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THE INVALIDITY AND THE NON-EXISTENCE OF COLLECTIVE BARGAINING AGREEMENTS IN THE SCOPE OF THE HUNGARIAN COURTS' DECISIONS

BALOGH, ÁRON PÉTER*

Abstract: The biggest innovation of the new Act I of 2012 on the Labor Code of Hungary (LC) was that opposed to its predecessor, as a principle it allows collective agreements and individual labor contracts to regulate the content of work differently from what is stipulated by the Labor Code. The goal of the new LC was to increase the role and efficiency of collective bargaining agreements by promoting flexible collective autonomy to the employer and the trade unions, that means the freedom of the participants of the labor market to regulate their relationship through bargaining agreements adjusting to their (financial, social) needs. The collective bargaining agreements (CBA) constitute an extraordinary legal institution with both contract law and public(labor) law elements. As an agreement, the collective bargaining agreement is the embodiment of the mutual will of the parties involved, the labor union and the employer, although the normative regulations of it are applicable to all the employees employed at the employer.

The aim of my research is to examine the contractual features of the CBAs, especially concerning their validity/invalidity, existence/non-existence to elaborate the case law of the Hungarian courts, and to draw consequences, how the contractual rules of the Labor Code and the Civil Code of Hungary shall be interpreted.

Keywords: collective agreements, invalidity, non-existent contract, labor law

1. Introduction

Collective bargaining agreements are extraordinary legal institutions of private labor law, where the elements of contract(ual) law and public (labor) law are present at the same time. As an agreement, the collective bargaining agreement is the embodiment of the mutual will of the parties involved, the labor union and the employer, although the normative regulations of it are applicable to all the employees employed at the employer.

The biggest innovation of the new Act I of 2012 on the Labor Code of Hungary (LC) was that opposed to its predecessor, as a principle it allows collective agreements and individual labor contracts to regulate the content of work differently from what is in the provisions of the Labor Code. The intention of the legislative body was – as it was expressed in the justification of the Act – to provide a more flexible and extended collective autonomy to the participants of the labor market. With the extended autonomy, the parties would be able to regulate their relationship and the content of work to match their financial, social and other needs.

The general rules of legal statements in the Labor Code went through significant changes not only as the new Labor Code entered into force in 2012, but with the new Civil Code as well, which was enacted in 2014. The new Labor Code contains an

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enumeration of particular provisions from among the sections of the general rules of obligations of the Sixth Book of the new Civil Code, which are applicable in the absence of a relevant provision of the Labor Code. In conclusion, the collective agreements are agreements (as legal acts), which are also governed by the Labor Code, but certain regulations of the Civil Code are applicable as general rules, unless otherwise stipulated. It should be noted that prior to these legislative changes, the interpretation of the relationship of the two acts were quite problematic, because there was no legal provision that would have provided a guideline how the rules of the Civil Code could be applied to the employment and labor relations. However, it could not be stated with a decent certainty that the relationship has been clarified, especially as far as the collective agreements are concerned. If the legislation does not provide sufficient guidance, the practitioners of the legal profession tend to rely on the decisions and interpretation of the courts. The aim of this paper is to present the actual case law of the Hungarian courts regarding the invalidity and non-existence of the collective agreements, and to illustrate that in several cases the guidance and the justification of the judgements are opposing, and as a result, constitute an ambiguous practice.

2. The Legal Nature of Collective Agreements

Under Hungarian Law, collective bargaining agreements can be concluded between the employer or employers' associations, and a recognized (registered) trade union. Unions are special forms of associations registered by the regional courts with a constitutional power. The capacity to conclude a collective bargaining agreement used to be linked to the results of the works council elections, where the union members needed to get the majority of the votes in order to achieve collective contractual capacity. Now, unions having the membership of at least 10% of the total number of employees employed at the employer are authorized to conclude collective agreements. If the employees employed at the employer are not represented by a single union, those unions that have at least 10 per cent membership are entitled to conclude a collective agreement jointly.

Hungarian labor law scholars make a distinction – originating from German dogmatic legal theories – between the normative and contractual part of the bargaining agreements.[1] The contractual part contains provisions that regulate the relationship between the concluding parties, the normative part declares the content of work, in other words, the rights and obligations that arise from or are in connection with the employment relationship. The normative regulations prevail just as legislative acts with respect to the relationship of the employer and the employee, and the employees shall perform their work in compliance with these regulations, regardless if they did or did not have the chance to express their consent or to take part in the bargaining process of

[1] KOVÁCS RITA: A kollektív szerződések szerepe a magyar munkajogban [Roles of the Collective Agreements in the Hungarian Labor Law], in SZÉKELY TÜNDE (szerk.): *XII. RODOSZ Konferenciakötet, Romániai Magyar Doktoranduszok és Fiatal Kutatók Szövetsége (RODOSZ)*; 2011, Editura Marineasa, Kolozsvár, 21. KISS, GYÖRGY: *Munkajog* [Labor and Employment Law], 2005, Osiris Kiadó, Budapest, 399.

the CBA as a member of the trade union.[2] The contractual part, practically speaking, governs the means of communication and shall be applied only to the concluding parties – the employer and the union, so it behaves the same way as the terms of a contract.

Collective Agreements are legal statements under the Labor Code, just as the employment contracts and any other agreements concluded between the employer and the employee, therefore the general rules of legal statements are applicable. This means that collective agreements are governed by the general rules of representation, forms of the statements and the breach of formal requirements, and the rules and consequences of invalid – void and voidable – statements.

The Labor Code does not give detailed instructions with regards to the contents of the collective agreements, instead, it authorizes the concluding parties to formulate the agreement matching their mutual consent. The authorization to do so is stipulated in Section 277 (2) of the Labor Code, which empowers the parties to regulate the content of work differently as it is in the Part Two (Employment Relationship) and Three (Labor Relations).

3. The Non-existence of Collective Agreements

Although neither the Civil Code, nor the Labor Code defines explicitly what a non-existent contract is, leaning mostly on the theories of legal literacy, the civil and labor courts established a practice to determine and to make a distinction between an invalid and a non-existent contract. According to Section 14 of the Labor Code, contracts constitute the outcome of an agreement resting on the mutual consent of the parties. A similar definition of contracts can be found in the Civil Code as well. From these regulations, it can be inferred that in order for a contract to be existent, it has to be the outcome of the mutual will of the parties which extends to all the terms and conditions the parties consider to be necessary. When the parties have no mutual will, there is no consensus between them, their statements shall not be defined as an agreement. The complete lack of consensus between the parties will also not result in a void or voidable contract or any kind of agreement, hence the rules of invalid agreements cannot be applied, and the legal consequences of invalidity are also not applicable.[3]

The Business Law Chamber of the Curia (Supreme Court) of Hungary expressed in its Decision 1146/2004. on principal issues that in civil law, false representation constitutes a non-existent contract, because there is no mutual will between the

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2 BERKE, GYULA: *A kollektív szerződés a magyar munkajogban* [Collective Agreement in the Hungarian Labor Law], 2014, Utilitates Bt., Pécs, 148.

3 György Nádas draws a similar conclusion, when he expresses that from the provisions of the Civil Code it can be inferred that regardless of its validity or invalidity, an agreement is concluded only if it is concluded between the parties. Hence, if there is no consensus between the parties that extends to all the terms and conditions the parties considered to be necessary by any of the parties, the contract does not exist. *See* NÁDAS, GYÖRGY: A kollektív szerződések jogdogmatikai kérdéseinek vizsgálata [Examination of Legal Dogmatic Issues of Collective Agreements], in *Tisztelgés. Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára,* 2015, ELTE Eötvös Kiadó, Budapest, 324.

represented party and the third party, unless the conduct of the false representative has been approved afterwards. The Curia also expressed that because of the lack of consent and direct intention of the parties, the false representative and the third party also do not engage into a contractual relationship with each other, but civil obligations, such as tort, may arise from their relationship, and the false representative shall repay all the profits that rose from the non-existent contract under the rules of unjust enrichment to the third party. The rules of false representation follow a different logic in labor law. Section 20 of the Labor Code states that if the employer's rights are exercised by an unauthorized person, his actions shall be void, unless the acts of the person are approved by the authorized representative. From this regulation, it can be inferred that in labor law if the contract is an outcome of the action of the false representative, it is an existing contract, and the consequences of invalid contracts shall be applied if it is declared to be invalid by a court of law.

In the case No. Mfv.I.10.094/2010/5., a union concluded a CBA before its registration by the regional courts. The employer terminated several employment relationships with notice citing collective redundancy, referred to the rules of the collective agreement in the termination documents, and provided severance pay to the employees in case the employment is terminated by the employer. The employees claimed that under the collective agreement they would have been entitled to an extra amount of four months of average salary as severance pay if a redundancy occurred, but the employer refused to pay the severance pay, claiming that the collective agreement was non-existent. In its final decision, the court expressed that the registration has a declarative power, and without it the union did not exist. Therefore, the union did not have the capacity to exercise any rights or to express any form of consent, especially to conclude an existing collective agreement. As for the consequences, none of the regulations of the collective agreement bound the parties by law. The court also remarked that the employer invoked the rules of the collective agreement in the documents concerning extra payments if a termination with notice occurred, so regardless of whether the collective agreement was non-existent, the employer was bound by its unilateral declaration regarding the severance payment. Beyond this, however, no rights, obligations and claims could be based on a non-existent contract.

The question may arise, whether an employer could claim back the enumeration that had already been paid as the result of a non-existent contract. As the Business Chamber of the Curia expressed in its decision above, in civil law, the rules of unjust enrichment are applicable, but none of the regulations of the Labor Code say that the rules of unjust enrichment shall be applied in an employment relationship, or in labor and employment law in general. It also has to be noted that instead of the unjust enrichment, the civil law rules of the promissory estoppel are applicable in labor law as well. E.g. if the (intended) conduct of the union has induced a bona fide employer to pay extra enumerations or provide benefits – through no fault of its own – under a non-existent and non-enforceable collective agreement, the court may declare the liability of the union. Nevertheless the application of the promissory estoppel regarding collective agreements has been without an example and has not been established in the practice of the Hungarian courts yet.

4. The Invalidity of Collective Agreements

Just as in civil law, in labor law there are two types of invalid contracts, the void and the voidable contract. If a contract is void, a special procedure is required for the declaration of invalidity, and the court observes it by its own motion. If it is voidable, the court declares the invalidity upon a successful contest. The Labor Code defines its own system of invalidity, establishes its own definitions, and does not refer to the rules of the Civil Code. In labor law, the agreement is void upon the infringement of a mandatory statutory provision, or if it was an attempt to circumvent the law.[4] The contract is also void if mandatory formal requirements have not been fulfilled. The agreement is voidable by the concluding party if error, misrepresentation, or unlawful duress or coercion occur, and it is invalid only upon a successful contest. Most importantly, in labor law the consequences of invalidity grossly differ from civil law. In civil law, if a contract is void or voidable – and it was declared to be invalid – it is considered invalid from its conclusion. In labor law, the rights and obligations that arise from, or are in connection with an invalid agreement, shall be treated as if they existed under a valid agreement. It also has to be emphasized, that in civil law, anybody who has a legitimate interest can refer to the contract's invalidity without any time constrains if the contract is void, and within one year from the conclusion if the contract is voidable. In labor law, only those who have a legitimate interest can request the declaration of invalidity if the agreement is void, and only the parties who concluded the voidable contract have the right to contest. It can be inferred that for example, the union who took no part in the bargaining process and the conclusion, or the employees alone as individual persons, have no right to contest the invalid collective agreement.

The Curia in its individual court decision (Mfv.I.10.885/2007/3) observed how the legal consequences of invalidity can be applied if a court of law declares the contract to be void. In this case, the employment relationships were terminated referring to the regulations of the CBA providing higher amount of severance payment to the employees. The CBA was found to be void after the transmission of the termination documents. The court expressed that under the rules of the invalidity in labor law, the regulations of the collective agreement shall be treated as if they existed under a valid agreement, regardless of the fact tat that during the procedure the CBA was found invalid by a court of law. Contrary to this case, the Curia expressed a vastly different opinion in its case (Mfv.I.10.231/2012/4.), where the regulation of the CBA provided a higher amount of severance payment that interfered with the mandatory regulations and limitations of statutory laws on public (property) employers. In this case, the parties terminated the employment relationship on a mutual consent, providing no severance pay to the employee. The employee contested the termination agreement on the grounds of misrepresentation, because he was not informed that if the employment relationship had been terminated by the employer, the collective agreement would have provided extra enumeration. The employer expressed that the regulation of the collective agreement providing extra enumeration was contrary to mandatory regulations (void), and therefore could not be applied. The court agreed

[4] The Artificial/disguise contract shall be enforced on the terms corresponding to the true intent (secret agreement).

with the respondent employer, and expressed that the regulations of the CBA were "not applicable" because of the interference with the Act.[5] The Court expressed a third opinion in its principal decision (Mfv. II. 10.983/2001/4.), where it was declared that if an enumeration was paid referring to CBA which was found invalid after the payment, the status existed prior to the conclusion of the contract shall be restored under the rules of the Civil Code.[6]

As these examples show, Hungarian Courts have quite an inconsistent case law regarding the consequences of an invalid collective agreement. Taking into consideration these three cases and the consequences of invalidity described in the Labor Code, the rules of an invalid regulation (contract) shall be applied as if they had existed under a valid agreement. This also means that even if the collective agreement interferes with the mandatory regulations, its rules shall be applied until it is declared to be invalid. It shall be noted that the Labor Code explicitly regulates the rules of invalidity in labor and employment relationships, which means that the rules of the Civil Code cannot be applied to them.

5. The Amendment of the Collective Agreements

The Curia expressed in two of its decisions that only those unions are entitled to amend or modify the CBA who were concluding parties to the collective agreement. Furthermore, the Curia expressed in its decision on a principal issue that the union who concluded the contract is entitled to amend it, even if it loses its collective contractual capacity.[7] This was a decision that relied on the previous Labor Code, where the union had collective contractual capacity if it obtained 50% of the votes at works council elections. Under the new rules of the Labor Code, as it was mentioned in Chapter 2. of this paper, only 10 percent of the employees employed is required to be a member of the union to conclude a collective agreement, and if the employees are represented by two or more unions at the employer, the unions with a collective contractual capacity are entitled to conclude the contract jointly. In this case, the Curia declared several amendments of the CBA to be void, because one of the unions was absent from the conclusion of the modifications. Although neither the old, nor the new regulations

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5 Section 13. § (2)-(3) of the Act XXII of 1992 on the Labor Code (previous Labor Code) said, that a collective bargaining agreement may govern any employment-related issues, however, such agreement may not be contrary to legal regulations. Unless otherwise provided for by this Act, a collective bargaining agreement or an agreement between the parties may deviate from the provisions set forth in Part Three of this Act on condition that such deviation provides more favorable terms for the employee.

6 The Section 237. § (1) of the Act IV of 1959 on the Civil Code of Hungary, that was in effect at the time the case was ongoing, stated, that *r*egarding invalid contracts, the state that existed prior to the conclusion of the contract shall be restored. The Act V of 2013 on the Civil Code (new Civil Code) significantly changed the system of invalid contracts, making the regulations more detailed. Although, the courts of law would have issued a similar decision with the application of the new rules, in other words, if the state existed before the conclusion could not be restored, the court would have ordered the parties to pay the value of the already fulfilled services (see Section 6:113. §).

7 Mfv. II. 10.174/2001. (BH2003. 128), Mfv. II. 10.174/2001/4. (EBH2002. 684).

express it explicitly, it can be inferred from the text of law that the rules and conditions of conclusion are applicable if the collective agreement is amended or modified. The problem is that the case law of the Curia shows that without the consent of all the unions that were originally concluding parties, the collective agreement cannot be modified. We should take into consideration that according to the Labor Code, the collective agreement will cease to apply only if all the concluding unions lose their contractual capacity, so long as only one of the union remains capable to conclude the CBA, the consent of all the smaller unions, who actually lost their contractual capacity, is required for the amendment. I assume the legislative body wanted to tie the both the conclusion and the amendment to the unions who have enough support to conclude an actual bargaining agreement, but in this case, both the regulations and the case law of the courts of law have to be revised.[8]

6. Conclusions

These cases demonstrate that the rules concerning the invalidity and non-existence of the collective agreement, particularly regarding the applicable legal consequences, are in many cases obstructed by dogmatic and interpretational difficulties. The general rules on agreements of labor law are difficult to apply to this special legal institution, which comes to the surface in practice, as it was presented by the Curia decisions. My opinion is that, in the spirit of dogmatic clearance, it would be appropriate to have more detailed regulations in the Labor Code than the currently established regarding the collective agreements, also the case law of the Hungarian courts of law should be reviewed, revised, and summarized in disambiguation opinion issued by the Curia.

As a final conclusion, I would like to point out the interesting fact that regardless of the invalidity and/or non-existence of a CBA, the unilateral statement of the employer referring to the provisions of the collective agreement, thus confirming them, may establish rights to the employees, and the provisions which are more favorable to the employees remain applicable. In general, the employers of the labor market often make the conditions of employment more favorable unilaterally, such as by, replacing the positive impacts of the collective agreements with internal policies and regulations. However, the collective agreement opens up the way for a deal, where it is possible to bargain for benefits with the employer itself, making all the benefits provided conditional to the conclusion of the agreement. The enforcement of these provisions may be quite problematic if the collective agreement is invalid / non-existent, therefore it serves the interests of the employer to validly conclude a collective agreement, especially with trade unions who are capable and authorized to do so.

[8] LŐRINCZ, GYÖRGY: A munkaviszonyból keletkező kötelmek szabályozásáról [Thoughts About the Obligations Arising from the Employment Relationship], in *Gazdaság és Jog*, Vol. 22. Issue 12. (2014), 5.

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[7] Curia Decision No. Mfv.II.10.174/2001. (BH2003. 128).
[8] Curia Decision No. Mfv.II.10.983/2001/4. (EBH2002. 693).

THE DEFINITION OF WORKING TIME IN CERTAIN EU MEMBER STATES' LABOUR LAW

WITH SPECIAL REGARDS TO THE CONFORMITY OF THIS DEFINITION WITH THE PROVISIONS OF THE DIRECTIVE 2003/88/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL CONCERNING CERTAIN ASPECTS OF THE ORGANIZATION OF WORKING TIME

FODOR, T. GÁBOR*

Abstract: One of the most important issues of my PhD dissertation, which is being prepared, is whether what can be considered as working time. I have already proved in one of my previous articles which is expected to be published soon that Act I of 2012 on the Labour Code, i.e. essentially the definition of working time in the Hungarian law is not in conformity with the definition of working time regulated in Article 2 of the EU directive mentioned in the title of the presentation, which definition has been interpreted several times by the Court of Justice of the European Union. In my presentation and based on that in my dissertation to be prepared I would like to investigate whether the working time definitions of other EU Member States - contrary to the Hungarian law - are in conformity with the working time definition of the directive or not. In my presentation and in my dissertation I would like to investigate the question as well that those periods I referred to in my previous article, with special regard to the travelling time, movements within the factory, and stand by, the judgement of which in the EU law are uncertain, are considered as working time or not in certain EU Member States.

Keywords: directive, EU law, stand-by, travelling time, working time

1. Introduction

One of the most important thesis in my PhD essay on the making is that the main service of the employee in an employment relationship is stand-by in order to work during working time, as de facto Karl Marx has already stated it in his: Lohnarbeit und Kapital[1] already in 1849, and not merely the performance of work, as some labour laws, also the Hungarian Labor Code (Act I of 2012) suggest. Since, in order to examine this problem, the mere definitions on the service of the employee in the individual labour codes will not help (in fact: they are the problem…), we should put a twist in our examination, and instead of that, the notion of working time should be examined. I believe that with examining the notion of working time we will come closer to the very heart of the notion of employment relationship, as well, for one simple reason.

It is obvious that the employee has to work only during working time. There is no working

obligation of the employee during periods which do not qualify as working time. Nevertheless, the obligation of working will not be a distinctive element for the

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1 MARX, KARL: *Lohnarbeit und Kapital 1849*, 2016, Gesammelte Werke, Köln, p. 178.

employment relationship from other work related legal relationships. The attorney-at-law also has to work on behalf of his client, just like a hairdresser. Therefore I believe that those who see the working obligation as a main definitiary element in the employment obligation are on a wrong path – I strongly believe that the real answer to that question lies in the definition of working time. To simplify it a bit, I believe that the main service of the employee is not working, but being available for work.

Now, after the assumptions are set, another goal can be also set as the aim of present essay.

It is a well-known fact among labour lawyers that the Hungarian working time regulation is not in line with Directive 2003/88/EC[2] of the European Parliament and of the Council concerning certain aspects of the organisation of working time from many aspects, including failure on the definition of working time, on the rest time provisions, on the length of working time, on the calculation of annual leave during reference periods, and also on the notion of reference periods, too.

However, I, as a Hungarian labour lawyer, was curious about the fact whether such "inconsistencies" can be also discovered in the labour laws of the countries which share similar historic and economic situation with Hungary. When writing this essay, I intentionally wanted to examine these countries instead of western European ones, whose traditions and experiences are different from ours, are in a different economic situation and whose labour law are also more well-known as that of our neighbours.

Before I go into details of examining the notion of working time in said neighbouring EU countries, of course first we should examine the base of all: the notion of working time in the EU law.

According to the Directive, "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.[3]

As we see, this definition can be interpreted in at least two ways, the first one will be that working time will be the pure period of working, however, the European Court of Justice has accepted the other possible definition, namely that any periods, during which the employee is at the disposal of the employer shall be qualified as working time.

In the case Simap,[4] the court held that what most national labour laws on call, so a period of availability to be spent at the workplace without a working obligation but with an obligation to be ready to work is in its entirety working time.

According to Dellas[5] case: Member states – despite of the definition above – may not defineworking time narrowly, so de facto, working time shall have the same definition all over the European Union.

According to the case Tyco[6]: a certain type of travelling time is working time, namely the one where the employee visiting several clients leaves his/her home in order

[2] Hereinafter referred to as Directive.

[3] Directive, Article 2, Section 1.

[4] Case C-303/98. Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana.

[5] Case C-14/04. Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité.

to visit the client. The interpretation of this court decision is not clear, there are debates going on all over Europe how this decision is to be interpreted. Let me introduce you a few examples: It is not clear from the present legal situation, created by the case Tyco, exactly what travelling times qualify as working time? The travel between the home and the workplace? What about the travel if the means of travelling is supported by the employer? What if the employer orders the worker to be at a designated to place in order to wait for the bus to pick him up to take him to work? How does the time qualifies when the employer orders the worker to wait at least a certain period of time at that designated place?

What if the employer fails to provide means of travelling (bus) to the employees who performed overtime and they cannot go home from the workplace? How does moving inside the premises of the employer qualify, for example if the official workplace is to be reached only by a 20-minute walk from the main entrance of the employer?

And the most interesting question: Also with regards to Matzak case,[7] how does stand-by qualify?

There is also one major issue with respect to the directive: Does the 48 hour limit of weekly working time to be counted per worker or per employment? – In my opinion, it is out of question that the former interpretation is correct, however, in quite a number of countries that limit is per employment.

In my presentation, I have examined the law of Hungary and certain further central European countries with respect to the above issues.

2. Hungary

In Hungary, the working time is defined as the period prescribed to work[8] – this is of course not in line with the definition of the directive, it is much narrower than that, even regarding the above mention ECJ court practice. Stand by – unless the worker works during it – does not qualify as working time. The 48 hours limit is per employment.

3. Slovenia

In the Slovenian labour law, working time is defined as comprising of three elements: effective working hours, breaks (this is in favour of employees) and justified absences.[9]There is, however, no provision in the Slovenian Labour Code on how to count such justified absences into the working tome, which may be problematic with respect to Article 16 of the Directive.

6 Case C-266/14. Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA.

7 Case C-518/15. Ville de Nivelles v Rudy Matzak.

8 Labour Code, Section 86, Subsection 1.

9 Employment Relationships Act, Article 141, Section 1.

Effective working hours shall be the hours during which a worker carries out his work, which means that he is at the employer's disposal and fulfils his working obligations arising from the employment contract. The worker must carry out work with due diligence at the workplace and with regard to the type of work for which the employment contract has been concluded, at the location and during the working time laid down for carrying out the work, taking into consideration the employer's organisation of work and business operations. As a consequence of the above travelling time is not working time under Slovenian labour law. However, the 48 hour-limit has a per worker effect. There is no mention of on-call time in Slovenian labour law.

4. Estonia

In the Estonian Labour code[10] there is no definition of working time. The 48-hour limit is a per worker one. Travelling time not part of working time. Breaks are usually not part of working time. There is no clear difference between on call and stand by.

5. Slovakia

The Slovakian Labour Code' definition on Working time[11]is a bit "tricky", but can beinterpreted as in line with the directive. According to the Slovakian Labour Code Working time is the time segment when an employee shall be at the disposal of the employer, performs work and discharges obligations pursuant to the employment contract. A rest period shall be any period which is not working time. In Slovakia, breaks not part of working time. Stand by and on call regulated similar to Hungary. There is no mention of per person limit for the 48-hour rule, so with this respect Slovakia is probably in breach of the EU law, just like Hungary.

6. Czechia

In Czechia working time means a period of time for which an employee is obliged to perform work for his employer and a period of time for which an employee is ready to perform work at the workplace according to his employer's instructions.[12] Rest period is any period not qualified as working time. As a consequence travelling time not working time, stand by is not working time. Breaks are not part of working time.

7. Poland

In Poland, working time is the time when the employee remains at the disposal of the employer in a work establishment, or in any other place designated as the place of

[10] Employment Contracts Act, 2009.
[11] Labour Code of the Slovak Republic, Section 85, Subsection 1.
[12] Labour Code, No. 262/2006 Col, Section 78, Subsection 1a.

performing work.[13] This is in line with the EU definition, however, not in connection with travelling time. On-call is working time. Stand-by is not mentioned in Polish law, also not the per person limit not mentioned.

8. Summary

As you see, compliance problems can be discovered in all countries examined – however, in some countries like Slovenia this seem to be less of a problem than in others, for example Hungary.

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[1] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
[2] Act I of 2012 on the Labor Code.
[3] Employment Relationships Act Ur. l. RS, No. 42/2002, Ur. l. RS, No. 103/2007.
[4] Employment Contracts Act, 2009.
[5] Labour Code of the Slovak Republic.
[6] Labour Code, No. 262/2006 Col.
[7] Act 23 of 1997 on The Labour Code.
[8] Case C-303/98. Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana.
[9] Case C-14/04. Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité.
[10] Case C-266/14. Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA.
[11] Case C-518/15. Ville de Nivelles v Rudy Matzak.
[12] MARX, KARL: *Lohnarbeit und Kapital 1849*, 2016, Gesammelte Werke, Köln.

[13] Act 23 of 1997 on The Labour Code, Article 128, Section 1.

BINDING EFFECT OF CJEU JUDGMENTS

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Abstract: The fundamental mission of the Court of Justice of the European Union is to ensure that 'in the interpretation and application of the Treaties the law is observed'. As such the Court decides in various types of proceedings – mainly in preliminary reference procedure, infringement procedure and review of legality of legislative measures. These proceedings pursue different aims and as a result of that, the binding effect of judgments given in these proceedings is different. The aim of the presentation would be to analyse the binding effect that these judgments have on member states' courts. The focus will predominantly be made on the preliminary rulings concerning interpretation of European Union law.

Keywords: Binding effect, Court of Justice of the European Union, judgment, preliminary ruling.

1. Introduction

The Court of Justice is the judicial authority of the European Union, its role is to *'ensure that in the interpretation and application of the Treaties the law is observed'.*[1] Treaty on the Functioning of the EU further specifies the jurisdiction of the Court, i. e. what cases it may hear and decide.

The Court fulfils various functions – it reviews the legality of legislative measures, therefore it performs the function of a constitutional court in most countries. It annuls decisions of Union bodies, therefore it performs the function of an administrative court. It also has competence to conduct proceedings that are unique and distinctive for EU law – it enforces EU law obligations towards member states which act contrary to EU law and also and probably most importantly, the Court gives rulings in preliminary reference procedures regarding the interpretation and validity of EU law.

The significance of this institution of the European Union is rather obvious – in the supranational international organization where various interests of member states, Union bodies and individuals compete, the existence of a neutral and respected authority with competence to resolve disputes among them and ensure that everyone complies with its obligations is vital.

Since the topic of this paper is the binding effect of the Court of Justice of the European Union judgments, it is necessary to define what is meant by bindingness. For the purposes of this paper binding effect of a judgment means an obligation of a member state court to apply the judgment, not respecting the judgment is a ground for appeal.[2]

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[1] Article 19 of the Treaty on European Union.

[2] For further reference on bindingness and precedential effects of judgments see PECZENIK, ALEKSANDER: The Binding force of Precedent, in MACCORMICK, NEIL – SUMMERS, ROBERT S. (eds.): *Interpreting Precedents, A Comparative Study,* 1997, Ashgate, Dartmouth, 461-479.

It stems from the Treaties that Court's decisions are binding on the parties of the proceedings. It also follows from the very nature of the Court of Justice as a judicial authority and it is not disputed. Conversely, a lot has been written about the legal effects of Court's judgments in general, i. e. legal effects to people, member states and their institutions and EU institutions that are not parties of the proceedings.

1.1 Perception of judgments in common law and on the EU level

The question arises whether Court's judgments are binding to the same extent as precedents in common law legal culture or whether they are binding merely upon the parties. The answer is of course neither of these possibilities, the extent of binding effect of CJEU judgments lies somewhere in between these two positions.

The judgments of the Court of Justice of the European Union cannot be regarded as precedents as they are understood in English law. There are number of differences between precedential judgments of English courts and CJEU judgments. It would be outside of the scope of this paper to thoroughly analyse the differences between English and EU law, suffice it to say that the historical origins of these two legal systems are too diverse to be combined and that they simply function differently.

To support the above statement, I shall indicate perhaps the most pertinent differences between decisions of English Courts and of the Court of Justice. In English court cases, the focus is made on the facts of the case. This may be evidenced by the practice of 'distinguishing'[3] – since the rule contained in previous judgment is never general but very specific, English judges have to carefully find the facts of the case at hand and either apply the earlier rule (follow a precedent) or not apply it (distinguish a precedent) on grounds that the facts of the case at hand are different. The rule has to be inferred from previous judgment, i. e. the precedent (inductive method).[4]

The practice of CJEU is rather similar to the practice of a continental judge who finds a legal norm, which is general, and applies it to the facts of the present case (deductive method),[5] while legal, i. e. not factual, evaluation of the present case is the focal point for the CJEU. In interpretative judgments of the Court of Justice in preliminary reference procedure the Court doesn't even apply the legal solution on the facts of the case, it provides the legal solution and then refers the case back to national court and it is the national court which has to make the final decision.

English judges create law even in areas with no legislation, they create new legal principles, new norms both general or very specific. Whole branches of law are judge-made in English law, e. g. the law of trust. On the contrary, CJEU does not create new rules out of nowhere, it infers them from existing law, even if it sometimes infers them only from 'the spirit of the Treaties' as it did in the famous judgment Van Gend & Loos[6] when it inferred the doctrine of direct effect of EU (then EC) law. It may be

[3] KNAPP, VIKTOR: *Velké právní systémy* [Significant Legal Systems], 1996, C. H. Beck, Praha, 170.

[4] BOGDAN, MICHAEL: *Concise Introduction to Comparative Law,* 2013, Europa Law Publishing, Groningen, 100-101.

[5] Ibid.

[6] Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Case 26-62.

argued that there is a fine line between interpreting and creating law and the Court's interpretation sometimes transgresses the line, however, the fact that when it declares new rights or obligations, the Court always *infers* them and carefully explains it, it is clear that not even the Court itself perceives itself as a legislator or creator of law. In reality, all EU lawyers agree that CJEU judgments do not possess equal binding effect as English precedents.

On the other hand, there are many legal scholars who have an opinion that CJEU judgments in general have binding effect only inter partes and as regards other parties, they are only of persuasive authority.[7] I believe that this opinion is not correct and I will try to state reasons why.

2. Binding effect of preliminary rulings concerning interpretation of a Union act

The Court has explicitly stated that its judgment is binding for the referring Court in cases Munari[8] and Milchkontor.[9] That may also be deduced from the art. 267 TFEU[10] and from the very essence of the proceedings.[11] The judgment of the CJEU is equally binding to the national courts which hears the case upon appeal.[12]

First argument in favour of erga omnes binding effect concerning interpretation of Union acts is the principle of legal certainty. Legal certainty is one of the fundamental legal principles of EU law, well established in the Court's case-law.[13] The same holds for the principle of protection of legitimate expectations which is intertwined to the former.[14] It is self-evident that legal certainty and the protection of legitimate expectations couldn't be achieved without a minimum level of stability, which essentially means that like cases should be treated alike. Naturally, this is important for all legal orders, EU and national, but it is especially important in the EU due to its transnational nature – in 28 member states interpretation of legal norms may easily get significantly inhomogeneous.

Second argument strongly in favour of general binding effect of CJEU judgments is the very aim of preliminary reference procedure – it should ensure homogeneous

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7 415 Precedent in EC law.

8 Judgment of the Court of 3 February 1977. Luigi Benedetti v Munari F.lli s.a.s., Case 52-76.

9 Judgment of the Court of 24 June 1969. Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken. Case 29-68.

10 See para 4 of the Opinion of AG Reischl in case Luigi Benedetti v Munari F.lli s.a.s. Case 52-76.

11 As M. Bobek and J. Komárek rightly say in their commentary: "What other reason would have the otherwise very demanding and costly procedure, that delays the proceedings in front of the national court for about two years? Surely not just to nurture academic disputations." BOBEK, MICHAL – KOMÁREK, JAN: Koho vážou rozhodnutí ESD o předběžných otázkách? [Whom do the ECJ decisions bind?], in *Právní rozhledy*, issue 19-20 (2004).

12 Ibid.

13 For further reference see ARNULL, ANTHONY: T*he European Union and its Court of Justice*. 2006, 2. ed. Oxford University Press, Oxford, 336-337.

14 For further reference see ARNULL: *op. cit.*, 336.

interpretation and application of EU law. Truly homogeneous interpretation of EU law is at best achieved when preliminary rulings concerning interpretation of Union law are respected beyond the case in which they were given.

AG Warner in his opinion in case Manzoni[15] observed that if preliminary rulings concerning interpretation had no binding effect, national courts could disregard them if they saw fit. It would deprive the preliminary reference procedure of its purpose, which is the uniform interpretation and application of Union law, if it was accepted that preliminary rulings have no binding effect except in the case in which they were given. AG Warner also aptly points out that provisions of the Statute of the Court entitling Union institutions and Member states to submit their observations in preliminary reference cases would *"correspond to the use of a sledgehammer to crack a nut"* if the ruling in such cases would be binding only to the court submitting the reference preliminary ruling.

Another argument is that the nature of the judgments is declaratory,[16] that was confirmed by the Court in case Denkavit[17] by stating that the interpretation of legal acts must be applied from the time of its coming into force. So if a provision of Union law has general binding effect, its interpretation should possess the same qualities. As a result of that, the interpretation of a legal act given by the Court in essence becomes a part of the act and acquires its general applicability and erga omnes binding effect. Moreover, the interpretation, which is given by the Court in preliminary ruling, does not give answer specific to the dispute in original proceedings before national court, it is general and as such it is suitable for general application in other cases.

In Da Costa[18] the Court ruled that a MS court may not refer an issue to the CJEU if there already is a previous judgment of the CJEU on the particular issue. The Court said that the obligation stipulated in article 267 of TFEU to refer an issue of EU law to the Court may be deprived of its purpose and emptied of its substance by the previous judgment. This has been later confirmed by the famous CILFIT[19] case, in which the Court further added that this rule applies even to cases that are not factually strictly identical and it is irrelevant in which type of proceedings the interpretation has been

[15] Opinion of AG Warner in case Renato Manzoni v Fonds national de retraite des ouvriers mineurs. Case 112-76.

[16] LENAERTS, KOEN – MASELIS, IGNACE – GUTMAN, KATHLEEN: *EU Procedural Law,* 2014, Oxford University Press, Oxford, 245.

[17] "The interpretation which [...] the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation [...]". Judgment of the Court of 27 March 1980. Amministrazione delle finanze dello Stato v Denkavit italiana Srl. Case 61/79.

[18] Judgment of the Court of 27 March 1963. Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration. Joined cases 28 to 30-62.

[19] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81.

made – this rule has further been denoted as 'acte eclairé doctrine'. Explicit acknowledgment of the Court that member state's courts may apply a previous judgment even to cases with non-identical factual background therefore essentially means that a CJEU judgment constitutes a general legal rule which is to be applied generally to future cases. This is a confirmation of the above arguments and of very strong binding effect of CJEU judgments in preliminary reference procedure.

The acte éclaire doctrine is strengthened by the Court's rules of procedure[20] which set forth that the Court may decide not to hear a case and rule by reasoned order if a question referred to the Court for a preliminary ruling

- is identical to a question on which the Court has already ruled,
- or the reply to such a question may be clearly deduced from existing case-law,
- or where the answer to the question is clear and admits no reasonable doubt.

It may be argued that the language of the Court merely recommends the national courts to follow its previous judgments,[21] however, it seems that if the Court mentions the possibility of a national court to submit another request for preliminary ruling, it indicates the possibility to clarify the meaning and extent of the previous interpretation rather than the possibility that it may reverse its previous judgment (but this option is also not excluded). This is further supported by the fact that judgments of the Court may too be subject to interpretation in preliminary ruling procedure.[22]

It is necessary to say that to claim that judgments in preliminary reference procedure only bind the court which has requested preliminary ruling would have absurd consequences – it would put an obligation on national courts to ask for a preliminary ruling again and again even if the Court has already given the answer and the Court would have the duty to deal with the case and give the ruling every time. Functional judicial cooperation couldn't exist in such circumstances and the role of the Court would be weakened.

Moreover, it follows from the CJEU jurisprudence that member states may be held liable for disregarding CJEU judgments.[23] In case Larsy[24] the Court held that non-application of EU law including CJEU jurisprudence could be regarded as breach of EU law and constitute liability of a member state. In case Köbler[25] the Court explicitly stated that if a member state court breaches EU law, that breach is attributable to member state and the member state is consequently obliged to make good damage caused to individuals. Furthermore, not respecting the duty to refer a matter for

[20] Art. 99 of the Rules of Procedure of the Court of Justice of the European Union.

[21] BARCELÓ, JOHN J.: Precedent in European Community Law, in MACCORMICK, NEIL – SUMMERS, ROBERT S. (eds.): *Interpreting Precedents*, *A Comparative Study,* 1997, Ashgate, Dartmouth, 423.

[22] Lenaerts – Maselis – Gutman: *op. cit.* 223.

[23] See also *ibid.* 102-103.

[24] Judgment of the Court (First Chamber) of 28 June 2001. Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI). Case C-118/00.

[25] Judgment of the Court of 30 September 2003. Gerhard Köbler v Republik Österreich. Case C-224/01.

preliminary ruling by a member state court against whose decision there is no remedy might lead to the commencement of infringement procedure by the Commission.[26] The fact that member states could be held liable for disregarding Court's judgments essentially means that the judgments do produce binding effect beyond the particular case.

3. Binding effect of preliminary rulings concerning validity of a Union act

The situation regarding bindingness of preliminary ruling concerning validity of EU measures is slightly less complicated and less controversial. If the Court declares an act of an EU institution invalid in the preliminary reference procedure, a party who has not been a party to the original proceedings may rely on the judgment. In the case International Chemical Corporation[27] the Court held that *"although a judgment of the Court given under article 177 of the Treaty[28] declaring an act of an institution [...] to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of the judgment which it has to give".*[29] As follows from this statement, the Court for the purposes of attaining legal certainty and uniform application of EU law basically authorized the national courts to treat such judgments as legally binding erga omnes.

Moreover, the Court stated that a national court may ask for a preliminary ruling regarding the same act that has already been declared void once again but the questions should rather be limited to *"the grounds, the scope and possibly the consequences of the invalidity established earlier".*[30] It is implicit in the judgment that should the national court raise a question concerning validity of the act, it would be simply referred to the previous judgment of the Court.

4. Binding effect of other types of judgments

4.1 Annulment judgments

As regards judgments in proceedings in which the Court reviews the legality of legislative acts, the judgment that declares the act void is naturally binding erga omnes.[31] The situation is, however, not so crystal clear with regard to judgments which do not declare a measure invalid since an earlier dismissed action to annul an act does not prevent a party (be it the same or a different one) to file an action for annulment

[26] ARNULL: *op. cit.* chapter 9.
[27] Para 13 of the Judgment of the Court of 13 May 1981. SpA International Chemical Corporation v Amministrazione delle finanze dello Stato. Case 66/80.
[28] Today art. 267 TFEU.
[29] Emphasis added.
[30] Para 14 of the Judgment International Chemical Corporation.
[31] CRAIG, PAUL – DE BÚRCA, GRÁINNE. *EU Law, Text, Cases and Materials*, 2008, 4. ed., Oxford University Press, Oxford, 572.

again. Nevertheless, the Court also in these cases refers to its previous judgment and dismisses the claim if the action is founded on the same reasons.[32]

4.2 Judgments given in infringement proceedings

Basically the same as for review of legality judgments is true for judgments given in infringement proceedings before the CJEU. It is so because a judgment in which the Court holds that a member state breaches EU law does not declare illegal a member state legal act but a legal situation which exists in that member state.[33] And if the Court declares illegal particular situation in one member state, identical legal situation in another member state shall be deemed illegal too. Opposite course of action would basically be a denial of equality of member states.

The Court also stated that "where the Court has found that a member state has failed to fulfil its obligation […], it is the duty of the national court, to take account […] of the elements of law established by that judgment in order to determine the scope of the provisions of Community law which it has the task of applying".[34] Here the Court explicitly places a duty on the courts of the member states to apply its previous judgments.

5. Binding effect of CJEU judgments generally

Binding effect of CJEU judgments in general may also be induced from its judgment in Foto-Frost[35] case – here the Court held that member state courts may consider the validity of a Union act, they may conclude that the grounds for invalidity claimed by the parties are unfounded and consequently the act is valid. However, if they have doubts about the validity of the act, they have no authority to declare the act void, they must refer the question to the Court under Art. 267 TFEU. The Court based its reasoning on grounds of the need of preserving legal certainty and coherent and uniform application of EU law. Barceló comes to a conclusion that this applies not only to acts of other EU institutions but also, a fortiori, to CJEU decisions. Therefore a member state court may not choose not to apply CJEU judgment if it perceives it incorrect, it either has to apply it or it has to refer the question of its correctness or proper interpretation to the CJEU.[36]

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[32] See Judgment of the Court of 16 May 1979. Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello Stato. Case 84/78.

[33] TOTH, ÁKOS G: The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects, in *Yearbook of European Law,* 1984, vol. 4, issue 1, 53.

[34] Judgment of the Court of 14 December 1982. Procureur de la République and Comité national de défense contre l'alcoolisme v Alex Waterkeyn and others; Procureur de la République v Jean Cayard and others. Joined cases 314/81, 315/81, 316/81 and 83/82.

[35] Foto-Frost v Hauptzollamt Lübeck-Ost. Reference for a preliminary ruling: Finanzgericht Hamburg - Germany. Case 314/85.

[36] BARCELÓ: *op. cit.* 423.

6. Conclusion

From preceding arguments in may be clear that the level of authoritativeness attributed by the Court to its judgments is very high. There are numerous reasons for which the various CJEU decisions should be treated as binding beyond the particular case. The reasons should not be evaluated according to national rules which apply in member states, they have to be considered exclusively in light of the specific nature of EU law and EU judicial system.

To conclude, although the Court never explicitly held that its judgments shall be perceived and applied as precedents, in its decision-making it treats them and it demands national courts to treat them as de-facto precedents.

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[6] KNAPP, VIKTOR: *Velké právní systémy* [Significant Legal Systems], 1996, C. H. Beck, Praha.

[7] LENAERTS, KOEN – MASELIS, IGNACE – GUTMAN, KATHLEEN: *EU Procedural Law*, 2014, Oxford University Press, Oxford.

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[9] TOTH, ÁKOS G.: The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects, in *Yearbook of European Law,* 1984, vol. 4, issue 1, 1-77.

THE NATURAL LAW IN THE CZECH CIVIL CODE

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Abstract: The article is about the anchoring of the natural law and natural rights in the new Civil Code, Law no. 89/2012 Coll., Civil Code and presents a general overview of the importance and existence of natural rights today. Czech legislature's intention stated very briefly, what is the role of the new mooring natural rights of man, a broader context, it must be interpreted in accordance with current legal theories.

Keywords: natural rights, the system of private law, civil law, moral rights, sources of law, legal principles

1. Introduction

Processing of the new Civil Code represents a big challenge every time, it was the case of the czech legislature as well. Fundamental dissatisfaction with the Civil Code of 1964 (Act no. 40/1964 Coll., Civil Code) was based on, according to experts, the stigma of communism.[1] So long was the air floated by the idea of a recodification effort to get closer to the modern trend of continental codification of the new generation. In generally a system of private law of the Civil Code starts a position of the fulcrum, which brings the basic concept and value system for all conceivable private relationships (relationships).[2] Therefore it was necessary to bring new conceptual changes.[3]

From 1st of January 2014 (the adoption of the new Civil Code) the Czech Republic became the first European country which brought to the text of the modern Civil Code the reference of the natural rights theory. This somewhat surprising feat evoked (and still produces) a lot of questions. Correct interpretation of the reference of the natural rights theory and its implementation in the context of the new Civil Code represents a challenge for discussion and the need to deal with the intention of the legislature, which was vaguely submitted. In the right case explanatory report should provide clear guidance, why was explicitly accepted the concept of the natural rights in the new Civil Code. Within uncertain answers we can with certainty say that the terms of positive anchoring of natural rights did not cause a revolution in the perception of positive and steady ties of natural law. Only few topics mean in a legal discourse so controversy discussion as just a question of natural rights. Among proponents of natural rights and positivists is a continuous controversy, not only in terms of normative. The dispute about the distinction of law and morality must be perceived as a

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[1] KÜHN, Z.: *Aplikace práva soudcem v éře středoevropského komunismu a transformace. Analýza příčin postkomunistické právní krize*, 2005, 1. vydání, Praha, C. H. Beck, 146-147.

[2] SCHWAB, D. – LÖHNIG, M., *Einführung in das Zivilrecht*, 2010, 18. Auflage. C. F. Müller, 1.

[3] HURDÍK, J. – LAVICKÝ, P. a kol.: *Změny soukromého práva v České republice a dalších evropských zemích*, 2014, 1. vyd. Brno, Masarykova univerzita, Právnická fakulta, 122. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia, sv. č. 500.

line of historical debate, which in several waves and forms returned and and we just repeat inaccurate claims.

Since the adoption of the new Civil Code is the area of private law accompanied by the fundamental changes which are detectable by simply comparing the text of the old and the new legislation. Depending on the required discontinuity were adopted institutes that represent a direct departure from the old law, but also institutes (old) new, which returns the terminology of private law back in time. Background and initial questions of the Czech Civil rights are due to "technology" and new approaches to processing a code difficult to detect, and in addition to individual autonomy (will), and of the principles proclaimed in the Preamble, requiring deeper reflection on the meaning of reform.

2. The Myth of Natural Rights

„Dead or Alive?“

I will start this chapter with a doubt with the significance and existence of natural rights that support the statement of the American philosopher Henry Veatch, who in his work years ago so urgently wrote: "Of course, the ancient and honorable doctrine of natural law is dead, isn´t it?"[4] If one asks, whether the theory of natural rights was dead, or at least fundamentally obsolete, we must answer that it is not. Or at least not entirely.

Current jurisprudence (juris prudentia), which divides the actors traditionally right to legal positivists and naturalists, refers to a number of major proponents of the idea of natural law and in German-speaking countries has nonpozitivismus even superiority.[5] Live is also called modern natural law theory, which recently formulated J. Finnis and his followers. Despite the fact that there are proponents of natural law theory, we must recognize numerous superiority of those who are subjected to this theory, criticism, through which, paradoxically, we know about aspects of natural rights by far the most.

The topic of natural rights is perceived differently, with some exaggeration, we can say that for practicing lawyers is just a sort of revelation fabled unicorn. It is an alien terminology, because we well known and basic human rights, immanent action of legal principles and rules across private law, knowing the doctrine of personal and individual rights, but to define the rights to the natural stand up to these "unicorns" correct form in practice a big problem.

Natural law comes from the nature of man and the world, as well as a law of physics is derived from the nature of space, time and matter. Philosophers usually try to reason by reason itself, as in mathematics, although it has long since shown that this

[4] VEATCH, H.: *Natural Law: „Dead or Alive?“* [online] Literature of Liberty: A Review of Contemporary Liberál Thought I, no. 4 (1978). http:// oll.libertyfund.org/ option=com_content&task=view&id=168&Itemid=259#anchor23192

[5] SOBEK, T.: *Právní myšlení, kritika moralismu*, 2011, Praha-Brno, Vydavatelství a nakladatelství Aleš Čeněk, 61.

can not be done, with the exception of mathematics, and perhaps not even there. Like the chicken and the egg, observation requires theory and observation led to the theory, the theory requires observation and theory leads to the observation. This is the core of the scientific method, if the scientific method can be expressed in words.

There are more possible definitions of natural law at this moment, we consider only those that are common to most theories, and capture the essence of natural rights.

In summary, as valid the characteristics of natural law to identify such analytical statements:

- natural law stems from the nature of man, as a species, which is,
- valid natural law is composed of arbitrary power of the state,
- natural law is objective, existing in nature,
- natural law can be only discovered, not to construct or create,
- natural law is a method, not a code,
- we do not recognize the natural right of the words or text, but only through individual cases.

These statements are the nature of the application test whether or not a natural right of man and constitute a default view in the case of a positive interpretation of the legal definition of natural rights.

3. Historical background

The first role of the natural rights theory, namely: *natural law as a sin jurisprudence*, was described above, but we can see also another, especially the historical role of natural rights: *the natural right of man serves as a tool (the revolutionary, repair and preventive).*

To better understand the essence of natural rights, we have to remind the evolution and the context to this theory. The historical evidence suggests that the natural rights (there may arise an apparent contradiction with one of the starting premise, namely, that "natural rights exist from the beginning of time, always and in all circumstances"), the man pleads especially at moments when needs ideals that they could shield some of his major decisions. Such ideals that have become „war“ or „revolutionary“ passwords, or allow to deal with the wrongs of the past regime, if the instruments of traditional jurisprudence are insufficient.

W. Friedmann, describes the theory of natural law as *"a story about humanity's search for absolute justice (mostly unsuccessfully), the search for higher ideals than the positive law itself. These ideals are then at certain intervals rediscovered."*[6]

M. B. Crowe[7] said that natural law is a set of unwritten laws that are qualitatively superior to positive law and also constitute its scale. Another view brought John Finnis, who reframed learning the basics of T. Aquinas and currently is considered the modern (authoritarian) interpreter of natural law theory today, we find that natural rights are defined on the basis of a goods of that person for their life really needs. Natural rights

[6] FRIEDMANN, W. G.: *Legal Theory,* (3rd Indian reprint 2003), Columbia UP: 1967, 95.

[7] CROWE, M., B.: The Changing Profile of the Natural Law, 1977, Hague, 12.

do indeed constitute what is good for man, these are the principles permitting to live human life in society under conditions of practical reasonableness needs of everyone.

According to McCormick, has a list of values, formulated by J. Finnis, "extremely unconvincing"[8] character. It is not possible to create lists of values, referring to the "self-evident character," because in this case you cannot avoid subjectivism. Every similarly formulated a list of "important objective" core values is only a projection of moral, political or social views of its author. Cannot be considered valid value judgments, which are the expression of one's feelings or desires.

Numerous political and social reform movements relied upon the natural law, because it was always considered as a powerful reason stands above the applicable law. Once the company against the valid legislation reported with the new requirement, arguing primarily natural law. In this spirit he acted France during the great revolution and his action also struck happening in the rest of Europe.[9]

Natural law theory was in XIX. century under the influence of the historical school of law and jurisprudence positivist orientation (except for the few exceptions) abandoned. They didn ´t believe that there could be other law that didn´t come from the will of the state. Beyond the text of the law, the legal ordinance was considered valid right, they were shaped by "spirit of the nation". Natural law theory was a dualistic conception. While legal positivism (monistic conception) constituted the only valid law.[10]

In XX. century have the category changed and the natural law concept has become a unitary concept, since this was based on the thesis inseparability of law and morality. Many contemporary authors consider the concept of splitting obsolete, since the conceptual separation of law and morality is Essentials only for legal positivism. T. G. Masaryk contributed to the revival of natural law in the XX. century to the czech territory. Natural law theory is repeatedly mentioned in connection with the so-called. czech issues and also in relation to the need to further significant reversal of the natural law takes place in Germany after World War II, it is a negative reaction to Nazi law[11] which was in retrospect falsely they identified as positive law.[12]

At present, we can follow the development of a new generation of legal naturalistics. Gary Chartier speaks about neo-classical theory of natural law, sometimes about a new theory of natural rights (new classical natural law - nCnL theory), which was initiated in the 70s by Germain Grisez. We can therefore recognize some kind of mix elements of classical and neo-classical natural law theory.

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[8] MCCORMICK, P.: Review of Nature as Reason: A Thomistic Theory of the Natural Law by Jean Porter, in *Journal of the Society of Christian Ethics,* 29, no. 1 (2009).

[9] STIEBER, M. *Dějiny soukromého práva v střední Evropě*, 1930, Nástin, Praha, Knihtiskárna Typus, 3.

[10] TOMSA, B. *Masarykův zápas o právo přirozené. Současně příspěvek k ideologii českých politických stran,* 1928, Bratislava, Nákladem Právnické fakulty University Komenského v Bratislavě, 22.

[11] SOBEK, T. *Viktor Knapp a nacistický moralismus,* 2013, Právník, AV ČR, Ústav státu a práva, roč. 152, č. 12, 1206-1218.

[12] TOMSA, B. *Masarykův zápas o právo přirozené. Současně příspěvek k ideologii českých politických stran,*1928, Bratislava, Nákladem Právnické fakulty University Komenského v Bratislavě, 22.

4. The Intention of the Legislature and the Statutory Regulation of Natural Rights

The explanatory report[13] of the Civil Code contains various references to natural rights that can be performed after selecting formulated as follows:

- man has inherently inalienable natural rights,
- a person or legal entity principally not and cannot be generally in equal legal status,
- Act doesn´t limit the fundamental rights of man, but rather the fundamental human rights constitute a limit to the law,
- it is required to respect the inviolability of the natural rights of man,
- it must still take into account the democratic traditions of the Czech legal thinking on standards of civil rights of European democratic states,
- natural human freedom takes precedence over the state (the state is not the creator of human freedom, but her protector)
- natural rights belong to a certain value system expressed in accordance with czech constitutional order.

The idea of natural rights in the Civil Code can be perceived also by two factors, one of them is a legacy of ius naturalist concept of modification ABGB. Another enumeration of the text of the explanatory report, where they highlighted the democratic traditions of Czech legal thinking, the standards upon which the civil law of European countries and the basic directives for mental concept of the new Civil Code, which found its prototype in the Charter of Fundamental Rights and Freedoms and the Constitution of the Czech Republic. Humans are the main ideological base of private law, which must take into account his anthropological nature, otherwise you can not find the right natural law foundations of private individual rights of man.

Furthermore, we must ask ourselves "What is the objective of the rule of law?" O. Weinberger[14] appointed three basic objectives that may very well be based on: a) the fairness of the legal decisions, b) legal certainty and c) the idea of the system. With this, it is highly advisable to avoid laws that can not be consistently and with full effects of the conduct, because this is a reliable way to demoralize society (*lex inanis*).

To assess the role of the natural rights of man in the Czech private law after 1. 1. 2014 is a key relationship, which can be between the theory and the Civil Code to consider.

In this context Damiano Canale[15] distinguishes three models of the relationship of natural law and codification:

[13] Explanatory report from 18. 5. 2011 [online]. 2011 From: http://obcanskyzakonik.justice.cz/tinymce-storage/files/OZ_Duvodova-zprava-11042011.pdf.

[14] WEINBERGER, O.: *Norma a instituce (Úvod do teorie práva)*, 1995, Brno, Masarykova univerzita, 24 – 25.

[15] CANALE, D.: The Many Faces of the Codification of Law in Modern Continental Europe, in CANALE, D. – GROSSI, P. – HOFFMANN, H. (eds.): *A treatise of legal philosophy and general jurisprudence. 9.*, Lawrence Meir Friedman.

- methodological model, the normative content of the Code is a natural right, standards of the Code are eternal, universal and necessary,
- revolutionary model means that the Code is a political instrument to implement the ideas of natural law, whose purpose is to create a better society,
- exculpatory model where natural law justifies the legislature to determine their will as the exclusive source of law, so the content of positive law may ultimately differ from natural law.

With reference to the wording of the law and the wording of the explanatory memorandum can be concluded that none of the options above the current relationship between them and the natural rights of private Code does not apply. On these three models, therefore we will continue and expand on the idea of natural law and the relationship of the new Czech Civil Code.

New Czech Civil Code includes explicit mention of natural rights in several places. On the bases of natural law also refers to the explanatory memorandum to new Czech Civil Code. What do such references mean? It would be easier to answer what you mean. Natural rights are not defined anywhere demonstratively, mentioned in the text of the law can signify their positive-legal base, but also a reference to the value system that exists outside the law. In connection with the new Civil Code can the issue of natural rights approach in the following manner:

- natural rights have the nature of a conceptual basis – worldview,
- express the core values as principles, and as a principle also become immanent part of the interpretative process,
- anchoring the natural rights in the text of the statute is a legal link to this theory in its pure form.

New Czech Civil Code puts his preference for autonomy and the natural rights of individuals. The above already mentioned the numerous nature that are related to new Czech Civil Code offers. Orthodox positivists opinions irreconcilable with the concept of natural law, the natural law as an ideology, not taken. Acknowledged would be that only occurred "capture in legal text" this theory. In the scenario where we understand the natural law concept as a philosophical stance, which affects the whole of private law, is required another procedure. It is essential that the new Czech Civil Code contains only normative references to the doctrine of natural rights.

5. Summary

The essence of natural rights (probably) lies precisely in the fact that only by the emotion and reason do we know what is right and how it should be. If so, it is very difficult to produce a description of the individual components of the system, which in their content varies depending on the circumstances of the examined case.

We can make a conclusion that a specific historical context of the theory of natural rights and the conclusions of contemporary jurisprudence enable us to identify only distinguishing features of natural rights, but without embedding in the text of the law will remain only value the proclamation. We can also say that the practice is not legal under current conditions argue pure theory of natural rights.

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[6] KÜHN, Z.: *Aplikace práva soudcem v éře středoevropského komunismu a transformace. Analýza příčin postkomunistické právní krize,* 2005, 1. vydání. Praha, C. H. Beck.

[7] MCCORMICK, P.: Review of Nature as Reason: A Thomistic Theory of the Natural Law by Jean Porter*,* in *Journal of the Society of Christian Ethics*, 29, no. 1 (2009).

[8] SCHWAB, D. – LÖHNIG, M.: *Einführung in das Zivilrecht,* 2010, 18. Auflage. C. F. Müller.

[9] SOBEK, T.: *Právní myšlení, kritika moralismu,* 2011, Praha-Brno, Vydavatelství a nakladatelství Aleš Čeněk.

[10] SOBEK, T.: *Viktor Knapp a nacistický moralismus,* 2013*,* Právník, AV ČR, Ústav státu a práva, roč. 152, č. 12, s. 1206-1218.

[11] STIEBER, M.: *Dějiny soukromého práva v střední Evropě,* 1930, Nástin. Praha 1930, Knihtiskárna Typus.

[12] TOMSA, B.: *Masarykův zápas o právo přirozené. Současně příspěvek k ideologii českých politických stran,* 1928, Bratislava, Nákladem Právnické fakulty University Komenského v Bratislavě.

[13] VEATCH H.: *Natural Law: „Dead or Alive?"* [online] Literature of Liberty: A Review of Contemporary Liberál Thought I, no. 4 (1978).
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CRITERIA FOR DETERMINING WHETHER A TRADEMARK IS WELL-KNOWN

AL RAWASHDEH, WADDAH*

Abstract: Nowadays, a trademark gives an incentive for commercial establishments to maintain the quality of their products or services such as COCA-COLA and Google. The customer will observe the trademark, indicating that certain products or services as a guarantee of quality. However, increasing figures of products appear on the market, which are similar to those marked with well-known trademarks. All these issues lead to the fact of how important is to protect well-known trademarks, which emerged strongly on the national and international forum. Recently, several trademark has international or worldwide renown and its reputation surpasses the country of origin where it has been registered and acquired fame in a relevant sector among the consumers' public, then that trademark called "well-known" trademark. The criteria for determining whether a mark is well-known have two folds: First, they are decisive factors to distinguish theoretically between ordinary trademarks and the well-known trademarks; second, they are important to confer protection in case of infringement. This paper highlights the definition of trademark and famous trademark under EU, USA, and international approaches. In addition, this paper examines the criteria-if available- provided under the WIPO Joint Resolution Concerning provisions on the Protection of Well-known mark.

Keywords: Criteria, Famous Trademark, Trademarks with a reputation, Well-known Trademark.

1. Introduction

Nowadays, trademarks are valuable properties for the owners of commercial establishments to distinguish their goods or services from that of others, thus, protection of trademark and well-known trademark has great importance to ensure the source from which a given products or service originates. For instance, a trademark gives an incentive for commercial establishments to maintain the quality of their products or services such as COCA-COLA, Google, BMW and DELL. The customer will observe the trademark, indicating that certain products or services as a guarantee of quality.[1]

However, increasing figures of products appear on the market, which are similar to those marked with well-known trademarks. It renders customer confusion and damages their ability to choose products by relying on the marks as indications of origin and quality. All these issues lead to the fact of how important is to protect trademarks and well-known trademarks, which emerged strongly on the national and international forum. Accordingly, all countries in the world register trademarks. Each national or regional office maintains a register of trademarks, which contains full application

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[1] The Secretariat of the World Intellectual Property Organization, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, 2006, World Intellectual Property Organization, Sixteenth Session, Geneva, 5.

information on all registrations and renewals, facilitating examination, search, and potential opposition by third parties. The effects of such registration are limited to the country (or, in the case of a regional registration, countries) concerned.[2] Recently, several trademark has international or worldwide renown and its reputation surpasses the country of origin where it has been registered and acquired fame in a relevant sector among the consumers' public, then that trademark called "well-known" or "famous" trademark, for example "McDonald's", "MICROSOFT", and "IBM".[3]

In other words, trademarks have a very relevant relation with our daily life and also are acquiring a commercial value and a huge effect on national and international economy, for the above reasons trademarks should be protected in order to protect consumers "the direct users" of trademarks. The criteria for determining whether a mark is well-known have two folds: First, they are decisive factors to distinguish theoretically between ordinary trademarks and the well-known trademarks; second, they are important to confer protection in case of infringement.

This paper highlights the definition of trademark and famous trademark under EU, USA, and international approaches. In addition, this paper examines the criteria-if available- provided under the WIPO Joint Resolution Concerning provisions on the Protection of Well-known mark.

2. What is a trademark?

Trademark has several definitions. As observed by Davis Bainbridge, that the courts defines the trademark as a mark, sign or symbol, the main and right function of which is, "to identify origin or ownership of the goods to which it is affixed".[4] He also states that "This definition of the function of the trademark has been in use with almost unvarying uniformity throughout the formative period of trademark law up to the present day".[5]

According to WIPO, a trademark is understood as "a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. Its origin dates back to ancient times, when craftsmen reproduced their signatures, or "marks" on their artistic or utilitarian products. Over the years these marks evolved into today's system of trademark registration and service because its nature and quality, indicated by its unique trademark, meets their needs."[6] Furthermore,

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[2] World Intellectual Property Organization (WIPO), *Well-known Trademark*, 2015, http://www.wipo.int/sme/en/ip_business/marks/well_known_marks.htm [15.10.2016].

[3] World Intellectual Property Organization (WIPO), *Well-Known Trademark Protection Reference to the Japanese experience*, 2010, http://www.wipo.int/export/sites/www/about-wipo/en/offices/japan/research/pdf/vietnam_2010.pdf/ [15.10.2016].

[4] SCHECHTER, FRANK I.: *The historical foundations of the law relating to trademarks*, 1925, Columbia University Press, 19.

[5] Ibid.

[6] World Intellectual Property Organization (WIPO), *What is Intellectual Property?*, http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf [18.10.2016].

Lanham Act[7] defines a trademark as "any word, name, symbol, or device or any combinations thereof-(1) used by a person, or (2) which a person has a bonafide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[8] The Lanham Act also lays down a definition for a service mark which is the same as that of a trademark except that a service mark identifies and distinguishes the source of a service rather than a product. The terms "trademark" and "mark" are commonly used to refer to both trademarks and service marks.[9]Accordingly, there are three requirements in the definition of trademark or service mark:

- A sign which may be considered as trademark may be a word, name, symbol, device or any combination thereof.
- A sign should be used or intend to be used in trade.
- The main purpose of a sign is to indicate the source of goods or service.

In addition, article 2 of European Trade mark Directive,[10] maintained a unified definition for trademarks in general (including marks to goods and marks to services) as a following: " a trademark may consist of any sign 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."[11] In the light of this wording, a trademark involves under European Union signs such as words, names, letters, and numerals and also a new concept which is a designs, and the shape of products or of packaging. By comparing the US and EU trademark laws, it appears that European Trade mark Directive proclaims a broader meaning than Lanham Act as trademark under European Trade mark Directive includes designs, and the shape of products or of packaging while trademark under Lanham Act does not include the designs, and the shape of products or of packaging.

In short, trademark could be defined as a "distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise"[12] or "any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings."[13]

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7 HIARING, ANNE – FRUCHTER, LYNN S.: *Understanding Basic Trademark Law*, 2004, Practicing Law Institute, San Francisco, 10.

8 § 45 Lanham Act, 15 U.S.C. § 1127. The Lanham Trademark Act of 1946 as amended.

9 Ibid.

10 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.

11 Article 2 of the Trade mark Directive.

12 World Intellectual Property Organization (WIPO), *What is Intellectual Property?*, http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf [18.10.2016].

13 KERLY, DUNCAN: *Law of Trademarks and Trade names*, 2001, Sweet and Maxwell, London, 8.

3. What is a famous trademark?

Nowadays, several marks have become famous and broadly known all over the world, for instance, the soft drink Coca-Cola, BURGER KING for fast food, and Levi's jeans. The concept of famous trademark has obtained a dynamic extends beyond the value of the goods and services with which they are mainly related as they might maintain secondary meanings in the mind of the customer, "loyalty between products, services and categories over time and to separate it from tangible production".[14] As a result of widespread of the license and franchise brands, famous trademarks have been widely become as the most important assets engaged by modern companies.

In fact, there is a lack of a common definition for the "famous trademark" or "well-known trademark" in the relevant international conventions and treaties, each country has its own perspective on the question of what is a well-known trademark. For instance, national laws used differently the concept "well-known trademark" the reason for that depending on the economic, political, cultural and social circumstances relevant to each. These contrasts create unclear image of the international legal system for the protection for well-known trademarks.[15] For instance, no definition of well-known trademark or famous trademark under United States law. Further, the United States law stipulated the term of "famous trademark" but not "well-known trademark" through its provisions. Indeed, the difference between "well-known" and "famous trademarks" is still unclear in any of the international treaties or conventions, and national trademark laws.

Conversely, Mr. Frederic Mostert; the former President of International Trademark Association (INTA) at USA, states that*:* *"*The ordinary dictionary meaning of "well-known" according to Merriam Webster is, among others, "widely known" and "known to many". In the context of trademark law, therefore, a well-known mark can be characterized as a mark which is known to a substantial segment of the relevant public in the sense of being associated with the particular goods or services**.** It has often been suggested that a special category of well-known marks, i.e., "famous" marks be recognized. Famous marks are considered to have a higher degree of reputation than well-known marks and therefore deserve a broader scope of protection against unauthorized use on non-competing goods or services".[16]

In European Union legislation, both the Trademark Directive and the Trademark Regulation did not adopt the terms "famous trademark" or "well-known trademark" in their English versions. The alternative concept formally used is the "mark having a reputation". However, a question that has not yet been clarified in the European context is the exact definition of "marks having a reputation". Actually, the

[14] DAVID, HAIGH: *Brand Valuation – Understanding, Exploiting and Communicating Brand Values*, 1998, Financial Times Retail & Consumer Publishing, London, 29.

[15] PHAN, NGOC: Well-known trademark protection. A comparative study between the laws of the European Union and Vietnam the Faculty of Law, Lund University, 2011, 57.

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"reputation" of a trademark means its exclusive attraction which can also be described as its "advertising value".[17] The European Court of Justice[18] states that a trademark may enjoy the protection extending to non-similar goods or services as a mark with a reputation if it is "known by a significant part of public concerned by the products or services which it covers".[19] In the same way, the European Court of Justice stated in the Intel case that: "The reputation of a trademark must be assessed in relation to the relevant section of the public as regards the goods or services for which that mark was registered. That may be either the public at large or a more specialized public".[20] Actually, there are several ways to understand the concept of "well-known trademark" and other terms, including "notorious", "reputation", "famous", "highly renowned", "highly reputed", and "exceptionally well-known".[21]

However, there is no difference between the legal status of protection granting for a "well-known" trademark or for a "very well-known" or "famous" trademark. Thus, for the scope of the thesis, the author mainly uses the two expressions anonymously. The difference may be eventually or limitedly mentioned in specific contexts. In very simple words, the concept of "famous trademark" or "well-known trademark" are used differently from state to state with varies levels of purpose. Despite of such differences, the "famous trademark" or "well-known trademark" can be defined as "a trademark which is widely known by many people within the relevant territory or is considered and recognized by the authorities of the countries regardless of where it is used or registered or not".[22]

4. Criteria for determining whether a mark is well-known

The Paris Convention neither stipulated any definition of the "well-known trademark, nor determined the criteria for considering a mark as a well-known one. However, article 6bis of same admitted the importance of well-known trademark by providing that the countries of the Union have the right, or at the request of an concerned party, to cancel or to reject the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a

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[17] CHRISTOPHER, HEATH– LIU, CHUNG KUNG: *The Protection of Well-known marks in Asia*, 2000, Max Planck Series on Asian Intellectual Property Law, 12.

[18] The European Court of Justice, General Presentation, http://curia.europa.eu/jcms/jcms/Jo2_6999/en/ [13.10.2016].

[19] See Case C-375/97, General Motors Corporation v. Yplon SA, on the interpretation of Article 5(2) of the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ 1989 L 40, p. 1), paragraph 31 of the Judgment dated on September 14, 1999. Judgment of the European Court of Justice of 14 September 1999. General Motors of Corporation v. Yplon SA. Case C-375/97.

[20] Judgment of the European Court of Justice of 27 November 2008. Intel Corporation Inc. V. CPM United Kingdom Ltd. Case C-252/07.

[21] MOSTERT, FREDERICK: Famous and Well-known Marks – An international Analysis, 1997, Butterworth, 18.

[22] PHAN: *op. cit.* 60.

mark considered by the competent authority of the country of use or registration to be well known in that country as being already the mark of a person entitled to the benefits of this convention and used for identical or similar goods.[23]

On the other hand, TRIPS Agreement[24] completed the elements missing from article 6bis of the Paris Convention and was more accurate than the Paris convention, because it gave some hints of the criteria which qualify a trademark to become a well-known one.

Article 16 paragraph 2 of the TRIPS Agreement provides: *"2. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark."*

Article 16/2 of the TRIPS Agreement ascertained that the relevant sector of the public is the decisive factor who can associate the fame with such trademark so as to be qualified and protected as a well-known trademark, the TRIPS Agreement meant to look at this knowledge in its broad meaning as this knowledge in a member state where protection is sought may be not sufficient to conclude such fame.

Also, the criteria for considering a mark as a well-known under the TRIPS Agreement still imperfect and inaccurate, the countries of the union suffered from the variation resulted from depending on the individual standard set under TRIPS Agreement and the possible ambiguities between their legislations which may arise of such. Thus, there was an attempt to overcome these possible dilemmas on June 11, 1999 by the standing committee on the Law of Trademarks, Industrial Designs and Geographical Indications, which recommended a proposed Joint Resolution Concerning provisions on the Protection of Well-known marks in order to be presented for adoption by the WIPO General Assembly and Paris Union Assembly on September 1999.[25]

The standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, recommended a proposed Joint Resolution Concerning provisions on the Protection of Well-known trademarks in order to be presented for adoption by the WIPO General Assembly and Paris Union Assembly in September 1999. The Resolution is addressed to the Member States of the Paris Union and of WIPO, which are already bound by an international obligation to protect well-known marks, for example, under the Paris convention itself or under another international agreement such as the TRIPS. The importance of the WIPO resolution is that the adoption of the resolution does not preclude the provisions from being incorporated into a treaty at a later stage. The International Bureau of the World Intellectual Property Organization (WIPO) prepared EXPLANATORY NOTES[26] on the said Joint

[23] Article 6bis of Paris Convention for the Protection of Industrial Property, Paris, France, on 20 March 1883.

[24] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994).

[25] WIPO: *Joint Recommendation Concerning provisions on the Protection of Well-known marks*, 1999, http://www.wipo.int/edocs/pubdocs/en/marks/833/pub833.pdf [18.4.2016].

[26] Ibid.

Resolution concerning provisions on the Protection of Well-known marks, explanatory notes work as a directive for the member states of the said Joint Resolution concerning provisions on the Protection of Well-known marks, however, it did not constitute obligatory explanatory provisions.

However, the Joint Resolution concerning provisions on the Protection of well-known marks also did not define well-known marks, but Article 2 of the same sets the following factors to be taken into consideration when determining wither a mark falls in to the "well-known" category:[27]

- The degree of knowledge of the mark.
- The duration and extent of any publicity associated with it.
- The number of registrations of it worldwide.
- The diligence with which its owner can prove that he has defended it against copiers.
- The value of the mark.

It would be interesting to cite an opinion mentioned by Kanesarajah: "It is possible that well-known marks in one jurisdiction will not be found to be well-known in another. For example, in Australia the trademark Champagne is descriptive merely of an effervescent party drink manufactured by 'methode Champenoise'. In the UK, Champagne means a drink made by 'methode Champenoise' from grapes in the Champagne region of France. The fame of this drink in the UK has enabled representatives of the Champagne Appellation to prevent use of the name Champagne in relation to any drink other than their Champagnes".[28]

5. Conclusion

The criteria for determining whether a trademark is well-known trademarks is still a grey area internationally. It needs more efforts to obligate all the countries to admit a uniform criteria for determining whether a trademark is well-known trademarks.

To conclude, it should be mentioned that while there is no commonly agreed detailed definition of what constitutes a "well-known" mark; countries might take advantage of criteria for determining whether a Mark is Well-known under the WIPO Joint Recommendations on the Protection of Well-Known Marks.

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