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LEGAL CERTAINTY IN THE CASE LAW OF COURT OF JUSTICE OF EROPEAN COMMUNITIES

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Abstract in original language
Příspěvek se zabývá problematikou dodržování zásady právní jistoty, zejména v podobě legitimních očekávání Soudním dvorem Evropských Společenství samým ve své judikatuře. Pozornost je věnována přehodnocení dosavadní judikatury, kvalitě odůvodnění změn a osudu rozhodnutí, jejichž postavení není Soudem dostatečně vymezeno.

Key words in original language
Evropský soudní dvůr, judikatura, závaznost, změny judikatury

Abstract
Contribution deals with the topic of principle of legal certainty, mainly principle of legitimate expectations within the case law of the Court of Justice and securing of those principles by the Court itself. Contribution is focused on previous case law reconsiderations, quality of justifications and destiny of the cases which postion is not clearly stated by the Court.

Key words
European Court of Justice, case law, binding force, reconsideration

1. INTRODUCTION

There is no doubt the principle of legal certainty belongs to the main principles governing the development of the EC law. General principle of legal certainty becomes specified in many forms of derived principles, e.g. respecting acquired rights, good faith, publicity or principle of legitimate expactations.

Protection of legitimate expectations means that law should be predicable and forseeable. Principle of legal certainty takes different variations in the ECJ case law, it may be invoked as a rule of interpretation, basis for an action in tort for damages or as a basis for annulement od EC measure.[1] There have been many cases dealing with the topic of res iudicata for example. This principle should apply not only to any Community or national authority applying EC law but also - and probably mainly - to the

[1] Kent, P. Law of the European Union. 4th ed. Longman law series, 2009, p. 81.

European Court of Justice.[2] What I would like to tackle in this article is the approach of the Court to securing this principle is observed not only by EC institutions and national authorities but also by the Court itself. Court set up some conditions and rules for other institutions and authorities when dealing with the principle of legal certainty but it seems to me it was not so precise to itself.

Court´s main job is to make sure that european legislation is interpreted and applied in the same way in all EU countries, so that the law is equal for everyone. But how does this role of such Supreme interpreter go in line together with quite frequent reconsiderations and changes of the Court´s existing case law?

2. CASE LAW RECONSIDERATION

Topic of case law reconsiderations is strongly connected with effect of Court´s case law but I have no intention to continue discussion about the inter partes or ega omnes effect of ECJ decisions, res iudicata, stare decisis or obiter dictum and ratio decidendi notions here. In my mind each author has its own opinion about the binding force of the ECJ case law and there is no need to try to produce another one. For the purpose of this article only one question from the abovementioned topics would be the most relevant: Is the Court itself bound by its decisions? Clear answer would be „no", but not everything is so clear especially when so many works are devoted to that. It is generally thought that ECJ is not bound by its own case law and there appear to be no decisions where ECJ would express any sense of obligation to follow its own previous case law. Interpretation of the Court must be observed but in fact it becomes binding only in particular case. There have been some trials to give the case law erga omnes effect like in International Chemical Corporation case[3] in which ECJ argued for the so called erga omnes effect of its judgements concerning the validity of EC legislation, special issue is represented also by doctrine acte clair or acte eclaire but generally there is no legal basis for bindingness of Court´s decision towards itself. The rationale to consider the past preliminary rulings of the ECJ to be binding can be related to the requirement of uniformity in the application and interpretation of EC law in Member States.[4] And uniformity could lead to legal certainty finally.
Court of course tries to be consistent in the decision it reaches. Thus in proceedings under Article 234 in which the Court is asked to rule on point it

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[2] Barde, P., Calinska, P. Protection of legitimate expectations. [online] Dostupný z: http://potionline.net/Items/enforcement_docs/The%20protection%20of%20legitimate%20expectations%20%28Calinska,%20Barde%29.pdf

[3] Judgment of the Court of 13 May 1981, Case 66/80, SpA International Chemical Corporation v Amministrazione delle finanze dello Stato.

[4] Raitio, J. The principle of legal certainty in EC law. Springer, 2003, p. 87.

has already dealt with it will, in the absence of any suggestion that the previous case law was wrongly decided simply repeat its earlier ruling.[5]

As Advocate General Trstenjak delivered in her 2007 opinion in case Internationaler Hilfsfonds e.V. v Commission of the European Communities, the binding authority of precedent is not an inherent feature of the Union's judicial system. Although, in the interest of legal certainty and the uniform interpretation of Community law, the Community Courts endeavour in principle to give a coherent interpretation to the law, the general structure of both the Community legal order and the judicial system means that the Community Courts are not bound by their previous decisions.[6]

Then AG Trstenjak cites work of former Court´s judge Colneric who refers to the Court of Justice's practice of citing its previous case law in the interest of legal certainty and uniform application of the law. In her view, it is nevertheless inevitable that the Court of Justice occasionally has to make corrections to its own case-law. However, that step is taken only if there are pressing reasons to do so. Nowadays the Court of Justice takes care to highlight clearly any changes to its case-law.[7]

But I must ask – does the Court really do so?

3. JUSTIFICATION STANDARD

As for example Czech Constitutional Court held – reconsideration of existing intepretation represents serious intervention into legal certainty and equality of all, who expect their case will be dealt with in a same way. It does not mean there is no space for change – but any change should be very exceptional and justifying the avoidance of principle of predictability. Existing case law should not be left unnoticed, but relevant authority should face its previous decision and explain properly the reason of change. Case law reconsideration must be exceptional, reserved and only in cases really justyfying violation of the principle of predictability od the Courts´ decision. Not to commit arbitrariness in decision-making and violate the principle of legal expectations the previous case law must be dealt with in the

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[5] Jacobs, F., Andenas, M. European community law in the English courts. Oxford University Press, 1998, p. 127.

[6] Opinion of Advocate General Trstenjak of 28 March 2007, Case C-331/05 P, Internationaler Hilfsfonds e. V. v Commission of the European Communities.
What is also interesting about this opinion is that as for the parts dealing with precedental character Advocate General Trstenjak refers only to academic works, no reference to case law is made.

[7] Colneric, N. Auslegung des Gemeinschaftsrechts und gemeinschaftsrechtskonforme Auslegung. *Zeitschrift* für europäisches Privatrecht, 2005, Vol. 2, p. 229.

justification of the new decision properly and Court must show what factors led him to submit a different new view.[8]
Let us have a look at Court´s justification when case law is beeing changed. Court of Justice mostly justifies its reconsiderations by fact that interpretation of Community law must be flexible and evolving, dynamic and it must follow Community and society developments.
Different types of justifications are presented in following part of this article and not always it is possible to say such justification is satisfying. Should not there be any more concrete or procedural standards when legal certainty of the involved parties is quite hardly violated in some cases?

3.1 AKRICH V METOCK

Metock case[9] had been delivered by the Court last year. This was quite emotional proceeding where Court concluded that his previous case of Akrich[10] from 2003 must be reconsidered. In Akrich the Court stated that third country national must be lawfully resident in a Member State when he moved with his union citizen spouse in order to benefit from Community right of residence. However, in Metock the Court came to completely opposite opinion although the situation was almost identical. Here the Irish legislation implementing so called residence Directive No. 2004/38/EC came before the Court. Irish legislation required a family member of a Union citizen to demonstrate that they had been lawfully resident in another Member State prior to their entry in Ireland. This requirement was in line with Akrich case, of course. But Court held such legislation was contrary to Community law at this time. What was the reason of such radical change?
There had been five years between these two decisions and Residence directive came in force meanwhile. But, was it enough for complete reconsideration? Akrich was a judgement of 2003, not very long before implementation of a Residence directive. Directive took as a source also case law of a Court and there was no sign of such prior lawful residence condition in the Directive. On the other hand this fact was used by the Court to say that Directive provides complete list of limits. Irish legislation also had as a source Court´s case law – Akrich case. Where is the legal certainty then, when a Member State – and it was not only Ireland - implements legislation completely in compliance with Court´s case law and after few years it is held unlawful.

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[8] Decision of Constitutional Court of the Czech republic of 25 February 2008, IV. ÚS 625/06.

[9] Judgment of the Court of 25 July 2008, Case C-127/08 Metock and the others v Minister for Justice, Equality and Law Reform.

[10] Judgment of the Court of 23 September 2003, Case C-109/01, Secretary of State for the Home Department v Hacene Akrich.

The obvious implication of Metock is that those Member States will now have to rescind these rules, and return to the more liberal rules which applied prior to the Akrich judgment. Those Member States, apparently joined by others, are reluctant to do this because of concerns about irregular immigration, this has also political and budgetary implications and such situation does not contribute to legal certainty among Union citizens and even non-residents at all.[11]

Another more important question arises when we are talking about Metock case - was the justification of the case law reconsideration precise?

In point 58 Court admits that in Akrich it held, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. *However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State...* To be honest there had been some sign of opening the scope ven before, Court refers to its previous judgements of Case C-459/99 MRAX or Case C-157/03 Commission v Spain, but still it leaves position of Akrich unclear.

3.2 FUTURA V BOSAL

In case Futura[12] the question was raised whether the conditions set up by Luxembourg tax authorities concerning loss relief represent infringement of freedom of establishment. The Court generously stated that "the effectiveness of fiscal supervision is an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty".[13] Luxembourg could therefore set a condition for the deduction of losses by a non-resident of an economic link to income earned of a non-resident in Luxembourg. This is so called application of "the fiscal principle of territoriality".

But as Advocate General Alber stated a few cases later, the fiscal principle of territoriality could not be relied on in case Bosal to substantiate cohesion of the system.[14] In Bosal an argument based on the principle of territoriality

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[11] Peers, S. Statewatch Analysis. The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms. [online] Dostupný z: ww.statewatch.org/analyses

[12] Judgment of the Court of 15 May 1997, Case C-250/95, Futura Participations SA and Singer v Administration des contributions.

[13] Judgment of the Court of 15 May 1997, Case C-250/95, Futura Participations SA and Singer v Administration des contributions, point 31.

[14] Opinion of Advocate General Alber of 24 September 2002, Case C-168/01, Bosal Holding BV v Staatssecretaris van Financiën.

has also been relied upon by the Netherlands government in order to justify the difference in tax treatment under the 1969 Law. According to Advocate General Futura Participations involved a permanent establishment of a foreign company which was located in Luxembourg and subject to tax there. Under the Luxembourg rules, the carrying forward of losses upon taxation in Luxembourg was subject to the condition that those losses should be related to the profit made by the permanent establishment itself, which was not case in Bosal also according to Court.

The Court therefore rejected using the principle in Bosal although it provided no sign in its justification why the costs of financing a branch may be allocated to the correct jusrisdiction as in Futura whereas the exact same costs of financing of the exact same investment but just in the legal form of subsidiary must be allocated tot he incorrect one as in Bosal. Doubts about relations between those two judgements thus remain.[15]

3.3 BACHMANN V DANNER

Case of Mr. Bachmann[16], a German national employed in Belgium, dealt with refusal od the deduction from his total occupational income of contributions paid in Germany pursuant to sickness and invalidity insurance contracts and a life assurance contract concluded prior to his arrival in Belgium. In case Bachmann the Court accepted that the measures there in issue were proportionate in that it was not possible to ensure the coherence of the Belgian system by less restrictive measures. In Bachmann the cohesion was expressed by a connection between deductibility and liability to tax.

Although the Court was very clear in explaining the thinking behind the acceptance of the cohesion of a tax system as justification, since this judgment, in fact every party have unsuccessfully invoked this justification in different circumstances where no direct link was found by the ECJ. Thus, the Court found no direct link in Baars case[17] and rejected such link also in

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[15] Terra, B., Wattel, P. European Tax Law. Springer, 2002, p. 132.

[16] Judgment of the Court of 28 January 1992, Case C-204/90, Hanns-Martin Bachmann v Belgian State.

[17] Judgment of the Court of 13 April 2000, Case C-251/98, C. Baars and Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem, point 37 and following:

The Court of Justice has held that the need to safeguard a tax system's cohesion may justify rules that are liable to restrict the fundamental freedoms (Case C-204/90 Bachmann [1992] ECR I-249 and Case C-300/90 Commission v Belgium [1992] ECR-305). However, that is not the case here.

First, there is no double taxation of profits, even in economic terms, because the tax at issue in the main proceedings is not charged on the profits distributed to shareholders in the form of dividends but on the assets of the shareholders through the value of their holdings in the capital of a company. Whether or not the company makes a profit does not in any event affect liability to wealth tax.

Danner case. On the other hand Danner case represents at the same time the confirmation of Bachmann being a good law.

In Danner case the Finnish rules became in question. Finnish authorities were aware of the judgements in Bachmann or Commission v Belgium but they were uncertain whether according to those judgments overtly discriminatory rules might be justified in order to preserve fiscal coherence. This is clear example of uncertainty left by ECJ judgements even on important issues.[18] Such type of uncertainty can cause governments, companies and citizens substantial economic damage, of course.

The reason of such uncertainty was caused mainly by the fact that in previous cases Court successfully avoided stating whether the rules in issue were discriminatory, and has examined grounds of justification not expressly mentioned in the Treaty. Right Bachmann is the example of that line of cases. In both judgments the discriminatory nature of the measures in issue as regards freedom to provide services was neither examined nor even mentioned and the measures were held to be justified by the need to preserve the coherence of the Belgian tax system, a justification not expressly mentioned in the Treaty and not previously recognised by the case-law.[19]

But what the Court stated in Danner case, it again rejected tax coherence stating only that *there is no direct connection between the deductibility of insurance contributions and the taxation of sums payable by insurers.*[20]

Except for this brief explanation at the same time the Court held: *A Member State is therefore in a position to check whether contributions have actually been paid by one of its taxpayers to an institution coming under the authority of another Member State. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting contributions provided for in the legislation at*

Second, in Bachmann and Commission v Belgium, cited above, there was a direct link between the deductibility of pension and life assurance contributions and the taxation of the sums received under those insurance contracts, and it was necessary to preserve that link in order to safeguard the cohesion of the tax system in question. There is, however, no such link in the present case, which concerns two separate taxes levied on different taxpayers. It is therefore irrelevant, for the purposes of granting shareholders a tax allowance in respect of the wealth tax, that companies established in the Netherlands are subject to corporation tax in the Netherlands and that companies established in another Member State are not.

[18] Opinion of Advocate General Alber of 21 March 2002, Case C-136/00, Rolf Dieter Danner, point 39.

[19] Opinion of Advocate General Alber of 21 March 2002, Case C-136/00, Rolf Dieter Danner, point 36.

[20] Judgment of the Court of 3 October 2002, Case C-136/00, Rolf Dieter Danner.

issue have been met and, consequently, whether to allow the deduction requested...[21]

So, as Multari say, it seems the concept of coherence of the tax system is a potentially valid justification of a restriction whenever a direct link reflecting a complementary relation between a tax advantage and a tax liability can be found. Another recent case, Krankenheim judgment,[22] can be seen as supporting consistency of ECJ in approaching the coherence of the tax system as justification where properly invoked.[23]

3.4 EMMOTT V FANTASK

Another example of diverging case law is representedy by case Emmott and Fantask. To begin this issue it is possible to refer to Advocate General Ruiz-Jarabo Colomer opinion in case C-30/02 where he states it is not contrary to Community law for a Member State to resist actions for repayment of charges levied in infringement of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question even though, at that date, the directive in question had not yet been properly transposed into national law. At the same time Advocate General states that only the judgment in Case Emmott[24] maintained the opposite view although other later judgments have abandoned it.

It may sound Emmott is the exception but in fact this had been the „previous case law“ which was replaced. Emmott says that where an individual could not start national proceedings due to bad implementation of a Directive by Member State, national terms should not begin before correct transposition. Emmott case was delivered in 1991, the other diverging cases, case C-338/91 Steenhorst Neerings and case C-410/92 Johnson followed later.

Fantask judgement was next one of those that reversed Emmott decision because of its broad and generous scope which was critised by Advocate general Jacobs in his opinion in Fantask.

The applicants and the Commission in case Fantask considered that on the basis of Emmott a Member State may not rely on a limitation period under national law as long as the Directive is not properly transposed into national law. But Court held ...*as was confirmed by the judgment in Case C-410/92...*

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[21] Judgment of the Court of 3 October 2002, Case C-136/00, Rolf Dieter Danner, point 50.
[22] Judgment of the Court of 23 October 2008, Case C-157/07 Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH.
[23] Multari, D.A. Loss recapture rule and coherence of the tax system: the Bachmann theorem in the recent. Krankenheim case. [online] Dostupný z: ials.sas.ac.uk/postgrad/courses/docs/MA_Tax_Working_papers/

[24] Judgment of the Court of 25 July 1991, Case C-208/90, Theresa Emmott v Minister for Social Welfare and Attorney General.

it is clear from Case C-338/91 (Emmott) that the solution adopted in Emmott was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive.[25] So again the justification of the non-application of previous case law is based only on the fact that circumstances of the cases differ.

4. ANY IMPROVEMENT POSSIBLE?

There are of course more cases that can be analyzed, just when we look at the old example of Keck case compared to casses Dassonville and Cassis de Dijon and what the justification of the Court was reconsideration of the previous case law in Keck was. In point 14 of its judgement the Court stated: *In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter*.[26]

The reasons were therefore purely political in that case and Court departed from its existing case law quite decently. It stated that it considered it necessary to re-exaimne and clarify its case law on this matter and concluded contrary to watt has previously been decided. However the Court did not make clear precisely what it was overruling. The effect of its judgement was therefore to leave the status of its previous decision unclear.

The same we can say about the cases mentioned above. What happen to that case law that becomes obsolete? It the Court does not state clearly it cannot be used any more or when it can be used it may happen it rises from the dead even when it is not expected. I also understand that the Court sometimes regrets what it had done but if there is no clear status of the case law it may lead to arbitrariness at any moment.

For example above mentioned Fantask case is the one of quite vague and brief justification which does not bring much legal certainty. There is also question to what extent reasons of political, spcial or economical changed should play role in case law changes.

Of course, one must differ between reconsiderations which completely change previous case law and those that can be really realted to the specific circumstances of the case. Some reconsiderations are ven necessary to make celarer previous statements but as I wrote above change of the case law is of

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[25] Judgment of the Court of 25 July 1991, Case C-208/90, Theresa Emmott v Minister for Social Welfare and Attorney General, point 26.

[26] Judgment of the Court of 24 November 1993, Joined cases C-267/91 and C-268/91, Bernard Keck and Daniel Mithouard, point 14.

a high importance whoch probably could deserve some special procedural standard, eg. decisions should be made by certain number of judges in plenum, some strucutre of decision can be set to make clear what and why is being overruled or whyt does the previous law still remains to be a good law. Although it is almost impossible to affect wide range of circumstances that may occur, still some effort can be made to reach uniform intepretation that can be relied on both by authorities or instiituions and citizens.

5. CONCLUSION

To summarize, I see two main problems when Court departs from ehat has previously been decide – at first the role of ECJ as producer of uniform interpretation of EC law contrasting with the second role of Court deciding cases binding only inter partes. Next problem represents frequent uncertainty about the relationship between the diverging judgements.

With the emerging body of law falling under Court´s jurisdictions according to the Lisbon treaty more such situations may arise and I think we deserve more legal certainty from Court itself.

Court always says that community law must be flexible and evolving , dynamical and must fit to the evolution of community and society. Also the intepretation cannot be static and decisions of the Court must by dynamic – but when we say dynamic, does not it rather mean they could be used, there is gap between the role as federator of intepretations and decision maker in inter partes cases – and this is not easy to overlap

Of course, being aware of case law and adhering to it, and at the same time realizing its transient quality, is very challenging. It is not easy to differentiate between case law which still applies to present conditions and case law which does not. Clearly, therefore, decision making requires a great deal of judicial acumen and background knowledge.[27]

To finalize, as advocate general Toth stated in his huge study[28] the difficulty of theorizing any issue about Community law is the fact ignorong that Community law as a new legal order of a sui genesis type with Court of Justice exercising a unique jurisdiction, requires sui genesis solutions. The role of the Court is very hard without any doubt, but does this prevent us to desire a bit more of legal certainty for twenty-seven or even more Member States and millions of Union citizens?

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[27] Raitio, J. The principle of legal certainty in EC law. Springer, 2003, p. 86.

[28] Toth A.G. The Authority of Judgements of the European Court of Justice: Binding Force and Legal Effects. Yearbook of European Law, 1984.

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