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Helena Bončková	
The Free Movement of Goods: Czech and Slovak Supreme Courts' Preliminary	6
Krzysztof Dobieżyński	
Protection of freedom of goods description and grounds for refusal of the trade mark registration.....	12
Jakub Harašta	
Cybersecurity & Dual-use Goods	30
Eva Hladká	
State v. International Trade Regulation: Economic Sanctions of the USA.....	40
Anna Churshina	
Legal regulation of the non-conventional trademarks in the EU and Russia	50
Roman Říčka	
The “recycling conflict” of the EU and the Russian Federation in the context of the WTO.....	58
Miroslav Slašťan	
Free movement of goods vs. fundamental rights	69
Dušan Sulitka	
Judicial Review in EU Law: Challenging the Common Commercial Policy Measures (not only) after the Lisbon Treaty.....	79

THE FREE MOVEMENT OF GOODS: CZECH AND SLOVAK SUPREME COURTS' PRELIMINARY REFERENCES

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Abstract in original language

Autoři zabývající se problematikou předběžných otázek, věnují jen zřídka pozornost faktorům, jež mohou zásadním způsobem ovlivnit rozhodnutí vnitrostátní soudu o předložení věci Soudnímu dvoru. Předkládající příspěvek si klade za cíl zaplnit zčásti tuto mezeru. Za tímto účelem analyzuji dva případy týkající se volného pohybu zboží, jež rozhodoval český Nejvyšší správní soud a slovenský Najvyšší súd. Poukazuji přitom na skutečnost, že žádost jednoho z účastníků řízení o předložení předběžné otázky nebo nález ústavního soudu rušící předchozí rozsudek nejvyššího soudu mohou sehrát klíčovou roli při rozhodování soudu o předložení předběžné otázky.

Key words in original language

Předběžné otázky; nejvyšší soudy; Soudní dvůr Evropské unie, aplikace práva EU

Abstract

The authors analyzing preliminary references rarely discuss factors which might actually urge a national court to request a preliminary ruling and thus constitute decisive incentives for the courts' decision to bring the matter before the Court of Justice. The present contribution tries to partly fill this gap by providing an analysis of two cases on free movement of goods decided by Czech and Slovak supreme courts. I argue that a request of a party to the proceedings to bring the case before the Court of Justice or a decision of the constitutional court quashing the supreme court's judgment might constitute decisive incentives for a preliminary reference.

Key words

Preliminary references; supreme courts; Court of Justice of the European Union, application of EU law

1. INTRODUCTION

In the preface of the book on the application of (what was then) EC law Malcolm Jarvis argued: "Since issues arising from the application of the provisions concerning the free movement of goods by the national courts have such wide implications (being representative of the application of any of the other four freedoms and indeed the

application of EC law by the national courts in general) it was felt that this should be reflected in the title."¹ As a result, his book was called "The application of EC law by national courts" with "The free movement of goods" being only a barely noticeable subtitle on the cover of the book.

If he had been writing the preface today I am not sure whether he would have come to the same conclusion (and title of the book). Looking at today's statistics of the Court of Justice of the European Union it is evident that the case-law in the area of free movement of goods constitutes no more than a drop in the ocean of judgments and decisions of the Luxembourg courts. For instance, according to the 2012 Annual Report the new references for a preliminary ruling in the area of the free movement of goods comprised only 4,04 % out of total which, in fact, means that there was only one such reference out of 404 new requests for a preliminary ruling in 2012. The subject-matter of questions on the interpretation of EU law, which have been raised before national courts, lies mainly in the area of taxation (57 preliminary references in 2012), freedom, security and justice (56) or social policy (34).² It seems therefore that the rules concerning the free movement of goods are relatively clear and the existing case-law of the Court of Justice is quite sufficient since their interpretation and application have not raised many questions before national courts in recent years. The same seems to apply also to the national courts in new Member States as their existing preliminary references in the area of free movement of goods comprise only 8,5 % out of total.³

These references, including references from the new Member States, and preliminary rulings of the Court of Justice have been commented and analyzed on numerous occasions.⁴ However, the authors have rarely discussed factors which might urge a national court to request a preliminary ruling and possibly constitute decisive incentives for the

¹ Jarvis, M.: THE APPLICATION OF EC LAW BY NATIONAL COURTS. THE FREE MOVEMENT OF GOODS. Oxford: Oxford University Press, 1998, p. XIII.

² Court of Justice of the European Union: ANNUAL REPORT 2012 - SYNOPSIS OF THE WORK OF THE COURT OF JUSTICE, THE GENERAL COURT AND THE CIVIL SERVICE TRIBUNAL. Luxembourg: Publications Office of the European Union, 2013, p. 91.

³ According to the data retrieved December 6, 2013 from the search engine at the website of the Court of Justice of the European Union (hereafter "the CVRIA") only 34 out of 401 references for a preliminary ruling made by national courts in the new Member States (i.e. Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia) concerned the free movement of goods.

⁴ See, for instance, Łazowski, A. (ed.): THE APPLICATION OF EU LAW IN THE NEW MEMBER STATES. BRAVE NEW WORLD. Hague: T.M.C. Asser Press, 2010.

courts' decision to bring the matter before the Court of Justice (except, of course, from the obvious, i.e. the question on the interpretation or validity of a rule of EU law itself). The present contribution will thus try to partly fill this gap by providing an analysis of two cases decided by the Czech Supreme Administrative Court and the Slovak Supreme Court on matters relating to the free movement of goods.⁵ The research question of the present contribution therefore stays as follows: Which factors urged the respective national court to bring the matter before the Court of Justice?

2. CASE SKOMA-LUX

The reference of the Czech Supreme Administrative Court (hereafter "the SAC") for a preliminary ruling in case C-339/09 Skoma-Lux s.r.o. v. Celní ředitelství Olomouc was in fact the second preliminary reference in the case.⁶ The first preliminary reference had been submitted by the Regional Court in Ostrava and concerned the enforcement of EC legislation unpublished in the Czech language.⁷ The preliminary reference of the SAC dealt with different issue, namely the interpretation of headings 2204 and 2206 of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (hereafter "the CN").

Skoma-Lux submitted to the Celní úřad Olomouc (Olomouc Customs Office) a declaration for free circulation of goods labelled as "red dessert wine Kagor VK". Those goods, from Moldavia, were declared under heading 2204 of the CN. The analyses carried out by the Olomouc Customs Office proved that a sample of those goods contained at least 25% of sugar of an origin other than grape juice, probably from a mixture of grape juice, beet sugar and sugar resulting from the hydrolysis of corn starch. As a result, the Olomouc Customs Office considered that the goods at issue should be classified under heading 2206 of the CN, on the ground that they were not liqueur wine since, in the course of their manufacture, they had been fortified, not with products obtained by the distillation of wine, but by alcohol of another origin.

⁵ These two cases are at the same time (at least according to the data retrieved from the CVRIA) the only Czech and Slovak cases concerning the free movement of goods. The case studies on the free movement of goods were chosen in respect to the title of the conference section which aimed on trade in goods. The present conference contribution thus provides only limited sample of the specific research project carried by the Law Faculty of the Masaryk University on preliminary references made by the Czech, Polish and Slovak supreme courts (project no. 0915/2012).

⁶ Decision of the Czech Supreme Administrative Court, July 7, 2009, no. 7 Afs 11/2008-75.

⁷ See judgment of the Court of Justice, December 11, 2007, C-161/06 SKOMA-LUX S.R.O. V. CELNÍ ŘEDITELSTVÍ OLOMOUC.

Following an action brought by Skoma-Lux, the Regional Court in Ostrava set aside that decision of the Olomouc Customs Office as it held that the goods at issue should be classified under heading 2204 of the CN, noting in particular that the addition of sugar or alcohol, whatever their origin, did not result in a change in the fundamental features of those goods, namely that they were produced from fresh grapes. The case was brought before the SAC which decided to stay the proceedings and to refer the question at issue to the Court of Justice. The Court of Justice came to the conclusion that the respective goods must be classified not as wine but as other fermented beverages in terms of the CN.⁸

The main reason behind the request for a preliminary ruling was undoubtedly the question of interpretation of the respective rule of EU law and the fact that the SAC was a court against whose decisions there is no judicial remedy under national law. However, it stems from the decision of the SAC that both parties actually urged the court to bring the case before the Court of Justice. The SAC in its decision expressly stated that it was one of main considerations taken into account while deciding on making the request for the preliminary ruling.⁹

3. CASE PROFITUBE

On the other hand, the preliminary reference on the free movement of goods made by the Slovak Supreme Court (hereafter "the SC") in case C-165/11 Daňové riaditeľstvo Slovenskej republiky v. Profitube spol. s r.o.¹⁰ was a result of the external factor, i.e. the previous judgment of the Slovak Constitutional Court.¹¹

The reference for a preliminary ruling concerned the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereafter "the customs code") and of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (hereafter "the Sixth Directive").

The tax administration for certain taxpayer carried out a VAT audit for Profitube. This tax audit revealed that the certain company established in Košice brought in from Ukraine semi-finished steel

⁸ Judgment of the Court of Justice, December 16, 2010, C-339/09, SKOMA LUX S.R.O. V. CELNÍ ŘEDITELSTVÍ OLOMOUC.

⁹ Decision of the Czech Supreme Administrative Court, July 7, 2009, no. 7 Afs 11/2008-75, p. 6.

¹⁰ Decision of the Slovak Supreme Court, March 22, 2011, no. 1Spž/1/2010.

¹¹ Judgment of the Slovak Constitutional Court, October 27, 2010, no. III. ÚS 283/2010-46

goods, namely hot-rolled coils, which it sold to Profitube. Those coils, stored in a public customs warehouse used by the latter and situated in the territory of the Slovak Republic, were placed under the customs warehousing procedure and then placed under inward processing arrangements in the form of a system of suspension. Profitube sold those steel sections to the some other company established in Košice and registered for VAT. The goods at issue were again placed under the customs warehousing procedure. Profitube took the view that the sale at issue was not subject to VAT. During all those transactions carried out during the tax years 2005 and 2006, the goods at issue remained in the same public customs warehouse.

The Tax Office ruled that, by not paying VAT on the sale at issue, Profitube had infringed the law on VAT. However, the Regional Court in Bratislava took the view that goods from a non-member country had to be placed in free circulation to be subject to VAT.

Following an appeal by the Daňové riaditeľstvo Slovenskej republiky (hereafter "the Slovak Tax Directorate") the SC varied the judgment of the Regional Court in Bratislava by holding that a customs warehouse situated in the territory of a Member State legally forms part of that territory. The Slovak Tax Directorate was therefore right to hold that the sale at issue constituted a supply of goods for consideration in national territory, for the purposes of the law on VAT.¹²

Profitube lodged an appeal against the judgment of the SC before the Slovak Constitutional Court which took the view that the SC had infringed Profitube's fundamental right to legal protection and to a fair trial. The Constitutional Court held that the SC had not examined the question of the application of Article 12 of the law on VAT, according to which, in the case of an importation, customs rules must take priority over that law. In the following proceedings the SC thus made a reference for a preliminary ruling.¹³ It stems from the decision of the SC that the decision to bring the case before the Court of Justice was at least indirectly motivated by the opposing view of the SC concerning the solution of the case at issue and the respective application of EU law.

4. CONCLUSION

The two cases thus show that apart from the obvious reasons behind the request for a preliminary ruling, i.e. the question on interpretation or validity of EU law, there are also other relevant factors (either expressly mentioned in a decision of a national court or indirectly

¹² Judgment of the Slovak Supreme Court, October 20, 2009, no. 5Sžf91/2008.

¹³ Judgment of the Court of Justice, November 8, 2012, C-165/11, DAŇOVÉ RIADITEĽSTVO SLOVENSKEJ REPUBLIKY V. PROFITUBE SPOL. S R.O.

stemming from the state of proceedings before national courts) which urge a national court to bring the case before the Court of Justice. The explicit request of a party to the proceedings to make a preliminary reference to the Court of Justice or a decision of the constitutional court quashing the previous supreme court's judgment may constitute decisive reasons why the respective court in the end of the day decides to halt the proceedings and send the case to Luxembourg.

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PROTECTION OF FREEDOM OF GOODS DESCRIPTION AND GROUNDS FOR REFUSAL OF THE TRADE MARK REGISTRATION

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Abstract

The aim of this article is to present one aspect of the free movement of goods which is the freedom of description of goods (freedom of communication). The freedom of communication is restricted by industrial property laws. Among industrial property rights on the said freedom the strongest seems to affect trade mark law. Therefore, the article will examine the rules governing the absolute grounds for refusal of registration of trade marks.

Key words

freedom of description of goods, industrial property law, absolute grounds for refusal, descriptive trade marks

1. INTRODUCTION

The common market is a base of the EU integration process. The base, allowing for a full implementation of the internal market, covers, so called European freedoms. The most fundamental freedom that contribute to a common market shall be the free movements of goods. Actually, the free movements of goods is supposed to provide producers of the EU Member States with the most convenient trading environment. Moreover, owing to the free movements of goods between the EU Member States, consumers are given a greater range of products to be selected. One of aspects of the respective freedom is freedom of description of goods (freedom of communication). Goods can be marked with information that enable the recipients to take the purchasing decision or withdrawing from it. In the event of no freedom of description of goods, it would be difficult to discuss the issue of free movement of goods. Yet, it is essential to attach various type of information onto the products addressed to end users from different EU Member States. However, freedom of description of goods is constrained by monopolies established on a basis of industrial property rights. As for industrial property rights, the one with ultimately extensive influence upon the said freedom seems to be the trade mark right. Exclusive rights granted by patent offices limit freedom of communication. The very nature of these rights has been set out by ban entitlements. Ban entitlements protect and simultaneously guarantee the range of exclusivity in terms of the trade mark use. Therefore, this paper shall contain an analysis of regulations dealing with absolute grounds for refusal of trade mark registration. Absolute grounds for trade mark registration protect against granting exclusive rights to signs that should be available in public. Thanks to

that, respective regulations also secure freedom of communications in goods trading. The right interpretation of said regulations is one of the prerequisites for proper execution of freedom of communications. In order to prove it, the origins of the EU trade mark laws, including the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (hereinafter referred to as Directive no. 89/104)¹ shall be presented. Furthermore, the paper shall discuss relevant regulations referring to Directive 89/104 as well as selected case law of the Court of Justice of the European Union² in terms of freedom of communication.³

2. FREEDOM OF DESCRIPTION OF GOODS

Undoubtedly, freedom of description of goods is tightly connected with the customs union. The very nature of the respective freedom is a ban of imposing import and export duties between Member States as well as charges having an equivalent effect to custom duties. In addition, it composes the ban of discriminating taxation. In order to ensure freedom of trading it is indispensable to provide entrepreneurs with freedom of description of goods. Such a freedom gives an opportunity to label goods with the notification that shall broadcast various kinds of information on a particular product. Simultaneously, free movements of goods may collide with exclusive rights established under intellectual property laws.

The principle of the intellectual property right features a territorial protection of exclusive rights. The territorial protection causes that performance of these rights may result in serious hindrance in trading between Member States. These rights have been explicitly indicated in Art. 36 of the Treaty on the Functioning of the European Union (hereinafter referred as TFEU).⁴ The cited regulation stipulates that

¹ OJ L 40, 11.2.1989, p. 1–7. Directive 89/104 was repealed by the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version), OJ L 299, 8.11.2008, p. 25–33 (hereinafter referred to as Directive no. 2008/95). Directive no. 2008/95 was introduced since the previous Directive no. 89/104 had been amended several times. Reference to repealed Directive no. 89/104 is deemed to be the reference to Directive 2008/95, in compliance with the correlation table enclosed in Annex II to Directive no. 2008/95.

² "Court of Justice of the European Union" is the new denomination of the European Court of Justice according to the Lisbon Treaty.

³ The Court makes also law-making activity. See more in respect to intellectual property rights: Týč V., Charvát R.: European Court of Justice as law-maker: example of intellectual property protection on EU internal market, *Dny práva – 2009 – Days of Law: the Conference Proceedings*, 1. edition. Brno: Masaryk University, 2009, p. 558-562.

⁴ Barnard, C.: *The Substantive Law of the EU. The Four Freedoms*. Oxford, 2007, p. 173.

prohibitions and restrictions on imports between Member States, justified on grounds of protection of industrial property, are acceptable, subject to they do not constitute a means of arbitrary discrimination or disguised restriction on trade between Member States. At the same time, the respective regulation shall not explain how to handle the collision of intellectual and industrial property rights and free market competition. This regulation solely points out that the protection of intellectual and industrial property is an exception from the free trade principle.⁵ Provisions of Art. 36 TFEU are supposed to exclude partial effects of the prohibition contained in Art. 34 TFEU. The latter bans quantitative restrictions on imports and all measures having equivalent effect between Member States. Otherwise, provisions of Art. 34 TFEU would entirely deprive the industrial property right of its meaning, basing upon national laws in EU Member States.

It is worth mentioning that industrial property laws, regardless whether recognized within the EU or nationwide, provide for situations when granting of the exclusive right to the trade mark is not possible. Thus, the laws shall stipulate so called grounds for refusal of trade mark registration. Here, it is worth depicting the origins of adoption of Directive 89/104. Actually, its adoption is related to striving for free movement of goods within the EU.

Origins of Directive 89/104

Upon the entry into force of EEC Treaty in 1958, the works on the European trade mark laws took off. The said Treaty, Art. 2. determined main tasks of the Community as promotion of a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it". The aforementioned objective assumed "establishing of the common market and progressive approaching of economic policies of Member States". The thing that the applicability of industrial property laws was territorial, i.e. was limited to certain States, resulted in restrictions of the market freedom. In the end of the day, there were no uniform regulations that covered the entire EEC area. Binding industrial property laws were barely constrained to the territory of the particular State.⁶ The free trade required to abolish extensive restrictions imposed by national protective laws.⁷ Therefore,

⁵ Woods, L.: Free Movement of Goods and Services within the European Community. Ashgate Publishing, Ltd., 2004, p. 140.

⁶ Tabor W., Wojcieszko, E.: Polskie prawo znaków towarowych a Wytyczne EWG (Problemy Harmonizacji), in: Europejskie standardy w obrębie prawa własności intelektualnej a prawo polskie, ed. Barta J., Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej, z. 60/1993, p. 10.

⁷ Beier, F.-K.: Od znaku towarowego EWG do znaku Wspólnoty, Przegląd Prawa Handlowego No. 5/1999, p. 13.

ideas on both unifying of national legislation systems related to the trade mark and establishing of the European (Community) trade mark were launched. Moreover, from the perspective of the economy, homogenous protection of trade marks seemed to be fundamental. Owing to unification of national industrial property laws, legal obstacles in the trading process between EEC countries could have been eliminated.⁸

In the beginning of the 1960-ies the European Commission set up the Trade Mark Group. This Group drew up the Preliminary Draft Convention for a European Trade Mark. This project was released as late as in 1973.⁹ It included establishing of the European Trade Mark Office. In 1974 the Commission appointed another working group. These efforts fructified with "the Memorandum on the creation of an EEC trade mark".¹⁰ It is to be emphasized that the fundamental objective of the aforesaid Memorandum was meant to be free movement of goods within the Community. This target was to be achieved through a uniform and autonomous system of trade marks based on the EEC trade mark. In order to implement these ideas, the EEC Trade Mark Office would have been established. In 1980 the Commission submitted the Proposal for a Council Regulation on Community Trade Marks.¹¹ Simultaneously, the Commission presented the Proposal for a first Council Directive to approximate the laws of the Member States relating to trade-marks.¹² Yet the final content of the Directive 89/104 was adopted as late as in 1988 as the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. Parallel works on the community system of trade marks resulted in adoption of the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.¹³

⁸ Ibid., p. 13-14.

⁹ Preliminary Draft Convention for a European Trade Mark, European Commission, Luxemburg 1973.

¹⁰ Supplement No. 8/76 to the "Bulletin of the European Communities" SEC (76) 2462, Luxemburg 1976.

¹¹ Proposal for a Council Regulation on Community trade Marks, supplement No. 5/80 to the „Bulletin of the European Communities”, Luxemburg 1981.

¹² COM (80) 635 final, 19 November 1980. Bulletin of the European Communities, Supplement 5/80.

¹³ OJ L 11, 14.1.1994, p. 1–36; hereinafter referred to as Regulation no. 40/94. Regulation no. 40/94 was repealed by the Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ L 78, 24.3.2009, p. 1–42, hereinafter referred to as Regulation no. 207/2009. References to the repealed Regulation no. 40/94 shall be deemed references to the Regulation no. 207/2009, in compliance with the correlation table enclosed in the Annex II of the Regulation no. 207/2009.

It is worth highlighting that the preamble of the Directive no. 89/104 underlined that the legislations on trade marks that were applied in the Member States those days varied from each other and therefore that might have been an impediment to free movement of goods and provision of services and might have interfered competition within the common market. Due to the aforementioned circumstances as well as because of establishing and existing of the internal market, it was necessary to approximate the laws of the Member States relating to trade marks. Provisions of Directive no. 89/104, and, currently, Directive no. 2008/95 were meant to reach this objective.

When working on Directive no. 89/104, legislators thought about setting up the first directive to handle the most vital issues, taking into account free movement of goods. Subsequent directives were to harmonize national laws regarding rules on proceedings before national patent offices. Today, the binding Directive no. 2008/95 has been introduced since the previous Directive no. 89/104 had been amended several times.

However, it is to be noticed that the works on amendments to the binding Directive no. 2008/95 are in progress.¹⁴ At the same time, the authorities are discussing changes of the Regulation no. 207/2009.¹⁵

Directive no. 2008/95 explicitly exposed that provisions on trade marks that had been applied in the Member States prior to the date the Directive no. 89/104 came into effect, had featured differences that might have obstructed free movement of goods and provision of services and interfered competition within the common market. Thus it is indispensable to approximate these laws, so to enable proper operation of the internal market.

Provisions of Directive no. 89/104 and therefore Directive no. 2008/95 set out grounds for refusal in terms of registration of trade marks. These regulations are meant to unify grounds of refusal within the entire EU area, basically in order to provide free movement of goods. Before listing the most crucial aspects of absolute grounds for refusal of trade mark registration, it is worth focusing on functions the trade mark is designed for. Actually, functions the trade mark are tightly connected with the free communications of goods.

Functions of the trade mark

A immanent function of trade marks is distinguishing goods or services on the market and therefore the mark operates as a

¹⁴ Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks, COM(2013) 162 final version of 27.03.2013.

¹⁵ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark, COM(2013) 161 final version of 27.03.2013.

distinguisher. It means that the function of the trade mark is to individualize goods or services and communicate thereon. As it has been highlighted by Ruiz-Jarabo Colomer, Advocate General, in his opinion in Case C-206/01 Arsenal Football Club¹⁶, the fundamental function of the trade mark is not only protection of origins, yet also protection of quality, mark recognition and, in some cases, of the way we perceive our life.¹⁷ It happens due to the fact that distinguishing marks may provide recipients with the vast array of meanings.¹⁸

It is worth to remark that pursuant to the preamble of Directive 89/104, the key objective to protect the trade mark is, in particular, pointing out the commercial background of goods. The doctrine states that "designation of the origin" by means of the mark might be split into four elements. Firstly, the trade mark has to identify the origin of goods or services, it is provided for. Therefore, it has to allow consumers or end users for distinguishing goods or services from goods or services coming from other undertakings. Thirdly, the distinguishing opportunity needs to bear no risk of confusion. Eventually, in order to provide designation of the origin, the owner of the trade mark has to be protected against competitors that intend to derive undeserved benefits of the status and recognition of such a trade mark through sales of goods holding an illicit sign.¹⁹ The Advocate General, in his opinion on HAG II case²⁰, indicated the warranty of product origin, as a basic function of trade marks. Within this function, the trade mark manifests reliability of its product source and guarantees the product identity. The trade mark provides its customers with the liability borne by the holder for a particular products and, simultaneously, guarantees that products marked with it probably characterize with the same features. Thus, the trade mark means the product itself and not only the source thereof. Being the product identity mark, it identifies the product the holder of the trade mark liable for, and informs on distinguishing properties of this product. Therefore, the trade mark has concurrently identification and communication functions with respect to the product. It is to be stressed that the trade mark is a mean of communication. Thanks to the trade mark, consumers gain information not only on the product origin but also many other information. Consequently, a possibility of

¹⁶ Case C-206/01 Arsenal Football Club [2002] ECR I-10273.

¹⁷ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-206/01 Arsenal Football Club [2002] ECR I-10273, 10275, delivered on 13 June 2002.

¹⁸ Davis, J.: To Protect or Serve ? European Trade Mark Law and the Decline of the Public Interest, *European Intellectual Property Review* 4/2003, p. 185.

¹⁹ Simon, I.: How Does „Essential Function” Doctrine Drive European Trade Mark Law ?, *International Review of Intellectual Property and Competition Law* 4/2005, p. 402.

²⁰ Case C-10/89 HAG II, Rec. p. I-3711.

labeling the products with trade marks enables to spread information thereon. Furthermore, the trade mark may pass the same information regardless of differences in languages used in particular Member States.

Undoubtedly, the trade mark law is a crucial component of the undisturbed competition system, that shall be introduced and maintained, which is considered one of the goals in the EEC Treaty. This system stipulates that enterprises ought to be given an opportunity to attire customers owing to high quality of goods and services they provide, which depends on existence of distinguishing designations allowing for identification.²¹

Absolute grounds for refusal of trade mark registration

It is widely accepted that the trade mark may be freely selected. As a matter of principle, the trade mark may be meant as such a designation that fulfils jointly two prerequisites: it may be depicted in the form of graphics, particularly if it refers to the word, picture, letter, digit, shape of the product or packaging; simultaneously, such a sign allows for distinguishing goods or services of a certain undertaking from goods or services of other undertakings. *Ipsa facto*, one may refuse to protect a submitted designation solely if strictly defined by the applicable laws. Therefore these special provisions stipulating obstacles in registration of the trade mark - as an exception from the principle of free trade mark selection - shall be construed strictly.

Provisions of Directive no. 89/104 and therefore Directive no. 2008/95, set out grounds for refusal of registration of the trade mark. Analogous hindrances have been included in the Regulation no. 40/94, as well as in binding Regulation no. 207/2009. Both the doctrine and the judicial practice commonly approves the division in the trade mark registration, splitting it into absolute and relative.²² In principle, absolute grounds are always subject to the examination carried out by patent offices. On the other hand, examining relative grounds *ex officio* is rather recognized as an exception but the rule in legal applications of particular Member States. Nevertheless, no matter whether absolute grounds are examined *ex officio* or not, patent

²¹ See: particularly judgements of the Court in Case C-10/89 HAG II, Rec. p. I-3711, par. 13, and Case C-206/01 Arsenal Football Club [2002] ECR I-10273, par. 47.

²² Relative grounds stand for situations when filed trade mark is identical with an earlier trade mark, and the goods or services for which the trade mark is applied for or is registered are identical with the goods or services for which the earlier trade mark is protected. Moreover, one of the most often relative grounds is the case when because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

offices primarily carry out survey on the filed trade mark in terms of absolute grounds. Once they have confirmed that the trade mark is free from absolute grounds in the registration process, the trade mark application is examined in terms of relative obstacles.

The most important absolute grounds for refusal of trade mark registration has been set out in provisions of Article 3 Directive no. 2008/95. Pursuant to the aforesaid provision, the following shall not be registered or, if registered, shall be liable to be declared invalid: a) signs which cannot constitute a trade mark; b) trade marks which are devoid of any distinctive character; c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods ; d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade; e) signs which consist exclusively of: (i) the shape which results from the nature of the goods themselves, or (ii) the shape of goods which is necessary to obtain a technical result, or (iii) the shape which gives substantial value to the goods. Moreover, trade marks which are contrary to public policy or to accepted principles of morality shall not be registered. In addition, provisions of Directive no. 2008/95 comprise and indication of other absolute obstacles. However, it seems that the most frequent ones are in practice those absolute registration obstacles that have been set out in Art. 3(1)(b) - (d) of Directive no. 2008/95. Among the latter, the most common cases of refusal of the trade mark registration relates to those that are descriptive signs. It refers to the grounds of registration refusal that has been specified in Art. 3(1)(c) of Directive 2008/95. The equivalent of this provision is Art. 7(1)(c) of the Regulation no. 207/2009.

Furthermore, from the perspective of free movement of goods, the most substantial factors are exactly obstacles set out in Art. 3(1)(b) - (d) of Directive no. 2008/95. These provisions are supposed not to allow for granting of an exclusive right to signs that, as matter of principle, shall remain public. Each and every person shall hold the right to mark goods with signs that indicate solely the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods. This type of designation ought to remain at the disposal of all the trading entities.

If, in relation to the designation, there is no ground for refusal set out in the provisions of Directive, referred to hereinabove, the designation, as a matter of principle, shall be of distinctive character. Distinctive character is the most essential prerequisite of the registration capacity as far as the trade mark is concerned. Actually, if the designation lacks sufficient distinctive features, the trade mark may not exercise its functions in the trading environment. It is to be emphasized that each of the aforesaid registration obstacles is of autonomous manner. Each of those prerequisites may actually

constitute and independent basis for refusal of providing protection to the trade mark.

Trade marks which are devoid of any distinctive character

Pursuant to provisions of Art. 3(1)(b) of Directive no. 2008/95 the trade marks which are devoid of any distinctive character shall not be registered or, if registered, shall be liable to be declared invalid.

As for freedom of description of goods, it is worth remarking the issues related to registration of colors as trade marks. Entrepreneurs generally intend to describe their goods using color, too. Patent offices, in principle, promote a restrictive viewpoint on granting of exclusive rights to this kind of signs.

In one of the judgements, the Court of Justice claimed that the color per se, not spatially limited, may, in respect of certain goods and services, have a distinctive character within the meaning of Art. 3(1)(b) of Directive. Yet, all the latter shall be true provided that, inter alia, this color may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective.²³ Simultaneously, the Court of Justice highlighted that in the course of examination regarding distinctive capacity of the trade mark meant as color, it is necessary to take into consideration the public interest. This interest the number of shades available for the entrepreneur's competitors shall not be unfairly limited. At the same time, the Court of Justice underlined that a color per se may acquire a distinctive capacity within the meaning of Art. 3(1)(b) of the Directive, provided that the mark is capable of identifying goods or services for which registration is sought as originating from a particular undertaking and distinguishing these goods or services from those of other undertakings.

When examining whether the designation can be classified within the category set out in provisions of Art. 3(1)(b) of the Directive 2008/95, it is to be decided basing on the criterion of perception of an average consumer of submitted goods or services in regular trading environment. The average consumer shall be deemed as well-informed and reasonably observant and circumspect. Such a meaning of the average consumer has been presented in the judgement of the European Court of Justice in the case of Gut Springenheide and Tusky.²⁴ Despite quite thorough determination of features, a model of the average consumer is not uniform and fixed. This model composes of numerous interpreting directives that shall be confronted against circumstances occurring in a particular case.

²³ Case C-104/01 Libertel [2003] ECR I-3793.

²⁴ Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657.

Simultaneously, the Court issued several key interpreting guidelines referring to the aforesaid regulation. Some of the fundamental principles have been briefly presented below.

The rule of non-distinctiveness of the sign

The protective right shall not be granted to the trade mark in the form of substantially non-distinctive designation. A substantial non-distinctiveness shall be meant as its incapability of distinguishing goods or services for which trade mark has been filed. In the judgment rendered in the case of INVESTORWORLD²⁵, the Court of First Instance stated that the distinctive character shall be assessed solely in relation to goods or services, with reference to which the trade mark has been filed.

The rule of apparent non-distinctiveness

The sign is considered non-distinctive only if it is apparently incapable of distinguishing submitted goods or services. Therefore, for the registration procedure, a minimum degree of distinctiveness is sufficient. For instance, the rule, referred to hereinabove, shall be valid as confirmed by the Court of First Instance (hereinafter referred to as CFI) in case of EUROCOOL.²⁶ The trademark EUROCOOL has been filed for designation, inter alia, services related to storing and keeping goods, including in particular, chilled and frozen products (class 39) and planning logistic systems, especially for the transport and storage of chilled and frozen products (class 42). The Court emphasized that a minimum of distinctive character suffices to receive protection for a particular mark. When examining distinctive capacity of the aforesaid trade mark, CFI remarked that the term EUROCOOL can be easily and instantly memorized by a targeted public as a distinctive sign.

Non-distinctiveness of the sign as a whole

All assessments of non-distinctiveness shall be carried out in relation to the sign as a whole. It results from the fact that in a regular trading environment, consumers do not analyze details of designations, yet they perceive them as a whole. The aforementioned rule has been

²⁵ Case T-360/99 Community Concepts v OHIM (Investorworld) [2000] ECR II-3545. The said rule has also been acknowledged, inter alia, in the judgement issued by CFI on the word trade mark COMPANYLINE. As for this case CFI stated that the distinctive character may be examined only in relation to goods or services, for the purpose of which the mark has been filed (judgement of CFI in Case T-19/99 DKV v OHIM (COMPANYLINE) [2000] ECR II-1).

²⁶ Case T-34/00 Eurocool Logistik v OHIM (EUROCOOL) [2002] ECR II-683.

expressed, inter alia, in the sentence in the cases of SABEL²⁷, as well as Lloyd Schuhfabrik Meyer²⁸.

Descriptive trade marks

Pursuant to Art. 3(1)(c) of the Directive no. 2008/95 trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services, shall not be registered or, if registered, shall be liable to be declared invalid.

When examining whether the sign is descriptive, it is necessary to take into consideration the public interest of the trading participants, which is meant as uninterrupted access to all designations informing about the name or properties of goods or services. Similarly to sign categories, referred to in Art. 3(1)(b) of the Directive no. 2008/95, also this case can be supported with several key interpreting guidelines launched by the Court. It seems that this obstacle is the most essential in terms of freedom of communications. Actually, granting an exclusive right to the trade mark may cause that the authorized entity shall be entitled to prohibit other trading participants to use designations including general information.

Descriptive trade marks shall be deemed merely those that compose exclusively of descriptive signs. On of the judgements of the European Court of Justice highlights that, in compliance with Art. 7(1)(c) of the Regulation no. 89/104, descriptive signs shall be meant signs that might be applied to describe properties of goods or services they have been provided for. In effect, the trade mark registration shall be refused basing upon the latter only if at least one of the possible meanings of the sign indicates properties of goods or services they have been provided for.²⁹

The rule of current descriptiveness

The prohibition of granting protective rights to descriptive trade marks refers barely to the signs composing of signs that might be applied in trading to describe goods or services. The subject of the aforementioned ban is trade marks that consists of designations which are currently useful in trading for the purpose of such a description. This is, so called, the rule of current descriptiveness.

²⁷ Case C-251/95 SABEL [1997] ECR I-6191.

²⁸ Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819.

²⁹ Case C-191/01 P OHIM v Wrigley [2003] ECR I-12447.

As a matter of principle, it shall not be deemed that the descriptive sign is the one that has been applied to describe goods or services and is currently out of use. Furthermore, is not allowed to recognize signs as descriptive, that hold descriptive properties which are solely expected in various theoretical market forecasts. The aforesaid principle shall also be applied in relation to such designations that may serve as description of goods or services in future, yet only in the event if special, extraordinary circumstances have occurred. In addition, the descriptive character shall not be attached to signs that, admittedly, depict some features of goods or services, however submitted goods or services fail to hold such properties and currently is not likely to happen.

The prerequisite of current descriptiveness of the sign may not be interpreted that the discussed prohibition refers merely to trade marks composing of designations that are currently applied to depict goods or services. The said provision shall be associated with the signs that do not only describe, yet may serve as a descriptive factor in the days to come. However, it is to be noticed that in the second case, the forecast-like assessments shall occur. Yet, these forecasts have to be derived from transparent conclusions that are justified with the market conditions.

The validity of the aforesaid rule has been acknowledged by the Court of Justice in the case of *Windsurfing Chiemsee*.³⁰ The European Court of Justice declared that the prohibition of registration of descriptive trade marks set out in Art. 3(1)(c) of the Directive, shall comprise signs indicating geographical location that are currently associated with submitted goods or services by relevant public as well as geographical signs that are likely to be used by undertakings as a indication of geographical origin of such goods or services in the future. When considering the latter situation, the European Court of Justice ascertained that it is indispensable to evaluate whether it shall be reasonable to establish that the geographical designation remains useful to indicate the geographical origin of submitted goods or services. The evaluation shall be particularly focus on particular consideration should be given to the degree of familiarity amongst the relevant class of persons with the geographical name in question, with the characteristics of the place designated by that name, and with the category of goods concerned. Apparently, the European Court of Justice remarked that the aforesaid ban referred also to the designations that could have been used for this purpose in the future. However, it has explicitly noticed that the forecast had to be justified with reasonable circumstances based on the current trading conditions.³¹ Moreover, the Court also expressed the importance of

³⁰ Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779.

³¹ The Court also stated that "the application of Article 3(1)(c) of the Directive does not depend on there being a real, current or serious need to leave a sign or indication free ('Freihaltebedürfnis') under German case-law".

keeping the geographical name available for use by other undertakings. In my opinion, this is also the way of protection freedom of goods description.

The rule of definite descriptiveness

The rule of definite descriptiveness means that protective rights to trade marks shall not be granted in relation to signs composing of definite description. Such designations include those that are necessary to describe submitted, and thus definite, goods or services.³² Therefore, the prohibition to grant protective rights to descriptive trade marks shall not be justified with usefulness of a particular sign for description differing from the one of submitted goods or services. Accordingly, the aforesaid ban shall not refer to designations that are solely of descriptive character in terms of similar goods or services. The definite descriptive signs shall be solely such designations that are indispensable to depict particular features of submitted, goods or services.

The Court's judgement in the Case C-383/99 P Procter & Gamble v OHIM³³ affirmed that the possible descriptive character of the sign ought to be determined not on a basis of particular words that contribute thereto, yet for the whole phrase. Each noticeable deviation in the phrase wording from phrases that are commonly accepted in the language practice applied in description of goods and services, the mark has been provided for, defines such a phrase as the one that holds a distinctive feature. In effect, the European Court of Justice stated that trade mark BABY DRIVE may be protected. Therefore, if the sign, as a whole, in spite of the fact that it consists of descriptive elements, is genuine, unique in trading, it might be granted with protective rights.

The rule of direct descriptiveness

According to rule of direct descriptiveness, it shall be deemed that only the signs that feature direct description of submitted goods or services are necessary to describe thereof.³⁴ Direct description designations shall be meant the signs that hold an explicit and direct indication of properties of submitted goods and services.³⁵ That is why prohibition to grant protection to descriptive trade marks shall not

³² Włodarczyk, W.: *Zdolność odróżniająca znaku towarowego*, Lublin: Oficyna Wydawnicza Verba, 2001, p. 174.

³³ Case C-383/99 P Procter & Gamble v OHIM [2001] ECR I-6251.

³⁴ Włodarczyk, W.: *Zdolność odróżniająca...*, p. 179.

³⁵ The similar judgments was issued by Court of First Instance in Case T-358/00 DaimlerChrysler v OHIM (TRUCKCARD) [2002] ECR II-1993 and in the Case T-356/00 DaimlerChrysler v OHIM (CARCARD) [2002] ECR II-1963,.

refer to the signs of indirectly descriptive character as for the submitted goods and services.

In the aforementioned judgment concerning trade mark BABY-DRIVE³⁶, the European Court of Justice stated that descriptive signs, within the meaning of Art. 7(1)(c) of the Regulation, shall be the signs that from the perspective of an average consumer, in a language routine, describe relevant goods or services in a direct manner or describe them indirectly through indication of its core features or properties. Moreover, according to the Court, registration of the trade mark shall be excluded in terms of its descriptiveness, only if the relevant sign, except for descriptive components, within the meaning referred to hereinabove, holds no other elements, designations or elements, and simultaneously those descriptive components have not been arranged so that the sign, as a whole, despite its descriptive components, does not distinguish goods or services that have been submitted in relation thereto.

The trading criterion

Assessment of descriptiveness shall be conducted taking into consideration circumstances related to its use in regular trading conditions.³⁷ An essential factor, which ought to be recognized, is kind of descriptive designations, general impression a particular sign makes within the entire trade mark, the nature of submitted goods or services, typical distribution and sales conditions, degree of interest among potential buyers as well as other relevant elements that result from the protective right granted to a certain trade mark. All the assessments shall be carried out on a basis of particular cases. Yet, in the course of decision-making, criteria the evaluation has been based upon shall be defined through an unambiguous determination of the examined circumstances.

In one of the judgements, the CFI has examined registration capacity of the word trade mark LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS.³⁸ The Court highlighted that the slogans with the information content that is widely available and trivial, and its interpretation is simple, hold no distinctive capacity, if they have been used or might have been used by the competitors in the regular trading. The aforesaid sign is the slogan of this kind. In spite of the applicant's opinion, it holds neither poetic character nor rhyme. In consequence, the consumers shall not consider it an indication of origin source of goods, but actually it shall be merely a simple advertising slogan, and therefore must not be protected.

³⁶ Case C-383/99 P Procter & Gamble v OHIM [2001] ECR I-6251.

³⁷ Włodarczyk, W.: Zdolność odróżniająca..., p. 182.

³⁸ Case T-216/02 Fieldturf v OHIM (LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS) [2004] ECR II-1023.

As a result, when examining whether the sign holds distinctive capacity, it is necessary to take into account the interest of trade participants that is expressed through a free access to any designations notifying on the name or features of goods or services.

Assessment of the trade mark as a whole

When examining the trade mark in terms of descriptiveness, it ought to be assessed as a whole. Thus, evaluations shall not be limited to some components of the surveyed mark. Particular elements of the sign are significant, if their assessment eventually leads to appraisal of the mark as some sort of integral parts.

The aforesaid principle has been proved in judgements of the European Court of Justice. In the case of SABEL³⁹ the Court has unequivocally underlined that the trade mark has to be evaluated as a whole in the assessments carried out under Art. 4(1)(b) of Directive. It results from the fact that average consumers perceive the trade marks as a whole and do not analyze its particular components”.

When interpreting absolute grounds for refusal of trade mark registration, the Court referred to the public interest. In one of its sentences, it stated that while evaluating refusal grounds for registration, specified in Art. 3(1)(c) of Directive, in a particular case, the public interest shall be taken into consideration. The thing is that all 3D shapes of products that compose barely of signs and designations and may be applied to mark features of goods or services should be available in public and cannot be registered. The exception is the situation when provisions of Art. 3(3) of Directive, may be applied, i.e. when a given mark shall acquire a secondary meaning.⁴⁰

Trade marks that solely consist of signs or indications, which have been introduced to the everyday language or are commonly used in fair and well-grounded trade practices.

Another obstacle for trade mark registration has been imposed through provisions of Art. 3(1)(d) of Directive. It stipulates that trade marks, which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade, shall not be registered or, if registered, shall be liable to be declared invalid.

In one of the sentences of The Court of First Instance it has been stressed that provisions of Art. 7(1)(d) of Regulation no. 40/94, that is equivalent Art. 3(1)(d) of Directive no. 89/104, shall be interpreted so that it is considered a hindrance in trade mark registration only if signs

³⁹ Case C-251/95 SABEL [1997] ECR I-6191.

⁴⁰ Joined Cases C-53/01 to C-55/01 Linde and Others [2003] ECR I-3161.

or indications, the trade mark solely consists of, have become customary in the current language or in the bona fide and established practices of the trade referring to designations of goods or services, in relation to which the registration has been applied for.⁴¹

Simultaneously, the Court sentenced that despite evaluation criteria referring to the distinctive character are the same for all kind of trade marks, it may appear that, in the process of application of these criteria, perception of these marks by relevant consumers may differ for each type and therefore it may turn out to be more difficult to indicate the distinctive character of some kinds of trade marks as compared to others.⁴²

3. CONCLUSION

It is worth highlighting that the Member States were obliged to implement provisions of Art. 3 of Directive 2008/95. And therefore the EU legislator decided that uniformity in application of, so called, absolute grounds of refusal of trade mark registration is of such importance that it should imply an obligatory harmonization of regulations within the discussed area in all EU Member States. It seems that one of the reasons of an obligatory harmonization of national laws in this area was, inter alia, an intention to provide freedom of description of goods.

A proper interpretation of obstacles in trade mark registration shall serve as a support to freedom of communication in terms of description of goods. Most of all, regulations that disturb registration of descriptive signs are meant to protect freedom of description of goods within the EU. Owing to that it is possible, among other things, to implement free movement of goods. Supposedly, if one entity was granted an exclusive right for descriptive sign, it would be easily able to cease free movement of goods, referring to the exclusive right it held.

Simultaneously, it is worth noticing that provisions of Art. 6 (1) (b) of Directive 2008/95 clearly limit the effect of the trade mark registration. Pursuant to the said paragraph, the proprietor shall not be entitled to prohibit a third party from using in the course of trade indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services.

⁴¹ Case T-322/03 *Telefon & Buch v OHIM– Herold Business Data (WEISSE SEITEN)* [2006] ECR II-835; see also analogous judgements Case C-517/99 *Merz & Krell* [2001] ECR I-6959, par. 31, and Case T-237/01 *Alcon v OHIM– Dr. Robert Winzer Pharma (BSS)* [2003] ECR II-411, par. 37.

⁴² See Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089.

This regulation is meant to protect against cases when the party authorized to the trade mark, invoking its exclusive right, would like to prohibit other trade participants from using descriptive indications. It seems to be essential due to the fact that many trade participants desire to obtain exclusivity for using descriptive indications in their operations. Exclusivity of using this type of signs means marketing attractiveness. Descriptive indications can easily be addressed to the consumers as compared to imaginative signs. Furthermore, it is easier to promote this kind of indications. Therefore, it is so essential to apply properly absolute grounds for refusal of trade mark registration. Inappropriate use of the aforesaid regulations may apparently interfere freedom of description of goods thus affecting negatively free movement of goods.

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CYBERSECURITY & DUAL-USE GOODS¹

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Abstract in original language

Kybernetická bezpečnost je dnes velice intenzivně pojednávána jak na úrovni jednotlivých soukromých společností, tak i na úrovni státní správy a mezinárodního společenství. Technologie používané při zajišťování kybernetické bezpečnosti jsou často přeshraničního původu, což s sebou nese nejenom problematiku bezpečnostních zájmů, ale i současného právního stavu, kdy se často jedná o zboží dvojího užití.

Key words in original language

Zboží dvojího užití, kybernetická bezpečnost, Nařízení 428/2009, cypherpunk

Abstract

Cyber security is very extensively approached within the private companies, state administration and the international community. Technology used to ensure cyber security often originates abroad, which does not only bring to light the security issues. It also contains the legal issues, given the nature of the technology, which is often considered the dual-use goods.

Key words

Dual-use goods, cyber security, Regulation 428/2009, Cypherpunk

1. INTRODUCTION

Given the amount of money pouring into the cyber security sector in various countries throughout the world and on the military, corporate and governmental level, the cyber security most certainly became something of a buzzword. Legislation is being prepared² or is entering into force,³ policy analysis are appearing by various subjects, directives are being proposed within the EU and literally everyone gets obsessed with the information and its protection. And all this is happening at the time when most of the internet users are willing to

¹ Příspěvek je výstupem projektu specifického výzkumu Právo a technologie II, reg. č. MUNI/A/0918/2013.

² Such is the case of the Czech Republic.

³ In Hungary.

exchange their personal data for discount in local convenience store and the mass surveillance is reaching previously unimaginable proportions. This is the unveiled reality of today's internet.

One of the ways to protect data is the encryption. When the possession started to shape within the mankind, it became clear that one does need to protect competitive resources from the others. Doors, locks, vaults etc. emerged in time. Just a while ago, given the history of mankind, the most valuable assets went digital. And as the encryption served in history to protect information from the enemy, today it serves to protect information from the competitors or enemies on the state level. It can be used as a both civilian and military technology and as such is rightfully subjected to the dual-use regime. This paper aims to sketch and briefly introduce the ratio behind this state. It explains the nature of the security and cyber security and the role of encryption in it. It also describes the regime of encryption in the post-World War II era when string norms and policies were imposed. In fact so strict it swung the goal of legislation from protecting the country towards limiting its citizens. In the European Union the situation never was so dramatic, but the encryption is still subjected to the dual-use goods legislation.

2. SECURITY ESSENTIALS

A lot of different definitions and concepts of security can be found in the literature or various policy defining documents. These often do copy the development on the field of international relations⁴ and therefore certain tendencies to forget the term "security" is multidisciplinary phenomenon can be seen. It is not the domain of international relations, but also other social sciences and of course engineering and information technology. Definitions usually vary as to define the security as a desirable state or as a characteristic.

The Czech security terminology depicts security in this manner as consisting out of two equally important elements: (I) Security is the state of affairs when possible threats to object and its interest are limited to the minimal possible level; and cumulatively (II) Security is the state of affairs when object is adequately equipped with particular set of tools allowing it to efficiently moderate or eliminate possible threats.⁵ The first element is the negative limitation of security while the other one presents the positive limitation. The Czech dictionary of cyber security depicts security as a characteristic of the object which

4 WAISOVÁ, Šárka. *Bezpečnost: vývoj a proměny konceptu*. Plzeň: Aleš Čeněk, 2005. 159 pp. ISBN 8086898210.

5 ZEMAN, Petr (ed.). *Česká bezpečnostní terminologie: výklad základních pojmů* [online]. Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2002 [cit. 11. 2. 2013]. 186 pp. ISBN 8021030372. Available at: www.defenceandstrategy.eu/filemanager/files/file.php?file=16048. P. 13.

determines the level of protection against losses.⁶ This seems to partially overlap with the general security definition in its part containing the positive limitation of the term. Both of these definitions are generally accepted within the Czech terminology.

However, the set presented by the term security contains various subsets. The term contains (among the most frequent) subsets of the “inner security” which presents identification and elimination of threats located or arising from inside the object, and the “outer security” which presents identification and eliminations of threats located or arising from outside the object. Subsets of “hard security,” aiming to mitigate and eliminate military threats, and “soft security,” aiming to mitigate and eliminate non-military threats, are also present within the general term of security.⁷ The cyber security fails to reflect any of these subsets in its general meaning. The critical infrastructure, which is generally acknowledged as the target for hypothetical military operations, is largely in private hands. Also the nature of attack could not be necessarily obvious on first sight, so the proper cyber security do have to contain tools to mitigate threats from both the hard and soft sphere, etc. Cyber security as a subset of security therefore bears almost the full set of characteristics as the general security does. The cyber security is therefore usually defined independently by the CIA triad arising originally from the information security terminology.⁸ Main difference between the information security and cyber security therefore lies in the distinction of the information security being the superior term and containing also the world outside the cyberspace.⁹ The CIA in this case stands as the

6 JIRÁSEK, Petr; KNÝ, Milan (eds.). Výkladový slovník kybernetické bezpečnosti [online]. Praha: Policejní akademie ČR & Česká pobočka AFCEA, 2012 [cit. 29. 1. 2013]. 93 pp. ISBN 978-80-7251-378-9. Available at: www.cybersecurity.cz/data/slovník_v150.pdf. P. 51.

7 ZEMAN, Petr (ed.). Česká bezpečnostní terminologie: výklad základních pojmů [online]. Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2002 [cit. 11. 2. 2013]. 186 pp. ISBN 8021030372. Available at: www.defenceandstrategy.eu/filemanager/files/file.php?file=16048. P. 13.

8 Certain alternative to the CIA triad is Parkerian hexad working with six elements of information: confidentiality, possession / control, integrity, authenticity, availability and utility. Author is Donn B. Parker who also criticises CIA triad as insufficient for description of the security assurance both inside and outside of the information networks. Parkerian hexad however remains to be of minor importance.

BOSWORTH, Seymour; KABAY, M. E. (eds.). Computer Security Handbook. 4th Edition. Hoboken: John Wiley & Sons, 2002. 1224 pp. ISBN 0471412589. Pp. 116-136.

9 Please bear in mind that this statement is rather simplified for the purpose of this paper.

abbreviation of terms Confidentiality, Integrity and Availability.¹⁰ Defining the cyber security as the “State of the Confidentiality, Integrity and Availability” of the “ability to ensure Confidentiality, Integrity and Availability” does not make any serious difference. Although appearing rather exotic on first sight, this concept is well known in the information security legislation in the Czech Republic¹¹ and also appears in the policies of the European Commission.¹² Its usage is therefore very convenient for its frequent appearance and rather good understanding.

Confidentiality of the system is (within the understanding of the CIA triad) bound to the protection of the stored or transmitted data against the access of non-authorized personnel.¹³ To ensure confidentiality the system ought to have the possibility to restrict users from accessing certain information. This is strongly tied to ability to verify identity of

10 GRAHAM, James; HOWARD, Richard; OLSON, Ryan (eds.). *Cyber Security Essentials*. Boca Raton: CRC Press, 2011. 325 pp. ISBN 978-1-4398-5123-4. P. 1.

11 „Every information system shall have prepared a security policy since the initial phase. Security policy of information system consists of norms, rules and procedure describing ways to ensure confidentiality, integrity and availability of confidential information and liability of the user for his operations within the system.“

Vyhláška Národního bezpečnostního úřadu č. 56/1999 Sb., o zajištění bezpečnosti informačních systémů nakládajících s utajovanými skutečnostmi, provádění jejich certifikace a náležitostech certifikátu. In: CODEXIS [legal information system]. Atlas Consulting [accessed 10. 11. 2013].

„Security of the information and communication systems consists of the set of measures aiming to ensure the confidentiality, integrity and availability of the confidential information contained within the system (...)“.“

Zákon č. 412/2005 Sb., o ochraně utajovaných informací a o bezpečnostní způsobilosti, ve znění pozdějších předpisů. In: CODEXIS [právní informační systém]. Atlas Consulting [accessed 10. 11. 2013].

12 „Network and information security can thus be understood as the ability of a network or an information system to resist, at a given level of confidence, accidental events or malicious actions that compromise the availability, authenticity, integrity and confidentiality of stored or transmitted data and the related services offered by or accessible via these networks and systems.“

Comm(2001)298, Network and Information Security: Proposal for European Policy Approach. In: EUR-lex [legal information system]. Publications Office of the European Union [accessed 10. 11. 2013]. Available at: <http://eur-lex.europa.eu/>. P. 5.

13 GRAHAM, James; HOWARD, Richard; OLSON, Ryan (eds.). *Cyber Security Essentials*. Boca Raton: CRC Press, 2011. 325 pp. ISBN 978-1-4398-5123-4. P. 4.

users and determine whether particular user shall or shall not have access to the information. Authentication and authorisation therefore presents inherent part of confidentiality of any system. The simplest possible way to ensure the confidentiality would be to have perfectly secure machine (disconnected from the internet) which could be physically accessed only by certain (authorised and authenticated) personnel. If the information was about to leave such a machine, even for legitimate purpose, it requires to be encrypted. Encryption therefore presents one of the crucial means to ensure the security of information, being it outside of cyberspace or within it.

To briefly finish the overview of the CIA triad – Integrity requires system to prevent any change of information to go unnoticed and Availability requires the system to be available to its rightful users. For this paper the Confidentiality is essential, because it is strongly tied to cryptography subjected to the dual-use legislation.

3. CRYPTOGRAPHY

As mentioned above, cryptography is one of the tools in use to ensure the information security (and cyber security) through its ability to ensure the confidentiality of transmitted information. Encryption is the process of encoding the information in such a way that anyone else than the eligible receiver (authorised, authenticated) is theoretically not able to read the information its transmission he successfully intercepted. Technical aspects of encryption fall outside the scope of this paper but the general idea remains the same regardless of the method used, being it symmetric encryption or public key encryption. Cryptography is being used since the dawn of time, because information has essential role in the culture, business or warfare. Importance grew even more recently with society reaching the phase of information society¹⁴ with acknowledged unprecedented rate and volume of information society uses to maintain and develop itself. In history the cryptography was used by Spartans¹⁵ and Caesar¹⁶ and appeared in the work of one of my favourite writers, Edgar Allan Poe.¹⁷ In the World War II cryptography played significant role in the war effort and the victory of Allies was reached also thanks to the decryption of Enigma and Purple.¹⁸ After the World War II, in year

¹⁴ See WEBSTER, Frank. Theories of the Information Society. Third edition. London: Routledge, 2006. 317 pp. ISBN 0-415-40633-1.

¹⁵ More information available at <http://courses.gdeyoung.com/pages.php?cdx=168> [accessed 29. 11. 2013] as a part of the Gary De Young website depicted to the history of encryption.

¹⁶ More information available at <http://courses.gdeyoung.com/pages.php?cdx=169> [accessed 29. 11. 2013].

¹⁷ Namely the short story Golden Bug.

¹⁸ Purple is the US codename for Angōki B-kata used by Japanese Foreign Office.

1949, two events served as a harbinger of things to come. The paper Communication Theory of Secrecy Systems by Claude Shannon¹⁹ was published and it basically started the era of modern cryptography. The second event was the emergence of the Armed Forces Security Agency in the USA, which eventually transformed into the National Security Agency (NSA) in 1952.²⁰ Until the 1970s cryptography was almost solely domain of the western armies and secret services. Civilian subjects did not use cryptography and the East struggled with research – GCHQ²¹ and NSA therefore possessed the most advanced cryptography back then. Situation changed in 1970s when the US government started to encourage individuals and companies to use cryptography in order to protect their privacy or know-how and other information used as company assets. Emerging encryption was largely arising from the government (which in this case meant mainly the NSA and various military facilities) and both individuals and companies were concerned about the backdoor possibilities.²² In the 1978 the RSA emerged from the civilian sector and this finally gave society strong and independent tool to protect the privacy. At this moment the government imposed embargo on cryptography and thus started the so called Crypto Wars, involving interference into the academic research etc.

As the reader probably noticed I gradually drafted from the idea of cryptography being essential for war effort and security toward the aspect of cryptography concerning privacy. The general idea of embargoing the cryptography followed the most essential military and nation security logic – one does not provide potential opponent with material and technologies that might be used in the future conflict. For US government was absolutely unthinkable and unacceptable (given the national security interests and the ongoing Cold War) to provide countries connected to the USSR with advanced cryptography. Main reason was not to enhance own information security or to harm the information security of Eastern bloc, but simply to prevent the information security of Eastern bloc from further development. US

¹⁹ SHANNON, Claude. Communication Theory of Secrecy Systems [online]. Bell System Technical Journal [accessed 25. 11. 2013]. Available at <http://netlab.cs.ucla.edu/wiki/files/shannon1949.pdf>.

²⁰ Nicely depicted in documents of the NSA itself. See various chapters of Crypto Almanach at http://www.nsa.gov/public_info/_files/crypto_almanac_50th/The_Creation_of_NSA_Part_1.pdf, http://www.nsa.gov/public_info/_files/crypto_almanac_50th/The_Creation_of_NSA_Part_2.pdf, and http://www.nsa.gov/public_info/_files/crypto_almanac_50th/The_Creation_of_NSA_Part_3.pdf [all accessed 29. 11. 2013]

²¹ Government Communications Headquarters, UK.

²² Intentional undocumented weak spot that might be used to eavesdrop the communication.

and its close allies improved own position on the process of information gathering by not allowing the opponent to use state-of-art cryptography. This is perfectly legitimate interest and given the overall political and military background of the Cold War I believe that these limitations in favour of national security (as a non-distributive informational right) were proportionate. However the situation is a bit more complicated, because these strict regulations also affected the individuals and imposed strong limitations on their distributive informational rights,²³ mainly on privacy and on freedom of speech. Prioritisation of the non-distributive rights (security) over distributive rights (privacy, speech etc.) never reached the extent of communist countries at that time,²⁴ but it was enough to create tension and to cause emergence of the cypherpunk movement.²⁵ Governments and security services have resources to monitor even the huge amount of communication occurring, as evidenced by the recent and ongoing PRISM affair and the less encrypted the communication is, the more information can be gathered this way. Embargo on encryption therefore affected the privacy and was not solely aimed toward the state-actors of any possible actual or hypothetical conflict. Any use of backdoors in cryptography massively (and I believe in most cases disproportionately) collides with right to privacy. Limitations imposed on research also collide with the freedom of speech (more precisely its subset of freedom of research).

Tendencies to use the encryption to spy on own citizens graduated in the 1990s when the NSA tried to present the so called clipper key or the idea to escrow keys to encryption used by corporate sector or individual citizens to ease the access for the purpose of national security or the law enforcement. Crypto Wars were claimed victorious in favour of the privacy on 25th May 2005 when provision of the UK Electronic Communications Act allowing creation of the register for encryption lapsed. In the US, the cryptography is still listed within the United States Munitions Lists as the Auxiliary Military Technology,

²³ POLČÁK, Radim. *Internet a proměny práva*. Praha: Auditorium, 2012, 388 pp. ISBN 978-80-87284-22-3. Pp. 326-327. The most serious problem of the informational self-determination is its relative instability in time. I this constantly emerging and re-shaping komplex of distributive informational rights. Its scope varies with the technology in use. Recently we can say that it contains the freedom of speech and freedom of research, protection of privacy, personality and right to lead socially active life, right to access education, proection of personal data and the right to public sector information.

²⁴ As depicted in BOBEK, Michal; MOLEK, Pavel; ŠIMÍČEK, Vojtěch (eds.). *Komunistické právo v Československu: Kapitoly z dějin bezpráví*. Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009. 1005 s. ISBN 9788021048447. Pp. 330-363.

²⁵ See LEVY, Steven. *Crypto : How the Code Rebels Beat the Government Saving Privacy in the Digital Age*. Penguin, 2002. 368 pp. ISBN 978-0140244328.

but the commercial encryption was removed from this list by the Executive order 13026 in 1996.

Today the encryption is part of many proprietary or open software and is being widely and gradually used by companies and citizens. At the dawn of the post-PRISM era it seems to gradually grow in importance. However the sensitive issue of the cryptography being used by military is not yet over and this aspect is regulated within the dual-use legislation. This is much more proportionate over the old approach and does not impose unnecessary limitations to the distributive informational rights.

4. DUAL-USE GOODS

As mentioned above, the general idea is not to provide potential enemy with any weapons (or military technology in general). The dual use goes in its philosophy one step further in order to more precisely reflect the technological reality. It is not necessary to provide the enemy with completed weapons in order to enhance the threat. It is sufficient to provide him with the particular part he is unable to manufacture. And because multiple civilian technologies can be slightly (or not at all) modified to serve military purpose, these technologies need to be subjected to certain special regime of trade, so called dual-use goods regime. Legislation within this area contains documents of both international and national law and of course also the communitarian law.

The Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items is in effect since 27th August 2009 and was amended by the Regulation (EU) No 1232/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. Amendment is in effect since the 7th January 2012. Category 5, part 2 of the regulation is entitled Information security and contains the dual-use goods within this field subjected to the special licensing regime. Although the general ratio behind the regulation turned into norms allowing countries to stop the export of certain goods, the provisions applicable to the information security tools are far from the nature of the law in the time of Crypto Wars.

Norms of the regulation cannot be imposed on products accompanying their user for the user's personal use, which is major improvement compared to the former US legislation. In general the information security products are effectively removed from the scope of this regulation if all of the following conditions are met:

Product is generally to the public by being sold, without restriction, from stock at retail selling points by means of (I) over-the-counter transactions, (II) mail order transactions, (III) electronic transactions, or (IV) telephone call transactions.

The cryptographic functionality cannot be easily changed by the user.

Product is designed for installation by the user without further substantial support by the supplier.

Product details can be accessed and will be provided upon request to the competent authorities if necessary.

To my knowledge the only authority that further described and explained these conditions is the Department of Business, Innovation and Skill in the UK.²⁶ It interpreted the abovementioned conditions that the retail selling point is a place with readily available cryptographic items (being it hardware or software). The media through which the offer or request is communicated is generally subjected to the own right of these retail selling points. Product is available without restriction if a product is acquired by paying a standard fee. Restriction in this context means that no one is in general excluded from commerce of this product and does not require any special kind of authorisation of person. Non-changeable cryptographic functionality means that the manufacturer ensured (not absolutely, but by reasonably chosen means) that the product can only be used according to its specification. The category with installation without further substantial assistance or support by supplier in general contains mass-market products with helpline (phone or e-mail) set up. This means that even the B2C and B2B contracts on sale of specific hardware or software could be subjected to the dual-use license regime. Therefore, in case of the critical infrastructure modernisation almost any information security tools fall within the scope of the dual-use, which further enhances various security and legal issues connected to it.

5. CONCLUSIONS

As described above encryption is valuable tool to protect the confidentiality of information. It played very important role in warfare throughout the history and its significance did not change at all. In fact, as evidenced above, it shifted to being legitimately used in the civilian sector to help protect corporate interests from competitors and governments and to help protect citizens from governments and each other. Information are the most valued assets in the information society and as such ought to be protected. The strict regime imposed on encryption in the USA was abandoned and the EU currently imposes the standard dual-use regime, which is proportionate and does not limit regular citizens almost at all through the general-use exception. Encryption did and does play significant role and in the post-PRISM era I believe it shall become even more important and widespread.

²⁶ This clarification is available at <https://www.gov.uk/export-of-cryptographic-items> [accessed 1. 12. 2013].

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STATE V. INTERNATIONAL TRADE REGULATION: ECONOMIC SANCTIONS OF THE USA

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Abstract in original language

Příspěvek se věnuje ekonomickým sankcím USA a zákonům, které opravňují výkonnou moc Spojených států k jejich ukládání. V souvislosti s tím zmiňuje kontroverze, které tyto zákony vyvolaly zejména pro jejich extraterritoriální účinky a možné porušení práva WTO. Příspěvek zmiňuje například Helms-Burtonův zákon, massachusettský zákon o Barmě nebo nařízení prezidenta Obamy č. 13645 z června roku 2013.

Key words in original language

Ekonomické sankce, zákony USA, embargo, extraterritoriální účinky, právo WTO.

Abstract

The article deals with economic sanctions of the USA and statutes that authorize the executive branch to impose them. It describes some controversies, which the statutes induced especially due to their extraterritorial effects and possible violation of WTO law. The article mentions for example the Helms-Burton Act, Massachusetts Burma Law or Executive Order 13645 issued by President Obama in June 2013.

Key words

Economic sanctions, statutes of the United States, embargoes, extraterritorial effects, WTO law.

1. INTRODUCTION

A state that wishes for its citizens and companies to participate in international trade might want to direct their business in accordance with its foreign policy. Still, such state is now fairly limited by international law, especially international trade regulations such as WTO law, international treaties or inter-governmental agreements. Hence, the state should take these rules into account when creating national laws. The United States is known for their far-reaching controls on international trade and business transactions. Therefore, its statutes and controversies, which the statutes caused, will be discussed in this article.

2. ECONOMIC SANCTIONS IN GENERAL

Economic sanctions fall under the categories of force and enforcement in their broader sense²⁷ and are used as foreign policy tools²⁸. Any state using them intervenes in the affairs of another state, usually in order to compel that particular state to change its policy in a certain area.²⁹ It is done so typically as a response to an unlawful act by another state. That constitutes a so-called reprisal.³⁰ Its former more forceful nature can be demonstrated by the evolution of the meaning of the term “embargo”. In its original sense, the term embargo covered “the seizure of ships belonging to the other [s]tate or its nationals”³¹. Nowadays, the term refers to a partial or complete ban on export of goods to certain countries.³²

Economic sanctions in general include any export and import controls such as embargoes, boycotts (ban on import³³) and prohibitions on property transactions (blocking or freezing of assets)³⁴. However, they may take form of basically any political and foreign policy sanctions that impede usual trade relations.³⁵ They play an important role where politically sensitive products are concerned, mainly those that can be used for military purposes.³⁶

²⁷ Shaw, M. N.: *International Law*, 5th Edition, Cambridge: Cambridge University Press, 2003, 1288 p., ISBN 0521531837. p. 1022.

²⁸ Friedland, J. A.: *Understanding International Business and Financial Transactions*, 3rd Edition, New Providence, NJ: LexisNexis, 2010, 394 p., ISBN 1422486370. [Hereinafter *Friedland*], p. 172.

²⁹ Cassese, A.: *International Law*, 2nd Edition, Oxford: Oxford University Press, 2005, 558 p., ISBN 0199259399. [Hereinafter *Cassese*], p. 297.

³⁰ *Cassese*, p. 299.

³¹ *Cassese*, p. 297.

³² Malenovský, J.: *Mezinárodní právo veřejné : jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*, 5th Edition, Brno: Masarykova univerzita, Doplněk, 2004, 551 p., ISBN 9788021044746. [Hereinafter *Malenovský*], p. 367.

³³ *Malenovský*, p. 367.

³⁴ *Friedland*, p. 172.

³⁵ Chow, D. C. K. et al.: *International Business Transactions : problems, cases and materials*, New York : Aspen Publishers, 2005, 864 p., ISBN 0735539855. [Hereinafter *Chow*], p. 131; *Friedland*, p. 172.

³⁶ *Chow*, p. 131.

3. ECONOMIC SANCTIONS OF THE UNITED STATES

The United States in particular often imposes economic sanctions from political and/or foreign policy reasons. It also influences export and international trade in general by anti-boycott laws, Foreign Corrupt Practices Act and regulations against economic espionage.³⁷

The broad set of rules is complicated and intertwined with different regulatory bodies.³⁸ Nevertheless, it always applies to the conduct of all citizens and residents of the United States, companies based in the United States, and conduct that takes place in the United States.³⁹ Some rules have also various extraterritorial impacts.⁴⁰

Economic sanctions in the United States sometimes overlap with general export controls, which are specifically in the United States also very complex and far-reaching.⁴¹ While economic sanctions are often directed more on controls of trading with certain countries or even persons, export controls are property-based, directed on export and reexport of goods which are produced in the United States or in its customs territory.⁴²

In the United States, economic sanctions may be adopted either by Congress directly in a statute or by the President of the United States (the executive branch), who must be authorized by a statute.⁴³ As an example of the first group of statutes serves the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act⁴⁴, also called Helms-Burton Act.⁴⁵ From the statutes that authorize the executive branch to impose sanctions are most renowned the Trading With the Enemy Act⁴⁶,

³⁷ More on that in *Friedland* and *Chow* in relevant chapters.

³⁸ *Friedland*, p. 171 – 176; Low, L. A., McGlone, W. M.: Avoiding Problems Under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act in *Chow*. [Hereinafter *Low, McGlone*], p. 133.

³⁹ *Low, McGlone*, p. 133.

⁴⁰ *Low, McGlone*, p. 133.

⁴¹ *Low, McGlone*, p. 138.

⁴² See generally *Low, McGlone*.

⁴³ *Friedland*, p. 172.

⁴⁴ 22 U.S.C. §§ 6021-6085, enacted March 12, 1996. In: United States Code [online]. Office of the Law Revision Counsel [cit. 2. 12. 2013]. Available at: <http://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter69A&edition=prelim>. [Hereinafter the *Helms-Burton Act*.]

⁴⁵ *Friedland*, p. 172.

International Emergency Economic Powers Act (IEEPA)⁴⁷, United Nations Participation Act⁴⁸ and International Religious Freedom Act (Wolf-Burton Act)^{49, 50}.

The United Nations Participation Act authorizes in § 287c the President to implement Security Council measures, which may include economic sanctions against targeted country. International Religious Freedom Act was adopted in order to promote freedom of religion and provide a tool to confront countries that discriminate or prosecute their inhabitants due to their religion.⁵¹ Based on this act, the President may decide to take various actions, including economic sanctions, directed against a country violating freedom of religion.⁵² Other statutes mentioned here along with other relating matters will be further discussed below.

Under the U.S. statutes authorizing the President to impose economic sanctions, the President is also usually authorized to waive the sanctions.⁵³ For example, under the International Religious Freedom Act, the President may waive the application of actions taken against

⁴⁶ 12 U.S.C. § 95a, enacted October 6, 1917. *In*: United States Code [online]. Office of the Law Revision Counsel [cit. 1. 12. 2013]. Available at: <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title12-section95a&num=0&edition=prelim>. [Hereinafter the *Trading With the Enemy Act*.]

⁴⁷ 50 U.S.C. §§1701-1707, enacted October 28, 1977. *In*: United States Code [online]. Office of the Law Revision Counsel [cit. 1. 12. 2013]. Available at: <http://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>. [Hereinafter the *International Emergency Economic Powers Act*.]

⁴⁸ 22 U.S.C. §§ 287-287i, enacted December 20, 1945. *In*: United States Code [online]. Office of the Law Revision Counsel [cit. 1. 12. 2013]. Available at: <http://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter7/subchapter16&edition=prelim>. [Hereinafter the *United Nations Participation Act*.]

⁴⁹ 22 U.S.C. §§ 6401-6474 enacted October 27, 1998. *In*: United States Code [online]. Office of the Law Revision Counsel [cit. 1. 12. 2013]. Available at: <http://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter73&edition=prelim>. [Hereinafter the *International Religious Freedom Act*.]

⁵⁰ See *Friedland*, p. 172.

⁵¹ Religious Freedom: Legislation. *In*: U.S. Department of State [online]. [cit. 1. 12. 2013]. Available at: <http://www.state.gov/j/drl/irf/c2132.htm>.

⁵² See *International Religious Freedom Act*, 22 U.S.C. § 6444 and 6445.

⁵³ *Friedland*, p. 173.

the targeted country if the violations of religious freedom ceased or if it is in the important national interest.⁵⁴

4. THE OFFICE OF FOREIGN ASSETS CONTROL REGULATIONS

Sanctions against targeted countries imposed under Trading With the Enemy Act and International Emergency Economic Powers Act are administered by the Office of Foreign Assets Control (OFAC), one of the agencies of the U.S. Treasury Department.⁵⁵ The typical OFAC regulations include not only bans on export, import, financing, technology transfer, etc., but also blocking orders and asset freezes.⁵⁶ The agency also maintains list of specific persons, vessels and entities that are not to be dealt with, similarly as the targeted country to which they are affiliated.⁵⁷ These so-called “Specially Designated Nationals” are deemed to be agents of the particular countries, terrorists, narcotics dealers, proliferators of weapons of mass destruction and others.⁵⁸ The list of targeted countries includes for example Burma, Cuba, Libya, Iran, Iraq, North Korea, Sudan and Syria.⁵⁹

5. THE HELMS-BURTON ACT

The Helms-Burton Act is the legal authority for sanctions against Cuba. However, the act during its existence covered not only embargo against Cuba, but enabled U.S. citizens to take lawsuits against foreign persons who benefited from or invested in the property that was confiscated by Cuba after the Cuban revolution.⁶⁰ Several states protested against the extraterritorial effect of this statute, including Canada, Mexico as well as the European Union.⁶¹ The European

⁵⁴ *International Religious Freedom Act*, 22 U.S.C. § 6447.

⁵⁵ *Low, McGlone*, p. 133.

⁵⁶ *Friedland*, p. 137; *Low, McGlone*, p. 134.

⁵⁷ *Friedland*, p. 170; *Low, McGlone*, p. 134.

⁵⁸ *Friedland*, p. 170; *Low, McGlone*, p. 134.

⁵⁹ Sanctions Programs and Country Information. *In*: U.S. Department of Treasury : Resource Center [online]. [cit. 1. 12. 2013]. Available at: <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

⁶⁰ *Friedland*, p. 172; Helms-Burton Act. *In*: Market Access Database [online]. European Commission [cit. 1. 12. 2013]. Available at: http://madb.europa.eu/madb/barriers_details.htm?barrier_id=960295&version=2. [Hereinafter *the EC information on the Helms-Burton Act*.]

⁶¹ *Friedland*, p. 173.

Union even commenced WTO dispute settlement procedure in 1996, alleging that the act is in violation with WTO Agreements, namely GATT articles I, III, V, XI and XIII, and GATS articles I, III, VI, XVI and XVII.⁶² Owing to long-lasting negotiations⁶³ between the European Union and the United States, the European Union did not continue in the case, mainly based on the fact that the President of the United States used his right to waive the application of some of the provisions of the Helms-Burton Act.⁶⁴ The European Union however still maintains the position that the act violates international law (international trade regulation)⁶⁵ and adopted Council Regulation No 2271/96⁶⁶, which should provide protection from the extraterritorial effect of similar laws in general, with the Helms Burton Act namely included in the Annex as a statute with such effects. Hence, the act is a clear example of a conflict between a state executing its sovereign powers by enacting a statute enforcing its foreign policy and international trade regulation adhered to by the rest of international community.

6. THE MASSACHUSETTS BURMA LAW

Another example of such conflict represents the Massachusetts Burma Law⁶⁷. The Commonwealth of Massachusetts adopted a statute aiming at restricting business with Burma by terminating contracts with

⁶² *The EC information on the Helms-Burton Act; United States – The Cuban Liberty and Democratic Solidarity Act. In: Disputes Database [online]. The Secretariat of the World Trade Organization [cit. 1. 12. 2013]. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm; Friedland, p. 173.*

⁶³ *See the EC information on the Helms-Burton Act.*

⁶⁴ *Friedland, p. 173.*

⁶⁵ *See the EC information on the Helms-Burton Act.*

⁶⁶ Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. *In: EUR-LEX [legal database]. Publications Office of the European Union [cit. 1. 12. 2013]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML>.*

⁶⁷ An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), enacted June 25, 1996, Chapter 130, 1, 1996, Mass. Acts. 210, codified at Mass. Gen. L. ch. 7. 22G-22M. *In: Acts and Resolves [online]. The State Library of Massachusetts [cit. 1. 12. 2013]. Available at: <http://archives.lib.state.ma.us/actsResolves/1996/1996acts0130.pdf>.*

companies trading with Burma.⁶⁸ Massachusetts wanted to prevent use of government finances as an indirect support of the regime in Burma.⁶⁹ In 1997, the European Union challenged the law, similarly as the Helms-Burton Act, at the WTO, especially based on the claimed violation of the WTO Agreement on Government Procurement.⁷⁰ Again, the European Union later suspended the case, this time due to a federal lawsuit against the Massachusetts Burma Law brought by a coalition of U.S. corporations.⁷¹ The case was in its final stage examined by Supreme Court of the United States, which held the act unconstitutional in *Crosby v. National Foreign Trade Council*⁷². The Supreme Court found that the act was preempted by federal law and also undermines the President's authority to represent the United States internationally. However, the Supreme Court did not expressly address the possible violations of international trade regulation, apart from summarizing the amount of international complaints.

7. THE EXECUTIVE ORDER 13645

The fact that question of extraterritoriality of the U. S. sanctions has not yet been fully resolved, may be demonstrated on the Executive Order 13645 issued by President Obama in June 2013 under the International Emergency Economic Powers Act and numerous other acts.⁷³ The executive order, directed against Iran, authorizes sanctions

⁶⁸ The Committee on International Trade: States' Rights v. International Trade: The Massachusetts Burma Law [online]. New York City Bar [cit. 1. 12. 2013]. Available at: <http://www.nycbar.org/pdf/report/99228%20-%20States%20Rights%20v%20International%20Trade.pdf>.

⁶⁹ Massachusetts Burma Procurement Law Challenged at WTO [online]. Public Citizen [cit. 1. 12. 2013]. Available at: http://www.citizen.org/trade/article_redirect.cfm?ID=11103. [Hereinafter *Public Citizen*.]

⁷⁰ United States – Measure Affecting Government Procurement. *In*: Disputes Database [online]. The Secretariat of the World Trade Organization [cit. 1. 12. 2013]. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm; *see also Public Citizen*.

⁷¹ *See Public Citizen*.

⁷² Decision of the Supreme Court of the United States in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). *In*: Findlaw [online]. [cit. 1. 12. 2013]. Available at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=530&page=363>.

⁷³ Executive Order – Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions with Respect To Iran. *In*: The White House [online].

against foreign financial institutions and commercial businesses. It even enables asset freezes of non-U.S. persons that take actions enumerated in the order. However, since sanctions against Iran are generally supported by Canada and the European Union,⁷⁴ it is not probable that these entities would lodge any complaints against the extraterritorial effect of the U.S. executive order.

8. CONCLUSION

This article provides a general and not exhaustive introduction into the topic of the U.S. economic sanctions and should serve as an incentive for its further exploration. There are several statutes in the United States that regulate economic sanctions and each of them would supply enough material for a controversial debate. It should be clear at this point that the United States tend to connect its foreign (mainly human rights) policy with its economic policy. That alone often leads to a criticism, with the usual extraterritorial effects of U.S. sanctions only adding fuel to the fire. The question whether U.S. sanctions violate WTO law is yet to be authoritatively resolved. A diplomatic solution, especially via WTO dispute settlement procedure, could be convenient, giving the U.S. legislation a boundary that should not be overstepped.

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LEGAL REGULATION OF NON-CONVENTIONAL TRADEMARKS

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Abstract

Due to the integration of the increased business activity of the Russian Federation economy to foreign countries, it is necessary to make analysis and harmonization of legislation in the field of intellectual property. Legal regulation of trademarks is very important in the framework of trade cooperation. In a modern market economy, the availability of large quantities of goods and services requires that the manufacturer find ways to differentiate their products against similar products of competitors. One of those ways is to use non-conventional trademarks that are distinguishable by senses other than sight. The article presents overview of different ways of regulation the non-conventional trademarks, case studies and possible ways to solve the gaps in the regulation.

Key words

Non-conventional trademarks, olfactory trademark, EU, Russia, Madrid System, OHIM

1. INTRODUCTION

Due to the integration of the increased business activity of the Russian Federation economy to foreign countries, it has been paved the way for the necessary analysis and harmonization of legislation of different countries.

Particularly, the issue relates to the legal regulations of the field of intellectual property. Each country has its own characteristics in the regulation of such relations. However, there were no clear mechanisms of international regulation. This situation led to the fact that the rights registered in one country did not find the defense in other countries. In its turn it caused numerous violations of intellectual property rights. In this regard, the need for cooperation between the countries and the establishment of mechanisms for international protection of intellectual property became obvious. In 2009, At the level of the European Union and the Russian Federation was launched a project named “Approximation of EU and Russian Federation Intellectual Property Right aspects”¹ and it had been implemented by the European Patent Office.

¹ <http://www.rupto.ru/rupto/portal/53f0b1f9-2fb3-11e1-351c-9c8e9921fb2c?lang=en>

Legal regulation of trademarks is very important in the framework of trade cooperation. Trademark protection in the European Union is regulated by the following acts: Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks. Also in the European Union there is a special type of trademarks as a community trade mark, regulated by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, that allows register a community trade mark, which will have the protection throughout all countries of the European Union.

According to the article 2 of the Directive 2008/95/EC: “A trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.”

Usually, trademarks are visually and graphically recognizable. In a modern market economy, the availability of large quantities of goods and services requires that the manufacturer find ways to differentiate their products against similar products of competitors. One of those ways is to use non-conventional trademarks that are distinguishable by senses other than sight.

According to the Madrid System for the International Registration of Marks², it is possible to register a trade mark in several countries where it will be by simply filing one application directly with his own national or regional trademark office. However, countries have different approach for the registration of the non-convention trademarks³.

Trademark under⁴ the Article 1477 of the Russian Federation Civil Code is a designation that serves to individualize goods of legal entities and individual entrepreneurs, to which an exclusive right, approve certificates of trademark. There are the following main types of trademarks: verbal, visual, dimensional and other signs or

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² The Madrid system for the international registration of marks (the Madrid system) established in 1891 functions under the Madrid Agreement (1891), and the Madrid Protocol (1989)

³ Non-conventional trademarks, IPro services (India) Pvt. Ltd, 2009

<http://www.iproinc.com/admin/files/upload/4753d4e7e2a6e89536dfae3af6d3097c.pdf>

Date of request: 20.09.2013

⁴ «Товарные знаки» means “trademarks” in russian

combinations thereof (Article 1482 of the Civil Code). Thus, the types of trademarks are not limited. It should be mentioned that in the worldwide practice the following forms of non-convention trademarks are gaining popularity: volume, sound, olfactory.

The subject under consideration is a special kind of trademarks like olfactory.

The basis for the consideration of this example, take the fragrance products. The manufacturer may register a wide range of rights related to it:

- 1) the trademark on the name of the perfume,
- 2) bottle as industrial design or trademark as the volume and so on.

2. IS IT POSSIBLE TO REGISTER THE SMELL OF PERFUME PRODUCT?

2.1 EU AND USA

In the United States the first olfactory trademark which was registered was using for embroidery yarn and described in the application as “a high impact, fresh floral fragrance reminiscent of plumeria blossoms»⁵.

The question arises, how we can pinpoint the smell. For a mere consumer, it is difficult to distinguish between different flavors. In addition, different conditions can change the smell of perfume; in this case it is impossible to check whether the trademark protection is the smell or something else. When registering olfactory trademarks in the United States must provide a graphical expression of the bottle and a description of flavor brand. Experts of United States Patent and Trademark Office distinguishes cases where the scent is of secondary importance and is the main source of differences. If the smell - it's the main difference between the brands and to distinguish the smell of this product from the same related products, such scent may be registered as a trade mark⁶.

The issue of olfactory trademarks has got another solution in the European Union.

⁵ Re Clarke 17 USPQ 2d 1238 (1990)

⁶ In the US scents may be trademarked if they do not serve a functional purpose. In 1990 for example a court held that a Californian company could register a plumeria scent as a trademark for its sewing thread and embroidery yarn (US Reg. No 1,639,128, subsequently abandoned).

Personal fragrances (e.g. the scent of a perfume) are considered functional - without separation of the product and the mark - and thus cannot be registered.

UK Trade Marks Act of 1994 provided for the possibility of registering olfactory trade marks. But at the same time, British Patent Office considers that the smell alone can not be the subject of legal protection for perfumes. In 1994, the UK was refused registration of smell trade mark "Chanel No 5" on the grounds that the smell of the perfume is the good itself. The smell should distinguish one product from the other products.⁷ However it is possible to register olfactory trade marks for goods other than perfume. In the UK were registered two olfactory trademarks, "floral fragrance, reminiscent of a rose" for items such as auto tires⁸, the second - a "strong smell of bitter beer" for the flights for darts game⁹. However, the Office for Harmonization in the EU's Internal Market (OHIM), does not agree with the provision of this two registrations in the UK¹⁰. There is just one positive example of the registration of the olfactory trademark. It was registered by Venootschap onder Firma Senta Aromatic Marketing. The mark related to tennis balls and was identified by the words "the smell of fresh cut grass"¹¹.

Let us turn to the case law.

In one case, the court found that, in particular, with regard to the specific subject matter of the dispute - the scent of perfume, it is impossible to ascertain the matter in dispute, and as a violation of law on this subject.

The French company "Lancome" filed a lawsuit against the Dutch "Kecofa", in which the plaintiff accused the defendant of violating the scent as a trademark in its perfume, which at a much lower price resembles the famous fragrance "Trésor". Lancome lost the case

⁷ The Registration of Smell Trademarks in Europe: another EU Harmonisation Challenge

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www.inter-lawyer.com/lex-e-scripta/articles/trademarks-registration-smell-EU.htm date of request 25.09.2013

⁸ Olfactory trade mark № GB 2001416 registered by Sumitomo Rubber Co

⁹ Olfactory trade mark № GB 2000234 registered by Unicorn Products

¹⁰ http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html

Date of request: 22.09.2013

¹¹ OHIM-Decision of the Second Board of Appeal, February, 11th, 1999

because it is difficult to establish the subject of the violation and prove it¹².

Thus, it is difficult to prove scent as a trademark, it is necessary to carry out the legal protection of perfume under the utility model patent.

According to the most famous case of Ralf Sieckman v Deutsches Patent und Markenamt [2002] ECR I-11737 the European Court of Justice laid down the requirements that enable a trademark to be graphically represented.¹³ Munich court considered the case of refusal by the German Patent Office to register the smell as a trademark. The manufacturer has provided all of the data: the exact chemical formula to describe the smell of shades, but registration was refused. The specialists of the Patent Office in Germany justify such a categorical refusal to EEC Directive¹⁴, which gives a clear definition of the trademark. According to the Directive trademark is only object capable graphic display with lines, shapes, and written symbols. The image used in a trade mark must be easily understandable for ordinary people. The smell is not included in this category, and therefore cannot serve as a trademark.

The European Courts of Justice stated that smells cannot be durable as a smell changes over time. Smells are subjective to every individual. Also a chemical formula of a smell would not be sufficiently accessible, clear or precise. Therefore the European Court of Justice confirmed as a general rule smells cannot be registered as trade marks. The same was confirmed by the statement of Advocate General D. Ruiz-Jarabo Colomer on 6 of November 2001¹⁵.

2.2 RUSSIA AND UKRAINE

The situation related to registration of perfume differs in Russia. Federal service for intellectual property (Rospatent)¹⁶ registered a square leather tag, which has "a pronounced smell of leather as a trade

¹² Lancome v. KecofaLancôme Parfums et Beauté et cie S.N.C. v. Kecofa B.V. Court of Appeals at Den Bosch (C0200726/MA) Decided June 8, pub. June 21, 2004

¹³ Dr. Ralf Sieckmann vs Deutsches Patent- und Markenamt (case C-273/00, a judgment of the European Court of Justice issued on December 12, 2002).

¹⁴ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark

¹⁵ Opinion of Advocate General Colomer , November 6, 2011,

¹⁶ <http://www.rupto.ru/rupto/portal/start?lang=en>

Date of request: 22.09.2013

mark¹⁷." In this case, the trademark is used to protect the scent of perfume.

Trademark registration is regulated by the Rules of compiling, filing and review of an application for registration of a trademark and service mark (approved by Rule of Rospatent from 05.03.2003 , № 32). The application should contain the description of the registered designation. Description serves to explain the merits of the claimed designation, that is to say its identification. In describing the characteristics of the claimed designation it should be noted: its form (verbal, visual, volume, sound, etc.), an indication of its constituent elements, the meaning of symbols in general or its components (parts). The rules are not clearly regulated the registration of olfactory trademark, but in the relationship of such specific categories as sound and light indicated that it was necessary to bring the characteristics of light symbols (signals) , their sequence , the glow time and other features. If for registration as a trade mark is declared sound indication, then the characteristics of its constituent sound (sound) , or musical notation , or a chart of frequencies with the application of a phonogram on audiotape . If for registration as a trade mark is declared sound (light) designation, then the designation is executed graphically and as a soundtrack (movies) in the audio (video) tape. Thus, we can assume that in order to register the olfactory trade mark, it is necessary to provide the chemical formula of the compound having the smell of this, his verbal description of the pattern. This sign is quite difficult to detect, as the perception of smell is extremely subjective, there is no exact criteria for recognition of smell and lack of practice with olfactory signs. Also, in the world there is no case of olfactory trade mark registration in its pure form as the smell of perfumes. Olfactory registered trademark in Russia consists of a leather tag with a strong smell of genuine leather.

Let us turn to the analysis of the legislation of Ukraine. Trademarks are regulated by the Law «On Protection of Rights to Marks for Goods and Services»¹⁸, which does not provide for the prohibition to register fragrance as a sign for the goods and services (trade mark). Since, according to the law provisions: the object of a mark can be any sign (the sign by which goods and services of one person different from the goods and services of others), or any combination of signs. The Ukrainian legislation provides that a trade mark must be capable of being registered, that is, shall be entered in the State Register and published in the official gazette "Industrial Property ". Thus,

¹⁷ <http://izvestia.ru/news/531727>

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¹⁸ <http://zakon4.rada.gov.ua/laws/show/3689-12>

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practitioners believe that the registration of the olfactory trade mark in Ukraine is impossible.

3. CONCLUSION

Possible ways of graphical representations requirements:

1) The “graphical representation” of scents is possible to solve by verbal description. However the smell is really subjective category and cannot really identify and distinguishing one smell or scent from another.

2) Another way is to describe the smell as a chemical formula. The chemical formula does not represent the smell of the chemical itself and that few people would be able to get a sense of the smell based on its chemical formula.

3) Sample of the scent provided as evidence of the scent in question may degenerate over a period of time as the chemical composition may deteriorate. Fragrances component are not stable or durable and smell can disappear.

4) Image representation of the scent. Graphical representation of strawberry was refused registration for a scent described as «the smell of ripe strawberry»¹⁹. It was rejected because the image depicted a strawberry instead of the smell of a strawberry, and this depiction could possibly have confused the public.

At the same time the formulae of perfumes and fragrances are most commonly reserved as trade secrets or may alternatively be protected through the patents²⁰.

Thus, we can conclude that there are still a lot of questions in the field of registration of olfactory trademarks. Not all countries register trademarks of smell, the process of registration is also not uniform. Such a unique trademarks as olfactory have a really big potential to represent innovative goods and services. At the same time contemporary situation requires EU law to be more flexible and adoptive. The crucial question is to how to fulfill the graphic representation requirement.

¹⁹ CTM Application No. 001122118/filing date Mar. 26, 1999

²⁰ REGISTERING SCENTS AS COMMUNITY TRADE MARKS, Stavroula Karapapa

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THE “RECYCLING CONFLICT” OF THE EU AND THE RUSSIAN FEDERATION IN THE CONTEXT OF THE WTO

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Abstract in original language

Příspěvek připomíná datum 22. srpna 2012, kdy se Ruská federace připojila k Světové obchodní organizaci a současně poukazuje na problémy, které v kontextu této skutečnosti vznikly. Poskytnut je stručný popis činnosti SOO a jejího mechanismu pro řešení sporů. Tento je doplněn informacemi o aktuálním konfliktu mezi dvěma významnými členy organizace – Evropskou unií a Ruskou federací. Autor nastiňuje, v čem spočívá jádro sporu, co činí tento případ „zvláštním“ a jaká se nabízejí východiska.

Key words in original language

Světová obchodní organizace; Evropská unie; Ruská federace; orgán pro řešení sporů; Ujednání o řešení sporů; „recyklační poplatek“; Karel De Gucht.

Abstract

The paper reminds the date of 22th August 2012 when the Russian Federation accessed the World Trade Organization outlining the problems that have occurred since then. The brief description of the WTO's functionality and its disputes settling mechanism is provided as well as the information about current conflict between two significant WTO's members – the EU and the Russia. The author explains what is the crux of the conflict, what makes this case “special”, and what are possible solutions of it.

Key words

The World Trade Organization; the European Union; the Russian Federation; the Dispute Settlement Body; the Dispute Settlement Understanding; the “recycling fee”; Karel De Gucht.

1. RUSKO ČLENEM WTO

If you visit the official site of the World trade organization, section “*The WTO... In brief*”, you will find very short “definition” of its activities – “*The World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably*

*and freely as possible*¹. No matter how purely and simply it might sound, all who are interested in business and law are fully aware of how challenging is such a mission. It requires inter alia to involve as many countries as possible so that negotiated (law) standards may be used as widely as possible.

From this point of view the date of 22th August 2012 represents one of the milestones of “life” of the WTO. It is so because on this day the very important economical subject entered the organization – the Russian Federation (156th member²). It took nearly two decades³ however as it was pointed out by Pascal Lamy⁴ „*It has been a long journey for both countries* (second accessing subject was the Vanuatu – 24th August) *and they will undoubtedly strengthen the multilateral trading system*“⁵. At least everybody hoped they would do so. Unfortunately as the following text will try to show the Russian Federation must nowadays face very hard criticism from another important trade/business subject, which is as well the WTO’s member – the European Union⁶.

Despite that „*from the date of accession, the Russian Federation has committed to fully apply all WTO provisions, with recourse to very few transitional periods*“⁷, the new member has made some controversial steps regarding the EU import of vehicles. Karel De

¹ The WTO.....In brief. *World Trade Organization* [online]. WTO, 2011 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm.

² ACCESSIONS Russian Federation. *World Trade Organization* [online]. WTO, 2012 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm.

³ “*The Working Party on the Accession of the Russian Federation was established on 16 June 1993*” – op. cit. 2.

⁴ The former Director-General of the WTO. It is also noteworthy that „*between 1999 and 2004, Pascal Lamy was Commissioner for Trade at the European Commission under Romano Prodi*“ – Pascal Lamy, WTO Director-General, 2005-2013. *World Trade Organization* [online]. WTO, 2013 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/thewto_e/dg_e/pl_e.htm.

⁵ WTO membership rises to 157 with the entry of Russia and Vanuatu. *World Trade Organization* [online]. WTO, 2012 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/news_e/pres12_e/pr671_e.htm.

⁶ “*The European Union [...] has been a WTO member since 1 January 1995*” – The European Union and the WTO. *World Trade Organization* [online]. WTO, 2013 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

⁷ Op. cit. 5.

Gucht⁸ “replied” that „since Russia has become a member of the WTO they are doing exactly the opposite of what they are supposed to do or what they have been promising to do...”⁹.

It is aim of this article to inform of recent developments regarding the outlined problem. To do so it is however necessary to describe at least in very few words the basic principles and relationships forming the grounds of the World Trade Organization.

2. THE FUNCTIONS OF THE WTO

We have already mentioned the very general definition of WTO’s activities. If we want to be at least a bit more specific we can use words of Naděžda Rozehnalová, who in general categorizes the WTO’s tasks as

„ensuring realization of the Agreement (establishing the WTO), multilateral agreements and the aims included,

providing space for negotiations regarding questions related to the agreements mentioned above (previous paragraph) and for handling the other questions concerning multilateral commercial relationships,

realization of the Dispute Settlement Understanding (DSU),

administering the mechanism of the reviewing of the trade policy,

cooperation with the International Monetary Fund and the World Bank in questions, where it is necessary for development of the world economic policy”

The third point should be stressed for the purpose of our topic – “realization of the Dispute Settlement Understanding”. This document can be considered as a cornerstone of settling disputes among the WTO’s members. Therefore it is relevant to the current situation among the Russian Federation and the European Union. In light of that the following text is devoted to the brief clarification of the “mechanism”.

⁸ Belgian politician, current European Commissioner for Trade (since February 2010) – Karel De Gucht – Biography. *European Commission* [online]. European Commission, 2010 [cit. 3. 10. 2013]. Accessible at: http://ec.europa.eu/commission_2010-2014/degucht/about/cv/.

⁹ CHAFFIN, Joshua. EU takes Russia to WTO over vehicle recycling fees. *FT.com* [online]. The Financial Times Ltd., published 9. 7. 2013 [cit. 3. 10. 2013]. Accessible at: <http://www.ft.com/intl/cms/s/0/88cb0438-e88e-11e2-aead-00144feabdc0.html#axzz2ge4IPKbE>.

2.1 DISPUTES IN THE WTO

The main role in settling disputes is entrusted to so-called DSB (the Dispute Settlement Body). Let's briefly introduce the whole process now.

The following system represents de facto formal way of settling disputes. However before it starts there is also *informal* dialogue, when "...parties involved in dispute are trying to find solution through the mutual consultations on expert and political level"¹⁰. If there is no result then *formal* procedure comes into question. This part follows document mentioned above (the Dispute Settlement Understanding), which "like the bulk of the WTO agreements [...] was one of the outcomes of the Uruguay Round negotiations (1986–1994)"¹¹. The three phases can be distinguished.

The first one has form of (this time) *formal* resolving of the problem by the involved parties again through the consultations. Those "...may as well ask the WTO Director-General¹² to figure as the mediator or to help them in some other way"¹³. The phase can take up to 60 days. It is important to notice that "...the DSU does not provide any guidance on how the consultations are to be conducted. Therefore, the manner and form in which the parties discuss the dispute, interpret the facts and reveal legal arguments is left almost entirely to them"¹⁴. Under the circumstances that the problem isn't solved the country may request establishment of the panel. This brings us to the phase two. It's however important to stress that "where consultations are denied, the complaining party may move directly to request a panel"¹⁵. The panel must be set up within 45 days and "they (panels) are normally

¹⁰ Řešení obchodních sporů v rámci WTO. *CzechTrade* [online]. Ministerstvo průmyslu a obchodu ČR, 2010 [cit. 3. 10. 2013]. Accessible at: <http://www.businessinfo.cz/cs/clanky/wto-reseni-obchodnich-sporu-7178.html>.

¹¹ Dispute settlement. *World Trade Organization* [online]. WTO, 2013 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

¹² Since 1st September 2013 is this position carried out by the Roberto Azevêdo – WTO Director-General: Roberto Azevêdo. *World Trade Organization* [online]. WTO, 2013 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/thewto_e/dg_e/dg_e.htm.

¹³ Op. cit. 10.

¹⁴ LESTER, Simon; MERCURIO, Bryan; DAVIES, Arwel. *World trade law : text, materials and commentary*. 2nd ed. Oxford: Hart publishing, 2012, 934 p. ISBN 9781849462228. P. 154.

¹⁵ Legal texts: the WTO agreements. *World Trade Organization* [online]. WTO, 2011 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding.

*composed of three, and exceptionally five, experts selected on an ad hoc basis. This means that there is no permanent panel at the (WTO); rather, a different panel is composed for each dispute*¹⁶. The experts have naturally duty to be independent of the countries' governments.

The process of the establishment of the panels is contained in the Dispute Settlement Understanding, however there is no need for purpose of this article to describe it in all details. Just as example we can mention that "...in a case involving a developing country, one panelist must be from a developing country (if requested)"¹⁷. When the panel is finally "ready" the case is consequently reviewed and the final report is put forward to the parties (six months) and then to the rest WTO's members (3 weeks later). It's as well submitted to the Dispute Settlement Body, which may reject it nevertheless only on the basis of *consensus*¹⁸, otherwise it becomes the Dispute Settlement Body's ruling or recommendation.

Regarding the ruling of the DSB there is one important option for either side of the dispute – to appeal. At the same time it must be accent that the basis for appeal must have *only* law character. If any party appeals than the Appellate Body, which has seven members, enters the procedure. Unlike the panels it has permanent nature and represents "...the second and final stage in the adjudicatory part of the dispute settlement system"¹⁹. The Appellate Body has maximum of 90 days for revision and once again its final report may be rejected by the DSB only by the *consensus*. Either way the DSB has 30 days for acceptance or rejection.

Finally there is the *third* part of the procedure – the fulfillment of the decision. In ideal situation the country voluntarily follows received recommendations. If not it must enter negotiations with the complaining party in order to determine mutually-acceptable

¹⁶ WTO Bodies involved in the dispute settlement process – Panels. *World Trade Organization* [online]. WTO, 2011 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm.

¹⁷ JACKSON, John; DAVEY, William; SYKES Jr., Alan. *Legal problems of international economic relations : cases, materials and text on the national and international regulation of transnational economic relations*. 5th ed. St. Paul: Thomson, 2008, 1210 p. ISBN 9780314160263. P. 270.

¹⁸ Řešení obchodních sporů v rámci WTO. *CzechTrade* [online]. Ministerstvo průmyslu a obchodu ČR, 2010 [cit. 3. 10. 2013]. Accessible at: <http://www.businessinfo.cz/cs/clanky/wto-reseni-obchodnich-sporu-7178.html>.

¹⁹ WTO Bodies involved in the dispute settlement process – Appellate Body. *World Trade Organization* [online]. WTO, 2012 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm.

compensation. Of course they may fail to agree in which case the complaining country “...may ask the Dispute Settlement Body for permission to impose limited trade sanctions [...] against the other side”²⁰. Such request may be rejected again only by the consensus. This “final stage” has its own detailed rules, e.g. “...to minimize the chances of (“sanction”) actions spilling over into unrelated sectors while at the same time allowing the actions to be effective”²¹, nevertheless the most general one is that the all actions are certainly overseen by the DSB.

Finally it should be stressed that apart the dispute settlement procedure, through which most disputes are resolved, “...the DSU gives parties the option of resorting to good offices, conciliation and mediation [...], as well as arbitration [...] to settle their differences, (however) these alternatives have rarely been used”²².

3. THE RUSSIAN FEDERATION V THE EUROPEAN UNION

Through the description of the procedure we have come to the core of this article, since it is just a few weeks ago that the European Union filed request for consultations regarding the Russian Federation and its so-called “recycling fee” imposed on motor vehicles. As we mentioned above this step formally initiated a dispute in the context of the WTO however there was also the informal part since “the EU took the decision to launch the WTO case after nearly a year of complaining to Moscow, including an unusually blunt warning issued in December by Karel De Gucht, the EU’s trade commissioner”²³. As the communication from the EU to the Russian Federation and to the Chairperson of the DSB states “Russia’s measures appear to be inconsistent with Russia’s obligations [...] in particular:

- Article I:1 of the GATT 1994;

²⁰ Understanding the WTO: settling disputes – A unique contribution. *World Trade Organization* [online]. WTO, 2011 [cit. 3. 10. 2013]. Accessible at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

²¹ Op. cit. 20.

²² GRANDO, Michelle. *Evidence, proof, and fact-finding in WTO dispute settlement*. Oxford: Oxford University Press, 2009, 410 p. ISBN 9780199572649. P. 22.

²³ CHAFFIN, Joshua. EU takes Russia to WTO over vehicle recycling fees. *FT.com* [online]. The Financial Times Ltd., published 9. 7. 2013 [cit. 7. 10. 2013]. Accessible at: <http://www.ft.com/intl/cms/s/0/88cb0438-e88e-11e2-aead-00144feabdc0.html#axzz2ge4IPKbE>.

²⁴ General Agreement on Tariffs and Trade 1994. In: *WTO legal texts* [online WTO legal texts]. World Trade Organization [cit. 11. 10. 2013]. Accessible at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

- Article II:1 (a) and (b) of the GATT 1994;
- Article III:2 of the GATT 1994;
- Article III:4 of the GATT 1994;
- Article 2.1 and 2.2 of the TRIMs Agreement²⁵ in conjunction with paragraphs 1(a) and/or 2(a) of the Illustrative List annexed to the TRIMs Agreement”²⁶

Regarding the length of this paper it is not easy to provide detail analysis of the case. However let’s try to introduce at least the crux of the matter. As we have sketched, the Russian Federation enacted the fee to cover the cost of the recycling of the vehicles. It is essential to point out that this levy applies *only to the imported* ones. Thus the domestic vehicles are under the certain conditions liberated. Furthermore “*an exemption is also available to vehicles imported from certain countries, such as Belarus and Kazakhstan. However, there is no exemption for vehicles imported from the European Union*”²⁷.

Such “measure” is of course very controversial, inter alia because it could be interpreted as protection of domestic production, which is contradictory to the Article III, paragraph 2 of the GATT 1994 – “*the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products...*”²⁸.

²⁵ Agreement on Trade-related Investment Measures. In: *WTO legal texts* [online WTO legal texts]. World Trade Organization [cit. 11. 10. 2013]. Accessible at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

²⁶ Russian Federation – recycling fee on motor vehicles. Request for consultations by the European Union. *World Trade Organization* [online]. WTO, 2013 [cit. 7. 10. 2013]. Accessible at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=117977&CurrentCatalogueIdIndex=0&FullTextSearch=.

²⁷ Op. cit. 26.

²⁸ WTO analytical index: GATT 1994. General Agreement on Tariffs and Trade 1994. *World Trade Organization* [online]. WTO, 2013 [cit. 7. 10. 2013]. Accessible at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_02_e.htm.

It also needs to be stressed that the fee starting at €420²⁹ has very real consequences regarding the exports of the European Union to the Russian Federation – “*the fee has cut European automobile exports to Russia by 7% at a time when the Russian market has been growing...*”³⁰. Seeing the statistics in context of that “*the EU vehicle exports to Russia amounted to about €10bn last year (2012)...*”³¹ it is obvious that quite “great” deal of money is in question. In my point of view it is therefore very reasonable from the European Union to start with formal actions towards its east neighbor, despite the topic represents without any doubts very (politically) delicate problem. It is so because the country “breaching” the WTO’s rules is not just any country, but the Russian Federation, which is clearly one of the biggest economic subjects in terms of the world/international business. Finally there is one more reason, which makes this case “special”, the reason why to follow this case. It is “*the (very) first dispute involving the Russian Federation since it acceded to the WTO...*”³².

Seeing the problem from the other side the EU is another world largest economic formation. As much as this fact may be called “irrelevant” on the theoretical field, it is of course very important in reality in particular considering the mutual political pressure. Regarding the step made by the EU (initiation of the dispute) this problem should not just fade away. The question is however how much the parties will let this case escalate.

4. WHERE THE CASE IS HEADING TO?

It is not easy to answer such question. If not for the other reasons then because two “equivalent subjects” are involved. One may hardly expect that the European Union would just give up its effort to make the Russian Federation to “cooperate”. Why? Quoting the EU officials, “*there are a number of issues in the Russian trade policy that give rise to concern,*”³³. It is therefore my personal opinion that

²⁹ Op. cit. 23.

³⁰ DALTON, Matthew; WHITE, Greg. Europe Takes Russia to WTO Over Car Fee. *The Wall Street Journal* [online]. Dow Jones & Company, Inc., published 9. 7. 2013 [cit. 7. 10. 2013]. Accessible at: <http://online.wsj.com/article/SB10001424127887324507404578595490232255884.html>.

³¹ Op. cit. 23.

³² EU files dispute against Russia on recycling fee on motor vehicles. *World Trade Organization* [online]. WTO, 2013 [cit. 7. 10. 2013]. Accessible at: http://www.wto.org/english/news_e/news13_e/ds462rfc_09jul13_e.htm.

³³ CHAFFIN, Joshua. EU takes Russia to WTO over vehicle recycling fees. *FT.com* [online]. The Financial Times Ltd., published 9. 7. 2013 [cit. 7. 10. 2013]. Accessible at: <http://www.ft.com/intl/cms/s/0/88cb0438-e88e-11e2-aead-00144feabdc0.html#axzz2ge4IPKbE>.

the EU, regarding this case, is about to show to the Russia that it is ready to protect its interests if necessary.

At the same time it should be pointed out that there is still chance that at least this case will reach the conclusion quite “peacefully”. As the Wall Street Journal states “*Russia's government submitted a bill to parliament in late May that would apply the recycling fee universally to domestic and foreign manufacturers. [...] (however) the bill must pass through three readings in the lower house and then the Federation Council before it can be signed into law by President Vladimir Putin*”³⁴. In light of the previous sentence it is necessary to take this “initiative” just as *possible* solution *not* as *the final/definitive* conclusion. Nevertheless from my point of view it would represent probably the most “favourable” option considering the duration of the conflict.

Going back to the question “where the case is heading?” only the following weeks and months will definitely answer to it. However there are two things that are more than evident even from the perspective of the present day. The first one is that it will be very interesting to see what proportion/combination of the political pressure, diplomatic attitude and law measures will be the European Union applying towards the Russian Federation. The second one is the fact that no matter this case, the relationship of the EU and the Russian Federation is obviously going to be tensed for the “near future”. Matthew Dalton and Greg White are pointing out that “*among their (EU officials) concerns is the fact that Russia changed the way it calculated duties after it joined the WTO, raising the levies on car bodies, poultry and palm oil to rates above those allowed by WTO rules. [...] Moscow also has imposed numerous bans on European food-product imports...*”³⁵. It needs to be therefore stressed that no matter the general importance of the accession of the Russian Federation to the WTO it remains questionable whether it is going to improve mutual (EU x Russia) relationships or it is much more likely just “the formal change”.

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³⁴ Op. cit. 30.

³⁵ Op. cit. 30.

- GRANDO, Michelle. *Evidence, proof, and fact-finding in WTO dispute settlement*. Oxford: Oxford University Press, 2009, 410 p. ISBN 9780199572649
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FREE MOVEMENT OF GOODS VS. FUNDAMENTAL RIGHTS

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Abstract

First fundamental freedom - free movement of goods - mentioned by founding treaties has been also first and probably most guarded golden egg within European Union Law. Since not only other fundamental freedoms has become important as well, and mutually contradictory situations has become possible, all fundamental freedoms later acquired their twin - fundamental rights. Relationship between freedom of movement of goods and fundamental rights is not synchronous and subsidiary, but rather choice of values, which should prevail in particular situation. This problem, even it is not new within EU Law, has its self evolution on the EU level as well as on the national level. This paper aims to provide analysis of judicial balancing between the EU economic values as fundamental freedom of goods and other values as fundamental rights.

Key words

fundamental freedom; free movement of goods; fundamental rights; freedom of expression and freedom of assembly; EU Law; Treaty on European Union (TEU); Art. 2 to 6; Treaty on the functioning of the European Union (TFEU); Art. 28 to 44; Court of Justice of the EU; Schmidberger case; exceptions; justifications; proportionality

1. INTRODUCTION

European Union which is now founded on the Treaty on European Union (adopted in Maastricht in 1992) and on the Treaty on the Functioning of the European Union (Rome Treaty from 1958) shall replace and succeed the European Community.¹

European Community has been established mainly for economical reason (European Economic Community) and economical aims should prevail.

The protection of fundamental rights in the European Union however has been established within European Community legal order as a success story of judge-made law of the Court of Justice of the European Communities (now Court of Justice of the European Union

¹ See Art. 1 para 1 Treaty on European Union (TEU), as amended by Lisbon Treaty from 2007 (entered into force on 1 December 2009).

after Lisbon Treaty). It started with the famous 1969 ruling in Stauder Case².

According to settled case-law, until 2009 when Lisbon Treaty (Charter of Fundamental Rights) came into force, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention of human rights has special significance in that respect.³

The fundamental rights of EU law are primarily addressed to the institutions of the EU. Yet, as the Court held in Wachauf⁴ and ERT⁵, the requirements of their protection are also binding on the Member States when they act in the scope of Community law, for example, when they implement Community rules.

2. TERMINOLOGY DISTINCTION - FUNDAMENTAL RIGHTS VS. FUNDAMENTAL FREEDOMS

Terms fundamental rights and fundamental freedoms were connected not only within constitutional comparative law but also within international public law to the human rights theory.

EU legal terminology use more or less coherently regarding to human rights only term "fundamental rights" without using "fundamental freedoms" in this context.

For example the most important source of EU Law in this field is named Charter of Fundamental Rights of the European Union.⁶ Charter also coherently use term fundamental rights in its text, starting from its preamble: "to this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter" or by Article 52 para 4 "In so far as this Charter recognises fundamental rights as they result

² Case 29/69, [1969] ECR 419.

³ Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25.

⁴ Case 5/88, [1989] ECR 2609.

⁵ Case C-260/89, [1991] ECR I-2925.

⁶ Official Journal C 326, 26/10/2012, p. 391 - 407.

from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions". Fundamental rights includes, or Union via Charter "recognises the rights, freedoms and principles set out hereafter" (see preamble, last sentence).

The term "fundamental freedoms" is used only as a part of authentic name of "European Convention for the Protection of Human Rights and Fundamental Freedoms" (see preamble, Art. 52 para 3). Nevertheless there is one provision with confusing terminology, Art. 53 states "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions." However phrase " Fundamental Freedoms" is strongly connected just to " European Convention for the Protection of Human Rights and Fundamental Freedoms" and cannot have different meaning than within "human rights" category.

Another argument in favour of specific EU legal terminology using sole "fundamental rights" within the whole human rights area is name of specific decentralised EU body - European Union Agency for Fundamental Rights.

Reason for this specific terminology can be found in the history of the European integration and early use of term "fundamental freedom "to the four freedoms of internal market" (also "free movement"). According to Art. 26 para 2 TFEU "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. Concept of four fundamental freedoms is based on the Treaties, notwithstanding this terminology in not used there.⁷ Unified concept of (four) fundamental freedoms is used by legal theory and has clear and precise meaning. So the term "fundamental freedoms" refers to the economic freedoms, which are the pillars for the establishment of the internal market, i.e. the core purpose of the EU existence.

3. BALANCING FREE MOVEMENT OF GOODS (FUNDAMENTAL FREEDOM) AND FUNDAMENTAL RIGHTS

Long before the Lisbon Treaty entered into force and Charter of Fundamental Rights have the same legal value as the Treaties and

⁷ Contrary to above mentioned distinction within Charter of fundamental rights, Treaties use term "fundamental freedoms" as a part of human rights concept (see e.g. Art. 21 para 1 TFEU).

became legally binding, fundamental rights became intertwined with four fundamental freedoms through the European Court of Justice's case law. The development of fundamental rights as general principles of EU law guiding the interpretation of EU law also had consequences for the common (internal) market.

More recent cases such as Schmidberger, Viking, Laval or Omega⁸ make this even more apparent. But these cases show how fundamental rights may also clash with the fundamental (economic) freedoms as well, forcing the Court of Justice to engage itself in a delicate balancing exercise.⁹

According to Art. 52 para 1 of the Charter of Fundamental Rights, "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." It means, that the exercise of fundamental rights may be limited and cannot be considered as absolute. Moreover according to Art. 52 para 2 of the Charter: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." Therefore provisions of the Charter (fundamental rights) cannot be exercised and apply isolate and without its systematic and teleological context within EU primary law.

On the other hand, when considering contradictory situations, when exercise of fundamental freedom can breach application of fundamental right (or vice versa), fundamental rights cannot be treated as single group of rights, a Court of Justice has already mentioned. Thus, according to its case-law before Charter of fundamental rights has been part of EU primary law and Convention has been used, unlike other fundamental rights enshrined in Convention of human rights and fundamental freedoms, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, some others appears not to be absolute and must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided

⁸ Case C-112/00, Schmidberger, [2003] ECR I-5659; Case C-341/05, Laval un Partneri Svenska Byggnadsarbetareförbundet, [2007] ECR I-11767; Case C-438/05, International Transport Workers' Federation v Viking, [2007] ECR I-10779. Case C-36/02, Omega Spielhallen- und Automatenaufstellungen GmbH v Oberbürgermeisterin des Bundesstadt Bonn, [2004] ECR I-9609.

⁹ Sybe A. de Vries: Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, In: Utrecht Law Review, Volume 9, Issue 1 (January) 2013, p. 169.

that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.¹⁰ In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.¹¹

The latest issue within this context is how the Court of Justice should balance conflicting economic fundamental freedoms with fundamental rights, considering also the changed EU legal framework (new Art. 6 TEU, i.e. that 1) the Charter of Fundamental Rights of the EU shall have the same legal value as the Treaties and 2) that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and lastly 3) that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

3. SCHMIDBERGER CASE

This case from June 2003 is important because it appears to be the first case in which a Member State has invoked the need to protect fundamental rights to justify a restriction on one of the fundamental freedoms of the EC Treaty (now TFEU), i.e. the the first case where the Court of Justice had to directly faced the oppositional relationship between the free movement of goods and the freedom to assembly.¹²

The Claimant Schmidberger was a German transport company transporting mainly timber and steel between Germany and Italy. In doing so, its lorries used the Brenner motorway through the Austrian Alps, which is the primary transalpine route for heavy goods vehicles travelling between Italy and northern Europe and an important part of the trans-European transport network. In May 1998, Transitforum Austria Tirol, an environmental pressure group, gave notice of its intention to hold a demonstration on a stretch of the Brenner motorway, blocking the route for twenty-eight hours on 12-13 June 1998. The aims of the demonstration were essentially to demand a strengthening of the legal measures designed to limit and reduce

¹⁰ Case C-62/90 Commission v Germany [1992] ECR I-2575, paragraph 23, and Case C-404/92 P X v Commission [1994] ECR I-4737, paragraph 18

¹¹ Case C-112/00, Schmidberger, [2003] ECR I-5659, paragraph 81.

¹² See also M. Avbelj, European Court of Justice and the Question of Value Choices. Fundamental human rights as an exception to the freedom of movement of goods, Jean Monnet Working Paper 06/04, New York University School of Law.

heavy goods traffic on the motorway and the resulting pollution. The Austrian authorities allowed the demonstration to go ahead and co-operated with the organisers and motoring organisations to limit the disruption caused, including by widely publicising notice of the demonstration, suggesting alternative routes and providing extra trains. The demonstration took place at the stated place and time. Consequently, heavy goods vehicles which should have used the Brenner motorway were immobilised from 09.00 hrs on Friday 12 June 1998. The motorway was reopened to traffic on Saturday 13 June 1998 at approximately 15.30 hrs, subject to the prohibition on the movement of lorries in excess of 7.5 tonnes during certain hours on Saturdays and Sundays applicable under Austrian legislation, i.e. the motorway was closed to most heavy goods vehicles for four consecutive days.

Schmidberger brought an action before the Landesgericht Innsbruck against the Republic of Austria on the basis that five of its lorries were unable to use the Brenner motorway for four consecutive days and arguing that motorway is the sole transit route for its vehicles between Germany and Italy. The failure on the part of the Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed amounted to a restriction of the free movement of goods. Since it could not be justified by the protesters' right to freedom of expression and freedom of assembly the restriction was a breach of Community (EU) law in respect of which the Member State concerned incurred liability. Schmidberger argued that, by allowing the closure of the road, the authorities had failed to guarantee the free movement of goods in accordance with Article 28 to 30 of the EC Treaty (now Art. 34 to 36 TFEU), and were therefore liable in damages to the company, which had been prevented from operating its vehicles on their normal route. In its defence, Austria argued essentially that the authorities had taken a reasonable decision after weighing up the various interests involved, concluding that the demonstrators' right to freedom of assembly could be exercised without any serious or permanent obstruction of long-distance traffic.

The Innsbruck Higher Regional Court (Oberlandesgericht) made a reference to the Court of Justice, whether the principle of the free movement of goods, possibly in conjunction with Article 5 of the Treaty (now Art. 4 para 3 TEU), requires a Member State to keep open major transit routes and whether that obligation takes precedence over fundamental rights such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Justice has stated at the outset that the free movement of goods is one of the fundamental principles of the Community.¹³ It is

¹³ Case C-112/00, Schmidberger, [2003] ECR I-5659, paragraph 51.

settled case-law since the judgment in Case 8/74 Dassonville¹⁴ that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade.¹⁵ In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 (now 34 TFEU) does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State. The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act.¹⁶

Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.

In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.¹⁷

The key question for the Court of Justice was whether the restriction was, in the circumstances, justified.

Interesting point of the Court of justice argumentation, is paragraph 66 of the judgement, where is stated, that even if the protection of the

¹⁴ Case 8/74 Dassonville [1974] ECR 837, paragraph 5.

¹⁵ See, to that effect, Case C-265/95 Commission v France [1997] ECR I-6959, paragraph 29.

¹⁶ Case C-112/00, Schmidberger, [2003] ECR I-5659, paragraph 57 and 58.

¹⁷ Case C-112/00, Schmidberger, [2003] ECR I-5659, paragraph 64.

environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway. The Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution. The question is also whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

Court of Justice has stated, that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community.¹⁸ Thus, since both the EU and its Member States are required to respect fundamental rights (guaranteed by both the ECHR and the Constitution of the Member State concerned), the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by EU law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.¹⁹

The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.

When it comes to balancing opposing interests in EU law, the Court of Justice have had the most experience with cases where one of the Treaty exceptions to free movement was invoked, or the so-called "rule of reason", allowing Member States – under certain conditions – to deviate from the rules on free movement whenever a general, non-economic interest is at issue. Here the principle of proportionality plays a key role. The proportionality principle or test usually contains the following three elements:

- i) There must be a causal connection between the national measure and the aim pursued; the measure is relevant or pertinent.

¹⁸ Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 14.

¹⁹ Case C-112/00, Schmidberger, [2003] ECR I-5659, paragraph 76.

ii) There is no alternative measure available, which is less restrictive concerning trade or free movement generally.

iii) And there must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and its actual attainment.²⁰

The Schmidberger case can also be seen as a case wherein the Court of Justice assessed the proportionality *stricto sensu* of the Austrian measure to allow a demonstration on the Brenner motorway.

Court of Justice summed up a number of factors which makes restrictions on the free movement of goods proportionate in the light of the protection of fundamental rights. Firstly, the demonstration took place following a request for authorization from the national authorities. Secondly, the demonstration took place on a single route, on a single occasion and during a limited period and was thus limited in comparison with the geographical scale and intrinsic seriousness. Thirdly, the purpose of the demonstration was not to restrict trade in goods of a particular type or from a particular source. Fourthly, supportive administrative measures were taken to limit the implications of the demonstration. Moreover, it was clear, according to the Court, that the demonstration did not give rise to a general climate of insecurity, which had a negative effect on trade. Lastly, an outright ban on the demonstration would lead to unjustifiable interference with the fundamental rights of the demonstrators.²¹

The Court of Justice has also distinguish its decision in Case C-265/95 *Commission v France* [1997] ECR I-6959, in which it had declared France to be in breach of its Treaty obligations to ensure the free movement of goods by reason of it having failed to adopt measures to prevent violent acts of protest by French farmers against agricultural produce from other Member States. The farmers' protests in France persisted over more than a decade; they were generally unauthorised, were characterised by regular acts of violence and vandalism.

4. CONCLUSION

Schmidberger is the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty. Such cases have perhaps been rare because restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection. It is however

²⁰ Sybe A. de Vries: *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, In: *Utrecht Law Review*, Volume 9, Issue 1 (January) 2013, p. 172.

²¹ *Ibidem* p. 179 and Case C-112/00, *Schmidberger*, [2003] ECR I-5659, paragraph 84 to 89.

conceivable that such cases may become more frequent in the future: many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations.

The point of departure for balancing conflicting fundamental rights with fundamental economic freedoms is very difficult and not really desirable to establish an a priori hierarchy between fundamental rights and economic freedoms. Although the fundamental freedoms have a fundamental character, they should not be given "a higher status than that awarded to other fundamental rights and values in the Community legal order".²²

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JUDICIAL REVIEW IN EU LAW: CHALLENGING THE COMMON COMMERCIAL POLICY MEASURES (NOT ONLY) AFTER THE LISBON TREATY

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Abstract

This paper aims to analyse the general system of judicial review of the common commercial policy measures after the Lisbon Treaty and the reasoning of the Court of Justice in the annulment proceedings. Special focus is to be placed mainly on the standing of private parties and the exceptions to the fourth paragraph of Article 263 TFEU set up in the anti-dumping cases.

Key words

Annulment, anti-dumping, common commercial policy, direct concern, ECJ, individual concern, judicial review, regulatory act, standing

1. INTRODUCTION

The common commercial policy represents the most intricate realm of the EU's external relations with third countries. Enormous number of administrative and legislative measures adopted in this particular area of law led over the period of existence of the European Communities (the EU subsequently) to creation of a significant body of the Court of Justice (hereinafter the "ECJ") case-law.

The main aim of this paper is to analyse relevant judicial decisions and shed light on the impact of Lisbon Treaty on the ECJ's reasoning vis-à-vis annulment of common commercial policy measures. Firstly, it takes into account evolution of EU competence in this field and the scope of its exclusivity. Secondly, it lays down general rules for making a claim for judicial review before the ECJ and last but not least, it focuses on the standing of private parties in cases concerning judicial review of the EU anti-dumping measures.

2. THE SCOPE OF EU COMMON COMMERCIAL POLICY (HISTORICAL OVERVIEW)

It was quite obvious from the early on that the ECJ's reading of common commercial policy competence of the EC was going to be rather broad concentrating on the effectiveness of the customs union.

In *Massey-Ferguson*¹, the ECJ held that the proper functioning of the customs union justifies wide interpretation of the powers granted to the EC institutions so as to allow them to control external trade relations.

Recognised approach changed greatly since Opinion 1/94² that marked the end of the broad view on the EC exclusive power in external trade relations. From then on the ECJ's attitude turned out to be more cautious of desires of the member states and the EC common commercial policy competence started to be interpreted more as being shared.³

The entry into force of the Lisbon Treaty, however, once again extended the EU common commercial policy competence. According to Article 207 TFEU also conclusion of tariff and trade agreements relating to trade in services, commercial aspects of intellectual property, and foreign direct investment nowadays fall into to the EU's exclusive competence. Expanding, thus, its former narrower scope. Relevant provisions are to be found mainly in articles 3 (5) TEU, 21 TEU, 75 TFEU, 205 to 207 TFEU and 215 TFEU. According to those, the EU competence shall be based on uniform principles, with regard to changes in tariff rates, uniformity in measures of liberalisation, export policy and trade protection.

3. THE EU COMMON COMMERCIAL POLICY INSTRUMENTS

Two sources of the common commercial policy may be identified as to the subject matter of the EU powers in this field, namely international agreements, bilateral and multilateral, and the measures enacted within the EU's internal regime. The main activity being in the former type of rule-making, it is impossible to cover such a huge mass of norms in this rather short article. Suffice it to say that considerable part of measures adopted in the way of international agreement lies in setting preferential regimes, creating free trade areas and customs unions. All of these being permitted by the WTO.

The most important EU autonomous measures are the common customs tariff, import and export regulations, and anti-dumping and anti-subsidy measures.

¹ Case 8/73 *Hauptzollamt Bremerhaven v. Massey Ferguson* [1973] ECR 897, para 4.

² Opinion 1/94 *WTO Agreement* [1994] ECR I-5267.

³ P Craig and G de Búrca, 'EU Law: Text, Cases, and Materials' (Oxford University Press, 5th edn, 2012) 321-2.

The current version of the customs tariff is found in 2658/87⁴ regulation establishing a goods classification called as "Combined Nomenclature".

The basic secondary legislation concerning the anti-dumping and anti-subsidy measures can be found in two separate bodies of EU rules, i.e. Regulation 1225/2009⁵ and Regulation 597/2009⁶.

The former containing detailed instructions relating to the calculation of dumping, procedures for initiating and pursuing an investigation, imposition of provisional measures, collection of anti-dumping duties, and duration and review of anti-dumping measures.

Pursuant to Article 1 of the Regulation 1225/2009 an anti-dumping duty may be applied to any dumped goods whose release for free circulation in the EU causes injury.

An investigation to determine the existence, degree and effect of alleged dumping is in principal initiated upon a complaint by any person acting on behalf of the EU. A complaint has to include evidence of dumping, injury and a causal link between both of them. The Commission must examine the complaint and decide whether there is sufficient evidence to justify the initiation of an anti-dumping procedure.

During such an investigation, parties have to be given opportunity to be heard, so that opposing views may be presented and arguments offered to all relevant institutions. Providing such an occasion it must be taken into account the need to keep confidentiality and the convenience to the parties. There is, however, no obligation for the Commission to adopt duties upon finding dumped products having being imported to the EU.

Action may be taken also against subsidised imports, the Commission procedure being rather similar to that of anti-dumping investigation. A subsidy shall be deemed to exist if there is a financial contribution by a government in the country of origin or export and a benefit is thereby conferred on the products concerned. Nevertheless, subsidies are to be subject to countervailing measures only if they are specific to enterprise or industry within the jurisdiction of the granting authority and cause injury to the EU industry.

⁴ Council Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff [1987] OJ L 256/1.

⁵ Council Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L 343/51.

⁶ Council Regulation 597/2009 on protection against subsidised imports from countries not members of the European Community [2009] OJ L 188/93.

The examination of such an impact include an evaluation of all relevant economic factors, including the decline in sales, profits, market share, employment, wages and, in the case of agriculture, whether there has been a burden increased on government support programmes. Be it as it may, the Commission, however, does not apply Regulation 597/2009 very often, on the contrary, number of cases concerning investigation of the subsidised products effect on the EU industry is much smaller to that of injury being caused by the dumped products.

4. MAKING A CLAIM FOR A JUDICIAL REVIEW BEFORE THE ECJ

The EU commercial policy, being determined by the number of various administrative and legislative measures, creates a fairly strong incentive for initiating judicial review proceedings before the ECJ as the impact of such acts on the private parties' position and economies is in practice of a rather huge significance.

The structure of this chapter is to be as follows, firstly, types of judicial review procedures in the EU law are discussed, secondly, the standing of private parties before the ECJ is subject to analysis, with a special focus on the changes brought by the Lisbon Treaty, and in the third and the last part, grounds for annulment of acts in question are described.

The main attention hereafter will be placed on the cases concerned with the EU anti-dumping measures as the judicial review of the anti-subsidy regulations is not of much importance for drawing a general view on the possibilities to challenge the EU common commercial policy acts. Other measures such as customs duties, are not covered by this paper as their in-depth analysis requires a separate study.

The most important provisions of the founding treaties as regards the judicial review are found in Articles 263 and 267 TFEU. The latter one being important as not all actions challenging the EU acts are brought before the ECJ directly. Many of them arrive from the member states in way of preliminary ruling reference as the national courts themselves have no jurisdiction to declare acts of the EU institutions invalid.⁷ Be it as it may, whether such case arrives in Luxembourg by one route or another, it has no impact on the ECJ substantive ruling.

Let us take a quick step back and look carefully at the wording of Article 263 TFEU. There are three aspects to be distinguished when applying this provision, i.e. the range of acts which may be subject to judicial review, the standing of various types of parties before the ECJ, and the grounds of review.

⁷ See also Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199.

In order to be reviewable by the ECJ, the act concerned must be adopted by the EU institution and intend to produce legal effects vis-à-vis third parties. It is still quite dubious, however, what type of measure may in reality constitute an ‘act’ for the purposes of Article 263 TFEU. What is certain, however, is that the list of EU legal acts provided in Article 288 TFEU is not exhaustive and there are measures other than therein stated (i.e. primarily regulations, directives and decisions) that might be subject to the ECJ scrutiny if they have ‘intention’ within the meaning of Article 288 TFEU.⁸

From the standpoint of this paper, it is important to note that measures imposing anti-dumping duties take form of regulation and undoubtedly therefore fall under the scope of Article 263 TFEU.

After this brief introductory note into the wording of Article 263 TFEU, let us skip for a moment its second feature, i.e. the standing, and proceed to the issue of grounds of review of the EU acts.

There are in principal four grounds of review that may possibly lead to annulment of the EU common commercial policy measure, namely the lack of competence, infringement of procedure or founding treaties and misuse of powers. Being not necessary to precisely specify one of those grounds, it is of crucial importance for an applicant to argue on points falling at least under one of the abovementioned annulment grounds to be successful.

5. STANDING OF PRIVATE PARTIES IN THE ANNULMENT PROCEEDINGS

Three groups of applicants may be distinguished under Article 263 as regards the possibility to challenge the EU acts, hence the commercial policy measures.

The first group referred to as ‘privileged’ is composed of the member states, the European Parliament, the Council and the Commission that do not bear any onerous burdens for they are in the position to challenge the EU secondary law without need for fulfilling any conditions except of time-limit for bringing the case before the ECJ⁹.

The situation being similar in the case of ‘semi-privileged’ applicants, i.e. the Court of Auditors, the ECB and the Committee of the Regions,

⁸ See Cases 22/70 *Commission v Council* [1971] ECR 263 and Joined cases C-193 and 194/87 *Maurissen and Union syndicale v Court of Auditors* [1990] ECR I-95.

⁹ Pursuant to Article 263, "The proceedings [...] shall be instituted within two months of the publication of the measure, 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."

this EU institutions are only required to prove that the challenged act intends to produce legal effects in relation to them.

The last group of applicants consists of natural and legal persons. This set of legal entities, called appropriately as 'non-privileged', is the most intriguing one and since long attracts attention of legal scholars dealing with the EU law. Under the fourth paragraph of Article 263 TFEU any person may bring the case against an act addressed to that person or which is of direct and individual concern to that person, and against a regulatory act of direct concern to that person and does not entail implementing measures.

Here we come to the most fascinating part of the judicial review of the EU common commercial policy measures. Before the entry into force of the Lisbon Treaty there was no mention of 'regulatory acts' in the relevant provision of (then) Article 230 EC. That meant that private parties were to prove that the act contested is directly addressed to them or that they are directly and individually concerned by it.

The former case did not cause much controversy. It is actually quite of a common ground for private undertakings to challenge, for example, decisions of the Commission concerning the application of competition rules under Articles 101 and 102 TFEU (then Articles 81 and 82 EC). The latter, however, did. Interpretation of direct and individual concern being strict by the ECJ, it was rather an impossible task for any private party to challenge decisions that were not addressed to them.

A. Direct concern

Direct concern is a matter of causal link between the EU measure and its impact on the applicant. As such, it is a much less tricky concept in comparison to that of being individually affected.

Complications arise, however, in situations where there are thoughtful uncertainties about the measure actually changing the legal position of a contestant. That is mainly in the case of the EU institution issuing an 'instruction' to the member state requiring it to act in a particular way. If the power granted is merely discretionary, the applicant is in reality affected by the activity of the member state, not the EU. If there is no free will as regards to the member state action, the national measure is equated to the EU 'instruction' and there is a clear path for the applicant to challenge the EU measure before the ECJ as his position is directly concerned in the meaning of Article 263 TFEU.¹⁰

¹⁰ J Tillotson and N Foster, 'Text, Cases and Materials on European Union Law' (Cavendish Publishing Limited, 4th edn, 2003) 528.

In the case of *Glencore Grain*¹¹ concerning the action for the annulment of the Commission dismissal to approve the contract with a Ukrainian company, the ECJ held that the condition of being ‘directly concerned’, requires the measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees, who are to implement it, such implementation being purely automatic without the application of other intermediate rules.

As the anti-dumping measures do not usually require any implementing act adopted by the member states, to prove being directly concerned by the EU act does not cause much difficulties.

B. Individual concern

It seems ideal to start with the *Plaumann*¹² decision as to begin with the section concerning the case of being individually touched by the EU measure.

The ruling itself dealt with the Commission refusal to grant the German government the authorisation for the partial suspension of duties on the fruit imported from third countries. The applicant was an importer who sought judicial review of the decision before the ECJ. As the decision was addressed to the German bodies, it was up to the applicant to prove being directly and individually concerned by the Commission verdict.

The ECJ stated in its judgment that persons other than those to whom a decision is addressed may claim to be individually concerned only if the contested decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. In the *Plaumann* case the applicant company lacked the standing as the concerned activity, i.e. fruit import, might have been at any time be practised by any person and was not therefore such as to distinguish the applicant in relation to the contested decision.

The ECJ case-law went further after the *Plaumann* and it is to be seen that it became more friendly to applicants contesting certain type of EU acts, namely those concerning competition rules, state aid, and the most importantly, from the common commercial policy point of view, also anti-dumping measures. The reasoning of the ECJ in those cases was, however, based on specific nature of such measures and could

¹¹ See Case C-404/96 P *Glencore Grain v Commission* [1998] ECR I-2435.

¹² See Case 25/62 *Plaumann v Commission of the EEC* [1963] ECR 199.

not be without any further be applied to other commercial policy acts in the form of regulations.¹³

Basically, there are three groups of applicants who might wish to annul anti-dumping measure, i.e. the complainant about dumping, exporter or producer of the dumped product, and its importer.

i) The Timex¹⁴ case

Timex was the main EC manufacturer of mechanical wrist-watches that lodged a complaint with the Commission by way of consideration that its position on the market had suffered because of the dumped products imported from the Soviet Union.

The final outcome of the EC investigation was an imposition of duty equal to the 12.6 % for watches without gold plating and 26.4 % for watches with gold plating of a thickness exceeding five microns. After having concluded that the anti-dumping duty was insufficient, Timex brought an action in the ECJ, claiming that the challenged regulation was adopted in breach of procedural and substantive rules.

In the course of the proceeding the Commission raised an objection of inadmissibility as the contested regulation was not addressed to Timex and this company was not even mentioned anywhere in that regulation. The Commission argued that Timex may had been entitled to request the opening of an anti-dumping procedure, nevertheless, the distinction between a regulation and a decision depends solely on the nature of the measure itself and its consequences in law.

After some consideration, the ECJ held the action to be admissible as the contested regulation applied to traders in general, nevertheless, its provisions might had been of direct and individual concern to some of those traders. In this regard, the ECJ stated, it was necessary to consider the part played by the applicant in the anti-dumping proceedings and its position on the market to which the challenged legislation applied.

The ECJ further noted that the conduct of the investigation procedure was largely determined by Timex's observations. More specifically, the preamble to the contested regulation made it clear that the imposed duty was made equal to the dumping margin which was found to exist taking into account the injury caused to Timex by the imported

¹³ P Eeckhout, 'EU EXTERNAL RELATIONS LAW' (Oxford University Press, 2nd edn, 2011) 461.

¹⁴ See Case C-264/82 Timex v Council and Commission [1985] ECR 849.

products. The regulation was therefore based on the applicant's own situation.¹⁵

ii) The Allied Corporation¹⁶ case

The case of Allied Corporation company confirmed that also producers and exporters affected by an anti-dumping duty could be considered as individually concerned. At least in situation when they are identified in the challenged regulation or were involved in the initial investigation.

The ECJ reminded firstly in its ruling that any anti-dumping duty may be imposed only on the basis of findings resulting from investigations concerning production prices and export prices of undertakings which have been individually identified.

It is, thus, clear from the ECJ's reasoning that the measures imposing anti-dumping duties are liable to be of individual concern to persons who are able to prove that they were identified in the contested measure or, as was mentioned above, were concerned by the investigations.

According to the ECJ, there is no risk of duplication of means of redress since it is possible to bring an action in the national courts only after the collection of a duty. Those are normally paid by an importer residing within the EC. There is therefore no risk of conflicting decisions in this area since it is for the ECJ alone to give a final decision on the validity of the contested regulations in the way of preliminary ruling.¹⁷

iii) The Extramet¹⁸ case

The third type of applicants wishing to annul an anti-dumping measure consists of importers of dumped product. Most of such cases, however, were rejected by the ECJ on the ground that the importer

¹⁵ See also Joined cases C-133 and 150/87 *Nashua Corporation and Others v Commission and Council* [1990] ECR I-719 and Case C-156/87 *Gestetner Holdings v Council and Commission* [1990] ECR I-781.

¹⁶ Joined cases 239 and 275/82 *Allied Corporation and Others v Commission* [1984] ECR 1005.

¹⁷ See more in P Eeckhout, 'EU EXTERNAL RELATIONS LAW' (Oxford University Press, 2nd edn, 2011) 461.

¹⁸ See Case C-358/89 *Extramet Industrie v Council* [1992] ECR I-3813.

could bring an action before the national court and sought annulment of the EU act by the way of preliminary reference procedure.¹⁹

Nevertheless, there is always an exception to every rule. The Extramet case, being such, showed when even an importer could be successful in the annulment procedure before the ECJ.

The case itself concerned a French company, that sought an annulment of the measure imposing an anti-dumping duty on imports of calcium metal originating in China or the Soviet Union.

As regards to the standing, Extramet pointed out in its argumentation that the contested regulation is of individual concern to it, in so far as it is the largest importer, it was involved in the anti-dumping procedure and it can be fully identified in the contested regulation.

The ECJ concluded in its judgment, by applying the Plaumann test, that the applicant company had established the existence of a set of factors constituting a situation which differentiates it from all other traders. The applicant was the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product. In addition, its business activities were seriously affected by the challenged measure due to the small number of manufacturers of the concerned product.²⁰

Extramet is, however, not the only example of an importer successfully contesting the legality of an anti-dumping measure. There were many others²¹, especially with regard to importers whose retail prices for the goods in question have been used as a basis for establishing the export prices. Nevertheless, it could be said that importers in principle lacked standing before the ECJ in the annulment procedures. However, as seen above, there were also examples proving that it was worthwhile to try contesting the validity of an anti-dumping regulation, even when there was not much probability of being successful.

C. Regulatory acts after the Lisbon Treaty

Things have changed a bit as the Lisbon Treaty brought a new standing test for regulatory acts into the fourth paragraph of Article 263 TFEU. Since then any natural or legal person may, under the

¹⁹ P Craig and G de Búrca, 'EU Law: Text, Cases, and Materials' (Oxford University Press, 5th edn, 2012) 500.

²⁰ See Case C-358/89 Extramet Industrie v Council [1992] ECR I-3813, para 20.

²¹ See Joined cases C-304/86 and C-157/87 Enital v Commission and Council [1990] ECR I-2939.

conditions laid down in the first and second paragraphs of Article 263 TFEU institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures. Thus, for regulatory acts the requirement of being individually concerned was removed from the TFEU.

As the concept of ‘regulatory act’ was nowhere defined in the founding treaties, it led to many debates concerning its true meaning and impact on the standing of potential applicants. The mainstream view was that the ‘regulatory act’ should be seen as a kind of residual group different to acts adopted by the EU in the course of special or ordinary legislative procedure. The idea behind this understanding was that the purpose of the fourth paragraph of Article 263 TFEU was to introduce more control to acts that lack democratic backup of the legislative procedure.

Many legal scholars and practitioners eagerly awaited the ECJ ruling on this matter. The first of such decisions came from the General Court in the *Inuit*²² case concerning annulment of regulation banning trade in seal products. The General Court in its order stated that the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts.²³ The ruling itself was, however, subject to a judicial review so it was up to the ECJ to decide on the correct reading of the fourth paragraph of Article 263.

Result of the ECJ considerations was quite expectable as the Advocate General Kokott in its opinion²⁴ supported the General Court's reasoning and stated that the absence of easier direct legal remedies available to individuals against legislative acts can be explained principally by the particularly high democratic legitimization of parliamentary legislation. Referring to the drafting history of the Constitutional Treaty she noted that where the constitutional text mentioned a possibility for natural and legal persons to institute proceedings against a ‘regulatory act’, this applied only to non-legislative acts. That was clear mainly from the *travaux préparatoires* of the European Convention on the Draft Treaty establishing a Constitution for Europe. In line with those documents, the wording ‘acts of general application’ was debated, but ultimately rejected and replaced by the ‘regulatory act’, which was envisioned the distinction between legislative and non-legislative acts.²⁵

²² See Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] ECR II-5599.

²³ *Ibid*, para 56.

²⁴ Opinion of Kokott AG in Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*.

²⁵ *Ibid*, para 40.

In the ruling²⁶ itself, the ECJ held that the concept of ‘regulatory act’ cannot refer to all acts of general application. To adopt such a reading it would amount to nullifying the distinction made between the terms ‘acts’ and ‘regulatory acts’ by the second and third limbs of the fourth paragraph of Article 263 TFEU. In those circumstances, the ECJ stated, the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, was to enable those persons to bring, under less stringent conditions, actions seeking an annulment of other than legislative acts. The General Court was therefore correct to settle that the concept of ‘regulatory act’ provided for in the fourth paragraph of Article 263 TFEU does not cover legislative acts within the meaning of Article 289 (3) TFEU²⁷.

To return to anti-dumping regulations, it is of crucial importance to state at this point what is the position of private individuals when seeking an annulment of such acts vis-à-vis the new wording of Article 263 TFEU. As regards the standing of exporters and producers of dumped product or complainants about dumping, not much seems to be different. Such parties were in principal quite successful in proving their standing even before the entry into force of the Lisbon Treaty. It remains, however, to be seen, what will happen in the procedures initiated by the importers of dumped product after the decision in *Inuit* case. Since anti-dumping regulations does not fall within the definition of legislative act provided for in Article 289 (3) TFEU, there should not be any difficulties for such importers to prove their standing in annulment proceedings. To confirm such a statement, we must, however, wait for the next judgment of the ECJ to clarify its position on this issue.

6. GROUNDS FOR ANNULMENT OF THE COMMON COMMERCIAL POLICY MEASURES

As stated above, there are four grounds of review listed in Article 263 TFEU, namely the lack of competence, infringement of an essential procedural requirement, infringement of the founding treaties or of any rule of law relating to their application and misuse of powers.

In the majority of cases concerning a claim for an annulment of anti-dumping measures, applicants usually complain about the violation of procedural requirement or committing assessment errors. The latter cases include errors in determination of injury, construction of normal values, and dumping margins, or interchangeability of like products. Procedural errors involve accusations of documents never being sent or ambiguous reasoning for decisions.

²⁶ Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*.

²⁷ *Ibid*, para 45.

One of the most illustrious decisions as regards the range of objections brought before the ECJ by an applicant is the Petrotub SA²⁸ case. The ruling itself concerned the application for the annulment of regulation imposing duties on imports of seamless pipes and tubes from central Europe, Romania and Russia. Petrotub SA, being an importer of such products, advanced various pleas in law in support of its application, namely the erroneous determination of normal value and the dumping margin, error in determining injury, infringement of the right to be heard, and also, inadequacy of the statement of reasons for the contested regulation in relation to that point.

All pleas were rejected and the application dismissed in its entirety by the Court of First Instance, however, Petrotub SA company succeeded in the appeal procedure before the ECJ with an objection against the dumping margin determination made contrary to the WTO legal rules.

That brings us to the important issue of the WTO law effects in the EU legal order and its position as a sole ground of review of anti-dumping measures.

It is settled case-law²⁹ that, having regard to their nature and structure, the WTO Agreement and the agreements and understandings annexed to it are not in principle among the rules in the light of which the ECJ is to review the legality of measures adopted by the EU institutions. This statement is being repeated mantra-like in many judgments of the ECJ, nevertheless, it still does not mean that the WTO law cannot serve as the ground of review of EU measures.

The ECJ in its ruling in Petrotub SA recalling its own case-law³⁰ stated that where the (then) Community intended to implement a particular obligation assumed in the context of the WTO organisation, or where adopted act refers expressly to precise provisions of the agreements and understandings contained in the annexes to the WTO Agreement, it is for the ECJ to review the legality of the measure in question in the light of the WTO rules. In that regard, the Community law must, so far as possible, be read in a way that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community.³¹

In view of this reasoning, the ECJ finally concluded, that the contested regulation imposing definitive anti-dumping duties must in particular contain, as part of the statement of reasons, the specific explanation

²⁸ Case C-76/00 P Petrotub and Republica v Council [2003] ECR I-79.

²⁹ See Case C-149/96 Portugal v Council [1999] ECR I-8395.

³⁰ Ibid, para 49.

³¹ See also Case C-341/95 Bettati v Safety Hi-Tech [1998] ECR I-4355.

provided for in the 1994 Anti-dumping Code (as a part of the WTO law). Nevertheless, being evident that the measure did not meet this requirement, it was held by the ECJ that the Court of First Instance erred in law by holding that there was no need to take into consideration the 1994 WTO Anti-dumping Code for the purposes to decide whether the EC Council fulfilled the obligation to state reasons for the contested regulation.

As is evident from the above, the grounds of review of EU measures, i.e. also common commercial policy measures, are relatively wide. Infringement of the founding treaties or of any rule of law relating to their application being interpreted very broadly, it is already apparent that the ground for annulment of the EU measure may rest also on the infringement of the WTO law. Furthermore, it is also settled case-law that as a ground for annulment of EU secondary legislation may serve also the general principles of EU law.³²

7. CONCLUSION

This paper examined some of the problematic issues of the judicial review of the EU common commercial policy measures. From the point of view of a private individual seeking an annulment under Article 263 TFEU, it was suggested that after the entry into force of the Lisbon Treaty there should be no more obstacles for importers of dumped products to prove their standing when challenging regulations imposing anti-dumping measures on products they deal with. It still, however, remains to be seen whether such an approach will adopt also the ECJ and if so, how many importers will try to rely on the new wording of Article 263 TFEU.

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