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DIRECT EFFECT AND DIFFICULTIES OF LEGAL ENFORCEMENT MECHANISM IN THE EUROPEAN UNION

As Ukraine integrates into European economic and political space in this respect it is important to comprehend the experience of national courts in the EU member-states in applying the European Community (hereinafter EC) law. Here, one of the problems is the analysis of EC law's direct effect doctrine on the territory of EU Member-States, i. e. the possibility of implementing the EC legal provisions by the national courts of Member-States. There are some complications in this process.

First of all, non-clarity of definition, in what cases the national courts may directly apply the EC law. The European Court of Justice (hereinafter ECJ) had established that any EC legal provision should have the power of direct effect if any citizen of the EU Member-State chooses it for the protection of his or her rights in the national court of EU Member-State. EC legal provisions, by virtue of direct effect principle, could also be enforced by the EU Member-States' governments. But there are certain criteria for any of their application. These criterion were defined for the first time in *Van Gend en Loos Case*¹. The first criteria is that provision should not contradict to the national law of the EU Member-State. If so, they are valid along with the national legislation and could be applied by national courts. The contents of the second criterion is the following: the EC legal provision should be aimed at protection of natural person's rights and should not contradict to the universal international principles of human rights protection.

Furthermore the American lawyer P. H. Folsom connects the application of direct effect doctrine with the sources of the EC law. He gives the following classification: a) treaties, establishing the European Communities and European Union; b) EC regulations c) EC directives; d) opinions and recommendations of the EC institutions; e) judicial decisions; f) international treaties, signed by the EU². The treaties, establishing the European Communities and European Union are binding according to the Article 189 of the Treaty on European Union. EC Regulations lay down general rules which are binding both at the Community level and at the national level. In *Grimaldi v. Fonds des Malsdies Professionnelles* the ECJ obliged national courts to consider the EC regulations³. EC Directives are also binding but the national courts are given the right to choose in what cases and how these provisions should be used (e.g., in what amount). Opinions and recommendations of the EC institutions according to Article 2 (1) of European Communities Act do not have binding character. Thus, they could have direct effect in the settlement of a particular case. Judicial decisions are binding for addressee (Article 189 of the Treaty on EU). Direct effect of the EC law is strictly observed in regard of the EU international treaties. According to European Court (ECJ) decision, an adopted international treaty can be the basis of the claim in the court with demands of clear and precise obligations without any additional legal regulation⁴.

Is there a need to use demands, established by the ECJ in *Van Gend en Loos*, for application of the EC law direct effect principle, when it is possible to enforce this principle by sources of the EC law, as R. H. Folsom proposed? From our

point of view, using criteria established in *Van Gend en Loos*, gives one more opportunity to apply the principle of the EC law direct effect. This point was proved in modern practice of the ECJ. Application only of the sources of law limits abilities of EC law direct effect.

The well-known in the field of the EU law British scholar T. C. Hartley's opinion is that according to the first criterion the cases should be tried in the national courts, and according to the other one they could be tried in ECJ⁵. For the first time this issue arose in *Van Gend en Loos Case* where private company referred to the Dutch court with the claim against the Dutch custom office and suggested applying the provisions of the EC law for the settlement of the case. Dutch tribunal requested to turn the ECJ's preliminary ruling on whether the provisions of the EC law had a direct effect. The Dutch government in its turn stated that ECJ had no jurisdiction over this case.

ECJ found that its jurisdiction in this case was limited to the establishment of the national legislation in conformity with the EC legal provisions; ECJ had no jurisdiction in matters of national law. ECJ dismissed the governmental claim, ruling that the present case concerned the conformity of the national law to the EC law. Thus, it was the first case decided by ECJ with application of the EC law direct effect doctrine. The Court established the test of direct effect applicability of the Court's legal acts and decisions. This test has the following structure: 1) the provision should be clear and precise; 2) the provision should be unconditional; 3) effect of the provision does not require to further actions of government or EU authorities⁶.

Analysing the first thesis of the above test, one has to stress that most of the EC legal provisions are not clear and precise. This is a common problem of the EC legislation. Article 6 (1) of the EC Treaty could be an example of this problem: "Member-States shall in close co-operation with EU institutions, coordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty"⁷. It is obvious that the above Article is too general and difficult to use.

The thesis of unconditionality means that the EC legal provisions are under control of neither EU authorities (Commission, Council, etc.) nor any institutions of the Member-States. The rule should not contain conditions for its realization, directly pointing that it must be applied by the national courts. E.g., this principle is absent in the Maastricht Treaty provision: "each EU Member State shall, in so far as it considers it desirable...". Also, there is no principle of unconditionality in the Article 48 (3) of the Maastricht Treaty which guarantees the right of free movement stating, however, that this right might be reduced on the basis of public policy, security or protection of public health considerations⁸.

Considering effect of the EC law independent from EU authorities or Member States further actions, it is necessary to point out that everything was made to minimize the term of EC legal provisions enforcement with the purpose to make its implementation free from any actions of the EU institutions. In connection with this, legal provisions immediately have the direct effect. Article 119 of the EU Treaty provides that "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work..."⁹. In this case the time for enforcement of the EC legal provision was not clearly defined (first period). It flows out from the contents of Article that enforcement of legal provision depends on authorities of the Member States.

The mentioned test somewhat limits the possibility of the EC law direct effect criteria but it is being used for the application of direct effect principle as the most accepted mechanism for influencing national judicial system while applying the EC law. In our opinion, in order to provide direct effect of the EC law, there is a need to give priority to the criteria first used in Van Gend en Loos. The practice of ECJ proves such a tendency.

1. Case 26/62, (1963) ECR 1.
2. Folsom Ralph H., *European Community Law*: West Publishing Co., 1992. - P.68-69.
3. Case C 322/88.
4. Ibid.
5. Hartley T.C. *The Foundations of European Community Law*, Clarendon Law Series, 3d edition, 1994. - P. 197.
6. Dashwood *The Principle of Direct Effect in European Community Law* //16 *Journal of Common Market Studies* 229. - 1978. - P. 231 et seq.
7. *Treaties establishing the European Communities*. Abridged Edition, 1987. - P. 127.
8. *Treaty on European Union*, Luxembourg, Office for Official Publications of the European Communities, 1992. - P. 17.
9. *Treaties establishing the European Communities*. - Abridged Edition, 1987. - P. 127.

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