Vertikálne dohody v americkom antitrustovom a európskom súťažnom práve

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Abstrakt

Rozdiely medzi politikou hospodárskej súťaže Spojených štátov amerických (USA) a Európskej únie (EÚ) sú predmetom značnej pozornosti. Jednou z týchto oblastí, kde sú jednoznačne viditeľné tieto rozdiely je otázka vertikálnych dohôd. V USA musí žalobca preukázať, že vertikálna dohoda môže ohroziť hospodársku súťaž, to znamená, že môže znížiť ekonomický blahobyt. Súťažné právo EÚ, na druhej strane kladie o niečo menšie bremeno na Európsku komisiu. Pred rozhodnutím amerického najvyššieho súdu v roku 1977 vo veci GTE-Sylvania, americké protimonopolné právo považovalo zmluvné obmedzenia distribúcie (napr. pomocou klauzúl upravujúcich výhradné územia) ako per se porušujúce protimonopolné právo. Európske právo bolo v tejto súvislosti viac ústretovejšie. V nasledovnej časti poskytnem pohľad na vertikálne dohody a ich právnu úpravu v oboch jurisdikciách.

Kľúčové slová

EÚ, súťažné právo, USA, vertikálne dohody

Abstract

Differences between competition policy of the United States (US) and the European Union (EU) are subject of considerable attention. One of those areas where there are clearly visible these differences is the question of vertical agreements. In the US, the plaintiff has to demonstrate that a vertical agreement may harm competition, which means that it can reduce economic welfare. EU competition law, on the other hand, raises slightly smaller burden on the European Commission. Before the decision of the US Supreme Court in 1977 in the case GTE-Sylvania, American antitrust law considered contractual limitations of distribution (e.g. through clauses governing the exclusive territory) as per se breach of antitrust law. European law was, in this respect, friendlier. The following sections provides insight on vertical agreements and their legal regulation in both jurisdictions.

Keywords

EU competition law, USA, vertical agreements

1. Úvod

Prvý oddiel Shermanovho zákona stanovuje, že akákoľvek "dohoda, spojenie vo forme trustu alebo inak, alebo sprisahanie za účelom obmedzenia obchodu alebo obchodovania medzi niekoľkými štátmi, alebo s cudzími krajinami, sa týmto vyhlasuje za nezákonnú."[1] Je potrebné mať na pamäti, že Shermanov zákon[2] vyžaduje prítomnosť vertikálnej dohody[3]. Tretí oddiel Claytonovho zákona sa vzťahuje na určité vertikálne obmedzenia, ako je viazanie a výhradné dohody. Od rozhodnutia amerického najvyššieho súdu z roku 1911 vo veci *Standard Oil*[4] platí, že prvý oddiel Shermanovho zákona sa vzťahuje len na neprimerané obmedzenia. V tejto súvislosti by mali byť spomenuté dve skutočnosti. Podľa tzv. rule of reason testu v zmysle prípadu *Standard Oil*, ak nie sú niektoré vertikálne obmedzenia neprimerané - podporujú, alebo aspoň nepotláčajú súťaž - sú zákonné v každom prípade. Po druhé, existuje problém ohľadne spojitosti medzi požiadavkou existencie vertikálnej dohody a súťažnej politiky. Čl. 101 TEFU[5] je naopak základným stavebným kameňom právneho rámca pre posudzovanie vertikálnych obmedzení v súťažnom práve EÚ. V rámci práva hospodárskej súťaže EÚ, na rozdiel od práva USA, neexistuje žiadne pravidlo rozumu.[6] Prvé úsilie o ustanovenie pravidla rozumu v práve USA priniesol sudca White, v rozsudku Transmissouri Freight Association[7] kde tvrdil, že pri interpretácii a uplatňovaní oddielu 1 Shermanovho zákona musí existovať "rozumnosť". Výklad rozumnosti bol podľa sudcu White založený na predpoklade, že "nejde o existenciu obmedzenia

[1] 15 U.S.C. § 1 Shermanovho zákona ... Každá zmluva alebo sprisahanie s cieľom obmedzovania obchodu, alebo obchodu medzi viacerými štátmi je nezákonná. Každá osoba, ktorá sa podieľa na takých aktivitách sa dopúšťa trestného činu a potrestá sa pokutou do výšky $ 100.000.000 v prípade korporácie, alebo $ 1.000.000 $ v prípade akejkoľvek inej osoby, alebo alebo väzením do 10 rokov, popr. obidvoma trestami v zmysle kompetencie súdu.

[2] BLAŽO, O. (2012): Rule of Reason, pridružené obmedzenia a systém výnimiek v prípade dohôd obmedzujúcich súťaž v európskom a slovenskom práve, str. 17 a nasl.

[3] Dohody medzi podnikateľmi, ktorí pôsobia na iných stupňoch distribučného reťazca, napr. dodávateľ – odberateľ.

[4] Standard Oil Co. v. Spojené štáty, 221 USA 1, 49-68 (1911).

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

[6] T-65/98, Van den Bergh Foods v. Commission, Zb. 2003, s. II-4653, body. 106-107.

[7] United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).

hospodárskej súťaže, ale o primeranosť tohto obmedzenia." Hlavná kritika vznesená proti pravidlu rozumu v USA spočíva v tom, že vzhľadom na to, že tento prístup vyžaduje preskúmanie každého jednotlivého prípadu, skutočnosť, že v rámci posúdenia nie sú žiadne jasné kritériá, prináša právnu neistotu.

VBER predstavuje ďalší doplnok v európskej legislatíve. Prostredníctvom tohto nariadenia[8] je splnomocnená Európska komisia aby uplatnila čl. 101 (3) ZFEÚ na niektoré kategórie vertikálnych dohôd a príslušných zosúladených postupov, ktoré spadajú do rozsahu pôsobnosti čl. 101 (1) ZFEÚ.[9] Preto pokiaľ je americké pravidlo rozumu tak dôležité, je ho vhodnejšie porovnať s čl. 101 (3) ZFEÚ namiesto s čl. 101 (1) ZFEÚ. Z hodnotenia príslušnej judikatúry a rozsudkov vyplýva, že aj keď Európska komisia a Všeobecný súd EÚ jednoznačne odmietli možnosť pravidla rozumu podľa článku 101 (1) ZFEÚ, Súdny dvor EÚ prijal flexibilnejší prístup zahŕňajúci zváženie protisúťažných a protisúťažných účinkov dohôd podľa čl. 101 (1) ZFEÚ.

2. Rozhodnutia amerického najvyššieho súdu

V tejto časti sa nebudeme zaoberať všetkými rozhodnutiami amerického najvyššieho súdu ohľadne otázky vertikálnych dohôd. Namiesto toho sa zameriame na prípad *Colgate*[10] a *Monsanto*[11] z dôvodu ich významu a prínosu pre právnu prax. Rozhodnutie amerického najvyššieho súdu v prípade *Colgate & Co.* je pozoruhodné v mnohých ohľadoch, najmä pokiaľ ide o následný vývoj právnej náuky a prístupu k protimonopolnému právu ako takému. Hoci tzv. *Colgate doktrína*[12] chráni len úzky rozsah správania, skutkový stav prípadu bol oveľa rozsiahlejší: rozdelenie medzi predajcami listov a telegramov poukazuje na jednotné ceny, ktoré majú byť účtované; nútenie dodržiavať tieto ceny s tým, že nebude zrealizovaný žiaden predaj tým, ktorí nebudú dodržiavať túto podmienku, atď.[13] Zjednodušene povedané, šírka vertikálnych dohôd v nasledovných prípadoch (vrátane prípadu Monsanto) a ponímanie práva niektorými právnymi teoretikmi sa zdá byť v rozpore s rozsahom povolení v zmysle prípadu *Colgate*. Hoci odlišné v mnohých ohľadoch, rozhodnutie amerického najvyššieho súdu v prípade *Monsanto Co.*,[14] ktoré oživilo *tzv. Colgate doktrínu*, zdieľa s prípadom *Colgate* nezáujem politiky hospodárskej súťaže, čo je vlastnosť, ktorá je prekvapivá v modernej protimonopolnej jurisprudencii. Namiesto toho sa súd do značnej miery obmedzil na obyčajné konštatovanie stavu veci. Súd ponúkol všeobecný náčrt, ktorý je často citovaný a hrá kľúčovú úlohu v prípadoch (ako napr. *Matsushita*)[15] pojednávajúcich o horizontálnych dohodách. Podľa súdu musí existovať dôkaz ktorým sa vylúči možnosť, že výrobca a distribútori konali nezávisle na sebe. Žalobca by mal predložiť priame alebo nepriame dôkazy ktoré preukazujú, že výrobca a iní mali záväzok k spoločnému postupu navrhnutému za účelom dosiahnutia nezákonného cieľa. Pri interpretácii prípadu *Monsanto* treba skúmať nielen všeobecné právne zásady a právne pravidlá, ale aj spôsob, akým boli aplikované v konkrétnom prípade. V konaní pred americkým prvostupňovým súdom bolo zistené, že išlo o vertikálnu dohodu. V rámci odvolacieho konania bolo otázkou, či existujúci žalobcov dôkaz bol dostačujúci pre podporu tohto záveru. Súd sa priklonil na túto stranu a rozhodol, že tomu tak bolo. Súd popísal svoje závery o existencii vertikálnych dohôd tak, že existoval priamy dôkaz o dohodách na udržanie cien. Rovnako tak existovalo svedectvo od manažéra spoločnosti *Monsanto* podľa ktorého spoločnosť *Monsanto* oslovila distribútorov znižujúcich ceny a odporučila im, že ak nebudú udržiavať odporúčanú maloobchodnú cenu, nedostanú dostatočné dodávky nového tovaru od spoločnosti *Monsanto*. Z prípadu *Monsanto* vieme, že tieto dôkazy sú dostačujúce, bez ohľadu na všeobecné právne zásady a právne pravidlá a ich význam. Súd okrem toho konštatoval existenciu nepriameho dôkazu v tom zmysle, že spoločnosť *Monsanto* sa usilovala o dosiahnutie dohody s distribútormi. Spoločnosť *Monsanto* sa snažila o túto dohodu v čase, kedy bolo možné využiť otázku dodávok ako páky na jej presadenie. Tento záver je pozoruhodný: jednostranná politika opierajúca sa o uvedené hrozby, nie je vertikálnou dohodou.[16] Ale v prípade, že hrozby sú aplikované v čase keď je pravdepodobné, že budú účinné, možno ju usudzovať. Je zrejmé, že prípad *Monsanto* nepredstavuje posledné slovo ohľadne vertikálnych obmedzení, pretože niektoré otázky zostávajú nevyriešené. Prípad Monsanto vyvolalal toľko otázok, koľko aj vyriešil. Žiadnen uspokojivý stav sa nedosiahne, kým súd nevykonáva komplexnú analýzu vertikálnych obmedzení. Základným stavebným kameňom komplexného prístupu je analýza motívov výrobcov v zavádzaní vertikálnych obmedzení.

[8] Nariadenie Komisie (EÚ) č. 330/2010 o uplatňovaní čl. 101 (3) ZFEÚ na kategórie vertikálnych dohôd a zosúladených postupov (VBER).

[9] FUNTA, R., NEBESKÝ, Š., JURIŠ, F. (2012): Európske právo, str. 380.

[10] United States v. Colgate & Co., 250 U.S. 300 (1919).

[11] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[12] Takzvaná *Colgate doktrína* vyplýva z rozhodnutia amerického najvyššieho súdu z roku 1919 kde bolo stanovené, že Shermanov zákon nebráni výrobcovi vopred oznámiť ceny, za ktoré by bolo možné tovar predávať a následne odmietnuť rokovať s distribútormi a maloobchodníkmi, ktorí nerešpektujú tieto ceny.

[13] United States v. Colgate & Co., 250 U.S. 303 (1919).

[14] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[15] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986).

[16] FUNTA, R. (2011): Abuse of a dominant position in EU and US Law, str. 39.

3. Nepriame dôkazy a odporúčania poroty

Právo do značnej miery závisí na dôkazoch ktoré sú k dispozícii a prípustné pri jeho uplatňovaní v danom prípade. S ohľadom na vertikálne dohody je požiadavka na existenciu nepriamych dôkazov obzvlášť dôležitá z niekoľkých dôvodov. Jednou z nich je, že viac priamych dôkazov môže byť nedostupných. Navyše priame dôkazy môžu byť nespoľahlivé. Nepriame dôkazy tak môžu byť viac spoľahlivé ako priame dôkazy. V dôsledku toho je nesporné, že nepriame dôkazy sú naozaj prípustné, a môžu tvoriť základ pre zistenie vertikálnej dohody. Tento bod bol jasne uvedený v prípade *Monsanto*. Je všeobecne známe v americkom protimonopolnom práve, že konanie v zhode v zmysle Shermanovho zákona môže byť preukázané pomocou nepriamych dôkazoch. V prípade vertikálnych obmedzeniach dominantného podniku podľa § 2 Shermanovho zákona (každá osoba, ktorá bude monopolizovať, alebo sa pokúsi o monopolizáciu s inou osobou alebo osobami, akúkoľvek časť obchodu, alebo obchodu medzi viacerými štátmi, má byť potrestaná pokutou do výšky $ 100.000.000 v prípade korporácie, alebo $ 1.000.000 v prípade akejkoľvek inej osoby, alebo väzením do 10 rokov, popr. obidvoma trestami v zmysle kompetencie súdu) musí žalobca najprv preukázať príčinnú súvislosť medzi konaním monopolistu a jeho trhovou silou. To znamená, že správanie monopolistu musí "byť schopné významne prispieť k vytvoreniu alebo udržaniu monopolného postavenia."[17] Avšak, aj keď správanie smeruje k podpore narastania monopolnej sily vylúčením konkurencie, nemusí to nutne vyústiť do porušenia § 2 Shermanovho zákona. Rovnako ako pri všetkých žalobách podaných na základe Shermanovho zákona, konanie monopolistu musí mať protisúťažný účinok, to znamená, že musí poškodiť konkurenčné prostredie, a tým poškodiť spotrebiteľov. Tak ako bolo uznané súdmi, len zriedka bude existovať priamy dôkaz o výslovnej dohode v prípadoch konania v zhode. Často krát môžeme odvodzovať povahu zmluvy iba zo správania spoločností. Je pravdou, že porota spravidla nečíta rozhodnutie Najvyššieho súdu alebo komentáre k nemu. Ani sudcovia nedávajú porote o nich poučenie. Namiesto toho sudca vydáva pokyny, a porota sa má nimi riadiť pri určovaní výsledku prípadu na základe predložených dôkazov. Za predpokladu, že porota venuje určitú pozornosť týmto veciam, je potrebné ich priamo zohľadniť. Súd nespomenul či existovali ďalšie pokyny poroty, ktoré by spresnili poňatie o konaní v zhode. V prípade *Monsanto* sa zdá, že súdu akoby bolo ľahostajné či niečo z vyššie uvedeného bolo porotou zohľadnené, ktorej verdikt bol potvrdený.

4. Pohľad na čl. 101 ZFEÚ

Pre väčšinu vertikálnych obmedzení môžu obavy o fungovanie hospodárskej súťaže nastať iba vtedy, ak je nedostatočná hospodárska súťaž na jednej alebo viacerých úrovniach obchodovania, t.j. ak existuje určitý stupeň trhovej sily u dodávateľa alebo kupujúceho, prípadne na obidvoch úrovniach. Vertikálne obmedzenia sú všeobecne menej škodlivé ako horizontálne[18] a môžu poskytovať značný priestor na zvyšovanie účinnosti. V zmysle čl. 101 (1) ZFEÚ[19] sa zakazuje ako nezlučiteľné s vnútorným trhom EÚ[20] "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 priamo alebo nepriamo určujú nákupné alebo predajné ceny alebo iné obchodné podmienky; obmedzujú alebo kontrolujú výrobu, odbyt, technický rozvoj alebo investície; rozdeľujú trhy alebo zdroje zásobovania; uplatňujú nerovnaké podmienky pri rovnakých plneniach voči ostatným obchodným partnerom, čím ich v hospodárskej súťaži znevýhodňujú; podmieňujú uzatváranie zmlúv s ostatnými zmluvnými stranami prijatím dodatočných záväzkov, ktoré svojou povahou alebo podľa obchodných zvyklostí nesúvisia s predmetom týchto zmlúv." Takéto dohody popr. rozhodnutia sú zakázané a neplatné.[21] Naopak, v zmysle čl. 101 (3) ZFEÚ sa ustanovenia čl. 101 (1) ZFEÚ neuplatnia napr. na dohody medzi podnikateľmi, rozhodnutia združení podnikateľov a zosúladené postupy pomocou ktorých sa prispieva k zlepšeniu výroby alebo distribúcie, podpore technického alebo hospodárskeho pokroku, apod. Je tu možné vidieť podobnosti s prvým oddielom Shermanovho zákona. V mnohých prípadoch týkajúcich sa vertikálnych dohôd rozhodla Európska komisia, že správanie ktoré sa na prvý pohľad javí ako jednostranné spadá do pôsobnosti čl. 101 (1) ZFEÚ[22] ako dohoda alebo zosúladený postup. Naopak, v mnohých prípadoch, počnúc prípadom *Bayer AG*[23] boli zistenia Európskej komisie ohľadne existencie dohôd medzi dodávateľom a jeho distribútormi zrušené v rámci odvolacieho konania. Niektoré závery o pôsobnosti vertikálnych dohôd v zmysle čl. 101 (1) ZFEÚ sú dosť obsiahle (napr. ak spoločnosť obdrží sťažnosť od konkurenta ohľadne súťaže zo strany svojich výrobkov a následne prispôsobí svoje správanie, je možné toto konanie označiť za zosúladený postup[24]). Cieľom čl. 101

[17] U.S. v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (quoting P. AREEDA & H. HOVENKAMP, III ANTITRUST LAW ¶ 651f (2d ed. 2002)).

[18] Horizontálne obmedzenia zahŕňajú nekalé obchodné praktiky ako aj kartel.

[19] SVOBODA, P. (2010): Úvod do Evropského práva, str. 242.

[20] FUNTA, R. (2015): Binnenmarkt der Europäischen Union: Rechtsgrundlagen, str. 11-20.

[21] TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. (2010): Evropské právo, str. 523 a nasl.

[22] FUNTA, R. (2014): Theory and practice of competition economics market definition, str. 56.

[23] C-2/01 P a C-3/01 P, Bundesverband der Arzneimittel-Importeure v. Bayer, Zb. 2004, s. I-00023.

[24] Napr. dohody obmedzujúce súťaž možno zaradiť medzi zosúladené postupy. Jej podstata spočíva v tom, že spoločnosti spravidla prijímajú nezávislé rozhodnutia vyplývajúce z toho, že nemajú poznatky o postupoch a obchodných metódach konkurencie, a snažia o to, aby

ZFEÚ je zabezpečiť, aby podniky nepoužívali vertikálne dohody na obmedzenie hospodárskej súťaže na trhu na úkor spotrebiteľov. Posúdenie vertikálnych obmedzení je dôležité aj v súvislosti so širším cieľom dosiahnutia integrovaného vnútorného trhu EÚ. Integrácia trhu podporuje súťaž v EÚ.

5. Záver

V posledných rokoch sa do centra pozornosti dostali rozdiely medzi politikou hospodárskej súťaže v USA a EÚ. Jednou z konkrétnych oblastí, kde sú viditeľné tieto rozdiely, je riešenie vertikálnych obmedzení. V Spojených štátoch musí žalobca preukázať, že vertikálna dohoda pravdepodobne poškodí hospodársku súťaž - to znamená, že znižuje ekonomický blahobyt. Požiadavky súťažného práva ohľadne vertikálnych dohôd sú tak všeobecne považované za mätúce a ponúkajú pomerne obmedzené jednostranné možnosti na obranu. Najvyšší súd v USA, na jednej strane, v prípade *Colgate* vybojoval oveľa väčší priestor pre jednostranné kroky ako uznali súdy a teoretici v následnom storočí, ale na druhej strane, v prípade *Monsanto* ponúkol iba pomerne úzke právne formulácie. V Spojených štátoch sa hľadí na monopol že má skôr schopnosť samočinnej nápravy. Súťažné právo EÚ, na druhej strane kladie o niečo menšiu záťaž pre Európsku komisiu ale s dominantnými spoločnosťami vstupujúcimi do vertikálnych dohôd sa v práve hospodárskej súťaže EÚ zaobchádza tvrdšie. SDEÚ robí menší rozdiel medzi dohodami o horizontálnej[25] a vertikálnej spolupráce ako je tomu v USA. Je tomu tak preto, že SDEÚ je ovplyvnený zásadami integrácie trhu v EÚ. V porovnaní s pohľadom SDEÚ na rozdiel medzi dohodami o horizontálnej a vertikálnej spolupráce, americké právo robí väčší rozdiel v tom zmysle, že horizontálne dohody sú ľahšie postihnuteľné ako per se nezákonné, zatiaľ čo vertikálne dohody podliehajú princípu rule of reason.

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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, 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.

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Case C-148/15 (Deutsche Parkinson Vereinigung eV v. Zentrale zur Bekämpfung unlauteren Wettbewerbs eV)

Ivo Hicar

Abstracts

The Court of Justice of the EU (CJEU) has in this case decided that German legislation on fixed prices for prescription pharmaceuticals is in accordance with Art. 34 TFEU contrary to the free movement of goods, and that the legislation is not justifiable in accordance with Art. 36 TFEU. The Court found that by preventing pharmacies located in other Member States from engaging in price competition with local pharmacies, the system makes it more difficult for such pharmacies to access and compete on the German market. The judgement is not very surprising. However, when we look on it a bit closer, the case constitutes an important piece in the field of free movement in the EU.

Key words

CJEU, Internal Market, Free Movement of Goods and Services

1. Introduction

On 19 October 2016, the European Court of Justice issued a ruling on a question referred to the limits on the free movement principle. German Government's good faith is highly questionable as it is the third time when Dutch pharmacy DocMorris has been involved in proceedings in relation to the compatibility of German law with the Treaty provisions. In the current case, the Court found the imposition of fixed sales prices to be a measure having an equivalent effect of a quantitative restriction, thus contrary to Art. 34 TFEU. The Court's reasoning was based on the notion that, within the framework of fixed prices, the mail-order pharmacies are unable to compete effectively to services provided by traditional, brick-and-mortar, pharmacies. It has been noted that, foreign pharmacies have been operating in Germany mostly through the internet, therefore sale by mail order constitutes a more important means of accessing the German market. The Court found that, reasonable price is a less significant factor of competition for traditional pharmacies, as the latter are able to compete with individually-tailored advice provided by dispensary staff.[1]

The Court also examined whether the measures at issue could be justified on the ground of protection of public health within the meaning of Art. 36 TFEU.[2] German Government asserted, that price-fixing framework was necessary to guarantee safe and high-quality supply of pharmaceuticals, particularly in rural areas.[3] Measures restricting a fundamental freedom must be accompanied by necessary evidence damning appropriateness and proportionality of measures at issue. Accordingly, the general contentions provided by German Government did not represent sufficient evidence for justification, based on the argument of uniform medicinal supply.[4] It has been specifically rejected the allegation that, the fixed price would ensure a high-quality of pharmaceuticals throughout the territory of Germany. Neither was there any evidence that, the supply of pharmaceuticals in rural areas would be negatively affected by allowing price competition, nor that the patient's health would be put in jeopardy. The Court rounded up the case by dismissing further arguments and put forward as to the negative effects of price competition for prescription pharmaceuticals.

2. Violation of the Treaty provisions?

The Court stressed the importance of the free movement principle, and refrained from deeper examination of the question, whether the general conditions on free movement of goods has been satisfied. Given the circumstances, it was trivial for the Court to determine the material scope of the provisions, by finding medicinal products to be considered as goods, as they could be evaluated in monetary form, and, were capable of forming subject of commercial transactions.[5] Territorial elements were also found to be satisfied, since the measures at issue, applied to both, domestic and imported goods. The internal dimension of the rules on free movement of goods[6] were also satisfied, as the medicinal products originated from Member State. However, precise information on the origin of goods does not appear in the judgment. The third condition for engagement of the Treaty provisions on goods relates to their direct effect. At this point, the Court considered the fact that, the provisions of TFEU have, in general, vertical

[1] http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-10/cp160113en.pdf

[2] Case C-148/15, para. 28.
[3] Case C-148/15, para. 32.
[4] Case C-148/15, para. 37.
[5] Case C-7/68, para. 428-9.
[6] BARNARD, C. (2013): The Substantive Law of the EU: The Four Freedoms.

direct effect[7] and therefore applied to the measures at issue. Quite understandably, the Court put a little effort in the measurement of the de minimis rule. Considering the broad scope of the Dassonville formula, there was no room for the recognition of such a rule in the context of Art. 34 TFEU.[8] This was also expressly held in Van de Haar[9] Case. In order to detect violation of the prohibition under Art. 34 TFEU, the Court employed the formula mentioned above.[10] Based on that, the Court relatively uncontroversially found that, the measures at issue constituted more of an obstacle to pharmacies outside Germany, than those within Germany,[11] and therefore impeded access to the German market. The Court in this case used the wider term "any measure" instead of "all trading rules", which is in line with current case-law.[12] Based on the Court's ruling in Dassonville and subsequently in Cassis de Dijon, there is no need for any discriminatory element in order for a national measure to be caught under Art. 34 TFEU. However, the measures at issue were considered to be discriminatory. The Court´s measurement could be more comprehensive in examination, whether the German provisions constitute "certain selling arrangements" within the meaning of the decision in Keck and Mithouard case.[13] With this judgement, contrary to what had previously been decided, the Court excluded from the scope of Art. 34 TFEU those measures, which applied to all traders and affected the marketing of domestic and imported products in the same manner, in law and in fact. Even though the Court never positively defined what should be understood by "certain selling provisions", the analysis made by the General Advocate clearly shows that measures at issue came close with such provisions.[14] It was crucial for the Court to find that, the mail-order sale constituted an additional channel of distribution for German based pharmacies, while for non - German based pharmacies it was the only distributional channel. Consequently, the Court differentiated between measures of non-economic nature, which were not discriminatory and only marginally linked to free movement as such, and those measures, which limited competition and market access of foreign traders. As the General Advocate correctly stated, the situation clearly fell within the scope of Art. 34 TFEU, as those measures, by indirectly discriminating against non - German pharmacies, did not constitute a 'certain selling arrangement' in the sense of Keck and Mithouard and did constitute a barrier to trade of medicinal goods from other Member States.[15]

3. Lack of evidence

As a next step, the Court investigated whether justifications within the meaning of Art. 36 TFEU can be used by the German government to justify the national measures that impede cross-border trade. While the Court's case-law on the matter of public health is extensive, the prescribed requirement was, that the protection of health cannot be invoked if the real purpose of the measure was to protect the domestic market. It should be pointed out, that the argumentation of Germany on this matter was unconvincing and incomplete. As it is constituted in consistent case-law,[16] the burden of proof regarding justifications under Art. 36 TFEU lies on the Member State, and evidences must be based on relevant scientific research.[17] However, this was not the case in relation to the evidence provided by Germany. The Court started its analysis by exercising constraints imposed on invocation of Art. 36 TFEU derogation.[18] The Court´s statement about the importance of strict interpretation of the above mentioned exceptions,[19] sheds the light on the further course of argumentation. However, the Court omitted to mention that, the German argument, regarded to the control of cost developments in the health sector, cannot be invoked, because the Art. 36 TFEU is directed to eventualities of "non-economic kind".[20] As a necessary step in application of Art. 36 TFEU, the Court discussed the issue of appropriateness and proportionality. Firstly, the Court examined the question, weather the measure that was at issue was capable to protect the public interest that needs protection. At this point, the argumentation of the Court did not encounter any uncertainty. Due to general contention made in the German argumentation, the Court was simply unable to measure how fixed price allows for better geographical allocation of traditional pharmacies in Germany.[21] The Court correctly found that, the necessary causal link between the measure and objective pursued was missing, or was of a very weak nature. Moreover, as pointed out by the General Advocate, the effective price competition could be conductive to a consistent coverage of pharmacies

[7] BARNARD, C. (2013): The Substantive Law of the EU: The Four Freedoms.
[8] For most recent case law, in which the Court still refers to the Dassonville formula, see e.g. Case C-420/01, para. 25, Case C-192/01, para. 39, Case C-41/02, para. 39 and Case C-147/04, para. 71.
[9] Joined Cases C-177/82, C-178/82, para. 36.
[10] Case C-8/74, para. 5.
[11] Case C-148/15, para. 23.
[12] Opinion of Advocate General Szpunar, 2 June 2016, Case C-148/15, para. 17.
[13] Joined Cases C-267 and 268/91.
[14] Opinion of Advocate General Szpunar, 2 June 2016, Case C-148/15, para. 25.
[15] Opinion of Advocate General Szpunar, 2 June 2016, Case C-148/15, para. 37.
[16] Opinion of Advocate General Szpunar, 2 June 2016, Case C-148/15, para. 71.
[17] ENCHELMAIER, S., OLIVER, P. (2010): Free movement of goods in the European Union.
[18] BARNARD, C. (2013): The Substantive Law of the EU: The Four Freedoms.
[19] Case C-148/15, para. 29.
[20] Opinion of Advocate General Szpunar, 2 June 2016, Case C-148/15, para. 42.
[21] Case C-148/15, para. 37.

throughout Germany.[22] Secondly, regarding the German argument about quality of pharmaceutics, the Court proved, by depicting the eventual situation of a decrease in number of traditional pharmacies that, there is no link between price of medicinal products and quality of services provided. Further, in relation to traditional pharmacies facing price competition with mail-order pharmacies, such pharmacies will have a strong motivation to improve the provision of individual advice and emergency care services, eventually by providing on-line consulting. As provided in settled case-law, the effective protection of health and life of humans demands medical products to be sold at reasonable prices.[23] The measure at issue potentially assures reasonable price, however, unfixed prices leaves the room for price competition that pushes the price down. Additionally, the Court had to respond to the question, whether the measure at issue was necessary to reach the aim pursued, and if there was a less restrictive alternative. As the Court remarked, Germany did not bear the burden of proof, by not proving that essential health services would no longer be ensured in Germany in case of absence of measures at issue. The Court put less effort in examination of the issue of necessity, arguably due to the fact, that measure at issue was already considered to be inappropriate to attain the aims purported. Quite unusually, the applicants produced no hard evidence to support their claim. If there is not sufficient evidence to ascertain a measure restricting a fundamental freedom, a national court should not accept the measure. This follows in line with the recent Scotch Whisky case[24] and confirms that the Court has taken a more strict view on the appropriateness criterion and the necessity of producing sufficient evidence when restricting fundamental freedoms. Finally, given that the case is referred to the Court by a national court pursuant to Art. 267 TFEU, the Court could have left it to the national court to rule on the appropriateness and proportionality of the price fixing regime.

4. Having not only political impact

The system of fixed prices for prescription pharmaceuticals may no longer be upheld in Germany. Consequently, foreign mail-order pharmacies are no longer obliged to sell prescription medicinal products to their German customers at the uniform prices. In contrast, German pharmacies will still be bound to sell prescription-only medicinal products at the fixed price. It remains to be seen in how the German legislator will handle the regulation at issue, once the German Court declared incompatibility with the Court's judgment. The matter has become a profoundly political issue in Germany. According to reports published in the media, both politicians from the ruling CDU party, as well as the German pharmacy trade association, call for reparatory legislation in the form of a total ban on distance sales of prescription medicines. It appears to follow from an earlier judgment of the Court from 2003, that under certain circumstances, such a ban may be allowed under European law.[25] However, the most possible consequence may be the implementation of a framework of a maximum, as opposed to fixed pharmacy prices, similar to the one that Germany had in place until 2004. The implications of the Court's judgment are EU-wide, as a result of which the interpretation of the EU free movement rules in the ruling is binding on all national courts. All the Member States, in which fixed retail prices for pharmaceuticals are legally prescribed, will need to adopt less interfering forms of price regulation. This development also appears to create opportunities for internet pharmacies in the European Union.

5. Conclusion

Finally, the judgement can constitute an important precedent that potentially can contribute to the creation of an EU wide market for online cross-border sales of medicinal products. Importantly, EU legislators should bear in mind that, if online sales are the only method to access local consumers, fixed retail prices are in principle prohibited.

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[22] Opinion of Advocate General Szpunar, 2 June 2016, Case C-148/15, para. 52.
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Global financial crisis, financial instability and the EU Law from the retrospective

Michael Pollack

Abstract

The global financial crisis, as bad as any since the stock market crashes of 1929, has showed us that there must be something wrong with the structure of financial regulation. At the beginning many were worried that regulation would do damage to the markets but now there is a need for strengthened global regulatory framework. The paper analyzes the main factors of the crisis which is not yet over. In order to stabilize the financial system, government measures have not always been fully compatible with the principle of free and open markets (risk of distorting of competition). It is clear that the financial system is undergoing a very challenging period with consequences for the future of global finance.

Keywords

EU Law, EFSM, EFSF, ESFS, Financial Crisis, Financial Instability, Financial System

I. Introduction

The financial crisis, which has become a global economic crisis and an employment crisis[1] (not excluded the social crisis and a political crisis) included some/all of the following elements: macroeconomic policies, financial-sector supervision and regulation, financial engineering, and the global activities of large private financial institutions. To understand the real causes[2] of the crisis we should note that no/weak regulation of financial instruments known as derivatives has also attributed to this turbulence. In my view, the financial services industry was the biggest offender in the situation. People borrowed a huge amount of money which subsequently led to reduced liquidity in the market. They incurred more debt than they could pay off (without having savings). Nobody was able to predict about how this crisis will resolve itself and many of the ordinary people were telling that it was getting worse even before it was getting worse.[3]

II. Financial stability/instability definition and why it occurs?

Padoa-Schioppa suggests that *"financial stability is a condition where the financial system is able to withstand shocks without giving way to cumulative processes, which impair the allocation of savings to investment opportunities and the processing of payments in the economy."*[4] Allen and Wood, in their paper have described the financial stability as *"a state of affairs in which an episode of financial instability is unlikely to occur."*[5] And lastly, European Central Bank in its Financial Stability Review paper from June 2010 follows the thesis according to which the financial stability is seen *"as a condition in which the financial system comprising of financial intermediaries, markets and market infrastructures is capable of withstanding shocks and the unraveling of financial imbalances, thereby mitigating the likelihood of disruptions in the financial intermediation process which are severe enough to significantly impair the allocation of savings to profitable investment opportunities."*[6]

When defining the financial instability, it is important to distinguish between financial instability and financial crisis. According to Mishkin, financial crisis occurs when *"shocks to the financial system interfere with information flows so that the financial system can no longer do its job of channelling funds to those with productive investment opportunities."*[7] For Allen and Wood *"episodes in which a large number of parties, whether they are households, companies or governments, experience financial crises which are not warranted by their previous behaviour and where these crises collectively have seriously adverse macro-economic effects"*[8] There are also several factors that can lead to financial instability like increases in interest rates, increases in uncertainty, asset market effects on balance sheets, and problems in the banking sector.

Minsky, well known for his financial instability hypothesis, has developed a thesis where increased investment always leads to larger current profits, and larger current profits stimulate expectations of higher future profits. Minsky's hypothesis was based on the idea that economic units (e.g. banks or investment businesses) have three income-debt relations: *"hedge*"

[1] GREAVES, P. L. (2006): The causes of the economic crisis, The Ludwig von Mises Institute, p. 164-171.

[2] FUNTA, R. (2011): Economic law and economic crisis: where do we go from here. Economic, Legal and Political dimension, pp. 65-71.

[3] Although latest unemployment and inflation figures seem to indicate the European and World economy is stabilizing but on the other hand it is not improving. Regarding the Youth unemployment numbers and rates expected in 2011 see the ILO (2010): Global employment trends for youth, Special issue on the impact of the global economic crisis on youth, p. 6.

[4] PADOA-SCHIOPPA, T. (2002): Central Banks and Financial Stability: Exploring a Land in Between.

[5] ALLEN, W., WOOD, G. (2006): Defining and achieving financial stability, pp. 152-172.

[6] ECB (2010): Financial Stability Review, p. 7.

[7] MISHKIN, F. S. (1994): Global Financial Instability: Framework, Events, Issues, pp. 3-25.

[8] ALLEN, W., WOOD, G. (2006): Defining and achieving financial stability, pp. 152-172.

finance, *"speculative"* finance, and *"Ponzi"* finance: *"Hedge financing units are those which can fulfill all of their contractual payment obligations by their cash flows: the greater the weight of equity financing in the liability structure, the greater the likelihood that the unit is a hedge financing unit. Speculative finance units are units that can meet their payment commitments on 'income account' on their liabilities, even as they cannot repay the principal out of income cash flows. Such units need to 'roll over' their liabilities (e.g. issue new debt to meet commitments on maturing debt). For Ponzi units, the cash flows from operations are not sufficient to fulfill either the repayment of principal or the interest due on outstanding debts by their cash flows from operators. Such units can sell assets or borrow. Borrowing to pay interest or selling assets to pay interest (and even dividends) on common stock lowers the equity of a unit, even as it increases liabilities and the prior commitment of future incomes."*[9] He argued, that problem with capitalism is that stability is destabilizing, and that the boom cannot continue forever. Over a period of prosperity, the financial structure of our economy becomes more and more fragile. Even if market participants were aware that financial crises will occur at some point that would not enable them to foresee when the financial crisis will occur. According to Minsky´s opinion, central banks must intervene in response to the threat, because *"they are the institutions responsible for containing and offsetting financial instability."*[10] Stricter regulation and supervision of the financial system is urgently needed to come out of the crisis.

III. Price stability, financial assistance and EU Law

The Lisbon Treaty establishing a new legal framework for the European Union[11] entered into force on 1 December 2009. The primary objective of the Eurosystem is to maintain price stability as laid down in Article 119 of the Treaty on the functioning of the European Union (TFEU): *"the primary objective of both Member States and the Union shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition."* The financial system stability consist, in particular, of four major elements, namely coordination and cooperation (between Central Banks, Fiscal authorities, Supervisory authorities as well as other agencies); research and surveillance (monitoring and measuring of developments regarding financial stability); prudential regulation (the absence of countervailing regulatory measures can lead to serious financial disruptions) and crisis management (to seek to prevent serious domestic or international financial instability). Each member must finance its deficits by itself. In this case, the so called *"no-bail-out"* clause (Article 125 TFEU) stipulates that *"The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project."* There are also many other articles in the TFEU which prohibit certain types of financial assistance, like Article 123 (1) TFEU which generally prohibits either the ECB or the national banks of Member States from providing credit facilities to or purchasing debt instruments from Member States[12] or Article 124 TFEU which prohibits measures providing EU institutions or Member State entities privileged access to financial institutions.[13] Contrary to this, EU financial assistance is allowed in case of application of Article 122 (2) TFEU *"where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned."*

IV. Credit rating agencies failure?

Credit Rating Agencies (CRA), which play an important role in investment decision-making process, have failed to warn people about potential risks. On this occasion we can agree with Arthur Levitt Jr. statement that *"the credit-rating agencies suffer from a conflict of interest, perceived and apparent, that may have distorted their judgment, especially when it came to complex structured financial products."*[14] More

[9] MINSKY, H. P. (1992): The Financial Instability Hypothesis, p. 7.
[10] MINSKY, H. P. (1986): Stabilizing an Unstable Economy, p. 322.
[11] Also the Article 3 (3), sentence 2 of the TEU states that the Union *"shall work for the sustainable development of Europe based on balanced economic growth and price stability."*

[12] Article 123 (1) states: *"Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments."*
[13] Article 124 prohibits: *"Any measure, not based on prudential considerations, establishing privileged Access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions..."*
[14] LEVITT, A. (2008):Triple A-Failure, p. 1 .

effective oversight of their activities is needed to bear some responsibility for the financial crisis. In the interest of financial market stability, CRA as the biggest uncontrolled power in the global financial systém have to be regulated. American and European legislators have to be focused to achieve effective control about their activities.

V. Conclusion

Minsky wrote that, *"a capitalist economy is fundamentally flawed, because the financial system necessary for capitalist vitality and vigor, contains the potential for runaway expansion, powered by an investment boom. This runaway expansion is brought to a halt because accumulated financial changes render the financial system fragile, so that not unusual ganges, especially rising interest rates, can trigger serious financial difficulties. The fundamental financial attributes of capitalism mean that periodic difficulties in constraining and then sustaining demand will ensue."*[15] Without a doubt, the current market system must be transformed and re-regulated. We can agree with Eliot Spitzer statement that*, "Not only did the Bush administration do nothing to protect consumers, it embarked on an aggressive and unprecedented campaign to prevent states from protecting their residents from the very problems to which the federal government was turning a blind eye."*[16]

The crash (both a liquidity crunch and a credit crunch) happened because households consumed too much, sending their debts to the banks. The banks sent the debts to the governments (e.g. Ireland or Greece). They are sending their debts to the European Union: but to whom will the EU send the bills when there is no money more? Will the Eurozone Collapse? No, it will probably not collapse. It will continue, but at a high price.

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[15] MINSKY, H. P. (2008): John Maynard Keynes, p. 28.

[16] SPITZER, E. (2009): Predatory lenders' partner in crime, April 13.

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