

PRINCIPLE OF LEGAL CERTAINTY AND (IN)DIRECT EFFECT OF DIRECTIVES

Aistė Samuilytė-Mamontovė

Mykolas Romeris University, Lithuania
asamulyte@yahoo.com

Abstract

Purpose – The research discloses problematic aspects of the case law of the European Court of Justice (ECJ) denying direct effect of the directives between private parties and real effect of (in)direct effect of the directives in the light of the principle of legal certainty.

Design/methodology/approach – Research employs logical, systemic, teleological and comparative analysis methods.

Findings – Though ECJ still explicitly refers to the ruling made in *Marshall* case prohibiting horizontal effect of directives, its practice in reality is quiet controversial, begging for discourse and suggestions capable to assist in assuring the respect to the principle of legal certainty.

Research limitations/implications – The focus of this article is not to analyse and disclose classical ECJ cases on (in)direct effect of the directives. Research is limited to analysis of exceptions to the rule that denies direct effect of directives and reveals their compatibility with the principle of legal certainty.

Practical implications – Key users of rules formed in the case law of the ECJ are national courts that shall assure application of the principle of legal certainty and abstain from acting *contra legem*. Such research is important in forecasting evolution of the case law of the ECJ in this area for courts and legal advisors that face with doctrine on effects of the directives in practice.

Originality/Value – Doctrines on the effect of the directives are of great interest to legal researchers. However, lately ECJ case law allows making more detailed generalizations, though it also leaves certain open questions on the importance of the principle of the legal certainty in relation to principles of effectiveness and supremacy of European Union law. Superior courts of Lithuania usually refer to these doctrines in pretty theoretical aspects, however it is very rarely applied in practice.

Keywords: legal certainty, direct effect, indirect effect, consistent interpretation, directives.

Research type: research paper.

Introduction

In the legal systems of both the European Union (hereinafter referred to as the EU) and Lithuania, the principle of legal certainty is one of the fundamental principles of law on which, first of all, the requirement for the law to be clear and precise so that the subjects of law may have a clear knowledge of their rights and duties and use them accordingly is based. Under the established case-law of the Court of Justice of the European Union (hereinafter referred to as the Court of Justice), *“the general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly”*¹. The Constitutional Court of the Republic of Lithuania has repeatedly stated that *“legal certainty and legal clearness are one of the fundamental elements of the principle of a state under the rule of law which is entrenched in the Constitution: legal regulation must be clear and harmonious, legal norms must be formulated precisely, they may not contain ambiguities”*².

Therefore, every subject has a legitimate expectation that legal norms in effect applied in his/her respect meet the abovementioned requirement and their legal status and content providing for the rights and duties of a person are understood universally unambiguously at the moment of the formation of a legal relation.

The issue of the vulnerability of the principle of legal certainty is especially relevant in analysing direct and indirect effect of EU directives. Pursuant to Article 288 of the Treaty on the Functioning of the European Union, a directive is an act of indirect effect the addressees of which are the Member States. National authorities enjoy the discretion to choose the form and methods of the implementation of a directive. Even though in the primary EU law an imperative obligation to implement the provisions of a directive properly and in time is formed, the implementation is usually late or improper. In pursuance of the effectiveness of EU law in the Member States, the Court of Justice has established the doctrines of direct and indirect effect of EU directives that should, seemingly, solve the problem of securing the principle of the *effet utile* of the EU law in the Member States. However, the ambiguity of the case-law of the Court of Justice related to the possible horizontal effect of the directives leads to a number of questions: whether the doctrine of indirect effect is compatible with the principle of legal certainty; whether the obligation to avoid the application of a legal norm in conflict with EU law does not mean its direct effect; whether in the present stage of the development of EU law one may speak about direct horizontal effect of the directives.

¹ See, in particular, Case C-194/09 P *Alcoa Trasformazioni Srl v Commission* [2011] ECR I-06311, paragraph 71; Case C-182/03 ir C-217/03, *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 69, and Case C-67/09 P *Nuova Agricast and Cofra v Commission* [2010] ECR I-09811, paragraph 77.

² The Constitutional Court of the Republic of Lithuania, rulings of 30 May 2003, 26 January 2004 and 24 December 2008.

Compatibility between the doctrine of indirect effect and the principle of legal certainty

According to the classical model, an EU directive can have a direct effect if the conditions of direct effect are satisfied and the relation is vertical, i.e. between a private person and the state. Although the Court of Justice provides a rather wide definition of the notion “state”, this doctrine is not sufficient to reach the effectiveness and efficiency of EU law in the Member States. Despite experiencing “pressure” from Advocates-General as well as legal scholars regarding the possibility for the directives to have a direct horizontal effect, the Court of Justice upholds the position formed as early as in the *Marshall* case: “<...> a directive may not be relied upon against an individual, it must be emphasized that according to article 189 (now article 288) of the EEC treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, 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 a person”¹.

Such a position of the Court of Justice is aimed at indirectly “punishing” Member States for failure to fulfil the duties arising from EU law, i.e. failure to implement the directives. Precisely against the state that is responsible for proper and timely implementation of a directive. Furthermore, the Court of Justice emphasises the specific nature of a directive that does not allow directly imposing obligations on private subjects, because this power of the EU is exercised through passing acts of direct effect – regulations. In this way, the Court of Justice seeks to avoid violations of the principle of legal certainty and legitimate expectations of individuals. However, further steps of the Court of Justice in establishing and developing the doctrine of the indirect effect of EU directives gives rise to new discussions.

In order to ensure a uniform functioning of the system of EU law in the Member States, the Court of Justice, in the judgement in the *Von Colson and Kamann*² case, established the doctrine of the indirect effect of directives, i.e. the obligation for national courts to interpret national law in the light of the wording and purpose of a directive. In the sense of the effectiveness of EU law, such a judgement of the Court of Justice is to be evaluated positively. However, having in mind that this doctrine is to be applied to relations between private subjects as well, a question whether in this way the principle of legal certainty is not violated arises.

In developing this doctrine, the Court of Justice also formulated certain “protectors” by claiming that a national court may apply methods of interpretation allowed under the national law³; however, the limitations to the obligation to interpret a

¹ See Case C-152/84 *Marshall* [1986] ECR 723, paragraph 48.

² See Case C-14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26.

³ It is suggested that for the purposes of legal certainty national courts, when interpreting national law in compliance with EU directive, shall clearly indicate the methods of interpretation of law they employ

domestic law in an appropriate manner are set by the general principles of law – firstly, the principle of legal certainty – and, in particular, in the sense that this obligation cannot serve as a basis for an interpretation *contra legem* of national law¹. The Court of Justice in its case-law most clearly stated certain limitations of the effect of this doctrine in criminal cases: when Member States rely on the directive against an individual in a criminal procedure, a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, determine or aggravate the liability in criminal law of persons who act in contravention of the provisions of that directive². Therefore, the obligation to interpret a harmonised national legal act can be fulfilled if it does not have the effect of determining or aggravating criminal liability of a private subject. Such an argumentation of the Court of Justice does not raise any additional questions, as it is compatible with national systems of criminal law.

Still, not without a reason a question whether on the whole the doctrine of indirect effect can function in civil relations between two private subjects arises. After all, the fact that a national court, on the basis of the principle of loyal cooperation, will interpret national law in conformity with an EU directive may grant a right to one of the subjects and impose an obligation on the other. Is that compatible with the principle of legal certainty?

In 2012, in its judgement in the *Dominguez* case, the Court of Justice as if tried to add clarity to the doctrines of the functioning of directives and interrelation between these doctrines. The Court of Justice in answering the questions of a national court step by step frames the scheme of the functioning of a national court. First of all, it formulates an obligation for the national court to interpret the whole national law, especially Article L.223-4 of the *Code du travail*, applying the methods of interpretation recognised by national law with a view to ensuring the effectiveness of Directive 2003/88 and passing a judgement that would be consistent with the pursued objective. Furthermore, the court must determine *whether it can find an interpretation of that law* that allows the absence of the worker due to an accident on the journey to work to be treated as being equivalent to one of the situations covered by that article of the *Code du travail*³. Of course, the Court of Justice, even being aware of the provisions of national law, does not interfere with the jurisdiction of the national court and does not comment on whether it is possible to interpret national law in conformity with the provisions of the directive. However,

and if purposes of the law cannot be achieved by interpreting it, clearly state reasons behind such findings. Upon merger of requirements of EU law with methods of interpretation admissible in national law, national court shall perform functions of the court of EU entrusted to it. See Figueroa Regueiro, P. V. Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case Law of “Horizontal” Direct Effect of Directives. *Jean Monnet Working Paper*. 2002 (7), p. 15 – 36. .

¹ See Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13; Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100; Case C-380/07 *Angelidaki* [2009] ECR I-3071, paragraph 19; Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paragraph 61.

² See Case 14/86 *Pretore di Salo* [1987] ECR 2545; Case C-60/02 *X* [2004], ECR 651, paragraph 61; Case C-387/02, C-391/02, C-403/02 *Berlusconi* [2005] ECR I-3565.

³ Case C-282/10 *Dominguez* [2012] not reported yet.

knowing that the legal dispute involves two private subjects, it does not claim that such an interpretation is impossible. Therefore, even despite the consistent denial of the possibility of direct horizontal effect of directives by the Court of Justice, the application of doctrines of indirect effect in a horizontal relation remains problematic, as in the case when a national legal norm takes the content of a directive it can have the same legal consequences as the direct effect of directives. Thus direct horizontal effect of directives is as if brought through the back door, as Craig insightfully noticed and called it the “indirect direct effect of directives”¹.

Noteworthy is the fact that for the courts of final instance of Lithuania the doctrine of indirect effect of directives is known; however, its actual application is rather exceptional. Usually, national courts limit themselves to quoting the definition of the doctrines of the effect of EU directives but lack determination in interpreting provisions of national law in conformity with an EU directive². Moreover, a national court usually does not identify the methods of interpretation. Presumably, national courts, in interpreting national law in conformity with an EU directive, should, for the sake of legal certainty, clearly identify the methods of interpretation that are followed and, if the interpretation of law is not effective in achieving the set objectives, provide well-grounded reasoning³.

Compatibility between the obligation to disregard national provisions that are in conflict with EU law and the principle of legal certainty: *Mangold* approach

Under the case-law of the Court of Justice, “<...> *it is the responsibility of the national court <...> to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law*”⁴.

When analysing the case-law of the Court of Justice, a reasoned question whether a national court must avoid the application of a national provision if it is in conflict with any source of EU law, arises. As an example one could take the *Mangold* case dealing with a dispute between an employee and an employer, practicing as a lawyer, regarding a fixed-term contract of employment concluded with the employee, then 56 years old, on the

¹ Craig, P. Directives: Direct Effect, Indirect Effect and the Construction of National Legislation. *European Law Review*. 1997, 22, p. 525.

² For the purposes of this research analysis of case-law of the Supreme Court of Lithuania and Supreme Administrative Court of Lithuania from 2008 to 2013 was conducted. It is noteworthy that ruling of Supreme Court of Lithuania of 5 April 2011 in the civil case *UAB „Smulkus urmas“ v. Plungės rajono savivaldybės administracija*, No. 3K-3-155/2011, analysis the meaning and practical problems of application of indirect effect of the directives.

³ See Sawyer, K. The Principle of Interpretation Conformé: How far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law? *Statute Law Review*. 2007, 28(3), p. 174.

⁴ See, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30.

basis of national law providing for a possibility to conclude fixed-term contracts of employment with older workers. The European Commission suggested avoiding the application of the controversial national provision even if it is accepted as being in conflict with the directive before the expiry of the period for the transposition of the directive¹. If the initial formula of the judgement was that it is possible to refer to the directive before the expiry of the period for its transposition in cases between two private subjects, a question whether such a rule is compatible with the principles of legal certainty and legitimate expectations may arise². However, the Court of Justice in its first comment on the principle of non-discrimination on the grounds of age as a general principle of EU law established in a directive, chose a different formulation: *“it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired”*³.

Even though precisely in the *Mangold* judgement the Court of Justice provided an impetus for discussions on the possible direct horizontal effect of a directive when a national legal act that is in conflict with the said directive is not applied (“negative”, “non-application” or exclusionary effect), the remaining doubts were dispelled by the judgement of the Court of Justice in the *Kücükdeveci* case. The Court of Justice cited the much criticised *Mangold* judgement; however, its comment was clearer and the obligation to disregard a conflicting national provision was related to the contradiction with the general principle of EU law rather than the directive itself. Still it is unclear whether this principle is as clear and unconditional as to have a direct effect in horizontal relations⁴.

More clarity regarding the obligation to avoid the application of a conflicting national provision was brought in the *Dominguez* judgement, where the Court of Justice stated that it is for the national court to determine the legal nature of the respondent in the main proceedings. If it suits the definition of a “state”, “as Article 7 of Directive 2003/88 fulfils the conditions required to produce a direct effect, the consequence would be that the national court would have to disregard any conflicting national provision [italics added]. If that is not the case, it should be borne in mind that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties”⁵. In such a situation, the party injured as a result of domestic law not being in conformity

¹ See the Opinion of AG A. Tizzano in Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 102-111.

² See Masson, A., Micheau, C. The Werner Mangold Case: An Example of Legal Militancy. *European Public Law*. 2007, 13, p. 587.

³ Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 78.

⁴ See critical view about *Mangold* and *Kücükdeveci* judgements: de Mol, M. *Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, Seda Küçükdeveci v. Swedex GmbH & Co. KG. European Constitutional Law Review*. 2010, 6, p. 293 – 308; Gabinaud, A. Case C-555/07 Seda K Küçükdeveci v. Swedex GmbH&Co. KG, Judgment of the Court (Grand Chamber) of 19 January 2010. *Maastricht Journal of European and Comparative Law*. 2011, 18 (1-2), p. 189 – 201.

⁵ Case C-282/10 *Dominguez* [2012] not reported yet, paragraphs 41-42.

with European Union law could nonetheless, relying on the doctrine of state liability, go to the national court and file a lawsuit against the state in order to obtain compensation for the loss sustained.

Such a line of the argumentation of the Court of Justice allows concluding that the obligation to disregard any conflicting national provision is not absolute. In order to carry out a revision of the conformity of national law with EU law, one should, first of all, determine the status of a legal norm of the EU law. To create the obligation to disregard any conflicting national provision, the norm under consideration must be clear, unconditional and of direct effect¹. On the basis of the fact that in this sphere the case-law of the Court of Justice is casuistic, a national court may easily follow the obligation to disregard any conflicting national provision when the status of the norm of EU law is clear. In case of a doubt, the national court should ask for a preliminary ruling.

However, it is possible to claim that the judgement in the *Mangold* case can be approached from the positive side, as the naming of the principle of non-discrimination on the grounds of age a general principle of law allows a private subject to defend its violated rights in respect of another private subject. Still one cannot deny that the legal certainty of the respondent was violated. The existence of such a principle could not *a priori* be known to and its content perceived by the respondent and, therefore, he could not have acted following the requirements of the principle instead of the national law in effect². Furthermore, even more doubts regarding the legitimate expectation of an individual to know the scope of his/her rights and obligations are raised by the judgement of the Court of Justice in the *Römer* case, where it was stated that an individual can refer to the right of non-discrimination on the grounds of sexual orientation only from the expiry of the period for the transposition of the directive which concerns the said principle³. Such a position of the Court of Justice creates an ambiguous situation regarding the prospects of the development of the status of other principles of law⁴.

A “different” horizontal effect of directives

Even though Advocates-General have put effort to expand the conditions for the direct effect of directives, the Court of Justice continued upholding the position that provisions of directives cannot be applied against private persons. Some confusion was caused by the judgements of the Court of Justice in the *CIA Security*⁵ and

¹ The directive can have also preclusive effect: the directive precludes the application of a national provision contrary to it in horizontal relationship without imposing any obligations on individuals. See Case C-215/97 *Bellone* [1998] ECR I-2191; Case C-456/98 *Centrosteeel* [2000] ECR I-6007.

² For a critical view about *Mangold* judgement see: Craig, P. The Legal Effect of Directives: Policy, Rules and Exceptions. *European Law Review*. 2009, 3, p. 373.

³ See Case C-147/08 *Römer* [2011] ECR I-03591, paragraphs 58-64.

⁴ Laurent, P. Between Judicial Minimalism and Avoidance: the Court of Justice Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*. *Common Market Law Review*. 2012, 49 (6), p. 1841 – 1880.

⁵ Case C-194/94 *CIA Security International* [1996] ECR I-2201.

*Unilever*¹cases. These judgements, in legal literature² and conclusions by Advocates-General, are usually presented as judgements in which the possibility to apply directives in proceedings between private parties in order to avoid the application of conflicting national law is recognised. However, this is not exactly the case. The *Unilever* case can serve as an example. A dispute between companies regarding oil supplied by Unilever for Central Food was heard at a national court. Central Food refused to pay for the goods claiming that the origin of the oil supplied to it was not labelled in accordance with the Italian legal acts. Then Unilever filed a lawsuit requiring Central Food to pay for the goods and claiming that national provisions must not be applied because the European Commission imposed an obligation to postpone their application (procedural aspect). This concerns the requirement for the Member States to immediately communicate to the European Commission any draft technical regulation (for example, related to requirements for product safety, dimensions, name, marking and labelling, etc.) before its adoption formulated in Directive 89/189. The Court of Justice, similarly to the *CIA Security* case, held that there was a procedural defect. The difference is that in the first case (*CIA Security*), the relation between the companies was non-contractual and the state breached the rule of the procedure for the provision of information, while in the second case (*Unilever*) the relation was contractual and the rule of the implementation of the procedure, i.e. the obligation to postpone the adoption of a draft technical regulation, was breached. The outcome of such a violation is the disregard of a national legal act (technical regulation) that obviously causes negative consequences for one of the parties to the proceedings due to the failure of the state to properly implement procedural requirements set by a directive.

A reasonable question arises: why the strict rule of the *Marshall* case that a directive can never impose obligations on private persons is not applied in this case? The Court of Justice, disregarding the critical positions of Member States and the Advocate-General, held that the rule of *Marshall* and *Faccini Dori*³case-law does not apply *when there is a substantial procedural defect* [italics added] and thus draws a line between directives that create rights and obligations for private subjects and directives that set procedural requirements for Member States. Therefore, a procedural defect renders a technical regulation inapplicable⁴. So Central Food which under national law had the right to refuse accepting the goods, following EU law is under an obligation to accept it. Even though this may not be called direct effect in the classical sense, but it is very close

¹ Case C-443/98 *Unilever* [2000] ECR I-7535.

² See Lackhoff, K. Nyssens, H. Direct Effects of Directives in Triangular Situations. *European Law Review*. 1998, 23 (5), p. 397 – 413; Dashwood, A. From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity? *Cambridge Yearbook of European Legal Studies*. 2006-2007, 9, p. 98 – 100; Ward, A. From Direct Effect to Review of Discretion: the Impact of Directives in National Law and the End of Individuals Rights? *Europarättslig Tidskrift*. 2007, 10 (1), p. 123 – 125.

³ See Case 152/84, *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20.

⁴ See Case C-443/98 *Unilever* [2000] ECR I-7535, paragraph 50.

to that considering its impact on private subjects. A directive that is not implemented has an impact on a private subject; it alters the situation of Central Food¹.

The application of such a rule formulated by the Court of Justice in proceedings between two private parties is hardly justifiable. In the *CIA Security* case, this rule was applied for the first time and private subjects had no possibilities to *a priori* foresee such interpretation of law. In the long-term perspective, there remains the possibility of the violation of the principle of legal certainty, as a complicated task falls on a private person: to realise whether particular legal act is a technical regulation falling within the scope of the regulation of the directive, whether the state had to notify the European Commission about draft regulation, whether the procedure for the notification was carried put properly, whether in a specific case the national provision must be disregarded, how the question regarding a breach of a contract entered into by two private parties should be resolved in the case of the absence of the guilt of one of the parties to the contract. In order to protect the legal certainty of private subjects to the greatest possible extent, Advocate-General Jacobs suggested setting as strict as possible limitations on the scope of exceptions to the *Faccini Dori* rule².

The application of such a rule formulated by the Court of Justice may become a real challenge in the national legal systems. Case-law is where the problem aspects of this rule of the Court of Justice manifest themselves most clearly. Further on, an example of the legislation of the Republic of Lithuania constituting a procedural defect is presented.

On 23 December 2011 the Seimas of the Republic of Lithuania adopted the Law on Modifications of and Amendments to the Articles 2, 3, 18, 22, 34 of the Law on Alcohol Control³ (hereinafter referred to as the Law) which since 1 January 2013 prohibits the sale of beer, cider, beer blends with non-alcoholic beverages, alcoholic cocktails *bottled in packaging of more than 1 litre* in retail sales outlets as well as beverages of the above types *the ethyl alcohol strength of which by volume exceeds 7,5 percent* in the Republic of Lithuania. In this case such a regulation can be analysed as a restriction within the context of free movement of goods and the soundness of restriction is to be assessed by the European Commission; however, a more important issue within the context of this research is that the requirement to notify the European Commission has not been satisfied. Under Article 8 of the Directive 98/34/EB⁴ of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, the state must notify the European Commission of any draft technical regulation. In the case being analysed, the Law on Amendments to the Law on Alcohol Control which prohibits the sale of alcoholic beverages bottled in certain packaging and containing certain ethyl alcohol strength is to be considered as a technical regulation. The European Commission has not been notified

¹ Weatherill, S. Breach of Directives and Breach of Contract. *European Law Review*. 2001, 26 (2) p. 177.

² Dougan, M. The „Disguised“ Vertical Direct Effect of Directives? *Cambridge Law Journal*. 2000, 59 (3), p. 586.

³ *Official Gazette*. 2011, No. 165-7859.

⁴ [1998] OJ L 204, p. 37.

of its provisions; therefore, a procedural breach has been committed due to which the Law on Amendments to the Law on Alcohol Control must not be applied.

In a particular case, after the receipt of the complaint against the above Law the European Commission drew attention to the already analysed case-law of the Court of Justice in the *CIA Security* case and noted that in the presence of a procedural breach these national provisions do not apply to private entities¹. Although according to the doctrine of the supremacy of EU legislation the Law cannot be applied due to the procedural breach committed, the Law is in effect until it is acknowledged to be null and void. Moreover, despite the fact that the Law conflicts with EU legislation, administrative authorities require to comply with the established restrictions of sale. In fact, the solution of this legal situation is in the hands of the legislative authority. It should be noted that there was an attempt to correct the situation and on 25 April 2013 the Revision of the Law on Amendments to the Article 18 of the Law on Alcohol Control which narrows the scope of application of prohibition established in the valid Law on Alcohol Control (the prohibition would not apply to alcoholic beverages bottled in glass, ceramic, wooden or metal packaging) has been adopted on the initiative of the group of the member of the Seimas. However, the obligation to notify is considered to have been breached again because on 24 April 2013 during a meeting the Committee on Health Affairs of the Seimas of the Republic of Lithuania approved the obligation to notify the European Commission of such a Revision and on 25 April 2013 the Revision was adopted during the plenary meeting of the Seimas. Taking into account the fact that the obligation to notify of a draft technical regulation appears in the preparatory stage when essential modifications can still be made, doubts regarding proper fulfilment of the obligation to notify arise.

The essential legal problem is that national entities, including public supervisory authorities, apply national law provisions being in effect, though they should not be applied due to procedural breaches committed. Accordingly, brewers which are subject to restrictions incur losses and could require compensation for losses from Lithuania. In addition, taking into account the fact that such a breach is continuous, i.e. the entity continues to incur losses due to the application of such national provisions, it would be quite logical to ask for provisional measures in court – to suspend the application of such a legal act until the settlement of the issue on its compliance with EU legislation.

Conclusions

The application of the doctrine of indirect effect of directives in horizontal relations by a national court may violate the principle of legal certainty if the national court, in interpreting national law in conformity with the objectives and the content of a directive, brings the content of the directive imposing obligations on private subjects into the national provision.

¹ Letter of the European Commission to Association of Small Breweries dated 29 September 2012, ENTR/C/2/LS/fs/D (2012) 1281130.

The obligation to disregard a conflicting national provision is not absolute. A provision of EU law must satisfy the conditions of direct effect (must be clear and unconditional). Provisions of EU treaties and general principles of EU law satisfying these conditions may determine the implementation of the obligation to disregard a conflicting national provision in horizontal relations as well. In case of a conflict with EU directive, such obligation arises only in vertical relations. With reference to the fact that the case-law of the Court of Justice in this case is casuistic, in case of any ambiguity a national court should ask for a preliminary ruling by the Court of Justice.

According to the classical rule of the *Marshall* case, a directive may not itself impose obligations on a private subject. However, after the judgement in the *CIA Security* and *Unilever* cases, it is necessary to separately consider directives that provide for the rights and obligations of private subjects that must be transposed into national law and directives that set procedural requirements for the states in adopting technical regulations (rules). Although the Court of Justice has drawn a clear line between different types of directives, a private subject is left in a situation of legal uncertainty. Even following the national provisions in effect, it may come out that they are inapplicable because of being adopted by violating the procedure for notification established in the directive.

Considering the fact that the case-law of the Court of Justice is multiple and sometimes ambiguous, it is to be claimed that proposal of acceptance of the possibility for a directive, satisfying the conditions of direct effect, to have a direct horizontal effect possibly could allow solving the currently relevant problem issues regarding the violation of the principle of legal certainty.

References

- Craig, P. The Legal Effect of Directives: Policy, Rules and Exceptions. *European Law Review*. 2009, 34 (3): 349 – 377.
- Craig, P. Directives: Direct Effect, Indirect Effect and the Construction of National Legislation. *European Law Review*. 1997, 22: 519 – 525.
- Dashwood, A. From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity? *Cambridge Yearbook of European Legal Studies*. 2006-2007, 9: 81 – 109.
- Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. [1998] OJ L 204, p. 37.
- Dougan, M. The „Disguised“ Vertical Direct Effect of Directives? *Cambridge Law Journal*. 2000, 59 (3): 586 – 612.
- ECJ Case 106/77 *Simmenthal* [1978] ECR 629.
- ECJ Case C-14/83 *Von Colson and Kamann* [1984] ECR 1891.
- ECJ Case C-152/84 *Marshall* [1986] ECR 723.
- ECJ Case 14/86 *Pretore di Salo* [1987] ECR 2545
- ECJ Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969.
- ECJ Case C-91/92 *Faccini Dori* [1994] ECR I-3325.
- ECJ Case C-194/94 *CIA Security International* [1996] ECR I-2201.
- ECJ Case C-347/96 *Solred* [1998] ECR I-937.
- ECJ Case C-215/97 *Bellone* [1998] ECR I-2191.

- ECJ Case C-443/98 *Unilever* [2000] ECR I-7535.
 ECJ Case C-456/98 *Centrosteeel* [2000] ECR I-6007.
 ECJ Case C-60/02 X [2004], ECR 651.
 ECJ Case C-144/04 *Mangold* [2005] ECR I-9981.
 ECJ Case C-387/02, C-391/02, C-403/02 *Berlusconi* [2005] ECR I.-3565.
 ECJ Case C-182/03 and C-217/03, *Belgium and Forum 187 v Commission* [2006] ECR I-5479.
 ECJ Case C-268/06 *Impact* [2008] ECR I-2483.
 ECJ Case C-380/07 *Angelidaki* [2009] ECR I-3071.
 ECJ Case C-12/08 *Mono Car Styling* [2009] ECR I-6653.
 ECJ Case C-67/09 P *Nuova Agricast and Cofra v Commission* [2010] ECR I-09811.
 ECJ Case C-147/08 *Römer* [2011] ECR I-03591.
 ECJ Case C-194/09 P *Alcoa Trasformazioni Srl v Commission* [2011] ECR I-06311.
 ECJ Case C-282/10 *Dominguez* [2012] not reported yet.

Figueroa Regueiro, P. V. Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case Law of “Horizontal” Direct Effect of Directives. *Jean Monnet Working Paper*. 2002, 7: 1 – 46. .

Gabinaud, A. Case C-555/07 *Seda K Küçükdeveci v. Swedex GmbH&Co. KG*, Judgement of the Court (Grand Chamber) of 19 January 2010. *Maastricht Journal of European and Comparative Law*. 2011, 18 (1-2): 189 – 201.

Lackhoff, K. Nyssens, H. Direct Effects of Directives in Triangular Situations. *European Law Review*. 1998, 23 (5): 397 – 413.

Laurent, P. Between Judicial Minimalism and Avoidance: the Court of Justice Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*. *Common Market Law Review*. 2012, 49 (6):1841 – 1880.

Law on Alcohol Control. *Official Gazette*. 2011, No. 165-7859.

Letter of the European Commission to Association of Small Breweries dated 29 September 2012, ENTR/C/2/LS/fs/D (2012) 1281130.

Masson, A., Micheau, C. The Werner Mangold Case: An Example of Legal Militancy. *European Public Law*. 2007, 13: 587 – 593.

de Mol, M. Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*. *European Constitutional Law Review*. 2010, 6: 293–308.

Opinion of AG A. Tizzano in ECJ Case C-144/04 *Mangold* [2005] ECR I-9981.

Sawyer, K. The Principle of Interpretation Conformé: How far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law? *Statute Law Review*. 2007, 28(3).

The Supreme Court of Lithuania, Civil Division, 5 April 2011 ruling in the civil case *UAB „Smulkus urmas“ v. Plungės rajono savivaldybės administracija* (case No. 3K-3-155/2011).

Ward, A. From Direct Effect to Review of Discretion: the Impact of Directives in National Law and the End of Individuals Rights? *Europarättslig Tidskrift*. 2007, 10 (1): 113 – 127.

Weatherill, S. Breach of Directives and Breach of Contract. *European Law Review*. 2001, 26 (2): 177 – 186.