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(Avoiding conflicts of jurisdiction between international courts on the example of European Court of Human Rights and Court of Justice of the European Union)

SUMMARY

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Since World War II the international community is a witness to the rapidly growing number of international agreements on almost every aspect of life, concluded both at global and regional level. This is a result of increasing activity of countries and international organisations on the international scene, but also of entities, whose activity, that goes beyond the borders of a specific country, born of the need to conclude the treaties to facilitate the exchange of, inter alia, economic exchange or a movement of persons. Consequently, numerous international agreements cover such areas of socio-economic life as international trade, human rights or environmental protection. Often those acts govern the same issues. All along the increase in the number of international agreements, the number of international courts is steadily increasing. This phenomenon is described as proliferation of courts and tribunals.

This evolution of international justice meant that in many areas of international law a settlement of a conflict may be reached in the developed and effective system of resolving disputes. Due to the lack of defined hierarchy between the international tribunals, the proliferation carries some negative consequences. As courts operate independently from each other and international agreements that establish them do not regulate mutual relations between the judicial bodies, the scope of their jurisdiction often overlaps. Therefore the same case may be settled by more than one court.

The aim of the thesis is firstly to identify the causes of the increase in the number of international courts and to determine the consequences of this phenomenon, in particular focusing on the problem of conflict of jurisdiction. Another objective is an indication of the instruments stemming from both the national and international law, which are used to minimise the negative effects of judicial pluralism. Among them I distinguished the methods used to prevent the emergence of overlap of jurisdiction and the instruments to eliminate conflicts of jurisdiction, which constitute a negative consequence of these overlaps. The diversity of these legal mechanisms raises an important question about their suitability for the settlement of conflicts of jurisdiction between international tribunals.

The catalogue of analysed instruments consists of jurisdiction clauses, res judicata, lis pendens, electa una via, forum non conveniens and comity. The case-law of the international courts shows that there is no one, universal method, which would rule out the possibility of negative effects of judicial proliferation, because each of them is of a limited use. The relative reluctance of international tribunals to apply the instruments of avoiding the plurality of proceedings can also be noted. It is usually reasoned by technical differences concerning both

parties to the proceedings, the ground and the object of the dispute, for which the requirement of identity is narrowly construed. That is why as long as conditions of the so-called triple test identity will not be interpreted in a flexible way (for instance by adoption of the construction of privity or of economic interests) the methods dependent on its meet (i.e. res judicata, lis pendens, electa una via and also partially forum non conveniens) are not enough to ensure the coordination of international proceedings. Since the classic conflict-of-law rules does not work in international law, the concept of judicial comity is being mentioned.

The potential possibility of making the decision on the basis of comity arises when there are no jurisdictional clauses in the agreement limiting to the minimum the danger of overlaps of jurisdiction. As a soft law instrument, of which the conditions of use are largely dependent on the will of the court – comity could be applied every time the rigorous conditions of forum non conveniens or res judicata are not met. Unfortunately, not every international court will find the relevant empowering measure in an agreement by which it is established to use this instrument. In contrast to the res judicata, comity is not a legally binding rule in international law. As finding a universal method against parallel proceedings poses many problems, the creators of the individual legal regimes, even those aware of the adverse consequences of judicial proliferation, have not an easy task when it comes to shaping the relationships with other courts, belonging to the system of international law.

At the stage of the creation of the European convention for the protection of human rights and fundamental freedoms the danger of overlapping jurisdictions of several international bodies with judicial authority was already recognized. The creators of this Convention added into its norms two standards designed to prevent conflicts of jurisdiction, which, however, are not always sufficient. The first regulation – article 55 ECHR, has the nature of the jurisdictional clause granting the ECtHR exclusive jurisdiction within the limits indicated in the Convention. However, this is a provision of a dispositive nature, as it gives to all contracting parties a possibility to bring the case to another court under a special agreement. A vague wording of this clause used to raise doubts about its scope.

After an analysis of article 55 ECHR I came to the conclusion that an exclusion of the Strasbourg Court's jurisdiction requires a conclusion of a particular agreement between the countries, indicating clearly the objective of its agreement, defined as settling the dispute on the basis of ECHR by a designated judicial body different than ECtHR. For the decisive factor should be considered a direct intention of the parties to the Convention to exclude a dispute (or a whole category of disputes) from the jurisdiction of the ECtHR. The designer of the

Convention did not foresee however any standard indicating the way of proceeding in the case of conflict of jurisdiction, which is not in my opinion an obstacle to apply the principle of res judicata, on condition of assuring by an external court at least an equivalent protection.

A freedom to choose an alternative forum of the case applies also to individuals. As the possibility to put a claim to another forum is not excluded, the creators of the ECHR have regulated relationships between the different investigations in the wording of article 35 (2) b of the Convention. An interpretation by the ECHR of this clause indicates that it has relatively broad scope of application, due to the fact that ECHR takes into such constructions as common economic, legal and factual interest of various actors, who are in fact privies.

Faced with a plethora of instruments for the protection of human rights, a change in the criterion of "the same ground" to "the same facts" has become, in turn, a necessity in order to prevent fraud in the form of the searching by individuals for legal protection by in multiple fora. Article 35 (2) b of the Convention, embodying the principle of electa una via, excludes the admissibility of cases pending before other international body, as well as of those already settled. Unfortunately, as a result of incompatible provisions of other international agreements relating to jurisdiction, a duplication of the proceedings in the same case is still possible. In order to avoid conflicts with the Human Rights Committee (HRC), the reservations made by states parties to the International Covenant on Civil and Political Rights should be adapted so that they eliminate the possibility of initiating the proceeding before HRC both when the same case is being settled or had been settled by another international court.

On the other hand, a developed by the ECtHR position in relation to the Court of Justice of the European Union can be defined as jurisdictional restraint, which is kept by the time of assuring an equivalent legal protection (although the presumption of equivalence can be rebut). It must be noted that this test used by the Court in Strasbourg is an modification of a criterion of "being settled in another international dispute settlement procedure" (with all the consequences in the form of an obligation to ensure a protection at the appropriate level), which is the premise of res judicata. The case-law of the ECtHR in matters relating to the EU is a clear signal that the jurisdictional withdrawal of the Court in Strasbourg is temporary in nature and does not mean the total dedication to the field.The judicial courtesy, which has the form of the so-called Solange method, is visible mainly in the situation of the reception to the national legal order of the standards of EU law, on the content of which the member state had

no impact. In this respect the doctrine of the equivalent legal protection actually helps to avoid conflicts of jurisdiction, but also of case-law.

On the other hand, insofar as the EU member states have a high degree of legislative freedom, as in the case of the implementation of directives, the jurisdiction of both tribunals remains parallel with regard to ruling on the breach by the national law of the standards of the Convention, which creates a possibility of conflict. Therefore, the method Solange alone seems insufficient to regulate the relationship between the CJEU and of the ECtHR. An accession of the union to the ECtHR will undoubtedly help in a comprehensive settlement of the mutual relations and minimize the risk of jurisdictional competition.

The involvement of the European Union in international fora may result in the presence of conflicts of jurisdiction between the CJEU and other international courts. However, the Court of Justice protects an autonomy of the EU legal order, including before interference of the external judicial authorities, which would take place beyond its control. The Court uses in this process article 344 TFEU, which grants to the CJEU the exclusivity in inter-state disputes concerning the interpretation or application of the treaties. This jurisdiction clause contained in article 344 TFEU is a typical example of the provisions, by which the parties of the international agreement want to ensure an exclusivity of a specific court within certain matters. In order to achieve that goal, not only the parties to the international agreement, but also external courts should take this provision into account. It must be borne in mind, that at the moment there are in international law no standards, which would make compliance with the exclusive jurisdiction of another court obligatory. Such action of another court will therefore be a manifestation of comity towards CJEU. The MOX Plant case is a good example of a different approach of international courts to the clause of the exclusive jurisdiction relating to the CJEU.

In order to respect this exclusivity, the court external to the EU must have a clear information about the scope of competence of the CJEU. As the content of article 344 TFUE is skimpy, defining the scope of the CJEU exclusive jurisdiction is not possible without an analysis of the relevant case-law of the CJEU. What results from this analysis is firstly that the exclusivity covers not only disputes concerning the interpretation and application of the primary law, but also secondary law of the EU. Secondly, with the phenomenon of the proliferation of international courts the Court is trying to cope by „extending" and emphasising the limits of its jurisdiction to the maximum, in particular in the matter regulated by mixed international agreements, whose interpretation should also stay with the CJEU.

Article 344 TFUE does not refer however to the disputes, in which a party is an individual, nor to disputes with third countries. The rationale for the broad understanding on the grounds of EU law the CJEU exclusivity is the need to protect the integrity of the EU legal order.

To tighten up article 344 TFEU and to protect the jurisdiction of the CJUE, the EU institutions use article 351 TFEU, obliging member states to revise their concluded international agreements such as bilateral investment agreements, that could endanger uniformity and consistency of interpretation of the EU law. Another tool is article 4 (3) TEU, establishing the principle of loyal cooperation, which may be used when the member states do not consult the intention to initiate the proceedings before the other court with the EU institutions. CJEU itself does not have adequate tools to protect its competence.

Another instruments of prevention of conflicts of jurisdiction, other than jurisdiction clause contained in article 344 TFEU, which can be found in the case-law of the EU courts are: res judicata, lis pendens, forum non conveniens and comity, but only the last one (in different forms) is applied to the relationships with other international courts. The other three instruments – for various reasons, may not be the basis for rejecting the case in the framework of EU law. The argument of the primacy of union law, raised in the proceedings before the external tribunals (as occurred in cases of BITs between member states) also may not be applied, since this principle of EU law is not binding to courts from outside the Union.

In the case-law of the CJEU some manifestations of respect for other international courts and their law (comity) are possible to be found. For example, the Court was interpreting the EU law and WTO law in compliance with the interpretation contained in the earlier reports of WTO panels and Appellate Body, which caused both the effectiveness of those reports, as well as preserved the unity of the EU law. The so-called muted dialogue, which takes place in relations between the CJEU and WTO judicial organs may in the future result in mutual respect that comity. It should be considered then that the CJEU is on track to develop its own understanding of comity.

A similar, friendly relationship exists between the two European courts – CJEU and of the ECtHR. It is also the type of decision-making comity, in the form of showing by the EU court a respect for the ECtHR case-law and basing on in the process of dispute settlement. This comity is also visible is refraining from an open criticism of the ECtHR judgments, which does not exclude cases of adoption of different interpretation.

Given that the overriding value, which is underlying article 344 TFEU (as well as article 267 TFEU) is a consistency of the UE legal order and legal certainty, in my opinion the

application by the CJEU in relations with other international courts a modified Solange method (which may be defined as a conditional acceptance of a judgment of another court, after confirmation that it had settled the dispute while maintaining the equivalent level of protection and ensuring analogous procedural guarantees) is possible.

It should however differ from the Solange method used by the ECtHR - the refusal by CJEU to settle a dispute should be preceded by the verification, whether in the legal proceeding of the external court all the conditions of so-called CILFIT doctrine had been met. Granting by the CJEU to external tribunals some trust and a margin of freedom would help to shape their mutual respect, which may in the future result in respecting the exclusive jurisdiction of the CJEU in all situations, when the dispute truly concerns the application of the EU law or its interpretation, which is not obvious.

A postulate of the CJEU to include an explicit exclusion of the jurisdiction of the ECtHR in disputes between EU Member States in the agreement on the accession of the EU to the ECHR is an expression of an enhanced fear of the Court of its competences. This requirement, formulated by the Court of Justice in the opinion 2/13 goes further than the standards accepted by this Court so far. However one has to bear in mind the complications, which result from the inclusion of the ECHR to the EU law. The fact that this agreement, having a mixed character, is going to become an element of the EU law leads to gaining by the CJEU the jurisdiction in all areas except for those which fall within the scope of the exclusive competence of the Member States. Attributing of given areas to respective bodies may, however, cause certain problems. If, nonetheless, an action would concern the matter belonging to the exclusive competence of Member States, its realization does not lead to breaching the obligation stemming from Art. 344 TFEU by the Member State. That circumstance should be taken in account when formulating a provision explicitly excluding the jurisdiction of the ECtHR.

As far as the impact of the accession of the EU to the ECHR on the admissibility of the individual actions is concerned undoubtedly it is going to lead to elimination of doubts concerning the relations between the term of „the same case" (included in Art. 35 (2) b of the ECHR), heard by another international dispute solving procedure and cases ended by the decisions of the CJEU.

The procedure before the Court of Justice is going to bear the character of a domestic remedy, which exhausting is going to be necessary before instigating the Strasbourg proceedings (instead of having the character of a decision of an international court which is a

requirement of recognition of the res judicata of a ruling by another court). That effect was introduced explicitly in Art. 5 of the draft agreement on the accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms. It means that the Member State (or the EU) cannot exempt itself from the responsibility toward an individual using the plea of res judicata.

The whole above mentioned argumentation of the CJUE which acknowledged incompatibility of the agreement on the accession with the founding treaties shows that keeping the exclusivity in the area of the interpretation of the EU law is of the highest priority for the Court. That being so the final agreement on the accession of the EU to the ECHR has to include detailed provisions which would set clear instructions as for the cooperation between the Strasbourg and Luxembourg courts and Member States of the EU.