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Neposredna uporaba Neposredni učinek

Literatura:

case-law!!!

C,deB (3): 178-229

Chalmers et al.: 365-409

Winter: Direct Application and Direct Effect: Two Distinct and Different Concepts in
Community Law, CMLR 1972

neposredna uporaba

direct applicability

applicabilite directe

unmittelbare Geltung – Anwendbarkeit

- **pravo ES velja v DČ brez inkorporacije v domači pravni red - brez posredovanja zakonodajnega/drugega organa DČ**
- PES?
- uredbe?
- direktive?

■ **uredbe: *Variola* (34-73)**

10. THE DIRECT APPLICATION OF A REGULATION MEANS THAT ITS ENTRY INTO FORCE AND ITS APPLICATION IN FAVOUR OF OR AGAINST THOSE SUBJECT TO IT ARE **INDEPENDENT OF ANY MEASURE OF RECEPTION INTO NATIONAL LAW** .

BY VIRTUE OF THE OBLIGATIONS ARISING FROM THE TREATY AND ASSUMED ON RATIFICATION, **MEMBER STATES ARE UNDER A DUTY NOT TO OBSTRUCT THE DIRECT APPLICABILITY INHERENT IN REGULATIONS AND OTHER RULES OF COMMUNITY LAW** .

STRICT COMPLIANCE WITH THIS OBLIGATION IS AN INDISPENSABLE CONDITION OF SIMULTANEOUS AND UNIFORM APPLICATION OF COMMUNITY REGULATIONS THROUGHOUT THE COMMUNITY .

neposredni učinek

direct effect

effets directs

unmittelbare Wirkung

- najbolj teoretično obdelano področje prava EU (“NUč je otroška bolezen prava ES”)
- PES ne vsebuje termina neposredni učinek → ideja: zagotavljanje spoštovanja komunitarnega prava s strani DČ preko 226
- nasprotno ECJ razvija načine nadzora izvrševanja prava ES na NS:
 1. **pravilo neposrednega učinka** → *Van Gend en Loos,...* (ECJ pa izvršuje komunitarno pravo ne glede na naravo določbe)

+ 2 dodatni možnosti za izvrševanja na NS, čeprav določba ni neposredno učinkovita:

2. **pravilo posrednega učinka** → *Von Colson, Marleasing,...*

3. **načelo odgovornosti države** → *Francovich, Brasserie du Pecheur,...*

Van Gend en Loos (26/62)

→ *glej case!*

- THE FIRST QUESTION OF THE TARIEFKOMMISSIE IS WHETHER ARTICLE 12 OF THE TREATY HAS DIRECT APPLICATION IN NATIONAL LAW IN THE SENSE THAT NATIONALS OF MEMBER STATES MAY ON THE BASIS OF THIS ARTICLE LAY CLAIM TO RIGHTS WHICH THE NATIONAL COURT MUST PROTECT.
- TO ASCERTAIN WHETHER THE PROVISIONS OF AN INTERNATIONAL TREATY EXTEND SO FAR IN THEIR EFFECTS IT IS NECESSARY TO CONSIDER THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THOSE PROVISIONS. → *obid dejstvu, da Nuč ni v PES*

- THE OBJECTIVE OF THE EEC TREATY, WHICH IS TO ESTABLISH A COMMON MARKET, THE FUNCTIONING OF WHICH IS OF DIRECT CONCERN TO INTERESTED PARTIES IN THE COMMUNITY, IMPLIES THAT THIS TREATY IS MORE THAN AN AGREEMENT WHICH MERELY CREATES MUTUAL OBLIGATIONS BETWEEN THE CONTRACTING STATES .
- THIS VIEW IS CONFIRMED BY THE PREAMBLE TO THE TREATY WHICH REFERS NOT ONLY TO GOVERNMENTS BUT TO PEOPLES . IT IS ALSO CONFIRMED MORE SPECIFICALLY BY THE ESTABLISHMENT OF INSTITUTIONS ENDOWED WITH SOVEREIGN RIGHTS, THE EXERCISE OF WHICH AFFECTS MEMBER STATES AND ALSO THEIR CITIZENS...

- THE CONCLUSION TO BE DRAWN FROM THIS IS THAT THE COMMUNITY CONSTITUTES A NEW LEGAL ORDER OF INTERNATIONAL LAW FOR THE BENEFIT OF WHICH THE STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND THE SUBJECTS OF WHICH COMPRISE NOT ONLY MEMBER STATES BUT ALSO THEIR NATIONALS.
- INDEPENDENTLY OF THE LEGISLATION OF MEMBER STATES, COMMUNITY LAW THEREFORE NOT ONLY IMPOSES OBLIGATIONS ON INDIVIDUALS BUT IS ALSO INTENDED TO CONFER UPON THEM RIGHTS WHICH BECOME PART OF THEIR LEGAL HERITAGE .

- THESE RIGHTS ARISE NOT ONLY WHERE THEY ARE EXPRESSLY GRANTED BY THE TREATY, BUT ALSO BY REASON OF OBLIGATIONS WHICH THE TREATY IMPOSES IN A CLEARLY DEFINED WAY UPON INDIVIDUALS AS WELL AS UPON THE MEMBER STATES AND UPON THE INSTITUTIONS OF THE COMMUNITY .

↳ *pravica izhaja iz obveznosti*

- THE WORDING OF ARTICLE 12 CONTAINS A **CLEAR AND UNCONDITIONAL PROHIBITION** WHICH IS NOT A POSITIVE BUT A NEGATIVE OBLIGATION. THIS OBLIGATION, MOREOVER, IS **NOT QUALIFIED BY ANY RESERVATION ON THE PART OF STATES WHICH WOULD MAKE ITS IMPLEMENTATION CONDITIONAL UPON A POSITIVE LEGISLATIVE MEASURE ENACTED UNDER NATIONAL LAW.**
- THE VERY NATURE OF THIS PROHIBITION MAKES IT IDEALLY ADAPTED TO PRODUCE DIRECT EFFECTS IN THE LEGAL RELATIONSHIP BETWEEN MEMBER STATES AND THEIR SUBJECTS.

- **THE IMPLEMENTATION OF ARTICLE 12 DOES NOT REQUIRE ANY LEGISLATIVE INTERVENTION ON THE PART OF THE STATES . THE FACT THAT UNDER THIS ARTICLE IT IS THE MEMBER STATES WHO ARE MADE THE SUBJECT OF THE NEGATIVE OBLIGATION DOES NOT IMPLY THAT THEIR NATIONALS CANNOT BENEFIT FROM THIS OBLIGATION.**
- **THE FACT THAT THESE ARTICLES OF THE TREATY ENABLE THE COMMISSION AND THE MEMBER STATES TO BRING BEFORE THE COURT A STATE WHICH HAS NOT FULFILLED ITS OBLIGATIONS DOES NOT MEAN THAT INDIVIDUALS CANNOT PLEAD THESE OBLIGATIONS, SHOULD THE OCCASION ARISE, BEFORE A NATIONAL COURT.**

└─ *na NS lahko ne glede na možnosti po 226-227 PES*

- IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT, ACCORDING TO THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THE TREATY, ARTICLE 12 MUST BE INTERPRETED AS PRODUCING DIRECT EFFECTS AND CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.



ob izpolnitvi pogojev imajo določbe PES NUč

→ kaj pomeni neposredni učinek?

- odnos prava ES do posameznikov in njihovih pravic, ki izhajajo iz prava ES

→ določba prava ES je taka, da se lahko posameznik sklicuje nanjo pred NC –
dovolj jasna, natančna in nepogojna (objektiven
NUč, doctrine of invocability)

→ določba prava ES je taka, da **daje vsebinske pravice**
posameznikom, ki jih smejo uveljavljati pred NS (subjektiven
NUč, doctrine of direct effect)

Razvoj doctrine of invocability:

Van Gend en Loos : določba je v osnovi self-executing: clear, negative, unconditional, containing no reservation on the part of the MS, not dependent on any national implementing measure
+ mehčanje kriterijev (liberalnejša interpretacija pogojev) v kasnejših odločbah:

Reyners (2/74) → *glej case!* : odpade pogoj negativne prepovedi

Defrenne v Sabena (43/75) → *glej case!*: 141. člen PES je Nuč kljub nepopolni jasnosti in nepogojnosti

Ratti (148/78) → *glej case!* : the provision in **sufficiently precise and unconditional to be invoked in NCs** (zajame večino določb)

na katere akte se nanaša?

- pogodbe + uredbe + odločbe + direktive + mednarodni sporazumi

→ ja (pogojno)

- nezavezujoči akti:

→ ne (le posredno, interpretativno: *Grimaldi (322/88)* za priporočila)

neposredni učinek – PES

Van Gend en Loos : ex 12. člen

Defrenne v Sabena : 141. člen PES

neposredni učinek – REG

■ **Ja** (če izpolnjeni pogoji):

Leonesio (93/71)

Azienda Agricola (C-403/98)

Commission v. Italy (39/72)

Amsterdam Bulb (50/76): če REG zahteva nadaljnjo implementacijo v MS in če ta ni
ustrezna - REG ima direktni učinek (če so izpolnjeni pogoji)

neposredni učinek – DEC

- **Ja** (če izpolnjeni pogoji)

Franz Grad (9/70)!

neposredni učinek - DIR

po poteku roka za implementacijo!

→ *Van Duyn v. Home Office (41/74)* → *glej case!:* sprejem neustreznega implementacijskega akta/prakse

IT IS NECESSARY TO EXAMINE, IN EVERY CASE, WHETHER THE NATURE, GENERAL SCHEME AND WORDING OF THE PROVISION IN QUESTION ARE CAPABLE OF HAVING DIRECT EFFECTS ON THE RELATIONS BETWEEN MS AND INDIVIDUALS

↓
→ številne negativne reakcije na tako splošno priznanje Nuč DIR, zato ECJ v *Ratti (148/78)* skonstruira “estoppel” argument: **DČ je prepovedano zanikati učinek DIR, če so same v kršitvi**

↓
če je DIR pravilno implementirana: DIR nima Nuč!

Ratti (148/78) → *glej case!:* še ni implementacijskega akta

A MS WHICH HAS NOT ADOPTED THE IMPLEMENTING MEASURES REQUIRED BY THE DIRECTIVE IN THE PRESCRIBED PERIODS **MAY NOT RELY**, AS AGAINST INDIVIDUALS, ON ITS OWN FAILURE TO PERFORM THE OBLIGATIONS WHICH THE DIRECTIVE ENTAILS.



DČ se ne more sklicevati na svojo napako

IT FOLLOWS THAT A NC REQUESTED BY A PERSON WHO HAS COMPLIED WITH THE PROVISIONS OF A DIRECTIVE NOT TO APPLY A NATIONAL PROVISION INCOMPATIBLE WITH THE DIRECTIVE NOT INCORPORATED INTO THE INTERNAL LEGAL ORDER OF A DEFAULTING MS, MUST UPHOLD THAT REQUEST **IF THE OBLIGATION IN QUESTION IS UNCONDITIONAL AND SUFFICIENTLY PRECISE.**



vendar morajo biti pogoji izpolnjeni

THEREFORE THE ANSWER TO THE FIRST QUESTION MUST BE THAT AFTER THE EXPIRATION OF THE PERIOD FIXED FOR THE IMPLEMENTATION OF A DIRECTIVE A MEMBER STATE MAY NOT APPLY ITS INTERNAL LAW - EVEN IF IT IS PROVIDED WITH PENAL SANCTIONS - WHICH HAS NOT YET BEEN ADAPTED IN COMPLIANCE WITH THE DIRECTIVE, TO A PERSON WHO HAS COMPLIED WITH THE REQUIREMENTS OF THE DIRECTIVE.

↳ DČ ne sme uporabiti svojega prava, ki ni skladen z direktivo, proti nekemu, ki se je ravnal po direktivi in s tem proti nacionalnemu pravu (shield-obramba posameznika)

Becker (8/81): direktiva uporabljena aktivno s strani posameznika **proti državi** kot *sword*

↳ **DIR imajo Nuč zgolj v primerih razmerij z DČ!!!**

neposredni učinek vertikalni / horizontalni?

PES: *Defrenne v Sabena (43/75)* : **V + H**

FO (Gabrielle Defrenne) v. PO (Sabena = B-letalska družba)

v 141. členu PES izrecno omenjene le MS

kritika sodbe: velja le za naprej

DIR: *Marshall* (152/84) : **le V** (zaradi “estoppel” argumenta, ki predvideva kršitev DČ)

FO (G. Marshall) v PO (Southampton and SW Hampshire health authority)

- IT MUST BE EMPHASIZED THAT ACCORDING TO ARTICLE 189 OF THE TREATY THE BINDING NATURE OF A DIRECTIVE, WHICH CONSTITUTES THE BASIS FOR THE POSSIBILITY OF RELYING ON THE DIRECTIVE BEFORE A NC, EXISTS **ONLY IN RELATION TO EACH MEMBER STATE TO WHICH IT IS ADDRESSED.**
- IT FOLLOWS THAT **A DIRECTIVE MAY NOT OF ITSELF IMPOSE OBLIGATIONS ON AN INDIVIDUAL AND THAT A PROVISION OF A DIRECTIVE MAY NOT BE RELIED UPON AS SUCH AGAINST SUCH**

PERSON. —————→ *dovoljen je le vertikalni*

neposredni učinek direktiv, saj se dolžnosti iz direktiv nanašajo le na MS in ne na posameznike

(enako tudi v *Faccini Dori* (C-91/92))

→ Vendar:

- ECJ že v *Marshall* razširi koncept države in s tem vertikalni neposredni učinek direktiv:

49. IN THAT RESPECT IT MUST BE POINTED OUT THAT WHERE A PERSON INVOLVED IN LEGAL PROCEEDINGS IS ABLE TO RELY ON A DIRECTIVE AS AGAINST THE STATE HE MAY DO SO **REGARDLESS OF THE CAPACITY IN WHICH THE LATTER IS ACTING**, WHETHER EMPLOYER OR PUBLIC AUTHORITY. IN EITHER CASE IT IS NECESSARY TO PREVENT THE STATE FROM TAKING ADVANTAGE OF ITS OWN FAILURE TO COMPLY WITH EC LAW



emanation of state - tudi proti tistim, ki v resnici niso odgovorni za kršitev

- vodilna sodba: *Foster v British Gas (C-188/89)*!
- case by case basis odločanje o tem, ali gre za emanation of state

Konceptualni problemi razumevanja horizontalnega učinka:

- ECJ se v *Marshall* sklicuje na izraz “MS” v PES (zato odreče HNuč), medtem ko v *Defrenne* v primeru določb PES in njihovega Nuč izraz “MS” ni ovira za horizontalni Nuč
- zamaje se kaznivi namen direktnega učinka za DČ: tudi nekdo, ki ni DČ, je kaznovan (ker je emanation of state)
- razlikovanje oseb javnega/zasebnega ne glede na to, da je njihova dejanska povezanost s FO enaka

→ in še novost: **incidental horizontal effect:**



Posameznik se zoper drugega posameznika ne more sklicevati na DIR, lahko pa posameznik uporabi DIR kot **Ščit**, kadar se drugi posameznik zoper njega sklicuje na nacionalno določbo, ki ni v skladu z DIR.

(CIA Security (C-194/94), Unilever Italia (C-443/98))

→ ne gre za prepovedan horizontalni direktni učinek!

→ pogoj: izpolnjeni pogoji!

- tudi če gre za prepovedani horizontalni neposredni učinek **DIR** (ko je na drugi strani oseba izven emanation of state)
- ali ko ni pogojev za neposredni učinek (določba ni dovolj jasna in nepogojna)

ima posameznik na voljo institut pred NS:

doktrino Frankovich

(odškodninska odgovornost D zaradi kršitve)

Francovich (C-6 in 9/90), *Brasserie du Pêcheur* (C-46 in 48/93)

3 pogoji!

Posredni učinek – načelo harmonične razlage

Nacionalno pravo se interpretira v luči direktiv: *Von Colson and Kamann (14/83)*

...in applying the national law and in particular the provisions of national law specifically introduced in order to implement Directive 76/207, NC are required to interpret their national law in the light of the wording and purpose of the Directive...

→ podlaga za tako ugotovitev: 10. člen PES (po *Pfeiffer* kar PES kot celota) - velja tudi za NC!
("in so far as possible")

→ implementacijsko nacionalno pravo v primeru neustrezne implementacije - **če ni pogojev za direktni učinek** (npr. določba ni dovolj jasna in nepogojna) - *Von Colson and Kamann*

→ razširitev: VSE nacionalno pravo, neodvisno od implementacije - *Marleasing (C-106/89)*
- vendar NS ni treba iti *contra legem!*

→ tudi pred potekom roka implementacije

Von Colson and Kamann = ind v. MS



Ali posredni učinek lahko tudi:

MS v. ind? – *Kolpinghuis Nijmegen (80/86)*: ne v primeru, ko bi prišlo do naložitve kazenskih sankcij (to bi bilo v nasprotju z načelom pravne varnosti!)

ind v. ind? – *Marleasing (C-106/89)*, *Pfeiffer (C-397-403/01)*: ja
→ DIR ima lahko torej horizontalni posredni učinek, tudi če nima neposrednega horizontalnega učinka

učinki pred potekom roka za implementacijo???

Ratti (148/78):

- IT IS ONLY AT THE END OF THE PRESCRIBED PERIOD AND IN THE EVENT OF THE MS'S DEFAULT THAT THE DIRECTIVE WILL BE ABLE TO HAVE THE EFFECTS ... UNTIL THAT DATE IS REACHED THE MEMBER STATES REMAIN FREE IN THAT FIELD.
- SINCE A DIRECTIVE BY ITS NATURE IMPOSES OBLIGATIONS ONLY ON MEMBER STATES, IT IS NOT POSSIBLE FOR AN INDIVIDUAL TO PLEAD THE PRINCIPLE OF LEGITIMATE EXPECTATION BEFORE THE EXPIRY OF THE PERIOD PRESCRIBED FOR ITS IMPLEMENTATION.



pred potekom ni neposrednih učinkov

Kolpinghuis Nijmegen (80/86):

IT MAKES NO DIFFERENCE TO THE ANSWERS SET OUT ABOVE IF
ON THE MATERIAL DATE THE PERIOD WHICH THE MEMBER
STATE HAD IN WHICH TO ADAPT NATIONAL LAW HAD NOT
YET EXPIRED



torej lahko že od objave dalje?

Vendar: *C-212/04: Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos*

P?: Must a national court – as far as possible – interpret its domestic law in accordance with a directive which was transposed belatedly into its national legal system from

- (a) the time when the directive entered into force, or
- (b) the time when the time-limit for transposing it into national law passed without transposition being effected, or
- (c) the time when the national measure implementing it entered into force?

mnjenje AG Kokott, 27.10.2005: the duty of interpretation begins from the moment of publication

odgovor ECJ, 4.7.2006:

A national court is required, **immediately upon entry into force of a directive**, to interpret the whole body of rules of national law, so far as possible, in the light of the wording and purpose of that directive, in order to achieve an outcome consistent with the objective pursued by the directive.

katero komunitarno pravo naj NS upoštevava pri lojalni razlagi?

- ne le neposredno izvršljive akte na NS, temveč tudi:
- nezavezujoče akte (*Grimaldi*)
- akte 3. stebra EU (*Pupino (C-105/03)*)