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CHARACTERISTICS OF JUDGMENTS OF THE EU COURT OF JUSTICE

Abstract:

The Court of Justice of the European Union is an independent judicial organ of the European Union. Its decisions possess usual characteristics and procedural aspects that judicial decisions in general have. In this respect we may consider *res judicata* principle, precedential effect and temporal effect of Court's decisions. However, some of these characteristics are modified due to the specific nature and aim of judicial process on the EU level. The aim of the paper will be to define the aforementioned characteristics of the Court of Justice decisions, to analyze them on the basis of Court's jurisprudence and to deal with them in depth in the context of EU judiciary.

Keywords:

European Union, procedural law, judicial process, *res judicata*, precedent, precedential effect, temporal limitation of judgments, procedural aspects.

JEL Classification: K40, K33

1 Introduction

Being the only judicial organ in the institutional structure of the European Union, the Court of Justice¹ gives its rulings in different types of proceedings. It performs tasks that are usual for constitutional and administrative courts, and tasks that are specific to it – it reviews legality of administrative decisions given by EU institutions, it annuls legislation for breach of the Treaties, it enforces observance of EU law by Member States and it ensures that EU institutions act in accordance with Union law. Furthermore, it has been entrusted with the task to interpret Union law; however, it interprets EU law in all types of proceedings not only in the preliminary rulings, which were designed specifically for interpretation (and review of validity) of EU law.

The EU Court of Justice (“CJEU”) has largely contributed to the evolution of EU law². Given the significant impact of its case law, the topic of the characteristics and effects of its decisions is undoubtedly worth studying. In this paper, the in my opinion most important characteristics, i.e. the force of *res judicata*, precedential effect and the possibility of the Court to limit temporal effects of its judgments, will be dealt with.

In the first part of this paper I will deal with the force of *res judicata*, whereas the second part will focus on precedential effects of the CJEU decisions. In the third part the force of *res judicata* and precedential effects will be compared and since the effects of these two procedural characteristics may on the first sight seem similar or even the same, the most important distinctions between them will be described. In the fourth part I will deal with temporal limitations of the CJEU judgments. All these three concepts will be scrutinized, every chapter will begin with the statement of its objective, the relevant source of law will be determined and subsequently rules governing its application and exceptions thereto will be analyzed. Naturally, the paper will end with a conclusion, in which the findings will be assessed.

2 The force of *res judicata* of CJEU decisions

2.1 Objective

Research about the principle of *res judicata* in European Union law should begin with reflections on its objective. The objective of the *res judicata* principle is to achieve legal certainty. It contributes to legal certainty in more ways. It prevents disputes to be heard and decided anew and parties constantly calling into question the outcome of the proceedings, which would happen if parties had the possibility to file claim with the same subject matter that has already been determined by a final court decision. *Res judicata*

¹ When mentioning the Court of Justice, where it is applicable I mean the General Court too.

² On the role of the CJEU for the European integration see also Sehnálek, 2018, chapter II.

also ensures the stability of legal order and legal relations and proper administration of justice since it clearly marks the moment when a case is final and definitive. From the moment when the decision becomes final and thus acquires the force of *res judicata* the parties to the dispute may cease to seek solution of their problem, which has been the subject of the dispute, and with regard the outcome of the proceedings they may make arrangements accordingly. Equally, the courts are not burdened with repeated identical disputes and may effectively deal with other cases. At the same time it prevents existence of multiple contradicting decisions (Thewes, 2003, p. 117).

It is usual in the legal orders of EU Member States that protection of individual interest of persons, i.e. protection against being repeatedly sued in identical matter, is perceived as the main purpose of the *res judicata* principle. In EU procedural law it is different, *res judicata* is not primarily aimed at protection of individuals. The whole judicial process has different aim – on the national level, the aim is protection of subjective rights of individuals, while the aim of EU judiciary is to ensure that 'in the interpretation and application of the Treaties the law is observed' (art. 19 Treaty on the European Union).

2.2 Effects

Effects of *res judicata* may be divided into two basic categories – positive and negative effects (Thewes, 2003, p. 118). Negative effect makes it inadmissible to hear a case and give a ruling in the case with identical subject, in which a ruling has already been given. In this respect it is necessary to determine the 'identical case', or a case with 'identical subject'. The positive effect of *res judicata* shows itself in cases that are not identical, the actual subject matter differs but the outcome of the latter case is dependent on the outcome of the former. The judgment given in the former proceedings is binding for the court hearing the latter case, the court has to accept it and not call into question the issues that have formed the *ratio decidendi*³ in the former case. As the CJEU stated in case of annulment proceedings *"It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure."* (CJEU judgment in joined cases 97, 193, 99 a 215/86). In case *Commission v. Italy* (Art Treasures) the Court held a prior judgment declaring a breach of Union law by Italy has *"the full force of law on the competent national authorities against applying a national rule recognized as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable [Union] law to be fully applied"* (CJEU case 48/71; see also Toth, 1985, pp. 53-54).

³ 'Ratio decidendi' is a notion that originates in common law, however, here it must be understood in the sense of EU law as it has its own EU meaning.

2.3 Scope of res judicata

The force of res judicata does not cover only the operative part of the decision but also the ratio decidendi. The EU Court of Justice defines ratio decidendi as grounds that form necessary support for the operative part and are inseparable from it (CJEU judgment in joined cases C-442/03 P and C-471/03 P)⁴ and are “*necessary to determine the exact meaning of what is stated in the operative part*” (CJEU judgment in joined cases 97, 193, 99 and 215/86). In contrast with what we are used to in procedural law in Central Europe, the operative part is thus not to be read separately but it is vital to see it in light of the ratio decidendi. The ratio decidendi is formed by grounds that are truly substantial and decisive for the operative part. Res judicata does not cover those parts of the grounds of judgment that are marginal and ancillary (obiter dictum). This is especially evident in annulment or infringement proceedings in which the ratio decidendi determines how exactly the EU institution or a Member State acted against the law and how they shall act in the future.

Res judicata is a fundamental principle of the Union legal order common also to legal orders of Member States. Its observance is important not only to the parties but also in the general interest and thus is it a matter of public policy (AG Tizzano in CJEU case C-442/03 P, para 66). Therefore it is settled case law that the motion of res judicata may not only be raised by the parties but the Court may deal with the question whether there is res judicata on its own motion at any stage of the proceedings (AG Roemer in CJEU case 29/63 (from 19th Oct. 1965), or CJEU case C-442/03 P, para 45).

2.4 Sources of law

If we looked for literal regulation of res judicata, its conditions and effects in EU procedural regulations, we would look in vain. The Statute of the Court of Justice does not mention it. Rules of Procedure of the Court of Justice (“RPCJ”) and the General Court (“RPGC”) state that judgment becomes binding on the date of its delivery and order shall be binding from the date of its service (art. 91 RPCJ and art. 121 RPGC). The provisions speak about ‘binding’ effect, not about res judicata. This holds true for most of language versions of both Rules of Procedure.⁵ Therefore these provisions should be considered as setting forth the moment when the respective court is bound by its own decision and may not change, repeal or amend it on its own motion.

⁴ English version of the judgment seems to be not so accurate as others, eg. German, French, Czech and the official Spanish.

⁵ German version of RPCJ uses the term ‚Rechtskraft‘, i.e. the German equivalent of res judicata, but the German version of RPGC uses the term ‚wirksam‘, i.e. effective. The difference here emphasises that judgments of General Court may not acquire the force of res judicata on the day of its delivery because an appeal to the Court of Justice is possible until the specified time limit expires.

Despite the lacking regulation of *res judicata* in Union legal order, it forms a part of EU law. *Res judicata* is a general principle of EU law stemming from legal orders of Member States (see also AG Tizzano in joined cases C-442/03 P and C-471/03 P, para 66). As the general principle of Union law, it is one of the sources of primary law. In respective Member States the regulation of *res judicata* and its effects differ, it is thus necessary to attribute specific ‘Union’ meaning which shall not be derived solely from rules of particular Member States. Yet it may be said that *res judicata* on the Union level is most similar to its French equivalent *autorité de la chose jugée* (Germelmann, 2009, p. 337). The EU Court of Justice acknowledges *res judicata* as the general principle of EU law and acknowledges its “*fundamental importance, both in the legal order of the Union and in the national legal orders*” (AG Bot in CJEU case C-352/09 P, para 130).

2.5 Definition

In CJEU case law *res judicata* is traditionally defined as inadmissibility of a dispute between the same parties, have the same purpose and is based on the same submissions (CJEU case 159/84). *Res judicata* of CJEU decisions is an underresearched topic as regards its specific conditions and effects in general and special cases. CJEU case law is the most important source of knowledge on the topic, however, to agree with Germelmann, it seems that CJEU prefers to find solution in individual cases rather than elaborating a comprehensive *res judicata* doctrine (Germelmann, 2009, p. 323).

It is a traditional feature of *res judicata* principle that a court decision has the force of *res judicata* only after it becomes final and binding. Due to the specific nature of Union judiciary and to the fact that in most cases the proceedings takes place only in one instance without the possibility for appeal, an order acquires the force of *res judicata* on the date of its service and a judgment in most cases on the date of the delivery. Only in case of judgments of a General Court an appeal may be lodged to the Court of Justice and as a result of that, the judgment acquires the force of *res judicata* either after lapse of the time limit for appeal or in case the appeal is lodged, in connection with the subsequent decision of the Court of Justice – order declaring inadmissibility of the appeal or judgment dismissing it. Lodging an appeal does not have suspensory effect, so a decision acquires the force of *res judicata* after it becomes enforceable (art. 278 Treaty on the Functioning of the European Union (“TFEU”))⁶.

2.6 Application of *res judicata*

There are three prerequisites for *res judicata* – same parties, same cause of action and same subject matter. Determination of parties to the dispute is usually without greater

⁶ With the exception of judgments of General Court declaring a regulation void – the judgment takes effect from the date of expiry of the period for appeal or from the date of dismissal of the appeal (if an appeal was lodged) – art. 60 CJEU Statute.

difficulties. The other two prerequisites, i.e. subject matter and cause of action, or in other words purpose and grounds or submissions which form the basis of the action, are much more difficult to ascertain.

In this respect it is important that the subject matter of the dispute consists of both factual questions and questions of law. This is reflected in art. 120 RPCJ and art. 76 RPGC which stipulates that an application to the court shall contain not only description of facts and evidence but also pleas in law and arguments. The Court of Justice strictly requires the applicants to state the facts and pleas in law and it justifies its practice by the need to secure legal certainty and proper administration of justice.⁷ Proper specification of questions of facts and questions of law is substantial for the Court to give a correct ruling in reasonable time and also a ruling with subject-matter thus specified forms *res judicata* to any subsequent applications between the parties.

The emphasis on both questions of facts and law for determining identity of subject-matter is apparent from opinion of AG Tizzano *"I must point out that the term 'same subject-matter' 'cannot be restricted so as to mean two claims which are entirely identical' and [...] it cannot be restricted to the identity of the act that has been appealed because the issue is not so much the identity of the acts but rather that of the points of law before the Court."* (AG Tizzano in CJEU case C-442-2003 P).

The identity of pleas in law is to be determined not only on grounds of the application, but primarily on the content of the grounds of judgment. Pleas claiming inadmissibility of an action based on a question of law which the court has not decided, would be unsuccessful. The force of *res judicata* applies only when a question of fact and law has actually or necessarily been settled by a court, that means that the issues have been a part of the dispute, they have been subject of adversarial argument by the parties and the court then included them in its judgment. It is not sufficient if the issue has been a part of the application but the court did not deal with it because it was no longer necessary due to the ruling on other issues of the case.

A typical example of above-mentioned situation is the case *Artegoda v Commission* (CJEU case C-221/10). Applicant applied for annulment of an act due to lack of competence of the issuing institution while at the same time it stated other possible grounds for annulment of the act in case the Court ruled that the institution had the competence to issue the act. If the Court gives a ruling declaring lack of competence, it does not deal with other objections which may lead to the annulment of the act. In such a case the principle of *res judicata* will apply only with regard to the ground of lack of

⁷ „The information given [in the application] must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to give a ruling, if appropriate, without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible.“ CJEU case T-56/92, para 21.

competence, the other ground stated in the application will not form the subject matter of the case.

It is necessary to evaluate the identity of legal issues in detail. The Court of Justice is willing to deal with the identity or difference of legal issues in depth if *res judicata* is claimed in the case at hand. In case *Commission v. Luxembourg* (CJEU case C-526/08) in which the Commission claimed that Luxembourg violated duties stemming from directive on protection of waters against pollution caused by nitrates, Luxembourg asserted the principle of *res judicata* in relation to some points of the application. There had been a previous infringement proceedings which was concluded by condemning judgment by the Court of Justice. In the case at hand the Court of Justice reviewed the points of application and held that the previous proceedings had concerned violation of different provisions of the directive and that “*those two cases are not essentially identical in fact and in law*”. The principle of *res judicata* has thus not been violated.

2.7 Exceptions to the principle of *res judicata*

There are instances when it is possible to conduct proceedings again even though there is a judgment that has become final and binding, and thus to act contrary to the *res judicata* principle. The revision procedure may be permitted by the Court on the application of a party if several conditions are fulfilled – a new fact has to be discovered, i.e. not a question of law. This fact had to be discovered before the judgment was given and had to be unknown to the Court and to the party claiming the revision. If the Court referred to it in any way or simply has taken it into account, it is not a new fact. This holds true even if the Court did not expressly mention it and it is irrelevant whether the knowledge of the fact was fortuitous or not (CJEU case 116/78 *rév.*). At the same time the condition has to be of such a nature that it could have been a decisive factor as regards the outcome of the case (art. 44 CJEU Statute in connection with art. 159 RPCJ or art. 169 RPGC; see also Lenaerts, Maselis and Gutman, 2014, pp. 854-857). If the new fact could not lead the Court to call into question the outcome of a crucial conclusion and thus lead to a different judgment, the revision would be inadmissible (GC case T-106/89 *rév.*, paras 14-18). Furthermore, the application for revision must be made within the time limit of 3 months after discovery of the new fact by the applicant and within ten years from the date of the judgment.

It follows from the systematics of the CJEU Statute and Rules of Procedure of CJEU and General Court and from the CJEU case law relating to the revision procedure that revision is not another form of appeal but an exceptional review procedure. Contrary to the general appeal, in revision procedure it is possible to reverse a judgment which had acquired the force of *res judicata* (GC case T-76/03, para 16). Therefore the Statute and Rules of Procedure set forth strict conditions for admissibility of application for revision and the Court strongly demands them to be fulfilled (CJEU case 116/78 *rév.*, para 3).

The other exception to the *res judicata* principle is the review procedure. It applied only to the decisions of the General Court if the General Court decided on appeal against decisions of a specialized court, the Civil Service Tribunal⁸. After the reform of the General Court, this possibility exists only on theoretical level. A specialized chamber of the CJEU on proposal of the First Advocate General decided on the need to carry out review, in case of a positive decision on need to carry out the review the same chamber decided on substance of the case (art. 191 and 195 RPCJ). The necessary condition for admissibility of review is provided for in the TFEU – it is the serious risk of the unity or consistency of Union law being affected (art. 256 para 2 and 3 TFEU). From the wording it is clear that review is an extraordinary procedure, which is reserved only for exceptional cases. The CJEU approached the review procedure accordingly (Lenaerts, Maselis, Gutman, 2014, pp. 659-661). It is the significant feature of the review that it is, unlike revision, limited to questions of law.

3 Precedential effect of CJEU judgments

3.1 Objective

The objective of precedential effect is two-fold. First aspect is directed to protection of rights of individuals, the other aims at uniform interpretation and application of EU law as a whole.⁹

R. Cross in his famous book *Precedent in English Law* states, “*It is a basic principle of the administration of justice that like cases should be decided alike.*” He then continues that in almost all jurisdictions judicial precedents have some persuasive effect although the degree varies greatly. Keeping to what has been decided previously he regards as a maxim of practically universal application (Cross, 1968, p.3). This all applies in context of European Union law equally. Judgments of the Court of Justice and their precedential effect serve as a means of protection of legitimate expectations of individuals (but also Member States and Union institutions) if they wish to assert their rights in court.

Protection of individuals’ rights is not the only purpose of precedential effect of CJEU judgments. In the specific supranational EU context, it is more than necessary to secure uniform interpretation and application of EU law. AG Capotorti, too, once stated that uniform interpretation of Union law is in the objective public interest (AG Capotorti in CJEU case 283/81, para 9). The need to ensure uniform interpretation and application of

⁸ TFEU moreover presupposes that possibility of review of preliminary rulings given by the General Court, the CJEU Statute nevertheless never enabled the General court to decide on preliminary references.

⁹ Although it may seem that protection of legitimate expectations and legal certainty are in fact one legal principle, they differ - protection of legitimate expectations in relation to courts mean that court should act in a way that could be foreseen by a diligent person and thus operates prospectively, whereas legal certainty has a rather static character and may be achieved by having clear and precise legal rules (Tridimas, 2006, p. 525).

EU law as a main ground for and source of precedential effect of CJEU case law is repeated as a mantra both by CJEU and academia (inter alia Brown, Kennedy, 1994, p. 198; Lenaerts, Gutman, Maselis, 2014, p. 246; CJEU case 283/81, para 7, and joined Cases C-72/14 and C-197/14, para 54). EU consists of (currently)¹⁰ twenty-eight Member States, that means of twenty-eight legal orders, which have not only different rules but also different history and origins, different traditions, operate in different societies and also come from different legal cultures (continental v. common law). In this environment it cannot be surprising that the Court of Justice developed what could be called a doctrine of EU precedent (however, it cannot be perceived as an equivalent of a common law precedent as it operates differently) and considers its judgments binding not only for the parties to the case but also having some precedential effect, i.e. binding effect erga omnes. CJEU judgments serve as a means of unification of case law of Member States' courts in areas which concern EU law in a similar way in which higher courts in Member States and their case law operate. Thereby CJEU judgments contribute to legal certainty.

3.2 Sources of law

There is nothing in the Treaties that would indicate whether or to what extent the CJEU judgments have precedential effect. We have to look for the answer in the CJEU case law. There are numerous judgments in which the Court has dealt with question of obligation of Member States' courts to follow CJEU case law.

Taking into account the question whether CJEU case law is a sufficient source of obligation to follow CJEU case law, i.e. the classical kompetenz-kompetenz problem, it is the CJEU who has the ultimate power to declare what is and what is not in accordance with EU law. Member States might be the masters of the Treaties but the Court of Justice interprets them and has the final word. Moreover, as mentioned above, there is nothing in the Treaties that would contradict the settled case law of the CJEU on precedential effects of its decisions.

Furthermore, art. 99 RPCJ may serve as confirmation of precedential effect of CJEU judgments. Art. 99 enables the Court of Justice to rule by reasoned order instead of a judgment if an answer to preliminary reference made by a Member State court can be deduced from existing case law (NB the wording 'from existing case law', i.e. not only from preliminary rulings but from all existing CJEU case law).

3.3 Application of previous case law (precedents)

The issue of legal effects of the judgments of CJEU naturally had to be a subject of its decision-making early from the outset of its functioning. EU and its Court of Justice have been new actors in the legal sphere on the continent and given the specific nature of EU

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law and silence of the Treaties on the question of legal effects of CJEU judgments, it had to be the CJEU to determine them.

As early as 1962 the Dutch Tariefcommissie asked the Court of Justice on the effect of prior preliminary ruling (in this case it was the famous Van Gend en Loos judgment) in equivalent case. The Court ruled in the Da Costa case that the “*authority of an interpretation [...] already given by the Court may deprive the obligation [to refer a question for preliminary ruling] of its purpose and thus empty it of its substance.*” (CJEU joined cases 28 to 30/62). Such a ruling might be interpreted as an effort to prevent Member States’ courts from referring the same questions for interpretation over and over again and related potential overload of the CJEU, however, subsequent evolution of the case law confirms that the intention of CJEU was rather to declare that its judgments possess some precedential effect.

Its stance on precedential effect of judgments has been confirmed in the seminal case Cilfit in which the Court referred to Da Costa case and continued further – it held that for the analogous application of a conclusion of a prior case, the present case does not have to be strictly identical. Furthermore, the nature of the proceedings of the prior judgment is irrelevant. As a result of that, the case law on precedential effects of CJEU judgments has to be applied also to other types of judgments than preliminary rulings (CJEU case 283/81, paras 13 and 14). This is a significant statement because since then the practice is not about simple copying of legal conclusion on materially identical cases, it is necessary to compare the circumstances in the previously decided and current case, search for the similarities and differences and finally consider whether the differences are insignificant and thus the judgment is to be followed, or the differences are considerable and the case is to be adjudicated in another way.

The Da Costa/Cilfit case law is still valid and the Court does work with it and refers to it (see also AG Wahl in CJEU joined cases C-72/14 and C-197/14). The predominant conviction in the academia and also of Court’s Advocate Generals is that CJEU judgments bind the Member States’ courts and EU institutions also beyond the particular case.

The Court of Justice ruled that the interpretation of provisions of EU law that it gives must be applied from the entry into force of the interpreted provision (CJEU joined cases 66, 127 and 128/79). The court may limit the temporal effect of its rulings (as it did e.g. in case Defrenne II, 43/75). If rulings of the Court had no precedential effect whatsoever, there would be no point in restricting its temporal effect. The very possibility of limitation of temporal effect and the practice of CJEU related to it proves that CJEU judgments do produce legal effects erga omnes. The interpretation of an EU law provisions given by the Court must be equally binding on the referring Member State’s court as on every other court or institution, which applies the same provisions (Bebr, 1981, pp. 483-484).

Probably the strongest advocate of the application of the stare decisis doctrine in EU legal order is GA Warner. In his opinion in case Manzioni he stated that *"to hold that a ruling of the Court under Article 177 had no binding effect at all except in the case in which it was given would be to defeat the very purpose for which Article 177 exists, which is to secure uniformity in the interpretation and application of Community law throughout the Member States. [...] This, it seems to me, is where the doctrine of stare decisis must come into play."* He further argues that if preliminary reference procedure was supposed to have only consultative nature or if preliminary rulings would only be binding in the actual case, its regulation, which enables the EU institutions and Member States to submit their observations to the case, would be rather absurd and would *"correspond to the use of a sledgehammer to crack a nut."* (AG Warner in CJEU case 112/76). AG Warner also stresses that the doctrine of stare decisis has various modes of application and may reflect the nature of the relations between courts in the system.

Although most of the case law relates to preliminary rulings, judgments given in direct actions proceedings possess equivalent effects (Arnull, 1987, p. 134; CJEU case 283/81). In case Schonenberg, CJEU held that a Member State court has to follow a judgment arising from infringement proceedings against a Member State and not apply criminal sanctions against an individual which were based on national law that was declared as incompatible with EU law (CJEU case Schonenberg, 88/77; see also Koopmans, 1991, p. 316).

An excellent explanation of emergence of the doctrine of precedent in legal systems generally and in the EU specifically was given by Koopmans. He claims that there are three conditions for a system of precedent to develop. Firstly, the main legal rules have to be unwritten. Secondly, it is the necessity of a court to serve as unifying element in a system characterized by centrifugal forces and thirdly, the necessity of resorting to principles, which essentially means that if a court bases its decision on general principles, other courts are more likely to follow it. These three conditions are all met at the EU level – on the level of Treaties, the rules are often unwritten since the Treaties are ambiguous or even silent on many important issues, EU undoubtedly consists of different legal systems and the need of the Court to acquire and then keep authority is obvious, and adjudication with reference to general principles is frequent (Koopmans, 1991, pp. 312-315).

The issue if and to what extent do judgments of the Court of Justice have precedential effect, is, unlike the principle of *res judicata*, a controversial one. There are authors who claim that no such effect exists (Toth, 1985) and there are authors and Advocates General who try to prove that the practice of the CJEU is not much dissimilar from practice of English courts (AG Warner in CJEU case 112/76; Koopmans, 1991; Brown, Kennedy, 1994). The Court itself is very reluctant to refer to the term precedent or stare decisis and leaves only clues as to how to work with its case law. Nonetheless, it is clear that it treats its case law as having legal effects beyond the particular case and being of

much more that persuasive authority and it requires Member States' courts and all other state institutions to do the same (see also Bobek, Komárek, 2004).

3.4 Effects

If a Member State's court disregards CJEU case law, that is does not apply it without relevant justification and does not refer the case to the CJEU for preliminary ruling, its decision is incorrect because it failed to find and apply relevant law. As such, it might be reversed on appeal.

Moreover, the Commission may commence infringement procedure for acting against EU law, subsequently, the Court of Justice may condemn the Member State for it and impose monetary sanctions (art. 260 TFEU). The CJEU repeatedly held that disregarding its case law is a breach of EU by a Member State (CJEU cases 48/71, 101/91 and C-118/00) and that a breach by a Member State's court is attributable to the particular Member State (CJEU case 129/00). It argued that disregarding case law is serious and intolerable breach of the duty of Member States under the art. 4 para 3 Treaty on the European Union to abstain from any measure that might jeopardize attainment of the objectives of Treaties and thereby goes to the very basis of Union legal order (CJEU case 101/91, para 23). Liability of a Member State may be invoked not only by the Commission but also by individuals in action for damages proceedings (CJEU case 224/01).

The fact that the Commission is rather reluctant to initiate infringement procedures for non-compliance of courts is not an argument that liability of a Member State does not exist. The Court of Justice, too, is very careful to expressly hold Member States liable for acts of courts so that it does not damage its good cooperation with national courts which is essential for inflow of new preliminary references and thus for the functioning of EU legal order. This argument, however, is political, not legal and does not deny the liability for breach of EU law on part of national courts.

3.5 Definition

It is difficult to precisely define precedents in EU law. It would be wrong to assume that the doctrine of precedent as we know it from e.g. English law applies in the EU legal order. Since the EU legal order is rather new, the doctrine of the 'EU precedent' is still being shaped but there is no doubt that CJEU case law do have high authority for resolution of future cases.

Nonetheless, it is not accurate to speak about 'de-facto precedent'. Whether a judgment is or is not a precedent is not a question of fact, it is a question of law. If previous judgments are followed by courts only for practical reasons (i.e. because it is easier for a lower court judge to use argumentation that a higher court gave in previous ruling than to create its own), it is not a precedent. There has to be some legal authority that pronounces judgments to be precedents.

Member States' courts are under obligation to apply EU law correctly, that means to take into account CJEU case law apart from Treaties, regulations and directives. The obligation lies on the courts, the application of CJEU case law is not dependent on the activity of the parties. It is up to the court to find the applicable legal regulations and case law and as the case may be, to decide whether it is necessary to make a reference for preliminary ruling to the CJEU and if it decides so, what questions to refer and what wording they will have (CJEU case C-2/06, para 41, AG Trstenjak in CJEU case C-316/09, para 63).

3.6 Departure from precedent

CJEU itself is not bound by its previous case law. As a rule, it does not depart from it but reserves the possibility of doing so and it has done so on several occasions. As Bebr noted *“the Court reserves for itself the exclusive jurisdiction to modify or refine its case law, if need be, in view of the development of the [Union] legal order”* (Bebr, 1981, p. 486). AG Fennelly observed that the Court seems to be willing to reexamine or decline *“earlier judgments which may have been based on an erroneous application of a fundamental principle of [Union] law, which interpret a Treaty provision as applicable to situations which are properly outside its scope, or which result in an imbalance in the relationship between differing principles, such as the free movement of goods and the protection of intellectual and commercial property”* (AG Fennelly in CJEU joined cases C-267/95 and C-268/95, para 146).

General Court is not bound by its case law too, it is also not strictly bound by the case law of CJEU (Barceló, 1997, p. 421), although in most cases it follows them and if not, it justifies its position properly (Arnull, 1987, p. 130).

The classical and most cited examples of departure from earlier case law are Keck and Mithouard and HAG II cases. In Keck and Mithouard (CJEU joined cases C-267 and C-168/91) the Court clearly intended to narrow the effects of its prior judgment Dassonville (CJEU case 8/74), on the other hand it did not want to openly call the judgment into question so it merely stated that it is *“necessary to re-examine and clarify its case-law on this matter”*. This approach can be contrasted with the approach in HAG II case. In HAG II (CJEU case C-10/89) the Court overruled its previous decision HAG I (CJEU case 192/73) expressly by saying that *“the Court believes it necessary to reconsider the interpretation given in that judgment [...]”*.

Member States' courts are not allowed to overrule a CJEU judgment equally as they are not allowed to annul any Union act or suspend a measure giving effect to it (CJEU case C-465/93). If they come to a conclusion that there is a CJEU judgment which applies to their case, they may themselves neither overrule it, nor simply disregard it (Brown,

Kennedy, 1994, p. 353)¹¹. The general rule would be to apply the judgment and if the court considers it appropriate, it may refer the relevant question of law to the CJEU. It is of course also possible to distinguish their case from the CJEU judgment but that would not *stricto sensu* be the materially identical case which requires the application of the judgment (Bobek, Komárek, 2004).

On the other hand, the Court of Justice has always ensured national courts that they may again refer the case for preliminary ruling (CJEU case 283/81; case C-45/09). Their references are welcomed by the Court especially in cases when the national court has difficulties in understanding or applying the previous judgment, when it refers a fresh question of law or when it wants to present new arguments to the Court which might lead the Court to reexamine its previous case law (CJEU case 14/86, para 12).

3.7 Scope of precedential effect

The notion *ratio decidendi* denotes the relevant part of a judgment, i.e. the one having precedential effect. It is clearly not sufficient to regard as *ratio decidendi* only the operative part of the judgment, it is necessary to read it together with the grounds of judgment. *Ratio decidendi* has to be determined in light of the factual circumstances of the prior case and the legal rule thus established may be applied to other cases (Barceló, 1997, p. 427). Court regularly refers to its previous decisions and while not naming it, it does in fact confirm that it applies the *ratio decidendi* – the legal considerations and rules that led to the judgment, which are extracted from the whole judgment (Koopmans, 1991, pp. 320-322). It is interesting to note that the Court when citing settled case law, refers not only to the first case establishing that rule but also adds the newer case law – to ensure the reader that the legal rule stemming from the case law is still being regularly applied (Šadl, Hink, 2014).

4 Difference between the force of *res judicata* and precedential effect

Res judicata and precedential effect have in general similar outcomes. The outcome of both is that a case which has already been decided by a court, will not be decided again. At a closer look, there are numerous substantial differences between them. Even though the most general purpose of both of them is to secure legal certainty, it shows itself in different ways in these two instances. *Res judicata* aims at a definitive closure of an individual dispute. This dispute will not be again a subject of court decision in an identical case or in other disputes between the parties that are dependent on the outcome of the

¹¹ Although it must be noted that there is no definitive consensus on the question whether a Member State court may depart from previous CJEU judgment, if it has persuasive reasons for doing so, or whether it in such a situation must refer the case for preliminary ruling for the CJEU to decide. For example, Schima argues that such an obligation would in fact mean that the case law has higher level of bindingness than the legal act itself since this obligation would in fact prevent national courts to interpret CJEU case law whereas national courts are permitted to interpret legal acts themselves without having to refer it to CJEU (Schima, 2004, p. 115).

original dispute (*Prejudizialität*). The exceptions to *res judicata* are usually expressly provided for in law¹². Strict conditions for admissibility of these exceptional procedures apply. If an application in a case that has already been finally decided is presented to the court, new decision on substance of the case is not permitted, it will be held inadmissible on procedural grounds. Effect of *res judicata* operates primarily retrospectively, to preserve the outcome of an adjudicated case (see also Sowery, 2016, pp. 1711-1712).

On contrast, precedential effect aims rather at setting a specific interpretation of law, i.e. at securing legal certainty via specifying or even creating a legal rule, which will since then be observed. Precedential effect of decisions contributes, unlike *res judicata*, to evolution of law. Thanks to it is possible to make a change in law without legal regulations (written law) being amended. Thus it operates rather prospectively. To overrule a precedent is in general allowed, in Union law as well. Explicit rules for overruling precedents are not to be found in legal regulations, they stem predominantly from case law or may be complemented by legal doctrine. The most elaborate rules for overruling precedents may be found in common law legal orders. The rule that a higher court may overrule a precedent of a lower court applies only in limited extent at the EU level because of the court hierarchy in the EU – it may apply when the General Court decides as a first instance court, i.e. in proceedings concerning individuals. In contrast, in preliminary reference proceedings, annulment of legal acts proceedings or infringement proceedings, when the only court instance is the Court of Justice, it does not apply at all. The Court of Justice is not bound by its own precedents, it may overrule them. A precedent is overruled by a judgment on substance, not by a procedural decision.

5 Temporal effects of CJEU judgments

5.1 Objective

It is settled case law that the interpretation of Union law which the Court gives in its rulings shall be applied from the time of its coming into force. In the famous and often cited case *Denkavit* the Court held that *“the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment”* (CJEU case 61/79). If the Court gives a ruling which was hardly foreseeable by the Member States or even private parties, it is clear that such a judgment may bring difficulties of various kinds. Therefrom comes the need to limit effects of the judgment as regards the past.

The Court justifies the limitations of temporal effects of its judgments by the *“application of the general principle of legal certainty inherent in the [Union] legal order and [by] taking account of the serious effects which its judgment may have, as regards the past, on legal relationships established in good faith”* (CJEU case 61/79, para 17). For instance, in

¹² On the Union level we may mention the revision procedure.

cases where the Court annulled an act of the President of the Parliament adopting EU budget, it stated that *“the annulment of that act should not be able to affect the validity of either payments or commitments or operations relating to the call-up and levy of own resources before the present judgment was delivered”* because of legal certainty and the need to guarantee the continuity of the European public service (CJEU case C-284/90, para 37; also CJEU case 34/86).

The essence of the competence of the Court to limit temporal effects of its judgments is a conflict between the principle of effectiveness of EU law, which requires *ex tunc* application of the rule stemming from the judgments, and the protection of legitimate expectations, which requires *ex nunc* application of the judgment, i.e. limitation of its effects. In most cases the effectiveness is preferred, yet sometimes, if serious difficulties would follow, the protection of legitimate expectations prevails (Düsterhaus, 2016, p. 34; CJEU case 24/86, para 28 and 30). As Hyland notes, limitation of effects of judgments allows the Court to develop EU law without being concerned about the adverse impact that its judgments may have (Hyland, 1995, 233).

5.2 Sources of law

In annulment proceedings under art. 264 TFEU the Court may, if it considers it necessary, state which effects of the annulled act remain valid. That means that the general rule is that the annulled act ceases to have effects, whereas the maintaining effects of the annulled act is the special rule. Sometimes the Court states that effects of annulled legislation shall be maintained until new legislation is adopted (CJEU case C-295/90). Non-legislative acts, such as the act of the President of the Parliament adopting the EU budget, may also be annulled by the Court (CJEU case C-284/90).

Art. 264 para 2 TFEU is applicable in preliminary reference proceedings concerning validity too. The Court held that the provision is applicable by analogy for the same reasons of legal certainty as those which apply in annulment proceedings (CJEU case 4/79, para 45). The principle of legal certainty has been used by the Court as a justification for limitation of temporal effects of interpretative preliminary rulings as well (CJEU case 43/75).

5.3 Application of temporal limitation

The first and leading case as regards temporal limitation of interpretative preliminary rulings is Defrenne II (CJEU case 43/75). In this case, which concerned direct effect of the art. 157 TFEU, i.e. the equal pay principle, the Court found that its ruling may have enormous impact on private and public employers since it could bring many claims against them and affect their financial situation and because of that the Court decided to limit the effects of the judgment. It ruled that the judgment could not be relied upon retroactively – those who have not instituted court proceedings for equal pay prior to that

judgment, will not be able to recover damages for period before the judgment. In all other cases the equal pay rule is enforceable.

Declarations of invalidity in preliminary reference procedures have generally retroactive effect, equally as a judgment annulling an act (CJEU case C-228/92). When a Union act is annulled in the annulment proceedings, it disappears from the EU legal order as if it never existed, i.e. from the date on which it entered into force (Lenaerts, Maselis, Gutman, 2014, p. 413; CJEU case 22/70, para 59-60).

5.4 Effects

If the Court limits the effects of its judgments, it means that individuals who are affected by the judgment may not claim their rights, which have arisen before the judgment, on basis of that judgment. Their rights as regards the future are unaffected. The Court usually makes an exception of the aforementioned rule for the benefit of those who have filed court claims before the relevant CJEU judgment – those individuals may claim compensation for their for the periods preceding and following the judgment. There have also been instances where the Court rendered a judgment in which it adopted *erga omnes* limitation, i.e. not even the applicant party in the proceedings from which preliminary reference arose benefited from the judgment. It seems that this approach has been abandoned by the Court since it deprives the applicant of the right to judicial remedy (Hyland, 1995, p. 228).

5.5 Definition

Most of CJEU judgments are declaratory – no new legal relations are established, they authoritatively pronounce what already is, be it the correct interpretation of law, infringement of EU law by Member States, validity or invalidity of an act etc. That means most judgments have *ex tunc* effect. Limitations of temporal effects come into consideration in case of preliminary rulings and judgments which annul an act. When an interpretation is given by CJEU or an act is annulled or declared invalid, individuals may generally seek redress if their rights have, in light of the judgment, been violated. In this respect the judgments may be perceived as operating retrospectively. Conditions for assertion of their rights are governed by national law (Schima, 2004, pp.117-118). These conditions may not be stricter than those which govern purely internal national situations and they may not render assertion of the right virtually impossible (principles of equivalence and effectiveness, CJEU case 309/85, para 18).

The Court of Justice takes into consideration that Union legal order develops gradually and meaning and scope of provisions of EU law may change in time and CJEU judgments may thus constitute a novelty (Schima, 2004, p. 119-120). Limitations of *ex tunc* temporal effect will therefore be only exceptional (CJEU case 24/86); this is further confirmed by the practice of the Court – it has used this competence only in a small number of cases (Hyland, 1995, p. 211).

5.6 Conditions

There are several substantive and procedural conditions for granting limitation of temporal effects. As regards substantive criteria, the judgment must constitute serious risk of (predominantly economic) difficulties and the parties involved must have been led by good faith. These two conditions sometimes overlap in the assessment of the Court (Düsterhaus, 2016, pp. 14-16).

The requirement of good faith means that individuals (or Member States) have acted against EU law but their actions have arisen out of “*objective, significant uncertainty regarding the implications*” of EU law provisions, “*to which the conduct of other Member States or the Commission may even have contributed*” (CJEU case C-82/12, para 42). There is no uncertainty when correct interpretation of EU law was obvious, could have been deduced from prior case law or in cases of mere clarification of case law (Düsterhaus, 2016, pp.16-17). Apart from the sole uncertainty about correct interpretation of EU law, the Court usually requires something more to find the condition of good faith fulfilled. Usually it would be the actions of the Commission or other Union institutions, bodies or agencies which lead the Member State to believe that its legislation was correct (Lenaerts, Maselis, Gutman, 2014, p. 248). Example of such a situation may be found in the case *Blaizot* – prior to the judgment there has been uncertainty about whether to regard university education as falling within the scope of EU law since the Commission firstly informed Belgium, the Member State concerned, that it does not find Belgian legislation allowing universities to collect extra fees for non-Belgian students to be contrary to EU law. Later, after the Court rendered a judgment in case *Gravier*, which concerned similar question, the Commission again informed Belgium that it had not yet formed a definitive conclusion as to effects of that judgment. The preliminary reference from the Belgian court in *Blaizot* came later on, the Court definitively decided that university education is within the scope of EU law but limited the operation of the judgment since the functioning of universities could be endangered if they had to reimburse of such fees to students (CJEU case 24/86, para 32). The case *Barber* may be mentioned here too, it concerned legal act which contained provision contrary to the Treaty. The Court limited the effects of the judgment since it would bring significant financial consequences for Member States even though they followed EU directive (CJEU case 262/88).

The criterion of serious difficulties is to be understood as taking into account a variety of different possible adverse repercussions, mostly they will be of financial nature. It seems that if financial interest solely of a State is at stake, the Court demands that the repercussions would have a systemic, structural dimension. Economic difficulties of a Member State would not alone suffice for the Court to limit retrospective operation of its judgment (Hyland, 1995, pp. 222-223). As AG Tesouro stated “*If it were otherwise, there would be a risk of according more favourable treatment precisely for the more serious infringements since it is those infringements which may have financial implications of*

greater significance for the Member States: an aberrant and clearly unacceptable solution.” (AG Tesouro in CJEU case C-200/90). However, if the judgment concerns horizontal relationships as well, the requirement of systemic dimension does not have to be present (Düsterhaus, 2016, p. 20).

As regards procedural requirements, temporal effects of a judgment may only be limited in the case where the interpretation was given or an act annulled or declared void ('first time' requirement, see CJEU case 61/79, para 18). In the opposite case it would be contrary to the principle of equal treatment if similar cases governed by the same EU law provision would be treated differently. It would also contradict the principle of legal certainty (CJEU case C-292/04, para 37).

Moreover, the party applying for limitation shall claim and put forward evidence that the substantive criteria, i.e. good faith and risk of severe financial difficulties, are fulfilled. Otherwise, the limitation will not be granted (CJEU case C-209/03).

It is usually stated that parties to the case before the Court have to apply for the limitation, however the fact the CJEU so far limited the temporal effects only where it was applied for, may not mean that it is an obligation. As Düsterhaus aptly notes, if the Court is permitted to rephrase question referred for preliminary ruling by national court and also give answers on points that the national court did not even ask because the CJEU considers to be of assistance to the national court (CJEU case C-225/13), there is no reason why it could not limit the effects of the judgment without a formal application (Düsterhaus, 2016, p. 22).

National courts and legislature themselves are prohibited to limit temporal effect of CJEU judgments themselves (CJEU case C-441/14, para 41), that would be in breach of the principles of primacy and direct effect of Union law and could compromise uniform application of Union law (CJEU case 309/85, para 13).

6 Conclusion

To conclude, all the characteristics of CJEU decisions which are analyzed in this paper are in some way known in the legal orders of the Member States, nevertheless one must be freed from the perceptions of these characteristics that are known to him/her from the national legal order. These concepts have their own EU meaning and are governed by rules stemming from EU law.

Unsurprisingly, CJEU decisions have the force of *res judicata*, which means that it may not hear and decide a case that has already been decided. The specifics of this principle show themselves in the assessment of the concept 'same subject matter' and its scope.

Much more controversial is the issue of precedential effects of CJEU judgments. The common law doctrine of precedent does not apply in the EU legal system. Nevertheless, that does not mean that CJEU case law is of no more than persuasive authority. On the

contrary, strong arguments speak for a certain degree of legally binding effect of CJEU case law, in fact it may be spoken about an EU doctrine of precedent.

Despite the fact that the EU Court is not a legislator, it does have the power to limit temporal effects of its judgments. The Court does exceptionally limit effects of judgments annulling EU legislation and of preliminary rulings on both validity and interpretation of EU law. The condition is that the judgment could lead to serious repercussions for Member States or for individuals.

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