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European Courts as Value-Harmonizing "Motors of Integration"

by

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CONTENTS

Abstract

The paper first deals with the conditions and prerequisites of adopting European law before the former "real-socialist" countries joined the EU. The key role of European Courts is described by showing that they worked as *de facto* virtual legislators even before accession. It is emphasized that European Courts have provided the courts and antitrust authorities of new Member States with an inestimable value-based orientation. The EU judicial practice enhanced national legal standards and legal

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culture in the respective countries. The second part of the contribution contrasts with this positive tone. An example of a serious inconsistency in values between the Court of Justice of the EU and the European Commission is shown concerning their divergent views on "uni-sex insurance" and the draft directive on women's representation in board member positions. There is substantial disagreement in this matter, which weakens and endangers the integrative role of the CJEU and its habitual value-confirming impact. This disparity could to some extent depreciate the role of European Courts as „motors of integration".

Résumé

Le document traite d'abord sur les conditions et les préalables de l'adoption de la législation européenne avant que les anciens pays «vraiment» socialistes aient rejoint l'UE. Un grand rôle des juridictions européennes est décrit d'une manière suivante: ils travaillaient en réalité comme des législateurs virtuelles même avant l'adhésion. Il est souligné que les tribunaux et les autorités de la concurrence des nouveaux Etats membres de l'UE ont été fournis d'une orientation axée sur la valeur inestimable par les juridictions européennes. La pratique judiciaire de l'UE renforçait des normes juridiques nationales et de la culture juridique dans les pays respectifs. La deuxième partie de la contribution contraste avec ce ton positif. Un exemple d'une grave incohérence de valeur entre la Cour de justice de l'Union européenne (CJUE) et la Commission européenne, concernant la divergence entre la CJUE et la Commission européenne dans une affaire qu'on appelle «l'assurance uni - sexe» et le projet d'une directive sur la représentation des femmes aux postes de membres du conseil d'administration est présenté. Il y a un désaccord important dans cette matière qui affaiblit et met en danger le rôle intégratif de la CJUE et son impact habituel de confirmation de valeur; il pourrait, en quelque sorte, déprécier le rôle des tribunaux européens étant des «moteurs de l'intégration».

Classifications and key words: European courts; European integration; quasi-normative character of judicial decisions; judicialization of legal doctrine; value-based decision making; divergence between European courts and European Commission; uni-sex insurance; discrimination

I. Introductory remarks

It is difficult to try presenting the specific point of view of the new EU Member States on the importance of European Courts. The same importance and the same impact of the judicial activities of the European Court of Justice (now the Court of Justice of the EU, including the Court of First Instance, now the General Court) can probably be expected for both older, and new EU

Member States. Nevertheless, some differences can be observed as to both the impact and the importance attributed to the jurisprudence of European Courts. This article tries to describe some of these variations and to emphasize that the European judiciary has provided the courts and antitrust authorities of the new Member States with an inestimable value-based orientation (section II). The paper offers the Czech point of view, as a "*pars pro toto*" approach only, without aspiring to provide any reliable generalizations. At the same time, however, the impact of European judicial practice on enhancing national legal standards and legal culture in the Czech Republic is fully recognized.

The second part of this contribution (section III) contrasts somewhat with the rather positive tone of its first part. A very recent example of a serious value inconsistency between the Court of Justice of the EU (hereafter: CJEU) and the European Commission is shown. It concerns the dissimilar approach of the CJEU and the European Commission to the so-called "unisex insurance" issue and the draft directive on women's representation in some board member positions. It is argued in this context that a significant and regrettable divergence of views exists here caused by ideologically based "political correctness" that weakens and endangers the integrative role of the CJEU and its value-confirming impact.

II. Integrative role of European Courts

1. Early nineties in a candidate country

Several points concerning the integrative role of European Courts should be made at the outset.

Access to the European Economic Area (EEA), and the functioning of the single market, would hardly be possible without joining the *common area of European justice* that was being created for decades. The EEA calls for establishing the common area of European justice and security based on common values.

European Courts are a kind of an institutional tool for shaping and enforcing these *common values*. Their value-based approach may be (and sometimes even is) suspected of *judicial activism*. This institutional tool works not only in the procedural area; it presupposes the assertion of common notions and concepts of substantive law as well.

Common European concepts and interpretations of law are inevitably reflected in the way in which national legal orders of particular Member States understand them: judicial interpretations provided by European Courts

influence even the application of exclusively domestic (national) legal norms; these interpretations tend to become part of additional and supportive legal argumentations.

A kind of "common law infection" can be observed that affects continental law whereby much bigger emphasis is being placed on jurisprudence compared with the written (statutory) law. The continental legal culture, characterized by the division of powers, is in this way converging towards the common law legal culture, despite swearing by a (formally) not binding nature of jurisprudence. It would be hard to deny the increasing importance of the judiciary[1].

Some interpretations, definitions and different tests formulated by the European judiciary in its reviews of particular cases became a stable part of EU law (for instance, where specific rulings become the basis for EU soft laws in the form of notices and guidelines) going as far as to sometimes even influence *written (statutory) law*. For example, the concept of a dominant position or the essential facilities doctrine, as defined in the Czech Act on Protection of Competition, sound so similar to the wording of individual EU judgments (*Michelin*, *United Brands*, *Hoffmann – LaRoche*…), that their influence is clear. The explanatory report to the draft of the Czech Competition Act does not conceal the fact that its inspiration came not only from written European law, but also from the jurisprudence of European Courts. This process may have been observed even before the new Member States joined the EU. So, for example, the definition of a dominant position and of essential facilities part of the original Czech Competition Act No. 143/2002 Coll. from 4 April 2001, that is, four years before the Czech Republic's accession to the EU.

Not only was the jurisprudence of European courts seen as a *de facto* legal norm, but also *retroactively*. EU candidates were formally obliged to obey the judicial concepts, definitions or tests developed by the European judicature, which created *de facto* norms. Nevertheless, there was at least some legal ground for this approach in the terms of the Implementing Rules for the Application of the competition provisions applicable to undertakings provided for in Article 64 of the Europe Agreement (among others between the EC and the Czech Republic[2]). This might be considered a very controversial example

[1] See F. Bydlinski, *Základy právní metodologie*, Vienna, 2003, p. 78.

[2] Brno, 14/02/95, 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 EU or Czech competition policies.

of *de facto distorting the division of power*, whereby the judiciary is used as a "virtual legislator".

Decision-making practice has referred to the interpretations of many key concepts created by European Courts as additional and complementary administrative and judicial reasoning. Despite the lack of a formal competence to create new legal rules (but rather, to only specify the content of general concepts, to fill the gaps in EU law, to articulate principles of its application in Member States, and to formulate its general principles), the effort to ensure maximum possible workability and enforceability of European law may lead European Courts to broad, *purpose driven interpretations.*

The *quasi-normative character* of some of the judgments delivered by European Courts (such as declaring the absolute supremacy of EU law over the national laws of its Member States, including national constitutional norms) would call for implementation[3], similarly to the approach applied to directives. The position of European Courts in declaring what it means to apply EU law correctly, is not the same as creating generally binding and permanently valid rules; even applying the same rule may differ over time. European Courts established many principles that appear *trivial today, but that were fundamental at the time of their formulation,* such as for the anchoring of competition law as a "motor of integration"[4].

In recent times, European Courts are more autonomous; they sometimes correct the views of the Commission and so contribute to creating *new principles*. That way, the "more economic approach", as a new assessment paradigm, was established in European competition law. It was a result of the Court of First Instance (now, the General Court) and the European Court of Justice (now, the Court of Justice of the European Union) requiting an enhanced emphasis on deeper economic reasoning from the Commission's decisions. Three annulments by the CFI of merger decisions issued by the Commission in 2002 (*Airtours*, *Schneider Electric*, *TetraLaval*) were symptomatic at that time. As a result, the European Commission subsequently started to take seriously well grounded economic analyses – a fact that should lead to higher legal certainty.

On the other hand, European Courts may in some cases keep and defend positions that are somewhat opposed to some European values or policies;

[3] See V. Týč, F. Křepelka, D. Novák, *Soudnictví v institucionální struktuře Evropské unie*, Brno 2006, p. 59.

[4] According to A. Weitbrecht, "From Freiburg to Chicago and beyond – the first 50 years of European competition law" (2008) 2 *ECLR* 83, Article 85 is not a mere principle, but is directly applicable; the distinction between restriction by object and by effect; the applicability of Article 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.

certain *value confusion* may thus occur. This is, for example, the case with gender differentiation – as mentioned in the second half of this contribution – where the CJEU took up a surprising stance.

A certain "would-be-member devotion", or maybe even "newcomer devotion", of the national courts and administrative bodies of new Member States to European jurisprudence might have been based on a false impression of their precedential character, which cannot really exist. Specifying and clarifying legal content is not the same as creating such content. It is obvious that the texts of judicial decisions do not amount to legal norms. The design of the preliminary question procedure 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.

2. Path-dependence in a new Member State regarding the adherence to written peremptory rules

The *pendulum movement* after the political changes in the early nineties 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 was simply to restructure the old socialist ownership system and to create the foundations of a democratic society and a free market economy.

On the other hand: general distrust towards arbitrary decision-making (as experienced in the socialist State Arbitration) and fear of excessive discretion pushed the new market economies to create very detailed rules. Ultimately, it was this approach that prevailed. Clearly, there is a vicious circle here: the more detailed the rules, the more problems with their interpretation arise, resulting in an additional need for even more detailed written rules.

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

Hypertrophy of written law was encouraged and strengthened by radical systemic changes in the former Czechoslovakia after 1989: these were characterized by overproduction of legal acts[5], which hindered their recipients

[5] Driven by "legislative optimism" that nearly every social and economic problem can be solved by a new legal act.

from realizing their content and purpose. This in turn resulted[6] in an especially restrictive manner of grammatical textual interpretation of legal norms ("letter acrobatics"), and in the escape to procedural formalism, caused by the lack of a moral and value-related self-confidence of the society.

At that point in time, suddenly, European Courts appeared as relevant institutions (as a *deus ex machina*), with their great impact on the interpretation and enforcement of the law, which is rarely to be found in a legal text, and that only stems from the elaboration and development of *general terms and concepts* contained in the Treaty.

The extent to which European Courts were allowed to intervene and to explain what the law really means was often surprising from the point of view of the would-be Member State. They gradually learned to accept the "normative power of facticity" created by the European judiciary. Attorneys started to advice their clients in accordance with EU jurisprudence, which gradually became more important than the plain words of legislation , unlike the earlier approach.

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

It is fair to say that hardly any European judge or civil servant would normally get along exclusively with a legal interpretation that is just the result of pure logical considerations. Rather, it is a consequence of a *value-based inclination to a preconceived solution*; the core value being the strengthening of economic and social integration of the Member States.

New Member States, which have experienced a totalitarian period of their economic, social and legal development, were accustomed to understanding and applying the law as a strict set of fixed and written rules. The role of the judiciary used to be very modest. In addition, some areas were totally set apart from "independent"[7] decision-making and straightforwardly left, for example, in the hands of State Arbitration deciding in accordance with the actual needs of the socialist economy. It was a realm of an almost totally arbitrary purpose-aimed discretion.

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[6] Compare P. Holländer, "Soudcovská tvorba práva – napětí vně i uvnitř interpretova světa, aneb Mezi hermeneutikou a Bermudským trojúhelníkem", [in:] *Sborník XVII. Karlovarské právnické dny*, Praha 2009, p. 104. The provocative "legally realistic" statement of Oliver Wendel Holmes – in "The Path of Law" (1897) 10 *Harvard Law Review* 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 sounded very strange and unacceptable to a typical socialist lawyer.

[7] As it was understood in the context and in terms of that real socialist time.

Coping with a more general question concerning the "right" or the "reasonable" way of *interpreting* broad and undetermined concepts and institutions became inevitable[8]. Judges had to use a number of such indeterminate concepts in order to explain the indeterminate content of written law. These tools included, for example, the "rule of reason", "common sense", "public interest", "important grounds", "sound and fair value", "more economic approach" etc. This was acceptable in terms of methodology and could belong to teleological interpretative methods.

Nonetheless, sometimes pure *arbitrariness* of the interpreting body or judge may occur as to the real substance. Discretion is in fact a tool that may be used only after all complex analyses and all conceivable lines of argumentation had failed.

Judges' discretion does not necessarily need to be understood as an interpretative argument. Rather, it can be seen as the opposite: using discretion stems from the *absence of an interpretative argument*, and from the recognition of its absence, so that interpretation has to be substituted in this emergency situation by a value-based consideration of the judge. This consideration should be consistent with the idea of how the judge would have decided in place of the legislator, and not just interpreter of the legislator´s intention[9].

Both European and national courts are exposed to everlasting (often contradicting) accusations 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. In fact, an individual mixture of these "alloying elements" has to be used in any particular case. It can be argued that a kind of legal realism is present in today's judicial activity. Still, it does not take the original, overstated shape steaming from the early 20th century U.S. and its "legal realistic" statement that the written law does not predetermine the result of the dispute. What can be learned, however, from this relativistic and pragmatic (maybe somewhat cynical) way of legal reasoning, is discerning between the "law in books" and the "law in action", for the books are too static and general. Yet "law in action" is but

[8] "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.

[9] Some EU judgments are considered to exceed the threshold of plain interpretation and to intervene into the sphere of creating the law, which might be sometimes useful, sometimes less so; see R. Streinz, "Die Auslegung des Gemeinschaftsrechts durch den EuGH" (2004) 3 *Zeitschrift für Europarechtlichen Studien* 401 et seq.; N. Rozehnalová, "Tvorba evropských jednotných pojmů?", [in:] J. Hurdík, J. Fiala (eds.), *Sborník Východiska a trendy vývoje českého práva po vstupu ČR do EU*, Brno 2005, p. 230.

the only possible way how to reanimate the "law in books" – these two concepts merely stand for two stages (phases) of the same phenomenon.

Another lesson that can be learned here might be to consider *interdisciplinary approaches* to the law (e.g. "law and economics" in terms of the "more economic approach" in EU competition law). Relevant here is the standpoint that the law is a tool of achieving social goals and of balancing social interests. The latter presupposes, of course, taking non-legal considerations into account when applying legal rules.

In the meantime, solving the conflict of multiple goals is an almost routine agenda especially for European Courts pursuing Treaty aims. Their decision-making practice is in this respect "*legally realistic*", because it has brought the law near social reality that considers broader social, economic and further aspects of the law. The courts relieved the law of the nimbus of an autonomous system of rules and principles.

New Member States generally experienced a *shifted kind of legal realism*. 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, which is seen as a mere tool (instrumentalism of the law). The law in this sense is nothing but the expression of will of the ruling social class sublimated into formal rules, which are formulated in a rather general manner 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 while the philosophers used to interpret the world in different ways – the task now is, however, to consider how to change the world. A similar argumentation whereby judges should change the law instead of interpreting it in different ways is unacceptable.

Even European judges are no "legislators in gowns", but their "legal realism" enables them to overcome 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 aim of enhancing social welfare. The "right law" should be assessed in terms of its impact on social welfare.

4. European courts as a conciliating "buffer zone" between static law and dynamic social reality, as intellectual incubators, and think-tanks

A type of resonance of a quasi-teleological approach to "correct" legal interpretation (*Roma locuta, causa finita*) can be observed. 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 taking this matter lightly because it is just another way and another tool of solving the 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 need to balance broader social and EU goals and not to unilaterally emphasize any "trendy" plain economic approaches. So, for instance, differentiation in prices might be advantageous from a purely economic standpoint. However, they can also distort broader social (EU-related) goals, which should not be measured by a microeconomic test only. Simple microeconomic goals pursued by the entity engaged in discrimination might be false, because they do not consider political values which the Member States are obliged to strive to. Some examples of European jurisprudence on discriminatory pricing[10] indicate that even in a period of a "more economic approach", the judiciary will have to favour fundamental freedoms necessary for the creation and functioning of the internal market. The moral principles of common sense also prohibit "economically advantageous" price discrimination. Discrimination – even though advantageous in microeconomic terms and in the short-term – is in many cases unsustainable for it infringes the integrity of the internal market and the common sense.

In conclusion, European law enforced by European Courts is, on the one hand, the *source* of a „more economic approach". On the other hand, however, it is also the *corrector* of a purely economic approach endangering the internal market, social cohesion and consumer welfare[11].

European courts are not merely interpreters of the law and seekers of the principles hidden behind the words of EU law. They supply fundamental, essential and vital material for legal reasoning and for the development of the doctrine. They provide value-conditioned, and contextual, interpretations of general legal norms. This activity does not necessarily have to be very different from creating a new norm (many examples are known of totally different interpretations of the same legal provision). The verification (falsification) tool lies here, first of all, in the authority of the interpreter (i.e. judicial authority, rarely intellectual academic authority). This is, however, surely not a scientific method.

It can be observed that following European jurisprudence, and its theoretical reflection, prevails over the opposite approach whereby judges would follow the

[10] See ECJ judgments in cases: C-45/93 *Commission v Spanish Kingdom*; C-28/98 *Angonese v Cass di Risparmio di Bolzano*; C-388/01 *Commission v Republic of Italy*.

[11] J. Bejček, "Cenová diskriminace a tzv. dvojí ceny v evropském a českém kontextu" (2008) 5 *Právní fórum* 181.

doctrine and bring doctrinal conclusions into life in their judicial decisions. This phenomenon might be called the "judicialization" of legal doctrine. European courts are the proponents of this development not only in the entire Europe, but even overseas.

More general interpretative standpoints, for example in competition law, arise usually as a consequence and generalization of the jurisprudence. "Soft laws" (notices, guidelines) in particular are usually a kind of a "generalized case report". They are an important "connecting bolt" between jurisprudence and legal norms. They enhance predictability of future analyses, of the decisions of the Commission and the rulings of the courts, and thus they contribute to legal certainty.

III. Value-disintegrative attempt?

1. European Courts as the source of schizophrenia related to "politically correct" insurance

An interesting schizophrenic phenomenon is currently being witnessed in European law connected with the issue of quotas, manifesting itself in the area of insurance. It is an indisputable statistical fact that women live significantly longer than men, particularly due to their genetic makeup. While certain factors causing differences in life expectancy are related to lifestyle, biology simply works against men; indeed, even if men switched to a healthy lifestyle, women would still outlive them[12].

Even though women live longer to a statistically significant degree, this fact must not be reflected in the conditions of life insurance, for example. The relevant Directive prohibits the use of *any differentiation based on sex* (the principle of equal access of men and women to goods and services) as a criterion for calculating premiums and benefits[13]. This so-called "Anti-discrimination Directive"[14] refers to the fact that equality of women and men is a basic principle of the European Union, which rules out any discrimination based on sex.

Fortunately, the fact is still recognised that there are "physical differences" between men and women that cause dissimilarities the provision of healthcare services, and are not considered to be differences in treatment (discrimination)

[12] Compare "The Economist: Catching up" (2013) 3 *Respekt* 36 ff.

[13] See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37 (also the "Anti-discrimination Directive").

[14] Compare recitals 4 and 5 of the Directive.

in a comparable situation[15]. Certain variations in treatment between men and women are deemed acceptable only if they are justified by a legitimate aim; any limitation should nevertheless be appropriate and necessary[16].

While the fact is acknowledged that the use of actuarial factors related to sex is widespread in the provision of insurance, and other related financial services, this should not result in differences in individuals' premiums and benefits so as to ensure equal treatment of men and women[17]. If sex is one of the determining factors in the assessment of the insured risks, Member States may, under the Directive, permit exemptions from the rule of unisex premiums and benefits so long as the underlying actuarial and statistical data on this factors (sex) is reliable, regularly updated and available to the public[18]. It is further stated in the binding wording of the Directive that the act does not preclude differences in treatment, "if the provision of the goods and services[19] exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"[20].

Common sense and empirical experiences relying on firm and long-term statistical data are reflected in Article 5 of the Directive. Accordingly, the use of sex as a factor in the calculation of premiums should not result in differences in individuals' premiums and benefits. Member States may, however, decide to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Directive obliges Member States to review their decision in this regard after 21 December 2012, taking into account the Commission's summary report on the use of sex as a factor in the calculation of premiums and benefits. Moreover, the Commission can submit a proposal to modify the Directive.

Importantly, the Directive was interpreted in a surprising manner in a preliminary ruling in *Association belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministers*[21]. The CJ ruled here on a reference lodged by the Belgian Constitutional Court claiming that the aforementioned Article 5(2) of the Directive (allowing Member States to maintain an exemption from the rule of unisex premiums and benefits without a temporal limitation) is inconsistent with the achievement of the objective of equal treatment of men

[15] See recital 12 of the Directive.

[16] Compare recital 16 of the Directive.

[17] Recital 18 of the Directive.

[18] See recital 19 of the Directive.

[19] Rather than the provision of other conditions, e.g. specifically in insurance (note by the author).

[20] Compare Article 4(5) of the Directive.

[21] Case C-236/09, judgment of 1 March 2011; see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0236:cs:HTML (29.04.2014).

and women, followed by the Directive. The contested rules was also said to be incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. As a result, the provision in question would have to be considered invalid upon the expiry of an appropriate transitional period.

Apart from referring to and quoting the text of the Directive, the CJ stated that the use of actuarial factors related to sex was widespread in the provision of insurance services at the time when the Directive was adopted. Consequently, it was permissible for the EU legislature to implement the principle of equality of men and women – more specifically, to apply the rule of unisex premiums and benefits – gradually, with appropriate transitional periods[22]. The CJ did not agree with the plea that the option provided for in Article 5(2) of Directive 2004/113/EC is merely intended to make it possible not to treat different situations in the same way. It stated that Recital 19 of the Directive describes the choice given to Member States not to apply the rule of unisex premiums and benefits as an opportunity to permit an "exemption". Thus, Directive 2004/113/EC is based on the assumption that *for the purposes* of the application of the principle of *equal treatment* between women and men stipulated in Articles 21 and 23 of the Charter, the situations of women and men are *comparable* as regards the amount of premiums and benefits.

The CJ concluded that, under these circumstances, there is a risk that the exemption from equal treatment stipulated in Article 5(2) of Directive 2004/113/EC will be permitted by EU law without limitation. There is also a risk that such a provision, which enables the Member States to maintain an exemption from the rule of unisex premiums and benefits without a temporal limitation, is in conflict with the pursuit of equal treatment between men and women, which is the purpose of Directive 2004/113/EC, and is incompatible with Articles 21 and 23 of the Charter. The Court maintains that the provision in question must be considered invalid upon the expiry of an appropriate transitional period. The Court therefore ruled that Article 5(2) of Directive 2004/113/EC was invalid with effect from 21 December 2012[23].

A legitimate question arises here whether this Directive, according to the above described interpretation, is not against nature as such. In the spirit of the above ruling, it will not be possible to distinguish, for example, between male and female drivers despite the fact that the accident rates and loss frequency is higher for male drivers to a statistically significant degree. On the other hand, it continues to be admissible for insurers to differentiate (in compulsory motor vehicle insurance) between drivers in a city and those from rural areas on the basis of the same statistical method, because of a difference in the expected accident rates. In this context, the sex of the driver is insignificant.

[22] Paragraphs 22 and 23 of the judgment.

[23] Paragraphs 30–34 of the judgment.

It is indisputable that the likelihood of an accident and of damages is higher in city traffic, just as the likelihood of an accident and of a higher damage is greater for men than for women. The difference lies "only" in the fact that the former does not pertain to a "fundamental principle of the EU".

Similar differences exist in the premiums, benefits and exclusions for people engaged in extreme sports, regardless of their sex but taking account of the type of risk (hazardous sport). However, once the increased risk is embedded in gender as such (typically in life insurance), European law prohibits differentiating, according to the judgment of the CJ. It *must be pretended that a difference,* which is biologically determined and proven based on reliable statistical data, *does not exist* because admitting a *natural* fact and deriving *legal consequences* from it would amount to "discrimination".

No matter how definite the statistical message is, the now changed rates, which are aimed at compensating for the statistically ascertained differences between the sexes, will in fact have a discriminatory effect in the name of non-discrimination. For example, premiums became more expensive for women and cheaper for men this year, despite the fact that according to long-term statistics of mortality, rates of injuries, diagnostics etc., the premium rates applicable earlier were designed more fairly. Equalising rates at a "unisex" level made women's premiums more expensive (up to twice the original rate) because they now have to pay for men who carry a higher risk[24]. In this case, actuarial science and unquestionable and unquestioned hard statistical data give way to the hypocrisy behind "political correctness".

2. Arbitrary "political correctness" of gender (in)equality

In connection with the promotion of compulsory quotas in corporate bodies, it is remarkable that people are expected to believe a mere *assumption* regarding the possible effect of "gender-mixed" bodies on the institutional performance of corporations as well as other vague qualities. This is referred to gender-mixed bodies not just in qualitative terms, but indeed to bodies with a "proper gender mix" based on specific proportions. It is inferred that there is a "minimum critical degree" of representation of the other gender which would ensure that the "representation of the other sex" is something more than illusionary or token[25]. This questionable allegation, which *lacks empirical and theoretical foundation*, is to substitute non-existent credible arguments in

[24] Compare http://www.novinky.cz/finance/293183-muzum-se-zavedeni-unisex-sazeb-vyplatilo-pojistovnam-plati-o-stovky-mene.html (16.02.2013).

[25] See the cited explanatory memorandum on the proposal for a directive on women's representation in board-member positions, p. 3.

favour of the introduction of quotas and aims to eliminate objections regarding the discrimination of candidates from the prevailing gender; by contrast, in the forcibly unified life and accident insurance field, hard statistical data on different life expectancy of men and women is not considered as an argument.

In its breakthrough ruling, the CJ[26] states that equality between men and women is a fundamental principle of the European Union. As such, the use of the gender criterion as an actuarial factor should not lead to differences in premiums, so as to ensure men and women are treated equally. That means that even if reliable statistical data regarding differences between the sexes provided an economic justification for a different approach to these two groups in insurance matters, this fact would have to give way to "political correctness" of a fictitious equality.

The CJ in fact says that there is no certainty regarding the existence of significant differences between men and women that would call for their different treatment (differences which, based on indisputable data and long-term statistics, are taken into account by insurance companies worldwide). Admittedly, *individual* certainty definitely does not exist; however, insurance is based on a *statistically* evaluated number of likelihoods and in life expectancy, for example, there is a *group* certainty that men as a group live shorter than women. This denounces the assessment of risk as one of the main principles of insurance and premium rates will now have to compensate for the statistically ascertained sex differences, thus introducing another discrimination of its kind[27]. Based on this logic, even a higher premium rate or exclusion from benefits in accident insurance for those engaging in extreme sports would be regarded as discriminatory even though it is firmly proven that such insured persons receive benefits more often and in higher amounts.

According to professionals, this *pseudo-egalitarian approach* is an underwriting non-sense – a hypocritical ideological measure which denies clear differences between genders and the basic principles of insurance based on the probability theory. It is also unfair to women, making their insurance more expensive as they must compensate for the higher risk associated with men[28].

The ironic commentaries made on this absurd judgment criticised the fact that with this approach, men will not only live shorter (as they already do), but

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[26] Cited above. Czech legislation has already responded to the judgement through Act No. 99/2013 Coll.

[27] Compare J. Ginter, "Ženám kvůli EU zdraží pojistky, aby se předešlo diskriminaci" ["EU Causes Increases in Women's Insurance Premiums to Prevent Discrimination"], 2 March 2011, http://ww.novinky.cz/finance/22698 (30.04.2013).

[28] See B. Buřinská, "Mužům se zavedení unisex sazeb vyplatilo. Pojišťovnám platí o stovky méně" ["Unisex Rates Pay Off for Men. They Pay Hundreds of Crowns Less"], 16 December 2012, http://www. novinky.cz/finance/293183 (29.04.2014).

will also get lower pensions. Recommendations were made in these comments that all real estate should be insured under the same rate notwithstanding the diversity of risks; that risk rates should be eliminated in motor vehicle insurance in large cities; that elderly people's associations should claim the analogous right to a 30-year mortgage, etc.[29]

Thus, despite its indisputable effect, the risk factor of gender must no longer be taken into account (as inadmissible and illegitimate), despite the fact that other legitimate risk factors (such as age or health) continue to be permitted and reflected in insurance premiums. It is simultaneously stated that gender *is a determining factor* for risk assessment in at least three product categories: motor vehicle insurance, life insurance or life annuity and private health insurance[30].

In relation to insurance, European law and jurisprudence claim in fact that men and women *are simply the same* (while in fact they are not) and should be treated identically (even though different treatment would be fairer).

By contrast, the European Commission claims in the proposal for a directive on women's representation in board-member positions that men and women *simply are not the same* (although gender definitely does not determine their managerial capabilities) and should therefore be treated differently (subject to preferential or discriminatory treatment) on the grounds of their respective sex.

The Court seems in this way to be in fact both against nature and against the drafted directive. Should the European Union insist on these incompatible approaches (labelled as "unisex in insurance versus gender differentiation in corporate bodies"), this would illustrate the lack of stable values, possible voluntarism and subjectivism, and a kind of supremacy of ideology (even if under the cover of "political correctness") that hardly belongs in the law.

IV. Conclusion

Though the principle of subsidiarity is part of positive law, its practical importance in the jurisprudence of European Courts is minimal[31]. The impact of the European judiciary on new Member States is today barely to be differentiated from its importance for the whole of the European Union.

[29] See "Očima expertů: Evropa vymýšlí nesmysly. Zdražil/y ženám pojištění" ["Experts Say: Europe Comes up with Nonsense. Prices of Insurance for Women Go up"], 29 June 2012, http://www.penize.cz (30.04.2013).

[30] Compare "Začínají platit pravidla EU upravující jednotné ceny pojištění pro obě pohlaví" ["EU Rules Regulating Unisex Insurance Rates Coming to Effect"], 20 December 2012, http://ec.europa.eu (30.04.2013).

[31] T. Břicháček, "Přístup Evropského soudního dvora k principu subsidiarity" (2008) 2 *Právník* 154–155; P. Holländer, "Soudcovská tvorba práva...", p. 107.

A key 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 of its Member States. In this way, another additional mechanism unifying legal order(s) has been created[32]. 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, conformity of values is very probable (a normal judge is not schizophrenic and interprets and applies both European and domestic law using the same value set 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. Consistency of values and common sense, free of "political correctness", are therefore both desirable and needed.

European Courts gained a very strong position in the EU that exercised significant impact on legal doctrine, causing in turn a "judicialization" of that legal doctrine. Courts should thus avoid pursuing different values to those followed by the EU Commission. It is undesirable to develop a value-based inconsistency stemming from "political correctness" seeing as it may depreciate the role of EU-courts as "motors of integration". Their value-integrative role is not any less needed now as it was before the great enlargement.

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[32] See P. Holländer, "Soudcovská tvorba práva...", p. 106.

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