THE IMPACT OF PRELIMINARY RULINGS PRONOUNCED BY THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE ACTIVITY OF THE ROMANIAN COURTS OF LAW

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Abstract

The creation of an area of freedom, security and justice represented an important project of building an Europe without frontiers where the citizens can enjoy the same rights, applied uniformly by the national courts, following the uniform interpretation thereof. The European law interpretation cohesion is ensured by the Court of Justice of the European Union by the mechanism of the preliminary procedure, which establishes cooperation between national courts of law and the European Court.

Keywords: *national courts of law, European Union Court of Justice, European law, preliminary procedure, European court*

1. Introduction

The integration of European law in the rule of law of the European Union Member States was made possible by the essential contribution of the Court of Justice which, by means of a law creative case law, established the founding principles of European law.

The jurisprudential establishment of these principles occurred in 1963, when the Court, by the ruling pronounced in case *Van Geen en Loos*[1], stated the principle of direct effect of European law in the national legal systems of the Member States. In 1964 the ruling in case *Costa*[2] was pronounced, whereby the Court established the principle of the primacy of European law over domestic law, according to which the Union represents a new rule of law which is autonomous and the originality of which is determined by the permanent transfer of powers from the Member States to the Union.

The principle of the primacy of European law, according to the Court, entails the non-application of the national regulation which is not consistent with the European regulation, and the role of the national court is to remove the former in favor of the latter. The European regulation replaces the domestic regulation, thus enabling the direct effect of European law.

Subsequently, in 1978, by ruling *Simmental*[3], the Court outlined that the principle of direct effect is the corollary of the principle of the primacy of European law. The direct effect and the primacy of European law are two complementary principles since the first represents the guarantee of the primacy of European law. If European law regulations were not applied directly in the national law, the principle of its primacy over domestic law would have no effect. On the same reasoning line, the case law of the Court provided the principle of the direct effect of European law previous to the principle of the supremacy of European law.

The integration of these principles and, through them, of the European regulations, in the domestic law of the Member States shall be incumbent on the Member States' courts of law[4].

These national courts judge the cases they acquired jurisdiction on under the procedural law specific to the national legislation of every state. As the procedural rules are different from one state to another, it is obvious that the principles of European law are different in what concerns procedural means used from one state to another. The Court agreed to grant these principles a principle value, thus establishing the procedural autonomy of the national courts by means of its case law. But procedural autonomy must ensure the full effectiveness of European law by means of effective national procedural means[5].

The procedural autonomy principle is a creation of the case law of the Court which, in case *Luck* decided that „the provisions of the treaty do not limit the right of the national competent courts to apply, from various procedural means provided by the national law system, those which are appropriate to guarantee the rights granted by community law[6]". In the same respect, in

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[1] ECJ, 05.02.1963, *Van Gend el Loos*, C-26/62.

[2] ECJ, 15.07.1964, *Costa/Enel*, C-6/64.

[3] ECJ, 09.09.1978, *Simmental*, C-70/77.

[4] N.Popa, E.Anghel, C.Ene-Dinu şi L.C.Spătaru-Negură, *Teoria Generală a Dreptului. Caiet de seminar*, CH Beck Publishing House, Bucharest, 2014, p. 154.

[5] R. Kovar, *Voies puvertes aux individus devant les instances nationales, en cas de violation des normes et decisions du droit communautaire*, Institut d'etudes europeennes, ULB, Bruxelles, Larcier Publishing House, p. 262.

[6] ECJ, 04.04.1968, *Luck*, C-34/67, p. 360.

case *Salgoil*[7] the Court provided that „the domestic courts are bound to ensure rights protection, given that the role of the rule of law of each Member State is to indicate the powers of the courts and the legal classification of these rights under the criteria laid down by the domestic law".

In the same respect, by case *Rewe,* the Court provided that, according to the legal system „established by the provisions of the treaty, as the one provided by art. 177, national courts can use any procedural mean provided by the national law in order to guarantee the fulfillment of the direct effect of community law under the same conditions concerning admissibility and judgment procedure regulated by the national law in order to ensure its compliance"[8].

According to the ruling pronounced in case *Rewe*, the European law is applied in the exercise of the national procedural laws. Therefore, any national court can acquire jurisdiction on the settlement of cases where European law can be incident, but no court of law, regardless of its nature, can reject an European law ground by motivating the limits of its own competence.

Therefore, European law can be claimed in the context of all procedural stages provided by the national law, regardless of the branch of law or procedural stage of the case.

2. Content

The Romanian courts of law, in the context of the settlement of cases, shall be bound to apply the European law principles, there being many cases where they decided to apply art. 148 paragraph 2 of the Constitution which provides the principle of primacy of European law over the national law. According to the aforementioned constitutional text, „following the accession, the provisions of all constituent treaties of the European Union, as well as the other mandatory community regulations, shall take precedence over the contrary provisions of the domestic laws, under the fulfillment of the provisions of the Act of accession".

The impact of the European law in the settlement of cases by the Romanian courts of law can be structured as follows:

1. cases where the courts settle the cases without requesting a preliminary ruling and without applying previous European case law (theory of clear act);
2. cases where the courts apply the European law as it has already been interpreted by the Court (judicial precedent established by means of the case law of the Court)
3. the request for a preliminary ruling, the jurisdiction being acquired by the Court of Justice. Hereinafter, we will briefly present these three situations.

1) cases where the courts settle the cases without requesting a preliminary ruling and without applying previous European case law (theory of clear act);

In the judicial practice, this issue was raised in case of disputes substantiated on the provisions of art. 214^1-214^1 of the Tax Code, having as scope the annulment of the administrative fiscal act and the repayment of the special tax for the registration of second hand vehicles bought from other countries of the European Union.

On the merits, the plaintiffs claimed that the payment of this tax violates the provisions of former art. 90 of the Treaty establishing the European Community, currently art. 110 of the Treaty on the Functioning of the European Union, according to which no Member State shall apply directly or indirectly to the products of other Member States direct or other nature taxes higher than those applied, directly or indirectly, to similar national products. It was also shown that, in these cases, the principle of non-discrimination according to which imported and domestic products should be treated equally is violated due to the fact the tax is charged only for vehicles registered in the European Union and re-registered in Romania, while for the vehicles already registered in Romania this tax is not charged in case of a new registration.

The first court of law of Romania which ruled in such a case was the Tribunal of Arad, which noted the violation of the rights granted by the treaty, by contrary regulations of the national law and ordered, under art. 148 par. 2 of the Constitution, the direct application of the provisions of art. 110 of the Treaty (former art. 90), which is part of the Romanian rule of law as of January 1st, 2007[9].

Therefore, the plaintiff's petition was admitted, by establishing that the tax was illegally collected and ordered the defendant – the Public Finance Administration of Arad – to repay it.

Subsequently, other similar cases were registered on the dockets of other courts of law which pronounced similar rulings. The reasoning of the courts of law was sometimes more detailed, when the jurisdiction of the national court to interpret the provisions of the treaty was called into question.

Therefore, by analyzing the European incident provisions, a court of law noted the *clarity of the European provisions,* „not the issue on the interpretation of the provisions of art. 90 of the Treaty establishing the European Community was discussed in this case, *these being very clear*, but the direct application of the provisions of the Treaty"[10], which means claiming one of the conditions established by means of case law *Cilfit* by the Court of Justice.

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[7] ECJ, 19.12.1968, *Salgoil/Ministry of Foreign Trade of Italy*, C-13/68, p. 675.
[8] ECJ, 17.07.1981, *Rewe-Handelsgesellschaft Nord mbH şi Rewe-Markt Steffen / Hauptzollamt Kiel*, C-158/80, p. 47.
[9] Tribunal of Arad, Civil Sentence no. 2563 of November 27th, 2007, not published.
[10] Court of Appeal of Cluj, Civil Decision no. 1145/2008 of May 14th, 2008, not published.

2) cases where the courts apply the European law as it has already been interpreted by the Court (judicial precedent established by means of the case law of the Court).

The cases having as scope the repayment of the special tax for the registration of second hand vehicles bought from other countries of the European Union were settled by certain courts of law by claiming the judicial precedent consisting in the case law of the Court of Justice (ruling of the Court of July 13th, 2006 pronounced in case Akos Nadasdi/Vam- es Penzugyorseg Eszak-Alfoldi Regionalis Parancsnoksaga, C-290/05 and ruling of the Court of December 11th, 1990 pronounced in case EC Commission against Kingdom of Denmark, C-47/88) and the obligation on the observance by the national courts of the interpretation of European law[11].

These disputes, settled in accordance with the Treaty of Accession and the case law of the European Court represent an example of unitary judicial practice based on the direct application of European law by national courts.

3) The request for a preliminary ruling, the jurisdiction being acquired by the Court of Justice.

The first request for a preliminary ruling addressed by a Romanian court to the European Court of Justice was formulated by Dâmboviţa Tribunal within a dispute which contemplated the limitation of freedom of movement abroad.

The disputes substantiated on Law no. 248/2005 on the free movement of Romanian citizens abroad – which contemplate the requests of the Passports General Directorate to prohibit the access of Romanian citizens on the territory of an EU Member State for a term of up to three years, state from which they were expelled before January 1st, 2007 for illegal residence – raised in practice the matter of knowing to what extent the provisions of the domestic law (law no. 248/2005), are compatible with European law on the free movement of persons, especially in relation to Directive 2004/38/EC of the European Parliament and the Council of April 29th, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

The review of the European Union framework (art.27 para.1 of the aforementioned directive), highlights exhaustively only three grounds on which the state could restrict the freedom of movement of persons: *public policy, public security or public health*, while the domestic regulation (law no. 248/2005) provides the possibility to restrict the freedom of movement *if the Romanian citizen has been returned from a state based on a readmission agreement*, without making any distinction in what concerns the person of the citizen in question, respectively whether the person represents a danger for public policy, security or health of the state he has been returned from.

The application of this law led to the first request from Romania for a preliminary ruling. The request for preliminary ruling was filed by the Tribunal of Dâmboviţa, which requested to the European Court of Justice to pronounce on the interpretation of article 18 EC (European citizenship) and of article 27 of Directive 2004/38/EC of April 29th, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

This request was formulated within a dispute between the Ministry of Administration and Internal Affairs (Passport Directorate of Bucharest) and Mister Gheorghe Jipa**.**

Mister Jipa left Romania in September 2006 to settle in Belgium, but he was repatriated due to the fact he did not fulfill the conditions of residence on the territory of Belgium.

The Ministry of Administration and Internal Affairs notified the Tribunal of Dâmboviţa by means of a petition whereby it requested, under Law. 248/2005, the limitation of the right of Mister Jipa to move abroad for a period of maximum 3 years. The preliminary ruling request was formulated by the Tribunal of Dâmboviţa on January 17th, 2007 and consists of the following aspects:

1. Does article 18 EC have to be interpreted as being contrary to articles 38 and 39 of Law no. 248/ 2005?
2.
   a) Do the provisions of aforementioned articles 38 and 39 represent an impediment for the free movement of persons provided by art. 18 EC?
   b) May an EU Member State restrict the free movement of its own citizens on the territory of another Member State?
3.
   c) Does the concept of „illegal residence” for the purpose of the agreement concluded between Romania and Benelux fall within the concepts of „public policy” and „public security” provided by article 27 of Directive 2004/38/EEC, so that the free movement of a person can be restricted?
   d) If the answer to the previous question is affirmative, does article 27 of Directive 2004/38/EC have to be interpreting in the meaning that Member States may automatically restrict free movement and residence of the European Union citizens on grounds of public policy and public security, without analyzing the „conduct” of the person in question?

The arguments of the Advocate General of the ECJ, Mister J. Mazak, provided in case C- 33/07[12], were the following:

[11] Tribunal of Alba, Civil sentence no. 1129/CAF/2008 of September 18th, 2008, Court of Appeal of Alba, Civil decision no. 974/CA72008 of September 17th, 2008, Tribunal of Sibiu, Civil Sentence no. 415/CA of July 1st, 2008, not published.

[12] http://curia.europa.eu/jurisp; http://eurojurnal.eu/?p=48.

- as of January 1st, 2007, Mr. Jipa is a citizen of the European Union, and may therefore, from that date, rely on the rights conferred by that status, including against his Member State of origin (item 30).
- article 18(1) EC is directly applicable in the national rule of law, therefore the EU citizens have the right to leave the territory of a Member State, including their Member State of origin, to enter the territory of another Member State (item 31).
- the fact that Mister Jipa has not exercised its right to free movement yet does not entail the assimilation of this situation to an internal situation (case law Chen et Zhu, C-200/02 is cited). On the contrary, the case has a direct link with European law (item 34).
- the right to move freely within the territory of the Member States guaranteed by article 18 (1) EC would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory to enter the territory of another Member State (item 35). The Advocate General claims the previous case law of the Court on the free movement of persons (Pusa, C-224/02, Singh, C-370/90), and of the right to settle (International Transport Worker's Federation et The Finnish Seamen's Union, C-438/05, Daily Mail and General Trust, 81/87, Bosman, C-415/93). Therefore, such impediments are prohibited both in the Member State of origin and in the Member State of destination.
- according to article 4 of Directive 2004/38/EC, all Union citizens shall have the right to leave the territory of a Member State to travel to another Member State.

Based on these arguments, the Advocate General of ECJ claims that such a national legislation (Law no. 248/2005) violates European law.

Hereinafter, article 27 of Directive 2004/38/EC is analyzed in order to reveal the conditions under which the right to leave the territory of a Member State can be restricted.

Although title VI where article 27 is included refers only to the right of entry and residence, the Advocate General considers that it is clear from the wording that it regulates restrictions on the freedom of movement and therefore includes the right to leave a Member State (item 40). Hereinafter, it is recalled that any exception from freedom of movement must be interpreted restrictively. Furthermore, the concept of public policy may vary from one country to another, and it is therefore necessary in this matter to allow competent national authorities an area of discretion (item 41).

Both based on article 27(2) of Directive, and on previous case law, grounds extraneous to the individual case or considerations of general prevention cannot be accepted. On the contrary, it is necessary „a genuine and sufficiently serious threat affecting one of the fundamental interests of society" (item 42) (claimed case law: Bouchereau, C-30/77, Rutili, C-36/75). Therefore, a Member State cannot restrict the right to leave the Member State of origin merely on the basis that the person in question was repatriated from another Member State due to his „illegal residence".

The threat must be to the state which takes the measure to restrict free movement and not to the state from which he was returned (Belgium). The measure has to be adopted in compliance with the principle of proportionality and based exclusively on the personal conduct of the individual concerned. The Advocate General of ECJ considers that Mister Jipa does not constitute a danger to the fundamental interests of Romanian society thereby necessitating the adoption of measure by Romania limiting his right to freedom of movement.

Lastly, the Advocate General of ECJ recalls that the measure must not be adopted automatically, but by analyzing the personal conduct of the person in question.

By examining the case, the Court noted that „article 18 EC and article 27 of Directive 2004/38/CE [...] are not contrary to a national regulation which allows the restriction of the right of a national of another Member Sate to move on the territory of another Member State, especially on the basis that he was previously returned from this state due to his „illegal residence", provided that, on the one hand, the conduct of this national represents a genuine and sufficiently serious threat affecting one of the fundamental interests of society and, on the other hand, the restrictive measure is able to guarantee the fulfillment of its scope and does not exceed the framework required for its fulfillment.

The court has to determine whether the aforementioned conditions are applicable in the case referred for settlement"[13].

The operative part of the judgment of the Court answers the question raised at the beginning of the recitals as follows: European law is not contrary to a national legislation which allows the restriction of the right of a national of another Member Sate to move on the territory of another Member State**,** provided that certain requirements are fulfilled (the conduct represents a threat and the measure is able to guarantee the fulfillment of the scope).

In this case, the domestic law is partially incompatible with European law due to the fact it contains exceptions from free movement of persons other than those concerning public policy, security and health, provided by European law.

Therefore, given that Romania was bound to transpose until January 1st, 2007 the provisions of the Directive in domestic law – but until the date the petition was submitted, law no. 248/2005 had not been amended in order to be harmonized with the provisions of the Directive – and given the principle of the primacy of European law, the law applicable in disputes where the restriction of the right of free movement of a Romanian citizen is requested is the European law,

[13] ECJ, 10.07.2008, Ministry of Administration and Domestic Affairs – Passports General Directorate of Bucharest/Gheorghe Jipa.

respectively art. 27 and the following of Directive 2004/38/EC.

The opinion expressed by the High Court of Cassation and Justice in its case law was the same, namely „Community law shall prevail over the national law, by producing actual effects in the rule of law of the Member States, national judge being the one called to punish the contrary”[14].

3. Conclusions

When national law grants the court of law the right to apply ex officio a domestic rule of law, this right represents an obligation if the application of European law is incident[15]. But the court is not bund to claim ex officio the exception on the violation of European law if it were to give up procedural passivity specific to the principle of availability, relying on other facts and circumstances than those that the party which would have had an interest in the application of European law relied its petition.

The case law of the Court proves its concern to maintain a balance between procedural autonomy, on the one hand, and the obligation of the courts to ensure justice seekers a direct, immediate and effective protection of their rights granted by European law.

In conclusion, the ex officio claiming of European law, although it is not an absolute obligation, represents in practice a cautious solution, taking into account the principle on the liability of the state if a court expressly ignores European law when pronouncing a definitive ruling.

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