Modern Approaches to the Extraterritorial Application of the EU Law

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Summary: This article offers the analyses of the problem of Extraterritorial Application of the EU Law on the example of the application of the EU competition law rules. It deals subsequently by the main theories of the Extraterritorial Application of the EU Law in particular the Single economic entity doctrine, Implementation doctrine, EU and the effects doctrine.

Keywords: EU, EU law, Extraterritorial Application of the EU Law, Competition Law.

1. Introduction

Due to the development of bilateral relations between the EU and third states the EU law in certain cases began to influence on such third states, and on natural and legal persons under their jurisdiction. The described situation was invoked by the fact that the activities of the third states' natural and legal persons could effect, namely in a negative way, the EU Internal Market and its entire legal order. The issues arising from the extraterritorial application of the EU law are considerable as establishment and functioning of the EU's harmonised legal order including extraterritorial application of its law, appears to be impossible in case extraterritorial jurisdiction of the EU Member states is excluded from the scope of the EU law. Extraterritorial application of the EU law should be understood as extension of the territorial scope of separate provisions of the EU law, usually those relating to its exclusive competences, beyond the EU's borders (i.e. territories of its Member states) to the territory of a third state, as well as natural or legal persons under its jurisdiction and relations, mainly economic, between them effecting the EU's legal order. Noteworthy, it is based directly on extraterritorial jurisdiction of its Member states. Extraterritorial application of the EU law often results in "a situation when the same relations fall under two concurring jurisdictions: on the one hand such

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relations are governed by the EU law and on the other hand they are governed by the national law of a third state. In such cases the extraterritorial application of the EU law can result in a negative impact on the functioning of economic relations within such a third state and relations between the latter and the EU"[1].

Unlike the USA, which usually introduces explicit provisions on extraterritorial application of the national legislation into the acts of the Congress, the concept of the extraterritorial application of the EU law is developed mainly by means of the Court of Justice of the European Union (ECJ) case-law. Legal position of the ECJ provides that grounding on the EU's international personality the latter can determine the geographical scope of its law on its own discretion, being limited only by prohibitions existing in modern international law. For example, in Case 214/94 Boukhala the ECJ stated that as a general rule the geographical scope of the EU founding treaties and its secondary legislation is limited to territories of its Member states, though EU primary and secondary law do not preclude EU rules from having effects outside the territory of the EU[2].

2. EU competition law

The EU has the most developed practice of the extraterritorial application of the EU law in the area of competition law governed by Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) and acts of secondary legislation regulating various aspects of this branch of the EU law. The possibility for the extraterritorial application of the EU competition law is explicitly provided for by the EU Merger Regulation No 139/2004 of 20 January 2004[3]. Articles 101 and 102 TFEU contain geographical limitations for their application, namely that any infringement of the EU law should affect trade between its Member states. Besides, Article 101 TFEU stipulates that anticompetitive effect from agreements or practices should be caused within the EU Internal Market. Professor Ivo Van Bael states that the term "agreement" in Article 101 TFEU should be "interpreted broadly so as to encompass any kind of consensus or understanding between parties as to their future behaviour"[4].

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[1] Муравйов В.І. Правові засади регулювання економічних відносин Європейського Союзу з третіми країнами (теорія і практика). Київ, 2002, С. 262

[2] Judgment of the ECJ of 30 April 1996. Case 214/94, Ingrid Boukhalfa v. Bundesrepublic Deutschland. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994J0214:EN:HTML

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Official Journal of the European Union, L 24, 29.01.2004, pp. 1–22

[4] Ivo Van Bael. Due Process in EU Competition Proceedings. Alphen van den Rijn, 2011, pp. 19

Article 101 TFEU enumerates criteria necessary for it to be applied. *First*, there should exist an agreement between undertakings, decisions by associations of undertakings or concerted practices. *Second*, such agreements or practices should affect trade between Member States. *Third*, such agreements should have as their object or effect the prevention, restriction or distortion of competition within the EU Internal Market. Article 101 TFEU is applied not only to actual competition, but also to the potential competition; the possibility of its existence is established on the basis of the structure of the market, economic and legal context within which the agreement functions[5].

For Article 102 TFEU to be applied there should exist a dominant position within the internal market its a substantial part. Though limitation of competition or other prohibited practices affecting the trade between Member states could have foreign origin, i.e. undertakings from third countries might apply agreed prices or market-sharing agreements. Moreover, foreign undertakings may have a dominant position within the EU Internal Market or its substantial part and apply practices violating Article 102 TFEU. Merger of foreign enterprises may also affect the competition within the EU Internal Market.

The European Commission (Commission) ensures the application of the principles laid down in Articles 101 and 102 TFEU and shall investigate cases of suspected infringement on application by a Member state or on its own initiative in cooperation with the competent authorities in the Member states. The Commission may propose appropriate measures to bring an infringement to an end. If such measures appear to be ineffective the Commission may publish its reasoned decision and authorise Member states to take the measures needed to remedy the situation. As a rule the Commission deals with a complaint in the following cases: when more than three Member states have been seriously affected by an agreement or practices; when the application is closely connected with the other provisions of the EU law, which may be more effectively or exclusively applied by the Commission or when the EU interest requires the adoption of a Commission decision to develop EU's competition policy. Enforcement of the Commission's decisions concerning foreign undertakings outside the EU territory is rather challenging, especially when such undertakings are not willing to cooperate or are protected by their States[6]. In order to avoid the conflicts arising from such situations the Commission strives to foster cooperation with the competent authorities of third states. In order to establish the existence of jurisdiction of the Commission or Member state's competent authority over the relationships originating from outside the EU territory, three

[5] Ivo Van Bael. Op. cit. pp. 23

[6] Alina Kaczorowska. Public International Law. 4th ed., London, 2010, pp. 342–343

principal doctrines are applied: single economic entity doctrine, effects doctrine and implementation doctrine.

3. Single economic entity doctrine

Historically the first instrument applied by the EU in the context of the extraterritorial application of its competition law was the single economic entity doctrine. This doctrine originated from the ECJ decision in Case 48/69 Dyestuffs which concerned the parent company from the United Kingdom than not being a Member state of the European Economic Community (EEC)[7]. The applicant registered in non-EEC country alleged that the Commission had no right to impose fines grounding only on the fact that the applicant's activities beyond the EEC Member states' territories had had negative influence on the EEC common market. Thus the ECJ had to establish whether the applicant's conduct constitute concerted practices and in chain whether these concerted practices affected the EEC common market. The applicant claimed that the conduct constituting concerted practices was to be imputed to its subsidiaries but not to it. Meanwhile the ECJ stated that the fact that a subsidiary had separate legal personality was not sufficient to exclude the possibility of imputing its conduct to the parent company, especially as the subsidiary didn't possess real autonomy in determining its course of action in the EEC common market. This way the ECJ authorized the extraterritorial application of the EU law. The ECJ's conclusions in Case 48/69 Dyestuffs may be applied to any concerted practices irrespective of whether such practices were applied by a single corporation consisting of several parent companies or by separate undertakings operated by different legal entities. In its judgement in case 6/72 Continental Can the ECJ concluded that conduct of a subsidiary registered in one of the EEC Member states might be attributed to the parent company registered in a third state[8]. Thus the fact that the parent company does not have its registered office within the EU territory is not sufficient to exclude such parent company from the application of the EU law. In practice it's a rather challenging task to establish the extent of parent company's control over the subsidiary, especially

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[7] Judgement of the Court of 14 July 1972. Imperial Chemical Industries Ltd. V. Commission of the European Communities. Case 48/69. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0048&lg=en

[8] Judgement of the Court of 21 February 1973. Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities. Case 6/72. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61972J0006&lg=en

when their relations are governed by a contract of franchise, a license agreement or a patent agreement.

4. Implementation doctrine

The main approach to the extraterritorial application of the EU was formulated in the ECJ judgement in the Case 129/85 Wood Pulp. The case dealt with concerted practices aimed at fixing the prices on wood pulp applied by 41 undertakings from third states and trade associations from Finland and the USA. The Commission established that these concerted practices violated Article 85 of the Treaty establishing European Economic Community (at present Article 101 TFEU) and relying on the effects doctrine concluded that the effect on consumer prices within the EEC caused by agreements between these undertakings and practices applied by them was substantial, intended and in general and directly resulting from the said agreements and practices. However the ECJ avoided the effects doctrine in its grounding and decided to apply the principle of objective territorial jurisdiction, i.e. implementation doctrine. Agreements and concerted practices may infringe the EU competition law irrespectively of the place where they were formed and the decisive factor is therefore the place where they are implemented and their effect on the trade between the EU Member states. Besides, in its judgement of 27 September 1988 the ECJ concluded that the infringement of the EU competition law, namely concluding an agreement affecting the competition within the EEC common market, consists of conduct made up of two elements: the formation of the agreement, decision or concerted practice and the implementation thereof. As in this case the producers implemented their pricing agreement within the EEC common market, it was immaterial whether or not they acted through their subsidiaries, agents, sub-agents or branches situated in the EEC while contacting with purchasers from the EEC. Hereby the ECJ used "a fiction that there was some quasi-territorial basis for jurisdiction"[9]. The Wood Pulp judgement substantially broadened the EU competition law scope as to the conduct and obligations originating from third states. Theoretically taking into account the size and importance of the EU internal market nearly every pricing scheme may be challenged by the EU as it will certainly affect competition rules functioning within the EU territory.

[9] Dieter G.F. Lange, John Byron Sandage, The Wood Pulp Decision and its Implications for the Scope of EC Competition Law, Common Market Law Review (Issue 26, 1989), pp. 157

5. EU and the effects doctrine

In modern globalized world there is a constant interplay between national legal systems, which sometimes provokes conflicts of jurisdiction especially in the economic area where every state tries to strengthen its position in global economic system. Some states, namely the USA, strive to influence on global economic system by means of the extraterritorial application of national law in the area of competition, corporative relations, merger etc. Meanwhile it's not always possible to clearly distinguish between the implementation doctrine applied by the EU and the effects doctrine used by the USA as the effects of agreements and practices obtain the same characteristics while being implemented i.e. such effects are substantial and aimed at infringement of existing competition rules. While the extraterritorial application of national legislation based on territoriality or nationality is not as a rule opposed by states, recourse to effects doctrine provokes serious criticism. The ECJ decided to apply the principle of objective territorial jurisdiction taking into account the negative consequences of application of the effects doctrine by the USA.

In certain cases agreements violating the EU competition law may be implemented beyond the EU internal market. According to the ECJ case-law the effects doctrine implies that the state may recourse to the extraterritorial application of its national competition law when agreements and practices have direct, substantial and foreseeable effect on the national market. Scholars in majority express negative attitude to the effects doctrine and state that the objective territorial jurisdiction principle allows the ECJ to protect the EU internal market without the application of the controversial effects doctrine.

6. Broadening the scope of the extraterritorial application of the EU law

The extraterritorial application of the EU law is not limited to the competition law. According to the established ECJ case-law the EU law on free movement of workers applies to "all legal relationships in so far as those relationships, by reason of either place where they were entered into or the place where they took effect could be located within the territory of the Community"[10]. Besides, professional activities pursued partially or temporarily outside the EU territory

[10] Judgement of the Court of 12 July 1984. SARL Prodest v. Caisse Primaire d'Assurance Maladie de Paris. Case 237/83, para. 6. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983CJ0237:EN:HTML

are not excluded from the scope of the EU law in case such activities retain sufficiently close legal link with one of the EU Member state's legal order. The most important criteria for establishing a sufficiently close link is the existence of a link between employment relationships and the legal order of one of the Member states and, thus, the EU. For example, the ECJ has applied such criteria for establishing a sufficiently close link in Case 9/88 Mário Lopes da Veiga: the person worked on board a vessel registered in the Netherlands; a shipping company was incorporated under the law of the Netherlands and established in that State; the relevant employment relationship between him and his employer was subject to Netherlands law; he was insured under the social security system of the Netherlands and paid income tax in the Netherlands. Finally the ECJ concluded that the scope of the EU law on the free movement of workers should be expanded on the applicant who was a Portuguese national even though the disputed relationship were entered to by the parties prior to Portugal accession to the EU.

The EU also attempts to recourse to the extraterritorial application of its law in the area of environmental protection[11]. Thus in 2008 international flights were included into the European Emissions Trading System (EETS). Pursuant to Directive 2008/101/EC from the 1st January 2012 all international flights arriving at and departing from the EU airports are included into the EETS irrespectively of the plane's state of registration[12]. Aircraft emission is calculated for the whole length of flight including extraterritorial emission over the high seas and over territory of third states. The described attempt to broaden the scope of the extraterritorial application of the EU law faced strong opposition on the international arena and as a result 21 states including the USA, Japan, China, India and the Russian Federation issued a Joint Resolution of September 2011, stating that the EU's plans to include extraterritorial emission in the EETS are inconsistent with international law. The ECJ dealt with this dispute and stated its position in the Judgement of 21 December 2001 in Case 366/10 Air Transport Association of America[13]. The ECJ concluded that as soon as the

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[11] Медведєва М.О. Теоретичні та практичні аспекти реалізації міжнародно-правових норм у галузі охорони навколишнього середовища / За наук. ред. проф. О.В. Задорожнього. – К.: Фенікс, 2012. – С.349.

[12] Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. Official Journal of the European Union, L8, 13.1.2009, pp. 3–21

[13] Judgement of the Court of 21 December 2011. The Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change. Case 366/10. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&pageIndex=0&doclang=EN& mode=lst&dir=&occ=first&part=1&cid=106658

aircraft is in the territory of one of the Member states and, more specifically, on an aerodrome situated in such territory, the aircraft is subject to the unlimited jurisdiction of that Member state and the EU. Therefore Directive 2008/10/EC does not infringe the principle of territoriality and sovereignty of third states, as well as, the principle of freedom to fly over the high seas. The EU legal regulation is extended only to those operators willing to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member state. The ECJ stressed that the EU, in principle, may choose to permit commercial activities, in casu air transport, to be carried out in the EU territory only if such activities comply with certain criteria established by the EU. Furthermore, the fact that a certain extent of emission occurs partly outside the EU territory is not such as to call into question the full applicability of the EU law to the whole length of flight.

7. Conclusions

The legal basis for the extraterritorial application of certain norms of the EU law in legal orders of states is provided for in the EU founding treaties and secondary legislation, namely in the area of competition, finances, transport, application of financial and economic sanctions by the EU. The ECJ gradually extends the scope of the extraterritorial application of the EU law to the other new areas of the EU legislation in order to maintain the proper functioning of the EU legal order, namely effective implementation of its founding treaties and secondary legislation. Meanwhile, third states sometimes object to the extraterritorial application of the EU law, which might potentially lead to conflicts and disputes. In order to avoid such disputes and minimize their possible negative consequences the EU, its Member states and third states recourse to international law peaceful means of jurisdictional disputes settlement, namely concluding agreements on cooperation in the relevant areas, reciprocal notification on the possible conduct of an investigation of an infringement of the relevant national legislation, consultations on the necessary convergence of the relevant legal regulation and administrative practices.