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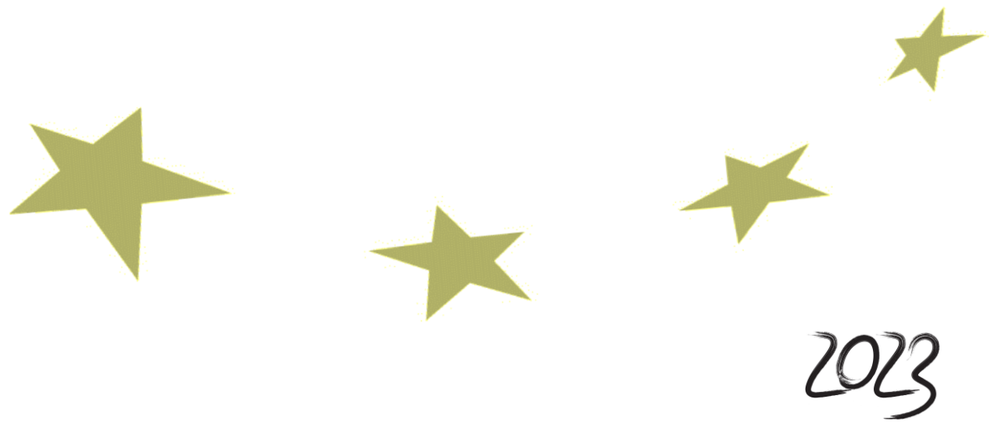

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The Future of Democracy

Dirk Buttler & Andreas Schultz
Danubius University

Abstract

"Democracy" is a technical expression of political and scientific usage that comes from the Greek. "Democracy" is derived from "demos" - the Greek word for people, popular mass or full citizenship - and kratein", which means "to rule" or "to exercise power". Democracy is, in this respect, rule or exercise of power by the people or rule by the many, as opposed to rule by the few, as in aristocracy or oligarchy, or rule by one, as in the case of monarchy or tyranny. What about the future prospects of democracy? This and other relevant facts will be examined in this article.

Key words

Democracy, Democratic power, Globalisation

1. Introduction

In the meantime, democracy has become the generic term for many political systems.[1] Few resemble the popular assembly rule of ancient Greece. The democracies of recent history and the present differ from the ancient Greek forms in many ways: through representative constitutions, the much larger proportion of the adult population who are entitled to participate, the addition of intermediary institutions such as parties, associations and mass media that mediate between the people and the political leadership, further through the curbing of democracy with the constitution and law as well as through the anchoring in small and large states.

But the older and the modern democracies have in common the claim to oblige the rule in the state to the norm of political equality of full citizens, to be based on the will of the whole or at least a significant part of the electorate and to make the temporary rulers accountable to the governed. On the other side, the realistic correction of Lincoln's definition of democracy is not enough. In many cases, it has been proven that neither the people nor the parliament rule, but rather the constitution, the judiciary or the bureaucracy, sometimes in conjunction with the government, with the functional laws of a market economy or the internationalization of the economy and politics.

At its core, democracy is characterized by a secularized order. In it, full citizens are ultimately the sole source of state power. The authority to regulate public affairs thus no longer rests with the monarch or the church, with God, the gods, or with rulers who claim to be appointed by God or gods. Possession and exercise of state power must be derived from full citizens and accountable to them, at least to a significant extent and for authoritative functions of government, in concrete terms and in chains of legitimation that are as intact as possible. That is the basic requirement of a democratic constitution and constitutional reality.

2. Forerunners of modern democratic theories

Just as there is not just one democracy, but many democracies, so there is not just one theory of democracy, but many doctrines of democracy.[2] These include empirical and normative as well as input- and output-oriented theories. Some theories are static, others dynamic, some are based on narrow experience, others on a broad information base, some of them do without comparative studies, but some use international and historical comparison to broaden horizons and to test hypotheses and forecasts more precisely. In addition, a significant part of the theories of democracy can be assigned to political-ideological mainstreams: some are conservative or liberal, others radical. But there are also theories that strive for the greatest possible ideological neutrality.

Jean-Jacques Rousseau elevated the idea of democracy to a radical doctrine. He eloquently promotes popular sovereignty, namely indivisible, inalienable popular sovereignty. A sharpening of Rousseau's teaching with a revolutionary intention can then be found in Karl Marx. Totally opposed to Rousseau's and Marx's conceptions of democracy is the political order advocated by the authors of the Federnlist Papers and John Stuart Mill in the theory of representative government. The Federalist Papers are documents of the liberal constitutional and federalist representative constitution of democracy in the United States of America, and Mill is the most important protagonist of classical liberal theory of democracy. Mill is closer to

[1] Boguszak, J. - Čapek, J. - Gerloch, A. Teorie práva. 2. vydání. Praha: Aspi, 2004.

[2] Kresák, P. Občan a demokracia. Bratislava: Minority Rights Group, 1997.

the threshold of twentieth- and twenty-first-century fashion and mass democracy. This applies even more to Alexis de Tocqueville, who wrote a seminal work on the theory of democracy as early as the 1830s: On Democracy in America. One of his main themes is the trade-off between equality and freedom. And like hardly anyone else before and after him, Tocqueville takes stock of the benefits and costs of democracy.

3. Mainstream predictions: Favorable future prospects

What about the future prospects of democracy? Many rate their prospects as favourable. Some even think that the whole world can become democratic. There seems to be a lot to be said for this optimism, above all the number of democracies and their share of all independent states: Both are larger than ever.

Nowadays, the prevailing opinion also teaches that democracies can count on excellent future prospects for another reason: A democratic state can count on a very high probability of survival once it has reached an economic development level of around 4,000 US dollars per capita, and its prospects of survival are all the more favorable the further its economic development progresses. And that is now the case in many democracies.[3]

It is also said that democracies now have excellent prospects for the future because the ranks of opponents of democracy have thinned. The democracies have even become "without enemies". And where socialism still survives, it is either economically toothless, as in North Korea, or marching in the direction of East Asian-style capitalism, as in the People's Republic of China.

According to the prevailing opinion, the departure of one of its main opponents reduces the vulnerability of democracy to foreign policy and blackmail and reduces the international security dilemma. The reason: as the number of democracies increases, so does the group of states that, according to the theory of democratic peace, resolve their conflicts peacefully among themselves.

4. Challenges of democracies

What about the future prospects of democracy, considering both its advance and its limitations? And what do the strengths of democracy, but also its weaknesses, contribute to a better estimation of its future prospects?

Undoubtedly, democracy[4] can boast of remarkable strengths. Without a doubt, these strengths speak for the future prospects of democracy. And the more a democracy fulfills the functional requirements, the greater its probability of survival. However, the weaknesses of democracy must also be taken into account when estimating its future prospects. This shows that even the best-performing democracies face major challenges.

Five challenges are currently and will be of particular importance in the foreseeable future due to their importance and their high probability of occurrence:

- the globalization-democracy dilemma,

A particularly great challenge to democracy is rooted in the tension between a high degree of international interdependence and transnationalization on the one hand, and anchoring democracy in national states on the other. The internationalization of the economy and the transnationalization of politics can promote democracy, for example by exporting information to autocratic regimes or by creating favorable international framework conditions for the transition to democracy.

- the lack of future responsibility,

A second challenge to democracy arises from its tendency to give priority to "meeting the needs of the moment" at the expense of the future. Shifting the burden to later generations is convenient and politically opportune: it favors the acquisition and retention of power here and now and fits particularly well with the short cycle of democracy. On top of that, it is politically easy to accomplish: the burden can be passed on without encountering resistance.

- the reduced ability to correct errors,

At the same time, however, the third challenge, the political leaders of democracies, like their citizens, find it difficult to reverse the shifting of burdens onto the shoulders of others. The political turmoil that fiscal policies aimed at reducing government debt regularly provoke is instructive, as is the electoral risk posed by a government serious about restructuring or downsizing government services.

- gaps between demand and supply in democratic politics,

A fourth problem of modern democracies lies only superficially in their difficulties in recruiting and selecting qualified leadership personnel. There are difficulties. Recruiting only "tireless handshakers" is not enough in the long run for the demanding tasks of politics in a modern democracy. And the fact that politicians' pay is sometimes far below the remuneration for responsible work outside of politics had already made Tocqueville skeptical in his observation of the rising democracy in the United States of America.

- the inconstancy from the number.

[3] Gayo-Avello, D. Social Media, Democracy, and Democratization, IEEE MultiMedia no. 2 (2015): 10-16.
[4] Procházka, R. - Káčer, M. Teória práva. Bratislava: C.H.Beck, 2013.

An even more dangerous challenge to democracy lies in the "inconstancy from the number" it adds to the already dangerous volatility of human nature. It would become critical for democracy if the electorate no longer tolerated the inconsistency of numbers, such as shifting voting majorities and voting paradoxes. Democracy would also be in acute jeopardy if the electorate no longer tolerated the high degree of path dependence of democratic outcomes, particularly the dependence of victory or defeat on the electoral system.

5. Conclusion: Prognosis on the future of democracies

All social-scientific forecasts are subject to a very high probability of error. This also applies to predictions of the future of democracy. However, if one extends the existing evidence on democracy to its probable development in the 21st century, there is much to be said for this projection: the established democracies, especially the best among them, are most likely to be able to continue to fulfill their functional requirements and tolerably master the challenges described in the last section, or at least live with them. In particular, the second and third challenges - deficiencies in terms of future accountability and error correction - could best be overcome with structural reforms.[5]

Dealing with the supply-demand problem in democratic politics is much more difficult. No one has a ready master plan for improving their leadership and, at the same time, their constituents. And the first challenge, the globalization-democracy dilemma, cannot be mastered even in the medium term: coping with it requires the development of international communities of communication, experience and remembrance. But these are only beginnings in sight and require long maturation phases. Finally, the fifth challenge, the volatility of numbers, is inherent in democracy. Coping with it presupposes the ignorant or sufficiently tolerant sovereign—a demos that is either ignorant of, or generously ignorant of, democratic path-dependence, reconciling itself to victory or defeat, however path-dependent.

While the best of the established democracies can do reasonably well in meeting the challenges, countries that oscillate between intact and broken democracies, such as India and Venezuela, have to make greater concessions. Whether the new democracies that became members of the European Union with the eastward enlargement will really become part of the established democracies remains to be seen over the course of the years.[6] They have comparatively good chances in the light of the functional requirements, but political errors and confusion can thwart success.

What is uncertain is the further development of the numerous defective democracies, i.e. those countries that, on the way from an autocratic state to democracy, have at best reached semi-democratization, such as Russia. Many paths are possible from this station, both the path to further democratization and the path back to autocracy or remaining in the state of a defective democracy.

And the autocratic regimes? How likely is their transition to democracy? In the light of the theories about the development and functional prerequisites of democracy, the chances of democratization in these countries, which include the People's Republic of China and North Korea, are not at all favorable. However, comparative research into forms of government and regime change shows that the continuity and discontinuity of political regimes not only depend on structural functional requirements, but also on the almost unpredictable actions and omissions of political actors. This makes it even more difficult to predict the future.

With a view to the 21st century, however, this much can be said with considerable probability for democracy: never before have the conditions for democracy been more favourable. However, the scope for democracy is narrowing - as a result of the globalization-democracy dilemma. In addition, the democracies have other difficult household chores to deal with and have to cope with permanent problems such as the instability of numbers. It cannot be ruled out that further challenges will arise, including an increase in dissatisfied democrats and possibly a further decrease in the willingness to participate.

For this reason, too, there is no reason to celebrate democracy unreservedly. Rather, cautious optimism is appropriate with regard to their future prospects in the 21st century. The 21st century could be a century of democracy more than the second half of the 20th - a century of partly well, partly moderately, partly miserably functioning democracies in the environment of a handsome band of authoritarian or totalitarian states.

6. Literature summary

Boguszak, J. - Čapek, J. - Gerloch, A. Teorie práva. 2. vydání. Praha: Aspi, 2004.

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Gerloch, A. Teorie práva. Plzeň: Aleš Čeněk, 2013.

Kresák, P. Občan a demokracia. Bratislava: Minority Rights Group, 1997.

[5] Ondria. P. – Šimoňák, V. O práve, štáte a moci. Praha: Professional Publishing, 2011.

[6] Gerloch, A. Teorie práva. Plzeň: Aleš Čeněk, 2013.

Ondria. P. – Šimoňák, V. O práve, štáte a moci. Praha: Professional Publishing, 2011.

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Obligation of national courts to take into account the decisions of the European Commission? (Part 2)

Rastislav Funta & Dirk Buttler
Danubius University

Abstract

Ensuring the uniform application of Union law is considered to be the foundation of the EU and its assurance is a prerequisite for the functioning of the community of states. The uniform application of EU competition rules is not an end in itself, but rather a crucial component in the development of the EU's internal market. he aim of the paper is to examine whether and to what extent national courts are obliged to take the decisions of the European Commission into account in their decision-making practice. As a result, the article examines whether and to what extent national courts (and authorities) should take such decisions into consideration under primary law, as well as how this is reflected in secondary law (Article 16 of Regulation 1/2003).

Key words

EU Law, European Commission, Primary Law, Secondary Law

2.2. Limity povinnosti zohľadňovať rozhodnutia Európskej komisie na základe primárneho práva

V ďalšom sa bude skúmať, či a do akej miery primárne právo obmedzuje povinnosť zohľadňovať rozhodnutia Európskej komisie vnútroštátnymi súdmi.

a) Právo na účinnú právnu ochranu

Právo na účinnú právnu ochranu je upravené v čl. 47 Charty základných práv Európskej únie.[1] Jednou zo základných záruk práva na účinnú právnu ochranu je zabezpečenie spravodlivého procesu.[2] To platí najmä vtedy, ak by sa rozhodnutie Európskej komisie malo alebo mohlo použiť ako podklad pre občianskoprávne konanie. Právo na účinnú právnu ochranu treba rešpektovať aj v rámci súťažného konania v prospech dotknutých spoločností.

Povinnosť zohľadňovať rozhodnutia Európskej komisie vnútroštátnymi súdmi musí byť napríklad vylúčená, ak rozhodnutie obsahuje skutkové tvrdenia o strane, ale táto strana nemala možnosť podať žalobu o neplatnosť podľa čl. 263 ZFEÚ. Následne, pokiaľ ide o otázku „záväznosti“ rozhodnutia[3] podľa protimonopolného práva EÚ v zmysle čl. 16 nariadenia 1/2003, SDEÚ sa zameriava aj na výrok rozhodnutia, ktorý však musí vykladať vo svetle jeho odôvodnenia. V prípade rozporu medzi výrokom a odôvodnením môže adresát rozhodnutia na základe čl. 47 Charty základných práv Európskej únie podať na SDEÚ žalobu o neplatnosť.[4]

Z hľadiska účinnej právnej ochrany nič nebráni tomu, aby rozhodnutie Európskej komisie vzal do úvahy vnútroštátny súd pokiaľ možno toto rozhodnutie napadnúť pred súdmi Únie. Rozhodnutie SDEÚ vo veci štátnej pomoci Greepeace Engery[5] zdôrazňuje, že ak rozhodnutia Európskej komisie nie sú napadnuteľné pred súdmi Únie s ohľadom na čl. 47 Charty základných práv Európskej únie, vnútroštátne súdy musia poskytnúť právnu ochranu proti nim. To je však možné len vtedy, ak súdy dospejú k nezávislému, autonómnemu a preukázateľnému posúdeniu skutkového stavu veci bez toho, aby museli ako záväzný základ brať príslušné rozhodnutie Európskej komisie. Platí to o to viac, že ustanovenie čl. 267 ZFEÚ a jeho uplatňovanie v praxi poskytuje jednotlivcovi len obmedzenú právnu ochranu: v rámci súdov nižšieho stupňa zvyčajne neexistuje povinnosť predložiť predbežnú otázku (prinajmenšom v prípade otázok výkladu). Okrem toho sa SDEÚ zvyčajne nezaoberá skutkovými otázkami v rámci konania podľa čl. 267 ZFEÚ, čo robí nepravdepodobné aby SDEÚ preskúmal zistenie skutkového stavu Európskou komisiou. Práve vtedy, keď rozhodnutie Európskej komisie nemožno napadnúť pred súdmi Únie majú osobitnú zodpovednosť za účinnú právnu ochranu národné súdy, ktoré nezávisle vyhodnocujú skutočnosti prezentované stranami. Otázka, aké limity stanovuje právo na účinnú právnu ochranu súvisí aj s tým, či sa dotknutá strana občianskoprávneho sporu môže alebo mohla brániť proti rozhodnutiu Európskej komisie pred úniovými súdmi. V zmysle čl. 263 ods. 4 ZFEÚ sa nevyžaduje, aby bol adresát oprávnený podať

[1] Svák, J. - Grűnwald, T.: Nadnárodné systémy ochrany ľudských práv I. zväzok. Bratislava: Wolters Kluwer, 2019, ISBN 978-80-8168-971-0.
[2] Hufeld, U. - Epiney, A. - Merli, F.: Europäisches Verfassungsrecht. Vertragliches Europaverfassungsrecht, Staatliches Verfassungsrecht. Zürich: Schulthess Verlag, 2014, ISBN 978-3-7255-6818-5.
[3] T-48/11, British Airways plc proti Európskej komisii, ECLI:EU:T:2015:988.
[4] T-46/11, Deutsche Lufthansa AG a iní proti Európskej komisii, ECLI:EU:T:2015:987.
[5] C-640/16 P, Greenpeace Energy eG proti Európska komisia, ECLI:EU:C:2017:752.

žalobu proti rozhodnutiu, ale len to, že „žalobca je napadnutým aktom priamo a individuálne dotknutý“. Pokiaľ ide o rozhodnutie v neprospech dotknutého adresáta, ten musí mať možnosť uviesť zodpovedajúce nedostatky v občianskom súdnom konaní. V opačnom prípade by jeho právo na obhajobu bolo neprimerane obmedzené.[6] V individuálnych prípadoch môžu existovať výnimky zo zásady, že povinnosť relevantnej úvahy (v zmysle zákazu protichodných rozhodnutí) existuje len vtedy, ak je strana občianskoprávneho sporu zraniteľná, napríklad ak sa príjemca pomoci spoliehal na poskytnutie/existenciu pomoci, hoci uznal, že to môže byť neprípustné z dôvodu rozhodnutia Európskej komisie.

b) Kompetencia a hranica rozhodovania Európskej komisie

Povinnosť vnútroštátnych súdov zohľadňovať rozhodnutia Európskej komisie vnútroštátnymi súdmi je odôvodnená osobitnou úlohou, ktorú má Európska komisia v oblasti práva hospodárskej súťaže EÚ. Naopak, táto povinnosť sa musí končiť tam, kde sa končí právomoc udelená Európskej komisii. To, že sa touto myšlienkou riadi aj SDEÚ, je zrejmé z jeho judikatúry[7] (v zmysle nariadenia 1/2003) o kompetencii rozhodovať o vnútornom rozdelení sumy solidárne uloženej pokuty. Tu možno vychádzať z toho, že Európska komisia nemá žiadnu regulačnú kompetenciu pre túto kompenzáciu, ale tá je výlučne v kompetencii vnútroštátnych súdov. Aj keď je možné vziať do úvahy neskoršie okolnosti v kontexte únioveho súdu zaoberajúceho sa rozhodnutím Európskej komisie, nič to nemení na skutočnosti, že úniové súdy nemôžu nahradiť odôvodnenie Európskej komisie vlastným odôvodnením v kontexte o preskúmaní zákonnosti podľa čl. 263 ZFEÚ.[8] To znamená, že povinnosť vnútroštátnych súdov zohľadňovať rozhodnutia Európskej komisie končí, keď Európska komisia neurobila žiadne zistenia o skutkovom stave.

c) Osobitosti v prípade rozhodnutí a zamýšľaných rozhodnutí

Tu treba zdôrazniť tri scenáre: Po prvé, Európska komisia definitívne rozhodla o svojej pozícii v rozhodnutí, ale rozhodnutie ešte nie je konečné. Po druhé, Európska komisia zaujala v rozhodnutí pozíciu ktoré ešte nie je konečné, a ktoré podlieha konečnému posúdeniu. Po tretie, Európska komisia len vyjadrila svoj úmysel prijať rozhodnutie.

V oblasti práva štátnej pomoci sa SDEÚ spočiatku (iba) zameral na konečné rozhodnutia Európskej komisie.[9] Podľa znenia čl. 288 ods. 4 ZFEÚ je rozhodnutie záväzné v celom rozsahu. Rozhodnutie, ktoré označuje tých, ktorým je určené, je záväzné len pre nich. To podporuje aj skutočnosť, že žaloba o neplatnosť nemá odkladný účinok (čl. 278 veta 1 ZFEÚ). Z toho sa usudzuje, že tieto rozhodnutia sú sprevádzané domnienkou platnosti až do ich odvolania.[10] Je však potrebné vziať do úvahy, že rozhodnutie, ktoré nie je konečné alebo je len predbežným posúdením, nemusí nevyhnutne predstavovať konečné stanovisko a môže sa zmeniť.[11] Práve preto, že aj národné súdy zohrávajú dôležitú úlohu pri uplatňovaní súťažného práva EÚ a sú v zásade povolané nezávisle posudzovať súťažné právo EÚ a vzťahuje sa na ne aj povinnosť poskytnúť účinnú právnu ochranu, nesmú ignorovať riziko že nie konečné rozhodnutie alebo predbežné stanovisko Európskej komisie by sa mohlo zrušiť alebo zmeniť. Je preto potrebné vyriešiť stret medzi povinnosťou zohľadniť tieto informácie a rizikom zrušenia rozhodnutia alebo zmeny stanoviska Európskej komisie. Spravidla to bude závisieť od konkrétneho prípadu. Primárne právo ponúka možnosti, ako postupovať. Napríklad, ak existujú pochybnosti o platnosti rozhodnutia vnútroštátny súd môže získať istotu pomocou konania podľa čl. 267 ZFEÚ alebo vyčkať na výsledok žaloby o neplatnosť proti rozhodnutiu. Naopak, vnútroštátny súd nemusí nevyhnutne prerušiť konanie, ak na základe vlastného pohľadu na skutkový stav a právne otázky považuje rozhodnutie Európskej komisie za správne a platné. Aj v tomto prípade však potreba právnej ochrany účastníka konania pred súdom môže hovoriť v prospech povinnosti prerušiť konanie, najmä ak tento účastník napadol predmetné rozhodnutie na súdoch Únie (čl. 47 Charty základných práv Európskej únie);[12] túto potrebu právnej ochrany jednej strany treba porovnať s potrebou účinnej právnej ochrany druhej strany.[13] Aké opatrenia sú tu potrebné, závisí aj od príslušnej oblasti práva hospodárskej súťaže EÚ, pretože v tomto ohľade musia byť vyvážené rôzne záujmy.

Ako je uvedené vyššie, základnú povinnosť zohľadňovať čakajúce rozhodnutia Európskej komisie možno odvodiť z požiadavky lojality v spojení s princípom právnej istoty. Vychádza to z myšlienky, že Európska komisia pristúpila k rozhodnutiu do takej miery, že možno predpokladať viac než len nezáväzný orientačný efekt pre vnútroštátne súdy. SDEÚ v rozsudkoch Delimitis/Henninger Bräu a Masterfoods

[6] Procházka, R. - Káčer, M.: Teória práva. Bratislava: C.H.Beck, 2013, ISBN 978-80-8960-314-5.
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[12] C-199/11, Europese Gemeenschap proti Otis NV a i., ECLI:EU:C:2012:388.
[13] C-170/13, Huawei Technologies Co. Ltd proti ZTE Corp. a ZTE Deutschland GmbH, ECLI:EU:C:2015:477.

vychádzal zo skutočnosti, že Európska komisia „zamýšľala“ vydať rozhodnutie. Kedy presne sa takýto zámer Európskej komisie dá predpokladať, je však otvorené v znení primárneho práva, ako aj v uvedených rozhodnutiach SDEÚ. Keďže túto povinnosť zohľadňovať čakajúce rozhodnutia Európskej komisie znamená ďalekosiahly zásah do inak existujúcej procesnej autonómie vnútroštátnych súdov, nie každý krok alebo stanovisko Európskej komisie možno interpretovať ako dostatočný „úmysel“. Vnútroštátne súdy sa nevyhnú ani hodnoteniu sekundárneho právneho kontextu, ktorý špecifikuje jednotlivé procesné kroky pre Európsku komisiu a zároveň (aj keď možno nie definitívne) informuje o tom, ako ďaleko pokročila Európska komisia.[14]

d) Vyvažovanie záujmov v prípade zamýšľaných rozhodnutí Európskej komisie, ako aj v prípade predbežných rozhodnutí

Konanie na základe čl. 108 ods. 3 poslednej vety ZFEÚ je o zvažovaní súkromných záujmov. Vnútroštátny súd musí vziať do úvahy akékoľvek pochybnosti o správnosti stanoviska Európskej komisie. Potreba právnej ochrany strany pred súdom však môže hovoriť v prospech pozastavenia konania, ak táto strana napadla príslušné rozhodnutie na súdoch Únie alebo tak plánuje urobiť (čl. 47 Charty základných práv Európskej únie); túto potrebu právnej ochrany jednej strany treba porovnať s potrebou účinnej právnej ochrany druhej strany a účinného presadzovania práva štátnej pomoci. Ak Európska komisia ešte nezaujala konečné stanovisko a vnútroštátny súd má pochybnosti o existencii štátnej pomoci a/alebo považuje za možné, že rozhodnutie Európskej komisie o začatí konania bolo nesprávne, má ešte možnosť obrátiť sa na Európsku komisiu so žiadosťou o „objasnenie“. Ak má vnútroštátny súd pochybnosti o výklade rozhodnutia, ktorým sa konanie končí, môže sa obrátiť na SDEÚ postupom podľa čl. 267 ZFEÚ. V prípade súdov posledného stupňa existuje dokonca povinnosť tak urobiť.[15] To isté platí, ak vnútroštátny sudca vidí neriešiteľný rozpor medzi predbežným stanoviskom Európskej komisie (napr. v rozhodnutí o začatí konania vo veci formálneho zisťovania) a vlastným názorom (napr. či ide o pomoc) alebo spochybňuje platnosť rozhodnutia. Ak vnútroštátny súd nie je schopný prijať konečné rozhodnutie, ktoré by prijalo názor Európskej komisie, pretože tento názor buď považuje za nesprávny, alebo by konečné rozhodnutie narušilo potrebu právnej ochrany, nesmie zostať nečinný. Vo svojej judikatúre týkajúcej sa Zuckerfabrik Süderdithmarschen[16] SDEÚ uviedol, že pozastavenie konania o presadzovaní práva EÚ je možné len za prísnych podmienok. V rozhodnutí CELF/SIDE II[17] SDEÚ tiež objasnil, že rozhodnutia vnútroštátnych súdov na základe čl. 88 ods. 3 poslednej vety ZES (dnes čl. 108 ods. 3 poslednej vety ZFEÚ) vyžadujúce úplné prerušenie ich konania v zásade neprichádza do úvahy, pretože by to malo „v skutočnosti rovnaký výsledok ako zamietnutie žiadosti o ochranné opatrenia“. Vnútroštátny súd preto musí konať a preskúmať, či sú potrebné predbežné opatrenia, aby sa nebránilo účinnému presadzovaniu práva štátnej pomoci. Skutočnosť, že medzi hodnotením zo strany vnútroštátneho súdu a (následným) konečným hodnotením na úrovni Únie môžu existovať rozdiely, je prijateľná a Európska komisia ju nemôže spochybňovať.[18] Vnútroštátne súdy preto musia nájsť rovnováhu medzi predbežným charakterom hodnotenia štátnej pomoci v rozhodnutí Európskej komisie o začatí konania, možnosťami právnej ochrany, ktoré sú stále otvorené, a účinným presadzovaním čl. 108 ods. 3 poslednej vety ZFEÚ.

2.3. Celkový pohľad na povinnosť zohľadňovať rozhodnutia Európskej komisie vnútroštátnymi súdmi

Povinnosť vnútroštátnych súdov prihliadať pri rozhodovaní na rozhodnutia a zamýšľané rozhodnutia Európskej komisie sa považuje za základný prvok zabezpečenia jednotného uplatňovania práva hospodárskej súťaže. Túto povinnosť možno vidieť v primárnom práve, čo možno odvodiť od požiadavky lojality vo svetle čl.17 ZEÚ, rozdelenia kompetencií v čl. 101 a 107 ZFEÚ a zásady právnej istoty. Celkovo možno vytvoriť nasledujúce skupiny prípadov:

a) Rozhodujúce, konečné rozhodnutia ktoré treba dodržiavať

Vnútroštátne súdy sú povinné ich náležite vziať do úvahy. Musia sa zaoberať vyjadreniami Európskej komisie, ale musia dospieť k vlastnému zisteniu skutkového stavu a vlastnému posúdeniu veci. Ak úmysel vydať konkrétne rozhodnutie vyplýva z rozhodnutia a toto nemožno napadnúť, platia zásady ako v prípade bodu d) Významný úmysel prijať rozhodnutie, nižšie. To isté platí pre rozhodnutia, ktoré môžu byť samostatne napadnuteľné, ale ktorých obsah hodnotenia je len predbežný a predstavuje len medzikrok ku konečnému rozhodnutiu.

[14] Opermann, T. - Classen, C. D. – Nettesheim, M.: Europarecht. 9. Auflage, München: C.H.Beck, 2021, ISBN 978-3-406-75739-6.

[15] Siman, M. - Slašťan, M.: Primárne právo EÚ. Bratislava: Euroiuris, 2010, ISBN 978-80-8940-606-7.

[16] C-143/88 a C-92/89, Zuckerfabrik Süderdithmarschen AG proti colnému úradu Itzehoe a Zuckerfabrik Soest GmbH proti colnému úradu Paderborn, ECLI:EU:C:1991:65.

[17] C-1/09, Centre d'exportation du livre français (CELF), v likvidácii, Ministre de la Culture et de la Communication/Société internationale de diffusion et d'édition, ECLI:EU:C:2010:136.

[18] C-39/94, Syndicat français de l'Express international (SFEI) a iní proti La Poste a iní, ECLI:EU:C:1995:445.

b) Rozhodujúce, nie konečné rozhodnutia ktoré treba dodržiavať

Treba brať do úvahy aj rozhodujúce, nie konečné rozhodnutia. Vzhľadom na ich provizórnosť však platia osobitné znaky. Ak má súd iný názor ako Európska komisia, musí svoje konanie prerušiť a počkať na objasnenie (ak napríklad prebieha žaloba o neplatnosť) alebo ho musí podať sám (prostredníctvom postúpenia na SDEÚ alebo konzultácie s Európskou komisiou). Ak súd považuje názor Európskej komisie za správny, musí tiež svoje konanie prerušiť, ak si to vyžaduje potreba právnej ochrany účastníka konania dotknutého rozhodnutím (napr. preto, že účastník konania podal proti rozhodnutiu žalobu o neplatnosť). Ak súd na základe stanoviska Európskej komisie rozhodne bez čakania, môže tak urobiť len na základe vlastných zistení a posúdení, ktoré je možné preveriť v rámci odvolania.

c) Rozhodnutia, ktoré majú len orientačnú funkciu

Ak je skutkový stav veci dostatočne porovnateľný, súd sa musí zaoberať názorom Európskej komisie, ale nesmie z neho rozhodujúcim spôsobom vychádzať. Musí dospieť k vlastnému zisteniu skutkového stavu a vlastnému posúdeniu, ktoré musia byť preskúmateľné v priebehu odvolania.

d) Významný úmysel prijať rozhodnutie

Zamýšľané rozhodnutia nie sú záväzné v zmysle čl. 288 ods. 4 veta 2 ZFEÚ. Z požiadavky lojality vo svetle čl. 17 ZEÚ a rozdelenia kompetencií v čl. 101, 107 ZFEÚ vyplýva aj požiadavka na ich zohľadnenie ak súd dospeje k záveru, že Európska komisia pristúpila k rozhodnutiu do takej miery, že úmysel prijať rozhodnutie už má významný vplyv. Ak má súd iný uhol pohľadu ako Európska komisia, nemôže rozhodnúť s konečnou platnosťou, ale musí svoje konanie prerušiť a počkať na objasnenie veci. Ak súd považuje názor Európskej komisie za správny, môže sa ním riadiť bez toho, aby čakal na konečné posúdenie Európskou komisiou, ale v tomto smere musí dospieť k vlastnému zisteniu skutkového stavu a vlastnému posúdeniu. Ak konanie pred Európskou komisiou trvá príliš dlho, súd musí zvážiť procesné práva strán, na ktoré sa vzťahuje primárne právo, s cieľom zabezpečiť, aby právo Únie bolo v praxi účinné.

Pokiaľ ide o otázku, či v prípade rozporu medzi rozhodnutím Európskej komisie a právoplatným súdnym rozhodnutím má prednosť posledné uvedené, vnútroštátne súdy musia vziať do úvahy okolnosti konkrétneho prípadu a pritom preskúmať najmä to, či sa v konečnom súdnom rozhodnutí zohľadnilo príslušné právo Únie.

3. Povinnosti sekundárneho právneho posudzovania v protimonopolnom práve EÚ (čl. 16 nariadenia 1/2003)

Povinnosť prihliadať pri rozhodovaní na rozhodnutia a zamýšľané rozhodnutia Európskej komisie na úrok národných súdov možno nájsť v sekundárnom práve súťažného práva EÚ v čl. 16 ods. 1 nariadenia 1/2003, ktorý má význam len v protimonopolnom práve EÚ (čl. 101 a 102 ZFEÚ). Toto ustanovenie bolo formulované na základe judikatúry SDEÚ vo veci Masterfoods. Ďalej sa najprv skúma, či toto ustanovenie môže mať svoj vlastný význam, a či nejde nad rámec primárneho práva.

3.1. Možnosť vlastnej regulácie obsahu čl. 16 ods. 1 nariadenia 1/2003

Ustanovenie čl. 16 ods. 1 nariadenia 1/2003 pojednáva o jednotnom uplatňovaní súťažného práva vnútroštátnymi súdmi. Táto norma má tak len objasňujúci účinok. Možno teda predpokladať, že zákonodarca vydal sekundárny právny predpis, ktorý síce vychádza z judikatúry, no nemusí ju nevyhnutne reflektovať, ale skôr ju prispôsobil novým okolnostiam.[19] Bez ohľadu na to možno konštatovať, že od prijatia nariadenia 1/2003 sa rozvinula aj judikatúra a stále viac sa odvoláva na čl. 16 nariadenia 1/2003.[20] Pri analýze preto nemožno ignorovať čl. 16 nariadenia 1/2003. Vnútroštátny súd musí určiť, či skutočnosti sú rovnaké ako tie, na ktorých Európska komisia založila svoje rozhodnutie. Až keď je to isté, môže vzniknúť povinnosť zohľadniť rozhodnutie Európskej komisie v zmysle čl. 16 ods. 1 nariadenia 1/2003. Z toho vyplýva, že súd sa nemôže vyhnúť vlastnému zisteniu skutkového stavu. To znamená, že rozhodnutia Európskej komisie aj v rámci čl. 16 ods. 1 nariadenia 1/2003 nemajú abstraktný všeobecný účinok (v zmysle zákazu protichodných rozhodnutí), pokiaľ ide o právne posúdenie skutkového stavu.

3.2. Obsah čl. 16 ods. 1 nariadenia 1/2003 týkajúci sa existujúcich a zamýšľaných rozhodnutí Európskej komisie

Čl. 16 ods. 1 veta 1 ZFEÚ zakazuje vnútroštátnym súdom prijímať rozhodnutia, ktoré sú v „rozpore“ s rozhodnutiami Európskej komisie. Pritom rozhodnutia Európskej komisie v protimonopolnom práve EÚ nie sú vo všeobecnosti adresované členským štátom, ale spoločnostiam. Je preto otázne, či z čl. 288 ods. 4 veta 2 ZFEÚ vyplýva pre vnútroštátne súdy rovnako komplexná povinnosť pre vnútroštátne súdy ako v prípade rozhodnutí smerujúcich proti členským štátom. Čl. 16 ods. 1 nariadenia 1/2003 túto domnelú medzeru uzatvára tým, že zákaz protichodných

[19] C-234/89, Stergios Delimitis proti Henninger Bräu AG, ECLI:EU:C:1991:91.
[20] C-199/11, Europese Gemeenschap proti Otis NV and Others, ECLI:EU:C:2012:684.

rozhodnutí platí bez ohľadu na postavenie adresáta.[21] Toto však nie je nič nové, pretože zákaz protichodných rozhodnutí možno odvodiť už z primárneho práva na základe čl. 4 ods. 3, čl. 17 ZEÚ, čl. 101, 107 ZFEÚ (pozri vyššie bod 2.3. a) Rozhodujúce, konečné rozhodnutia ktoré treba dodržiavať alebo 2.3. b) Rozhodujúce, nie konečné rozhodnutia ktoré treba dodržiavať). Tu však treba brať do úvahy aj to, že právo na účinnú právnu ochranu priznané primárnym právom nemožno obmedziť podľa sekundárneho práva. Povinnosť prihliadať na čl. 16 ods. 1 nariadenia 1/2003 teda existuje len v prípade, ak je možné príslušné rozhodnutie napadnúť. Aj tu je však potrebné dodržať čl. 297 ods. 2 pododsek 3 ZFEÚ, podľa ktorého ostatné rozhodnutia, ktoré uvádzajú, komu sú určené, sa oznamujú tomu, komu sú určené, a týmto oznámením nadobúdajú účinnosť. Rozhodnutia, ktoré neboli zodpovedajúcim spôsobom oznámené, nemožno zohľadniť v rámci čl. 16 nariadenia č. 1/2003.

Napr. korunní svedkovia zhovievavosti, t.j. páchatelia kartelu, ktorí podali žiadosť o uplatnenie programu zhovievavosti[22] sú v rozhodnutiach Európskej komisie zvyčajne uvedení ako páchatelia, a to aj v prípade, že získali 100% oslobodenie od pokuty. Takíto svedkovia nie sú vylúčení z čl. 16 nariadenia 1/2003. Povinnosť v ňom upravená sa teda uplatňuje v ich neprospech, pokiaľ sú v rozhodnutí uvedení ako adresáti, rozhodnutie im bolo oznámené a na tomto základe im (bolo) dané právo podať žalobu podľa čl. 263 ods. 4 ZFEÚ. Účinok čl. 16 ods. 1 nariadenia 1/2003 v neprospech účastníka občianskoprávneho konania existuje len vtedy, ak je to práve osoba, ktorá je v príslušnom rozhodnutí označená za páchateľa kartelu. Naopak, účinok čl. 16 nariadenia 1/2003 sa stráca v dôsledku práva na účinnú právnu ochranu, ak žiadateľ o zhovievavosť nemohol napadnúť rozhodnutie Európskej komisie na súdoch Únie z dôvodu absencie odvolania. Vnútroštátny súd musí určiť, či sú predložené skutočnosti rovnaké ako tie, na ktorých Európska komisia založila svoje rozhodnutie. Až keď je to isté, môže vzniknúť povinnosť zohľadniť rozhodnutia Európskej komisie v zmysle čl. 16 ods. 1 nariadenia 1/2003. To však znamená, že súd sa nemôže vyhnúť vlastnému zisteniu skutkového stavu, ak ide o (úplnosť) zisťovania skutkového stavu Európskou komisiou. To znamená, že rozhodnutiam Európskej komisie, ani v rámci čl. 16 ods. 1 nariadenia 1/2003, nie sú priznané abstraktné a všeobecné účinky (v zmysle zákazu protichodných rozhodnutí) ako sa pripisujú napríklad rozsudkom SDEÚ.

Podľa čl. 16 ods. 2 druhej vety nariadenia 1/2003 sa vnútroštátne súdy "musia vyhýbať aj prijímaniu rozhodnutí, ktoré sú v rozpore s rozhodnutím, ktoré Komisia zamýšľa prijať v konaní, ktoré začala". Na jednej strane začatie konania nie je nevyhnutne spojené s konkrétnym zámerom Európskej komisie, ale slúži len na zistenie skutočností, na základe ktorých Európska komisia rozhodne, či prijme rozhodnutie alebo konanie ukončí. Po druhé, podľa znenia čl. 16 ods. 1 druhej vety nariadenia 1/2003 nie je začatie konania v žiadnom prípade jediným faktorom, ktorý je potrebné zohľadniť. Podstatné je skôr to, aby sa súdy vyhýbali rozhodnutiam, ktoré sú v rozpore s "rozhodnutiami, ktoré má Komisia v úmysle prijať v konaní, ktoré začala". Čo sa rozumie pod pojmom "úmysel", nie je podľa znenia nariadenia1/2003 jasné. Tak napr. v nemeckom znení čl. 16 ods. 1 nariadenia 1/2003 sa zákonodarca Únie rozhodol pre pojem "Absicht", ktorý sa používa aj v nemeckých zneniach rozhodnutí Delimitis/Henninger Bräu a Masterfoods. Vo francúzskej verzii nariadenia 1/2003 sa používa výraz "intenter", čím sa odchyľuje od vyššie uvedených rozsudkov ("envisagées"), zatiaľ čo anglická verzia ("contemplated") v nariadení 1/2003 aspoň dodržiava znenie anglickej verzie rozhodnutia Masterfoods. Čl. 16 ods. 1 veta 2 nariadenia 1/2003 zakazuje v prípade zamýšľaných rozhodnutí, ako v prípade existujúcich rozhodnutí, protichodné rozhodnutia vnútroštátnych súdov. Pokiaľ ide len o zamýšľané, ale ešte neexistujúce rozhodnutia Európskej komisie, takéto objasnenie v nariadení 1/2003 absentuje. Rozhodnutie, ktoré je len zamýšľané, však nemožno napadnúť na súdoch Únie z dôvodu jeho neexistencie.

4. Záver

Vnútroštátne súdy sú už na základe primárneho práva povinné zohľadňovať rozhodnutia Európskej komisie v rozsahu, v akom sa dotknuté subjekty boli schopní proti nim brániť (v zmysle zákazu protichodných rozhodnutí). Treba však brať do úvahy, či rozhodnutia už nadobudli právoplatnosť alebo nie. Primárne a sekundárne právo poskytuje Európskej komisii a vnútroštátnym súdom nástroje, ktoré môže Európska komisia použiť na plnenie svojej úlohy primus inter pares a ktoré môžu vnútroštátne súdy ako funkčné súdy Únie prispieť ku koherentnému uplatňovaniu práva Únie v oblasti hospodárskej súťaže. Z primárneho práva možno vyvodiť len povinnosť Európskej komisie zaoberať sa rozsudkami vnútroštátnych súdov o rovnakých skutočnostiach, pokiaľ ich má Európska komisia k dispozícii. Európska komisia je povinná takéto rozhodnutia prešetriť len vtedy, ak existujú náznaky, že by takéto rozhodnutia mohli existovať. Pokiaľ teda Európska komisia poskytuje vnútroštátnym súdom vyjadrenia alebo informácie alebo vyhlásenia z vlastnej iniciatívy v odpovedi na ich žiadosti, nie sú vnútroštátne súdy povinné ich brať do úvahy, majú len orientačnú funkciu; iná situácia je, ak Európska komisia oznámi súdu svoj konkrétny úmysel rozhodnúť vo veci, ktorou

[21] C-547/16, EGasorba SL a iní proti Repsol Comercial de Productos Petrolíferos SA, CLI:EU:C:2017:692.

[22] Králik, A.: Náhrada škody spôsobenej porušením súťažného práva. Bratislva: C.H.Beck, 2014, ISBN 978-80-8960-320-6.

sa súd tiež zaoberá, alebo ak sa môže odvolať na existujúce rozhodnutia.

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Legal Regulation of Food Safety in the EU

Liudmyla Golovko
National University of Life and Environmental Sciences of Ukraine

Abstract

This study is supported by the Erasmus+ Programme of the European Union as a part of project № 620340-EPP-1-2020-1-UA-EPPJMO-MODULE "EU Food Law and Policy" which is implemented in the National University of Life and Environmental Sciences of Ukraine. The article focuses on the principles of EU food law. Genesis of the food safety system in the EU was studied. Adaptation of Ukrainian legislation to EU requirements in the field of food safety were analyzed.

Key words

Food safety, EU law, Sanitary and Phytosanitary measures

1. Introduction

By signing the Association Agreement with the European Union on June 27, 2014, Ukraine has continued process of adaptation of its legislation in the field of food safety to European standards. A large part of the Association Agreement is devoted to the safety of food products and sanitary and phytosanitary measures. According to Chapter 4 «Sanitary and Phytosanitary Measures» of the Association Agreement, Ukraine should introduce an equivalent European system for monitoring the quality and safety of food products. The benefits for Ukraine after signing the Association Agreement are unconditional, but more important is to implement its provisions.
Implementation of EU policy in the field of food safety in Ukraine demands obligatory coordination of organizational and legal aspects of governance that is crucial for its effective functioning. That is why it is important to study relevant EU legislation, make analysis of what Ukraine has done in order to adapt national legislation in the field of food safety to requirements of EU law and determine what else should be done.

2. General principles of the legal regulation of food safety in the EU

General principles of the legal regulation of food safety in the EU are set out in a number of regulations and directives, in particular: Regulation of the European Parliament and of the Council 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety; Regulation (EC) № 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules; Regulation (EC) № 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs; Regulation (EC) № 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin; Regulation (EC) № 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption; Commission Regulation (EC) № 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs; Council Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption.

Regulation (EC) № 178/2002 provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.[1] Prior to the creation of the EFSA, EU policy had been aimed at eliminating trade barriers within the European market and its goal was economic success rather than safety assurance.[2]

The Regulation also sets forth the obligations of EU Member States with regard to food trade, general safety requirements of food law and traceability, stating the basic rule that “food shall not be placed on

[1] Regulation of the European Parliament and of the Council 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety
[2] LEIBOVITCH, E.H., (2008): Food Safety Regulation in the European Union: Toward an Unavoidable Centralization of Regulatory Powers.

the market if it is unsafe".[3] It further regulates liability issues, making reference to the responsibility of both states and business operators.[4] In this latter respect, it is important to take due consideration of the direct effect of the Regulation, which enables European citizens to enforce consumer rights both against member states before Community courts (vertical direct effect), and against other individuals and companies in actions before national judges (horizontal direct effect). Protecting global health from foodborne hazards is a compelling duty and a primary interest of both states and non-state actors; it calls for enhanced proactive cooperation between national and international institutions.[5]

Traceability is considered to be a vital issue for all stakeholders in food supply chains. The most important driver is the increasing societal need to guarantee food quality and provenance. Because consumers cannot know in detail what processing steps are executed in the production of food and what ingredients or resources are used in these steps, they want to be assured that food products are safe, healthy, sustainable, and of high and consistent quality.[6] Based on EU experiences each EU member state tries to implement good practices in an effort to improve the traceability.[7] There is no other way to truly ensure the public's health than through cooperation.[8]

Articles 5 to 10 of Regulation 178/2002 define the general principles that shape the legal framework of EU horizontal food legislation. In particular, the following principles of horizontal legislation include:
1) Risk analysis. In order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure. Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner;

2) Precautionary principle. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment;

3) Protection of consumers' interests. Food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume. It shall aim at the prevention of: fraudulent or deceptive practices; the adulteration of food; and any other practices which may mislead the consumer;

4) Principles of transparency. There shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it. Without prejudice to the applicable provisions of Community and national law on access to documents, where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk.[9]

3. Requirements for product safety

EU legislation contains stringent requirements for product safety, minimizing possible food poisoning. The European system is organized in such a way as to quickly detect and remove a dangerous product from circulation and promptly eliminate the cause of the problem. This is achieved through the requirement of traceability throughout the chain «from field to table» - when every entrepreneur knows where he got the raw materials, each ingredient for his product and where his product goes further. In these sphere Ukraine still faces many challenges. However, some work has already been done. The following laws were adopted with the aim of adapting Ukrainian legislation to EU legislation: «On Basic Principles and Requirements for the Safety and Quality of Food Products», «On the safety and hygiene of feed», «On state control, carried out in order to verify compliance with the legislation on food and feed, animal health and welfare», «On by-products of animal origin, not intended for human consumption», «On Amendments to Some Laws of Ukraine on Identification and Registration of Animals». The following laws were amended: «On seeds and gardening material», «On State Regulation of Imports of Agricultural Products», «On the State

[3] FUNTA, R., GOLOVKO, L., JURIŠ, F. (2016): Európa a európske právo.
[4] LADYCHENKO, V., GOLOVKO, L. (2013): Legal Regulation of the Common Agricultural Policy in the EU
[5] NEGRI, S. (2009): Food Safety and Global Health: An International Law Perspective.
[6] SCHOLTEN, H., VERDOW, C., BAULANS, A., VAN DER VORST, J. (2016): *Advances in Food Traceability Techniques and Technologies.*
[7] HADJIGEORGIO, A., SOTERIADES, E., GIKAS, F., TSELENTIS, Y. (2013). Establishment of a National Food Safety Authority for Cyprus: A comparative proposal based on the European paradigm.
[8] GOSTIN, L. O. (2008). Global Health Law: Health in a Global Community.
[9] Regulation of the European Parliament and of the Council 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

Security System in the Creation, Test, Transposition and Use of Genetically Modified Organisms».

On the way to reform of state control over observance of the legislation on quality and safety of products by market operators, a significant step was made by adoption by the Supreme Council of Ukraine of the Law «On State Control over Compliance with Food Legislation, Feed, Animal by-products, Health and Animal Welfare» of May 18, 2017 aimed at establishing the legal and organizational basis for state control in the said sphere. Earlier food market operators were warned in advance about inspections, which obviously did not contribute to the effectiveness of such a form of state control. Now state control measures are implemented without warning (notification) of the market operator, except for audit and other cases where such a warning is a necessary condition for ensuring the effectiveness of state control and meets European standards.

Article 18 of the Law «On State Control over Compliance with Food Legislation, Feed, Animal by-products, Health and Animal Welfare» establishes risk-oriented nature of state control, which is also one of the innovations of the Law. This means that the lower the level of risk that the activity of a particular market operator sets, the less often the competent authority controls this operator. Nowadays the only body authorized to exercise control over observance of the legislation on quality and safety of products in Ukraine is State Committee for Consumer Safety, which began its work in April 2016. State Committee for Consumer Safety replaced several supervisors, who often duplicated each other's functions.

Another innovation is enabling of audio and video recording of control procedure. According to part 10 of article 18 of the Law «On State Control over Compliance with Food Legislation, Feed, Animal by-products, Health and Animal Welfare» inspectors, state veterinarians, other persons carrying out state control activities, as well as market operators, have the right to record the process of exercising state control by means of audio and video equipment.

Also, legislation provides for the gradual transition of food manufacturers to the mandatory use of HACCP procedures. In September 2017, the HACCP system became obligatory for the first group of enterprises - producing food products with unprocessed ingredients of animal origin (dairies, slaughterhouses and meat processing enterprises). It should be emphasized that control with the use of HACCP procedures should be handled by the manufacturer himself and he is responsible for the safety of products. But at the same such control is exercised also by the State Committee for Consumer Safety.

4. Conclusion

The Law of Ukraine «On State Control over Compliance with Food Legislation, Feed, Animal by-products, Health and Animal Welfare» completely renewed approaches to state control. The law strengthened the responsibility of producers and entrepreneurs for the safety of food products, introduced the principle of control of food production without warning, expanded the grounds for an unscheduled visit to production and established the mechanism for public monitoring. The law clearly defines the powers of inspectors. Even a list of issues that an inspector can put during a routine inspection will be the same for all enterprises and is known in advance. The law provides for obligatory introduction by the manufacturers of HACCP procedures and traceability requirements. Legislation on the safety and hygiene of feed and on seeds and gardening material has been largely aligned with the requirements of the EU.

At the same time, it is necessary to enact further laws aimed at adapting Ukrainian legislation to EU legislation. It is necessary to change the legislation concerning nutritional supplements and flavours. Ukraine should put under strict control the remains of pesticides, veterinary drugs and agrochemicals, mycotoxins, etc. in food products. It is necessary to improve legislation on the protection of plant health, control of infectious and other animal diseases, as well as the welfare of animals.

5. Literature

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HADJIGEORGIO, A., SOTERIADES, E., GIKAS, F., TSELENTIS, Y. (2013). Establishment of a National Food Safety Authority for Cyprus: A comparative proposal based on the European paradigm. *Food Control*, 30 (2), 727 – 736.

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Implementation of European Standards of Food Safety into the Legal System of Ukraine

Viktor Ladychenko
National University of Life and Environmental Sciences of Ukraine

Abstract

This study is supported by the Erasmus+ Programme of the European Union as a part of project № 620340-EPP-1-2020-1-UA-EPPJMO-MODULE "EU Food Law and Policy" which is implemented in the National University of Life and Environmental Sciences of Ukraine. The article focuses on legal regulation of food safety in the EU. Adaptation of Ukrainian legislation to EU requirements in the field of food safety was analyzed.

Key words

EU food law, food safety, adaptation of Ukrainian legislation to EU law

1. Introduction

The food policy of the European Union is built around high standards of food safety, which serve to protect the health of consumers. Food production and consumption is central to any society and has economic, social and, in many cases, environmental consequences. Although consumer health should always be a priority, these issues should also be taken into account when developing food policy. In addition, the state and quality of the environment, particularly ecosystems, can affect different stages of the food chain. Therefore, environmental policy also plays an important role in ensuring safe food for the consumer.

The main goal of EU food law is to protect the life and health of consumers. [1] Therefore, in the EU legislation, first of all, the activity of entities that produce food products is regulated in detail. [2] The obligations of public authorities - both at the level of the European Union and at the level of EU member states - are secondary in comparison with the obligations of food market operators.[3] State bodies must monitor the fulfilment of obligations by subjects of economic activity and establish sanctions for non-fulfilment of obligations. These issues are also regulated by EU food law.

By signing the Association Agreement, Ukraine undertook to adapt domestic legislation to the directives and regulations contained in the Agreement and its annexes. Chapter 4 "Sanitary and Phytosanitary Measures" of Chapter IV "Trade and Trade-Related Matters" of the Association Agreement deals with issues of food safety and quality. The purpose of this Chapter is to facilitate trade in goods covered by sanitary and phytosanitary measures between the Parties, while ensuring the protection of life and health of people, animals and plants, by: ensuring full transparency regarding sanitary and phytosanitary measures applied in trade; approximation of the laws of Ukraine to the laws of the EU; recognition of the state of health of animals and plants of the Parties and application of the principle of regionalization; establishing a mechanism for recognizing equivalence in relation to sanitary and phytosanitary measures applied by the Parties; further implementation of the principles of the Agreement on the Application of Sanitary and Phytosanitary Measures; establishment of trade facilitation mechanisms and procedures; and improving communication and cooperation between the Parties on sanitary and phytosanitary measures.

Ukraine should bring its legislation on sanitary and phytosanitary measures closer to EU legislation, as defined in Annex V to the Association Agreement. This Annex contains more than 250 regulations and directives. Therefore, it is important to study the problems of adapting Ukrainian legislation to EU requirements in the field of food safety.

2. Institutional support in the field of adaptation of Ukrainian legislation to EU food law

The implementation of activities in the field of food safety belongs to the competence of two structures functioning as part of the Ministry of Agrarian Policy of Ukraine. The State Department of Veterinary Medicine, which acts on the basis of the Regulation approved by the Cabinet of Ministers of Ukraine in Resolution No. 641 of June 8, 2001, performs the following tasks: participates within its competence in the implementation of state policy in the field of veterinary medicine; carries out state veterinary and sanitary control and supervision over the quality and safety of raw materials, food raw materials, products

[1] FUNTA, R., GOLOVKO, L., AKHTAR, A. (2016): Vybrané otázky európskeho práva a medzinárodného práva súkromného
[2] FUNTA, R., NEBESKÝ, Š., JURIŠ F. (2014): Právo Európskej Únie
[3] SHULGA, E. (2015): Some aspects of the effectiveness of international legal protection of human rights to a healthy environment

and food products of animal origin, as well as protection of the territory of Ukraine from the introduction of pathogens of infectious animal diseases from the territory of other states or from the quarantine zone; summarizes the practice of applying the legislation on issues within its competence, develops proposals for improving this legislation; develops and implements in the prescribed manner a set of measures regarding: protection of the territory of Ukraine from the introduction of pathogens of infectious animal diseases from the territory of other states or from the quarantine zone; prevention, diagnosis of infectious, invasive and non-infectious animal diseases and their treatment; protection of the population from diseases common to animals and humans; state veterinary-sanitary control and supervision of the production of veterinary-sanitary good-quality products of animal origin; state veterinary and sanitary control over the quality of veterinary medicines and preparations, fodder, feed additives; veterinary and sanitary examination of products of animal origin, and on the markets, of plant origin, intended for human consumption, further processing, feed, feed additives, as well as in the case of their domestic transportation, export, import, transit and issuance of relevant veterinary documents (certificates, etc.); bacteriological, radiological and toxicological control of the quality of products of animal origin at meat processing plants, in refrigerators and at the bases of procurement, storage and sale, and in the markets of products of plant origin; monitoring compliance by legal entities and individuals with the requirements of regulatory acts on veterinary medicine, including inspection of the production base of enterprises; improving the qualifications of veterinary medicine specialists and implementing the achievements of veterinary science and best practices into practice; development of international cooperation in the field of veterinary medicine.

The Ministry of Environmental Protection of Ukraine is the central executive authority on issues of environmental protection, rational use, reproduction and protection of natural resources, environmental safety, waste management, formation, preservation and use of the ecological network, geological study and ensuring the rational use of subsoil, as well as geodetic and cartographic activities.[4]

3. Adaptation of Ukrainian legislation to EU food law

22.07.2014 Law of Ukraine No. 1602-VII "On Amendments to Certain Legislative Acts of Ukraine on Food Products" was adopted, which entered into force on September 20, 2015. This Law states that the Law of Ukraine "On the Safety and Quality of Food Products" is set forth in a new version, namely: Law of Ukraine "On Basic Principles and Requirements for Food Safety and Quality". This Law defines the deadline for the introduction of general hygienic requirements for handling food products. The Law of Ukraine "On Basic Principles and Requirements for Food Safety and Quality". establishes requirements for the implementation of food safety management systems based on the principles of the HACCP system. Such an obligation is placed directly on market operators (Articles 20, 21 of the Law). The Law No. 2042 is more about control/inspections. Its effect extends, in particular, to public relations related to the implementation of state control over the activities of market operators engaged in the production and/or circulation of food products, feed, including the import/forwarding of food products and/or feed to the customs territory of Ukraine, in order to check such activity for compliance with the legislation on food products (Article 3 of the Law No. 2042).

In view of the implementation of the approved strategy for the implementation of the specific requirements of the Association Agreement between Ukraine and the European Union (namely in terms of appropriate sanitary and phytosanitary measures in relation to trade and trade-related issues), Ukraine undertook to develop and implement the necessary regulatory acts. This Law brought Ukrainian legislation closer to the provisions of Regulation of the European Parliament and of the Council (EC) No 178/2002 of January 28, 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. The key changes that should be emphasized are as follows: now the market operator is responsible for the quality of the food product exclusively within the limits of its activity (previously the state was responsible for the quality of the food product); the introduction of traceability, which is the ability to identify the market operator, time, place, subject and other conditions of delivery (sale or transfer) sufficient to establish the origin of food, food-producing animals, food contact materials, or substances intended for inclusion or expected to be included in foodstuffs at all stages of production, processing and circulation; procedures under the HASSP system are being implemented.[5]

The Law of Ukraine "On state control carried out to verify compliance with legislation on food, feed, animal by-products, animal health and welfare" defines the legal and organizational principles of state control carried out to verify compliance with market operators legislation on food, feed, animal by-products, veterinary medicine and animal welfare [6]. The law approximates the legislation of Ukraine to the

[4] ZERKALOV, D. (2012): Environmental safety and environment

[5] GOLOVKO, L. (2022): General Principles of EU Food Law

[6] Law of Ukraine "On state control carried out to verify compliance with legislation on food, feed, animal by-products, animal health and welfare". URL: https: //zakon.rada.gov.ua/laws/show/2042-19#Text

provisions of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules laying down special rules for the official control of products of animal origin intended for human consumption and Council Directive 97/78 / EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries. The key changes introduced by the law are as follows: after the adoption of the law, inspections of food producers are carried out without notice; the risk-oriented nature of state control has been introduced, which consists in the fact that the lower the level of risk posed by the activity of a particular market operator, the less often the competent authority inspects this operator; introduction of a mechanism of control by the public. Thus, the changes that have been made to the food legislation of Ukraine are aimed at harmonizing domestic legislation with EU legislation.

Legal regulation of organic production and use of GMOs in Ukraine in accordance with EU legislation is a rather complex topic, as the EU requirements for organic production and use of GMOs are quite high, and Ukraine does not yet have full membership in the EU. EU organic legislation requires that products sold as organic be grown without the use of synthetic fertilizers, pesticides or other chemicals, and without the use of GMOs. Ukraine undertook to comply with these requirements when exporting its organic products to the EU.

Regarding the use of GMOs, the EU has quite strict rules that limit the use of GMOs in the food industry. For example, GMO products must undergo a risk assessment procedure and be labeled as such on the product packaging. Ukraine has some restrictions on the use of GMOs, but these restrictions are not as strict as those in the EU.

Thus, one of the problems of legal regulation of organic production and use of GMOs in Ukraine is that our state has less stringent requirements for organic production and use of GMOs than the EU. This could create problems for Ukrainian farmers and producers who export their products to the EU, who must comply with strict EU requirements.

Another important issue is insufficient quality control of products and the quality of products produced in Ukraine. Insufficient control may result in products not meeting EU requirements for organic production and the use of GMOs, which may result in Ukrainian products not being able to access EU markets.

In addition, there are problems with control and labeling of GMO products in Ukraine. Ukraine has a labeling system for GMO products, but this system may not meet EU requirements, which may become an obstacle for exporting products to the EU. In addition, Ukraine does not have a full-fledged certification system for organic products that meets EU requirements. This may become an obstacle for the export of Ukrainian organic products to the EU.

4. Conclusion

In view of the implementation of the approved strategy for the implementation of the specific requirements of the Association Agreement between Ukraine and the European Union (namely in terms of appropriate sanitary and phytosanitary measures in relation to trade and trade-related issues), Ukraine undertook to develop and implement the necessary regulatory acts. Most of the commitments undertaken in the food sector according to the Association Agreement Ukraine already have been fulfilled. But some issues remained unresolved. It is necessary to change the legislation concerning nutritional supplements and flavors. Ukraine should put under strict control the remains of pesticides, veterinary drugs and agrochemicals, mycotoxins, etc. in food products. It is necessary to improve legislation on the protection of plant health, control of infectious and other animal diseases, as well as the welfare of animals. In order for Ukrainian products to have access to the EU markets, it is also necessary to improve the national legislation on organic production and the use of GMOs, including a system of labeling and certification of products that meets EU requirements.

5. Literature

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Regulating and Managing Food Safety in the EU

Viktor Ladychenko & Anton Mykytyuk
National University of Life and Environmental Sciences of Ukraine

Abstract

This scholarly work is supported by the Erasmus+ Programme of the European Union as a part of project № 620340-EPP-1-2020-1-UA-EPPJMO-MODULE "EU Food Law and Policy" which is implemented in the National University of Life and Environmental Sciences of Ukraine. The article focuses on legal regulation of food safety in the EU and principles of EU food law. Adaptation of Ukrainian legislation to EU requirements in the field of food safety were analyzed.

Key words

EU food policy, EU food law, principles of EU food law, food safety

1. Introduction

Solving the food problem, as well as preventing its occurrence, is a priority for both Ukraine and European countries. In order to ensure the implementation of the above-mentioned priorities, there is a need to consolidate and use at the national and international levels effective methods and mechanisms of state regulation of pricing in the domestic market, directions and tools for supporting the food sector of the economy, ensuring the quality, safety and availability of products for the population. The Organization for Economic Cooperation and Development, as a specialized international organization, during the calculation of collected data in the relevant field, stated that agricultural support in the EU countries is up to 49% of the value of agricultural products.[1]

The problem of food safety must be solved in the long term, which requires the presence of specific national programs, special laws on food safety, as well as effective methods and tools for regulating relevant legal relations in the EU member states. Separate emphasis should be placed on the implementation of the above-mentioned narratives, in particular through state regulation, which will control the timely application of the system of food principles, approaches, normative legal acts, institutions, etc.

[1] OECD. (2018). Agricultural policy monitoring and evaluation. URL: https://www.oecd.org/agriculture/topics/agricultural-policy-monitoring-andevaluation/

Taking into account the experience of the EU in the field of ensuring food security, the development of strategies that diagnose the current state of food security in the country should also include the development of further plans in order to develop action plans, adjust strategies and obtain results.

2. Principles of food law of the European Union

The issue of food law and food legislation in the European Union is not only important, but also one that is actively monitored by civil society. A high level of safety and effective public control is necessary to ensure that the food supply is safe and wholesome, and to ensure that other consumer interests are effectively protected. As a result, the European integration processes in Ukraine should ensure compliance of Ukrainian food legislation with the legislation of the European Union.

In the European Union, there is a system that defines specific hazards and precautionary measures for their control (HACCP), and accordingly, this system establishes a number of principles of food law of the European Union. The first principle is the need for a correct definition of the situation, which consists in determining the potential danger associated with the production of food products at all stages, from growth, processing, production and distribution to the moment of consumption, assessing the likelihood of the occurrence of dangers and determining preventive measures for their control.

The next principle is planning, which means the need to identify points/procedures/work steps that can be controlled to eliminate the hazard or minimize the likelihood of its occurrence (Critical control point). The next principle is the principle of defined limits, which consists in the fact that there is a need to establish critical limits that must be observed in order to ensure control of CCP. The principle of constant monitoring is the need to establish a monitoring system for the control of Critical control point through planned testing or observations.

The principle of adjustment involves the need to establish a corrective action to be taken if monitoring indicates that a particular Critical control point is not under control. Verification as a principle, in turn, is the need to include additional tests and procedures to confirm that the HACCP system is working effectively.

The documentation principle ensures that the procedures and records that comply with these principles and their application are documented in writing. The principle of quality of food products needs detailed research. The issue of quality standards and certification in the domestic market (regarding products or companies) is left to the voluntary initiative of operators. However, these tools must be used in accordance with misleading information rules and must not create barriers to trade. In addition, to ensure the reliability of these devices, operators should be encouraged to adhere to standards recognized at international and European levels, in particular the ISO 9000 and EN 29 000 series.[2]

As for the policy of quality promotion and certification, special measures have been introduced, in particular for the development of rural areas. These instruments concern organic products, certificates of special character for traditional products and protected geographical indications. Food labeling as a principle of EU food law, presentation and advertising of food products, consists in creating a single legal basis for mandatory food labeling rules. Currently, the Directive has been changed several times. The latest amendments, adopted by the European Parliament and the Council in 1996, introduce the principle of the quantitative declaration of ingredients and make changes to the rules for labeling the trade name of the product, taking into account recent judicial practice.

Also, the food law of the European Union distingishes four principles of ensuring sufficient guarantees of objectivity and independence of scientific recommendations on consumer health and food safety, such as:

- ensuring that scientific qualifications and competence are criteria for the selection of members of the Scientific Committees and that the selection process is transparent, and that Member States, economic entities and consumers ensure the freedom of the members of the Scientific Committees from interests that may conflict with the requirements of providing independent recommendations;
- ensuring expansion of requirements and procedures for declaration of interests;
- conducting a general policy of transparency in the entire process of scientific consulting;
- providing access to information about the working procedures of the committees and their recommendations.[3]

It is important to emphasize that the European Union in the field of food law is working on the normative consolidation of such principles as the consolidation of the principle of obtaining EU scientific advice before developing provisions on EU food products that may affect public health (although certain exceptions will be necessary, in particular in the case of urgent protective measures); and applying a single procedure for assessing all relevant risks ("one door, one key" principle).

The principle of responsibility for products in the food sector. Council Directive 85/374/EEC on liability for defective products establishes the principle according to which the manufacturer is responsible for the defect of his products. The directive applies to foodstuffs as well as other products. However, the product definition in Article 2 of the Directive excludes primary agricultural products. For the purposes of the Directive, primary agricultural products mean products of the soil, livestock and fisheries, with the exception of products that have undergone primary processing.[4] Thus, in principle, unprocessed agricultural products are excluded from the scope of the product liability directive, although Member States may choose to include these products. So far, only Greece, Luxembourg, Finland and Sweden have taken advantage of this opportunity.

3. Food safety in EU member states and Ukraine

The strategy of food security at the national level, as the main task of every state, regardless of its socio-economic level of development, is carried out on the basis of the implementation of a set of methods, principles and measures of state agrarian policy to guarantee food security.

It is worth noting that the strategic provision of food security in the European Union involves the use of a mechanism to protect the internal market and domestic production based on supranational price regulation mechanisms, namely: intervention, limit and target prices, import tariffs and export subsidies, etc.[5]

The food safety policy of the EU member states provides for the support of the food sector by stimulating exports, and accordingly by implementing the policy of admitting goods to the EU market from tropical countries where food is cheaper. The general food policy of the EU aims to protect the domestic food producer, so programs for stabilizing food prices and incomes are actively applied at the expense of both the national budgets of the EU member states and at the expense of the general budget of the EU.

This is the basis for protecting European farmers from competitors from foreign countries by profiting from the sale of their own product at world-class prices. The

[2] TRUSH, Yu. (2020): The system of analysis of dangerous factors and critical control points: principles and benefits of its implementation.

[3] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action

[4] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

[5] BATYGINA, O., ZUSHMAN, V., KORNIENKO, V. (2013): Actual problems of legal regulation of food safety in Ukraine

industrial law and experience of foreign countries, taking into account the European integration path of Ukraine, shows the advantages and risks for agriculture, the peculiarities of the state policy to reduce risks, as well as the prevention of negative consequences.[6]

The European experience of supranational and state regulation of food safety is relevant for Ukraine in modern conditions. Covering the costs of producers of the main agricultural products (food and fodder grains) will reduce the cost of livestock and poultry, dairy products, meat and eggs, respectively. In turn, this will increase the level of consumption of these products by the population and the competitiveness of domestic products. The identified mechanisms of state support for commodity producers in Ukraine should be a component of both the state's agrarian policy and the food security strategy.

It should be emphasized that only the system of compensations and subsidies is an effective tool for ensuring food safety of the state and sustainable development of the agricultural sector of the EU member states. And the flexibility of state regulatory mechanisms will allow to protect domestic producers, complying with World Trade Organization requirements, especially when applying such guarantees as customs duties and import tariffs for food products, however, this requires proper state control over monitoring the food balance. It is worth noting the need for strategic planning in the field of food safety, the need for a comprehensive system of monitoring, collection and analysis of information.

4. Conclusion

Thus, having studied the main principles of the food law of the European Union, it should be emphasized that the corresponding general principles are fixed by law, and a mechanism for their implementation has been developed. In the event that the European Union plans to standardize the quality principles of food law, the relevant ideas must pass the scientific committee, which has the status of independent and free from any interests. The only shortcoming of the principles of EU food law is the lack of responsibility of farmers for certain products of animal origin, which can lead to irreparable consequences, but the caveat regarding the choice of a member state in its way of settling this issue is a significant improvement in solving this issue.

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Market Access Requirements in EU Food Sector

Viktor Ladychenko & Kidalov Sergi & Natalia Kalinichenko
National University of Life and Environmental Sciences of Ukraine

Abstract

This study is supported by the Erasmus+ Programme of the European Union as a part of project № 620340-EPP-1-2020-1-UA-EPPJMO-MODULE "EU Food Law and Policy" which is implemented in the National University of Life and Environmental Sciences of Ukraine. The article focuses on the market access requirements in EU Food Sector.

Key words

EU food law, EU food sector, EU law

1. Introduction

Food regulation in the European Union (EU) is an important aspect of EU policy as it aims to ensure safety, quality and consumer protection. The EU has established an extensive system of standards, rules and procedures that govern the production, labelling, importation and control of food to ensure high standards of product safety and quality. In this context, the EU has various bodies and institutions responsible for food regulation.[1] These bodies provide scientific review, evaluation and regulation of various aspects related to food, including safety, food additives, pesticides, GMOs and other substances that may be present in food.[2] In addition, the EU has a number of policies aimed at improving safety, quality and consumer awareness. These policies cover aspects such as product labelling, label requirements, information transparency and protection of geographical indications. However, EU requirements and standards also cause risks and shortcomings. They can be difficult for some producers and exporters, especially from countries outside the EU, and can create administrative and financial challenges. In addition, there is a need for constant updating and adaptation of requirements to rapidly changing technologies, scientific research and consumer demands.

2. Concepts and basic principles of EU legislation in the field of food products

Food safety is a guarantee that products will not harm the consumer and the environment during their production, preparation or consumption in accordance with their intended purpose. It is a concept that includes the processing, preparation and storage of food products in such a way as to prevent foodborne diseases. Food manufacturers and distributors must follow a number of procedures to avoid potentially serious health hazards. That is, to produce and sell a safe food product.

A safe product is a food product that does not have a harmful effect on human health and is suitable for consumption. When a food product market operator manufactures a product, he must assess the risks of this or that hazardous factor, how these risks will affect the safety of the product.

Important elements of the food safety policy are the collection and analysis of information on their potential hazards.[3] The role of the Community food safety system is to determine the most adequate, easiest to collect and most informative indicators; clarification of such indicators should be carried out on the basis of a scientific consultation independent of any industrial and political pressure. Such reasons are the most important in reforming the scientific research system in the field of food safety.

In order to make the field of food regulation more transparent and scientific, in the late 1990s a thorough study of the structure of food safety was conducted. The first scientific advisory system in the field of food safety was created in 1997. In this system, scientifically based positions were expressed by eight sectoral Scientific Committees, five of which covered, directly or indirectly, the fields of food and feed. A Steering Scientific Committee was also created to consider many specific issues and coordinate those topics that conflicted with the mandates of more than one sectoral Committee (for example, antibacterial resistance). It should be noted that this coordination task was particularly important as food safety issues increasingly cover the entire chain from producer to consumer. As a result, the importance of the problem

[1] FUNTA, R., GOLOVKO, L., JURIŠ, F. (2016): Európa a európske právo.
[2] SCHOLTEN, H., VERDOW, C., BAULANS, A., VAN DER VORST, J. (2016): *Advances in Food Traceability Techniques and Technologies.*
[3] GOSTIN, L. O. (2008). Global Health Law: Health in a Global Community.

of food safety is constantly increasing, and in accordance with the proposals of the White Paper, EFSA was established in January 2002 (by Regulation of the European Parliament and of the Council 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety). The same Regulation established the basic principles and requirements of the law on food products. The law established that EFSA should be an independent scientific source of advice, information and risk communication in the areas of food and feed safety. Such a body closely cooperates with similar bodies in the countries of the European Union.[4]

Although EFSA provides recommendations on possible risks related to food safety, the responsibility for risk management rests with the EU institutions (the European Commission, the European Parliament and the Council, that is, the member states of the European Union). The role of such EU institutions is, taking into account the recommendations of EFSA and other issues, in the development and adoption of legislation, as well as regulatory and control measures as necessary. [5]

Many procedures are carried out by the European Community in order to minimize any risk of food safety, for example, subscription to relevant editions of international quality standards, risk control programs in production, tracking, use of the precautionary principle, etc. Strict adherence to standards established by the International Organization for Standardization (ISO 9000) and European Standards (ES 29000) ensures that food processing, supply and other food industries follow prescriptions and documented procedures. The effectiveness of such programs is regularly evaluated by independent experts.

Regulation EU/178/2002 defines traceability as monitoring food, feed and their ingredients at all stages of production, processing and distribution. It establishes a structure for increased participation of interested parties at all stages of the development of the food law and defines the mechanisms necessary to increase consumer confidence in this law. The main provisions described in the Regulation come into force on January 1, 2005 and cover all food industry manufacturers, without prejudice to the legislation in force in certain sectors: meat industry, fish industry, GMO, etc. Importers are equally covered by these legal regulation measures, as they are required to indicate where the goods are exported from.

3. Market access requirements in EU food sector

Since 1998, the European market has restricted access to all products containing or derived from genetically modified organisms, which corresponds to the precautionary principle. However, as a result of constant pressure from third countries and international structures, in particular the WTO, the EU was obliged to open its market for such products. The EU recognizes consumers' right to information and labelling as a tool for informed choice. Thus, since 1997, Community legislation has established mandatory labelling of genetically modified food for products consisting of or containing GMOs; products derived from GMOs, but no longer containing GMOs, in the event that DNA or protein obtained by genetic modification is present. In addition, all GMO additives and GMO flavours, genetically modified varieties of seeds must be labelled. Subsequently, the consumer himself decides whether to buy genetically modified products or not. [6]

Food products must meet established food safety criteria. Any technological processes and manipulations with food products must be carried out in proper sanitary and hygienic conditions, registered if necessary, properly packaged, labelled, and also traceable. In the European Union, these requirements are supplemented by the provisions that food products must be used for their intended purpose and understand that dangerous food products are those that may pose a health risk, as well as those that are unfit for human consumption. The safety criteria regulate the permissible levels of pathogenic microorganisms, pesticide residues, veterinary drugs, and chemicals. The subject of regulation is also the selection of samples, laboratory tests and the work of laboratories.[7] Some microorganisms enter the food chain naturally with contaminated raw materials, while others can contaminate food at any stage of the food chain. The microbiological status of raw materials, components and final products is determined on the basis of microbiological criteria related to the absence or presence of microorganisms, including parasites, the amount of their toxins (metabolites) in a unit of mass, volume or batch. Safe food products must not contain microorganisms, parasites and their toxins or metabolites in quantities that pose a threat to human health. Microorganisms in certain food products are bacteria, viruses, yeasts, fungi, parasitic protozoa, helminths and their toxins (metabolites). Laboratory evaluation of microbiological criteria is a tool that is

[4] Regulation of the European Parliament and of the Council 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

[5] LEIBOVITCH, E.H., (2008): Food Safety Regulation in the European Union: Toward an Unavoidable Centralization of Regulatory Powers.

[6] NEGRI, S. (2009): Food Safety and Global Health: An International Law Perspective.

[7] SCHOLTEN, H., VERDOW, C., BAULANS, A., VAN DER VORST, J. (2016): *Advances in Food Traceability Techniques and Technologies*

widely used to assess the safety as well as the quality of food products.

The principles of applying microbiological criteria for food products are defined by the Codex standard CAC/GL 21-1997 "Principles of establishing and applying microbiological criteria for food products". Guided by this standard, countries formulate requirements and establish tolerances in relation to microorganisms in food products. Microbiological criteria also determine the acceptability of food products and their manufacturing, processing and distribution technologies. The use of these criteria should be an integral part of the use of procedures based on the principles of HACCP and other hygiene control measures. Microorganisms included in the criterion must be generally recognized pathogens, organisms - indicators or agents that cause spoilage of a certain type of products.

All microbiological criteria for all food products in the EU are collected in Regulation EC No. 2073/2005 on microbiological criteria for food products. Regulation EC No. 853/2004 of the European Parliament and the Council of April 29, 2004 also establishes microbiological criteria as indicators of the quality of raw milk, although they do not belong to the criteria of food safety.

Pathogenic microorganisms for which microbiological criteria are established in the EU include:
- salmonella (Salmonella, Salmonella typhimurium, Salmonella enteritidis),
- listeria monocytogenes,
- cronobacter spp. (enterobacter sakazakii),
- staphylococcal enterotoxins,
- shigatoxin-producing E. coli10 (STEC) O157, O26, O111, O103, O145 and O104: H4,
- histamine.

Food market operators must comply with microbiological criteria. It is necessary to establish the methods of analysis taking into account the errors, the sampling plan, the microbiological limit values, the required number of samples for the limit value. It is necessary to establish the food products and stages of the food chain to which these criteria apply, as well as actions in case of non-compliance with the criteria. Among the measures that must be provided by food market participants in order to guarantee compliance with the criteria that determine the acceptability of the technological process, control of raw materials, hygiene, temperature and shelf life of the product should be provided.[8] Regulation No. 396/2005 of the European Parliament and the Council[9] in its annexes contains requirements for certain groups of food products, regarding pesticide residues and the maximum level of pesticide residues.

4. Conclusion

After examining the provisions of EU legislation, we can come to the following conclusions: the safety of food products in modern life is of great importance. Safety is the absence of harmful effects on human health and the suitability of a food product for consumption. Quality is understood as a set of properties that determine the ability of goods to satisfy certain human needs. The issue of food safety in the EU is regulated by a sufficiently large number of regulatory and legal acts. During the research, it was determined that the quality of food products is affected by the following factors in the field of production: growing conditions of plant products, quality of raw materials, semi-finished products, materials, production technology, equipment, quality of storage, transportation, sales; factors in the field of consumption - the quality of short-term storage, consumption and assimilation. Attention is paid to: compliance with the terms of sale, location and storage of products in retail establishments, agro-food market, availability of documents regarding traceability and confirmation of their quality (waybill, expert opinions or product quality certificate).

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Fundamentals of labor law in relation to posting of workers: Different contract models

Ivan Podhorec & Matej Šebesta
Danubius University

Abstract

Today, as in the past, more and more employees are given the opportunity to work abroad for their employer for a certain period of time. Be it, for example, in the form of a short-term assignment abroad of a few weeks or in the form of a longer assignment lasting several months or years. Due to increasing globalization and mobility, the scenarios listed are widespread in internationally active companies. In this context, one speaks of the so-called secondments, i.e. when the employer sends his employee for a certain period of time to a country other than where the employer is based and where the employee usually performs his work. This poses a number of legal challenges, both for the employer and the employee.

Key words

EU Law, Labor Law, Posting of workers

1. Introduction

Due to posting of workers, the legal bases of at least two states are always affected, normally that of the home state and the host state.[1] Posting of workers are complex international issues and so that they can be carried out without any legal problems, it is necessary for the labor law regulations of the countries involved to be coordinated. The issue of posting of workers has not yet been fully regulated in many legal systems. This leads to a certain legal uncertainty, but at the same time allows a relatively free design of the employment or posting of workers contract. It can already be said in advance that, especially in the case of a multi-year posting, various labor law points must be regulated, for example whether the family accompanies the employee, integration or non-integration into the organization of the host company, as well as social security and tax law issues.

2. Basics of labor law in relation to posting

The adjustment of the existing employment contract is not necessary for all international assignments abroad. This is not necessary in particular if it is a short stay abroad of a few days.

However, in the case of long-term stays abroad, it is usually necessary for the employment contract to be amended, also with regard to taking on new jobs in the host country. In practice, it is very common for a so-called mobility clause to be included in the employment contract. This confirms that the employee is willing to work abroad. If there is such a clause, the employer is allowed to send the employee abroad temporarily on the basis of his right to issue instructions.

3. Different contract models

With regard to postings, there are various contractual models for structuring postings under employment law.[2] The most common contract models are discussed in detail below.

3.1 Classic posting

A foreign assignment is classified as a classic posting if the employer sends his employee abroad for a certain period of time to do work for him there. In the event of posting, the employment contract originally entered into between the posted employee and the so-called home company remains in force. However, the employment contract is supplemented with a so-called posting agreement, which regulates the purpose and duration of the posting between the two parties. The employment contract and the posting agreement form a contractual unit for the duration of the posting. However, no formal contractual relationship will arise between the posted employee and the host company abroad, as the home company remains the legal employer.[3] As a result, the right to issue instructions remains with the home company of the posted employee and there is no integration into the host company abroad. The host company abroad and the home company conclude a so-called intercompany agreement. This is a separate contract that regulates the tasks to be taken on during the posting, e.g. the provision of a suitable workplace, work materials, possibly a language course, etc. A posting can be approved if both parties intend to continue the employment relationship in the period after the posting (so-called willingness to return and work).

[1] Bercusson, B. European Labour Law (Law in Context). 2nd Edition. Cambridge: Cambridge University Press. 2009.

[2] Barancová, H. Európske pracovné právo. Flexibilita a bezpečnosť pre 21. Storočie. Bratislava: Sprint dva. 2016.

[3] Štefko, M. Vysílání zaměstnanců do zahraničí. Praha: C.H. Beck, 2009.

The posting agreement is a temporary or limited adjustment of the employment contract between the seconded employee and the home company. If the posting agreement expires or is withdrawn prematurely, the employment contract regains its original effect. The conclusion of posting agreements is particularly relevant for longer postings, as adjustments to the employment contract are necessary. The main changes to the employment contract should be listed in the posting agreement. The important elements of the posting agreement include the assignment location, the tasks, the authority to issue instructions and any return conditions. In practice, the duration of a posting is often limited. Age, the parties can also agree so-called termination rights, such as a right of recall for the domestic employer (in the event of, for example, a.o. operational bottleneck). It is also possible for the notice periods in the employment contract to be extended or even excluded for the duration of the posting. If several contracts exist side by side, especially agreements with the user company, the coordination of the contracts must be regulated.

In addition to the posting agreement, it can also be advantageous if so-called posting regulations are drawn up. This is particularly useful for companies that frequently send employees. Then the general aspects regarding posting, which apply to all posted employees, can be recorded in a posting regulation. Such regulations ensure the harmonization of operational and administrative processes and the equal treatment of employees.

3.2 Temporary transfer

The temporary transfer is characterized by the fact that the originally concluded employment contract between the employee and the home company is suspended or put on hold for the duration of the posting and is replaced by a local employment contract with the host company abroad. The local employment contract then forms the legal basis for the provision of work during the posting. It can be stated that there are two separate employment contracts that are related in terms of content. On the one hand, there is a dormant employment relationship between the posted employee and the home company and, on the other hand, there is an active employment relationship between the posted employee and the host company abroad. In order for the originally concluded employment contract to have a dormant effect, a so-called suspension agreement must be concluded between the posted employee and the home company. The suspension agreement is a sui generis contract that does not contain all the points of an employment contract. The agreement serves as a temporary supplement to the original employment contract and is only valid during the agreed posting period. The contractual unit consists of the employment contract and the suspension agreement. The suspension agreement states that the main labor law obligations from the suspended employment contract are suspended for the duration of the posting (e.g. the employee's obligation to perform work and the employer's obligation to continue paying wages). During the posting, the originally concluded employment contract only applies to the ancillary obligations (e.g. confidentiality obligation, non-competition clause, etc.). "Suspended" means that there is temporarily no entitlement to claiming the respective benefits. The employee's duty of loyalty and the employer's duty of care from the suspended employment contract remain unrestricted. In connection with a posting, some of the ancillary obligations are mostly adjusted to the circumstances with the suspension agreement (e.g. provisions regarding data protection, non-competition clause, etc.) or supplemented by additional obligations (e.g. obligation of the employee to report to the home company).[4]

The legal provisions of the country in which the registered office of the guest company is located apply to the design of the local employment contract with the guest company abroad. From a legal point of view, the local employment contract is a full-fledged employment contract including the usual main and secondary obligations. Due to the fact that the work is carried out in the host country, the area of responsibility, the function, the wage, the working hours, vacation and public holidays as well as obligations of conduct must be regulated in the local employment contract with the host country.

3.3 Personnel leasing

Personnel leasing describes the triangular relationship between the home company e.g. in Germany, the assignment company abroad and the employee.[5] Personnel leasing occurs when the employer, with the employer's consent, lets a third party do work for a specific period of time. Because the employee is involved in the assignment company, the assignment company becomes a temporary employer. However, the home company remains the legal employer. Due to the position as an employer, the assignment company abroad has the right to issue instructions for the agreed period, but also the duty of care.

As a result, there is a quasi-contractual legal relationship between the assignment company abroad and the posted employee. The original employment relationship continues to exist. However, a so-called hiring contract is also concluded between the home company and the assignment company, which regulates the hiring of the employee.

In practice, there are always difficulties with the distinction between leasing and posting. The central

[4] Davies, A. C. L. EU Labour Law. Oxford: University of Oxford. 2013.
[5] Pauknerová, M. Evropské mezinárodní právo soukromé. 1. vydání. Praha: C.H. Beck, 2008.

distinguishing feature, however, is that in the event of a posting, the right to issue instructions to the posted employee remains with the posted employer. This is in contrast to personnel leasing, in which the right to issue instructions is transferred to the assignment company abroad. In the case of personnel leasing, no secondment agreement is necessary because the employment contract only comes into effect when a deployment contract or leasing contract is concluded.

4. Different types of postings

If there is no integration into the foreign work organization, a distinction is made between two types of posting. On the one hand the short-term posting and on the other hand the long-term posting.[6]

Postings of a few days or weeks are classified as short-term postings. This is the case if the employee in the interest of the employer goes abroad for a few weeks on a business trip. As mentioned, no contract adjustment is required for a business trip lasting a few days or weeks. In such a case, the costs incurred can be claimed via an expense regulation. From a legal point of view, such business trips are treated specially because many legal systems provide for easier requirements for so-called short stays for the issuance of residence and work permits. The same applies in the area of social security and tax law.

If there is no integration into the foreign company, the legal consequences are similar to those for short-term posting. In this context, it is relevant when an integration into the organizational unit is given. There is a lack of integration, for example, with assembly work if work is carried out at several foreign locations over a longer period of time. If this is the case, the usual place of work is not shifted, nor does a third party exercise the right to issue instructions to the posted employee. Another example is when an employee is already certain at the time of hiring that the one will go on a posting. In such a scenario, the employee is hired for the purpose of working in a foreign legal system where the employer does not yet have a presence. In the case of long-term postings, a posting agreement is mandatory for the existing employment contract, which regulates the purpose and duration of the posting.

Not only assignments that are planned as unlimited from the start are qualified as permanent assignments abroad, but also assignments that are limited in time but envisage a period of more than five years. If an assignment abroad was planned for a shorter period of time and if this is extended to a period of more than five years, then this is subsequently converted from posting to an unlimited assignment abroad. As a result, the originally granted posting privileges subsequently cease to apply.

[6] Schronk, R. Pracovné právo Európskej únie. Bratislava: VO PF UK. 1998.

5. Conclusion

Posting is a very complex matter. This can be seen very well in employment law. Depending on the foreign assignment, different requirements are necessary for the employment contract or the posting agreement. Afterwards, it is always important to consider which country I would like to post an employee to as an employer. There are countries where entry or obtaining a residence permit is easier than in other countries. E.g. In Switzerland, there are various types of permits that apply to foreign nationals who want to work in Switzerland.

In addition to social security and labor law, a posting also has a significant impact on tax law. From a tax law perspective, it is initially relevant whether a tax residence e.g. established in Switzerland. It must then always be checked whether the posting is short-term or long-term. Depending on the duration of the posting, this has different tax consequences.

A posting is always associated with advantages and disadvantages, be it for the posted employee, but also for the employer. It can be said that the advantages of posting clearly outweigh the disadvantages. It should not be neglected that posting costs a lot more than hiring a local worker. However, these costs can be put into perspective again if it is taken into account that the employer can open up new markets abroad and spread their own corporate culture abroad through posting. It can be said that a posting involves many complex issues for the employer, but the effort and the clarifications pay off.

It can be said that a posting is a great opportunity for employees, which can open up new perspectives, improve the chances of advancement and ultimately also provide personal enrichment. However, it must also be mentioned that posting not only has positive points for the employee, but also has some disadvantages. For example, reintegration can be difficult after returning to the home company because no suitable work can be offered. Nevertheless, it can be said that the advantages that speak in favor of posting clearly outweigh the disadvantages for the employee.

In conclusion, it can be said that both the employer and the employee benefit from a posting.

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