

Pro-European interpretation of national commercial law and the spillover effect of European Union law

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Introduction

The aim of the article is to present the phenomenon referred to as the spillover effect of European Union law on Member State law. It is a situation, in which the European law (directive) is implemented in the domestic legal order of a Member state to a wider extent than the European law requires. It entails numerous implications and obligations for a notional interpreter. The starting point will be the presentation of the concept of Pro-European interpretation of national company law. Subsequently, there will be presented the causes of the spillover effect of European Union law. Both issues will be discussed with reference to the European Court of Justice rulings concerning commercial law as well as to examples from Polish commercial law, to which the Pro-European interpretation applies and where the spillover effect occurred. The final part of the presentation will focus on guidelines concerning the Pro-European interpretation and handling the spillover effect.

Pro-European interpretation of European law

Pro-European interpretation is a concept well-founded by the Court of Justice (hereinafter referred to as the ECJ). It is also known as the *effet utile* doctrine. It is of particular significance in horizontal relations (private entity – private entity), since in vertical relations (state, public entity – private entity) private entities are entitled to refer to direct effect of the directives.²⁹⁴ *Effet utile* is based on the assumption that domestic law, and in particular legislative provisions specifically adopted for the purpose of implementation of the requirements of a directive, need to be interpreted by national courts so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU²⁹⁵.

²⁹⁴ As in joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 11, and Case C-62/00 Marks & Spencer [2002] ECR I-6325, paragraph 25, in joined cases C-397/01 to C-403/01 Bernhard Pfeiffer and Others, [2004], ECR I-08835, ECJ, in paragraph 103 stated that: "In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly".

²⁹⁵ see to that effect, inter alia, the judgments Case 14/83 Von Colson and Kamann [1984] ECR 01891, paragraph 26; Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and C-91/92 Faccini Dori [1994], ECR I-03325 paragraph 26.

The doctrine states that the borders of pro-European interpretation are demarcated by²⁹⁶:

- decisive discretion of domestic court stated by domestic (national) law,
- the result of the interpretation is legitimized in the light of domestic rules of interpretation,
- guarantees of the rules of certainty of law and non-retroactivity of law,
- interpretation *contra legem*.²⁹⁷

Nevertheless, the ECJ leads the interpretation of national law as far as it, in fact, becomes interpretation *contra legem* in order to provide coherence between domestic and European law. For example, in the Pfeiffer²⁹⁸ case, the ECJ concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In consequence, it led to the outcome that can be considered as interpretation *contra legem*.

The principle of interpretation in conformity with Community law thus requires the national court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that directives are fully effective. In the Polish Constitution, the basis for pro-European interpretation is embodied in Art. 91 par. 1, which states that after the promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute a part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

The phenomenon of spillover effect

The spillover resulting in the ECJ's competence to give preliminary ruling in case not regulated by EU law occurs when²⁹⁹:

- a) European law is implemented to a broader extent than European Union law requires (Case *Leur-Bloem*,³⁰⁰ *Poseidon Chartering BV*³⁰¹, *Volvo Car Germany GmbH*³⁰²),
- b) national provisions refer to Common Customs Tariff to the extent of terminology or procedure in matters connected with VAT tax or duty on goods imported from other EU states (for instance cases *Gmurzynska-Bscher*³⁰³, *Giloy*³⁰⁴),

²⁹⁶ K. Oplustil, *O potrzebie proeuropejskiej wykładni polskiego prawa spółek*, „Przegląd Prawa Handlowego” 2010, No. 9, pp. 5-7.

²⁹⁷ The limitation is formulated by the doctrine; in lack of this limitation the directives would be effective also in horizontal relations; on the grounds of ECJ judgements, especially *Pfeiffer*, such a limitation were not obvious.

²⁹⁸ Joined cases C-397/01 to C-403/01 Bernhard Pfeiffer and Others, [2004], ECR I-08835, paragraph 119.

²⁹⁹ Grouping made by S. L. Kaleda, *Właściwość Trybunału Sprawiedliwości do wydawania orzeczeń wstępnych w sytuacji krajowej*, [in:] *Studia z prawa Unii Europejskiej*, Kraków 2000, p. 139-143.

³⁰⁰ C-28/95 *Leur-Bloem* [1997], ECR 4161.

³⁰¹ C-3/04 *Poseidon Chartering BV* [2006], ECR I-02505.

³⁰² C-203/09 *Volvo Car Germany GmbH* [2010], ECR I-10721.

- c) agreement concluded between private parties directly refers to EU regulations, even though the issue regulated by the agreement is not covered by EU law/competence (case *Fournier*³⁰⁵, *Federoconsorzi*³⁰⁶).

The ECJ holds the position that it appears neither from the wording of Art. 267 TFEU nor from the aim of the procedure introduced by that article that it was intended to exclude from the jurisdiction of the ECJ requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State.

On the contrary, it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.³⁰⁷ The ECJ adopts the rule of uniform interpretation as the justification for widening of the ECJ's competence, though it may apply only if the actual purpose of the preliminary ruling is avoidance of future differences in interpretation. Furthermore, the rule of uniform interpretation is not limited to the extent to which EU has a competence, but spreads also on the cases to which the EU law is applicable due to reference or wider implementation.

The above-mentioned considerations lead to the conclusion that concepts of European law and pro-European interpretation must be also used in the areas, in which European Union has no competence to interfere or in which the interference was not intended. So the range of EU and ECJ competence is, in fact, widened beyond the scope stated in the Treaties.

In Polish jurisprudence, the spillover effect is subject to dispute. Some authors³⁰⁸ claim that (with reference to ECJ judgements) in cases of spillover effect pro-European interpretation needs to be applied. The justification for that view is - apart from rulings of ECJ - averting of discrimination (the entities in purely national situations would be treated in other way than ones in situations covered by EU law)³⁰⁹. On the other hand, others³¹⁰ claim that reference to the directive in matters out of the scope of EU law is possible only within interpretation methods existing in national law, for example historical and teleological, and that the pro-European interpretation has no application in those cases. Taking into account developments of the ECJ, the first point of this view is to be shared.

³⁰³ C-231/89 Gmurzynska-Bscher [1990], ECR I-04003.

³⁰⁴ C-130/95 Giloy [1997], ECR I-4295.

³⁰⁵ C-73/89 Fournier [1992] ECR I-05621.

³⁰⁶ C-88/91 Federoconsorzi [1992] ECR I-4060.

³⁰⁷ Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ERC I-3789, paragraph 37.

³⁰⁸ For example E. Skibińska, *Prounijna wykładnia prawa spółek w przypadku spillover effect*, Monitor Prawa Handlowego, 1/2011, pp. 75-80.

³⁰⁹ Ibidem, pp. 78.

³¹⁰ Amongst them A. Opalski, *Europejskie prawo spółek. Zasady prawa europejskiego i ich wpływ na polskie prawo spółek*, Warszawa 2010, pp. 62-77.

Cases of spillover occurrence in Polish law

In Polish law, a spillover occurred in many cases. I will focus only on cases related to commercial and company law.

The first case concerns the contract of agency. EU regulates the matters connected with this contract in Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents. For the purposes of the directive, “commercial agent” shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that principal. Polish Civil Code introduces a wider notion of agency. It need to be understood as the obligation to mediate permanently in concluding contracts with clients for the benefit of an entrepreneur being the principal or in concluding such contracts in the principal's name. It is not narrowed only to sale or purchase of goods, but it concerns all contracts.

In consequence, due to the shape of Polish provisions, there may occur analogous case as *Poseidon Chartering BV*. In *Poseidon Chartering*, the national court filed for preliminary ruling, even though the case was connected with the contract of services rather than sale or purchase of goods. The ECJ continuing its line of judicial decisions stated that where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling.

*Where domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply*³¹¹.

In the *Poseidon Chartering* case, although the questions concerned a contract concluded with an intermediary with authority to negotiate a contract for services and not a contract for the sale or purchase of goods and the directive did not therefore directly govern the situation in question, the fact remains that, in implementing the provisions of the Directive in national law, the national legislature decided to treat those two situations in the same way.

The second case is the implementation of Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies³¹² in Polish legal order. The directive covers some issues concerning companies whose shares are admitted to trading on a regulated market situated or operating within a Member State. Polish legislator decided to widen the scope of implementation to all public companies. Public companies in accordance to Polish law are companies in which at least one share is paperless (the rights attached to paperless securities arise

³¹¹ see Leur-Bloem; Giloy.

³¹² Official Journal of the European Union L 184/17

when these securities are first entered in the securities account). In consequence, provisions of the implemented directive regulate issues connected with companies listed on regulated market, alternative trading system and also those not listed, but whose at least one share is paperless.

The example of pro-European interpretation in a situation of the spillover effect may be the determination of the form of proxy to exercise rights on a general assembly. In both public and non-public companies, the proxy must be granted “in writing”. Polish Civil Code³¹³ in Art. 78 provides that to observe the form in writing, one shall append one's handwritten signature to the document containing the declaration of intent. Due to the necessity for observance of the primacy of EU law, there needs to be applied pro-European interpretation of the notion “in writing” to the extent of proxy in the Polish public company. Consequently, a handwritten signature may not be demanded from a public company's shareholder appointing the proxy to exercise the rights on a general assembly, since the directive does not set such requirement. Thus, in public companies it is not required to append a handwritten signature to the proxy. Shareholders may be identified through a facsimile, PIN number or password.³¹⁴ The form “in writing” in case of the public company is also met if the proxy is sent to the company via fax or scan.³¹⁵ If the pro-European interpretation was not applied, such an outcome would be impossible; the proxy document in the public company would have to be appointed with a handwritten signature.

The third case is related to First Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies, repealed by Directive 2009/101/EC of 16 September 2009.³¹⁶ The directive is addressed to Polish spółka z ograniczoną odpowiedzialnością (limited liability company), spółka komandytowo-akcyjna (limited joint-stock partnership), spółka akcyjna (joint-stock company). However, the scope of implementation of most of the provisions concerning disclosure and third parties protection is implemented also as regards registered partnerships (spółka jawna), professional partnerships (spółka partnerska) and limited partnerships (spółka komandytowa). Therefore, to this extent, a spillover occurred and the pro-European interpretation must be applicable also to the notions connected with registered partnerships, professional partnerships and limited partnerships.

On the margin, it is worth mentioning that the pro-European interpretation regarding Directive 2009/101/EC needs to be applied also to limited joint-stock partnerships. Articles 11-13 of

³¹³ Act Civil Code of 23.04.1964 (Dz. U. Nr 16, pos. 93 with amendments).

³¹⁴ K. Oplustil, *Pełnomocnictwo do występowania na walnym zgromadzeniu akcjonariuszy spółki publicznej po nowelizacji kodeksu spółek handlowych ustawą z 5.12.2008 r.*, Przegląd Prawa Handlowego 11/2009, pp. 7.

³¹⁵ Ibidem, pp. 7, though in Polish doctrine there exists also opposite view, treating scan and fax as electronic form (M. Rodzyńkiewicz, *Kodeks spółek handlowych. Komentarz*, Warszawa 2009, pp. 847-848 oraz M. Korniluk, R. L. Kwaśnicki, *Praktyczne aspekty prawne pełnomocnictw do udziału w zgromadzeniach spółek kapitałowych po nowelizacji 3.08.2009 r.*, Przegląd Prawa Handlowego 9/2009, pp. 20).

³¹⁶ Official Journal of the European Union L 65.

the directive (concerning nullity) are implemented (in the Code of Commercial Companies³¹⁷) directly only to companies, not partnerships. Nevertheless, Polish doctrine uses the pro-European interpretation to according application of companies' provisions to this type of partnership.³¹⁸ It is possible with the use of interpretation "as far as possible" in the light of the wording and purpose of the directive, in order to attain the result which it pursues and thus to ensure compliance with the directive.

The fourth case concerns implementation of the third³¹⁹ and sixth directive³²⁰ on company law. Both are aimed at regulating accordingly mergers and divisions of joint-stock companies. Polish legislator though decided to implement those provisions to joint-stock companies as well as to limited companies. Again, a spillover occurred in respect to limited liability companies.

Handling spillover effect

The abovementioned conclusions have implications also for the obligations of national courts. In case of a spillover, a national court (authority) need to use the pro-European interrelation of a notion of national law, in the matter outside EU legislative competence. If there arises a problem with interpretation of such notion, the national court is obliged to ask the ECJ for a preliminary ruling. The aim is to forestall future differences in interpretation of notions, having their origin in EU law, irrespective of the fact that they are applicable to purely internal situation or to a case, where EU has its competences.³²¹ Correspondingly, the ECJ would be obliged to give a ruling in such a case. In such way, the rulings of the ECJ led to attribution to this court new competences, exceeding their scope granted to EU authorities by Treaties.

Conclusions

As presented, due to the multicentrism³²² and complexity of legal systems, many regulations overlap. In case of directives, the matter is more complicated due to the fact that they need to be implemented and the scope of implementation is sometimes broader than the scope required by EU legislators. In such cases, a spillover occurs that broadens the ECJ competence to give preliminary rulings and that widens the scope of regulations to which the pro-European interpretation needs or can be applied. In each case of a spillover, the pro-European interpretation needs to be applied and

³¹⁷ Act Commercial Companies Code of 15.09.2000 (Dz. U. Nr 94, pos. 1037 with amendments).

³¹⁸ A. Opalski, *Kodeks spółek handlowych. Komentarz*. Legalis 2016, Commentary to art. 21 of Code of Commercial Companies; see also: S. Sołtysiński, *Kodeks spółek handlowych. Komentarz do art. 1-150 k.s.h.*. Legalis 2012, Commentary to art. 21 of Code of Commercial Companies.

³¹⁹ Third Council Directive 78/855/EEC of 09.11.1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, Official Journal of the European Union L 295, repealed.

³²⁰ Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, Official Journal of the European Union L 378, repealed.

³²¹ Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ERC I-3789.

³²² Meaning that the specific legal order emerges as conglomerate of multiple legislatures (national, EU, etc.) that overlap.

if a national court has doubts about the meaning of the notions taken from directives, they must file for the preliminary rulings of the ECJ.

O autorze

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Streszczenie

Celem artykułu jest zaprezentowanie zjawiska określanego jako efekt spillover (rozłania) prawa Unii Europejskiej na prawo państw członkowskich. Punktem początkowym artykułu będzie prezentacja instytucji pronunijnej wykładni prawa handlowego państw członkowskich. Następnie zostaną zaprezentowane przyczyny efektu spillover. Obydwie kwestie będą rozważane z odniesieniem do orzeczeń Trybunału Sprawiedliwości Unii Europejskiej, jak również w odniesieniu do przykładów z polskiego prawa handlowego, do których znajduje zastosowanie pronunijna wykładnia i w których nastąpił efekt spillover. Ostatnią częścią artykułu będą wytyczne dotyczące pronunijnej wykładni i radzenia sobie z efektem spillover.

Summary

The aim of the article is the presentation of the phenomena referred to as spillover effect of European Union law on Member State law. The starting point will be the presentation of the institution of Pro-European interpretation of national company law. Subsequently, there will be presented the causes of the spillover effect of European Union law. Both issues will be discussed with the reference to the European Court of Justice rulings concerning commercial law as well as to examples from Polish commercial law, to which Pro-European interpretation applies and where spillover effect occurred. The final part of the presentation will focus on guidelines concerning Pro-European interpretation and handling spillover effect.