The Right to Jurisdictional Protection Resulting from the Fulfillment of the Obligations Provisioned by Treaties

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Abstract: The member states are obliges to take all the legal measures of internal law necessary for the application of the mandatory acts of the European Union, from a judicial point of view, reason for which they are responsible for the passivity or the faulty application of the European Union's law by the national authorities. In this context, the member states are the ones establishing ways of appeal at a national level, in order to ensure an effective jurisdictional protection in the domains that are regulated by the Union's law. Contrariwise, the states are liable both for the actions as well as the omissions of the independent state's organs in applying the European Union law from a constitutional perspective.

Keywords: European Union; legal measures; principle of loyal cooperation

The right to an effective jurisdictional protection or private and judicial persons regarding the rights mentioned by the law of the European Union is guaranteed both by the primary law as well as by the jurisprudence of the Court. The jurisprudence[1] in this matter admits the fact that *the principle of effective jurisdictional protection* is a general principle in the EU Law, deriving from the *constitutional principles common to the member states.*

The principle of effective jurisdictional protection is regulated by article 6 in the *European Convention of Human Rights* and in article 47 in the *Charter of Fundamental Human Rights*.

According to the treaties, the member states are obliged to take all the measures on internal law necessary to the application of the acts of the EU, compulsory from a

[1] The causes linked C-402/05 P şi C-415/05 P, *Kadi şi Al Barakaat international Foundation/ Council and Commission in* Court of Justice of the European Communities, *Jurisprudence repertoire of the Court of Justice and Court of First Instance,* Part I, Ed. CURIA, Luxembourg, 2—8-8/9A, p. I-6360, p. 8.

judicial point of view, reason for which they are responsible for the inaction or the wrongful application of the EU law by the national authorities.

In the context in which the particulars find that their access to the Court is compromised, in what concerns the directly attack the Union's acts, because of the restrictive provisions on the admissibility of such requests, according to article 263, paragraph 4, this jurisdictional protection has to be ensured at the level of the national instances by the internal ways of appeal. Based on the *principle of loyal cooperation*, the states are forced to interpret and apply the internal procedural norms "in a manner that will allow persons to attack in justice the legality of any decision or any national measure regarding the application of a community act that affects them, invoking the invalidity of the latter and determining that these instances will refer to the Court" with a preliminary question.[1]

In this context, the Court established, through a constant jurisprudence[2] that when there are no established regulations at the EU level, the internal judicial order of the member states receives the role to establish the competent instances and the procedural ways applicable to actions aiming at ensuring the protection of the rights provisioned by the EU law. In other words, the member states and accordingly, the national instances, will take all the measures in order to ensure the protection of the EU rights.[3]

By taking *internal measures*, we can understand for example the elimination of all internal regulations that prevent the national instances from applying the Union's law or, according to the competence field attributed to the member state, the

[1] Cause C-15/06 P, Regione Siciliana/ Comisia, Court of Justice of the European Communities, *Jurisprudence repertoire of the Court of Justice and Court of First Instance*, Part I, Ed. CURIA, Luxembourg, 2007, P. I-2592, I/ 2593, p. 2.

[2] Decision on December 19th 1968, *Salgoil*, 13/68, Rec., p.680, 693; Decision on June 7th 2007, *van der Weerd and others*, C-222/05- C225/05, Rep., p. I-4233, p. 28.

[3] As the feeling that the EU regulations are *foreign laws* persists and despite the cooperation between the Court of Justice with the member states, the European Commission insists within the programs of cooperation on judicial matters on the activity of training the lawyers and judges of the national instances. See Commission of European Communities, *European Governing, White Paper*, Brussels, 2001, p. 33. The lack of preparation is present also because of the fact that in the university curricula in the Eastern European countries the European or comparative administrative law is not present and nevertheless persons specialized in these domains. As the public administration in the Western European states enjoyed a certain tradition, a dissemination of it was attempted in the east of the continent. Thus the creation of new programs or public administration has given this discipline "impulses to develop its own identity and approach". See for details Bernadette Connaughton and Tiina Randma, *Teaching Ideas and Principles of Public Administration: is it possible to achieve a common European perspective? 1999*, pp. 2-8, www.unpan1.un.org/intradoc/groups/public/documents/NISPAcee.

application of the principle of priority of the Union's law, the contrary regulations being also maintained.

The Treaty of the European Union[1] provisions the member states are the ones that establish the ways of appeal at the national level in view of an effective jurisdictional protection in the fields regulated by the European Union. This principle is called the *procedural autonomy* and represents a general principle in the EU law to be respected by the member states.

The principle of *procedural autonomy* in strong connection with two other principles: the *principle of equivalence* and the *principle of effectiveness*. Thus, in establishing the jurisdictional competencies and the procedural ways corresponding to the available means of appeal, the Court has established within the jurisprudence in this matter, that this "should not be less favorable that the ones applicable to similar actions in the internal law (*the principle of equivalence*) and must not make the exertion of the rights conferred by the judicial order of the EU impossible of excessively difficult (*the principle of effectiveness*)".[2]

We cannot talk about a breach of *the principle of effectiveness* by the member states in case it is impossible to formulate actions in all the national judicial instances, but in a certain one. This aspect has to be interpreted in virtue of a legitimate necessity to find, at the level of the of the member states, specialized instances in view of a *better administration of justice*.[3]

The abovementioned can be concluded with the fact that the national jurisdictions, when the application of the Union's law is imposed, have to take into account the general principles of the European Union's law. But if the states have solicited a preliminary decision to the Court they have to apply the interpretation offered by the Court to the special cause for which they have been invested at a national level. Any internal regulation that prevents the application of the procedure of appeal interpretation by the Court of Justice has to be eliminated.[4]

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[1] Article 19, al. 1, par. 2 in TEU.
[2] Decision on December 16th 1976, *Rewe*, 33/76. Rec,. p.1989, p.5; Decision on December 14th 1995, Peterbroeck, C-312/93, Rec., p. I-4599, p.12 in the conclusions of General lawyer Kokott, C- 268/06, *Impact*, p. I-2501, p. 51.
[3] Conclusions of General lawyer Kokott, C- 268/06, *Impact*, p. I-2501, p. 51.
[4] Cour de Cassation, *L'application aux Pays Bas des principes généraux du droit communautaire, notamment les principes de sécurité juridique, de confiance légitime, de bonne foi et celui de la proportionnalité*, 2000, http://www.courdecassation.fr.

In what concerns the non compliance with the European Union's law by the instances of the member states, in virtue of article 258 of the TEU, the Court mentioned that they are responsible *both for the action as well as for the omissions of the independent state organs* from a constitutional point of view, even if the Union's instance never gave a decision on these grounds. The inaction of the national instances has to be eliminated. Offering value to the *principle of direct application of the Union's law* and the *principle of supremacy* the national instances have to apply the EU law not only in that cases in which they specifically asked to do so with a request and if they disobey, the penalty would consist in the illegality of the decision. The Commission avoided to pronounce itself on aspects related to the procedure that a national instance would have to follow for not complying or wrongfully applying the Union's law by the national instances, as it is still a delicate matter from a political point of view. (Craig & Burca, 2009, pp. 561-562)

In what concerns the violation of article 110 in the Treaty of the functioning of the EU, regarding the fiscal obligations devolving upon the member states, Romania is still under the careful monitoring of the European Commission but also under the watch of the Court of justice as in several occasions, it was referred to by the national instances using the way of appeal in interpretation due to the institution of the pollution tax for second hand vehicles bought from another member state.

Initially, in Romania a tax was instituted for first registration applied for the registration of all second hand vehicles bought from another member state and after coming into force of *EGO no. 50/2008 on the institution of a pollution tax for vehicles* this tax was owed for vehicles in category M(1)- M(3) and N(1)- N(3), according to the *Regulations on the type approval and release of identity card of road vehicles*, as well as type approval the products used for these vehicles, approved by the *Order of the minister of public transportation, transport and housing no. 211/2003.*

According to the EU law, *no member state can directly or indirectly apply to the products of another member state, internal taxes of any nature, bigger that the ones directly or indirectly applied to similar national products* (art 110 in the TEU). Thus, the application of such a tax, based on the EGO no. 50/2008 contravenes to the provisions of article 110 in the Treaty of the functioning of the European Union, generating thus a clear discrimination of Romanian citizens towards the citizen of other member states of the EU.

According to the dispositions of article 148, paragraph 2 of the *Romanian Constitution, the constitutive treaties of the European Union as well as the other regulations of the Union that have the same mandatory character, have priority in front of the contrary dispositions in the internal law* and paragraph 4 of the same article obliges not only the legislative and executive authorities to fulfilling these obligations but also the judicial authority.

It is certain that the problematic of not respecting the provisions of the treaties, that belong in the first place to the executive authority by the obligation not to adopt any act contrary to the Union's regulations has confused the judicial activity by the volume of the research deployed by the citizens in view of the restitutions if the pollution tax illegally collected by the state through the fiscal organs. As the legal basis of the action aims at first the principle of priority of the EU law to the internal one, the establishment of the object of action has generated some confusion, in a certain proportion the actions being rejected on one side because of the fact that it was considered that an annulment of the administrative act is imposed (in this case the Decision of the fiscal organ), based on Law 554/2004 on administrative contentious and on the other side because of the fact that the instances are trying to shed light on the national legal basis applicable to the requests of restoration of pollution tax. According to this last consideration, in most of the motivations of the judicial instances decisions the legal basis for the restoration of the pollution tax is not found, being mentioned only the provisions of the EU law. Or, as mentioned and given the jurisprudence of the Court of Justice of the European Union, the member states have the duty to establish the procedural ways applicable to actions meant to ensure the protection of the rights provisioned by the EU law, and the national instances will take all the measures to ensure the protection of the EU rights.

We do not want to reach to contradictory conclusions according to which the member states, through the judicial instances, apply the legislation provisioned within the treaties without a n internal judicial frame existent. At least in the present case, the legal frame is regulated by the common law, the basis of the restoration being represented by the *undue payment* and the penalty could consist in a ground of illegality of the decision.

But we cannot accept the idea of respecting the obligations provisioned by the treaties granting under any form rights the citizens benefit from according to the regulations existent at the EU level, ignoring the respect of the principle of legality

and determining breaches even more serious from the member states through the national instances. On the other side, how can we talk about respecting the law of the European Union as long as there are no *remedies or legal procedures* for the breach of the EU law?

What happens thus when the right to restoration of a tax paid by breaching the EU law id not regulated in the law f the member state that breached this obligation?

The answer to this question came from the Court as well. Thus, in the cause *San Giorgio*, the Court held that the right to restoration by a member state represents the consequence and the complementary element of rights granted to litigants by the community provisions that prohibit the taxes equivalent to custom tax respectively "the discriminatory application of internal tax" but recognized the fact that the restoration has to be granted only within the "form and substance conditions" existent at the level of the national legislation. The Court insists thus in view of imposing a legal remedy but more than that asks the member states to identify it within the specific judicial systems. Still in the causes *Comateb* and *Sutton*, the Court indicated that in case the jurisdictional protection at internal level is sufficient due to a legitimate national procedural restriction the only way left is the one regarding the liability of the state granting remedies, as a second category alternative to the direct or indirect effect of the rights provisioned by the treaties, action that is no longer restricted by the national norms.[1]

In case these remedies exist, the *principle of effectiveness* implies that the procedural ways available at the internal level must not make the exertion of the rights conferred by the judicial order of the EU impossible of excessively difficult[2] irrespective if we talk about an instance or an organ of the national administration. For example, in the cause Barra C. Belgium, the Court held that the national legislations restricted the possibility or restoring the undue tax paid reason for

[1] Cause 199/82, *Amministrazione delle Finanze dello Stato c. San Giorgio*, 1983, ECR, 3995; Cause 192-218/95, *Société Comateb c. Directeur Général des Douanes et Droits Indirects*, 1997, ECR, I-165; Cause 66/95 R. c. *Secretary of State for Social Security, ex. p. Eunice Sutton*, 1997, ECR, I-2163 in Paul Craig, Grainne de Burca, *European Union Law, Comments, Jurisprudence and Doctrine*, 4th edition, Ed. Hamangiu, Bucharest, 2009, pp. 384-386, 426, 427.

[2] CJCE, Decision on December 16th 1976, *Rewe*, 33/76. Rec,. p.1989, p.5; Decision on December 14th 1995, Peterbroeck, C-312/93, Rec., p. I-4599, p.12 in the conclusions of General lawyer Kokott, C-268/06, *Impact*, p. I-2501, p. 51.

which the issue of a practical exertion of the rights provisioned by the EU law couldn't be addressed.[1] (Craig & Burca, 2009, p. 384)

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[1] Cause 309/85, Barra v. Belgium, 1988, ECR 355.