

## THE PROCEDURAL AUTONOMY OF THE MEMBER STATES AND THE PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

*LA AUTONOMÍA PROCESAL DE LOS ESTADOS MIEMBROS Y LOS PRINCIPIOS DE EQUIVALENCIA Y EFICACIA*

Katalin Holé

PhD in Criminal Procedural Law. Senior lecturer at Eötvös Loránd University (ELTE), Budapest, Faculty of Law, Department of Criminal Procedures and Correction.

### RESUMEN

Este artículo pretende discutir las barreras de la autonomía procesal nacional que surgen en los estados miembros de la Unión Europea. También hablo de las actividades de interpretación jurídica de la Corte Europea de Justicia sobre las leyes procesales nacionales y de las medidas de codificación nacional que requieren la aplicación del Derecho de la UE.

**PALAVRAS CLAVE:** Derecho de la UE. Autonomía procesal. Interpretación judicial. Corte Europea de Justicia. Codificación nacional.

### ABSTRACT

This article has as its goal to discuss the barriers of national procedural autonomy emerging in the member states of the European Union. I also discuss the legal interpretation activities of the European Court of Justice make on national procedural laws and what national codification measures the enforcement of EU law requires.

**KEYWORDS:** EU law. Procedural autonomy. Legal interpretation. European Court of Justice. National codification.

### I INTRODUCTION

In my essay I discuss the content and barriers of national procedural autonomy emerging in the member states of the European Union, the principle of equivalence and effectiveness. These rules which materially affect the division of powers were established in the field of civil procedural law with regard to the tendencies of legislation

and the application of law – but today they also shape criminal procedure law.<sup>1</sup> It is interesting what effect the legal interpretation activities of the European Court of Justice make on national procedural laws and what national codification measures the enforcement of EU law requires.

The dogmatic basis of the principle of procedural autonomy of Member States is that the European Union has never had and – except for a rather small area – still does not have any legislative rights in the field of national procedural laws. Even though already with the Amsterdam Treaty the Community, thus today the European Union received some legislative rights in connection with civil procedure law and several related procedural rules have been enacted, section (2) of article 81 of the Treaty on the European Union (herein after referred to as: TFEU) establishes legislative competence for the Council and the European Parliament only for cross border civil procedures for the abolishment of barriers hampering the smooth performance of such procedures, among them the regulation of rules about competence, and the enforcement of the principle of mutual recognition.

This statement is even more relevant for the field of criminal procedure law, as section (2) of article 82 of the TFEU states that “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.”

According to literature the first decision of the Court in Luxembourg was the Rewe-judgement nr. 33/76, in which the European Court of Justice stated that in the absence of community rules in this subject, it is for the domestic legal system of each member state to designate the courts haha<sup>7</sup>

of this rule of fundamental dogmatic significance, the principles of equivalence and effectiveness.

According to the first restriction procedural rules used for these legal relationships cannot be less favourable than those rules applicable for similar actions submitted upon national law, while according to the second principle these procedural norms cannot make the enforcement of rights provided by the community legal order impossible or extremely difficult.

---

1 See: dr. Zoltán Nemessányi: The effect of the European regulations of unfair contractual conditions on the basic principles of national civil procedure laws [*A tisztességtelen szerződési feltételek európai szabályozásának hatása a nemzeti polgári eljárásjogok alapelveire*] <http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2012-1-2/3.pdf>

It is important that the notion of procedural rules shall be interpreted more widely in the context of EU law than we do it upon the definition used in national law, because several material rules of Member States are considered procedural ones from the aspect of the execution of EU law.<sup>2</sup>

. In my essay I discuss what requirements the principles of equivalence and effectiveness impose upon the law enforcement authorities, namely the national courts and authorities, and what codification actions shall be considered by the legislator in the field of criminal procedure law in order to enforce these principles.<sup>3</sup>

## 2 AUTONOMY OF NATIONAL PROCEDURE LAWS AND THE LIMITS OF THIS DOCTRINE

### 2.1. Procedural autonomy of member states

In its decision published in the *Deutsche Milchkontor* case the ECJ held that all member states shall ensure the enforcement of EU law even in lack of any relevant EU rules. In lack of specific EU rules and unless the general principles state otherwise the national authorities act upon national material and procedural law.<sup>3</sup>

This rule has become a consistent practice of the ECJ, but – as I have referred to this before – the procedural autonomy of member states is far from being unlimited. According to section (3) of article 4 of the TEU “pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

For the enforcement of community law the Lisbon Treaty defines another obligation for the member states and their courts. Section (19) of article 19 of the TEU states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law”.<sup>4</sup>

According to the practice of the Court, from section (3) of article 4 of the TEU, and in line with the relevant provisions of the Treaty on the European Commission, two

---

2 Nemessányi p 39

3 See: section 17 of the judgement delivered in the C-205/82-215/82 *Deutsche Milchkontor* et al. unified cases on 21 September 1983 [EBHT 1983, p 2633].

4 Section (1) of article 19 of the Treaty on the European Union

obligations limiting the procedural autonomy of member states emerge: the principle of effectiveness and the principle of equivalence.

## 2.2. Principle of effectiveness

According to the principle of effectiveness national law cannot hamper or make impossible the execution of Community law.

Regarding the principle of effectiveness the ECJ found that in all cases in which the question arises whether any national procedural rules make it more difficult or impossible to exercise the rights of private persons it shall be examined what position these rules have in the procedure, as well as the conduct of the procedure and its specialities before the available national fora.<sup>5</sup>

The principle of effectiveness was a key issue in the *Factortame et al* case.<sup>6</sup> Upon the motion of the House of Lords, the British supreme court of the time the ECJ had to rule whether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.<sup>7</sup> The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.<sup>8</sup> According to this judgment the House of Lords had to set aside the application of those rules which did not allow the application of interim measures against the state.<sup>9</sup>

---

5 See: section 55 of the judgement delivered in the C-426/05 *Tele2 Telecommunication* case on 21 February 2008 [EBHT 2008, p I-685], section 33 of the judgement delivered in the C-222/05-C-225/05 *Van der Weerd et al* unified cases on 7 June 2007 [EBHT 2007, p I-4233], section 14 of the judgement delivered in the C-312/93 *Peterbroeck*-case on 14 December 1995 [EBHT 1995, p I-4599], section 19 of the judgement delivered in the C-430/93 and C-431/93 *Van Schijndel and van Veen* case on 14 December 1995 [EBHT 1995, p I-4705].

6 See: judgement delivered in the C-213/89 *Factortame Ltd. and Others* case on 19 June 1990 [EBHT 1990, p I-2433].

7 See: section 17 of the judgement delivered in the C-213/89 *Factortame Ltd. and Others* case on 19 June 1990 [EBHT 1990, p I-2433].

8 See: section 20 of the judgement delivered in the C-213/89 *Factortame Ltd. and Others* case on 19 June 1990 [EBHT 1990, p I-2433].

9 See: section 21 of the judgement delivered in the C-213/89 *Factortame Ltd. and Others* case on 19 June 1990 [EBHT 1990, p I-2433].

### 2.3. Principle of equivalence

The principle of equivalence states that during the execution of the community law the application of national law shall be without any discrimination compared to procedures used for the settlement of pure internal legal disputes, which similar to community law.

During the execution of its claims based on EU law the parties to the proceeding shall not get into a more disadvantageous situation than in case of the enforcement of its similar claims based on internal law.

A condition of the respect for the principle of equivalence is that the given provision of national law shall be applied to all claims with similar subject and legal basis, based both on community law and internal law without any discrimination.<sup>10</sup> For decision making about the equivalence the similarity of the relevant rules shall be examined objectively and also theoretically, with regard to their position in the principle, the conduct of the given procedure and the specialities of the rules.<sup>11</sup>

In relation to this, in the *Transportes Urbanos y Servicios Generales* case<sup>12</sup> the ECJ had to examine whether, in the light of their purpose and their essential characteristics, the action for damages brought by Transportes Urbanos, alleging breach of European Union law, and the action which that company could have brought on the basis of a possible breach of the Constitution may be regarded as similar" According to the decision of the Court, the two actions for damages have exactly the same purpose, namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the State.<sup>13</sup> "The only difference between the two actions referred to in paragraph 35 of this judgment is the fact that the breaches of law on which they are based are established, in respect of one, by the Court in a judgment given pursuant to Article 226 EC and, in respect of the other, by a judgment of the Tribunal

---

10 See: section 36 of the judgement delivered in the C-231/96 Edis-case on 15 September 1998 [EBHT 1998, p I-4951], section 41 of the judgement delivered in the C-326/96 Levez-case on 1 December 1998 [EBHT 1998, p I-7835], section 55 of the judgement delivered in the C-78/98 Preston and others case on 16 May 2000 [EBHT 2000, p I-3201], and section 62 of the judgement delivered in the C-392/04 and C-422/04 Germany and Arcor joint cases on 19 September 2006 [EBHT 2006, p I-8559].

11 See: in this approach section 63 of the judgement delivered in the C-78/98 Preston and others case on 16 May 2000 [EBHT 2000, p I-3201].

12 See: the judgement delivered in the C-118/08 *Transportes Urbanos y Servicios Generales* case on 26 January 2010 [EBHT 2010, p I-635].

13 See: sections 35-36 of the judgement delivered in the C-118/08 *Transportes Urbanos y Servicios Generales* case on 26 January 2010 [EBHT 2010, p I-635].

Constitucional.”<sup>14</sup> However, in light of the principle of equivalence the ECJ ruled that this sole difference cannot suffice to establish a distinction between those two actions.<sup>15</sup> Therefore the right to appeal available for the violation of the constitution had to be ensured also in case of violation of community law.

The obligation to interpret the law of member states in conformity with EU law results from the obligation of the effective enforcement of community law. Based on section (3) of article 4 of the TEU and earlier on the rules of the TEC with the same content since the judgement of the ECJ in the *Von Colson and Kamann* case<sup>16</sup> it has become consistent case law that all authorities of member states, including judicial organisations shall interpret national law in a way that they shall consider obligations resulting from community law to the highest extent.<sup>17</sup> According to the procedural rules of member states the court decisions which are contrary to community law and cannot be subject to remedy may ground the obligation of member states to pay damages.

The obligation to interpret in compliance with community law may also be derived from Hungarian constitutional rules.

### 3 THE EFFECT OF THE DECISIONS OF THE ECJ TO THE NATIONAL JURISPRUDENCE

In the application of EU law it has been a consistently applied principle that if the national court initiates preliminary ruling procedure based on article 267 of the TEU (former article 234 of TEC), the national court gets obligatory legal interpretation in the judgement – of which it is the primary addressee – and it is obliged to it. “Where such a question is raised before any court or tribunal of a Member State, that court or

---

14 See: section 43 of the judgement delivered in the C-118/08 *Transportes Urbanos y Servicios Generales* case on 26 January 2010 (EBHT 2010, p I-635).

15 See: sections 44-45 of the judgement delivered in the C-118/08 *Transportes Urbanos y Servicios Generales* case on 26 January 2010 [EBHT 2010, p I-635].

16 See: especially section 26 of the judgement delivered in the C-14/83 *Von Colson and Kamann* case on 10 April 1984 (EBHT 1984, p I891).

17 See: especially section 8 of the judgement delivered in the C-106/89 *Marleasing*-case on 13 November 1990 [EBHT 1990, p I-4135], section 26 of the judgement delivered in the C-91/92 *Faccini Dori* case [EBHT 1994, p I-3325], section 40 of the judgement delivered in the C-129/96 *Inter-Environmental Wallonie* case on 18 December 1997 [EBHT 1997, p I-741 I], section 48 of the judgement delivered in the C-131/97 *Carbonari and others* case on 25 February 1999 [EBHT 1999, p I-1103], section 106 of the judgement delivered in the C-378/07-C-380/07 *Angelidaki and others* joint cases on 23 April 2009 [EBHT 2009, p I-3071], and section 113 of the judgement delivered in the C-397/01-C-403/01 *Pfeiffer and others* joint cases on 5 October 2004 [EBHT 2004, p I-8835].

tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”<sup>18</sup>

Moreover, those judgements of the ECJ cannot be put aside which it delivers in preliminary ruling procedures initiated by other national courts.

The legal effects of the judgement of the ECJ have also been examined by the Hungarian Supreme Court<sup>19</sup>.

With reference to the *Van Gend & Loos*<sup>20</sup> case declaring the direct effect of community law and to the *Costa kontra E.N.E.L.*<sup>21</sup> case declaring the supremacy of community law the Supreme Court stated<sup>22</sup>, that Hungarian courts have to comply with the case law of the European Court of Justice.

According to the highest Hungarian judicial forum case law may be interpreted as generally applicable and obligatory. Preliminary rulings have normative force and may have legal effect also in other cases.

Regarding the temporal effect of the judgements the Supreme Court ruled after reviewing the practice of the ECJ that the interpreting preliminary rulings usually have *ex tunc*, i.e. retroactive effect. This means, therefore, that the content of the norm established as result of the interpretations shall be applied as of the time when the relevant piece of community legislation entered into force.

According to the judgements of the ECJ delivered in the similar manner: “a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted

---

18 See: section 3 of the judgement delivered in the 29/68 Milch-, Fett- und Eierkontor / Hauptzollamt Saarbrücken case on 24 June 1969 [EBHT 1969, p 165]

19 See: in the case Legf. Bír. Kfv. I. 35.055/2007, published as decision BH 2008.135.

20 See: the judgement delivered in the 26/62 Van Gend & Loos case on 5 February 1963 [EBHT 1963, p 3]

21 See: the judgement delivered in the 6/64 Costa kontra E.N.E.L. case on 15 July 1964 [EBHT 1964, p 1141]

22 The judgement was supported in legal literature, see Attila Vincze: The judgement of the Supreme Court about the registration tax. Decision about the application of the judgement of the European Court of Justice about Hungarian registration tax in ongoing cases [A Legfelsőbb Bíróság ítélete a regisztrációs adóról. Döntés az Európai Bíróságnak a magyar regisztrációs adóval kapcsolatos ítélete folyamatban lévő ügyekben való alkalmazhatóságáról] Jogesetek Magyarázatai 2010/1, pp 51-56

entered into force.”<sup>23</sup> Therefore “a rule of Community law as thus interpreted must be applied by an administrative body within the sphere of its competence even to legal relationships which arose and were formed before the Court gave its ruling on the request for interpretation.”<sup>24</sup>

In legal literature many authors share the same opinion.<sup>25</sup>

The ex officio application of the judgement of the ECJ, regardless of the requests of the parties is not unique in the legal system. The resolutions for the uniformity of the law delivered by the Curia and the judgements of the Constitutional Court interpreting the provisions of the Fundamental Law are also sources of the interpretation of law. These sources were established outside of the ongoing procedures, not in relation with those, even though the interpretation of law set forth in the decisions shall be applicable also for the proceeding court. In its Decision 52/1997 (X. 14.) AB the Constitutional Court also held that the principles set forth in its generally obligatory decision interpreting the Fundamental Law shall be applicable also in ongoing procedures.<sup>26</sup>

In his monograph “Theories and misbeliefs in the science of criminal procedure law” Árpád Erdei examines jurisprudence, thus resolutions for the uniformity of the law and the judgements of the Constitutional Court as factors forming the procedure, and states that “the court does not have power of legislation”, therefore the jurisprudence may only shade the picture of the procedure, but cannot rewrite it due to the lack of competence”. Erdei stresses that the function of the court is only to elaborate on

---

23 See: section 35 of the judgment delivered in the C-2/06 Kempter-case on 12 February 2008 [EBHT 2008, p I-41 I]. Furthermore, see section 33 of the judgement delivered in the C-137/94 Richardson-case on 19 October 1995 [EBHT 1995, p I-3407], section 16 of the judgment delivered in the 61/79 Denkvit Italiana case on 27 March 1980 [EBHT 1980, p I205], section 43 of the judgment delivered in the C-50/96 Deutsche Telekom case on 10 February 2000 [EBHT 2000, p I-743], and section 21 of the judgment delivered in the C-453/00 Kühne & Heitz case on 13 January 2004 [EBHT 2004, p I-837].

24 See: section 36 of the judgment delivered in the C-2/06 Kempter-case on 12 February 2008 [EBHT 2008, p I-41 I], and cf. with section 22 of the judgment delivered in the C-453/00 Kühne & Heitz case on 13 January 2004 [EBHT 2004, p I-837], and in this approach with section 44 of the judgment delivered in the C-347/00 Barreira Pérez case on 3 October 2002 [EBHT 2002, p I-8191], section 41 of the judgment delivered in the C-453/02 and C-462/02 Linneweber and Akritidis joint cases on 17 February 2005 [EBHT 2005, p I-1131], and section 34 of the judgment delivered in the C-292/04 Meilicke and others case on 6 March 2007 [EBHT 2007, p I-1835].

25 Bernhard W. Wegener: “AEUV Art. 267 (ex-Art. 234 EGV) [Vorabentscheidung]” in: Calliess/Ruffert: EUV/AEUV (Munich: C.H. Beck 2011) margin number 55; Karpenstein: “EGV Art. 234 [Vorabentscheidung] (Nizza-Fassung)” in: Grabitz/Hilf: Das Recht der Europäischen Union (München: C.H. Beck, 402009) margin number 103

26 See: Decision 52/1997 (X. 14.) AB of the Constitutional Court



the content of norms which are carried by legal sources, therefore this notion means the ruling tendency of legal interpretation and application of law emerging from the legislative actions of the court which has no legislative power.<sup>27</sup>

The decisions of the Supreme Court and the Constitutional Court are applied by the courts regardless of the initiative of the parties, as the main guidelines of the interpretation of law. In line with the principle of equivalence during the enforcement of community law the application of national law shall be performed with reference to the procedures used for the settlement of purely internal disputes, similar to community law, without any discrimination. It results from this interpretation that the proceeding court shall apply those set forth in the decisions of the ECJ's rulings regardless of the initiative of the parties, similarly to the content of the judgements of the Constitutional Court or the Curia.

Legal science also follows this opinion.<sup>28</sup>

The binding force of the judgements of the ECJ is one of the debated issues of legal literature. Attila Vincze analyses this problem in his study "About the procedural effect of the judgments of the European Court of Justice". The question is whether these decisions have "erga omnes" or only "inter partes" effect. The reasons against the "erga omnes" effect is that it assumes legislative powers for the European Court of Justice, but, on the other hand, it is the main tool for the unified application of community law.<sup>29</sup>

If the ECJ rules upon the ineffectiveness of a piece of community law, the judgement obviously has "erga omnes" effect, because it applies to all courts of member states. Regarding community legal acts it is obvious that the different approach towards their

---

27 See: Árpád Erdei: Theories and misbeliefs in the science of criminal procedure law [*Tanok és tévtanok a büntető eljárásjog tudományában*] ELTE Eötvös Kiadó, Budapest 2011, p 107

28 Attila Vincze: About the procedural effectiveness of the judgements of the European Court of Justice [*Az Európai Bíróság ítéleteinek processzuális hatályához*] Magyar Jog 2008 p 821; A Attila Vincze: The judgement of the Supreme Court about the registration tax. Decision about the application of the judgement of the European Court of Justice about Hungarian registration tax in ongoing cases [*A Legfelsőbb Bíróság ítélete a regisztrációs adóról. Döntés az Európai Bíróságnak a magyar regisztrációs adóval kapcsolatos ítélete folyamatban lévő ügyekben való alkalmazhatóságáról*] Jogesetek Magyarázatai 2010/1 pp 55-56

29 Attila Vincze: About the procedural effectiveness of the judgements of the European Court of Justice [*Az Európai Bíróság ítéleteinek processzuális hatályához*] Magyar Jog 2008 p 820; Attila Vincze: The judgement of the Supreme Court about the registration tax. Decision about the application of the judgement of the European Court of Justice about Hungarian registration tax in ongoing cases [*A Legfelsőbb Bíróság ítélete a regisztrációs adóról. Döntés az Európai Bíróságnak a magyar regisztrációs adóval kapcsolatos ítélete folyamatban lévő ügyekben való alkalmazhatóságáról*] Jogesetek Magyarázatai 2010/1 pp 55-56

effectiveness by member states' courts make the unified character of community law questionable and it endangers the basic principle of legal certainty.<sup>30</sup>

However, in case of a valid norm there is no such effect, as later reasons for ineffectiveness, even for another preliminary ruling procedure may emerge. As I have referred to it before, it results from the goal of the procedure and the community loyalty obligation that the judgement interpreting community law binds the initiating court.

However, the "erga omnes" effect results from the case law of the European Court of Justice, because "if the given provision of community law has already been interpreted by the Court, or the proper application of the community law provision is so obvious that it allows no reasonable doubts", the preliminary ruling procedure is not possible.<sup>31</sup>

After analysing the practice of the ECJ Attila Vincze stated that it is not the judgement of the ECJ which has "erga omnes" effect but the EU norm, which is interpreted in the specific judgement of the ECJ<sup>32</sup>. The judgement delivered in the preliminary ruling procedure is not constitutive but merely declarative, therefore it becomes effective retroactively.<sup>33</sup> This is in harmony with the statements of Erdei about jurisprudence, provided that the case law remains within the limits of legal interpretation.<sup>34</sup> It shall be added though that for this the European Court of Justice has been heavily criticised.

---

30 Cf.: section 15 of the judgment delivered in the 314/85 Foto-Frost kontra Hauptzollamt Lübeck-Ost case

31 Cf.: section 21 of the judgment delivered in the 283/81 Srl CILFIT és Lanificio di Gavardo SpA kontra Ministero della sanità

32 Attila Vincze: About the procedural effectiveness of the judgements of the European Court of Justice [Az Európai Bíróság ítéleteinek processzuális hatályához] Magyar Jog 2008 p 820; Attila Vincze: The judgement of the Supreme Court about the registration tax. Decision about the application of the judgement of the European Court of Justice about Hungarian registration tax in ongoing cases [A Legfelsőbb Bíróság ítélete a regisztrációs adóról. Döntés az Európai Bíróságnak a magyar regisztrációs adóval kapcsolatos ítélete folyamatban lévő ügyekben való alkalmazhatóságáról] Jogesetek Magyarázatai 2010/1 pp 55-56

33 Cf.: section 35 of the judgment delivered in the C-2/06 Willy Kempfen KG kontra Hauptzollamt Hamburg-Jonas case of the European Court of Justice on 12 February

34 See: Theories and misbeliefs in the science of criminal procedure law [Tanok és tévtanok a büntető eljárásjog tudományában] ELTE Eötvös Kiadó, Budapest, 2011, p 107

#### 4 THE LIMITS OF THE PRINCIPLE OF PROCEDURAL AUTONOMY IN CRIMINAL PROCEDURE

Another important issue is in what procedures the guidelines of the decisions containing the described principles shall be applied.

Attila Vincze explains that these judgements shall be relevant in all cases when the individual faces the state, its organisations, authorities, whether upon his/her own request or in a procedure, therefore criminal procedure is a relevant field.<sup>35</sup>

In addition to the obligation related to the harmonization of criminal law resulting directly from EU law the unified direct application of these rules also affect the provisions of member states' criminal procedure law.

However, due to the principles of legal certainty and the prohibition of retroactive effect this shall not result in the establishment of aggravation of criminal responsibility.<sup>36</sup>

With regard to this principle the European Court of Justice held that the prosecutor shall not participate in the enforcement of national rules which are contrary to community rules with direct effect, even if the member state has failed to implement such rules; moreover, the prosecutor shall disregard of filing the indictment in such case. Also, national courts shall not apply the rules of national criminal law which are contrary to community law if it contributed to postponing the declaration of the invalidity of the national rules. This means that the national court cannot aggravate the sentence with reference to a judgement which was based on rules contrary to community law.<sup>37</sup>

In connection with the examined decisions the modification of the Hungarian criminal procedure code shall be considered. I believe that it would be reasonable to regulate the case of criminal law facts incompatible with community law as procedural obstacle of procedural nature – due to the changing nature of community law – because in lack of such rules – unless the prosecutor receives full discretionary powers – there is no opportunity to terminate the procedure in the system of Hungarian

---

35 Attila Vincze: About the procedural effectiveness of the judgements of the European Court of Justice [*Az Európai Bíróság ítéleteinek processzuális hatályához*] Magyar Jog 2008 p 820; Attila Vincze: The judgement of the Supreme Court about the registration tax. Decision about the application of the judgement of the European Court of Justice about Hungarian registration tax in ongoing cases [*A Legfelsőbb Bíróság ítélete a regisztrációs adóról. Döntés az Európai Bíróságnak a magyar regisztrációs adóval kapcsolatos ítélete folyamatban lévő ügyekben való alkalmazhatóságáról*] Jogesetek Magyarázatai 2010/1 pp 55-56.

36 Cf. Vincze, See: case 80/86 Kolpinghuis Nijmegen BV, section 13; case 14/86 Pretere di Salo kontra X. section 20

37 See: Ákos Farkas: Criminal law cooperation in the European Union [*Büntetőjogi együttműködés az Európai Unióban*] Osiris, Budapest, 2001 p 20-21. Case 103/88. (1989) ECR p 1839, Case 21/81(1982) ECR p 381

criminal procedural law. It is further problem if the court realises that that the material law norm does not comply with the requirements of community law. In lack of proper procedural rule the court cannot enact any procedural actions.

It results from the nature of procedural law that the application of its institutions are (or should be) regulated properly. Procedure cannot tolerate the lack of regulations if it wants to keep up the appearance of fairness.<sup>38</sup>

With regard to the requirement of the prohibition of retroactive effect, which is a principle of criminal law it is the obligation of national courts to interpret national law in light of the text and goal of community law.<sup>39</sup>

---

38 Árpád Erdei: Prohibitions in evidence [*Tiltalmak a bizonyításban*] In *Tények és kilátások* KJK. Budapest, 1995, p 51

39 C-334/92 case Teodoro Wagner Mizet kontra Foado de Garaghia Salarial case; C-106/89 case Marleasin kontra Le Comercial International de Alimentacion SA

Recebido em: 05/06/2022

Aprovado em: 23/06/2022