Politika hospodárskej súťaže a online platformy

Rastislav Funta

Abstrakt

On-line platformy, ako sú vyhľadávače a trhoviská, ktoré pôsobia ako sprostredkovatelia medzi rôznymi skupinami zákazníkov, sú v centre záujmu mnohých súťažných orgánov. Vzhľadom k ich dynamickej štruktúre sa môže rýchlo meniť trhové postavenie jednotlivých spoločností čo sťažuje zásah súťažných orgánov ktoré sú potom často považované za kontroverzné. V nasledovnom článku budú najskôr diskutované zvláštnosti on-line trhov a v ďalších častiach konanie proti spoločnosti Google a vertikálne obmedzenia v prípade online-obchodov.

Kľúčové slová

Digitálne trhy, Google, on-line platformy, vertikálne obmedzenia

Abstract

Online platforms, such as search engines and marketplaces that act as intermediaries between the different customer groups are in the centre of many competition authorities. Due to their dynamic structure the market position of each of the companies can change very quickly making it difficult for the competition authorities to intervene which are then often considered as controversial. The following article will first discuss the peculiarities of online markets, the proceedings against Google and vertical restraints for online-shops.

Key words

Digital Markets, Google, online platforms, vertical restraints

1. Úvod

Rýchly a trvalý rast rôznych on-line platforiem vedie k diskusii vo vedeckých kruhoch a politike či tieto on-line platformy viac podporujú hospodársku súťaž alebo či spôsobujú koncentráciu na trhu smerom k monopolnému postaveniu. V USA a EÚ, rovnako ako v iných krajinách vzbudzuje táto otázka záujem orgánov pre hospodársku súťaž. Európska komisia predstavila v rámci svojej stratégie "jednotného digitálneho trhu" realizáciu odvetvového prieskumu elektronického obchodu.[1] Zatiaľ čo v Európe sú v centre záujmu rôzne vertikálne obmedzenia v prípade on-line obchodovania, v Spojených štátoch sa uplatňuje menej rušivý prístup. Vertikálnym obmedzeniam na internete sa venuje pomerne menšia pozornosť. Naopak, v oboch jurisdikciách sa venuje značná pozornosť konaniam proti spoločnostiam Google a Apple.

2. Súťaž na on-line trhoch

Mnoho on-line trhov funguje ako takzvané platformy, ktoré združujú aspoň dve rôzne skupiny zákazníkov, napr. kupujúcich a predávajúcich alebo používateľov a inzerentov. Pri službách ponúkaných takouto platformou ide o tzv. matchmaking, službu ktorá musí byť použitá aspoň dvoma rôznymi skupinami zákazníkov. To vytvára nepriame sieťové efekty: zatiaľ čo pri priamych sieťových efektoch (ako napr. v prípade WhatsApp, Skype, Facebook, LinkedIn) je hodnota služby u jednotlivých užívateľov priamo závislá na celkovom počte ostatných užívateľov, existujú nepriame sieťové účinky, ak charakter dopytu skupiny zákazníkov závisí na veľkosti druhej skupiny. Ako príklady možno uviesť vyhľadávače (Google), trhovisko (Amazon), platformy pre hotelové izby (Booking.com), taxi služby (Uber), cestovné kancelárie (Expedia) a mnohé iné. Tieto účinky sa vyskytujú aj na "tradičných" miestach, ako sú veľtrhy, pouličné trhy, nákupné centrá, atď. Koncentrácia je vplyvom vonkajších faktorov, ako napr. kapacitné obmedzenia, obmedzená. Z hľadiska politiky hospodárskej súťaže však toto nemôže byť hodnotené negatívne. Z dôvodu sieťových účinkov je výhodné pre obe strany na trhu, aby tá druhá bola tak veľká ako je to len možné. V prípade situácie s mnohými malými platformami sú vyhľadávacie náklady pre potenciálnych obchodných partnerov znížené a vytvára sa tak väčšia transparentnosť.

2.1. Koncentrácia trhu pri on-line platformách

Vzhľadom k nepriamym sieťovým účinkom je trhová koncentrácia v prípade trhu platforiem často vyššia ako v iných odvetviach. To neznamená, že každý takýto trh vykazuje automaticky vysokú trhovú koncentráciu - opakom sú portály nehnuteľností, porovnávacie portály (check24) alebo zoznamovacie

[1] Pozri Európska komisia, IP/16/922. Prieskum ktorý sa začal v roku 2015 poskytol Európskej komisii cenné údaje a umožnil jej identifikovať problémy z hľadiska hospodárskej súťaže v rámci trhov elektronického obchodu v EÚ. Tento prieskum doplnil opatrenia na odstránenie prekážok cezhraničného elektronického obchodu, ktoré stanovila Európska komisia vo svojej stratégii jednotného digitálneho trhu.

portály. Na nich sú viaceré platformy, ktoré súťažia medzi sebou. Je dôležité si však uvedomiť, že vysoká koncentrácia na týchto trhoch môže podporiť účinnosť. Ak sú všetci užívatelia aktívni len na jedinej platforme, dochádza k maximalizácii sieťových účinkov. K podpore súťaže medzi platformami dochádza, ak majú (a) skupiny zákazníkov odlišné preferencie a ak je (b) pomocou užívateľov realizovaný tzv. multihoming, čiže ak sú užívatelia aktívni paralelne na rôznych platformách.

2.2. Vymedzenie trhu pri trhoch platforiem „two-sided markets“

Vymedzenie trhu[2] je v prípade protisúťažného práva obzvlášť dôležitá a slúži ako základ pre vyhodnotenie potreby pre prípadný zásah zo strany protisúťažných orgánov. V rámci definície relevantného trhu[3] by mali byť presne identifikované produkty a spoločnosti, ktoré sú postihnuté, napr. fúziou alebo možným zneužitím dominantného postavenia. Celkovo možno povedať, že relevantný trh zahŕňa všetky trhové sily, ktorým čelia spoločnosti. V praxi sa pritom rozlišuje medzi vecnou, časovou a geografickou definíciou trhu.[4] Ak chceme vymedziť trh pokiaľ možno čo najpresnejšie, používa sa tzv. SSNIP test.[5] Ak je spoločnosť hypoteticky schopná svoje ceny v strednodobom až dlhodobom horizonte zvýšiť o 5-10% nad konkurencieschopnú úroveň, táto spoločnosť nebude vystavená súťažnému tlaku. Ak spotrebitelia v tomto prípade prejdú na iné výrobky, tieto predstavujú dostatočne dobrú náhradu, a preto sú priradené k rovnakému trhu. Tento spôsob definície trhu nie je možné priamo aplikovať na on-line trhy. Spotrebitelia neplatia často žiadnu pozitívnu peňažnú cenu. Namiesto toho poskytnú svoje dáta, takže platformy nesúťažia na tejto strane trhu o zisky. Zvýšenie cien o 5 alebo 10% preto nie je možné. Nie je však jasné, čo by takýto nárast o 5-10%, pokiaľ ide o sprístupnenie dát (ako priama platba) znamenal a ako by to malo byť merané. Ďalším problémom pre orgány hospodárskej súťaže je otázka, ktoré ceny by mali byť hypoteticky zvýšené, aby bolo možné určiť trhový podiel. Majú byť zvýšené obe ceny súčasne, alebo by sa mala pozornosť zamerať iba na jednu stranu? Predovšetkým je potrebné poznamenať, že spoločnosť je vystavená rôznym tlakom, ktoré musia byť zahrnuté pri výpočte cenovej štruktúry.

[2] FUNTA, R., GOLOVKO, L., JURIŠ, F. (2016): Európa a Európske právo, str. 395.
[3] Oznámenie Komisie o definícii relevantného trhu na účely práva hospodárskej súťaže spoločenstva, 97/C 372/03. Toto oznámenie vytvorilo právny rámec pravidiel založených na ekonomických princípoch, pomocou ktorých sa pre každý jednotlivý prípad určuje relevantný trh. Ten je výsledkom kombinácie relevantného trhu výrobkov a geografického trhu.
[4] SVOBODA, P. (2010): Úvod do Evropského práva, str. 240-241.
[5] FUNTA, R. (2014): Theory and practice of competition economics market definition, str. 58-59.

3. Súťaž medzi vyhľadávačmi a prípad Google

Kým Baidu dominuje v Číne a Yandex v Rusku, je zďaleka najpoužívanejším vyhľadávačom vo všetkých západných krajinách Google. Google[6] je v USA a EÚ v centre záujmu orgánov pre hospodársku súťaž. Spoločnosti Google je pripisované zneužívanie dominantného postavenia v tom, že vo výsledkoch vyhľadávania viac uprednostňuje dcérske spoločnosti (Google Shopping, Youtube alebo Google Maps).

3.1. Koncentrácia na trhu vyhľadávačov

Vyhľadávače fungujú na jednej strane v tom zmysle, že umiestňujú reklamu pre spoločnosti, na základe analýzy dát zákazníkov, zároveň poskytujú užívateľom ich vyhľadávaciu funkciu. Preto je dôležité zohľadňovať dva druhy trhov, a to reklamný trh a trh s ohľadom na vyhľadávaciu funkciu. V prípade spoločnosti Googlu je literatúra nerozhodná v tom, či trhová sila vyplýva v prvom rade zo samotnej veľkosti spoločnosti, alebo či nie je založená na inovačnej sile spoločnosti Google. Vzhľadom k tomu, že užívatelia majú malé náklady na prechod a v minulosti dominovali na trhu aj iné vyhľadávače (Altavista a Yahoo!) nie je možné spochybňovať kvalitu vyhľadávača spoločnosti Google pre jej úspech na trhu. Okrem toho priemerná doba hrá úlohu, ktorá vyžaduje, aby používateľ dosiahol uspokojivé výsledky. Okrem kvality dát z údajov na internete ako aj historických dát, hrá kvalita vyhľadávacieho algoritmu kľúčovú úlohu. Vynára sa otázka, aké nápravné opatrenia by mali byť uložené spoločnosti Google aby sa predišlo deformácii trhu v rámci súťaže medzi vyhľadávačmi. V literatúre sa objavujú názory o neutralite vyhľadávacej funkcie.[7] Jedná sa však len o ťažko uskutočniteľnú úlohu pri ktorej realizácii by mohlo dôjsť k potlačeniu inovácií. Prípad Google vyjadruje príklad, akým môže platforma využiť silnú pozíciu v jednej oblasti (všeobecné vyhľadávanie) s cieľom spojiť rad ďalších služieb, a takto vstúpiť do priamej konkurencie s obchodnými partnermi. Takáto integrácia môže ponúknuť spotrebiteľom výhody, ako je väčší komfort, ale môže tiež vylúčiť konkurentov a poškodiť spotrebiteľov v prípade, že nie je zameraná na tie najlepšie služby, alebo ak je obmedzená inovácia.

4. Vertikálne obmedzenia v prípade online-obchodov

Okrem prípadu Google sú v centre záujmu európskych súťažných orgánov vertikálne obmedzenia v prípade online-obchodov. Je to výsledkom rozmachu internetu ako distribučného kanálu, najmä zo strany veľkých poskytovateľov, ako je eBay, Amazon alebo

[6] FUNTA, R. (2016): Prípad Google: príležitosť alebo protekcioniznus?, str. 1-5.
[7] CRANE, D. A. (2012): Search Neutrality and Referral Dominance, In. Journal of Competition Law and Economics, str. 459-468.

Booking.com. Najviac spomínanými vertikálnymi obmedzeniami online obchodovania sú:

a) predajné zákazy na on-line trhoch, ktoré sú ukladané výrobcami,
b) dohody obmedzujúce distribúciu prostredníctvom on-line obchodovania percentuálne alebo na základe absolútneho množstva,
c) dvojité ceny (výrobca vyžaduje vyššie veľkoobchodné ceny v prípade online-obchodov ako v prípade bežných predajov),
d) selektívne distribučné systémy a
e) APPA.

S úplným a čiastočným obmedzení on-line predajov sa zaoberala Európska komisia v roku 2001 v prípade Yves Saint Laurent. V tomto prípade schválila Európska komisia zásadu podľa ktorej autorizovaní predajcovia môžu predávať produkty spoločnosti Yves Saint Laurent na internete.[8] Európska komisia uznala, že určité produkty môžu byť riadne predávané len prostredníctvom veľkoobchodníkov - najmä keď je potrebné zabezpečiť kvalitu výrobkov a zamýšľaného použitia. Rovnako tak vnútroštátne orgány hospodárskej súťaže dospeli v iných prípadoch k podobným výsledkom. Toto hodnotenie sa však značne zmenilo v prípade Pierre Fabre.[9] V tomto prípade rozhodol Súdny dvor EÚ (SDEÚ), že de facto obmedzenia online-predajov predstavujú úmyselné obmedzenie hospodárskej súťaže v zmysle čl. 101 (1) Zmluvy o fungovaní EÚ (ZFEÚ)[10] a mali by byť považované za hardcore. Európske orgány pre hospodársku súťaž zastávajú pomerne prísny pohľad pokiaľ ide o prípustnosť vertikálnych dohôd, a zameriavajú sa predovšetkým na ochranu intra-brand súťaže.[11] V poslednej dobe sa dostali do centra záujmu orgánov na ochranu hospodárskej súťaže tzv. Across-Platform Parity (APPA)[12] dohody. APPA bývajú používané napr. cestovnými hotelovými platformami a na E-Book trhu. Pomocou nich sa poskytovateľ zaväzuje voči platforme neponúkať na iných platformách výhodnejšie ceny. APPA sa líšia od bežných doložiek najvyšších výhod.[13] Pod doložkami najvyšších výhod rozumieme záväzok dodávateľa poskytnúť odberateľovi minimálne tak výhodné podmienky (cenu), aké poskytuje iným odberateľom.

Na druhej strane predstavujú záväzok dodávateľa neposkytovať iným odberateľom výhodnejšie podmienky, aké poskytuje odberateľovi, ktorému sa zaviazal. Ich cieľom je zabezpečiť odberateľovi, že jeho vstupné náklady v porovnaní s konkurenciou sú najnižšie.[14] V prípade APPA a hotelových rezervačných platforiem sú hlavnými obavami, že APPA môžu narúšať trh a vytvárať kolúzie na trhu platforiem. Na jednej strane sťažujú vstup na trh pre potenciálnych konkurentov, pretože hotelieri nemôžu podhodnotiť ceny na iných platformách. Po druhé, platformy by nemali žiadnu motiváciu k zníženiu provízií voči hotelom.

5. Záver

On-line platformy sú hnacou silou rastu, inovácií a hospodárskej súťaže, ktoré umožňujú spoločnostiam a spotrebiteľom, aby čo najlepšie využili príležitosti, ktoré poskytuje digitálna ekonómia. Platformy elektronického obchodu umožňujú malým a stredným podnikom prístup na svetové trhy, bez toho aby museli investovať do nákladnej digitálnej infraštruktúry, a poskytujú spotrebiteľom väčšiu možnosť voľby. Vyhľadávače umožňujú svojim používateľom využívať webové služby efektívnejšie. Sociálne médiá a komunikačné platformy tak poskytujú občanom nové príležitosti pre interakciu. Zákonodarcovia by však mali dbať na skúmanie problémov spojených s rýchlo sa rozvíjajúcimi trhmi.

Európska komisia vo svojej stratégii jednotného digitálneho trhu vyjadrila obavy, že online platformy by mohli zneužívať svoje trhovú silu[15] v mnohých ohľadoch. Zneužitie dominantného postavenia[16] možno pritom rozdeliť do dvoch kategórií

[8] Makro v Beauté Prestige International AO, Case No C.01.030 (2002).
[9] C-439/09, Pierre Fabre Dermo-Cosmétique SA, Zb. 2011, s. I-9419.
[10] „Článok 101 ZFEÚ: 1. Nasledujúce sa zakazuje ako nezlučiteľné s vnútorným trhom: všetky dohody medzi podnikateľmi, rozhodnutia združení podnikateľov a zosúladené postupy, ktoré môžu ovplyvniť obchod medzi členskými štátmi a ktoré majú za cieľ alebo následok vylučovanie, obmedzovanie alebo skresľovanie hospodárskej súťaže v rámci vnútorného trhu, najmä tie, ktoré a) priamo alebo nepriamo určujú nákupné alebo predajné ceny alebo iné obchodné podmienky; b) obmedzujú alebo kontrolujú výrobu, odbyt, technický rozvoj alebo investície; c) rozdeľujú trhy alebo zdroje zásobovania; d) uplatňujú nerovnaké podmienky pri rovnakých plneniach voči ostatným obchodným partnerom, čím ich v hospodárskej súťaži znevýhodňujú; e) podmieňujú uzatváranie zmlúv s ostatnými zmluvnými stranami prijatím dodatočných záväzkov, ktoré svojou povahou alebo podľa obchodných zvyklostí nesúvisia s predmetom týchto zmlúv. 2. Všetky dohody alebo rozhodnutia zakázané podľa tohto článku sú automaticky neplatné. 3. Ustanovenia odseku 1 sa však neuplatnia... [absolútne].“ Pozri tiež MUNKOVÁ, J., SVOBODA, P., KINDL, J. (2006): Soutěžní právo, str. 83 a nasl.
[11] Treba rozlišovať medzi-značkovú (inter-brand) a vnútro-značkovú (intra-brand) súťaž. Súťaž medzi značkami (inter-brand) predstavuje súťaž medzi spoločnosťami, ktoré si vytvorili značky pre svoje tovary, aby ich rozlíšili od ostatných značiek predávaných na rovnakom trhu. Príkladom je Coca-Cola a Pepsi. Súťaž v rámci jednej značky (intra-brand) predstavuje súťaž medzi distribútormi alebo maloobchodníkmi, predávajúcimi výrobok rovnakej značky.
[12] Sú dohody medzi dodávateľmi a obchodníkmi, ktoré určujú relatívny vzťah medzi cenami konkurenčných výrobkov alebo cenami účtovanými konkurenčnými obchodníkmi.
[13] BAKER, J. B., CHEVALIER, J. A. (2013): The Competitive Consequences of Most-Favored-Nation Provisions, str. 20 a nasl.
[14] AKMAN, P., HVIID, M. (2005): A Most-Favoured-Customer Clause with a Twist, str. 57-86.
[15] SURBLYTE, G. (2015): Competition on the Internet (MPI Studies on Intellectual Property and Competition Law), str. 101 a nasl.
[16] KÁLESNÁ, K., HRUŠKOVIČ, I., ĎURIŠ, M. (2006): Základy európskeho práva, str. 164.

- Vylučovacie zneužívanie, ktoré majú za cieľ alebo účinok upevnenie alebo posilnenie dominantného obchodného postavenia na trhu a
- Vykorisťovateľské zneužívanie, kedy dominantná spoločnosť využíva skutočnosť, že ani zákazníci, ani konkurenti nie sú schopní potlačiť jej obchodné správanie. Príkladom takýchto praktík je účtovanie neprimerane vysokých cien, výhradné dohody, odmietnutie dodávok tovaru alebo služieb alebo viazanie tovaru alebo služieb (núti zákazníkov k nákupu nesúvisiaceho tovaru alebo služby).

Zjednodušene povedané, on-line trhy sú vystavené podobným problémom v rámci hospodárskej súťaže ako offline trhy, takže môžu byť použité osvedčené protisúťažné nástroje. Online trhy sa prejavujú dynamickejšie v porovnaní s tradičnými trhmi, preto regulačné zásahy majú účinky, ktoré nie sú vždy jasné a predvídateľné. Na základe čl. 101 (3) ZFEÚ[17] nie sú reštriktívne opatrenia v rámci EÚ považované per se za ekonomicky neefektívne. Iba na základe individuálneho posúdenia môžu byť privilegované záujmy súťažného charakteru (v prospech verejného záujmu a prosperity). Presne tieto účinky by mali byť, aj keď sú často len teoreticky zistiteľné, zvažované v právnej praxi. Aj keď protisúťažné právo v zásade stanovuje dostatočné podmienky pre zabezpečenie hospodárskej súťaže na on-line trhoch, zostáva niekoľko nevyriešených otázok. Aj z toho dôvodu zostáva priestor pre ďalší výskum ohľadne uplatňovania pravidiel hospodárskej súťaže na internetových trhoch.

Knižná literatúra

FUNTA, R., GOLOVKO, L., JURIŠ, F. (2016): Európa a Európske právo, Iris, Bratislava.
KÁLESNÁ, K., HRUŠKOVIČ, I., ĎURIŠ, M. (2006): Základy európskeho práva, VO PFUK, Bratislava.
KARAS, V., KRÁLIK, A. (2012): Právo Európskej únie, 1. vydanie, C.H. Beck, Praha.
MUNKOVÁ, J., SVOBODA, P., KINDL, J. (2006): Soutěžní právo, C.H. Beck, Praha.
SURBLYTE, G. (2015): Competition on the Internet (MPI Studies on Intellectual Property and Competition Law), Springer, Heidelberg.
SVOBODA, P. (2010): Úvod do Evropského práva, 3. vydání, C.H. Beck, Praha.

Časopisecká literatúra

AKMAN, P., HVIID, M. (2005): A Most-Favoured-Customer Clause with a Twist, In. European Competition Journal, Vol. 2, No. 1.
BAKER, J. B., CHEVALIER, J. A. (2013): The Competitive Consequences of Most-Favored-Nation Provisions, In. Antitrust, Vol. 27, No. 2.
CRANE, D. A. (2012): Search Neutrality and Referral Dominance, In. Journal of Competition Law and Economics, Vol. 8, No. 3.
FUNTA, R. (2014): Theory and practice of competition economics market definition, In. Acta Oeconomica Universitatis Selye, Vol. 3, No. 1.
FUNTA, R. (2016): Prípad Google: príležitosť alebo protekcioniznus?. In: EU Law Journal, Vol. 1, No. 2.

[17] KARAS, V., KRÁLIK, A. (2012): Právo Európskej únie, str. 400 a nasl.

The state of adaptation of Ukrainian water related legislation and the provisions of EU law

Liudmyla Golovko

Abstract

Today it is clear that the availability of water resources is one of the most important preconditions for the existence and sustainable development of society. Water is needed in all areas of life: food production, energy production, industrial production, domestic water consumption. The World Bank estimates that in the next 50 years (from the middle of the 21st century) 40 % of the population will experience water shortage, 20 % will suffer from its lack. This means that maintaining such rate of water consumption as in the second half of the XX century is not possible. Positive solution of problems, regarding the quality of water resources, depends on the implementation of effective mechanisms of legal support of sustainable use and protection from pollution and depletion of water resources. The European Union (EU) pays a special attention to the development and implementation of measures ensuring the quality of water resources is guaranteed.

Keywords

Water resources, water quality, water management, water intended for human consumption

1. Introduction

The use, protection and management of water resources belong to the most urgent among global environmental problems of our time. Today, the civilization clearly realizes the need for careful management of water resources, maintaining and restoring its quality. Water quality determines the possibility of its use in various fields of human activity. For Ukraine, problems of water sector are also acute and urgent. Low efficiency of water use, small percentage of population with drinking water, poor condition of water bodies in Ukraine requires more foreign experience in this sphere, especially the EU experience. Cooperation in the field of water resources quality is considered as one of the priorities in relations between Ukraine and the EU set up in the Partnership and cooperation agreement signed in 1994.

2. The state of adaptation of Ukrainian legislation and the EU legislation in the field of drinking water supply

The legal basis of functioning of drinking water supply in Ukraine, aimed at providing the population with qualitative and safe drinking water for human health, is defined in a number of normative legal acts, including the Water Code on Drinking Water and Water Supply, ensuring sanitary and epidemiological welfare of population, in the National Target Program for Drinking Water of Ukraine for 2011-2020, state sanitary norms and regulations "hygienic requirements for drinking water intended for human consumption" (State standards 2.2.4-171-10).

The Law of Ukraine "on Drinking Water and Water Supply" reflects basic principles of the state policy in the field of drinking water, namely the convergence of national standards of drinking water quality and evaluation methods to appropriate standards and methods that are used in the EU. However, provisions of this law are mainly declarative, they do not contain the terms for achieving quantitative and qualitative results. Therefore it is difficult to assess how the legislation is implemented in practice.

Adopted in Ukraine, state standards 2.2.4-171-10 "hygienic requirements for drinking water intended for human consumption" were designed to meet the requirements of Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption.[1] This regulatory document is binding and has expanded the list of indicators of epidemiological safety of drinking water, sanitary-chemical indicators of its quality, determines the degree of microbiological, parasitological and viral contamination of water, as well as the maximum allowable concentration for a number of toxic compounds. At the same time it should be noted that the above mentioned state standards are not implemented due to lack of instrumental base in laboratories and state methods of conducting the researches. Only two laboratories across the country can perform the research.[2] There are differences between the new standards of quality of drinking water in Ukraine, which are even stricter than the European, and technical capacity of many water utilities to conduct appropriate testing.

Ukraine prepared the plan for the implementation of Council Directive 98/83/EC on the quality of water intended for human consumption. The purpose of this plan is to improve the quality requirements for drinking water intended for consumption by population and creation of system of monitoring of drinking water quality. However, current legislation of Ukraine concerning monitoring system of drinking water quality still requires adaptation to the provisions of the Council Directive 98/83/EC.[3]

[1] Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption (OJ L 330, 5.12.1998).

[2] What Lies Behind the New Standard on Water Quality: Expert Opinion.

[3] LADYCHENKO, V., GOLOVKO, L., SHULGA, E., KIDALOV, S. (2015): Legal basis of management in the sphere of forest and water resources, p. 232.

The requirements of the article 13 of the Council Directive 98/83/EC concerning measures necessary to ensure that adequate and up-to-date information on the quality of water intended for human consumption are not implemented in practice, although they are provided by Article 9 of the Law of Ukraine "on Drinking Water and Drinking Water Supply" and by order of preparation and publication of national reports on water quality and state of drinking water in Ukraine, approved by the Cabinet of Ministers of Ukraine of 29.04.2004, № 576.

Solving problems related to water supply requires a set of measures in order to update and modernize the network of water supply and sewage system, introduction of rational norms of water consumption for the population, improvement of accounting of water resources and tariff policy that could revive water supply of population, create the basis for stabilization of water use and improvement of water quality.

3. Problems of implementation of provisions of the EU Nitrates Directive in Ukraine

Nitrate contamination of water sources, eutrophication and related threats are relevant to society. According to the Law of Ukraine on the Fundamentals (Strategy) of the State Environmental Policy of Ukraine till 2020 of 21 December 2010 № 2818-VI issues related to prevention of water pollution due to runoff of nitrates from agricultural lands is one of the priority areas of harmonization of Ukrainian environmental legislation with the provisions of EU law.[4] Ukraine-EU Action Plan foresees adaptation of Ukrainian environmental legislation to the EU legislation and implementation of European models of management and protection of natural resources, including water resources management. The main tasks in the sphere of implementation of provisions of the Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources[5] in Ukraine are: the adopt national legislation and designation of authorized body (bodies); to determine areas vulnerable to accumulation of nitrates; to implementat action plans for zones vulnerable to accumulation of nitrates; to implementat relevant monitoring programs.[6]

Currently, provisions of the Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources are not implemented in the national legislation of Ukraine. For river waters of Ukraine very high level of pollution with mineral forms of nitrogen is distinctive. In the past 10 years it has been showed a decreased level of nitrogen pollution but it is still quite high. There is a situation of increasing of mineral nitrogen in the Azov sea area and a slide increase of pesticide pollution in the Black Sea for chlorine-organic compounds.

The European Union has formed an extensive network of monitoring of groundwater pollution caused by nitrates from agricultural sources, which gave the possibility to identify the source of getting nitrogen compounds and choose the methods of its localization. Ukraine should use this experience, especially concerning emissions of nitrogen compounds. At the same time the fragmentation of land use complicates the process of monitoring of contamination of water objects from agricultural sources.

According to Golian, Sakal and Tretiak, at the regional level there should be established a working group with representatives of the Department of agricultural development of regional administrations, NGOs, regional units of the State science and technology center for protection of soil fertility, State service of Ukraine for geodesy, cartography and cadaster, State water resources agency of Ukraine with the goal to develop a roadmap for the implementation of Directive 91/676/EEC. Due to the significant number of households engaged in agricultural production and their fragmentation many problems concerning development of measures for formation of system for monitoring of discharges of nitrogen compounds into the water will arise.[7]

The Nitrates Directive aims to protect water quality across Europe by preventing nitrates from agricultural[8] sources polluting ground and surface waters and by promoting the use of good farming practices. All Member States have drawn up action programs: there are more than 300 of them across the whole EU. The quality of programs is improving. Farmers are becoming increasingly positive about environmental protection, exploring new techniques such as manure processing. All Member States have to analyze their waters' nitrate concentration levels and trophic state. Good monitoring is crucial, and focused on setting up high-quality monitoring networks for ground, surface and marine waters. Member States have to establish codes of good practice for farmers, to be implemented on a voluntary basis throughout their territory, and develop specific action programs for compulsory implementation by farmers located in nitrate-vulnerable zones. Periodically, they have to revise their designation of vulnerable zones, to monitor the effectiveness of action programs and amend them to

[4] Law of Ukraine «On the Fundamentals (Strategy) of the State Environmental Policy of Ukraine till 2020», p. 218.

[5] Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, p. 1–8.

[6] Plan for the implementation of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

[7] GOLYAN, V., SAKAL, N., TRETYAK, N. (2015): Regulation of activity of households in the context of protection of waters from pollution by nitrates from agricultural sources: Ukrainian realities and the possibility of implementing European experience, p. 6-16.

[8] FUNTA R., NEBESKÝ, Š., JURIŠ, F. (2014): Právo európskej únie, p. 496-497.

ensure they match up to the Directive's objectives.[9] Taking into account high level of domestic pollution of surface and groundwater with chemicals and nitrates through the use of fertilizers on steep slopes and the implementation of European experience this is be a necessary condition for sustainable land use and preservation of quality of water resources.

4. Protection of water bodies in Ukraine and the EU: comparative analysis

According to article 2 (33) of the Water Framework Directive "pollution" means direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment.[10] Thus, the Water Framework Directive focuses not only on the needs of water use, but on the protection of aquatic and terrestrial ecosystems, as well as on its natural background conditions.

According to Article 1 of the Water Code of Ukraine water polution (surface and underground sources, internal sea waters and territorial sea) is the contamination of water bodies due special water use, while the contaminant is a substance that is brought by into the water as a result of human activities, such as water intake from water bodies using installations or technical devices, water use and discharge of harmful substances into water bodies, including water intake and discharge of harmful substances into water using reverse channel due to special water use.

The main difference between Ukrainian and European legislation concerning the protection of water bodies lies in general approach to this problem. Water Code of Ukraine and the Water Directive are aimed at reduction of pollutants in water bodies and achievement of indicators of water quality. At the same time in the Water Code of Ukraine indicators of quality of water are sanitary and hygienic and refer to the protection of human health while the Water Framework Directive defines environmental indicators aimed at protection of ecosystems of water bodies.[11]

In Ukraine it is necessary to review fines for water pollution. In the sphere of industrial production the principle of "contaminated-pay" should operate effectively. At present time the system of fines in Ukraine does not prevent physical and legal persons from pollution of water objects.

As noted by Romanenko, environmental taxes in Ukraine should perform fiscal function - to promote filling special and state budget at the level of developed countries; improve environmental situation through the implementation of "polluter pays" principle, which means financial incentives to reduce pollution; encourage taxpayers to reduce negative environmental impact through introducing environmentally friendly, resource and energy saving technologies; be simple in declaration and payment, which require simplification of administration procedures and expansion of the range of tax agents.[12] Considering the scale of ecological crisis in Ukraine the necessity of forming a new system of economic regulators of nature is obvious.[13] Such system must not only accumulate funds for urgent actions, but primarily encourage economic entities to protect the natural environment. In Ukraine, insurance mechanisms of environmental risks are not regulated by legislation. According to the Law of Ukraine on insurance environmental insurance is not mandatory. As a result, practice of insurance for environmental risks is not developed. On the example of some EU countries we consider it appropriate to introduce mandatory environmental insurance for operators of environmentally hazardous activities.

5. Conclusions

Technical requirements for the drinking water quality contained in State standards 2.2.4-171-10 of 12 May 2010 № 400 and some other legal acts mostly take into account the requirements of the Council Directive 80/778/EC on water quality, intended for public consumption. At the same time significant differences in the formulation of provisions, which aim to ensure appropriate measures reducing or eliminating the risk of non-compliance with technical requirements remain in place. It is necessary to establish stricter liability for violation of legislation on drinking water, including the responsibility of water management companies in the case of supply of drinking water of poor quality to the population.

Books

FUNTA R., NEBESKÝ, Š., JURIŠ, F. (2014): Právo európskej únie, Tribun EU, Brno.

LADYCHENKO, V., GOLOVKO, L., SHULGA, E., FESCHENKO, I. (2012): Organizational and legal mechanisms of environmental management: COMPRINT, Kiev.

LADYCHENKO, V., GOLOVKO, L., SHULGA, E., KIDALOV, S. (2015): Legal basis of management in the sphere of forest and water resources, COMPRINT, Kiev.

[9] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, p. 1–8.

[10] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, p. 1-73.

[11] CHERKASHINA, M., VYSTAVNA, Y. (2013): Legislative aspects of water pollution in Ukraine and European Union: comparison of the principal determinants, p. 238-242.

[12] ROMANENKO, V. (2013): Environmental taxation in the European Union and Ukraine: comparative analysis, p. 1 and follows.

[13] LADYCHENKO, V., GOLOVKO, L., SHULGA, E., FESCHENKO, I., (2012): Organizational and legal mechanisms of environmental management, p. 1 and follows.

Journal Articles

CHERKASHINA, M., VYSTAVNA, Y. (2013): Legislative aspects of water pollution in Ukraine and European Union: comparison of the principal determinants, In. Journal of Kharkov National University named after V.N. Karazin, Series "Law", Issue 1062.

GOLYAN, V., SAKAL, N., TRETYAK, N. (2015): Regulation of activity of households in the context of protection of waters from pollution by nitrates from agricultural sources: Ukrainian realities and the possibility of implementing European experience, In. Agrosvit, Issue 20.

What Lies Behind the New Standard on Water Quality: Expert Opinion [Electronic resource]. http://www.ses.gov.ua/articles/1/126/chto-stoit-za-novym-standartom-kachestva-vody-mneniya-ekspertov/print.html

ROMANENKO, V. (2013): Environmental taxation in the European Union and Ukraine: comparative analysis, In. Фінансове право, Issue № 2 (24).

Council, Commission and European Parliament Documents

Council Directive 98/83 of 3 November on the quality of water intended for human consumption, OJ L 330, 05.12.1998.

Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375, 31.12.1991.

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22/12/2000.

Beginnings of the European Cybercrime Centre

Libor Klimek, Květoň Holcr, Daniela Košecká

Abstract

The paper deals with the early beginnings of the European Cybercrime Centre, which is a crucial aspect of the European Union to prevent and combat computer crime. It is divided into four sections. The first section is focused on its establishment. The second section introduces its 'legal basis' and its official opening. While the third section is focused on its reception, the last fourth section introduces its main achievements.

Keywords

European Cybercrime Centre, computer crime, legal basis, official opening, reception, achievements

1. Introduction

The world of organised crime expands its activities into cyberspace. It is trite, but nonetheless true, to say that we live in a digital age. The proliferation of digital technology, and the convergence of computing and communication devices, has transformed the way in which we socialise and do business. While overwhelmingly positive, there has also been a dark side to these developments. Proving the maxim that crime follows opportunity, virtually every advance has been accompanied by a corresponding niche to be exploited for criminal purposes.[1] The European Union has set itself the objective of maintaining and developing an Area of Freedom, Security and Justice. That concept has appeared as the second objective of the Treaty on the European Union[2]. The general policy objective of the European Union is to ensure a high level of security through measures to prevent and combat crime[3]. A crucial aspect of that field is the European Cybercrime Centre, also known as 'EC3'.

The main task of the European Cybercrime Centre is to disrupt the operations of organised crime networks that commit a large share of the serious and organised cybercrimes. Offences include those generating large criminal profits, those causing serious harm to their victims or those affecting our vital infrastructure and IT systems[4], for example, cyber-attacks, online child sexual exploitation and payment fraud. The establishment of the European Cybercrime Centre is a part of a series of measures of the European that seek fight against online crimes. It complements legislative measures such as the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography[5] and the Directive 2013/40/EU on attacks against information systems[6]. The paper deals with the early beginnings of the European Cybercrime Centre. It is divided into four sections. The first section is focused on its establishment. The second section introduces its 'legal

[1] Clough, J. (2010) Principles of Cybercrime. Cambridge University Press, Cambridge, p. 3.

[2] Article 3(2) of the Treaty on European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/13 of 30th March 2010. In-depth analysis see: Blanke, H. J., Mangiameli, S. et al. (2013) The Treaty on European Union (TEU): A Commentary, Springer, Berlin – Heidelberg, p. 157 et seq.

[3] Article 67(3) of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/47 of 30th March 2010.

[4] It should be noted that the task of the European Cybercrime Centre is not defined in any legislative instrument of the European Union. It can be observed 'only' in documents of the European Commission, for example: European Commission (2012) 'Frequently asked questions: The European Cybercrime Centre EC³', MEMO/13/06, 9th January 2012, p. 1; European Commission (2012) 'Frequently Asked Questions: the new European Cybercrime Centre', MEMO/12/221, 28th March 2012, p. 3.

[5] Directive 2011/93/EU of the European Parliament and of the Council of 13th December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. Official Journal of the European Union, L 335/1 of 17th December 2011. This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof (Article 1 of the Directive).

[6] Directive 2013/40/EU of the European Parliament and of the Council of 12th August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. Official Journal of the European Union, L 218/8, 14th August 2013. The Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of attacks against information systems. It also aims to facilitate the prevention of such offences and to improve cooperation between judicial and other competent authorities (Article 1 of the Directive). It should be noted that the Directive is intended to be consistent with the approach adopted in the Convention on cybercrime of 2001, adopted by the Council of Europe. Council of Europe, European Treaty Series No. 185 [2001], Budapest, 23rd November 2001.

basis' and its official opening. While the third section is focused on its reception, the last fourth section introduces its main achievements.

2. Establishment: A Brief Overview

An intention to establish the European Cybercrime Centre was introduced by the European Commission 2010 in the Internal Security Strategy of the European Union[7]. The Strategy identified the most urgent challenges to European Union security. It proposed five strategic objectives and specific actions for 2011-2014 which would help make the European Union more secure, namely:

- disrupt international crime networks,
- prevent terrorism and address radicalisation and recruitment,
- raise levels of security for citizens and businesses *in cyberspace* (emphasis added),
- strengthen security through border management, and
- increase Europe's resilience to crises and disasters.

As far as the third objective is concerned – raise levels of security for citizens and businesses *in cyberspace* – the European Commission argued that by 2013 the European Union would establish a cybercrime centre, through which the Member States and European Union institutions would be able to build operational and analytical capacity for investigations and co-operation with international partners. The centre would improve evaluation and monitoring of existing preventive and investigative measures, support the development of training and awareness-raising for law enforcement and judiciary, establish co-operation with the European Union Agency for Network and Information Security[8] and interface with a network of national/governmental Computer Emergency Response Teams. [9] The cybercrime centre should become *the focal point in Europe's fight against cybercrime*[10] (emphasis added) and should *act as the focal point in the fight against cybercrime in the European Union*[11] (emphasis added). Having conducted the 'Feasibility study for a European Cybercrime Centre'[12], the European Commission introduced the European Cybercrime Centre as a part of Europol[13] in the Hague[14] (the Netherlands) and as the focal point in the fight against cybercrime in the European Union. In order for the European Cybercrime Centre to provide added value, while respecting the principle of subsidiarity, the European Commission argued that the Centre should focus on the following major strands of cybercrime:[15]

- cybercrimes committed by organised crime groups, particularly those generating large criminal profits such as online fraud,
- cybercrimes which cause serious harm to their victims, such as online child sexual exploitation, and

[7] European Commission (2010) 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe', Communication from the Commission to the European Parliament and the Council, COM(2010) 637 final.

[8] Regulation (EU) No 526/2013 of the European Parliament and of the Council of 21st May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004. Official Journal of the European Union, L 77/1 of 13th March 2004; see also: European Commission (2007) 'On the evaluation of the European Network and Information Security Agency (ENISA)', communication from the Commission to the European Parliament and the Council, COM(2007) 285 final.

[9] European Commission (2010) 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe', communication from the Commission to the European Parliament and the Council, COM(2010) 637 final, p. 10.

[10] European Commission (2010) 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe', communication from the Commission to the European Parliament and the Council, COM(2010) 637 final, p. 10.

[11] European Commission (2012) 'Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre', communication from the Commission to the Council and the European Parliament, COM(2012) 140 final, p. 4.

[12] Rand Europe (2012) 'Feasibility study for a European Cybercrime Centre', Final Report (prepared for the European Commission), TR-1218-EC.

[13] Details see: Council Decision 2009/371/JHA of 6th April 2009 establishing the European Police Office (Europol). Official Journal of the European Union, L 121/37 of 15th May 2009. See also: Klimek, L. (2014) European Police Office (Europol): Past, Present and Future. Bělohlávek, A. J., Rozehnálová, N. & Černý, F (eds.), Czech Yearbook of International Law, vol. 5, The Role of Governmental and Non-governmental Organizations in the 21st Century. New York, Juris Publishing, pp. 209-228.

[14] Schjolberg, S. (2014) The History of Cybercrime: 1976-2014. Books on Demand, Norderstedt, p. 89; Bryant, R. & Stephens, P. (2014) Policing Digital Crime: the International and Organisational Context. In: Bryant, R. & Bryant, S. (eds.), Policing Digital Crime. Farnham – Burlington. Ashgate Publishing, p. 112; Cruz-Cunha, M. M., Portela, I. M. et al. (2015) Handbook of Research on Digital Crime, Cyberspace Security, and Information Assurance. Hershey, Information Science Reference, p. 203; Lloyd, I. (2014) Information Technology Law. 7th edition. Oxford University Press, Oxford, p. 201.

[15] European Commission (2012) 'Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre', communication from the Commission to the Council and the European Parliament, COM(2012) 140 final, p. 4; Zarza, Á. G. (2015) EU Networks for Administrative, Police and Judicial Cooperation in Criminal Matters. In: Zarza, Á. G. (ed.), Exchange of Information and Data Protection in Cross-border Criminal Proceedings in Europe. Heidelberg – New York – Dordrecht – London, Springer, p. 111; Schjolberg, S. (2014) The History of Cybercrime: 1976-2014. Books on Demand, Norderstedt, p. 89.

- cybercrimes (including cyber-attacks) affecting critical infrastructure and information systems in the European Union.

The European Commission pointed out that the European Cybercrime Centre should have four core *functions*:[16]

- serve as the European cybercrime information focal point,
- European cybercrime expertise to support Members States in capacity building,
- provide support to Member States' cybercrime investigations,
- become the collective voice of European cybercrime investigators across law enforcement and the judiciary.

3. Legal Basis and Official Opening

The European Cybercrime Centre has no legislative legal basis. It was established in 2012 'only' by the 'Council conclusions on the establishment of a European Cybercrime Centre'[17]. In our opinion this solution was not well designed. It is not usual approach for establishment of European Union body/unit/network in the area of criminal law co-operation in the European Union, for example, the European Union's Judicial Co-operation Unit[18] (known as Eurojust), the European Police Office[19] (known as Europol), the European Anti-fraud Office[20] (known as OLAF), or the European Judicial Network[21]. On the other hand, the Council of the European Union acknowledges in the conclusions that the establishment of the European Cybercrime Centre should be taken into consideration when revising the Europol legal basis, i.e. the Decision 2009/371/JHA of establishing the European Police Office. We are the opinion that the (future) revision of that Decision should include the legal basis of the Centre. The amended version of the Decision should provide in particular the definition of the Centre, its objectives and tasks, structure, relations to other EU bodies/units/networks, etc.[22] Official opening of the European Cybercrime Centre took place in January 2013 at the headquarters of the European Police Office in the Hague (the Netherlands). Commissioner for Home Affairs Cecilia Malmström argued – '*The Cybercrime Centre will give a strong boost to the EU's capacity to fight cybercrime and defend an internet that is free, open and secure. Cybercriminals are smart and quick in using new technologies for criminal purposes; the EC3 will help us become even smarter and quicker to help prevent and fight their crimes*'[23]. In addition, Troels Oerting, Head of the Centre argued – '*In combating cybercrime, with its borderless nature and huge ability for the criminals to hide, we need a flexible and adequate response. The European Cybercrime Centre is designed to deliver this expertise as a fusion centre, as a centre for operational investigative and forensic support, but also through its ability to mobilise all relevant resources in EU Member States to mitigate and reduce the threat from cybercriminals wherever they operate from*'[24].

4. Reception

The results of the European Cybercrime Centre has met positive approach. For example, Commissioner for Home Affairs Cecilia Malmström argued – '*Criminal behaviour is changing fast, exploiting technological developments and legal loopholes. Criminals will continue to be creative and deploy sophisticated attacks to make more money, and we must be able to keep up with them. The expertise of the EC3 is helping us to fight this battle and boost European cooperation. Through several successful, far-reaching operations in the past year, the European Cybercrime Centre has already earned well-deserved*

[16] European Commission (2012) 'Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre', communication from the Commission to the Council and the European Parliament, COM(2012) 140 final, p. 4 et seq.

[17] Council of the European Union (2012) 'Council conclusions on the establishment of a European Cybercrime Centre', 3172nd Justice and Home Affairs Council meeting, Luxembourg, 7th and 8th June 2012.

[18] Council Decision 2002/187/JHA of 28th February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by the Decision 2009/426/JHA. Official Journal of the European Communities, L 63/1 of 6th March 2002.

[19] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11th May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. Official Journal of the European Union, L 135/53, 24th May 2016.

[20] Commission Decision of 28th April 1999 establishing the European Anti-fraud Office (OLAF) as amended by the Commission Decision 2013/478/EU. Official Journal of the European Union, L 136/20 of 31st May 1999; see also: Klimek, L. (2014) 'Európsky úrad pre boj proti podvodom (OLAF)'. Justičná revue, vol. 66, no. 8-9, pp. 1101-1117.

[21] Council Decision 2008/976/JHA of 16th December 2008 on the European Judicial Network. Official Journal of the European Union, L 348/130 of 24th December 2008.

[22] Klimek, L. (2015) 'Európske centrum boja proti počítačovej kriminalite'. Justičná revue, vol. 67, no. 8-9, pp. 1032-1043.

[23] European Commission (2013) 'European Cybercrime Centre (EC3) opens on 11 January', press release No. IP/13/13, 9th January 2013.

[24] European Commission (2013) 'European Cybercrime Centre (EC3) opens on 11 January', press release No. IP/13/13, 9th January 2013.

fame amongst law enforcement agencies'[25]. Troels Örting, Head of the European Cybercrime Centre added – '*In the 12 months since EC3 opened we have been extremely busy helping EU law enforcement authorities to prevent and investigate cross-border cybercrime. I am proud and satisfied with our results so far, however we cannot rest on our laurels. I am especially worried about the increasingly complex forms of malware that are surfacing, along with more technologically advanced cyber-scams, and the so-called 'sextortion' of minors. We have only seen the tip of the iceberg, but EC3, backed by our valued stakeholders and partners, is dedicated to supporting Member States' future frontline cybercrime operations*'[26]. In addition, scholars also share optimism. For example, *Zarza* argues that '[*a*] *major step forward in the prevention and fight against cybercrime was done*'[27].

5. Main Achievements

The European Cybercrime Centre has supported and co-ordinated operations and investigations conducted by Member States' authorities in several areas. Recent examples include:[28]

1. high-tech crimes (cyber-attacks, malware),
2. online child sexual exploitation, and
3. payment fraud.

Ad 1) In its first year, the European Cybercrime Centre assisted in the co-ordination of major cybercrime operations, for example: International investigations *Ransom* and *Ransom II* were concluded between the Member States of the European Union. They were related to so-called Police Ransomware – a type of malware that blocks the victim's computer, accusing the victim of having visited illegal websites containing child abuse material or other illegal activity. Criminals request the payment of a 'fine' to unblock the victim's computer, making the Ransomware look as if it comes from a legitimate law enforcement agency. Cybercriminals convince the victim to pay the 'fine' of around 100 € through two types of payment gateways – virtual and anonymous. The criminals investigated by European Cybercrime Centre infected tens of thousands of computers worldwide, bringing in profits in excess of 1 million € per year. Thirteen arrests were made (mainly in Spain) and the networks were broken up. The European Cybercrime Centre has also supported several international initiatives in the areas of botnet takedowns, disruption and investigation of criminal forums and malware attacks against financial institutions, such as the recent takedown of the *ZeroAccess* botnet together with Microsoft and high-tech crime units from Germany, the Netherlands, Latvia, Luxembourg and Switzerland.

Ad 2) The European Cybercrime Centre supported large child sexual exploitation police operations within the European Union. In the first year significant efforts – jointly with many Member States and non-EU co-operation partners – were put into combating the illegal activities of paedophiles engaged in the online sexual exploitation of children using hidden services. The European Cybercrime Centre was involved in many operations and joint investigations targeting the production and distribution of child abuse material on various internet platforms. It was providing ongoing operational and analytical support to investigations on the dark net, where paedophiles trade in illicit child abuse material in hidden forums, as well as to investigations into sextortion[29].

Ad 3) As far as payment fraud is concerned, the European Cybercrime Centre provided operational and analytical support to investigations of the Member States of the EU. In 2013 it supported investigations resulting in different international networks of credit card fraudsters being dismantled, for example:

- An operation led to the arrest of 29 suspects who had made a 9 million € profit by compromising the payment credentials of 30.000 credit card holders.
- A network that was tackled resulted in tens arrests during the operation in several Member States of the European Union, two illegal workshops for producing devices and software to manipulate Point-of-Sale terminals dismantled, illegal electronic equipment, financial data, cloned cards, and cash seized; the organised crime group had affected approximately 36.000 bank/credit card holders in 16 European States.
- An operation targeted an Asian criminal network responsible for illegal transactions and the purchasing of airline tickets. Two members of the criminal gang, travelling on false documents, were arrested at Helsinki airport. Around 15.000 compromised credit card numbers were found on seized computers. The network had been using

[25] European Commission (2014) 'European Cybercrime Centre – one year on', press release No. IP/14/129, 10th February 2014.

[26] European Commission (2014) 'European Cybercrime Centre – one year on', press release No. IP/14/129, 10th February 2014.

[27] Zarza, Á. G. (2015) EU Networks for Administrative, Police and Judicial Cooperation in Criminal Matters. In: Zarza, Á. G. (ed.), Exchange of Information and Data Protection in Cross-border Criminal Proceedings in Europe. Heidelberg – New York – Dordrecht – London, Springer, p. 111.

[28] European Cybercrime Centre (2014) 'First Year Report' (report of 2013, published in 2014); European Commission (2014) 'European Cybercrime Centre – one year on', press release No. IP/14/129, 10th February 2014.

[29] *Sextortion* is the term given to the phenomenon where child abusers gain access to inappropriate pictures of minors and use the images to coerce victims into further acts or the abuser will forward the images to family and friends of the victim.

card details stolen from cardholders worldwide. In Europe, over 70.000 € in losses were suffered by card holders and banks.

- An operation against airline fraudsters using fraudulent credit cards to purchase airline tickets was co-ordinated by the European Cybercrime Centre in 38 airports from 16 European States. During the operation, more than 200 suspicious transactions were reported by the industry and over hundred individuals were arrested in total. These were all found to be linked to other criminal activities, such as the distribution of credit card data via the internet, intrusions into financial institutions' databases, other suspicious transactions, drug trafficking, human smuggling, counterfeit documents including IDs, and other types of fraud. Some of those detained were already wanted by judicial authorities under European arrest warrants[30].

6. Conclusion

An intention to establish the European Cybercrime Centre was introduced by the European Commission 2010 in the Internal Security Strategy, which identified the most urgent challenges to European Union security. the European Commission argued that by 2013 the European Union would establish a cybercrime centre, through which the Member States and European Union institutions would be able to build operational and analytical capacity for investigations and co-operation with international partners. The centre would improve evaluation and monitoring of existing preventive and investigative measures, support the development of training and awareness-raising for law enforcement and judiciary, etc. The European Cybercrime Centre was established in 2012 by the 'Council conclusions on the establishment of a European Cybercrime Centre'. In our opinion that solution is not well designed. It is not usual approach for establishment of European Union body/unit/network in the area of criminal law co-operation in the European Union. Official opening of the Centre took place in January 2013 at the headquarters of the European Police Office in the Hague (the Netherlands). A question which begs consideration is whether the European Cybercrime Centre has become the focal point in Europe's fight against cybercrime and should act as the focal point in the fight against cybercrime in the European Union. At the time of writing it is too early evaluate whether the Centre reached ideas of the European Commission. However, its initial success has been proven, since its has met positive approach. The Centre has supported and co-ordinated operations and investigations conducted by Member States' authorities in several areas, for example high-tech crimes (cyber-attacks, malware), online child sexual exploitation and payment fraud.

[30] See: Council Framework Decision 2002/584/JHA of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States. Official Journal of the European Communities, L 190/1 of 18th July 2002; see also: Ivor, J., Klimek, L. et Záhora, J. (2013) Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky. Žilina, Eurokódex, p. 535 et seq.; Klimek, L. (2015) European Arrest Warrant, Cham – Heidelberg – New York – Dordrecht – London, Springer, 375 pages.

Books

BLANKE, H. J., MANGIAMELI, S. et al. (2013): The Treaty on European Union (TEU): A Commentary, Springer, Berlin – Heidelberg, 1813 pages.

BRYANT, R. & STEPHENS, P. (2014): Policing Digital Crime: the International and Organisational Context. In: Bryant, R. & Bryant, S. (eds.), Policing Digital Crime. Farnham – Burlington. Ashgate Publishing, pp. 111-122.

CLOUGH, J. (2010): Principles of Cybercrime. Cambridge University Press, Cambridge, 579 pages.

CRUZ-CUNHA, M. M., PORTELA, I. M. et al. (2015): Handbook of Research on Digital Crime, Cyberspace Security, and Information Assurance. Hershey, Information Science Reference, 602 pages.

LLOYD, I. (2014): Information Technology Law. 7th edition. Oxford University Press, Oxford, 546 pages.

Schjolberg, S. (2014) The History of Cybercrime: 1976-2014. Books on Demand, Norderstedt, 224 pages.

ZARZA, Á. G. (2015): EU Networks for Administrative, Police and Judicial Cooperation in Criminal Matters. In: Zarza, Á. G. (ed.), Exchange of Information and Data Protection in Cross-border Criminal Proceedings in Europe. Heidelberg – New York – Dordrecht – London, Springer, pp. 107-113.

Journal Articles

KLIMEK, L. (2015): 'Európske centrum boja proti počítačovej kriminalite'. Justičná revue, vol. 67, no. 8-9, pp. 1032-1043.

Other sources

Treaty on European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/13 of 30th March 2010.

Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/47 of 30th March 2010.

Council of the European Union (2012) 'Council conclusions on the establishment of a European Cybercrime Centre', 3172nd Justice and Home Affairs Council meeting, Luxembourg, 7th and 8th June 2012.

European Commission (2010) 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe', Communication from the Commission to the European Parliament and the Council, COM(2010) 637 final.

European Commission (2012) 'Frequently asked questions: The European Cybercrime Centre EC³', MEMO/13/06, 9th January 2012.

European Commission (2012) ‘Frequently Asked Questions: the new European Cybercrime Centre’, MEMO/12/221, 28th March 2012.
European Commission (2012) ‘Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre’, communication from the Commission to the Council and the European Parliament, COM(2012) 140 final.
European Commission (2013) ‘European Cybercrime Centre (EC3) opens on 11 January’, press release No. IP/13/13, 9th January 2013.
European Commission (2014) ‘European Cybercrime Centre – one year on’, press release No. IP/14/129, 10th February 2014.
European Cybercrime Centre (2014) ‘First Year Report’ (report of 2013, published in 2014).
Rand Europe (2012) ‘Feasibility study for a European Cybercrime Centre’, Final Report (prepared for the European Commission), TR-1218-EC.

Note: The contribution was elaborated as a part of the research project VEGA ‘Súčasnosť a budúcnosť boja proti počítačovej kriminalite: kriminologické a trestnoprávne aspekty’ [transl.: Present and Future of Cyber-crime: Criminological and Criminal Aspects] No. 1/0231/15.

Recovery outstandings in Slovak republic with the elements of international cooperation

Roman Pauliček

Abstrakt

Predkladaný príspevok sa venuje mechanizmom fungovania vymáhania pohľadávok z hľadiska smerovania kodifikácie Európskych smerníc pri vymáhaní daňových pohľadávok týkajúcich sa určitých poplatkov, odvodov a daní. Taktiež sú riešené pramene právnej úpravy vymáhania pohľadávok a ďalšie súvisiace činnosti s touto tematikou. Otázky vymožiteľnosti práva všeobecne sú najčastejšou témou odbornej i laickej verejnosti v oblasti práva na Slovensku.

Kľúčové slová

Daňová pohľadávka, dane a odvody, vymožiteľnosť práva, výber daní

Abstract

The present paper deals with the operating arrangements of recovery in terms of leading the codification of European directives for the recovery of tax claims relating to certain levies, duties and taxes. They are also designed springs legislation recovery and other related activities on this topic. Questions of law enforcement in general are the most common topic of professional and general public in the areas of Slovakia.

Key words

Tax outstandings, taxes and fees, law enforcement, tax collection

1. Úvod

Vnútroštátne ako aj medzinárodné vymáhanie daňových pohľadávok je z hľadiska aktuálnosti stále zaujímavou a odborníkmi stále neutíchajúcou témou, ktorá sa neustále vyvíja smerom vpred k lepšiemu dosiahnutiu vymožiteľnosti práva v SR ako aj v krajinách EU a ich vzájomnej spolupráci. Taktiež úzko súvisiaca téma vymáhania daňových pohľadávok v Slovenskej republike je neodmysliteľnou kapitolou, ktorá v samej podstate vymáhania pohľadávok patrí k tým témam, ktoré budú neustále rezonovať a upozorňovať na každodenné problémy v tejto oblasti. Vzájomná pomoc medzi členskými štátmi EU pri vymáhaní pohľadávok, ktoré majú členské štáty voči sebe, ako aj pri vymáhaní pohľadávok Únie v súvislosti s určitými daňami a inými opatreniami prispieva k riadnemu fungovaniu vnútorného trhu. Zabezpečuje sa ňou daňová neutralita, ktorá umožňuje členským štátom v prípade cezhraničných transakcií odstraňovať diskriminačné ochranné opatrenia. Ich zmyslom je zabraňovať podvodom a rozpočtovým stratám.

Pod „vymožiteľnosťou práva“ rozumieme súhrn zákonných a faktických možností na dosiahnutie uspokojenia zákonným spôsobom uplatneného právneho nároku, vrátane výkonu rozhodnutia. Medzi základné úlohy právneho štátu patrí vytvorenie právnych a faktických garancií uplatňovania a ochrany základných práv a slobôd svojich občanov. Ústavnoprávne základy vymožiteľnosti práva sú dané najmä právom na súdnu a inú právnu ochranu (čl. 46 Ústavy SR a čl. 6 Dohovoru o ochrane ľudských práv a základných slobôd). Čl. 46 ods. 1 a 4 Ústavy SR - Každý sa môže domáhať zákonom ustanoveným postupom svojho práva na nezávislom a nestrannom súde, resp. na inom orgáne Slovenskej republiky; podmienky a podrobnosti o súdnej a inej právnej ochrane ustanoví zákon. Mechanizmy vzájomnej pomoci pri vymáhaní sa prvýkrát vymedzili v smernici Rady 76/308/EHS z 15. marca 1976 o vzájomnej pomoci pri refundácii pohľadávok vyplývajúcich z činností, ktoré tvoria časť systému financovania Európskeho poľnohospodárskeho usmerňovacieho a záručného fondu a o poľnohospodárskych poplatkoch a clách. Uvedená smernica a akty, ktorými sa zmenila a doplnila, boli kodifikované smernicou Rady 2008/55/ES z 26. mája 2008 o vzájomnej pomoci pri vymáhaní pohľadávok týkajúcich sa určitých poplatkov, odvodov, daní a ďalších opatrení . V zozname preberaných právnych aktov EÚ sa táto Smernica Rady 2008/55/ES nahradila novou smernicou č. 2010/24/EÚ. Týmto zákonom sa navrhovalo zlúčenie Daňového riaditeľstva SR s Colným riaditeľstvom SR a tým sa v súčasnosti vytvorilo Finančného riaditeľstva SR.

2. Súčasný stav problematiky doma a v zahraničí

Štát ako základný pilier spoločnosti, ktorý by mal plniť distribučnú funkciu, musí byť schopný získať dostatok zdrojov do svojho systému samotného fungovania. Najvyššou a nesporne aj najdôležitejšou zložkou príjmovej stránky štátneho rozpočtu sú daňové príjmy. Dane boli už od dávnych čias zdrojom príjmov pre vládnucu elitu. Súčasná tendencia nie je chápať vyberanie daní ako cieľ procesu platenia daní, ale chápať ho ako prostriedok, ktorý napomáha naplniť iný z cieľov.

Aj keď ani jeden z týchto zákonov nestanoví za nedodržanie naplnenia príjmovej stránky štátneho rozpočtu žiadne sankcie, je nutné, aby štát mal prostriedky na to, aby bol schopný vybrať zdroje v takej výške, v akej to zákon predurčuje. Je logické, že tieto finančné prostriedky štát získava od tých, ktorí sú povinní dane platiť. Nie každý túto povinnosť plní dobrovoľne. Aj keď všetky subjekty povinné platiť dane vedia, že platenie daní je nutným zlom a štát si tieto peniaze vynúti zákonným spôsobom, sú aj takí, ktorí sa rozhodnú túto povinnosť obísť, či z rôznych dôvodov porušiť. Práve tu prichádza prostriedok či nástroj v podobe inštitútu daňovej exekúcie, resp. možnosti vymáhať na povinných subjektoch splnenie ich zákonom stanovenej povinnosti, teda zaplatenie dane. Keďže tak Česká ako aj Slovenská republika sú štáty demokratické a právne, uznávajú ako jednu zo základných zásad svojich právnych poriadkov rovnosť. Rovnosť je zásadou, ktorá sa uplatňuje aj vo výbere daní, a prípadne následnej daňovej exekúcii. Rovnosť spočíva nie len v tom, že má každý v rovnakom zákonom predpokladanom prípade rovnaké práva, ale i v tom, že má rovnaké povinnosti. Z tohto pohľadu je možné daňovú exekúciu vnímať nie len ako pomocný nástroj, či prostriedok, ale dokonca ako povinnosť štátu zabezpečiť rovnosť, rovný prístup ku všetkým povinným subjektom. EÚ vypracovala komplexný súbor nástrojov na zlepšenie schopnosti členských štátov bojovať proti daňovým podvodom a únikom. Tento súbor obsahuje právne predpisy EÚ (o zlepšenej transparentnosti, výmene informácií a administratívnej spolupráci), koordinované opatrenia odporúčané členským štátom (napríklad postupy proti agresívnemu daňovému plánovaniu a daňovým rajom) a odporúčania pre jednotlivé krajiny týkajúce sa zintenzívnenia boja proti daňovým podvodom ako súčasť európskeho semestra správy ekonomických záležitostí. Komisia navyše predstavila osobitný akčný plán, v ktorom stanovila kľúčové opatrenia, ktoré členským štátom pomôžu v boji proti daňovým podvodom a únikom v oblasti priameho a nepriameho zdaňovania. SR postupne implementovala do svojej vnútroštátnej právnej úpravy celý rad týchto nástrojov v podobe zmien právnych predpisov. Prijatím nového procesného predpisu zákona č. 563/2009 Z. z. o správe daní (Daňový poriadok), ako aj nového kompetenčného zákona pre oblasť daňovej a colnej správy nastalo zavŕšenie prvej fázy reformy daňovej a colnej správy s výhľadom zjednotenia výberu daní, cla a poistných odvodov. Účelom tejto reformy bolo zmeniť daňovú a colnú správu tak, aby bola efektívnejšia v zmysle zníženia vlastných nákladov, účinnejšia z pohľadu výberu štátnych príjmov a zároveň proklientsky orientovaná s cieľom zjednodušenia procesov a odstránenia nadbytočnej byrokracie a záťaže na strane povinného subjektu, no predovšetkým pripravená na prevzatie úlohy miesta zjednoteného výberu daní a cla s predpokladom pripojenia výberu poistných odvodov k 1. januáru 2013. Smernica Rady 2010/24/EÚ zo 16. marca 2010 o vzájomnej pomoci pri vymáhaní pohľadávok vyplývajúcich z daní, poplatkov a ďalších opatrení sa vzťahuje na pohľadávky, ktoré sa týkajú predovšetkým všetkých daní a poplatkov akéhokoľvek druhu, ktoré vyberá členský štát alebo jeho územný či správny celok vrátane miestnych orgánov, alebo ktoré sa vyberajú v jeho mene alebo v mene Únie. Do rozsahu pôsobnosti tejto smernice patria správne sankcie, pokuty, poplatky a prirážky súvisiace s pohľadávkami, pri ktorých je možné požiadať o vzájomnú pomoc, uložené správnymi orgánmi, ktoré sú príslušné vyberať predmetné dane alebo poplatky alebo vykonávať správne vyšetrovanie súvisiace s týmito daňami alebo poplatkami, alebo potvrdené na žiadosť týchto správnych orgánov správnymi alebo súdnymi orgánmi.

3. Pramene právnej úpravy vymáhania pohľadávok

V záujme lepšej ochrany finančných záujmov členských štátov a zabezpečenia neutrality na vnútornom trhu je potrebné rozšíriť rozsah uplatňovania vzájomnej pomoci pri vymáhaní na pohľadávky týkajúce sa daní a poplatkov, na ktoré sa zatiaľ nevzťahuje vzájomná pomoc pri vymáhaní, pričom v snahe zvládnuť zvýšený počet žiadostí o pomoc a dosiahnuť lepšie výsledky je nevyhnutné, aby táto pomoc bola efektívnejšia, účinnejšia a ľahšie uplatniteľná v praxi. Zákon o medzinárodnej pomoci pri vymáhaní pohľadávok č. 466/2009 Z. z. o medzinárodnej pomoci pri vymáhaní niektorých finančných pohľadávok a o zmene a doplnení niektorých zákonov upravuje postup a podmienky, podľa ktorých príslušný orgán Slovenskej republiky poskytuje, požaduje a prijíma medzinárodnú pomoc pri vymáhaní niektorých finančných pohľadávok. Predmet úpravy tohto zákona bol donedávna plne v súlade so smernicou Rady 2008/55/ES o vzájomnej pomoci pri vymáhaní pohľadávok týkajúcich sa určitých poplatkov, odvodov, daní a ďalších opatrení. V zozname preberaných právnych aktov EÚ sa táto Smernica Rady 2008/55/ES nahradila novou smernicou č. 2010/24/EÚ.[1] Týmto zákonom sa navrhovalo zlúčenie Daňového riaditeľstva SR s Colným riaditeľstvom SR a tým sa v súčasnosti vytvorilo Finančného riaditeľstva SR. Znenie § 15 ods. 2 a 3 ustanovuje doručovanie žiadostí v súvislosti s medzinárodnou pomocou ako aj jednotného exekučného titulu elektronickými prostriedkami, prípadne iných dokumentov. V súlade so smernicou č. 2010/24/EÚ sa doručovanie uskutočňuje elektronicky prostredníctvom štandardného formulára, ktorého vzory upravuje vykonávacie nariadenie Komisie (ES) k transponovanej smernici. Taktiež sa ustanovuje, že v prípade, ak nie je možné doručiť písomnosti elektronicky, písomnosti sa doručia poštou. Predmet úpravy sa vzťahuje na vymáhanie peňažných pohľadávok a v prípade pohľadávok v pôsobnosti

[1] http://www.ulclegal.com/sk/bulletin-pro-bono/podnikatelia/4069-medzinarodna-pomoc-pri-vymahani-niektorych-financnych-pohladavok.

ministerstva pôdohospodárstva aj na nepeňažné pohľadávky. Po pristúpení Slovenskej republiky k Európskej únii bol postup pri vymáhaní upravený zákonom č. 446/2002 Z. z. o vzájomnej pomoci pri vymáhaní niektorých finančných pohľadávok – implementácia smernice 76/308/EHS o vzájomnej pomoci pri vymáhaní pohľadávok týkajúcich sa určitých poplatkov, ciel, daní a iných opatrení. Zákon č. 466/2009 Z. z. o medzinárodnej pomoci pri vymáhaní niektorých finančných pohľadávok a o zmene a doplnení niektorých zákonov,ktorý schválila Národná rada Slovenskej republiky v mesiaci október 2009 nadobudol účinnosť 15. decembra 2009. Týmto zákonom sa zrušuje zákon č. 446/2002 Z. z. o vzájomnej pomoci pri vymáhaní niektorých finančných pohľadávok v znení neskorších predpisov. Rekodifikovaný zákon o medzinárodnej pomoci pri vymáhaní pohľadávok vo svojej podstate nadväzuje na pôvodný zákon, ktorý je z hľadiska svojho obsahu s pôvodným zákonom takmer totožný.[2]

4. Spôsoby vymáhania pohľadávok v SR

Slovenská republika je demokratickým a právnym štátom, čomu nasvedčuje aj právny poriadok SR kde sa uplatňuje jedna zo zásad rovnosti práve pri výbere daní. Práve rovnosť je zásadou, ktorá sa uplatňuje vo výbere daní a prípadne následnej daňovej exekúcii. Rovnosť spočíva nie len v tom, že má každý v rovnakom zákonom predpokladanom prípade rovnaké práva, ale i v tom, že má rovnaké povinnosti. Z tohto pohľadu je možné daňovú exekúciu vnímať nie len ako pomocný nástroj, či prostriedok, ale dokonca ako povinnosť štátu zabezpečiť rovnosť, rovný prístup ku všetkým povinným subjektom. V duchu spomínanej vízie daňovej správy Slovenskej republiky je tiež zrejmé, že daňová exekúcia nie je a v právnom štáte by ani nemala byť vnímaná ako cieľ či účel procesu platenia daní, pretože ani samotný výber daní nie je cieľom, ale len prostriedkom k spokojnosti občanov. Štát nemá záujem na čo najvyššom počte daňových exekúcií. Tak ako každý dobrý hospodár, aj štát je spokojný ak dostane to, čo mu patrí pri čo najmenšej možnej námahe, čo najrýchlejšie a pri čo najnižších možných nákladoch spojených s výberom daní.[3] Problematika vymáhania daňových pohľadávok v Slovenskej republike nemá len vnútroštátny kontext, ale aj európsky a má tiež zásadný význam tak z hľadiska právno-teoretického, ako aj z pohľadu aplikačnej praxe. Prijatím nového procesného predpisu zákona č. 563/2009 Z. z. o správe daní (daňový poriadok), ako aj nového kompetenčného zákona pre oblasť daňovej a colnej správy dochádza k zavŕšeniu prvej fázy reformy daňovej a colnej správy s výhľadom zjednotenia výberu daní, cla a poistných odvodov prijatej uznesením vlády č. 285 zo 7. mája 2008. Pri samotnom vymáhaní pohľadávky vo vzťahu k členským štátom Európskej únie sa v Slovenskej republike postupuje podľa zákona č. 563/2009 Z. z. o správe daní (daňový poriadok). Tento zákon upravuje správu daní, práva a povinnosti daňových subjektov a iných osôb, ktoré im vzniknú v súvislosti so správou daní. Na účely tohto zákona sa rozumie správou daní postup súvisiaci so správnym zistením dane a zabezpečením úhrady dane a ďalšie činnosti podľa tohto zákona alebo osobitných predpisov. Taktiež sa na účely tohto zákona rozumie daňou daň podľa osobitných predpisov vrátane úroku z omeškania, úroku a pokuty podľa tohto zákona alebo osobitných predpisov a miestny poplatok za komunálne odpady a drobné stavebné odpady podľa osobitného predpisu.[4] Podľa tohto zákona sa rozumie daňovým konaním konanie, v ktorom sa rozhoduje o právach a povinnostiach daňových subjektov a daňovým preplatkom suma platby, ktorá prevyšuje splatnú daň. Daňovou pohľadávkou sa rozumie pohľadávka správcu dane na dani do lehoty splatnosti dane, ak tento zákon neustanovuje inak a daňovým nedoplatkom dlžná suma dane po lehote splatnosti dane. Každý veriteľ si môže zvoliť taký spôsob na vymáhanie dlžnej čiastky, aký mu najviac vyhovuje. V každom prípade ale musí byť takýto spôsob legálny a jeho vykonávanie musí byť v súladu s platným právnym poriadkom Slovenskej republiky. Jedným zo spôsobov je vymáhanie pohľadávky prostredníctvom upomienok od samotného veriteľa. Ten sa snaží, aby dlžník zaplatil a verí, že v prípade napomínania si túto svoju povinnosť splní. Tento spôsob však nie je natoľko efektívny, ako si niektorí veritelia myslia. Predsa len dlžníci tiež poznajú svoje práva a vedia, že sa im týmto spôsobom (pokiaľ ide len o upomienky) nemôže nič stať. Na svoje povinnosti akosi zabúdajú. Asi najčastejším spôsobom, ktorý veritelia praktizujú, je podanie žaloby na zaplatenie konkrétnej dlžnej čiastky. Súd vydá platobný rozkaz a po nadobudnutí právnej moci je spravidla do troch dní dlžník povinný uhradiť dlžnú čiastku, súdny poplatok a náklady konania, ktoré žalobcovi vznikli. V dnešnej dobe sa stretávame s tým, že si veriteľ najme právnika alebo advokátsku kanceláriu, ktorá ho v tejto veci zastupuje a práve rieši tieto súdne veci. V takomto prípade potom musí dlžník zaplatiť aj náklady advokátskej kancelárie podľa platných cenníkov. V prípade, že dlžník nezaplatí po vydaní platobného rozkazu alebo rozsudku pre uznanie, môže veriteľ pristúpiť k ďalšiemu kroku, ktorý opäť dlžníka stojí peniaze navyše a tým je exekučné konanie. Platobný rozkaz alebo rozsudok pre uznanie totiž slúži ako exekučný titul, na základe ktorého je možné vydať uznesenie o nariadení exekúcie. V tomto prípade musí dlžník uhradiť navyše ešte náklady exekútora a ďalšie náklady advokátskej kancelárie opäť podľa cenníku.[5]

[2] http://www.cus.sk/manualy/orig/2012-11-13/Rek%20z%C3%A1 kony%20563.doc.

[3] REVIĽAKOVÁ, Z. (2009): Komparácia vymáhania daňových nedoplatkov v Českej republike a na Slovensku, 2009, http://is.muni.cz/th/134436/pravf_m/diplomka.txt.

[4] Zákon č. 563/2009 Z.z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov.

[5] http://www.vymahaniepohladavok.net/sposoby-vymahania-pohladavok.

5. Doručovanie písomností v SR

Príslušné orgány Slovenskej republiky zabezpečia doručenie písomností súvisiacich s pohľadávkou alebo vymáhaním pohľadávky adresátovi len na základe žiadosti príslušného orgánu iného členského štátu. Príslušné orgány Slovenskej republiky sú taktiež oprávnené požiadať príslušný úrad iného členského štátu EÚ o doručenie nimi vydaných rozhodnutí a iných písomností súvisiacich s pohľadávkou alebo s vymáhaním pohľadávky. Žiadosť o doručenie musí obsahovať náležitosti uvedené v tomto zákone. Vymáhanie finančnej pohľadávky iného členského štátu Európskej únie bolo možné začať len na základe žiadosti, ktorá musí obsahovať náležitosti ustanovené týmto zákonom a nariadením Komisie (ES) č. 1179/2008, ako aj vyhlásenie príslušného úradu členského štátu, ktorý žiada o vymáhanie toho, že ním vydaný exekučný titul nie je napadnutý opravnými prostriedkami a že vymáhanie pohľadávky bolo uskutočnené, ale neviedlo k úplnému vymoženiu pohľadávky. K žiadosti musí byť doložený exekučný titul. Doručovanie písomností v daňovom konaní sa spravidla vykonáva správcom dane, ktorý doručuje písomnosť elektronickými prostriedkami. Ak je to účelné a možné, písomnosti doručujú zamestnanci správcu dane. Ak písomnosť nie je možné doručiť spôsobom podľa vyššie uvedeného spôsobu, správca dane doručuje písomnosť prostredníctvom poskytovateľa poštových služieb, iného orgánu, ak to ustanovuje osobitný predpis alebo verejnej vyhlášky. Ak má adresát zástupcu s plnomocenstvom na účely správy daní, doručuje sa písomnosť len tomuto zástupcovi. Ak má však adresát osobne pri správe daní niečo vykonať, doručuje sa písomnosť jemu aj jeho zástupcovi. Ak nejde o doručovanie elektronickými prostriedkami, doručuje sa písomnosť na adresu na území členského štátu, ktorú daňový subjekt oznámil správcovi dane; inak sa doručuje písomnosť fyzickej osobe na adresu trvalého pobytu a právnickej osobe na adresu sídla.

5.1. Doručovanie do vlastných rúk

Do vlastných rúk sa doručujú písomnosti ak je deň doručenia rozhodujúci pre začiatok plynutia lehoty, ktorej nesplnenie by pre adresáta mohlo byť spojené s právnou ujmou, alebo ak tak určí správca dane. Ak nebola fyzická osoba, ktorej má byť písomnosť doručená do vlastných rúk, zastihnutá v mieste doručenia, upovedomí ju doručovateľ vhodným spôsobom, že písomnosť príde doručiť znovu v určený deň a hodinu. Ak bude nový pokus o doručenie bezvýsledný, uloží doručovateľ písomnosť na pošte a fyzickú osobu o tom vhodným spôsobom vyrozumie. Ak si nevyzdvihne fyzická osoba písomnosť do 15 dní od jej uloženia, považuje sa posledný deň tejto lehoty za deň doručenia, aj keď sa fyzická osoba o uložení nedozvedela.[6]

5.2. Doručovanie elektronickými prostriedkami

Jednou z ďalších možností správcu dane na doručenie písomnosti je doručovanie elektronickými prostriedkami, na ktoré sa vzťahujú ustanovenia tohto zákona a osobitného predpisu. Elektronický dokument musí byť podpísaný zaručeným elektronickým podpisom. Správca dane doručuje elektronický dokument osobe a daňovému subjektu, ktorý o to požiada. Elektronický dokument sa doručuje do elektronickej osobnej schránky subjektu. Elektronický dokument zaslaný do elektronickej osobnej schránky je doručený okamihom, keď osoba subjekt s prístupom do elektronickej osobnej schránky prijme uvedený dokument. Ak osoba neprijme elektronický dokument do 15 dní odo dňa jeho zaslania do elektronickej osobnej schránky, považuje sa tento elektronický dokument za doručený posledným dňom tejto lehoty, aj keď sa osoba o doručení nedozvedela. Elektronické doručovanie sa považuje za doručenie do vlastných rúk. Doručovanie elektronickými prostriedkami sa vzťahuje aj na finančné riaditeľstvo a ministerstvo.

5.3. Doručovanie mimo územia Slovenskej republiky

Adresátovi, ktorý má sídlo alebo bydlisko na území členského štátu mimo územia Slovenskej republiky a jeho sídlo alebo bydlisko je známe, doručujú sa písomnosti priamo. Ak je potrebné doručiť písomnosť adresátovi do vlastných rúk, zašle sa písomnosť na medzinárodnú návratku; správca dane môže písomnosť doručiť aj podľa osobitných predpisov. Ak si takýto adresát určí zástupcu na doručovanie, doručujú sa písomnosti tomuto zástupcovi. Adresátovi, okrem adresáta, ktorým je daňový subjekt podľa § 9 ods. 11 zákona č. 563/2009 Z.z. alebo zástupca podľa § 9 ods. 2 a ktorý má sídlo alebo bydlisko mimo územia členského štátu a jeho sídlo alebo bydlisko je známe, doručujú sa písomnosti priamo. Ak sa doručuje písomnosť adresátovi do vlastných rúk, zašle sa písomnosť na medzinárodnú návratku; správca dane môže písomnosť doručiť aj podľa osobitných predpisov.[7]

5.4. Doručovanie verejnou vyhláškou

Ak nie je správcovi dane známy pobyt alebo sídlo adresáta, doručí písomnosť verejnou vyhláškou. Tento spôsob doručenia sa vykoná v mieste posledného pobytu alebo sídla adresáta tak, že obec na žiadosť správcu dane vyvesí po dobu 15 dní spôsobom v mieste obvyklým oznámenie o mieste uloženia písomnosti s jej presným označením. Obec potvrdí

[6] https://www.drsr.sk/dokumenty.

[7] https://www.financnasprava.sk/_img/pfsedit/Dokumenty_PFS/Profesionalna_zona/Dane/Metodicke_pokyny/Danovy_proces/Informacia_k_ust_par9.pdf.

dobu vyvesenia; posledný deň tejto lehoty sa považuje za deň doručenia. Oznámenie o mieste uloženia písomnosti sa vyvesí aj v sídle správcu dane, ktorého písomnosť má byť adresátovi doručená. Doručovanie verejnou vyhláškou sa považuje za doručenie do vlastných rúk.

6. Modely daňového zvýhodnenia

Dôvodom využívania medzinárodného daňového plánovania môžu byť rôzne dôvody. Dominuje však snaha po úspore daní, t. j. ako docieliť efektívnu daňovú optimalizáciu v tom najširšom slova zmysle. Pokiaľ by sme to chceli rozmeniť na drobné, tak účelom, ale najmä motívom môže byť minimalizácia alebo úspora daní, využitie výhod odlišného právneho prostredia, ochrana majetku, snaha po regulácii niektorých podnikateľských aktivít alebo snaha zachovať anonymitu vlastníctva. Preferenčné daňové režimy súčasného globálneho sveta ponúkajú najmä tieto modely daňového zvýhodnenia:

- individuálne daňové zvýhodnenia ponúknuté veľkým strategickým investorom
- daňové zvýhodnenia pre holdingy
- daňové zvýhodnenia využívajúce teritoriálny princíp zdanenia
- daňové zvýhodnenia spočívajúce v aplikácii zníženej sadzby dane z príjmov (napríklad Holandské Antily, Cyprus, Maďarsko)
- daňové výhody vyplývajúce z paušálneho oslobodenia pre niektoré subjekty (napríklad Seychely, Britské Panenské ostrovy)
- daňové zvýhodnenia v krajinách, kde neexistuje žiadna daň z príjmov (Bahamy, Anguilla, Kajmanské ostrovy).

Podľa týchto kritérií sa v internacionálnom daňovom plánovaní vyprofilovali štyri hlavné skupiny krajín:

- krajiny ponúkajúce individuálne daňové výhody (napríklad aj Slovenská republika v prípade zahraničných investorov,
- vyspelé krajiny s vysokým daňovým zaťažením, avšak s ponukou daňového zvýhodnenia pre holdingy alebo iné podobné zvýhodnenia (napríklad aj členské krajiny Európskej únie ako Belgicko, Francúzsko, Dánsko, Rakúsko, Veľká Británia),
- vyspelé krajiny umožňujúce vznik daňovo oslobodených subjektov (Hongkong, Panama, Jersey a Guernsey),
- typické daňové raje – tzv. off-shore (prevažne ostrovy v atraktívnych dovolenkových teritóriách, ktoré nemajú daň z príjmov a pre firmy etablované v ich krajine zaviedli len relatívne nízke ročné paušálne poplatky.[8]

[8] BURÁK, E. (2004): http://www.sme.sk/c/1631179/danove-raje-moznost-uspory-dani-i-exotickej-dovolenky.html.

Z hľadiska medzinárodného práva súkromného v tejto súvislosti vystupuje do popredia problematika možnosti zakladania pobočiek (filiálok) spoločností mimo krajiny, kde je založená a registrovaná spoločnosť (fiktívne sídlo).

7. Záver

Medzinárodná pomoc pri vymáhaní pohľadávok sa vo vzťahu k členským štátom vzťahuje na pohľadávky týkajúce sa všetkých daní, poplatkov akéhokoľvek druhu, dovozného alebo vývozného cla, ktoré vyberá členský štát, jeho územný celok alebo jeho správny celok vrátane miestnych orgánov, alebo ktoré sa vyberajú v mene členského štátu alebo v mene Európskej únie, okrem povinných odvodov sociálneho zabezpečenia a poplatkov zmluvnej povahy. V súvislosti s vymáhaním daňových pohľadávok v SR si obmedzením daňových podvodov a únikov môžu nielen členské štáty zvýšiť daňové príjmy, vďaka čomu budú mať takisto väčší priestor na reštrukturalizáciu svojich daňových systémov spôsobom, ktorý lepšie podporuje rast, ale aj Slovenská republika si týmto systematickým kontrolným mechanizmom môže vylepšiť štatistiky vymožiteľnosti daňových pohľadávok. Týmto spôsobom sa môže rovnako podporiť úsilie členských štátov o zmiernenie daňového zaťaženia zárobkovo činných ľudí s nízkym príjmom a najzraniteľnejších skupín. Zlepšenie daňovej správy predstavuje mimoriadnu výzvu pre tretinu členských štátov. Existuje celá škála dôvodov, napríklad vysoké administratívne náklady na získané čisté príjmy, nevyužívanie informácií od tretích strán na vyplnenie niektorých údajov v daňových priznaniach vopred, 3 obmedzené využívanie možnosti vypĺňať doklady elektronicky a veľké administratívne bremeno, ktoré daňové systémy kladú na stredne veľké spoločnosti. V súvislosti s implementáciou smernice Rady 2010/24/EÚ o vzájomnej pomoci pri vymáhaní pohľadávok vyplývajúcich z daní, poplatkov a ďalších opatrení je potrebné novelizovať vybrané ustanovenia zákona č. 466/2009 Z. z. o medzinárodnej pomoci pri vymáhaní niektorých finančných pohľadávok a o zmene a doplnení niektorých zákonov, aby reflektovali na novú úpravu obsiahnutú v predmetnej smernici. Zmeny sa týkajú najmä rozšírenia vecného rozsahu zákona č. 466/2009 Z. z. na všetky dane, poplatky a clo vyberané na území členského štátu s vylúčením určitých skupín pohľadávok tak, ako to predpokladá samotná smernica. V rámci návrhu zákona vychádzajúceho z Programového vyhlásenia vlády SR na roky 2012 – 2016, podľa ktorého sa vláda SR zaviazala *„vytvoriť podmienky na zefektívnenie vymáhania pohľadávok štátu s cieľom ich jednotného a centrálneho vymáhania“* sú všeobecné pravidlá správy a nakladania s pohľadávkami štátu upravené zákonom NR SR č. 278/1993 Z. z. o správe majetku štátu v znení neskorších predpisov. Ide o také pohľadávky štátu, ktoré spravujú štátne rozpočtové organizácie, štátne príspevkové organizácie, štátne fondy, verejnoprávne inštitúcie alebo iné právnické osoby, ak spravujú majetok štátu. Tieto pohľadávky

štátu vznikajú najmä zo zmluvných vzťahov, zo správneho konania, zo služobného, pracovného alebo obdobného pomeru, z náhrady škody, bezdôvodného obohatenia a pod. Prax preukázala nevyhnutnosť efektívnejšieho vymáhania pohľadávok štátu jednotným a koordinovaným postupom. Jednotným postupom uplatňovania pohľadávok štátu sa zvýši efektívnosť vymáhania pohľadávok štátu a posilní postavenie štátu ako veriteľa v konaniach, ktorých predmetom je vymoženie pohľadávky štátu.

Knižná literatúra

BABČÁK, V. (2008): Dane a daňové právo na Slovensku. 2. diel., Aprilla, Košice.

GÁŠPÁROVÁ, E. (2008): Splatnosť, zánik a premlčanie pohľadávok, http://www.epi.sk

GROSSOVÁ, M. (2007): Exekuce na peněžité plnění v současné právní praxi. 5. Vydanie, Linde, Praha.

PAULIČKOVÁ, A., BAKEŠ, M. a kol. (2007): Finančné právo na Slovensku a v Čechách. Vysoká škola v Sládkovičove. EUROUNION, Bratislava.

PAULIČKOVÁ, A. (2009): Medzinárodná pomoc pri vymáhaní niektorých finančných pohľadávok, riešiteľka projektu Justičnej akadémie SR a APVV, FPJJ, Sládkovičovo.

PAULIČKOVÁ, A. a kol. (2009): Medzinárodné vymáhanie daňových pohľadávok, FPJJ, Sládkovičovo.

REVIĽAKOVÁ, Z. (2009): Komparácia vymáhania daňových nedoplatkov v Českej republike a na Slovensku,
http://is.muni.cz/th/134436/pravf_m/diplomka.txt

VLKOVÁ, E. (2003): Vymožiteľnosť práva v podmienkach Slovenskej republiky, Nadácia profesora Karola Planka, Bratislava.

Ďalšia literatúra

BURÁK, E. (2004): http://www.sme.sk/c/1631179/danove-raje-moznost-uspory-dani-i-exotickej-dovolenky.html

Smernica Rady 2010/24/EU o vzájomnej pomoci pri vymáhaní pohľadávok vyplývajúcich z daní, poplatkov a ďalších opatrení.

Zákon č. 466/2009 Z. z. o medzinárodnej pomoci pri vymáhaní niektorých finančných pohľadávok a o zmene a doplnení niektorých zákonov.

Zákon č. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov.

Vymožiteľnosť práva v Slovenskej republike, Elektronický zborník príspevkov riešiteľov v rámci projektu APVV 0745-07 za rok 2008, Justičná akadémia – 15.4.2012.

Smernica Rady č. 76/308/EHS, Smernica Rady č. 2002/94/ES.

Genesis and Development of Idea of European Public Prosecutor's Office

Bystrík Šramel

Abstract

The author of the contribution deals with the problem of the European Public Prosecutor's Office that has been frequently discussed over the last years. The idea of the establishment of a common investigation and prosecution office has been in existence for quite a long time and is very controversial. Therefore the author analyzes the origins of this idea, its conditions and reasons. The adoption of the Lisbon Treaty has brought a real possibility and basis for the establishment of this long awaited institute – the European Public Prosecutor's Office. However, it is questionable, if such an office is really necessary and if its purpose could not be reached another way.

Keywords

European Public Prosecutor's Office, financial interests of the European Union, harmonization of the criminal law, Eurojust.

1. Introduction

In the last few years, experts and politicians have expressed opinions about the need to protect important financial interests of the European Communities / European Union through a new institution called the European Public Prosecutor's Office. Today, when the process of Europeanization of criminal law is quite notable and the criminal law is still more and more important to European Union, the issue of office conducting common investigation and prosecution of certain offences is not very surprising; on the contrary- existence of this idea seems to be quite natural. However, the real possibility of such an office has brought Lisbon Treaty that has entered into force on 1st December 2009 and that is the last (but very strong) document changing the founding treaties. It is this treaty that says that under certain conditions the European Public Prosecutor's Office can be established. However, this provision raises contradictory reactions coming from the very nature of this legal institution. Public Prosecutor's Office is the institution used in the criminal law to prosecute offences and act in court. It is an office which through its organizational units conducts criminal prosecution of offences committed on the territory of the particular nation state.

In terms of the traditional understanding, only the State itself is entitled to prosecute criminal offences that have been committed on its territory and any external intervention to this right may be considered as interference in its national sovereignty. Many experts from European countries therefore consider the formation of a joint office of investigating and prosecuting offences committed on their national territory and for this purpose intervening in the functioning of their own national criminal law as totally unacceptable and undesirable. Despite these reservations, the possibility of this office has been made through the Reform Lisbon Treaty, which certainly has been welcomed in particular by the officials of the Union itself. They are the ones that most cry out and call for the establishment of such an office because it is considered to be very important tool to combat crime affecting the financial interests of the Union. However, is this office really so necessary that without its existence, the financial interests of the Union will face the threat of even greater losses than at present? In this paper I will try to look further into the background of the idea of a European Public Prosecutor's Office and its development leading to its transformation into the Union's legal order.

2. European Public Prosecutor's Office – the idea not so old

The emergence of the idea of European Public Prosecutor is directly linked to the need to protect important financial interests of the European Communities/European Union. The need for protection of financial interests is based on the fact that every year more than 10% of the funds from the EU budget are wrongfully used. That includes also the attacks on the Euro currency[1]. Since most of the budget revenue of the EU is a contribution of the Member States (about 76%), it is quite natural that the need to protect the financial interests arose just from worries of the Member States on these not negligible funds. For reasons given, since the seventies European Communities / European Union have tried to create rules that can help in the effective fight against the damage of the financial interests of the European Communities/European Union. Back in 1976, the first Draft for a Treaty amending the Treaties establishing the European Communities has been adopted. Its purpose was to establish common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of

[1] FENYK, J. (2001): Veřejná žaloba. Díl první: Historie, současnost a možný vývoj veřejné žaloby.

infringements of the provisions of those Treaties.[2] However, this proposal was rejected, also in the result of at that time too courageous solutions to the existing problem as well unpreparedness of the States to adopt such draft.

Some progress in the search for tools and instruments for the protection of the financial interests of the European Communities was made by the adoption of the Treaty on European Union of 1992.[3] This Treaty had brought a new article 209a stipulating that *"Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests."* In view of its formulation it was quite vague provision that had not been consistently developed in secondary legislation. It can be said that already in this provision we can see certain elements of criminal law. Furthermore, this Article also established mutual cooperation between Member States and the Commission in matters concerning the protection of financial interests.

A very important step in seeking the means to fight against harming the financial interests of the Communities was the adoption of the Convention on the protection of the European Communities' financial interests of 1995.[4] It was a document that established a duty for each member state to take the necessary measures to ensure that their national law will involve a quite broad definition of fraud affecting the European Communities' financial interests stipulated in Article 1. Besides that, the Convention stipulates that the fraud affecting the European Communities' financial interests should be punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty. The Convention established also the duty of effective cooperation, if a fraud as defined in Article 1 constitutes a criminal offence and concerns at least two Member States; those States shall cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State. The Convention represents a document that is a very significant sign of Europeanization of criminal law. It is necessary to add that in 1996 and 1997, two protocols that impose on Member States new obligations related to the implementation of other measures to combat threats and harm to financial interests were adopted as a part of this Convention.

Treaty of Amsterdam of 1997[5] replaced Article 209a brought by the Treaty on European Union with the new Article 280. This Article replaced previously vague provisions by new provisions which required effective measures for the prevention and prosecution of fraud and any other illegal activities affecting the financial interests of the Community. The Treaty also entrusted duties initially delegated to the Member States as well as to the authorities of the European Communities and the Member States. It can be stated that Article 280 represented an important step in the fight against fraud, as it was also one of the initiators of creation of the European Anti-Fraud Office (OLAF), which replaced the previously existing Anti-Fraud Coordination Unit (UCLAF).

As can be seen, pursuit of effective fight against the harm to the financial interests of the European Communities / European Union has existed for a long time. The fragmentation of the territory of the European Union on 27 national territories with separate legal systems, however, makes the protection of the financial interests weak or inadequate. Each state has its own regulations on how to fight against fraud and other harmful acts directed against the financial interests of the Union as well as his interests. Although there are provisions on legal relations with abroad, as well as on international cooperation in criminal matters, many argue that the possibility of prosecution of perpetrators of crimes against the financial interests of the European Union is low and due to the many administrative barriers slow. The abolition of internal borders and maintenance of fragmentation of the Union into national judicial territories are the reasons why transnational organized crime is still a step ahead. This was also one of the reasons why many experts have recently begun to talk about a common European judicial area in which European public prosecutor should operate. The initiative to create the European Public Prosecutor's Office, however, has not arisen from the Commission or other Union body, but from the ranks of academics as one of the *de lege ferenda* proposals. Its name is Corpus Juris.

3. Corpus Juris - the first de lege ferenda proposal on the European Public Prosecutor

Corpus Juris represents the first draft penal code, which tries to provide a more modern, faster and more efficient protection of the financial interests of the European Communities. The proposal was developed by a number of university professors under the supervision of Professor at the Paris Sorbonne Mireille Delmas-Marty. The draft was published for the first time in 1996, but in 1999 at the conference in Florence it was improved in several areas, which included the

[2] See Draft for a Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, 22.9.1976, COM(76)418, OJ C 222.

[3] Treaty on European Union, Official Journal C 191, 29/07/1992, p. 1-110.

[4] The Convention on the protection of the European Communities' financial interests, Official Journal C 316, 27/11/1995, p. 48.

[5] Treaty of Amsterdam, Official Journal C 340, 10/11/1997, p. 1-144.

issue of the compatibility with the Constitutional and criminal law principles, and also the issue of mutual cooperation. Therefore, this new version is called Corpus Juris 2000. Corpus Juris 2000 is a work that is a very significant milestone in the protection of the financial interests of the European Communities / European Union. Although this is only a de lege ferenda proposal and it is not a generally binding legal document, its provisions are now a model for legislative activities of the Union. The penal code contains provisions of substantive and procedural law and heralds how the harmonization of criminal law could look like.

Corpus Juris 2000 introduced into criminal law a new principle, known as principle of European territoriality. The meaning of this principle is to create a single European territory, so called European judicial area, which should help to overcome problems caused by the fragmentation of the territory of the European Union on 27 national judicial areas. The meaning of this provision is to simplify the complicated legal assistance between Member States and facilitate the investigation and prosecution. The single judicial area should be a place of activities of European public prosecutor, whose role is to investigate and prosecute crimes against the financial interests of the European Union, which are listed in the substantive part of the Code. The European Public Prosecutor, however, does not bring a charge before the European Court of Justice or before any court or tribunal new created, but before the national courts of the Member States. The Code also contains criteria for determining the jurisdiction of the court that will hear a case. These are specified in a way in some cases resulting into extraterritorial jurisdiction of the national court. This means that in practice it may happen that the English court will hear a case of a German offender who committed crime in the Netherlands. Corpus Juris 2000 has brought a rule, that courts should follow the principle of subsidiarity, which means that procedural rules set up in the Corpus Juris 2000 should always be applied, except a case that is not regulated by this Code. In this situation procedural rules of national law could be applied.The organization of the European Public Prosecutor's Office should be built on two levels. The Office should consist of the European Director of Public Prosecution with offices based in Brussels and European Delegated Public Prosecutors with offices based in the capital of each Member State, or any other town where the competent court sits. The activities of prosecutors should be based on three principles, namely the principle of independence, the principle of unity and the principle of mutual cooperation. This means that no national authorities or bodies could interfere with their operations. All operations carried out by one member of the European Public Prosecutor's Office should be considered to be carried out in the name of the Office, as well as all acts of the Office could be carried out by any member. Finally, European Delegated Public Prosecutors must help each other and cooperate, and this obligation also applies to national public prosecutors.[6] Powers of the Office should be divided among the European Director of Public Prosecution, the European Delegated Public Prosecutors and, as may be, national authorities appointed for this purpose. The exclusive powers of the European Director of Public Prosecution should include such powers as supervision over investigations undertaken by the European Delegated Public Prosecutors or coordination of their activities. On the other hand, European Delegated Public Prosecutors should be entitled to perform specific acts in the criminal procedure - interrogation of the accused or acts connected with detaining persons or things in criminal proceedings (house search, seizure). Because many of these acts could infringe fundamental human rights and freedoms, Corpus Juris 2000 expects the existence of judicial review of pre-trial investigation. This should be conducted by the independent and impartial "judge of freedoms".

At the time of its release, the project Corpus Juris became the subject of much heated debate that saw both positive and negative reactions. The negative responses came mainly from Anglo-American legal experts that had actually hostile attitude to this proposal. They considered particularly problematic the legal institutions that their system did not know. In addition, they did not know well enough to identify with the fact that under the Code the courts trying offences under the code must have consisted of professional judges, specialising wherever possible in economic and financial matters, and not simply jurors or lay magistrates." The Code excluded trial by jury which obviously belongs to the Anglo-American legal system. According to their word, the exclusion of the lay element in court, was a substantial adverse effect on the integrity of the common law.[7] Despite these reservations, the Corpus Juris document encouraged the authorities of the European Communities in other activities aimed at finding appropriate protection of financial interests by criminal law institutions. The Commission was aware that in order to prevent harm to the budget as a result of fraudulent acts, it will be necessary to resort to the repressive solution to this problem. The European Public Prosecutor suggested in the Corpus Juris appeared to be very useful.

4. The first legislative proposal dealing with the European Public Prosecutor

In 2000, the Intergovernmental Conference on institutional reforms was held in Nice. At this conference, the Commission presented its proposal on the establishment of the European Public Prosecutor.[8]

[6] DELMAS-MARTY, M., VERVAELE, J. A. E. (2003): Corpus Juris 2000: trestné právo na ochranu finančných záujmov Európskej únie (Európsky verejný prokurátor). Slovak translation by A. Ondrejková.

[7] DONOGHUE, B. (2010): European public prosecutor: Will it happen?

[8] Additional Commission contribution to the Inter-governmental Conference on institutional reforms: The

In this document, the Commission proposed to amend the founding Treaties by adding a new Article 280a, which should provide for the framework conditions for the work of the newly established office. The article included three paragraphs which touched only fundamental questions of functioning of European Public Prosecutor, - the European Public Prosecutor's appointment and removal from office and the definition of his main tasks and the principal characteristics of his function. Other issues, such as the regulations applicable to his office, rules of substantive law concerning the protection of financial interests by the European Public Prosecutor (offences and penalties), rules governing criminal procedure and the admissibility of evidence, rules concerning judicial review of actions taken by the Public Prosecutor in the performance of his duties should have been governed by the secondary legislation.

In the Commission's view, the European public prosecutor should have been responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by paragraph 3. Inspiration in the project Corpus Juris was more than evident, as the European Public Prosecutor should have performed its duties before national courts. Regarding the appointment of the European Public Prosecutor, the Commission proposed that the European Public Prosecutor was appointed by the Council, acting by a qualified majority on a proposal from the Commission with the assent of the European Parliament. This method of appointment should certainly have served to preserve the legitimacy of performance of its duties. Regarding the term of the office, the Commission proposed a non-renewable term of six years. A non-renewable term should have been some kind of assurance or guaranty of the independence of the European Public Prosecutor. Question of personal conditions aimed at ensuring as much as possible independent performance of its functions was also governed by the proposal. The proposal stipulated that "the European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries." In addition, the proposal said that "in the performance of his duties, he shall neither seek nor take any instructions." This meant that the European Public Prosecutor should have been independent and impartial and should have been bound only by an interest in strict adherence to laws. However, The Court of Justice, on application by the European Parliament, the Council or the Commission, should have had the right to remove him from office if he no longer fulfilled the conditions required for the performance of his duties or if he was guilty of serious misconduct. These mechanisms should have been a solution to avoid the misuse of office as well as to ensure the greatest possible independence of the European Public Prosecutor.

The Commission's contribution to the Inter-governmental Conference for revision of the EC Treaty to provide a legal basis for the establishment of the European Public Prosecutor was not taken up by the European Council at Nice in December 2000. There were many reasons. In the first place the Intergovernmental Conference was not given the necessary time to examine the proposal. The need for more detailed study of the practical implications was also expressed. It must be said that the reason of rejecting this contribution was mainly the lack of political will that stopped the establishment of this new body to combat the harm to financial interests. However, the Commission did not give up its efforts and in 2001 it published Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.[9] The main objectives of this Paper were 1) to extend the debate to all interested circles, 2) to explore the proposal's feasibility. In the Green Paper, the Commission explained in detail its intention and necessity to establish the office. The Commission held an opinion that prevention and detection of fraud were not enough by themselves. The need for effective enforcement activities remained. It was known that organised crime had been involved in numerous cases that had come to the knowledge of the Commission departments over the years, and especially of the Unit for the Coordination of Fraud Prevention (UCLAF) set up in 1988 and replaced in 1999 by the European Anti Fraud Office (OLAF), with independent investigative powers. The Commission expressed itself that "*a problem on this scale must be met with an appropriate response. This is a specific form of crime which calls for a specific response. Given its nature, the response must include a repressive dimension, in accordance with the requirements introduced by the Treaty of Amsterdam.*"[10] The Commission therefore proposed to establish the European Public Prosecutor, which in its words has some "added value". This "added value" was based on four basic arguments for the creation of this new body. The first argument said that the European Public Prosecutor would helped overcome the fragmentation of the European criminal law enforcement area which caused that the police forces and courts of the Member States still basically had

criminal protection of the Community's financial interests - A European Prosecutor, 29.09.2000, COM(2000) 608 final.

[9] A green paper is a tentative government report and consultation document of policy proposals for debate and discussion, without any commitment to action-the first step in changing the law. Green papers may result in the production of a white paper.

[10] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11.12.2001, COM (2001) 715 final, p. 7-8.

jurisdiction solely in their own territory. This fragmentation between authorities had lead to competing or incomplete investigations and in some cases to none at all. Another argument was the move beyond the cumbersome and inappropriate traditional methods of judicial cooperation between Member States. According to word of the Commission, the European Public Prosecutor would have helped to overcome the difficulties and he would have provided an interface between the Community and the national judicial authorities. Thirdly, according to the Commission, the transmission of information between Member States and between them and OLAF came up against a series of barriers in the form of differing rules governing criminal prosecutions in the Member States. The integration of the investigation and prosecution functions that the establishment of the European Public Prosecutor would achieve would have ironed out these difficulties. The last argument said that the organisation and effectiveness of internal investigations in the institutions would inevitably have been boosted by the establishment of a European Public Prosecutor. It was because the European Anti fraud Office (OLAF) was still an administrative investigation service and proceedings in cases internal to Community bodies still depended on the goodwill of the national enforcement authorities in the headquarters State.[11]

In other parts of the Green Paper, the Commission deals with particular issues relating to the functioning and operation of the European Public Prosecutor, substantive and procedural provisions, and the relationship of this new office to other authorities (e.g., Eurojust, Europol, OLAF). The Commission proposes a decentralized form of organization of the European Public Prosecutor, meaning that the tasks of the office would be divided (as in the Corpus Juris project) between a chief European Public Prosecutor, who would provide the minimum degree of centralisation necessary at Community level, and Deputy Prosecutors, who would be integrated into the national justice systems and who would actually bring offences to trial.[12] The Green Paper does not mention directly the issue of accountability of chief European Public Prosecutor for performance of his duties; it mentions only his removal from office. Another important issue mentioned in the Green Paper is whether the European Public Prosecutor has a right or a duty to initiate criminal proceedings *(principle of legality vs. principle of opportunity)*. The Commission proposed that the Public Prosecutor is governed by the principle of legality; that means he is obliged to prosecute all offenses brought to its attention. At the same time it proposes exceptions to this rule (e.g. the possibility not to prosecute minor offenses and thus avoid overloading the office).[13] One of the controversial parts of the document was a proposal of the Commission, that evidence lawfully obtained in one Member State was acceptable in legal proceedings in another Member State. The Commission reasoned that the evidence obtained in one Member State was not automatically recognized in other Member States, and it was an obstacle to effective prosecution. However, the question was how this mechanism should have functioned. The Commission did not detail this issue and left it open. We can deduce, however, that in practice such a provision would have caused significant problems. These would have stemmed mainly from a multiplicity of laws which apply in the Union. It is hard to imagine that a national court hearing a particular case would have known criminal law rules of all these countries.

Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor raised a number of international discussions. The creation of a European Public Prosecutor's Office caused concerns especially in common law countries. However, it was rejected also by countries such as France, Austria, Denmark, and Finland. They argued that the creation of such an office is too radical and hurried step and that the inefficient sanction of prosecution of fraud against the Communities' financial interests had not yet been empirically demonstrated.[14] The good thing about these debates, however, was that they drew into attention something new, something that no longer presented only some fiction expressed in the academic project Corpus Juris. On the contrary, the idea of a common European Public Prosecutor began to have concrete form that has been transformed in 2003 by the Convention on the Future of Europe into the draft of European Constitutional Treaty.

In this regard, it is necessary to mention one more event. While the heated debate took place about the need for investigation and prosecution of crimes affecting the financial interests of the Communities, at the same time the legislators created a competitive project to the project of the European Public Prosecutor called Eurojust. Eurojust was established in 2002 as the new European Union body. Its objectives were 1) to stimulate and improve the coordination between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by anybody competent by virtue of provisions adopted within the framework of the Treaties; 2) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests; 3) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective. It did not have operational competence in Member States; it operated through the national members working directly in Hague.[15] It is necessary to add, that Eurojust does not deal only with offenses of fraud against the EU

[11] Ibid. 10, p. 12-15.
[12] Ibid. 10, p. 28-30.
[13] Ibid. 10, p. 45-46.
[14] Ibid. 7, DONOGHUE, B. (2010).
[15] FENYK, J., SVÁK, J. (2008): Europeizace trestního práva.

budget, but also with many other types of serious crime, for example cybercrime, money laundering activities. His field of activity is therefore wider than the field of activity of future European Public Prosecutor.

5. The Treaty establishing a Constitution for Europe – European Public Prosecutor almost within reach

Draft of the Treaty establishing a Constitution for Europe was presented to the public by the Convention on the Future of Europe in the year 2003. It was subsequently approved at the intergovernmental conference and in 2004 it was signed by the representatives of the Member States. The Treaty establishing a Constitution for Europe, however, was subject to ratification by all EU Member States, which resulted in rejection by referendums in France and the Netherlands. The aim of the European Constitutional Treaty was primarily to make the European Union more effective, more democratic and more transparent entity and to deepen the European integration. It also had to replace the existing treaties and to ensure institutional reform. Among other things, the purpose of the reform was the introduction of new elements to the existing system. They included also an instrument to protect the financial interests of the European Union in the form of the European Public Prosecutor's Office. Draft of the European Constitutional Treaty authorized the Council to establish a European Public Prosecutor's Office from Eurojust under European law. European law must, however, have been adopted unanimously, only after obtaining the consent of the European Parliament.[16] The mission of the European Public Prosecutor's Office should have been investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the European law provided for in paragraph 1. It should have exercised the functions of prosecutor in the competent courts of the Member States in relation to such offences.[17] Here we can see the efforts to decentralize the European Public Prosecutor, who should not have acted as some unknown, distant authority bringing a case to court somewhere in Brussels. On the contrary, he should have acted before national courts. Just before national courts he should have acted as a representative of the financial interests of the European Union that had been affected by acts contrary to the law. Other conditions for the functioning and activities of the European Public Prosecutor's Office, including rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions should have been governed by the European law.[18]

It can therefore be concluded that the content of the provisions of the European Constitutional Treaty concerning the European Public Prosecutor's Office was more or less already known from previous activities of the Commission. The proposal, however, brought a novelty, which was the extension of powers of the European Public Prosecutor's Office. This provision should have allowed the extension of the powers of the European Public Prosecutor to prosecute other serious crimes that had cross-border dimension and that involved more than one Member State. Extension of the powers could have been implemented on the basis of a European decision adopted unanimously by the European Council and after obtaining the consent of the European Parliament and following consultation the Commission.[19] Here, we can clearly see a change of prior Commission proposals which governed powers of European Public Prosecutor only in cases of crimes affecting the financial interests of the Union.

6. European Public Prosecutor's Office and its regulation by the Treaty of Lisbon

Up to now the Treaty of Lisbon represents one of the final steps in the effort to create a European Public Prosecutor's Office as a tool to fight against activities damaging the financial interests of the European Union. The Lisbon Treaty was signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009. The article 86 of the Treaty once again raises the question of the possibility of establishing this office. However, it can be said that the aforementioned article is largely identical to the provisions of the Treaty establishing a Constitution for Europe, because it regulates the general questions of organization and functioning of the European Office of the Prosecutor practically in the same way.

At this point it is desirable to mention the new regulation of Eurojust, which is closely related to the issue of the European Public Prosecutor's Office and the fight against serious crime. Eurojust was originally established as a new body with the task of facilitating cooperation between States in criminal matters. After the adoption of the Lisbon Treaty the provisions about its role have been modified and Eurojust has because a body with a more proactive approach to fighting serious crime. The new mission of Eurojust is defined in article 85 this way: *"Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted*

[16] Article III-274, par. 1 of the Treaty establishing a Constitution for Europe, 29.10.2004, CIG 87/2/04,REV 2.

[17] Article III-274, par. 2 of the Treaty establishing a Constitution for Europe, 29.10.2004, CIG 87/2/04,REV 2.

[18] Article III-274, par. 3 of the Treaty establishing a Constitution for Europe, 29.10.2004, CIG 87/2/04,REV 2.

[19] Article III-274, par. 4 of the Treaty establishing a Constitution for Europe, 29.10.2004, CIG 87/2/04,REV 2.

and information supplied by the Member States' authorities and by Europol."

As we can see, there is one new rule: serious crimes do not have to involve two or more Member States, but it may happen that Eurojust will perform its duties only in relation to crimes committed on the territory of one Member State, if a prosecution will be required on common bases. The specific content of this provision is unclear and we will have to wait for its application in practice. Another change towards more proactive approach of Eurojust is that it is entitled to start a criminal investigation, particularly in cases of damaging the financial interests of the Union (before the adoption of the Lisbon Treaty Eurojust was only entitled to ask the competent authorities of the Member States to initiate an investigation of such crimes). The real exercise of this right is, however, dependent on future developments in this area and it also requires clarification. One of the important changes in the tasks of Eurojust is the fact that after the Lisbon Treaty it is entitled to deal with cases of jurisdictional disputes. In practice this means that if, for example, serious crime is committed on the territory of several Member States; Eurojust will decide where the prosecution will be conducted. As one can see, there are significant changes that represent a certain shift in the importance of Eurojust. They show not only its growing importance in the fight against serious crime, but they can indicate its role in the development of the European Public Prosecutor's Office. Indeed, it is the Lisbon Treaty that brings up a possibility of transformation of Eurojust to a new body called the European Public Prosecutor's Office. Eurojust, as modified by the Lisbon Treaty, may therefore represent an embryonic stage of the office the foundations of which were laid by the 1996 Corpus Juris project.

As I have mentioned, the Lisbon Treaty (just like the draft Treaty establishing a Constitution for Europe) introduces the possibility to establish a European Public Prosecutor's Office as the office for combating crimes affecting the financial interests of the Union. The Office may be established by the Council acting unanimously and after obtaining the consent of the European Parliament. This procedure is similar to the procedure proposed in the Treaty establishing a Constitution for Europe. A new feature, however, is the system of enhanced cooperation, which makes possible to establish the European Public Prosecutor's Office, even in the absence of unanimity in the Council. It means that even if other countries do not agree with the establishment of this office, their disagreement will not result in a veto. The system of enhanced cooperation in practice means that even if there is not achieved unanimity in the Council and the establishment of a European Public Prosecutor's Office is requested by min. 9 Member States, these States shall notify their intention to the European Parliament, the Council and the Commission (Art. 86-1 of the Lisbon Treaty). After the notification they may cooperate in the intended area. This provision prevents blockade of certain institutes in case of the absence of unanimity and allows at least 9 states to cooperate. Here we can see a Union tendency of using certain institutes at the cost of circumventing the unanimous agreement of all Member States.

The role of the European Public Prosecutor's Office is defined in the Lisbon Treaty in the same way as in the provisions of the Treaty establishing a Constitution for Europe. Its role is to investigate and prosecute perpetrators of offences against the Union's financial interests. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. What offences are damaging the financial interests of the Union should be defined by the Regulation. The Treaty establishing a Constitution for Europe indicated that there are also efforts to extend the powers of the European Public Prosecutor's Office and this trend is reflected in the Lisbon Treaty. The last Reform Treaty empowers the European Council to adopt a decision that may extend the powers of the European Public Prosecutor's Office to include under its sphere of competence serious crime having a cross-border dimension, in case of serious crimes affecting more than one Member State. Such decisions must be taken unanimously and after obtaining the consent of the European Parliament and after consulting the Commission (Art. 86-4 of the Lisbon Treaty).

The Treaty of Lisbon contains only general provisions on the establishment of the European Public Prosecutor's Office. As I said above, the Lisbon Treaty comments on its role and the way of its establishment. Other issues, such as details on the actual status and functioning of the European Public Prosecutor's Office, procedural grounds for admissibility of evidence and the judicial review of procedural acts are left to future regulations (Art. 86-3 of the Lisbon Treaty).

7. Recent development in the field of European Public Prosecutor's Office

The Lisbon Treaty represents today the only legally binding document that mentions the European Public Prosecutor's Office. However, the adoption the Lisbon Treaty is not the final effort to establish this Office. Two years after it came into force, in May 2011, the Commision issued a new document called as "The Commission's communication on the protection of the EU's financial interests by criminal law and by administrative investigations". It is a document that is not legally binding. In this Communication, the Commission deals with an integrated policy to safeguard taxpayers' money. It gives the reasons why there is a need to act in the field of protection of the EU financial interests. The Commission points out to insufficient protection against criminal misuse of the EU budget and insufficient legal action to fight criminal activity. Then it gives the reasons for shortcomings in this area of crime. This document is not directly about the issue of the European Public Prosecutor's Office. However, it is indirectly connected to this issue, because in Part 4 the Commission mentions four ways to protect EU financial interests under the Treaty on the Functioning

of the EU. One of them is the European Public Prosecutor's Office.

The latest document directly concerning the issue of the European Public Prosecutor's Office is the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office adopted on 17 July 2013. It is only the draft regulation based on Article 86 TFEU, introduced by the Lisbon Treaty, which allows the creation of such an office through a special legislative procedure. Today, this proposal is the subject of the interinstitutional procedure file 2013/0255(APP). Under the proposal, the European Public Prosecutor's Office will be an independent Union body with the authority to investigate and prosecute EU-fraud and other crimes affecting the Union's financial interests. The establishment of the European Public Prosecutor's Office will bring about substantial change in the way the Union's financial interests are protected. It will combine European and national law-enforcement efforts in a unified, seamless and efficient approach to counter EU-fraud. The European Public Prosecutor's Office will be a body of the Union with a decentralised structure. The decentralised structure aims at involving and integrating the national law enforcement authorities. The European Public Prosecutor's Office will be headed by a European Public Prosecutor. Its investigations will in principle be carried out by European Delegated Prosecutors located in each Member State. The number of these Delegated Prosecutors will be left for Member States, but they should have at least one. The European Delegated Prosecutors will be an integral part of the European Public Prosecutor's Office but also continue to exercise their functions as national prosecutors. When acting for the European Public Prosecutor's Office, they will be fully independent from the national prosecution bodies. The European Public Prosecutor's Office will mainly rely on national rules of investigation and procedure, which will apply if the regulation does not provide for more specific provisions.

8. Conclusion

The public prosecution service is the criminal law institution which serves the purpose of bringing charges before the court and which, through its branches, conducts the prosecution of perpetrators of offences committed on the territory of the particular state. According to the traditional opinions on criminal law only the State itself is entitled to prosecute crimes committed on its territory and any external intervention may be considered as interference with its national sovereignty. Many experts from European countries therefore consider the emergence of a common office investigating and prosecuting crimes committed on their territory as totally unacceptable and undesirable. Despite these reservations, the possibility of this office has been approved by the last Reform Treaty, which is surely appreciated in particular by the officers or politicians of the Union itself. They are the ones who have been constantly calling for the establishment of such office, because they consider this office to be very important tool for combating criminal activities damaging the financial interests of the Union. But is the establishment of such an office really so necessary? Is it possible that the financial interests of the Union would face the threat of even greater damages as in recent times if the European Public Prosecutor's Office was not established?

Despite the fact that high-ranking EU officials are still calling for the creation of the European Public Prosecutor's Office, Member States are having lukewarm or dismissive attitude toward establishment of a common office of investigation and prosecution. It is debatable whether all the Member States will be interested in adaptation and unanimous voting for the creation of the new office. Indeed, it is true that the Lisbon Treaty enables the system of enhanced cooperation. However, the creation of this office by only a lower number of states will not reach the main purpose. This purpose is the elimination of fragmentation of the EU territory and the elimination of complicated legal relations with abroad, and ultimately improvement of the fight against crime threatening or damaging the financial interests of the Union. Moreover, as indicated by the former director of the Irish Public Prosecution Service Barry Donoghue at the conference in Budapest, the establishment of the European Public Prosecutor's Office under the provisions of the Lisbon Treaty about enhanced cooperation could mean violation of the provisions of the Lisbon Treaty saying that the European Public Prosecutor's Office should arise from Eurojust. Within the system of enhanced cooperation Eurojust will continue in its daily activities.

It is also questionable whether it is even necessary to establish the European Public Prosecutor's Office. The Commission and its officials claim that the need for the creation of such an office mainly results from the fact that mutual cooperation between Member States in criminal matters is ineffective, weak. These statements, however, contradict the statements made in a detailed report from 2001 prepared by experts coming from the Member States. This report says that although the mutual cooperation of the Member States is having some shortcomings, the constant criticism of this cooperation is exaggerated and in general it can be stated that the system of cooperation does not work badly. The establishment of any state office must be followed by the realization of what purpose it will serve and whether it is really necessary. Institutional system that is too branched does not provide an easy survey and is the cause of an excessive financial burden. For this reason, it is preferable to improve and simplify the current system of mutual cooperation better than to create an entirely new office, which does not guarantee full effectiveness. It would be also possible to extend the powers of Eurojust which could

carry out some tasks of the envisaged European Public Prosecutor's Office.

Public prosecution service is an essential element of the system of criminal justice. The establishment of the European Public Prosecutor's Office would mean the exclusion of this element of the whole framework of criminal justice system. Public prosecution service has its links with other institutes of criminal law, it cannot be isolated without taking into account its relationships to other bodies and institutions. That is why the creation of the European Public Prosecutor's Office requires more than constituting its basic tasks and functions in primary or secondary legislation. The establishment of such office will inevitably lead to the need for harmonization of the criminal law, or to creation of European Criminal Code/European Code of Criminal Procedure. However, this would have represented too radical solution, because criminal law is traditionally considered to be an internal matter of each Member State. It is also questionable whether it would have been politically acceptable to make such a solution.

Books

DELMAS-MARTY, M., VERVAELE, J. A. E. (2003): Corpus Juris 2000: trestné právo na ochranu finančných záujmov Európskej únie (Európsky verejný prokurátor). Slovenský preklad A. Ondrejková, Iura Edition, Bratislava.

FENYK, J. (2001): Veřejná žaloba. Díl první: Historie, současnost a možný vývoj veřejné žaloby. Institut Ministerstva spravedlnosti České republiky pro další vzělávání soudců a státních zástupců, Praha.

FENYK, J., SVÁK, J. (2008): Europeizace trestního práva. Bratislavská vysoká škola práva, Bratislava.

Journal Articles

NIKODÉM, A. (2003): The European Public Prosecutor: Waiting For Godot? In: Acta Juridica Hungarica, No. 3-4.

Other sources

DONOGHUE, B. (2010): European public prosecutor: Will it happen? [online], available https://www.dppireland.ie/filestore/documents/European_Public_Prosecutor-Will_it_Happen_BD280308.pdf

Draft for a Treaty amending the Treaties establishing the European Communitiesso as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provosions of those Treaties, 22.9.1976, COM(76)418, OJ C 222.

Additional Commission contribution to the Intergovernmental Conference on institutional reforms: The criminal protection of the Community's financial interests-A European Prosecutor, 29.09.2000, COM(2000) 608 final.

Final Report on the first evaluation exercise-mutual legal assistance in criminal matters, OJ C 216/14-26, 1. august 2001.

Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11.12.2001, COM (2001) 715 final.

European Commission. Statistical Evaluation of Irregularities- Own Resources, Agriculture, Cohesion Policy,Pre-Accession Funds and Direct Expenditure - Year 2009: Accompanying document to the Report from the Commission on the protection of the European Union's financial interests and the fight against fraud – 2009, 14.7.2010, SEC(2010) 898 final

Treaty on European Union, Official Journal C 191, 29/07/1992 P. 0001-0110.

The Convention on the protection of the European Communities' financial interests, Official Journal C 316, 27/11/1995 P. 0048 - 0048.

Treaty of Amsterdam, Official Journal C 340, 10/11/1997 P. 0001-0144.

The Commission's communication on the protection of the EU's financial interests by criminal law and by administrative investigations.

The Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office.