HARMONISATION OF PROCEDURAL LAW VS PROCEDURAL AUTONOMY OF THE MEMBER STATE

HARMONIZÁCIA PROCESNÉHO PRÁVA VS PROCESNÁ AUTONÓMIA ČLENSKÝCH ŠTÁTOV

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ABSTRACT

The judicial cooperation in the field of private law is a real success story in the European Union. The current regulatory system of EU law does not aim to unify procedural law; the Member States have autonomy to establish their own procedural rules (principle of national procedural autonomy). The Court of Justice of the European Union may subordinate this freedom to an examination based on the principles of equivalence and effectiveness. The rule of a Member State's procedural autonomy may clash with the matter of the "act of its own motion" (ex officio) mechanism of the application of EU law. The question is where we can find the borderline between the ex officio mechanism and the principle of national procedural autonomy if the private individual party wants to enforce his claims based directly on EU law in front of the court of the Member State.

ABSTRAKT

Súdna spolupráca v oblasti civilného práva je úspešným príbehom v Európskej únii. Súčasný regulačný stav práva únie neumožňuje dospieť k záveru o existencii jednotnotného procesného práva; totiž členské štáty majú autonómiu prijímať vlastné procesné pravidlá (princíp národnej procesnej autonómie). Súdny dvor Európskej únie môže túto slobodu podriadiť preskúmaniu založenému na zásadách rovnocennosti a účinnosti. Pravidlo autonómie členského štátu je tiež striktne ovladané mechanizmom „konania na základe vlastného podnetu" (ex officio). Tento koncept je skutočným pravodlom procesnej autonómie vzťahujúcej sa k vymáhaniu nárokov založených na európskej regulácii. Otázkou je: kde je možné najš hraničnú čiaru medzi ex officio mechanizmom a princípom narodnej procesnej autonómie v prípade aj súkromná osoba chce vymáhať svoje nároky priamo z práva EU pred súdom členského štátu.

I. INTRODUCTION

Judicial cooperation in law making on the terrains of private law is a real success story in the European Union, which is clearly demonstrated by the sheer number of EU norms adopted in this particular field of law. This legislation is still one of the most dynamically evolving fields of law of the European Union at present, in other words it's "flagship". From the perspective of law-making, the most significant step was the "communitarisation"[1] of the legal field, which was induced by the Treaty of Amsterdam, and law-making has been strenuously

[1] This is how the progression can be called, while after the adoption of the legal field into the regulation spectrum of the Union, it became possible to regulate it directly by legal sources of the EU.

advancing ever since. A due consequence of this is that the former legislation, governed mostly by international agreements, is being replaced by and in certain fields complemented by secondary EU norms, primarily by regulations.

The majority of EU norms are of procedural nature;[2] today we can find fewer norms that regulate questions of substantive law.[3] Yet it can well be observed as a tendency, that recently in the course of law making it is legal sources of a complex nature that have gained supremacy, which means that a comprehensive set of rules applicable to procedural law matters (primarily jurisdiction, recognition and enforcement of judgments) and substantive law matters (primarily the applicable law) relating to a given topic shall be set in the same legal norm/source.[4] It marks a peculiarity of the harmonisation of the procedural law that EU legal sources are also created to cover numerous technical questions (e.g. rules on the application of standard forms[5]) as well. Another peculiarity comes from the fact that several Member States have added opt-out and opt-in reservations to the judicial cooperation in civil matters,[6] thus the declarations, provisions and agreements made in this field are also all enrichment to the body of legal sources.[7] Moreover, the option of enhanced cooperation must be considered as well in this particular area.[8]

Finding the governing rule that applies in a given case and finding the applicable rules among those many is not any easy task, since along with the rejoicing increase in the number of EU sources of law, and thus the gradual expansion of regulatory areas, agreements of the Member States on mutual legal assistance between themselves,[9] international agreements in force between the European Union and other organisations,[10] and the norms of the European Union – and in particular those on the designation of authority – relating to international treaties[11] have a significant role in the application of the law.

The situation is shaded by the fact that while some sources of EU law do not require any connecting regulation from either a domestic or an EU law perspective, others do assign to the Member State either an explicit or an implicit regulatory authority. The two categories can be distinguished by the intention of the EU law-maker to define the degree of autonomy of the Member State as either in an auxiliary matter, reducing the freedom of the Member State to the implementing measures [12] or in the absence of a comprehensive regulation, the Member

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2 See e.g. themes of jurisdiction, taking of evidence, transmission of documents, and exemption from court fees.

3 Mainly the rules relevant to the applicable law regulating competing/colliding situations.

4 Such as e.g. Regulation (EU) No 650/2012; Regulation (EC) No 4/2009.

5 See e.g. 2004/844/EC: Commission Decision; 2005/630/EC: Commission Decision.

6 The United Kingdom, Ireland and Denmark annexed a protocol to the Treaties of Amsterdam and Lisbon, in which they excluded themselves from the authority of acts to be determined for the future in the area of freedom, security and law.

7 See e.g. In accordance with articles 1 and 2 of protocol no.: 22 on the situation of Denmark, Denmark did not participate in the adoption of Regulation (EU) No 1215/2012, yet in accordance with paragraph (2) of article 3. of the agreement between Denmark and the EU, Denmark briefed the Commission on 20th December 2012 in a letter upon it's decision to implement the provisions stipulated in Regulation (EU) No 1215/2012; 2009/26/EC: Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I); 2009/451/EC: Commission Decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

8 See e.g. Regulation (EU) 2016/1103; Regulation (EU) 2016/1104.

9 See e.g. Regulation (EU) 1215/2012/EU articles 71-73.

10 See e.g. the Protocol on the Law Applicable to Family Maintenance Obligations as of the 23 November 2007 Hague Protocol).

11 See e.g.: 2008/431/EC: Decision; Regulation (EC) No 662/2009; Regulation (EC) No 664/2009; 2011/220/EU: Council Decision of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; 2011/432/EU: Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

12 Such as e.g. in the case of Rome III., the possibility that the national law can determine the latest deadline to which the parties may exercise their freedom of the choice-of-law, in terms of the regulation on inheritance for instance such as the freedom to determine the technical validity of the verbal last will.

States shall retain their own regulative powers.[13] If EU law does not completely extrude Member State regulation, in non-regulated matters, Member States may either adopt implementing measures or adopt primary regulation in areas uncovered by EU law, by which the laws of the Member States may govern the procedural law matters in question.

II. BASIC SCOPE OF THE ISSUE

The procedural rules facilitating the enforcement of private claims can be classified in several ways, along several criteria, and aligned by the above logic; several types of regulatory methods can be introduced both at an EU and at a Member State level. Since the majority of EU rules adopted so far are of procedural nature, several approaches have been developed for procedural cooperation between the Member States, and even the possibility of the unification of procedural law has arisen.[14] There are also a number of procedural problems[15] in the focus of interest of organizations examining procedural issues[16].

The counterpoint of the unification of procedural law is emphasized by the principle of the Member State's procedural autonomy, the content of which is interpreted in different ways. The most extremist view is that the civil procedural law is not considered to fall within the regulatory framework of EU law. However, the wording of the judgments of the Court of Justice of the European Union (CJEU) gives a more subtle wording. To be more precise, from the denotations of "in the absence of relevant (EU) provisions," "in the absence of relevant EU (Community) rules,"[17] and "where the area is not governed by EU (Community) law"[18] it can be concluded that civil procedural legislation is not the exclusive competence of the Member State.

Moreover, it also refers to a certain extent of the regulation in EU procedural law that there are EU legal sources explicitly dealing with procedural matters (these can be regarded as rules of direct mutual legal assistance).

Examples are: Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters**;** Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Nevertheless, a certain type of legal unification is targeted by those legislative techniques of the EU, which can lead to certain proceedings performed in accordance with the principles of the European Union, as well as the rules of the Member State. The two

[13] As a "Remainder authority" in non-regulated matters of the legal sources, the possibility for the Member State to regulate is open.

[14] In 1987 a group of experts was formed, dedicated to work out the fundamental questions of the harmonisation of civil procedural law. The draft version of the directive created by the experts group was released in 1993, and it was here, where the concept of the "European Model Code Civil Procedure" was first introduced.

[15] In 2004, the ALI and the UNIDROIT adopted and jointly published the "Principles of Transnational Civil Procedure". The very focus of the cooperation of ELI and UNIDROIT is the examination of the possibility of a standardized procedural law regulation. The currently operating program is the "European Rules of Civil Procedure," under which several project groups have been formed.

[16] Such organisations are for example the ALI (American Law Institute), the ELI (European Law Institute), and the UNIDROIT (The International Institute for the Unification of Private Law).

[17] Joined cases C-46/93 and C-48/93. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. ECLI:EU:C:1996:79.

[18] Joined cases 212 to 217/80. Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato. ECLI:EU:C:1981:270.

different regulatory patterns of judicial cooperation in civil matters can well be seen in the regulation so far.

First-generation sources can be considered the norms dedicated to facilitate cross-border disputes with EU rules related to uniform jurisdiction, determining the choice of the applicable law, or which are aimed to provide procedural assistance (typically by directly applicable regulations in order to provide easier and unified application),

Compared to this, the "second generation" sources of law create such alternatives for the parties, by which they can access independent legal acts of a sui generis EU law (which are sometimes only ancillary) which, in addition to the legal possibilities of the Member States, allow them to pursue proceedings and make use of legal institutions based on EU law.

The European order for payment (EOP) procedure can typically be regarded as one example, which does not replace the payment order procedures pursued by the Member States, but provides additional options for parties to enforce their claims in cases including cross-border elements.

The EU's legislative achievements along with guidelines given by the CJEUbased on the interpretations of the law are altogether inducing a standardised system in procedural rules in Europe. However, we should consider the concept of a school supported by legal literary research, which aims to establish a concentrated, standardised European regulation compiled in one single legal source applicable in legal disputes including cross-border elements.

The jurisprudence of the CJEU in the field of freedom, security and justice has clearly highlighted the need for an autonomous EU terminology in procedural law. Procedural law can only serve the efficient protection of rights, if EU rules are uniformly interpreted. If there is need for an autonomous interpretation, there is a greater risk that national law enforcement, in violation of this rule, will interpret the specific legal instrument in a different way, in particular if a clear legal concept exists in the national legal system of the same name but with a different meaning.

The proper interpretation of the EU rule will be lost in every such case even if the obligation to apply the relevant EU law is not violated, as the legal practice "purely" violates the principle of the priority of interpretation.[19] The harmonisation measures taken so far are still not sufficient to ensure that legislation is legally unproblematic with respect to the safeguarding of rights. The majority of the EU rules adopted till date have created a unified law, since regulations prescribe an obligation of direct application for the national legal practice. In the areas where ruling has been done by directives, the EU lawmaker aims to create harmonized rules, primarily minimum conditions. However, the results of both regulatory techniques implies the free flow of judicial judgments to the utmost, and the notions of mutual trust and mutual recognition, which have become the most essential principles in the harmonisation of law since the birth of the Cassis-concept[20] .

From the fact that the current regulation of EU law does not allow for the unification of procedural law it does not follow that there is no harmonization at all. In principle, Member States retain their autonomy with respect to the establishment of procedural rules, in other words in the case of a corresponding EU rule, their own rules of procedure apply, but in cases

[19] See more details: GOMBOS, KATALIN: *The Levels and Steps of the Judicial Protection Arising from the European Law*. In: Ünnepi kötet Dr. Bodnár László egyetemi tanár 70. születésnapjára. (ed: BLUTMAN, LÁSZLÓ) Acta Universitatis Szegediensis. Acta Juridica et Politica, Tom. 77. Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2014. 123-134. p. http://digit.bibl.u-szeged.hu/00000/00051/00442/juridpol_077.pdf

[20] Case 120/78. Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.ECLI:EU:C:1979:42., yet on the basis of the product included in this case, only by Cassis de Dijon did the principle introduced by the judgment became famous as the, a "mutual recognition", which, by now has made one of the key principles of the harmonisation of law.

where the rights guaranteed by EU law are enforced before the courts of a Member State, the CJEU may examine this freedom based on the principles of equivalence and effectiveness.

In such cases, an EU standard for procedural law is also valid if the specific procedural rules are governed by the law of the Member State. More precisely, individuals have the right to enforce their claims based directly on the EU law in front of their national courts as well.[21] Since the Treaty of Lisbon came into force, the Charter of Fundamental Rights has the same binding force as the Treaties, under Article 6 (1) of the Treaty on the European Union. Article 47 of the Charter of Fundamental Rights also defines the principle of effective judicial protection expressis verbis.

Due to the principle of effective judicial protection and legal remedies, there are some substantive rules that can be deduced directly from EU law, yet EU procedural rules are not or are not fully associated with the right to enforce claims. This all shall lead to the conclusion that if a private individual wishes to enforce his claims based directly on EU law before the national court of the Member State, then he shall adapt to national procedural laws, and can only refer to EU substantive law as the grounds of the claim. Nonetheless, content-wise the rules of national procedural autonomy may only mean that in the absence of a relevant EU regulation, procedural rules – with the limitations introduced by the CJEU – shall be governed by the national law.[22] With regard to the rules of the Member State, it is an important principle that they may not be less favourable than those governing claims under domestic law (the principle of equivalence), and that national procedural rules may not render excessively difficult or practically impossible the exercise of the rights conferred by EU law (the principle of effectiveness).[23] In other wording: in the absence of EU regulation , procedural rules shall be governed by the national law of the Member State on the basis of the principle of procedural autonomy, yet only on condition that these rules must comply with both principles of equivalence and effectiveness.[24] Furthermore, the Member State's procedural autonomy shall also prevail if there are some given EU norms to a certain extent, but the detailed rules on the implementation of these norms are governed by the domestic law of the Member State.[25] The rule of a Member State's procedural autonomy is also clashingly shaded by the matter of the "act of its own motion" (ex officio) mechanism.

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[21] Upon the matter of legal remedies comprehensively see: DOUGAN, MICHAEL: *National remedies before the Court of Justice. Issues of harmonisation and differentiation*. Hart Publishing, Oxford 2004.

[22] C-439/08. Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW v Raad voor de Mededinging Minister van Economie. ECLI:EU:C:2010:739, paragraph 63. 64.

[23] C‑ 378/07–C-380/07. Kiriaki Angelidaki (C-378/07), Anastasia Aivali, Aggeliki Vavouraki, Chrysi Kaparou, Manina Lioni, Evaggelia Makrygiannaki, Eleonora Nisanaki, Christiana Panagiotou, Anna Pitsidianaki, Maria Chalkiadaki, Chrysi Chalkiadaki v Organismos Nomarchiakis Autodioikisis Rethymnis, and Charikleia Giannoudi (C-379/07), Georgios Karabousanos (C-380/07), Sofoklis Michopoulos and Dimos Geropotamou. ECLI:EU:C:2009:250, paragraph 159., C-212/04. Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG). ECLI:EU:C:2006:443, paragraph 95., C-53/04. Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate. ECLI:EU:C:2006:517, paragraph 52., C-180/04. Andrea Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate. ECLI:EU:C:2006:518, paragraph 37., C-364/07. Vassilakis Spyridon, Theodoros Gkisdakis, Petros Grammenos, Nikolaos Grammenos, Theodosios Grammenos, Maria Karavassili, Eleftherios Kontomaris, Spyridon Komninos, Theofilos Mesimeris, Spyridon Monastiriotis, Spyridon Moumouris, Nektaria Mexa, Nikolaos Pappas, Christos Vlachos, Alexandros Grasselis, Stamatios Kourtelesis, Konstantinos Poulimenos, Savvas Sideropoulos, Alexandros Dellis, Michail Zervas, Ignatios Koskieris, Dimitiros Daikos, Christos Dranos v Dimos Kerkyras. ECLI:EU:C:2008:346, paragraph 126.

[24] C‑ 470/12. Pohotovosť s. r. o. v Miroslav Vašuta, a Združenie na ochranu občana spotrebiteľa with the participation of HOOS. ECLI:EU:C:2014:101, paragraph 46.

[25] C-364/07. Vassilakis Spyridon, Theodoros Gkisdakis, Petros Grammenos, Nikolaos Grammenos, Theodosios Grammenos, Maria Karavassili, Eleftherios Kontomaris, Spyridon Komninos, Theofilos Mesimeris, Spyridon Monastiriotis, Spyridon Moumouris, Nektaria Mexa, Nikolaos Pappas, Christos Vlachos, Alexandros Grasselis, Stamatios Kourtelesis, Konstantinos Poulimenos, Savvas Sideropoulos, Alexandros Dellis, Michail Zervas, Ignatios Koskieris, Dimitiros Daikos, Christos Dranos v Dimos Kerkyras. ECLI:EU:C:2008:346, paragraph 149.

III. CASE LAW AND CONCLUSIONS

The CJEU in its joined cases of van Schijndel and van Veen no.: C-430/93. and C-431/93. [26] unequivocally acknowledged the boundaries marked by the peculiar features of national civil proceedings with respect to the ex officio examinations by national courts. This judgment proclaimed that EU law does not prescribe for the national courts to take into consideration ex officio the argument on the violation of EU norms in case the examination of this argument would oblige the courts to ignore the binding force of the claim and to leave the boundaries of the legal dispute as determined by the parties, by considering facts and circumstances other than those referred to by the claimant whose interest would be the application of the aforementioned regulations .

In the judgment of the CJEU delivered in the case of Peterbroeck no.: C-312/93,[27] the court concluded that in such cases, when the given national procedural provision makes the application of EU law excessively difficult, the provision in question must be analysed with respect to the proceedings on the whole, and also with respect to the peculiarities of the national courts in their proceedings on different levels.

Following the judgment made in the Peterbroeck case, in several cases the CJEU has returned to emphasizing the principle of equivalence, which means that EU law does not impose a general duty on the courts of the Member State to apply EU law ex officio. Depending on the nature of the EU law provisions, they can be classified as either being or not being equivalent to national rules of public policy when applying the law of the Member State, and accordingly, bound by the procedural provisions of the Member State, it is either an obligation,[28] an option or prohibited [29] for the courts of the Member State to "act of their own motion" (ex officio).

As a main rule, EU law does not require the courts of the Member States to take into consideration ex officio any legal grounds referring to the violation of EU provisions in court proceedings related to claims filed on the basis of EU substantive law, as it is not required either by the principle of equivalence or the principle of effectiveness.[30] This can be concluded from the fact that it is not contrary to the principle of effectiveness if the national provision stipulates that the courts of the Member State may not "act of their own motion" (ex officio) when referring to the legal grounds of a case based on the violation of EU provisions in case the examination of the legal grounds would put the courts in a situation where they would abandon their passive role , they would have to go beyond the ambit of the dispute defined by the parties and would have to consider and rely on facts and circumstances other than those referred to by the claimant. [31]

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[26] Joined cases C-430/93 and C-431/93. Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten. ECLI:EU:C:1995:441.

[27] Case C-312/93 Peterbroeck, Van Campenhout & Cie SCS v Belgian State. ECLI:EU:C:1995:437.

[28] Case C-126/97. Eco Swiss China Time Ltd v Benetton International NV. ECLI:EU:C:1999:269, where the public policy status of the EU's competition law became declared.

[29] Joined cases C-222/05 to C-225/05., J. van der Weerd and Others (C-222/05), H. de Rooy sr. and H. de Rooy jr. (C-223/05), Maatschap H. en J. van 't Oever and Others (C-224/05) and B. J. van Middendorp (C-225/05) v Minister van Landbouw, Natuur en Voedselkwaliteit. ECLI:EU:C:2007:318, where the non-public policy status of the EU's provisions on foot-and-mouth disease were declared by the Court.

[30] Joined cases C-222/05 to C-225/05. J. van der Weerd and Others (C-222/05), H. de Rooy sr. and H. de Rooy jr. (C-223/05), Maatschap H. en J. van't Oever and Others (C-224/05) and B. J. van Middendorp (C-225/05) v Minister van Landbouw, Natuur en Voedselkwaliteit. ECLI:EU:C:2007:318, paragraph 36.

[31] Joined cases C-430/93 and C-431/93. Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten. ECLI:EU:C:1995:441, paragraph 22.

The Océano Grupo case[32] is a consumer protection case of particular interest in the jurisdiction of the CJEU, where the Court used a terminology and stronger means of expression different from its earlier practice, but later the Court turned to a more reserved style.[33] The most convincing standpoint is which considers the validity of these decisions restricted to the given procedural legal context. A key element is that the consumer – either due to the provisions of the law or unfair contractual terms – is legally or practically deprived of the possibility to file his complaint pertaining to the unfair contractual terms.[34] However, some authors persuasively argue that since the walls of national procedural autonomy (e.g. respecting the res iudicata principle) were not pulled down even within the scope of the Océano Grupo case ,[35] the basic principles laid down in the Schijndel case were not overruled here, but indeed they became accurately specified within a unique consumer protection context.[36]

The Océano Grupo and the relevance of its derivative case law are both argued in terms of ordering proof ex officio. In addition, the different language versions of the Court's judgment show diversity here. The German text (Befugnis von Amts wegen zu prüfen, ob die Klausel missbräuchlich ist) is open to the interpretation supporting the "act of their own motion" (ex officio) ordering proof, as opposed to the English version restricted to the notion of determination (to determine of its own motion). Both the Hungarian (hivatalból köteles vizsgálni) and the French versions (pouvoir d'examiner d'office le caractère abusif d'une telle clause) in themselves give way to multiple interpretations. In the absence of unequivocal orders of the CJEU and the unambiguous legal practice of national authorities it cannot be stated that EU law imposes an obligation on the courts of the Member State to "act of their own motion" (ex officio) when ordering proof in connection with the unfairness of consumer contracts. Community Directive no.: 93/13/EEC does not regulate the burden of proof in general, only in clearly defined areas (e.g. in the area of proving the specifically discussed nature).

In the case of VB Pénzügyi Lízing no.: C-137/08 related to the Directive[37] the CJEU explicitly ordered the national court- on the basis of its obligations granted by the provisions of this Directive, to examine whether the given contractual term (the subject of the dispute) forming the base for the proceedings in progress before the court is under the scope of the Directive.[38] It is also beyond debate that in special procedural law cases[39] the national court can hold the obligation to evaluate the nature of the unfairness of contractual terms otherwise not complained by the consumer. Yet on the other hand, in the Invitel case no.: C-472/10, [40] the CJEU proclaimed that at the examination of the unfairness of the disputed contractual term, the national court shall be obliged to consider all the terms of the contract included in its general terms and conditions, and beyond this general terms and conditions, all other possible rights and obligations as well, which are rendered by the national law. However, the aforementioned judgment of the Court did not apply to the issue of the "act of their own motion" (ex officio), so on the basis of the present case-law it is questionable, - even in the case of an

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[32] Joined cases C-240/98 to C-244/98. Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98). ECLI:EU:C:2000:346.

[33] I.e.: Case C-473/00. Cofidis SA v Jean-Louis Fredout ECLI:EU:C:2002:705.; Case C-168/05. Elisa María Mostaza Claro v Centro Móvil Milenium SL. ECLI:EU:C:2006:675.

[34] CRAIG, PAUL – DE BÚRCA, GRÁINNE: *EU Law – Text, Cases, and Materials,* 5th ed. Oxford University Press, 2011, 233. p.

[35] Yet the substantial relativisation of the res judicata happened e.g. in: Case C-2/08. Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl.ECLI:EU:C:2009:506.

[36] WHITTAKER, SIMON: *Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law.* Oxford Legal Studies Research Paper No. 46/2012; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118433.

[37] Case C-137/08. VB Pénzügyi Lízing Zrt. v Ferenc Schneider. ECLI:EU:C:2010:659, paragraph 49.

[38] Explicitly the examination of a single concrete term is included in several other cases e.g. in: Case C-618/10. Banco Español de Crédito SA v Joaquín Calderón Camino. ECLI:EU:C:2012:349.

[39] E.g. in the course of the examination of their competence.

[40] Case C-472/10. Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt. ECLI:EU:C:2012:242.

evaluation from a consumer protection perspective- whether the obligation to evaluate by "act of their own motion" (ex officio) only applies to the given term exclusively, or it implies a more general requirement for all judges when examining any contractual term in a consumer contract. The Court emphasized in case no.: C-348/14. that upon the examination of the unfairness of a single contractual term, the national judge shall be obliged to consider all the circumstances of entering into a contract, which may only be possible if the judge is familiar with the entire content of the contract. However, not even this finding determines clearly the obligation to apply the principle of the binding force of the claim or the "act of their own motion" (ex officio) principle. .

Based on the judicial practice of the CJEU – with peculiar sidesteps taken in the field of consumer protection – it appears that the principle of effectiveness does not impose a duty on Member State courts to consider legal grounds based on EU law by "act of their own motion" (ex officio) if the parties were given a genuine opportunity to refer to those legal grounds before a national court.[41] Based on judicial practice till date it can be concluded that - with respect to the principle of the binding force of the claim and due to national procedural rules applicable in case of Member State autonomy- national courts shall not hold the obligation to consider EU law by "act of their own motion" (ex officio) in cases where the parties were actually provided with the rights to file a claim before a Member State court in relation to a violation of their own substantive rights created by EU law. Nonetheless, it should be noted that currently there are several claims before the Court of Justice of the European Union related to the principle of "act of their own motion" (ex officio), thus the issue is still at stake. A few more claims submitted in consumer protection matters may fit in these series,[42] and the Court of Justice of the European Union will have the opportunity to develop its judicial practice in non-consumer protection matters[43], which will obviously have an impact on both the legal practice and approaches in legal professional literature.

KEY WORDS

Judicial cooperation in civil matters in the EU, harmonisation of Procedural Law, generations of European regulations, national procedural autonomy, principle of equivalence, principle of effectiveness, effective judicial protection, principle of legal remedies, ex officio.

KĽÚČOVÉ SLOVÁ

Súdna spolupráca v civilných veciach v EÚ, harmonizácia procesného práva, generácie európskej regulácie, národná procesná autonómia, princíp rovnosti, princíp efektívnosti, účinná súdna ochrana, princíp právnych opravných prostriedkov, ex officio.

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[41] Joined cases C-222/05 to C-225/05. J. van der Weerd and Others (C-222/05), H. de Rooy sr. and H. de Rooy jr. (C-223/05), Maatschap H. en J. van't Oever and Others (C-224/05) and B. J. van Middendorp (C-225/05) v Minister van Landbouw, Natuur en Voedselkwaliteit. ECLI:EU:C:2007:318, paragraph 41.

[42] See e.g. Case C-51/17: Request for a preliminary ruling from the Fővárosi Ítélőtábla (Hungary) lodged on 1 February 2017 — Teréz Ilyés, Emil Kiss v OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt.

[43] See e.g. Case C-300/17: Request for a preliminary ruling from the Kúria (Hungary) lodged on 24 May 2017 — Hochtief AG v Budapest Főváros Önkormányzata.

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