce osnovy byla textu PETL enormně vzdálená.[24] Podle posledních zpráv z jednotlivých minitýmů pracujících na dílčích oblastech nově vznikající české soukromoprávní kodifikace je zřejmé, že osoby participující v minitýmech věnují úpravě principů PETL stále větší pozornost.

Rozsah krátkého příspěvku mi bohužel neumožňuje podrobněji analyzovat jednotlivé články PETL principů (ani to není cílem tohoto příspěvku), proto bylo pouze ve stručnosti poukázáno na jejich základní metodologická východiska.

Závěr

Současné tendence a trendy vývoje soukromého práva v rámci evropského prostoru naznačují, že soukromé právo dospělo do stádia, které je charakterizováno zvýšenou europeizací obligačních vztahů. Tyto tendence se projevují nejen v rámci smluvního práva, ale v poslední době i v rámci

[22] *European Group on Tort Law.* Principles on Tort Law – Text and Commentary. Wien: Springer, 2005, 282 p.
[23] Shodně *Pelikánová, I.* op. cit. sub 17, s. 6.
[24] *Pelikánová, I.* Principy evropského deliktního práva. Právní zpravodaj, 2007, č. 7, s. 5 - 7.

soukromoprávních deliktních vztahů.

Europeizace civilně právních odpovědnostních vztahů probíhá nejen prostřednictvím komunitárních nástrojů, tedy nejčastěji prostřednictvím nařízení a směrnic, ale nově se objevují i snahy zachytit společné rysy a tendence vývoje ve formě spontánních projektů (*soft law*). Pokud jde o přímé regulativní působení práva ES v oblasti soukromoprávních deliktních vztahů, jedná se zatím pouze o fragmentární a útržkovité náznaky, nejčastěji v rámci spotřebitelského *acquis*. Na druhou stranu se již dnes objevují velice zajímavé spontánní projekty, které se snaží zachytit společné rysy deliktního práva, na nichž stojí právní řády jednotlivých evropských států.

Poznávání těchto nových trendů a jejich komparace se současnou českou legislativní realitou nám umožní zachytit nastávající evropské vývojové tendence, jež mohou sloužit jako velmi významný inspirační zdroj při přípravě návrhu nového občanského zákoníku.

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DIFFERENCES BETWEEN CZECH AND POLISH FAMILY LAW – COMPERATIVE ANALYSIS

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Abstract

For Czech Family Law the most important statue is Family Code (from 1963, hereinafter called "FC"), for Polish – Family and Guardianship Code (from 1964, hereinafter called "FGC"). Those regulations are similar, but there are some important differences – connected with mariage, divorce, parental responsibility, child's protection, period of time (in each particular). The aim of this contribution is to present and to compare them.

Key words

Marriage, registered partnership, divorce, fault, separation, Ombudsman for Children, parental responsiblity, period of time.

Marriage

The definition of marriage is similar in Czech and Polish law. But different is the place when we can find it. §1 of FC directly defines marriage as a permanent union of man and woman founded in the way stipulated by law.

The Polish Constitution states that the Republic of Poland protects and takes care about marriage, being a union of a man and a woman (art. 18). Only this sentence directly addresses the definition of marriage. But under art. 1 of FGC we can conclude the same, because one of the prerequisites of a marriage is being opposite sex. That record in Polish Constitution (in Czech Constitution it is not written) has an important meaning, because there is no legal recognition for same-sex partners in Poland.

Legal recognition for same – sex relationships can be divided in (main groups):

1. marriage,
2. registered partnership,
3. registered cohabitation,
4. unregistered cohabitation.

Same-sex marriage is (still) forbidden in the Czech Republic, but this country (already) provides legal registered partnerships. It is by Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů (Registered Partnership Act, came into force in July 2006, hereinafter called "RPA"). According to §1 of RPA the registered partnership is a permanent union of two the same sex persons, solemnized in the manner laid down by the RPA *("Registrované partnerství je trvalé společnoství dvou osob stejného pohlaví vzniklé způsobem stanoveným tímto zákonem").*

To register partnership partners must:

1) be at lest 18 years old {§4 (4 point a)};
2) have Czech citizenship - at least one {§4 (2)};
3) not be next of kin or siblings {§4 (3)};
4) be competent and single - neither registered or married {§4 (4 point c)}.

There is nothing about the purpose of registered partnership (like estabilishment of a family and upbringing children in marriage) in RPA.
After registration, partners have the same rights and obligations and can act on behalf each other in common affairs (*„partner je oprávněn zastupovad druhého partnera v jeho běžných záležitostech, zajména za něho běžná plnění“*). Partners have many rights that are similar to spouses (inheritance, health care and alimony rights), but they cannot: adopt a child, employ each other, use common or double surname.

1998, 2001, 2003, 2005 - rejection the plans for registration partnership,

⇩

16. 12. 2005 - a new civil unions bill - passed by the Czech House of Representatives; *26. 01. 2006* - accepted by the Senate;
16. 02. 2006 - vetoed by the President Václav Klaus;
15. 01. 2006 - overturned the President's veto by the House of Representatives,

⇩

01. 07. 2006 - The Registered Partnership Act (*Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů*) came into force.

Graph 1: Registered partnersip - formative stages

The registered partnership must be recorded in the identification documents of the partners (§18). Since the partnership has been legal in Czech Republic approximately 500 couples registered their partnership.

69 % of Czech people support same – sex registered partnership, 57 % oppose same – sex marriage, 67 % oppose lesbian and gay adoption (according to a poll from June 2007).

In Poland the situation is different. The Polish Constitution ensures the prohibition of discrimination in the public, social or economic sphere for any reason whatsoever, because all people are equal by the law (art. 32). A similar reference is in art. 18^{3a} para. 6 of the Labour Code, that states about equal treatment in employment. There is no legislation concerning homosexual partnership in Poland, but there are a lot of voices saying that it should be allowed. On the other hand, it is amazing how many attacks are on people who want to protect the typical model of marriage and family. Poland is a very catholic country (the nation is 95% Roman Catholic, with 75 practicing), with a long tradition and history. A survey from 2005 found 89 % of the population stating that they consider homosexuality an "unnatural" activity, deviation from the norm. Poles are against same – sex marriages and adoption of children by those people. In my opinion, those results do not mean that we are backwards.

Coming back to marriage between man and woman in our Codes: it seems obvious that an engaged couple should first know each other in order to enter into a marriage (characters, information about health and it is connected with fulfilling its purpose – §2 FC), so that notation does not exist in FGC.

If there is a church wedding – the authority of the church or religious society (registered by state) must deliver the report of marriage to the relevant register office in whose administrative district the marriage was solemnized into. According to §4b point 3 FC he has 3 days to do so, but according to art. 8 para. 3 FGC he has 5 days to do so. If there is *vis minor* and it is not possible to deliver it during those 5 days the runs of the termin is suspended.

That difference in period of time is small, but in my opinion, polish regulation - with longer time – is better.

The marriage in invalid if the declaration of entrance into marriage was made as a result of unlawful threats, error concerning identity of one of the engaged couple or error concering the nature of the legal act of marriage (according to §15a FC). On the basic of a petition of any spouses the court shall declare that such marriage is invalid. It must be petitioned before the lapse of time of 1 year from the day when he or she learned of the facts making it invalid. FGC states that marriage can be invalid because of very

similar reasons, but the spouse (in which declaration of will is defect) has the right to assert invalidity of marriage:

1) before the lapse of time six months when the state of not permitting a conscious expression of will for any kind of reason, detection an error , cessation wrongful threat
2) before the lapse of time three years after contracting a marriage – in every case.

In the Czech Republic descendents of a spouse (who filed the petition for declaration of a invalid married before his or her death) can ask for it within one year after his or her death. In Poland it is also possible, but according to art. 450 Polish Civil Procedure Code the proceedings of annulment of a marriage is suspended if one of the spouses dies. Later there is a discontinuance of legal proceedings if the descendents of spouse who died – will not petition of reopening of suspended proceedings within six months after announcement of a suspension.

The public prosecutor can also enter an action for nullification of a marriage (according to art. 22 FGC).

Marriage can not be contracted between direct relations in an ascending or descending line or between sister and brother (§12 FC). Polish FGC adds that there can be a consent of the court to the marriage between in – laws because of important reasons.

Our families codes say about rights and duties of spouses, but FGC does not mention about duties to mutually respect their dignity and to create a healthy family niveau – but it also seems obvious.

Divorce

Our codes similar define divorce (irretrievable – in both - and completely – in Polish - disintegration of matrimonial life) and state that a divorce will not be granted if the welfare of common minor children of the spouses can submit because of that. FGC adds also prerequisite discrepancy divorce with the principles of social intercourse, and says that a divorce is not allowable if it has been requested by the spouse who is the sole guilty party for the disintegration of matrimonial life, unless the other spouse has expressed his or her consent thereto, or the refusal of such consent by the other spouse is - in the given circumstances - contrary to the principles of social intercourse.

A court – deciding on a divorce - has a duty to estabilish whether one of the spouses - and if so which one – is to be blamed for break-up of the marriage, but omits the ruling on responsibility at the request of both spouses (art. 57 FGC).

The Central Statistical Office announces that 70% divorces is no – fault divorces (it is also because of shorter and less bitter divorce procedure).

But established guilt in the disintegration of matrimonial life is important for some reasons. The divorced spouse who has not been found exclusively blamed for the breakdown of the marriage and who is in inshortage may demand from the other spouse maintenance (corresponding to his/her justifiable needs, earning capicity, and financial possibilities of the other – obliged – spouse). The spouse who is found to be exclusively responsible for the breakdown of the marriage is obliged to satisfy needs of the spouse who is not responsible and whose material situation substantially deteriorated because of divorce, even if he is not in inshortage.

The maintenance obligation expires when:

1) the spouse entitled to it enters into a new marriage;
2) with the lapse of time 5 years after the divorce, but where the spoust who was obliged to it was not be found to blame for the disintegration of matrimonial life.

We can find a different regulation connected with divorce in Czech law . FC does not mention about fault, but also protects a spouse who "did not predominantly take part in breakdown of the marriage through violation of marriage duties" (if the spouses have been living with each other at least for three years, if the divorce would lead to considerable harm to him/her and if he/she opposes the divorce petition, and, the court shall reject the petition if exceptional circumstances indicate that the marriage should be preserved) .

There is also a "uncontested/agreed divorce" (§ 24a FC). It is a quite fast and popular (70% of all divorces) procedure, because, the court will not investigate the causes for the breakdown and will divorce the marriage - that has lasted at least one year, the couple has not been living with each other for at least six months, and the other spouse joins the petition for divorce - if the spouses submit: 1) written agreement (with thein officially verified signatures) regulating settlement of mutual property relationship, rights and duties from their common dwelling and possibly an agreement on maintaining the spouse divorced;

2) a final decision by with the court approved the agreement of parents about regulation of the condition of minor children after the divorce.

A petition for a divorce is submitted to the District Court for the district in which the couple had its last place of cohabitation in the Czech Republic, provided at least one of the spouses lives in the district, but

in Poland it must be lodged with the regional court with jurisdiction for the most recent place of joint residence of the spouses.

The Czech regulation connected with maintenance to a divorced spouse is similar to Polish, but the spouse, who did not significantly contribute to the breakdown of the marriage by breaching his or her marital responsibilities and who would suffer significant loss due to the divorce may by awarded maintenance by the court against his/her former spouse in the same scope as the spousal maintenance duty (and this is determined so that material and cultural level of both spouses is principally the same) – but for no more than three years after the divorce.

A divorced spouse who changed his/her surname (by contracting the marriage) may notify the manager of registry office that he/she wants to revert to the surname that was borne before marriage (FGC) or that or that he/she will no longer append the other spouses surname to his/her original surname. In Poland the spouse has for this three months after the divorce ruling takes final effect, in Czech Republic – one month. It seems that longer time is again better.

According to the report of Eurostat, the Czech Republic belongs to the countries in the European Union where people get divorced the most. 67 married couples out of 100 get divorced. The number of divorces stood at 31.1 thousands in 2007. Divorce rate in Poland is low compared to other countries of EU (33 married couples out of 100 get divorced). Over 80,000 marriages were divorced in 2007.

The institute of legal separation does not exist in the Czech Republic but it exists in Poland. Separation is a situation in which the partners in a married couple live apart (they no longer reside in the same dwelling, even though they may continue their relationship).
Legal separation has (almost) the same consequences as divorce, but it does not terminate the marriage, so spouses cannot marry again (art. 61^4 of FGC). It is "easier" to go through a separation process than a divorce, because the only one prerequisite to obtain separation is complete breakdown of the marriage (spouses are not obliged to prove that that the breakdown of their marriage is irretrievably and has occurred in emotional, physical and economic terms).

If the spouses do not have common minor children, the court may decree a separation at the request of both of them. However the court will not grant a separation - even if there is the complete breakdown of the marriage - if the the welfare of the common minor children of the spouses may suffer because of that or if granting the separation would be contrary to the principles of social intercourse.

If one of the spouses demands a separation and the second divorce and this demand is justified, then the court grants divorce. But if the adjudication of divorce is unallowable, and demand for a separation is justified, the court grants separation.

During separation - if required for reasons of fairness - the spouses are obliged to help each other.

A separated spouse has no possibility to revert to his/her previous surname and to notify the manager of registry office about it (like within the period of time three months after the divorce ruling takes final effect).

Separation is also tolerated by the Catholic Church.

Ombudsman for Children

The Constitution of The Republic of Poland ensures protection of the rights of the child (defence against violence, cruelty, exploitation, demoralization; assurance care and assistance by public authorities if a child is deprived of parental care).

There is also a special public authority which takes care about children's rights - Ombudsman for Children (Rzecznik Praw Dziecka). Art. 72 para. 4 of Polish Constitution states that the competence of the Commissioner for Children's Rights shall be specified by statute. That statute is "The law on the Ombudsman for Children" (from 01. 06. 2000, hereinafter called "LOCh"). . According to Art. 1 LOCh, Ombudsman for Children guards the rights of the child defined in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other rules of law. He undertakes his actions (provided in the LOCh on his own initiative, in the interest of the child, with due respect his dignity and subjectivity) to protect that rights (in particular the rights: to life and health protection, to be brought up in the family, to decent social conditions, to education) and to protect the child against violence, cruelty, exploitation, depravity**,** neglect and any other evil treatment. He extends special care and assistance to handicapped children. In exercising his powers he also respects the responsibilities, rights and duties of parents, and takes into consideration the fact that the family is the natural milieu for the full and harmonious child’s development.

The Ombudsman for Children may apply to:

1) public authority agencies, organizations or institutions for explanations and the necessary information, also for access to files and documents including those personal data;

2) the relevant bodies, organizations or institutions (within the scope of their competencies) to undertake actions to the benefit of a child;
3) the respective bodies to undertake a legislative initiative or issue or amend other legal acts.

He also presents his reviews and motions (to relevant public authority agencies, organizations and institutions) to ensure effective protection of the rights and the interest of the child and the Report (to Parliament - every year) on the state of the observance of children's rights.

The Ombudsman for Children is appointed for 5 years. That function cannot be performed by the same person for more than two terms of office. Those persons held the Ombudsman for Children office: Marek Piechowiak - from 08. 06. 2000 till 12. 11. 2000, Paweł Jaros - from 16. 04.2000 till 07. 04. 2006,
Ewa Sowińska – from 07. 04. 2006 till 22. 04. 2007 (resignation).

The function of Ombudsman for Children exists in many countries of the world (with exactly the same or similar name, for example Defenseur des Enfants in France, Deputy Ombudsman for Children's Rights in Greece).

In the Czech Republic there is the general Ombudsman (in Poland also - Civil Rights Ombudsman – Rzecznik Praw Obywatelskich), which is known as *Veřejný ochránce práv* (Public Defender of Rights), but the separate Ombudsman for Children is not estabilished.

According to art. 7 LOCh**,** he is independent in his activities from other state bodies and is responsible only to the Sejm in accordance with the rules defined in the LOCh.

That function is another instrument for protecting children's rights (which are humans rights), by making it more visible - so this is an advantage of polish family law.

Other differences:
According to § 31 FC parental responsibility collects rights and duties that concern:
- minor child's care (especially about his/her health, phisical, emotional and moral growth),
- minor child's representation
- managment of minor child's property

The definition of parental responsibility does not exist in FGC Code, but it seems that this term is similar to Czech regulation.

A court - granting the divorce - also decides about parental responsibility (art. 58 FGC), but in Czech Republic that decision may be replaced with an agreement of the parents - the validity of such agreement requires a consent of the court (except contact of the parents with the child – if it is not required by the interest in his/her upbringing or by condition of the family).

In Poland district courts - family and juvenile cases divisions competent on the grounds of a child's domicile - are competented to decide in cases relating to parental respionsibility, but in Czech Republic it is the District Court which is pertinent to the district where the child is resident.

The court may suspend the performance of the parental responsibility, if:

- a significant impediment prevents a parent from carrying out his/her parental responsibilities
- it is in the welfare of the child

FGC mentions only about a passing impediment.

The father of the child of an unmarried mother is obliged (according to circumstances) to contribute the cost connected with the pregnancy and childbirth and cost of three months living of mother in the period of childbirth. For important reasons a mother may demand a contribution to her cost of living for a period more than three months. According to FC that men must provide an adequate contribution for two years.

What our codes say also about guardianship is similar, but also there is a difference in the period of time, because in Czech law the guardian must give the court a final statement about the management of the child's property within two months after the and of guardianship; in Polish law he has three months to do so. It seems that two months is a good solution, to better protect the child's interest.

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EUROPEANIZATION OF THE NATIONAL LAW, THE LISBON TREATY AND SOME OTHER LEGAL ISSUES

Sborník příspěvků z konference Cofola 2008 konané na PrF MU 13. – 14.5.2008

Eds: Radovan Dávid, Jan Neckář, Martin Orgoník, David Sehnálek, Jaromír Tauchen, Jiří Valdhans

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