Josef Bejček, Professeur à l’université de Brno

European Courts and New EU Member States

I. Introductory remarks

I share your strange feeling that may arise after looking at the heading of my contribution which promises a special point of view of new EU member states on the importance of European courts.

At first sight, we would probably expect the same importance and the same impact of the judicial activity of CFI and ECJ for both older and new member states of the EU. Of course, I do not try to put myself in the shoes of a lawyer coming from a traditional EU member state and to assess the importance attributed to the judicial activity of European courts from this point of view – therefore I do not dare compare. I am just talking about my particular observations and impressions which can serve only as a "pars pro toto" approach without any ambition to reliably generalize.

Several starting points of my short consideration are as follows:

a) The access to the European Economic Area (EEA) and the functioning of the single market would be hardly possible without joining the common area of European justice that was being created for decades.

b) The EEA calls for creating and putting through the common area of European justice and security based on common values.

c) European courts are a kind of institutional tools of shaping and enforcing these common values. Their value based approach may be (and sometimes even is) suspected of judicial activism

d) This institutional tool works not only in the procedural area; it presupposes assertion of common notions and concepts of substantive law as well.

e) Common European concepts and interpretations of law inevitably reflect in the way in which national law orders of particular member states understand these concepts: judicial interpretations of European courts influence even the application of exclusively

* Professor at the Faculty of Law, Masaryk University, Brno, Czech Republic. Contribution to the workshop „Access to the Justice“, Célébration des 20 ans du Tribunal de première instance des Communautés européennes, CFI Luxembourg, 25. 9. 2009.
domestic (national) legal norms and these interpretations tend to become a part of additional and supportive legal argumentation.

f) A kind of “Common law infection” may be observed in continental law area in terms of much bigger emphasis laid on the judicature compared with the written (statutory) law. The continental legal culture characterized by the division of powers is in this way getting near the legal culture of common law despite swearing by a (formally!) not binding judicature. Increasing importance of judicature can hardly be denied.\(^1\)

g) Some interpretations, definitions and different tests introduced by the European courts during the decision making in a particular case became a stable part of European law (i.e. case law and soft law involved in different notices and guidelines); but moreover they influenced even the written (statutory) law.\(^2\) We even can talk about some kind of “doctrinal power of judicial facticity”.

h) This process may have been observed even before the new member states joined the EU\(^3\). The decision making practice of European courts used to be assessed as a de facto legal norm and moreover with retroactivity.\(^4\) It might be considered a very controversial example of distorting the division of power de facto - judicial power as a “virtual legislator”.

i) Decision making practice had referred to CFI and ECJ interpretations of many important concepts in term of additional and complementary administrative and judicial reasoning.

j) Despite the lacking capacity of ECJ to create new legal rules (and instead to only specify the content of general concepts, to fill the gaps in European law, to articulate principles of applying European law in member states, to formulate general principles of European law), the effort to ensure workability and enforceability of European law as much as possible may lead courts to broad ways of purpose driven interpretation.

---

\(^1\) See Bydlinski, F.: Základy právní metodologie, FOWI, Wien, 2003, p. 78.

\(^2\) E.g. the concept of dominant position or of the doctrine of essential facilities as defined in the Czech Act on Protection of Competition sound so similar to the wording of decisions in particular cases (Michelin, United Brands, Hoffmann – LaRoche...), that there is no doubt about the influence – the explanatory report to the draft of the Act does not conceal its inspiration not only by the written European law but also by decision making practice of European courts.

\(^3\) So e.g. the definition of dominant position, of an “undertaking”, of essential facilities etc. was involved in the original Act Nr. 143/2002 Coll. from April 4\(^{th}\), 2001, that is four years before the accession of my country to the EU.

\(^4\) The judicial concepts, definitions, tests etc. had been developed (de facto norms had been created) before my country was formally obliged to obey them. Nevertheless, there was partly some legal ground for this approach – see the Implementing Rules for the Application of the competition provisions applicable to undertaking provided for in the Article 64 of the Europe Agreement between the EC and Czech Republic (done in Brno, on 14\(^{th}\) February 1995), Art. 6: (Block Exemptions) “...the competition authorities ensure that the principles contained in the Block Exemption Regulations in force in the EC shall be applied integrally... Where such Block exemptions Regulations encounter serious objections on the Czech side, and having regard to the approximation of legislation as foreseen in the European Agreement, consultations shall take place in the Joint Committee or Association Council...”. The same principles shall apply regarding other significant changes in the EC or Czech competition policies.
k) Quasi-normative character of some decisions of European courts (such as declaring the absolute preference of European law to the national law, including national constitutional law) would call for implementation\(^5\) (similarly as in the case of directives). 

l) The position of European courts in declaring what it means to apply European law correctly does not equal to creating generally binding and permanently valid rules; even applying the same rule may differ in the course of time. ECJ established many principles that appear trivial today but that were fundamental at the time e.g. for the anchoring of competition law in EEC as a „motor of integration“\(^6\). In recent times the European courts are more self standing and autonomous; they correct sometimes Commission’s views and contribute in this way to creating some new principles.\(^7\)

m) Some kind of „would-be-member devotion“ or maybe even „newcomer devotion“ of national courts and administrative bodies of new member states to the decisions of European courts might have been based on a false impression of precedential character of these decisions that cannot really exist. Specifying and clarifying legal content is not the same as creating the content. It is obvious that the texts of judicial decisions do not stand for legal norms.

Preliminary question proceeding confirms the obligation of each member state to apply European law correctly, that means, among others, in accordance with the current opinion of the European courts.

II. Path-dependence regarding the adherence to written peremptory rules

The pendulum movement in the early nineties after the political changes was two-edged.

On the one hand: there was an obvious reluctance to regulate (except for fundamental elements of a free society) and to bind anybody unnecessarily (especially entrepreneurial activities). The priority simply was to restructure the old fashioned socialist ownership system and to lay foundations of a democratic society and a free market economy.

---


\(^6\) According to Weitbrecht, A.: From Freiburg to Chicago and beyond - the first 50 years of European competition law, E.C.L.R., 2008, issue 2, p. 83: that Art. 85 is not a mere principle, but directly applicable; the distinction between restriction by object and by effect; the applicability of Art. 85 to vertical agreements, to intra-brand competition and in the area of intellectual property rights...At that time (since 1969) the Commission was fully supported by the ECJ.

\(^7\) So the „more economic approach“ as a new assessment paradigm was established in European competition law as a result of an enhanced accent on deeper economic reasoning of the Commission’s decisions that the CFI and ECJ started to require. Three cancellations by the CFI of merger decisions issued by the Commission in 2002 (Airtours, Schneider Electric, TetraLaval) are symptomatic in this sense...European Commission started then – as a result thereof – to take seriously well considered economic analyses that should lead to a higher legal certainty.
On the other hand: our distrust towards arbitrary decision making (that we experienced in the socialist State Arbitration) and the fear of too much discretion pushed us to create very detailed rules. This trend finally prevailed. But as it is well known, there is a vicious circle: the more detailed and punctual regulation, the more problems with interpretation resulting in additional need for even more detailed written regulation.

Former countries of "real socialism" were deprived of the otherwise natural ability of the society to perceive the content of the law in its real contextual sense and to absorb its sense by long term and stable use of the law. They suffered from the decline of non legal normative social systems that usually supplement and co-create the content of legal norms.

The hypertrophy of written law was encouraged and strengthened by radical systemic changes after 1989: these were characterized by overproduction of legal acts that hindered their recipients from realizing their content and purpose. This resulted in an especially restrictive way of grammatical textual interpretation of legal norms (“letter acrobatics”), and in an escape to procedural formalism as a result of lacking moral and value self-confidence of the society.

And suddenly European courts appeared to us in terms of relevant institutions as a *deus ex machina* with their great impact on interpretation and enforcement of law that is often not to be really found in any legal text and that only stems from the elaboration and development of general terms and concepts contained in the Treaty.

The extent in which European courts were allowed to intervene and to explain what the law really means was surprising from our point of view. We gradually learned to accept the „normative power of facticity“ (R. Jhering) created by the European courts. The attorneys started to advice their clients in accordance with the judicature that became gradually more important than plain words of the act, as was usually the case in the past.

**III. Grey area of a (false?) dilemma between interpretation and de facto rule-making**

**General observation** is that hardly any European judge or civil servant get along without interpretation that is – as a rule – not a result of a pure logical consideration but rather a consequence of a value-based inclination to a preconceived solution;

---

8 Driven by the „legislative optimism“ - that nearly every social and economic problem can be solved by a new legal act...
9 Comp. Holländer, P.: Soudcovská tvorba práva – napětí vně i uvnitř interpretova světa, aneb Mezi hermeneutikou a Bermudským trojúhelníkem, sborník XVII. Karlovarské právnické dny, Linde, Praha 2009, p. 104. The provocative “legally realistic” statement of Oliver Wendel Holmes - in „The Path of Law“, HarvLRev.10,1897, p. 457 et seq. (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”) would have sound as very strange and unacceptable to a typical socialist lawyer...
10 As Peter Häberle somewhere stated: „There are no simple legal norms; just interpreted legal norms exist“.
the main value core was strengthening economic and social integration of the member states.

New member states that experienced totalitarian period of their economic, social and legal development were accustomed to understanding and applying law as a strict set of fixed and written rules. The role of judicature used to be very modest. Of course, some areas were totally set apart from the „independent” decision making and straightforwardly entrusted for example in hands of the State Arbitration deciding in accordance with the actual needs of socialist economy. It was a realm of an almost totally arbitrary purpose-aimed discretion.

We have to cope with a more general question concerning the „right“ or the „reasonable“ way of interpreting broad and undetermined concepts and institutions. A number of such indeterminate concepts have to be used by judges in order to explain the indeterminate content of written law. These tools are e. g. „rule of reason“, „common sense“, „public interest“, „important grounds“, „sound and fair value“, „more economic approach“ and the like. It is OK in terms of methodology and it can be subordinated under the teleological interpretative methods.

Nonetheless, as to the real substance, in some cases pure arbitrariness of the interpreting body or judge may occur. The discretion is in fact a resort that may be used only after all complex analyses and all conceivable lines of argumentation had failed.

I do not understand the judge’s discretion as an interpretative argument - just the opposite: using discretion stems from the absence of interpretative argument and from the recognition of its absence, so that the interpretation has to be substituted in this emergency case by a value based consideration of the judge. This consideration should be consistent with the idea of how the judge would have decided in the place of legislator (and not just interpreter of legislator’s intention).

Both European and national courts are exposed to everlasting reproaches (contradicting each other), that

1) they are utilitarian
2) they represent and pursue judicial activism
3) they are too formalistic

The dispute between those three fundamental value-based positions is eternal, and in fact, an individual mixture of these „alloying elements“ has to be used in any particular case. I think that a kind of legal realism is present in today’s judicial

---

11 Of course, in the context and in terms of that real socialist time...
12 „General (basket) clause legislation“ may be the way in which the legislator tries to face the ever-changing reality without having to change the static legislation in the same pace.
activity, although not in the original overstated U.S. shape from the beginning of the 20th century. I hope we do not (and cannot) accept the U.S. “legal realistic” statement that the written law does not predestinate the result of the dispute. What we can, however, learn from this relativistic and pragmatic (maybe somewhat cynical) way of legal reasoning is discerning between „law in books“ and „law in action“, for the books are too static and general...But the „law in action“ is just the only possible way how to reanimate the „law in books“. These two concepts just stand for two stages (phases) of the same phenomenon.

What we further can learn, is the inclination to interdisciplinary approaches to the law and the standpoint that the law is a tool of achieving social goals and of balancing social interests, which, of course, presupposes to take extralegal considerations into account when applying legal rules.

By the way, solving the conflict of goals is almost a routine agenda especially before European courts pursuing the goals of the Treaty. Decision making practice of European courts is in this respect „legally realistic“, too, because it has brought the law near the social reality considering broader social, economic and further aspects of law. The courts relieved the law of the nimbus of an autonomous system of rules and principles.

IV. Welcoming legal (Euro)realism

New member states experienced as a rule a shifted kind of legal realism, too. Marxism may be understood as a type of legal realism in its „power version“ because it denies the autonomy of a legal system and emphasizes its economic and social conditionality and its social tasks that are to be achieved through the law as a mere tool (instrumentalism of the law). The law in this sense is nothing but a will of the ruling social class sublimated into formal rules that are rather general, in order to enable their interpretation in accordance with the “will of the ruling class”.

Another (perverted) inspiration of Marxian philosophers (ideologists) might be their statement that the philosophers used to interpret the world in different ways so far, whereas the task is now how to change the world. A similar argumentation according to which the judges should change the law instead of interpreting it in different ways is unacceptable.

Even the European judges are no „legislators in gowns“, but their so called „legal realism“ enables them to overcome the rigid and overstated formalism.

Nevertheless, topical motto of the „more economic approach“ is a kind of echo of those versions of legal realism that oblige judges to decide in accordance with the

---

14 ...which allegedly depends much more on what the judge had for breakfast...
15 E. g. „law and economics“ in terms of the „more economic approach“....
aim of enhancing the social welfare. The „right law“ should be assessed in terms of its impact on social welfare.

V. European courts as a conciliating “buffer zone” between static law and dynamic social reality

We can observe resonances of a quasi-teological approach to „correct“ legal interpretation in my country (in terms of Roma locuta, causa finita). An analogy might be seen with fatwa (i. e. religious and legal statement of Islamic clerics – ayatollahs) substantiating or hallowing certain conduct or policy from the religious (i. e. value conditioned) standpoints.

It would not be wise to laugh at it because it is just another way and another tool of solving general and permanent tension between the wording of a legal (religious) text and its reasonable coherence. The social function of judicature (including the European one) is similar.

European courts are well aware of the necessity to balance broader social and Community goals and not to emphasize unilaterally any „trendy“ plain economic approaches. So e. g. different prices might be - from the purely economic point of view - advantageous. Nevertheless, they can distort broader social (Community) goals that are not to be measured by a microeconomic test only. Simple microeconomic goals of the discriminating person might be false because they do not consider political values which the member states are obliged to pursue. Some examples of European judicature on discriminatory double pricing16 indicate that even in a period of a „more economic approach“ it will be inevitable for the courts to prefer fundamental freedoms necessary for creating and functioning of the single market. The moral principles of common sense prohibit „economically advantageous“ price discrimination as well. Discrimination – though advantageous in microeconomic terms and in short-term – is in many cases unsustainable for it infringes the integrity of the single market and common sense.

In conclusion, the European law enforced by European courts is, on the one hand, the source of a „more economic approach“ and, on the other hand, the corrector of a purely economic approach endangering single market, social cohesion and consumer welfare, as well.17

VI. European courts as intellectual incubators and think-tanks

European courts are not only interpreters of law and seekers of the principles hidden behind the words of European law. They supply fundamental, essential and vital material for legal reasoning and for the development of the doctrine, as well.

16 ECJ: C-45/93, Commission v Spanish Kingdom; ECJ : C-28/98 Angonese v Cass di Risparmio di Bolzano; ECJ: C – 388/01, Commission v Republic of Italy.
17 Bejček, J.: Cenová diskriminace a tzv. dvojí ceny v evropském a českém kontextu, Právní fórum 2008, issue 5, p. 181.?
European courts pursue value conditioned and contextual interpretations of general legal norms, which is an activity that necessarily does not have to be very different from creating a new norm (we do know many examples of totally different interpretation of the same legal provision). The tool of verification (falsification) seems to be, first of all, the authority of the interpreter (i.e. judicial authority, rarely intellectual academic authority), but surely not a scientific method.

It seems to me that following the judicature of European courts and its theoretical reflection prevails over the opposite direction, namely following the doctrine by judges and bringing its conclusions into life by judicial decisions.

Maybe we can talk about the “judicialization” of legal doctrine. European courts are the proponents of this development in all Europe and even overseas.

More general interpretative standpoints for example in competition law arise usually as a consequence and generalization of the case law.

Especially the „soft law“ (notices, guidelines) is - as a rule- a kind of a “generalized case report”. It is an important „connecting bolt“ between judicature and legal norms that enhances foreseeable of analyses and of future decisions of the Commission and of the courts and contributes to legal certainty.

**VII. Conclusion**

Though the principle of subsidiarity makes part of the positive law, its practical importance in the judicature of European courts is minimal. The impact of European courts on new member states is today hardly to be discerned from the importance for the whole European community.

Crucial majority of EU law does not work nowadays in a form of incorporated law but instead in a form of transformed law, i.e. as a national law. In this way, another additional mechanism unifying legal order(s) has been created. European law (as to the content) acts as a domestic (national) law (as to its form) and the domestic judge acts as a European one.

In this way the value conformity is very probable (the normal judge is not schizophrenic and interprets and applies both European and domestic law using the same value and methodological basis).

It is a mitigating circumstance for European courts not to be solely responsible for applying European law; nevertheless, their role as a methodological and value confirming and declaring authority is irreplaceable.

---

19 See Holländer, P., ibid, p. 106.