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Application of the Environmental Law in Slovene Jurisprudence

Prof. Dr. Rajko Knez, Univeristy of Maribor, Faculty of Law

Verena Rošic, univ. dipl. prav., doctoral student at the University of Maribor, Faculty of Law

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I. Introduction

The following national report is a result of the analysis of the Slovenian courts' case law including all three levels of courts legal protection in Slovenia (District court, High court, Supreme court), as well as case law of the Administrative court and the Constitutional court of Slovenia. Although the main focus of the report is on the environmental law, the analysis was not limited solely to this area of law – where appropriate, case law in other fields of law is mentioned to provide a general impression on the application of the EU law in Slovenian case law.

At the outset it has to be noted, that the number of cases where courts have used primary or secondary EU law, especially the Treaty on the Functioning of the EU (TFEU) and the Treaty on the European Union (TEU), has increased in the last few years substantially. In the first years of Slovenian membership in the EU references to secondary law, regulations and directives, mostly prevailed. Additionally, in general, the quantity of cases involving transboundary issues between EU Member States, as well as with classical transboundary element in international law, has increased.[1] Cases from the field of the environmental law are among the other areas of law where the EU legal rules prevail. Consequently, the opportunities for the administrative authorities and courts to apply EU law (and the case law of the Court of the EU) are rather high. This reasoning is confirmed by number of cases where the national courts in the environmental matters apply the EU law using direct effect or by way of the consistent interpretation. Since the trend is in favour of the latter, the article will first deal with the consistent interpretation doctrine.

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[1] Case law cited in this article is not dealing only with the transboudary issues. Secondary EU law is applicable also in purely national acases.

II. Consistent interpretation

The application of EU law by by Slovenian courts (and attorneys also) has increased with years, which indicates an increased awareness of EU law as an integral part of the national legal system. If in the past cases could be found where the courts shall have applied EU law but failed to do so[2], this generally is not the situation today. Despite that, it still has to be emphasized that every use of national law has to be seen first through the prism of international and then EU law; for international as well as for EU law the principle of consistent interpretation is of elementary importance. In practice consistent interpretation has been long overlooked but it is now gaining importance and applicability equivalent to that found in the legal systems of other EU Member States. It is used even more than the direct effect doctrine.

The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty to take all appropriate measures to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the administrative authorities and the courts. In applying national law, the national court called upon to interpret national law, is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter (*doctrine of consistent interpretation*). Although the mentioned rule has been quite often used by the Slovenian courts, it has been applied only in a few environmental cases. One of such cases refers to habitat directives.[3] Against that, there are no cases in Slovenian case law, where principles of legal certainty or the prohibition of interpretation of national law *contra legem* have prevented the application of the doctrine of consistent interpretation. This holds true for the area of environmental law as well as for other fields of law.

III. The direct effect doctrine

In general, cases concerning issues of the environmental law appear habitually before Slovenian courts. An analysis of the case law indicates that most of these cases concern environmental law in a rather broader sense, such as questions concerning allowances or permits necessary to construct different kind of infrastructure or buildings. These issues are usually not related to EU environmental legislation, except in cases where environmental impact assessment or strategic environmental assessment is needed in accordance with the EIA ,SEA, and IPPC Directives. However, the majority of cases do not refer to the EU legislation as such, nor to the doctrines of the direct effect, direct

[2] For example an improper argument regarding the use of ECtHR in case P 166/2006 (i.e. that the parties have to file a suit at the ECtHR if wants to apply it).
[3] See in particular judgment of the Administrative court UPRS I U 1809/2010.

applicability or consistent interpretation. The few cases where references to EU environmental legislation are made are rather the exception than the rule, and, at the time of conducting the research of case law, there were no cases where the national courts have held the provisions of EU environmental Directives to be insufficiently precise and unconditional to have direct effect.

Regarding the direct effect of provisions in the international environmental treaties, concluded by the Union, there are several court cases where Slovenian national courts have held provisions of the EU treaties to be directly applicable; however, these cases refer to non-environmental law issues (such as general prohibition of discrimination, asylum cases, denationalizations, industrial property right, agricultural policy, access to the information of public nature, effectiveness of legal remedies)[4] . Additionally in Slovenian case law there are also no cases – either in the field of the environmental law nor in other areas of law – where national courts have examined whether the national legislature/administrative authority has remained within the limits of discretion allowed by the directive (so called *Waddenzee/Kraaijveld doctrine*). This issue has not yet been raised and answered by Slovenian courts. In relation to *Kraaijeveld* the Administrative courts have however held in one or two cases that EU law must be raised by the court on its own motion (*ex officio,* as held in case *Kraaijeveld [1996] ECR I-5403*), but not yet in the field of the environmental law. The situation in case law is the same also in respect of the so-called *Inter-Environnement* doctrine in environmental cases – national courts have not yet ruled that during the transposition period of the directive the State must refrain from taking any measures liable seriously to compromise the result prescribed by the Directive.

Situations, where secondary legislation of the EU environmental law is applicable, have appeared quite often before Slovenian courts, but the courts only refer to national law. From the case law it can be concluded that it would have been possible for the courts to refer to EU environmental principles as well, but neither the parties nor the courts have proceeded in such way. The result is that none of the cases, which refer to the environmental planning, strategic environmental assessment, environmental permits, environmental impact assessment and precautionary principle, refer to the environmental principles. On the other hand in parallel with this conclusion, cases concerning nature conservation are to be found where different general EU principles, such as the principle of proportionality, were considered and applied by national court.

[4] See more in particular the following cases: Supreme court I-Up 3/2007, Supreme court I-Up 69/2008, Supreme court I-Up 365/2007, I-Up 1657/2005, Supreme court III Ips 68/2010, Supreme court III Ips 179/2007, Administrative court UPRS U 14/2007, Administrative court UPRS U 38/2006, Administrative court UPRS U 655/2004, Constitutional court UP-1201/05, High court in Ljubljana II Cp 5686/2005.

Another legal aspect regarding the direct application of the EU law concerns the issue of vertical effect, as well as the concept of the emanation of the state. This rather significant question has to be seen in the light of a number of state-own companies (one of the consequences of the previous socialist system where all commercial entities were state owned). Interestingly, the question has not been yet raised before the Slovenian courts. In general, the directives do not produce horizontal or third-party effect in the sense that, in the absence of national implementing measures, they directly result in obligations for private individuals. Although in Slovenian case law there are number of cases, where the courts referred to consistent interpretation, none of these cases include the assessment of national implementing measures in the field of the EU environmental law. Furthermore, there are no cases in the case law of the Slovenian courts which refer to a directive's lack of "*inverse direct effect*", according to which a public authority was not able to invoke a directive against an individual (and thereby require him to act in conformity with the directive, because the obligations contained in the directive, have not yet been implemented in the national legal order). This issue has not been raised in environmental cases or other fields of law. Regarding the potential direct effect of the environmental directives and their "indirect horizontal" side effects there also appears to be no case-law to date.

The European Court's ruling in the case *Fratelli Constanzo* has actually never been used by the Slovenian courts, but there are cases referenced in the literature, where administrative authorities expressed the view that directives do not bind the administrative authorities, but merely the courts.[5] This view point was attacked by lawyers and experts, who referred to *Frattelli Constanzo*. We are, however, still awaiting for the *Fratelli Constazo* doctrine to be upheld by the Slovenian courts. Our view is that this is due to a lack of suitable cases, since a substantive number of cases never reach court but remain within administrative procedures.

Last but not least, the state liability due to a national failure to implement a directive (*Francovich doctrine*) has never been upheld or applied by the Slovenian courts. Currently, however, there is one case pending at the court in Maribor regarding the directive dealing with late payments.[6]

[5] For references and the criticism see in particular *R. Knez*, Unmittelbare und mittelbare Anwendung der Richtlinien im Bereich des Umweltschutzes. In: BORIĆ, Tomislav (ed.). Öffnung und Wandel - Die internationale Dimension des Rechts II : Fetschrift für Willibald Posch. Wien: LexisNexis, 2011, str. 315-326.
[6] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions.

IV. Procedural barriers

EU law in general does not intervene with national procedural rules (exceptions are rules with international element, on the basis of Article 81 of TFEU). In most of the situations it determines only that judicial protection of the EU rules has to be granted. Traditionally, EU principles have therefore left a large degree of national autonomy when it comes to procedural rules but this is not always the case. But there is no case law of the Slovenian courts, referring to questions of procedural rules influenced by the EU law, either in the field of environmental law or elsewhere. There is also no record of a tension between EU substantive principles of the environmental protection and other national law principles.

With respect to the preliminary rulings procedures, national courts have not sent many preliminary questions to the CJEU – to date, only three preliminary rulings have been sent to CJEU and none of them concern the environmental law. One can conclude that judges generally use the preliminary reference procedure only on the application of the parties, and although the decision to make a reference is one for the court, regardless to parties' interests, quite a number of cases can be found, where the courts upheld the arguments of the parties why the preliminary ruling was or was necessary.[7] It is worth adding that experience indicates that CJEU rulings, once received, are fully followed by the Slovenian national courts. It is also worth noting that there is no record of a case involving defective implementation of the EU law where the existence of a parallel infringement proceeding by the European Commission has had a significant impact on the national proceedings.

V. Constitutional Issues

Although the principle of supremacy remains unwritten in the European Treaties it is settled case law that, in relation to national law EU law is supreme and holds priority. The principle of supremacy is taken into account in the case-law of the Slovenian national courts in order to disapply national law, but the cases mainly concern the general prohibition of discrimination under Article 12 of the former Treaty of the European Community rather than environmental law.

Slovenian courts have not yet been faced with the issue of whether an EU legal act is in breach of the EU Treaties. Additionally, so far no Slovenian court has identified an EU rule as in contradiction with

[7] As can be seen from cases such as G 8-2005, R 68-2004, III Ips 156-2007.

the Slovenian Constitution. The Slovenian Constitutional court decided years ago,[8] that opening the door to EU law was in the line with the Constitution, is in line with the latter and this is the only case, where it was questioned whether EU law was in general, in breach of the national Constitution.

VI. Conclusion

The review of national case law, referring to different issues regarding environmental law, as well as the cases taking account of EU law in general, leads to a general assessment. Compared to the period immediately following EU membership, EU law is now used much more frequently before the Slovenian national courts, but unfortunately this cannot yet be said when EU environmental rules are at stake. It should be stressed – though it is not a complete excuse - , that Slovenia only joined the EU in 2004, and therefore a comparison with case-law of Member States who joined years ago or were even founding members would be unfair. There are a number of cases where the Slovenian courts could apply EU environmental law, either by direct effect or by way of consistent interpretation. This is especially true in various cases considering environmental planning and environmental impact assessment, strategic environmental assessment, as well as different environmental and nature permits. The lack of consistent interpretation may also be found in environmental criminal cases, especially with respect to the penalties in the field of the environmental law, which are also foreseen by the Directive 2008/99/EC. Some decisions in criminal matters are not consistent with this Directive at all (for instance the decision of a Slovenian court that there is no crime committed, if certain action is not defined as prohibited in the environmental legislation. Hence, if somebody causes an oil spill into the environment as the result of a road tanker accident, this cannot be defined as a criminal act. As explained by the court, this is due to the fact that such an action or omission is not prohibited by environmental legislation, but instead by laws concerning traffic safety.[9]

It is also problematic that some administrative bodies and authorities competent to decide environmental cases from the administrative point of view are of the opinion that secondary legislation, especially directives, cannot bind them, although this view is clearly contrary the *Fratelli Contanzo* rule. Moreover such a position is not logical, since it would lead to the conclusion that within the administrative procedure there is one legal cause of action, but once the case reaches the court, the court shall change this legal cause of action from national to EU law. Such a step-change would be

[8] Opinion of the Constitutional Court of the RS, Rm-1/97, 5 June 1997.
[9] See more in particular the judgment of the Supreme Court, VS I Ips 96/2000.

inappropriate and not in line with the principle of legal expectations and legal certainty. Consequently it is our opinion that it is legally logical that administrative authorities as well as courts are directly and *ex officio* bound to apply EU law - primary and secondary law, including the directives and the jurisprudence of the CJEU.

Controversial and well-publicized national cases can play an important role in bringing wider attention to the importance of EU environmental law. In the past few years, there is an important case going on concerning plans made by the Republic of Italy to construct gas terminals in the Gulf of Trieste.[10] This is of significant importance for Slovenia, especially for people living at the northern Adriatic coast on the Slovenian side. The case can only be evaluated and judged in the line with EU environmental law (especially SEA, EIA directives, Environmental impact assessment directive as well as the Seveso directive). This case is also raising awareness of the existence and importance of the EU environmental legislation among Slovenian administrative authorities and Slovenian citizens, and may well have longer term and positive impacts in this regard.

[10] *L. Kajfež Bogataj*, Znanost enotna - plinski terminali v Tržaškem zalivu nesprejemljivi (Science unanimously – gas terminals in Gulf of Trieste are not acceptable), article on *http://www.rtvslo.si/okolje/kajfez-bogatajeva-znanost-enotna-plinski-terminali-v-trzaskem-zalivu-nesprejemljivi/266323.*
Knez, R., Ferk, P.: Slovenia. In: CAMERON, Peter D. (ed.), LAFFRANQUE, Julia (ed.). The Interface European Union Energy, Environmental and Competition Law : reports of the XXV FIDE Congress Tallinn 2012. Tallinn: Tartu University Press, 2012, p. 428.
Compare also *Knez R.*, Plinski terminali - primeren premik od politike k pravu (Gas Terminals – a shift from politic to law). Legal Practice, 2009/28, Nr. 46, p. 3.