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PRINCIPLE OF REGARD AND FAIRNESS AS ONE OF THE PRINCIPLES OF EUROPEAN PRIVATE LAW AND ITS REFLECTION IN THE SLOVAK COMMERCIAL LAW

Introduction to the issue

As A. von Bogdandy states, ethical, political or economic conflicts can be seen as conflicts of principles¹. Although the legal principles do not provide concrete solutions to these conflicts, they serve as the basis to propose the solutions to these conflicts.

The principles of private law, as well as legal principles in general, are of particular importance to private law. The principles express the values of private law and form a stable basis for all private law regulation. The principles of private law imply and conceal the axioms and values, which society refers to. Without absorbing the principles of private law, the law in its true sense would cease to meet its objectives. The principles of private law fulfill the function of a stabilizer of the law and order. The important role of the principles of private law lies in their flexibility. The principles can flexibly respond to social changes that are then drawn through the interpretation into law. The principles are used in the preparation of new legal regulations, but also in application of law.

The principles of private law have not only a national dimension, but also a significant transnational (European) dimension with regard to the unification of private law in the European Union and creation of model codifications of private law and contract law.

It can be said that the general principles of EU law have, firstly: an interpretative function, since they serve to interpret written law, secondly: supplementary function, since they serve to fill gaps in the law and ultimately:

1 Von Bogdandy, A. Founding Principles of EU Law: A Theoretical and Doctrinal Sketch. In European Law Journal, 2010, No. 2, p. 111.

check function (corrective, revision function), since they serve to assess legality of legislative or executive acts¹. As regards particular principles of the EU's private law², these principles in addition have a special significance for the systematization of the EU's private law³.

Since the EU's private law is both an EU's law and a private law, it is possible to include into the system of its principles, firstly: the general principles of EU's law applicable to all areas of EU's law in the extent of relevance to private law, and secondly: the specific principles of EU's private law, the scope of which is limited to the EU's private law⁴.

Among the specific principles of the EU's private law are generally included the following: the principle of contractual freedom, the principle of *pacta sunt servanda*, the principle of awareness, the principle of transparency, the principle of contractual solidarity, the principle of regard and fairness and the principle of consumer protection⁵.

As it can be seen from the above, in European Private Law, in addition to traditional principles, such as the principle of the contractual freedom or the principle of *pacta sunt servanda*, new principles have also been formed to highlight the social responsibility of subjects of private law relations and to contribute to emphasize the social function of private law. One of these principles is the principle of regard and fairness (*Rücksichtnahme und Fairness*). This principle includes reciprocal openness, fairness and regard between the parties. It is related to contractual solidarity, but its designation as the principle of regard and fairness more accurately expresses its true content and does not induce mistaken associations related with the concepts of solidarity and social contract law. The principle of regard and fairness is not based on solidarity in the sense of redistribution of wealth or on social policy measures. By virtue of this principle, the parties do not have to give up their

1 Hartkamp, A. The General Principles of EU Law and Private Law. In *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2011, No. 2, p. 242.

2 European Private Law *de lege lata* means the private law of the European Union (also referred to as the Private Law of the EU), i.e. a set of norms of private law which, under EU Law, are valid in all Member States or are binding for all Member States. In the past (prior to the entry of the Treaty of Lisbon into force), it was referred to as Private Law of Community, or Community Private Law.

3 Mak, V. A Shift in Focus: Systematisation in European Private Law through EU Law. In *European Law Journal*, 2011, No. 3, p. 420.

4 Jančo, M., Jurčová, M., Novotná, M. a kol. *Európske súkromné právo*. Bratislava : EUROIURIS, 2012, p. 150.

5 For more details see Jančo, M., Jurčová, M., Novotná, M. a kol. *Európske súkromné právo*. Bratislava : EUROIURIS, 2012, p. 178 and following.

interests and act altruistically, but they are only expected to act fairly, i.e. in accordance with good faith and to take into account the interests of the other contractual party¹.

Honesty, openness, and regard for the interests of the other party are signs that can also characterize the principle of fairness. Honesty is to be understood «in the sense of the unacceptability of fraud against the other contractual party»². Openness is such a conduct of a contractual party that can be described as transparent and regard for the interests of the other party means the minimum, commonly required regard³.

Despite the fact that the principle of regard and fairness represents the opposite of the formally understood contractual freedom, the principle of regard and fairness must still be at the same level as the fundamental principle of contractual freedom.

As regards the Slovak Commercial Code⁴, although it was adopted at the time when the principles of European Private Law were not inevitably relevant to the Slovak legal environment, it can be said that the principle of regard and fairness in terms of content corresponds to the exercise of right in accordance with the principles of fair business conduct. Under provision § 265 of the Slovak Commercial Code, the exercise of rights, which contravenes the principles of fair business conduct, shall not be legally protected. The principles of fair business conduct are sometimes referred to as fair trade principles.

It is assumed that the entrepreneur will, in its dealings with other entrepreneurs, promote its interest, exploit the opportunities provided by legal regulations and strive to achieve the maximum possible profit and improve its position on the market. On the other hand, however, the entrepreneur must not, in the pursuit of its interests, exceed the limits resulting from the principles of fair business conduct, or abuse the rights arising from the law. The entrepreneur must behave regardfully and fairly. The right cannot be exercised in a way that the fundamental right of the other participant in the contractual relation is unjustifiably violated nor it can lead to an imbalance of mutual rights and obligations. The contractual freedom of the parties in the contractual relation is

1 Jančo, M., Jurčová, M., Novotná, M. a kol. Európske súkromné právo. Bratislava : EUROIURIS, 2012, p. 181.

2 Nový, Z. Dobrá víra jako princip smluvního práva v mezinárodním obchodu. Praha : C. H. Beck, 2012, p. 139.

3 For more details see: Bar, Ch., Clive, E., Schulte-Nölke, H. (eds.). Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Munich : Sellier European Law, 2009, p. 136. Available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

4 Act No. 513/1991 Coll. Commercial Code as amended.

not unlimited and must not deviate from certain boundaries acceptable by law. If the boundaries are exceeded, then the legal protection cannot be granted.

The principles of fair business conduct

It can be concluded that the principles of fair business conduct are the concretization of more general moral principles or norms expressed in the legal term “good manners”. The principles of fair business conduct are the specification of the morality norms in the area of business contractual relations. These principles form a coherent set of behavioral policies, whose respecting in the commercial conduct, qualifies this conduct as a fair one. A violation of the principles of fair business conduct is always the case, if a legal participant in the exercise of its interests exploits its rights to the detriment of the other party, and the exercise of rights clearly seeks only to harm the other party in order to get the other party into a more unfavorable situation.

A breach of the principles of fair business conduct has many concrete forms in real life. There is a number of different cases when the exercise of right is in conflict with the principles of fair business conduct. These cases need to be assessed very individually and comprehensively.

In general, the principles of fair business conduct can be characterized as regardful, fair, decent and professional conduct of entrepreneurs in their mutual relations, but also in relations with other subjects. The entrepreneur’s obligation to act in accordance with the principles of fair business conduct applies to entrepreneurs also in contacts with non-entrepreneurs.

The principles of fair business conduct include the particularities of professional relations in the business environment and its special ethics. In the commercial relations regime, the social aspect of justice in relations is harder to apply. This is also reflected in the principles of fair business conduct, where particular emphasis is placed on the general prohibition of abuse of rights and the good faith of parties of contractual relations.

As the provision § 265 of the Commercial Code generally refers to the principles of fair business conduct, said principles are legally binding and, given the fact that § 265 is a mandatory provision, the parties cannot exclude or limit stated provision by an agreement.

In addition to the regulation set out in provision § 265 of the Commercial Code, the principle that the exercise of rights and obligations must be in accordance with good manners also applies in the business relations. A legal act that contravenes good manners is invalid¹.

¹ For more details see provision § 39 of Act No. 40/1964 Coll. Civil Code. Given the fact that the Civil Code is *lex gen-eralis* in relation to the Commercial

The provision § 265 of the Commercial Code must be perceived as an order to the judge to decide in accordance with equity, and as opposed to good manners, the principles of fair business conduct allow to take into consideration particularities of the professional relations of the business environment and its specific ethics. Due to the prevailing professionalism of relations in commercial law, sensitivity to the aspects of social justice is slightly weaker in the area of commercial law (allowing to take into consideration the particularities of business ethics). Even such practices can be under certain circumstances considered as fair in the sphere of commercial law that could already be seen as unethical in the sphere of general civil law¹. Thus, even such a practice, which could be considered as unethical compared to the good manners, would stand the test of principles of fair business conduct.

Fair business conduct vs. good manners

The definition of term “fair business conduct”, as well as of the term “good manners”, is generally left to jurisprudence and case law². It is exceptional to find the definition of these terms in the legal norm³. This approach can be considered correct, since these legal terms are multifaceted and their meaning evolves in time and place.

It can be concluded that the principles of fair business conduct and good manners have a common core which lies in equity. The function of principles of fair business conduct and good manners is to find justice in places, where the

Code, this provision also applies to commercial law relations. For more details see the provision § 1 sec. 2 of the Commercial Code.

1 E.g. in commercial law relations, the possibility to plead the pressure and strikingly disadvantageous conditions (§ 267 sec. 2 of the Commercial Code) is excluded in the Slovak legal order, while in civil law relations provision § 49 of the Civil Code sets out that: «The participant who concluded an agreement in pressure under strikingly disadvantageous conditions shall be entitled to withdraw from the agreement. «

2 E.g. the Supreme Court of the Slovak Republic has defined good manners as «normal, honest and just behaviour, which corresponds to the fundamental moral principles which prevail in society». For more details see the Judgment of the Supreme Court of the Slovak Republic of 28.02.2005, File. No. Obdo V 53/2003. Similarly, the Supreme Court of the Czech Republic, in its Judgment of 26.06.1997, File. No. 3 Cdon 69/96 characterized good manners as «a set of social, cultural and moral norms which, in historical development, certify some unchangeability, represent essential historical tendencies, the crucial part of society shares them and they have the nature of basic standards».

3 E.g. the definition of acting contrary to the good manners in § 4 sec. 8 of Act No. 250/2007 Coll. on protection of consumers.

formal application of legal norms would lead to unsustainable consequences.¹ Nevertheless, fair business conduct and good manners are two different legal terms.

Despite the fact that many specific violations will overlap with violations of principles of fair business conduct, the legal term “good manners” is broader in content than the legal term “principles of fair business conduct”. If a certain legal act is contrary to the principles of fair business conduct within the meaning of the provision § 265 of the Commercial Code, it does not automatically imply that the act (legal act) is void because, under the provision § 39 of the Civil Code, it is at variance with the good manners². While good manners are a general measure of ethical evaluation, the principle of fair business conduct reflects the distinctive nature of the business environment, and, as has been mentioned above, even such a practice, which could be considered as unethical compared to the good manners, would stand the test of principles of fair business conduct.

As for the legal consequences, there is a fundamental difference between acting contrary to fair business conduct and between acting contrary to good manners. As mentioned above, the principles of fair business conduct are the concretization of the more general moral principles or norms expressed in the legal term of good manners. If the legal acts are at variance with good manners, the provision § 39 of the Civil Code shall be applied and the consequence shall be the invalidity (absolute invalidity) of the legal act. If, however, in the course of exercising the right, there is a violation of the principles of fair business conduct, in this case the provision § 265 of the Commercial Code shall be applied and the court shall refuse the exercise of right. In other words, in this case the legal act will not be invalid, but the court will refuse to legally protect the exercise of right which is contrary to the principles of fair business conduct (even if no mandatory provision is breached). Such an exercise of right is therefore valid, but it is not possible to claim it in court. Only the exercise of right, not the mere legal act, from which the right is exercised, can be contrary to the principles of fair business conduct. The prerequisite to apply the provision § 265 of the Commercial Code is a valid legal act, from which the right is exercised³.

1 For more details see the Resolution of the Constitutional Court of the Czech Republic of 1.8.2011, File. No. I. ÚS 3727/10.

2 The Judgment of the Supreme Court of the Czech Republic of 1.7.2008, File No. 29 Odo 1027/2006.

3 Resolution of the Constitutional Court of the Czech Republic of 7.12.2011, File No. 32 Cdo 542/2010, similarly also the Judgment of the Supreme Court of the Czech Republic of 25.6.2008, File No. 32 Cdo 3010/2007.

Due to the fact that the application of the provision § 265 of the Commercial Code does not result in the invalidity of a legal act but only in the denial to protect the exercise of right, it is possible for the subject to fulfill its obligation based on such a legal act and such fulfillment cannot be considered as an unjust enrichment.

The role of the court in the decision-making process is also different. When applying provision § 39 of the Civil Code, the court finds that a legal act is void for a breach of good manners, whereas when applying the provision § 265 of the Commercial Code, the court does not grant legal protection to the exercise of right which is contrary to the principles of fair business conduct. The reason for such a solution is, among other things, the legislator's attempt to achieve as much contractual freedom in business relations as possible.

The Supreme Court of the Czech Republic has stated¹ that it is incorrect when the conduct which is contrary to the fair business conduct and conduct that is at variance with good manners is perceived as a relation of cause (the conduct is contrary to the principles of fair business conduct) and the consequence (and that is why such a conduct is at variance with good manners). If this opinion was accepted, the provision § 265 of the Commercial Code would not be applicable on its own, which would contradict its steady interpretation and the way in which this institute is being interpreted by legal theory².

The principles of fair business conduct and judicial practice

The provision § 265 of the Commercial Code provides a wide margin for judicial discretion in a question whether a certain provision of an agreement is or is not in accordance with the principles of fair business conduct. The law does not restrict the judge in considering what his points of view should be based on, when assessing compliance with the principles of fair business conduct. However, the use of the provision § 265 of the Commercial Code should be the last resort (*ultima ratio*) in exceptional cases to mitigate or eliminate the excessive strictness of the law in a situation where to award the claimed right would appear as extremely unfair.

The provision § 265 of the Commercial Code belongs to legal norms with a relatively indefinite (abstract) hypothesis, i.e. to legal norms whose hypothesis is not directly established by legal norm, and which thus oblige the court to

1 The decisions of the Supreme Court of the Czech Republic are stated because for a certain period of time, the Slovak and Czech legislation arising from the Commercial Code, adopted at the time of the common state, was the same and therefore the decisions are also relevant for the Slovak legal environment.

2 Judgment of the Supreme Court of the Czech Republic of 20.1.2009, File No. 29 Cdo 359/2007.

determine, on its own merits, in each individual case the very hypothesis of a legal norm from a broad, previously unlimited set of circumstances¹. A decision as to whether the conditions for the application of provision § 265 of the Commercial Code are met must therefore always be done after careful consideration, in which all the decisive circumstances of the case must be taken into account.

The courts have to be very prudent in their decision-making, because we fairly often meet with the objection of § 265 of the Commercial Code in lawsuits, whereas many times the party tries to abuse given provision and compensate, for example, its own risk of trading or its inattention when concluding a contract and so on. This is most noticeable with regard to default interest and the amount of the contractual penalty.

In such cases, a party which, due to a breach of its contractual obligation, is obliged to pay default interest or a contractual penalty, seeks to get rid of this sanctioning obligation by stating that it is the exercise of right contrary to the principles of fair business conduct. However, it would be wrong to conclude that there is a violation of fair business conduct, only e.g. because of ratio of the amount of the agreed contractual penalty to the value of the secured obligation, or to generalize that any creditor's claim for the payment of a contractual penalty is vexatious, simply because the secured obligation was additionally fulfilled by the debtor. On the other hand, the fact that the contractual penalty is not disproportionately high does not indicate anything about how and under what circumstances the creditor exercises the right to payment of a contractual penalty, and whether the exercise of right is not contrary to the principles of fair business conduct. These examples show the importance of investigating violations of the principles of fair business conduct always in relation to the specific circumstances of the case.

On the other hand, even the courts can sometimes be criticized for the incorrect understanding, interpretation and application of the provision § 265 of the Commercial Code. As an example, we can see from the case law that there is a tendency of courts to use the provision § 265 of the Commercial Code to reduce the amount of a contractual penalty, although this function should be fulfilled by the discretionary power of judge to reduce the disproportionately high contractual penalty (§ 301 of the Commercial Code)². Such practice is

¹ Resolution of the Supreme Court of the Czech Republic of 1.12.2016, File No. 23 Cdo 2664/2016.

² The existence of a disproportionate contractual penalty is a precondition for the use of the discretionary power of the court to reduce the disproportionately high contractual penalty under § 301 of the Commercial Code, but the existence of a

in many cases an abuse of the provision § 265 of the Commercial Code and is an application that undermines legal certainty, because in such cases the law protects the person who has breached the legal obligation.

There is also a question, whether the breach of the principles of fair business conduct has to be taken into account by the courts *ex offio*, or whether the breach must always be objected. We consider that, given the fact that the sanction for the exercise of right contrary to the principles of fair business conduct is that such exercise of right does not enjoy legal protection, it depends on the will of the person who has been affected by the abuse of right, whether the sanction will be applied or not. Therefore, we think that it is necessary to object the exercise of right which is contrary to the principles of fair business conduct.

As it was already mentioned, courts must always examine all the circumstances of the case. The courts should proceed in such a way as to first consider whether the legal act or only the exercise of right is to be considered unfair. If a legal act is unfair, the provision § 39 of the Civil Code must be used and the legal act must be declared void for contradiction with good manners. Then there is no need to prove contradiction with the principles of fair business conduct. If the legal act is valid, but the exercise of right is unfair and it is a commercial-law relation, it is necessary to use the provision § 265 of the Commercial Code.

Conclusion

Due to the fact that the Slovak Republic is a part of the European Union, the principles of European Private Law are legally relevant for the Slovak legal environment and it is necessary for the Slovak legislation to respond to them. The room for their consistent incorporation into Slovak Private Law is being created especially now, during the ongoing recodification of private law.

For each codification of private law, it is necessary for the optimal application of the adopted legal norms, to determine the values which the legislation should follow and to express them in the form of a set of principles, which will then create a stable legal basis of the legislation and play a decisive

disproportionate contractual penalty is not a statutory precondition for a discrepancy of the exercise of right with the principles of fair business conduct within the meaning of provision § 265 of the Commercial Code. If the court considers the contractual penalty as disproportionately high, it does not necessarily mean the fulfillment of all prerequisites for the application of the provision § 265 of the Commercial Code, i.e., it does not mean that the exercise of right to a contractual penalty does not enjoy legal protection, but prerequisites for the procedure under § 301 of the Commercial Code.

role in the interpretation and application of each provision, which allows different possibilities of interpretation.

However, the definition of civil code values and principles is very difficult, as the civil code must take into account different social views and tendencies. As for the incorporating of the principle of regard and fairness, the provision § 265 of the Commercial Code is a good stepping-stone. The exercise of right, which does not breach the mandatory provisions of the law or the provisions of an agreement, but is contrary to the principles of fair business conduct and goes beyond the limits of contractual freedom provided by the law in commercial relations, cannot be given legal protection. An entrepreneur must not abuse its rights, especially if its rights are not threatened in such a way that it would be possible without further to allow the entrepreneur to obviously harm other persons by the exercise of its rights¹. Honesty expresses a certain standard of conduct in legal relations, requiring uprightness, fairness, openness, and duty to take into account the interests of the other party. It can be said that the principle of regard and fairness is contained in the concept of honesty, so the duty to act in legal relations honestly should be clearly expressed in the new civil code².

As for the application of provisions that require moral principles to be taken into account, such application is difficult and can slip to the point where we can talk about misuse of morality or moral principles when applying law. Therefore, it is not possible to make a decision without thorough examination of a specific case and thorough argumentation. It is the role of the courts to be careful and prudent in their decision-making, and the quality legislation is certainly important in their decision-making³.

Nevolná Z. Principle of regard and fairness as one of the principles of European Private Law and its reflection in the Slovak Commercial Law

The principles of private law, as well as legal principles in general, are of particular importance to private law. The principles express the values of private law and cre-

1 Judgment of Regional court in Bratislava of 18.4.2013, File No. 1 CoZm/30/2012.

2 Similarly, the Czech legislator has chosen to emphasize the need to act honestly in the new Civil Code, pointing out that no one may profit from its unfair or unlawful act (§ 6 of Act No. 89/2012 Coll. Civil Code). In § 7 it also clearly states: «It is understood that the one who acted in a certain way, acted honestly and in good faith.» Subsequently, it is clear from § 8 of the Czech Civil Code that obvious abuse of rights does not enjoy legal protection.

3 This paper was created as a part of the solution of the project APVV-14-0061 «Proliferation of the social function of the Slovak private law by the application of European private law principles».

ate a stable basis for all private law regulation. The principles of private law have not only a national dimension, but also a significant transnational (European) dimension with regard to the unification of private law in the European Union. One of the principles of European Private Law is the principle of regard and fairness. In the Slovak Commercial Code, the principle of regard and fairness corresponds to the exercise of right in accordance with the principles of fair business conduct. This paper is dedicated to the very question of fairness and honesty in business conduct.

Keywords: the principles of private law, the principle of regard and fairness, the principles of fair business conduct, good manners